

ALJ @ 80: PAST, PRESENT & FUTURE^{*}

The Hon Justice Michael Kirby AC CMG^{}**

PAST & PRESENT

National journal of record: The ALJ is 80. The British Empire was at its zenith in 1927 when the first issue was published. The Empire packed its colonial judges off home at 65, doubtless fearing that the midday sun would addle older brains. To this day, judges in most parts of the Commonwealth of Nations must retire at 65, or even 62. In Australia, the Constitution was changed to ensure that federal judges do not serve beyond 70. By such standards, the ALJ is getting long in the tooth. Yet we all know people who are as sharp as a tack at 80 and much older. And as I get older I tell myself that it is all relative

It falls to me to lead this celebration. And to reflect on the changing perspectives of the law and of its profession over the past 80 years. In the law, we participate in such jubilees partly for reasons of

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nostalgia; partly to get our bearings for the present; and partly to grasp the gossamer-thin portents that suggest where we may be going.

There is nothing quite like the ALJ in most other common law jurisdictions. England has the *Law Quarterly Review* and the *Modern Law Review*. But these do not contain the same mixture of cases, current topics, news and national judicial authority as the ALJ presents month by month. There is the *New Zealand Law Journal*, which plays a similar role. Likewise, South Africa has the *South African Law Journal*.

But federations have a special need for a national legal organ such as the ALJ. This was the chief function identified by the Federal Attorney-General, J G Latham KC, in his foreword to the first issue of the ALJ in May 1927. Mr Latham (later to become Chief Justice of Australia) said¹;

"The difficulties inherent [in the publication] are complicated in Australia by the fact that there are one Federal and six State bodies of statute law and one Federal and six State judicial systems. ... [S]ubstantial divergences exist between the States (in the working out of details more often than in matters of general principle) and the task of those responsible for a genuinely Australian legal publication is accordingly a difficult one".

Recently, I had evidence of the special place the ALJ plays in Australia. In January 2007, at the Bombay High Court, which proudly

¹ J G Latham, "Foreword", (1927) 1 ALJ 1.

shares the same legal tradition as we do, I delivered an address² to mark the centenary of the late H M Seervai, writer of the best-known textbook on Indian constitutional law³. Several judges and advocates in the audience lamented that there was no national journal in that most populous common law federation, to bring the celebrations to the entire sub-continent. If, in the past 80 years, the common law of Australia has evolved from regarding itself as no more than the transplanted common law of England, and if it has achieved uniformity under the authority of the High Court⁴, an important contribution to that outcome has been made by the ALJ. Despite the State and Territorial divisions and the sheer size of Australia, it has helped us to think as Australian lawyers. It has kept us aware of federal, national and divergent local legislation. It has accompanied, and stimulated, our journey towards full legal independence. Our debt to the ALJ, and to its successive editors⁵, is immense. One only appreciates that fully by travelling in a foreign land, especially a large federation, that does not enjoy the unifying and informative function that this journal has discharged since 1927.

² M D Kirby, "H M Seervai's Centenary - His Life, Book and Legacy", to be published in *Legal Studies*, August 2007.

³ H M Seervai, *Constitutional Law of India*, (4th ed, 1996).

⁴ *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 487; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 563.

⁵ See Table 1 below.

The seven editors: There have been seven editors of the ALJ. Each has been a distinguished lawyer and six have served in high judicial office⁶. Only J G Starke, although an experienced barrister, was not and did not become a judge. In later years he turned to academic life and held a number of professorships⁷.

Great credit must go to the foundation editor Mr (later Sir) Bernard Sugerman⁸. Not only did he help inaugurate the ALJ. His was the guiding hand behind the *Australian Digest* of which he was also first editor. These two publications stand today as his most enduring monuments. As in my case, Sugerman's first judicial post was in the federal Conciliation and Arbitration body. He later became the President of the New South Wales Court of Appeal. We should remember his scholarly energy and practical engagement and that of all of his editorial successors.

Sugerman had a good eye for talent. Before he went on the bench, he selected two young barristers to help him with the editorial task. One was Nigel Bowen, later Federal Attorney-General, Chief Judge in Equity (NSW) and first Chief Judge of the Federal Court of

⁶ (1977) 51 ALJ 1.

⁷ (1992) 66 ALJ 111.

⁸ See (1946) 20 ALJ 16; (1976) 50 ALJ 613 and the entry on his life in *Australian Dictionary of Biography*, Vol 16 (MUP, 2002), 342.

Australia⁹. The other was Rae Else-Mitchell, later Judge of the Supreme Court of New South Wales and of the Land and Valuation Court and Chairman of the Commonwealth Grants Commission¹⁰. When Else-Mitchell retired from the post of editor in 1958, his place was taken by Russell Fox, later Chief Judge of the Supreme Court of the ACT, judge of the Federal Court of Australia and Ambassador for Nuclear Non-Proliferation¹¹. He has sent his best wishes for this occasion which, by remarkable fortune, coincides with an equally notable anniversary - the opening of the Sydney Harbour Bridge designed by his father-in-law, the great civil engineer Dr John Bradfield¹². The Bridge was opened exactly 75 years ago. With the completion of Bradfield's underground railway stations in Sydney in 1926, the building of the Bridge was proceeding in earnest as the time the ALJ initiative was conceived and launched. Bradfield has been described as probably the first man to have the imagination and vision to perceive Sydney as a great world city, with commensurate needs. The founders of the ALJ had a similar vision for the future of Australian law and of its integrating function¹³.

⁹ (1973) 47 ALJ 412; (1998) 69 ALJ 47.

¹⁰ (1958) 32 ALJ 158 and (2006) 80 ALJ 625.

¹¹ (1967) 41 ALJ 182; (1977) 51 ALJ 106; (1982) 56 ALJ 204.

¹² See the entry on J J C Bradfield in *Australian Dictionary of Biography*, Vol 7 (MUP, 1979), 381.

¹³ (2006) 80 ALJ 331.

Russell Fox¹⁴ was succeeded by Phillip Jeffrey QC, later a judge of the Supreme Court of New South Wales, who died whilst very young¹⁵. His successor, J G Starke, died but recently¹⁶, ironically sharing, in his last year, the same hospital in Canberra as the ailing Rae Else-Mitchell. Happily, the present editor, Mr Justice Peter Young, is full of life, energy and devotion to the ALJ.

A table sets out the service of the successive editors of the ALJ:

TABLE 1
EDITORS OF THE ALJ 1927-1987¹⁷

Editor	First Volume	Service
B Sugerman	1	1927-1946
N H Bowen	20	1946-1961
R Else-Mitchell	20	1946-1958
Russell Fox	32	1958-1967
Philip Jeffrey	41	1968-1973
J G Starke	48	1974-1992
P W Young	66	1992-

¹⁴ Russell Fox, co-editor with Bowen, was effectively the sole editor from 1958. He had been an assistant editor in the early 1950s together with Frank Hutley who later became a Judge of Appeal (NSW).

¹⁵ (1979) 53 ALJ 107.

¹⁶ (2006) 80 ALJ 331.

¹⁷ The overlap of Bowen and Else-Mitchell and Fox should be noted.

Some statistics: The most obvious change since 1927 is that the size of the ALJ has expanded greatly over the past 80 years. A table measures this expansion under the successive editors:

**TABLE 2
EXPANSION IN THE SIZE OF THE ALJ¹⁸**

Vol	Year	ALJ	ALJR	Total
1	1927-28	388	-	
20	1946-47	500	-	
32	1958-59	396	468	864
41	1967-68	558	414	972
48	1974	600	538	1138
66	1992	872	868	1740
80	2006	870	1743	2613

Table 2 needs some explanation. Initially, the ALJ contained summaries of High Court and Privy Council decisions in Australian appeals¹⁹. From Volume 32, the journal published the full text of advanced copies of High Court and Privy Council reasons. The

¹⁸ Until Vol 32, the ALJ carried only summaries of High Court decisions. The ALJR series began in 1958 with Vol 32.

¹⁹ For the original policy see J G Latham, "Foreword" (1927) 1 ALJ 1.

explanation for this change of policy was stated on the first page of volume 32. The aim was to render the legal profession a new service by making available the full text "at the first available date" without waiting for final revisions or the preparation of authorised headnotes. Despite the cessation of the Privy Council reports, after the termination of Australian appeals to that court, the expansion of the length of High Court reasons has meant a considerable growth in the size of the combined ALJ and ALJR. What began as a slim volume of 388 pages, praised in the *Law Quarterly Review* as a compact and informative overview of Australian law²⁰, now appears, generally, in three volumes, seven times the aggregate size of the original. More than two-thirds of the contents, being the High Court's reasons, are outside the control of the editor.

Once it came to be realised that statutory interpretation was not merely a task of giving literal meaning to words but a more complex function of deriving meaning from the context, purpose, policy, history and other admissible materials as well as the words, it was inevitable that judicial reasoning would expand. This, together with the growth of cited case law and of the bulk and complexity of Australian law, explains the increase in the size of the ALJR, as of other legal reports. The recent decision of the High Court in *Sons of Gwalia v Margaretic; ING Investment Management LLC v Margaretic*²¹ is a good illustration.

²⁰ (1934) 50 *Law Quarterly Review* 293.

²¹ [2007] HCA 1.

Previously, such a decision would probably have been reached solely by reference to a general or legal dictionary and a few cases. Now, it must be derived with the use of internal textual indications and extrinsic materials and with due acknowledgment of the issues of legal principle and policy that lie behind the contested statutory words.

The number of articles on legal topics has also changed. Since the end of Sugerman's editorship and the beginning of the Bowen-Else-Mitchell duumvirate, the number has been remarkably steady at about half that of the first twenty years:

**TABLE 3
NUMBER OF ARTICLES IN THE ALJ**

Vol	Year	Number of Articles
1	1927-28	87
20	1946-47	41
32	1958-59	37
41	1967-68	35
48	1974	42
66	1992	41
80	2006	37

The reason for the variation in the number of articles is a change of editorial policy concerning such contributions. In Sugerman's time, the articles were generally of two or three page length²². Obviously, short articles are more easily absorbed by busy lawyers, according to

²² Good illustrations are found at (1927) 1 ALJ 5, 8, 38, 40. Occasionally, to keep within the desired length, articles were published in two parts.

their needs or interests. However, they may sometimes appear dogmatic, whereas lengthier analyses give the background to the problem, comparative law analogies and more thoughtful analysis of the legal complexities. Getting the balance right involves a matter of judgment.

As might be expected, a great part of the ALJ has, from the beginning, been taken up with case reports. These reports indicate how remarkably stable, over the course of the life of the journal, has been the number of fully reasoned decisions of Australia's highest judges. Once again, a table, by reference to successive editors, presents the picture:

**TABLE 4
NUMBER OF CASES REPORTED IN ALJ**

Vol	Year	HC Cases	PC Cases	Pages
1	1927-28	65	2	57
20	1946-47	73	0	230
32	1958-59	83	1	468
41	1967-68	68 [53]	3	414
48	1974	83 [54]	5	538
66	1992	80	0	868
80	2006	70	0	1743

Although the number of cases has been stable, a decline in more recent times reflects a similar development in the Supreme Court of the United States. Yet the present number is higher than it was in 1927, even combining High Court and Privy Council decisions at that time. The important difference from 80 years ago is that, at the time the ALJ was launched, much of the High Court's work comprised appeals brought as of right. Now, the Court has effective control over its entire

work. This has had an impact both on the kinds of proceedings that it hears. It tends to result in priority being given to public over private law; to statutory over common law; and to federal or national over State legal issues. These priorities are also reflected in the contents of the ALJ over the years, since the universal system of special leave to appeal was introduced²³.

Changing content. V I Lenin once declared that the greatest enemy to action was the blank page. Those who filled the first pages of the ALJ established a focus, and set a tone, that has largely been maintained ever since.

The format of the original volume included "Current Topics"; substantive articles; a series of items on real property law (originally called "The Conveyancer"); notes on recent cases at home and abroad (initially called "British and Dominion Courts"); practice notes, legislative summaries, followed by book reviews (initially called "Book Notes"); entries on the lives of lawyers admitted to practice, appointed judges or achieving other public office ("Personalialia"); obituaries, followed by material on recent High Court and Privy Council decisions.

In the first volume there was a "Students' Column and University Notes", recounting issues of concern to law schools and also a section dealing with "Magistrates and Other Courts", described as a column

²³ *Judiciary Act 1903 (Cth)*, s 35(2) introduced by the *Judiciary Amendment Act 1976 (Cth)*. See *Carson v John Fairfax and Sons Ltd* (1991) 173 CLR 194 at 205-207.

devoted to "those courts whose decisions are not usually reported in the law reports of the various States"²⁴.

Neither the Students' Notes nor the reports of other courts have survived. Yet under various descriptions all of the other sections remain as staple elements in the ALJ. With time, a "Correspondence" section was introduced. So too, by volume 48, "International Legal Notes" made an appearance during the first year of Starke's editorship. This was hardly surprising given that Joe Starke was a noted writer in the field of international law. At his death he was the last surviving staff member of the Secretariat of the League of Nations.

The growing role of international law, including international human rights law, ensures that this is a topic that will have an increasing prominence in years to come. The end of the Second World War, the establishment of the United Nations Organisation and the role of Australia in those developments, gave early portents of the coming tide of international law²⁵; but the prominence of the topic then lay in the future.

Some entries proved transitory. Thus, the fascination with the personality of the first Chief Justice of Australia, Sir Samuel Griffith, was

²⁴ (1927) 1 ALJ 31.

²⁵ See eg the article by B J Dunn, "Trial of War Criminals" (1946) 19 ALJ 359.

still evident in Vol 1, seven years after his death, in items titled "Griffithiana"²⁶. As with all mortal things, they have faded away.

Three deletions: A review of the pages of earlier volumes shows three recurrent features of the early ALJ that are no longer maintained.

One was the "New Zealand letter" written by "Welex" who reported on legal developments in that country, generally with an eye to borrowings from Australian law or links with Australian personalities²⁷. The last New Zealand letters were in Volume 25. To maintain such a series requires a remarkably faithful contributor with a devotion to a foreign legal system. One also needs an audience that cares about the jottings about another jurisdiction not of immediate application or practical relevance²⁸.

To similar effect were the regular letters of Theo Ruoff. Mr Ruoff had been the Chief Land Registrar in the United Kingdom. For thirty-five years he wrote an endearing column with witty, insightful, informative news on statutes, cases and personalities in the law of the United Kingdom, of interest to Australian lawyers²⁹. By the end of the series, Privy Council appeals from Australian judgments had finished. The

²⁶ (1927) 1 ALJ 313, 331; (1928) 2 ALJ 21, 44, 170.

²⁷ See eg "New Zealand Letter", April 1944 (1944) 18 ALJ 13. In earlier volumes, the letters were a virtually monthly feature of the ALJ.

²⁸ The last New Zealand letter appeared (1951) 25 ALJ 724.

²⁹ His obituary appears (1991) 65 ALJ 120.

doings of British lawyers were of less interest. In this sense, the ALJ reflected the changing mood and concerns of the legal profession of Australia. Yet whilst we were linked, formally as well as emotionally, to the great legal system centred in London, the ALJ did a service to remind us, through the pen of Theo Ruoff and others, of the generally whimsical, ever-evolving and temperate character of the place where our legal system began.

The third deletion is of the papers and commentaries of the Australian Legal Convention. These were a regular, and for a time biennial, feature of the ALJ. The papers always included one or more contributions from leading judges or scholars from Britain, the Commonwealth and the United States. Their essays helped to rescue us from the isolation that can be a feature of the geographical distance that separates Australia from its natural legal *stimuli*. The Australian Legal Convention, sponsored by the Law Council of Australia, became a gathering point of lawyers with diverse interests and specialties from all over Australia. A review of the topics considered at the successive conventions, from the first Convention in 1935³⁰ to the last fully recorded, the 24th, in 1987³¹, affords a kaleidoscope of the changing topics of interest that have engaged Australian lawyers for most of the life of the ALJ³².

³⁰ (1935) 9 ALJ 209 supp 1; (1936) 10 ALJ 165.

³¹ (1987) 61 ALJ 452.

³² The Australian Legal Convention continues but without the same coverage. See the report of the Chief Justice on the Judicature at the 30th Australian Legal Convention: (1997) 71 ALJ 809.

In its day, the Convention was a great occasion for a large gathering of Australian lawyers, devoted to scrutiny of the entirety of Australian law. Many of the papers presented and discussed (and later published in the ALJ) were destined to affect the course of reform of substantive, procedural and institutional law in Australia³³. The deletion of the papers and discussions from the pages of the ALJ, diminished the regular national assembly of all of the leaders in Australian law.

Sometimes it is in the *verbatim* record of things said at the Australian Legal Convention that truly interesting insights can be gleaned about the law, going beyond the formal papers. Thus, at the 4th Convention in Brisbane, in July 1939, the President of the Law Council, Mr David Maughan KC expressed his disappointment that Mr Justice Evatt of the High Court had only recently sent a telegram saying that he could not deliver his promised paper on "The Constitution and Civil Rights"³⁴. The given excuse was an "attack of influenza". One is left to speculate whether this was a virus of the diplomatic variety or whether Justice Evatt looked long and hard into the Constitution and, consistent with the then doctrines, could not see enough to talk about to fill the allotted hour. Perhaps, on the brink of war, Evatt foresaw the

³³ An example is the paper of Sir Raymond Evershed, "The History of the Court of Appeal" (1950) 24 ALJ 346 which greatly influenced the decision to constitute a separate Court of Appeal in New South Wales which, in turn, stimulated the creation of similar courts in other Australian jurisdictions.

³⁴ (1939) 13 ALJ 147.

curtailment of civil rights in which he would himself play a controversial part³⁵.

In one of his asides at a Convention, Chief Justice Dixon lamented the lack of attention overseas to the reasoning of the High Court of Australia³⁶. At the time, this remark would have been chiefly directed to the Law Lords of the Privy Council. It is only recently that the House of Lords has made it plain that English counsel must come prepared with comparative material from Commonwealth courts. The unique lack of a Bill of Rights in Australian national law now cuts our decisions off from relevance to overseas courts in many cases. But in all probability, we will never cease complaining.

In what was no more than an aside at one of the Conventions, Dr John Bray, then Chief Justice of South Australia, declared in 1971 that "diversity is the protectress of freedom"³⁷. Perhaps in a more considered text, such brilliant spontaneity might have been suppressed. Yet Bray's aphorism has continued to agitate my mind. I confess that it

³⁵ *Al-Kateb v Godwin* (2004) 219 CLR 562 at 589 [60], 621 [166].

³⁶ Dixon CJ in his closing address to the 11th Australian Legal Convention: (1959) 33 ALJ 185 at 187.

³⁷ (1971) 45 ALJ 585 at 586. This was in a comment on a paper by A E [later Sir Edward] Woodward on "Censorship" (1971) 45 ALJ 570 delivered at the 16th Australian Legal Convention July 1971. See (1971) 45 ALJ 449. Bray had delivered a paper "Law, Liberty and Morality", which is a classic, to the same Convention: (1971) 45 ALJ 452.

was an element of my thinking as I wrote my minority opinion in the recent *WorkChoices* decision of the High Court³⁸.

Changing times and topics: Many topics that filled the pages of the ALJ in earlier times have been banished and are now merely part of the esoterica of legal history. For example, all the old law on adultery, conjugal rights, condonation, breach of promise and so forth was swept aside by the *Family Law Act 1975* (Cth). Only rarely do the courts now get to examine the remaining vestiges of the old law³⁹.

Another topic that filled the earlier pages, but was swept away by legislation, was death and estate duty. The status of illegitimacy of birth attracted an article by Sugerman himself in the first volume⁴⁰. One of the very few articles Julius Stone offered to the journal was concerned with so-called "unnatural offences"⁴¹. After a long drawn-out struggle these relics of English law have been substantially consigned to history.

Every volume of the ALJ reflects, and records, the events, persons, concerns and legal issues of its time. The names appearing in

³⁸ *New South Wales v The Commonwealth* (2006) 81 ALJR 34 at 133 [446]; 157 [555]; 167-168 [611]-[613].

³⁹ *Magill v Magill* (2006) 81 ALJR 254. Contrast the article on restitution of conjugal rights (1927) 1 ALJ 269, 298, (1947) 20 ALJ 50 and the note by the current editor (2007) 81 ALJ 7.

⁴⁰ B Sugerman, "Succession by Legitimated Child on Intestacy" (1927) 1 ALJ 207.

⁴¹ J Stone, "Propensity Evidence in Trials for Unnatural Offences" (1943) 15 ALJ 131.

the Personalia entries tell the story of the passing parade of lawyers throughout the country. The journal has always picked up, and pursued, themes considered important for the legal profession of Australia as a whole. In the first volume it urged the establishment of what it called "an Australian Law Association"⁴². That article castigated the legal profession as "one of the few professions or businesses in Australia which are without a Federal Organisation of some kind". The establishment of the Law Council of Australia quickly followed.

Controversies over the two branches of the legal profession⁴³; complaints about the long Court Vacation⁴⁴; debates over wigs and over judicial appointments recur throughout the pages⁴⁵. We should not think that perceived lack of respect for the judicial institution is something new. In the first volume, the editor recorded the warning of the Chief Justice of New South Wales about the necessity for "proper decorum in all legal proceedings, from those before Magistrates up to those before the highest appellate tribunal"⁴⁶. The complaints of disrespect are now mostly directed elsewhere, particularly at the media; but the work of the courts goes on.

⁴² (1927) 1 ALJ 184.

⁴³ (1927) 1 ALJ 230.

⁴⁴ (1928) 1 ALJ 257.

⁴⁵ (1939) 13 ALJ 98; (1969) 43 ALJ 557.

⁴⁶ (1927) 1 ALJ 129.

The ALJ has been the primary legal journal of record for judges, practitioners and law students throughout Australia. Not only have professional events been noted. They have been closely related to the events of high importance for the nation, and the world. It is interesting to look back at the contemporary record and to see the way the ALJ chronicled, and treated, important events in our history. On the outbreak of the Second World War, the editor, with personal reasons to so describe it, titled the lead item of the "Current Topics" as the beginning of "The War with Nazism"⁴⁷. In each of the succeeding editions of the journal notes are included on the "War Emergency Legislation"⁴⁸. Early arrangements for briefs to be delivered in favour of counsel who might be performing war service are noted. So, eventually, is the "Transition to Peace" upon the Japanese Government's acceptance of the United Nations' terms of surrender⁴⁹.

Events of significant scientific interest, such as the implications of the Kinsey Report on human sexuality, did not escape the eagle-eye of the editor in 1950. A lengthy comment in the "Current Topics" presciently observed that the Kinsey Report⁵⁰:

⁴⁷ (1939) 13 ALJ 213.

⁴⁸ (1939) 13 ALJ 297, 385, 477.

⁴⁹ (1945) 19 ALJ 101.

⁵⁰ (1950) 24 ALJ 193. See later D Chappell and P R Wilson, "Public Attitudes to the Reform of the Law Relating to Abortion and Homosexuality" (1968) 42 ALJ 120, 175.

"...exposes the hypocrisy which has for so long surrounded our professed attitude to the subject, and demonstrates the way in which men have come to accept as truths what are in fact only rationalisations of the behaviour forced upon them by the social pressure of their own group".

These remarks, probably penned by Else-Mitchell, drew to specific notice the significance of the findings of Dr Alfred Kinsey for the then Australian laws on adultery as a ground for divorce and also on unlawful homosexual acts. It was critical thinking like this that was to lead to inquiries, legislation and changes in social attitudes partly shaped by law. The ALJ has generally been in the vanguard of the legal profession in Australia, calling to notice developments at home and elsewhere that might otherwise be overlooked. It has looked beyond the narrow perspective of daily practice. Yet it has always been anchored in daily legal practice as the vital glue that binds the lawyers of the nation together with a sufficient common interest.

If one wishes to capture the mood of a particular time, an Australian lawyer can open the pages of the ALJ. Soon enough he or she will discover the response of the able and articulate lawyers who have edited and written for this journal. Thus, soon after the item on the Kinsey Report appeared, the journal recorded the retirement as Chief Justice of Sir John Latham⁵¹, who had written the foreword to the first and tenth volumes of the ALJ. Soon after that, the ALJ captures the

⁵¹ (1951) 24 ALJ 509.

national feelings in February 1952 on the death of King George VI and the ascension of the present Queen⁵².

Just as the articles are a reflection, over time, of the changing controversies and interests of lawyers in Australia, so the "Current Topics" reflect the events, moods and feelings that lawyers have shared with their fellow citizens. Few lawyers now have the time, or inclination, to pick up an old volume and to leaf through its contents. In the preparation of this survey, I have done so. It has taught me how words about events and personalities in the law, written at particular times, read again today, can recreate in a most evocative way the sentiments and emotions, friendships and controversies of unfolding decades.

Staying in touch: I began my regular journey with the ALJ in 1958 when the ALJ had reached volume 32. Russell Fox had commenced his service as sole editor. I was then in the first year of the combined Arts/Law course at the University of Sydney. My fellow students included Murray Gleeson, David Hodgson, Graham Hill, Brian Tamberlin, Jane Mathews, Charles Curran and many others. At the Law Book Company shop on the eastern side of Phillip Street, not far from where the Westpac Head Office now stands, Mr Kelly talked me into a "bargain" student's subscription to the ALJ. I was hooked. I have been a devotee ever since. On that lamentable day in two years time when

⁵² (1952) 25 ALJ 577.

the Constitution obliges me to retire from the High Court, I will maintain the subscription. The ALJ is the one universal law journal that can be sure to keep an Australian lawyer up to date with things legal, ancient and modern, close to home and far away.

FUTURE

Positive perspectives on law: If we look back on the past 80 years, and revisit the cases and controversies recorded in the ALJ, can we be generally satisfied with the role that the law has played in the life of the Australian nation and people over this time?

I would be the last to advocate uncritical self-congratulation. I have seen too much of the law, witnessed too many unfulfilled needs of law reform and personally felt the sting of unjust laws to embrace such a view.

On the other hand, there is much of which Australian lawyers can be proud in the history of their discipline, as recorded in the ALJ. Above all, we are a nation of legal continuity. We have avoided revolutions and civil bloodshed. We have managed to achieve many changes through parliamentary and democratic means. The foundation of our Constitution is the rule of law⁵³. This means that everyone is subject to

⁵³ *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193.

the law. Governments and parliaments are answerable for their actions before the courts. Attempts to exclude such supervision, at least in federal jurisdiction, normally founder on the irreducible constitutional guarantee of judicial scrutiny of the acts and omissions of officers of the Commonwealth⁵⁴.

Virtually without exception, our judiciary is made up of well trained, careful, serious-minded and devoted professionals. It has not been corrupted in the ways that have occurred in many other countries. By their training and daily experience, judicial officers in Australia are conscious of the importance of maintaining their independence and impartiality. It is a precious heritage. They possess it for the relatively short time of their service. They know that it exists not for themselves but for the protection of the people.

Of course, the ability and capacity of individual judicial officers varies, as does their energy, devotion to the law or interest in its controversies. I know of one lawyer, later a judge, who took the ALJ on his honeymoon. Not all lawyers have such a commitment. Yet the judicial institution has actually improved in the past 80 years in the strengthening of the institutional independence of the magistracy - the judicial officers closest to ordinary people and their litigation⁵⁵. Fifty

⁵⁴ Under the Constitution, s 75(v). See *Plaintiff S 157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513 [103]-[104].

⁵⁵ K Mack and S R Anlev, "The Security of Tenure of Australian Magistrates" (2006) *Melbourne University Law Review* 370.

years ago magistrates were often too close to police. The separation of powers was blurred. Now, the magistracy comprises a large, talented, independent part of the judicature. It has earned ever higher respect. This has been a huge change for the better. It applies throughout the nation.

Law schools have proliferated. They turn out well trained young lawyers who are chosen, substantially, from the top cohort of school leavers, measured in terms of intellectual attainments at secondary schools. The majority of their graduates are women—another big change from 1927, or even 1958.

Australia has seen the formation of independent Bars in every jurisdiction and the formation of a national Australian Bar Association to maintain the traditions and standards of that branch of the legal profession. The common law system depends very heavily on the quality and integrity of its advocates. They help select the important cases. Often they appear without fee for disadvantaged litigants. Admirably, the independent Bars have participated in causes that were once neglected. I include in this the advancement of the legal interests of Aboriginal Australians, refugee applicants and other minorities, defence of whose rights need special vigilance. Legal professional organisations have also called attention to such questions as stress and

depression in the legal profession itself⁵⁶ and the need for facilities for women practitioners balancing their professional duties and children and home responsibilities - topics which not so long ago would generally have been ridiculed or belittled as alien to the macho world of the Bar.

The lives of solicitors have changed with the growing internationalisation of legal practice, new opportunities from government and commerce and the outreach to countries of Australia's geographical region which was typically neglected in the early decades of the ALJ⁵⁷. The foundation of LAWASIA, and the central role that the Australian legal profession has played in its activities demonstrate that Australian lawyers, long attuned to the values and approaches of English law, have probably been in advance of most of their fellow citizens in recent times in seeing the openings, and the responsibilities, for engagement with legal colleagues in lands to which we are connected by geography, but not by legal tradition.

Basic problems of law: I realise that this somewhat upbeat review masks a multitude of problems in the law. For example, our Constitution is too rigid. It is one of the most difficult in the world to amend⁵⁸. This

⁵⁶ M D Kirby, "Judicial stress—An update" (1997) 71 ALJ 774; cf J B Thomas "Get up off the ground" (1997) 71 ALJ 785.

⁵⁷ cf M D Kirby, "Our Region - The Challenge for Law and Justice" (1998) 72 ALJ 197.

⁵⁸ See the comment of Starke on the failure of the Bicentenary referendum: (1988) 62 ALJ 976.

feature of Australian legal arrangements can sometimes protect us from the risk of mistakes, as in the Communism referendum of 1951. But the rigidity also helps produce a national constitutional lethargy that despairs of needed alterations and of fresh thinking about our basic governance.

In recent decades, the substantial loss of real power from Parliament to the Executive and from the Executive to the Head of Government has become clear. In many ways, our Constitution no longer truly describes our system of government, as it is practised⁵⁹. We do not have a lively national discussion about new checks and balances in the Constitution. For many Australian lawyers this is too large a challenge, too hypothetical, too unattainable. Of their nature, all laws need regular review. The Australian Constitution is no exception.

Although the courts are uncorrupted, there are still dangers. One of them was noted, and not just by me, in the recent decision of the High Court in the constitutional challenge to the increasing incidence of temporary judges in State courts⁶⁰. Another, connected with the lack of genuine constitutional debate, concerns the common disrespect for

⁵⁹ M D Kirby, "Law Reform, Human Rights and Modern Governance: Australia's Debt to Lord Scarman" (2006) 80 ALJ 299 at 311-313; P Kelly, "Rethinking Australian Governance: The Howard Legacy" (2006) 65 (1) *Public Administration* 7.

⁶⁰ *Forge v ASIC* (2006) 80 ALJR 1606 at 1619 [46], 1630 [97]-[101], 1660-1661 [223]-[228].

federalism in Australia. Yet the federal system of government can often be a wise system, specially suited to features of the modern age⁶¹.

The courts may vigilantly safeguard their powers of supervision over the other branches of government. Yet when those powers are actually invoked, the limited view taken about the ambit of the available supervision (if it is confined to the mysteries of jurisdictional error) is often bound to disappoint. The very high costs of litigation in Australia and the increasing costs of interlocutory case management have contributed to the advancing decline of the trial as the means of resolving a dispute, beginning to end, in a single hearing before a judge with the power and responsibility to decide everything quickly and, for the most part, finally.

The disappearing trial has led to, or certainly encouraged, the outsourcing of decision-making from courts and lawyers to mediators, conciliators and arbitrators. Obviously, this will have advantages in economy, finality and even justice. But these advantages may sometimes be bought at the cost of undermining the capacity and opportunity for decision-makers (by their independence and power) to protect the equality before the law of the poor, the vulnerable and weak.

⁶¹ *NSW v The Commonwealth* (2006) 81 ALJR 34 at 158 [556].

The noticeable shift in the Australian legal profession to large trans-border firms and the decline of personal injury litigation and conveyancing, which were the staple business of legal practice in the past, that helped maintain small but viable offices affordable to ordinary people, may threaten real access. The cost of barristers is now commonly beyond the pocket of ordinary Australians or even those who are reasonably well off. Unless they are supported by some form of legal aid or by a *pro bono* scheme, a union or other organisation that will foot the bill, most Australians simply cannot afford to go to court to uphold their rights. This is not something that has improved since 1927 when the ALJ was founded.

The defects of the Rolls Royce adversary system have become more apparent during the life of the ALJ. Recorded in its pages in 1981 is a paper of Professor Wolfgang Zeidler, then President of the German Constitutional Court, delivered at the 21st Australian Legal Convention in Hobart⁶². In his unrecorded oral commentary on his paper, Dr Zeidler compared the Australian legal system to a Rolls Royce; and the German to a Volkswagen. But he asked: How many citizens can afford these respective vehicles? The situation has become even more pressing in the twenty-six years since the question was asked.

⁶² W Zeidler "Evaluation of the Adversary System: A Comparison, Some Remarks on the Investigatory System of Procedure" (1981) 55 ALJ 390.

Some future issues: Without pretending to a comprehensive examination of the future issues that will engage the pages of the ALJ, a number stand out:

- (1) **Bills of rights:** Australia is now out of step with the rest of the legal world, including the common law world, in safeguarding the fundamental human rights of the people living within its jurisdiction. Putting it bluntly, we have so far largely ignored, or rejected, the relevance for our own legal system of the great change that came about in the protection of basic rights, following the Second World War and the creation of the United Nations. We live in an age of enlarged concentration of political power, enlarged demands for counter-terrorism legislation, increased technological integration and a shift from White Australia to the realities of a disparate, multicultural community. In such circumstances, the notion that a triennial visit to the ballot box authorises everything done thereafter by Parliaments and Governments becomes an increasingly unconvincing fiction⁶³. If the United Kingdom, Canada, New Zealand, South Africa, not to say the United States and virtually every other country, can sharpen their systems of law and their democratic processes by accepting a judicially enforceable Bill of Rights, it seems unlikely that the Australian legal system will be able to avoid this

⁶³ A F Mason, "Democracy and the Law: The State of the Australian Political System" (Nov 2005) *Law Soc J (NSW)* 8 at 69.

development for too much longer. Already, the ACT⁶⁴ and Victoria⁶⁵ have enacted statutory charters of rights. Other States are said to be considering such an initiative. It seems unlikely that this issue for the law and just governance under the law, will go away, including for the Australian Commonwealth.

- (2) **Globalisation:** It is self-evident that the process of globalisation of law will continue apace. The phenomenon will affect both the content of law and the way that law is practised. As to the content, we have already witnessed the influence of international treaties, including human rights treaties, on judicial decision-making in Australia⁶⁶. This trend is bound to increase as human rights laws are enacted throughout Australia and as judges and lawyers become more familiar with this type of reasoning⁶⁷.

⁶⁴ *Human Rights Act 2004* (ACT). See G Williams, "The Case for an Australian Bill of Rights" (UNSW Press, 2004), 66. See also cases such as *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

⁶⁵ *Charter of Human Rights and Responsibilities Act 2006* (Vic).

⁶⁶ *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42. For an example of a trade treaty see *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

⁶⁷ A M Gleeson, "Global Influences on the Australian Judiciary" (2002) 22 *Australian Bar Review* 184, 187; S Kiefel, "The Judiciary and Change: 1982 to 2006" in A Rahemtula (ed) *Justice According to Law* (2006) 387 at 401.

A remarkable development of recent years has been the outsourcing of legal services from countries such as Britain and Australia to countries such as India. In India, there are a million lawyers and each year 70,000 new lawyers graduate. Already it is estimated that 80,000 jobs in the American legal sector have moved offshore. In this environment, a generalist journal such as the ALJ will play an increasingly useful role to introduce offshore lawyers to the current authority, past practices, professional expectations and present concerns of their onshore colleagues and clients⁶⁸

- (3) **Statute law:** A glance at the first volume of the ALJ, and a comparison with the most recent issues, confirms what is the experience of the High Court and lawyers throughout Australia. Whilst Australia is still a common law jurisdiction, with important questions still decided in accordance with analogous reasoning according to common law techniques⁶⁹, we have well and truly entered the age of statutes. The common law today revolves in the orbit of statute. No statement of the common law of Australia can ignore any relevant statutory setting.

⁶⁸ M Peel, "Lawyers Cooperate to Tear Down Barriers", *Australian*, 16 January 2007, 21.

⁶⁹ Recent examples include *Cattanach v Melchior* (2003) 215 CLR 1; *Harrington v Stephens* (2006) 80 ALJR 791 and *Leichhardt Municipal Council v Montgomery* [2007] HCA 6.

The Harvard Law School, which pioneered the teaching of law to students by the casebook method, substantially abandoned its own invention in 2006. Instead, first year students now begin their encounter with law, with a compulsory course on statutes and statutory interpretation.

Yet, in Australia, we still need to wean lawyers from their love affair with the common law and judicial writings. Flattering though this may be to the judicial ego, it is fundamentally erroneous to begin the analysis of a legal problem today without close attention to any applicable legislation. In the High Court, we have our little differences. But upon this issue the Court has spoken often, consistently, unanimously but still without a lot of effect⁷⁰. Advocates love to go back to the cases and commentaries on the cases, including those appearing in the ALJ. They often seem to have an aversion to analysing statutory language. This attitude is quite inappropriate and must change. The ALJ must lead the change.

Where a legislature within power has spoken, that is the starting point for a search for the law. That is why legislation increasingly dictates the contents of a journal such as the ALJ. This does not

⁷⁰ See *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 80 ALJR 1509 at 1528, fn 64 where the cases are collected.

necessarily mean a declining utility for a national journal, speaking as it does to every jurisdiction. An important tool of analysis in the High Court is often an examination of differences between similar provisions enacted by different States and Territories of Australia. I would expect more material in the ALJ in the future to be concerned with questions of statutory interpretation, both generally⁷¹ and in particular cases. There is no getting away from this focus. It is simply the way the law is now lived. All Australian law schools and journals will have to follow Harvard. The ALJ should give the lead.

- (4) **Technology & law:** The pages of the ALJ have always contained fascinating, cutting-edge articles on new technology that is such a feature of the present age. The first essay I could find on computers was published in 1963⁷². Thereafter, drawing on countless reports from overseas, "Current Topics" has repeatedly returned to the significance of computers, and information technology generally, not only for the way law is performed but also for its content and for the protection of basic rights such as privacy⁷³.

⁷¹ There have many such articles in the past. See eg (1940) 14 ALJ 181, 255; H Mayo, "The Interpretation of Statutes" (1955) 29 ALJ 204; G E Barwick, "Divining the Legislative Intent" (1961) 35 ALJ 197.

⁷² (1963) 37 ALJ 105.

⁷³ (1968) 42 ALJ 157. See also K S Pope, "The Lawyer and the Computer" (1969) 43 ALJ 463.

Similarly, biotechnology, itself greatly stimulated by information technology, began to attract attention in 1974⁷⁴. Now, nanotechnology crosses the boundaries of informatics and biology. The capacity to concentrate huge amounts of data into physical elements of ever-decreasing size is illustrated for the ordinary person by the IPOD. This amazing invention can produce a vast variety of musical works or sound recordings.

Scientists are now debating the interface of nanotechnology and human beings. People can be implanted by computer chips for various purposes. A specialised journal on the ethical dilemmas presented by nanotechnology has been launched in 2007⁷⁵. The ability to miniaturise data into infinitesimally small formats suggests that enhancement of human knowledge and memory cannot be far off⁷⁶. Defence and weapons scientists are

⁷⁴ See eg D F de Stoop, "The Law in Australia Relating to Transplantation of Organs from Cadavers" (1974) 48 ALJ 21.

⁷⁵ *NanoEthics: Ethics for Technologies that Converge at the Nano Scale*. The journal is published in the Netherlands by Springer. The editor-in-chief is Professor John Weckert of the Australian National University.

⁷⁶ G Q Macguire Jr and E M McGee, 'Implantable Brain Chips', (1999) *Hastings Center Report* 29, pp 7-13, 29.1; J Hockenberry, "The Next Brainiacs", *Wired* (2001), Vol 9, pp 94-105, 9.8; G Khushf, "Systems Theory and the Ethics of Human Enhancement: A Framework for NBIC Convergence", [2004] *Annals of the New York Academy of Sciences* 1013, 124-149.

constantly working on this capacity. Lawyers will be amongst the first beneficiaries.

Artificial intelligence has so far been rather primitive and of comparatively little use in the practice of law. However, we cannot rule out the development of technologies that will assist lawyers in the future to process more information more quickly and economically. It seems unlikely that nanotechnology will ever wholly replace the lawyer or the judge. So far, we have not been able to conceive, still less create, technology with a human sense of justice or with a will to do equal justice under law, such as judges and lawyers are committed to uphold. But we need to keep abreast of these developments. For many Australian lawyers the ALJ will be the source of knowledge on the main developments. Who knows? Future lawyers may be able to secure an implanted chip that gives instantaneous access to the entire contents of the ALJ and much else besides.

We should not scoff at the potential capacity of technology to present new problems and new opportunities for law and lawyers. When I commenced my life in the law, there were no photocopiers. The typewriter was very basic. We used carbon paper. Word processors were not even dreamed of. Dictation platters and belts would be used for many years before tapes and then voice recognition would sweep them aside. In some ways, the old technology was more modest and economic. There were no 'two trolley silks'. Cases, many of them

before juries, had to be reduced to their bare simplicities. Lawyers' (including barristers') offices were quite modest. Many an hour I spent in the queue waiting to address the Prothonotary's clerk. There was no electronic filing. Law was local. Federal jurisdiction rarely mattered. The ballpoint pen was a marvellous invention. The changes we have witnessed in the past forty five years will accelerate by the time the ALJ has reached its 125th volume. My counterpart then will look back on the 'marvels' of the technology of 2007 and wonder at how primitive it all was.

Future of law journals: Yet will there be a 125th volume of the ALJ? Will the whole business of law journals be transformed by informatics? Will a generalised national law journal surrender to the specialised needs of modern lawyers? Alternatively, will globalisation make much of the focus which the ALJ has given to Australian national law seem increasingly old-fashioned? Legal publishing is no longer immune to globalisation. Thus, New Zealand legal information is now largely controlled by international off-shore companies that present the challenges of a global platform⁷⁷. Will the position in Australia be very different?

The heartburning about law journals and their place in the legal profession was reignited in 1999 when Fred Rodell's well known essay

⁷⁷ M Russell and J Treadwell, "Global Legal Platforms and National Legal Identity" [2005] *New Zealand Law Journal* 34 at 40.

"Goodbye to Law Reviews" was reprinted in the ALJ, sixty years after its first appearance⁷⁸. My defence of the ongoing utility and stimulation of law journals⁷⁹, and my expressed confidence in their future in Australia has been questioned⁸⁰. There have been similar views in the United States⁸¹. In that country, Professor B Hibbitts has reassessed the contemporary law journal in the light of changing technological and academic conditions. He has described the inauguration of online services and electronic law journals as the solution to some of the traditional problems presented in the past by printed journals.

Hibbitts' basic conclusion is that legal writers should self-publish on the World Wide Web, as indeed he did with a previous version of his printed article. He argues that this practice gives legal writers more control over the substance and form of their own scholarship. It creates more opportunities for spontaneity, boldness and originality. It promotes more direct dialogue amongst legal thinkers. Hibbitts predicts that, in the end, the Web will sound the death knell for hard copy law journals, and possibly other legal publications, in their present form.

⁷⁸ (1999) 73 ALJ 593.

⁷⁹ M D Kirby, "Welcome to Law Reviews" (2002) 26 *Melbourne University Law Review* 1.

⁸⁰ J Gava, "Law Reviews: Good for Judges, Bad for Law Schools?" (2002) 26 *Melbourne University Law Review* 560; cf I Ramsay and G Stapleton, "A Citation Analysis of Australian Law Journals" (1997) 21 *Melbourne University Law Review* 676.

⁸¹ B Hibbitts, "Last Writes?: Reassessing the Law Review in the Age of Cyberspace" 71 *New York Uni L Rev* 615 (1996).

It is necessary to note these debates about the future of legal publication⁸² at the time when we gather to celebrate the ALJ's achievements of the past. Lawyers of my age are caught in a kind of time-warp. We grew up with books. We like their feel, their look, their smell, their friendly companionability, their portability and their familiarity. Predictions of the demise of the book have been around for decades. Yet books remain extremely popular in Australia and it is certainly too soon to write them off.

Online publication: However, lawyers of the present and future generations will doubtless have new needs, with their thumbs physiologically extended by text messaging; with eyes dimmed by the time they peer at a scrolling screen; with brains we hope unaffected by the hours they spend talking on cell-phones; and with souls undiminished by the impersonality of electronic, as distinct from actual, communication.

I by no means exclude the possibility that in forty-five or fewer years, the ALJ will be solely published online. The lovely red buckram volumes may be consigned to libraries. Or they may be sent to poor countries in Africa. Or sold in bulk as wall decorations, much admired by stylish interior decorators.

⁸² H Wallace *et al*, "The Future of Legal Publishing" (2003) 11 *Australian Law Librarian* 293.

There can be no doubt that online publication has many advantages, not least in accessibility of material inadequately indexed in hard copy books and textual analysis permitted by googling or its equivalent. But online publication is less useful for the serendipity of browsing. Somehow, it seems less likely that the moods and feelings and passions of passing decades will be conveyed as successfully online as for those of us brought up with hard copy.

One way or the other, the future of a national law journal in Australia seems safe. That future has been purchased by the devotion of those who went before. It has been secured by the contributions which the ALJ has made to the very psyche of Australian lawyers: stimulating them to think in larger terms than the jurisdiction that first admitted them to practise; encouraging them to reason nationally and later internationally about their discipline. The ALJ continues to do this. For its contributions to the lives of lawyers of Australia, and thus to their clients and all citizens, we must give grateful thanks.

Of course, there is plenty of room for improvement. Yet a survey distributed in 2003 showed that subscribers were generally happy with the journal overall. Most, like myself, had been using it for more than twenty years. But there is a constant need to publish material relevant

to the lawyers outside Sydney and Melbourne⁸³. There is a need for articles about challenging new areas where the ALJ has always been a path-breaker and eye-opener. Perhaps there is a need for more and shorter articles: a compromise between the current practice and the style of the first volumes. Certainly, there is a need for today's Mr Kelly to sell the journal to aspiring young lawyers at a student rate so as to capture their allegiance which may then last their entire professional lives. All of us, who benefit from this universal journal, should consider how we can offer material of interest to the readership to strengthen its subscriptions.

Stronger than steel: I think of how Bernard Sugerman and all of the distinguished editors, sub-editors, case reporters, note writers, article contributors and others have made the ALJ such a special companion for us in the law. I think of the support that the Law Book Company Limited, now Thomson Legal and Regulatory Limited, and its employees have given over the years to this publication. In volume 51, noting the 50th Anniversary of the ALJ, Starke wrote that: "Without the splendid continuing support of the Law Book Company Limited, particularly during the period of the War years ... a publishing enterprise of such value to the legal profession of Australia and to the community at large would not have been possible"⁸⁴.

⁸³ This has long been a source of sensitivity: See eg R W Baker, (1951) 24 ALJ 62.

⁸⁴ J G Starke, "50th Anniversary of the Australian Law Journal" (1977) 51 ALJ 1 at 2.

I also think of the managing director of Law Book when the ALJ was first established, Mr H N Lambert. Apart from Sugerman, it was he who breathed life into this brave but initially risky publishing idea. In this celebration Mr Anthony Kinnear, CEO of Thomsons, is maintaining the tradition. Of Lambert, the second editor, Bowen, wrote⁸⁵: "He had a great feeling for law and lawyers". We should remember him and all those in the publisher who followed. They do not receive the honours and the glory, the knighthoods, the long wigs, the ermine trimmed robes and the imperial enamel medallions. But they, like legal scholars, law librarians, barristers' clerks, court officials, students and many others are essential contributors to the life of Australian law.

This weekend Australians in their thousands will gather to remember with pride three parts of a century of the Sydney Harbour Bridge. Today we, a smaller band, collect to reflect on another Australian icon: the ALJ. To the extent that the ALJ has played a part in securing, promoting and defending the rule of law throughout Australia, it has been even more precious than steel. Its binding force has proved stronger than the great rivets on the Bridge. It has contributed to the noble ideal that human beings can, after all, live together in a nation of justice and peace under laws that they view critically and regularly update for succeeding generations.

⁸⁵ N H Bowen (1976) 50 ALJ 614.

To the present editor, whose outstanding service continues this great tradition, on behalf of the judiciary and lawyers of Australia, I extend grateful thanks and best wishes for the years ahead.

ALJ @ 80: PAST, PRESENT & FUTURE

The Hon Justice Michael Kirby AC CMG