

**SOUTHERN CROSS UNIVERSITY**

**LISMORE, NEW SOUTH WALES**

**GRADUATION CEREMONY**

**SATURDAY 29 SEPTEMBER 2007**

**DEFINING AUSTRALIAN IDENTITY**

**The Hon Justice Michael Kirby AC CMG Hon DUniv**

**ADDRESS ON THE CONFERRAL OF THE HONORARY DEGREE OF DOCTOR OF THE  
UNIVERSITY**

**CONGRATULATIONS TO GRADUATES**

It is a great honour for me to address this Ceremony. Especially so, because I can now offer these words as myself a graduate of Southern Cross University. To be made a Doctor of the University is a special and precious award. It links me to all of the Schools of the University, all of the Graduate Colleges and the Departments, all the staff and students. I thank the Chancellor, the Vice-Chancellor and the Council of the University which have been so generous to me before; but especially today.

It is a particular privilege for me to receive the degree at the hands of the Chancellor, the Honourable John Dowd. From our schooldays together, where we already showed a keen interest in public affairs, we

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have shared many engagements. In his political life, the Chancellor took a step for which he deserves great honour. When others faltered, he began the process to remove the irrational laws that penalised sexual minorities. A decade later, we sat together as judges of the Supreme Court of New South Wales. We worked together in the International Commission of Jurists for human rights and the rule of law. His service in that respect continues. His presence today brings back memories that span more than fifty years.

I realise that most of my fellow graduates worked much harder than I did to earn their degrees. They burned the midnight oil. They consumed numberless gallons of coffee. They neglected family and friends in the pursuit of this special day. They deserve honour and praise.

So do their families and friends who have supported the graduates on their journey. None of us can accomplish the arduous road to graduation without loving support. When we go out into the sunshine, we will take photographs that will freeze this day in time. The photos will be framed and placed on the mantelpiece. As the years fade, they will remain in pride of place. Take my advice and tell those who helped you to this day how much you love and honour them. For some curious, possibly genetic, reason, human beings of the Anglo-Celtic species particularly seem to have an acute difficulty in saying that precious word: 'love'. Do not be hesitant today, of all days.

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Remember also your teachers at Southern Cross University and in earlier places of learning - colleges, schools and kindergartens. Right back to the first moment when you began the expansion of the mind that brings you to this day. Where would any of us be without our teachers? Next to our parents and (occasionally) our siblings, they generally play the most precious part in our development.

So let us pledge here and now never to forget Southern Cross University, in its beautiful setting in rural and regional Australia. Calm and peaceful; yet vibrant and innovative. Welcoming and open-minded. Creative and also traditional. Last week Australians learned that their universities are seriously under-funded by OECD standards<sup>1</sup>. As citizens who have received the precious gift of education, we should lift our voices to tell the simple truth. A nation's investment in its universities is its most precious investment in the future of everyone.

#### DEFINING OUR IDENTITY

Like the Chancellor, I am a lawyer. I cannot escape it. Many of the graduating class are not lawyers. I honour all the graduates from the Graduate College of Management; from the School of Commerce and Management; and the School of Tourism and Hospitality Management.

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<sup>1</sup> H Alexander, "University funded among lowest in OECD", *Sydney Morning Herald*, 19 September 2007, 6.

Yet, naturally, I feel a special empathy with the graduates in the School of Law and Justice. They are, in a sense, my kith and kin.

It is a good thing that Southern Cross University called its Law School a school of "Law and Justice". Law, alone, is not enough. Law without justice is an incomplete concept. Hitler's Germany and Stalin's Soviets were full of law. Yet at critical moments, justice was missing. There were black holes where the law was silent and justice had no say. The rule of law did not run to defend the weak, the unpopular and the vulnerable.

I do not intend now to speak only to my fellow lawyers. I want to speak to everyone as a fellow citizen. There is no more precious office in our Commonwealth than that of citizenship. It is the glue that binds us together. Whilst I know that some of the graduates are not citizens of this country, I will treat them for the purpose of this ceremony, momentarily, as honorary citizens. They have shared a time with us. They have, I hope, imbibed some of our ethos and the features, good and bad, that make up this nation.

Australia is a country in a process of renewal. We are changing. Many things long accepted are undergoing revision. However, one of the good features that we traditionally boast of, to define the essence of Australian society, has been our shared commitment to "a fair go" for all. To be a tolerant, inclusive, moderate society in which virtually everyone can find their place. Like every democracy, we have sometimes strayed

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from these noble ideals. However, this week, in a way that I want to describe, the nation's institutions corrected themselves. This is a story that has relevance to everyone at this ceremony. It is a story about the bedrock identity of Australian society.

On Wednesday of this week in Canberra, the High Court published its reasons for orders made earlier in an important case. Those orders took the always serious and solemn judicial step of invalidating an Act of the Federal Parliament. That Act, passed in 2006, had taken away the right to vote from all prisoners in Australia, serving a sentence of imprisonment. The High Court declared that, consistent with the Constitution, this could not be done.

Figures produced to the Court showed that there are nearly 26,000 prisoners throughout Australia, of whom nearly 6,000 are on remand, awaiting trial. The 2006 law excluded about 8,000 citizens of this country from the vote. More than 20% of them, like the applicant before the High Court, Vickie Roach, are indigenous citizens. Shockingly, 82% of the prisoners in the Northern Territory are Aboriginals.

Since colonial times in Australia, there had been exclusions from voting for persons convicted of treason or other "infamous crimes". For much of the history of the Commonwealth a person had to be serving a sentence of more than one year's imprisonment to be so disqualified. This was later changed to five years and in 2004 it was cut back to three

years. But then, in 2006, the *total* prohibition on sentenced prisoners was introduced, no matter how short the sentence – even if it was for just a few days that happened to coincide with the election. Ms Roach, on her own behalf and for other prisoners, including indigenous prisoners, challenged the validity of the new law. In effect, she said that when sentenced to prison, she was there as punishment, not *for* further punishment. She was still a citizen and a human being. She would soon be returning to the community. So she should have a say in the system of representative democracy that is a central principle of Australia's constitutional arrangements.

The High Court was told that, in Canada a similar total exclusion of prisoners was struck down by the Supreme Court in 2002<sup>2</sup>. Last year, in Britain, a similar law was held to infringe the fundamental rights in the *European Convention on Human Rights*<sup>3</sup>, to which Britain is required to conform. In the United States, four million citizens, no less, are banned from voting for life<sup>4</sup>. In New Zealand only those serving three years or more in prison lose their right to vote.

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<sup>2</sup> *Sauvé v Canada (Chief Electoral Commissioner)* [2002] 3 SCR 519 at 585 [119] per Gonthier J citing Tribe, *American Constitutional Law*, 2nd ed, 1988, at 1084.

<sup>3</sup> *Hirst v United Kingdom [No 2]* (2006) 42 EHRR 41.

<sup>4</sup> *Richardson v Ramirez* 418 US (1974); *Hunter v Underwood* 471 US 222 at 233 (1985).

The Federal Government defended its legislation. It argued that prisoners under sentence had temporarily forfeited their right to take part in federal elections. It said that it was up to Parliament to decide such matters because of the "sovereignty" of Parliament.

However, in our country, by the wisdom of the Constitution, no Parliament is completely "sovereign". It is only the people who are sovereign. The people express their will in the constitutional text. There is no Charter of Rights in Australia that could be appealed to, as in Canada or Britain. But the Constitution spells out a democratic form of government. As Chief Justice Gleeson observed<sup>5</sup>, it would be incompatible with the text and character of the Australian Constitution to revive today the early nineteenth century exclusion of Roman Catholics from the vote. Equally, it would be invalid to restore the early twentieth century Australian exclusions from the vote of women and indigenous people.

The Australian Constitution expressly provides that a person may not be *elected* to serve in Parliament although sentenced to imprisonment of one year or longer. If a *member* of Parliament, with those higher duties, could serve despite such a sentence, it would be paradoxical to exclude altogether prisoners with their much less onerous obligations of being *voters*.

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<sup>5</sup> *Roach v Electoral Commissioner* [2007] HCA 43 at 3 [8].

Accordingly, four of the High Court judges upheld the challenge to the exclusion of prisoners in the 2006 Act. They held that the 2006 Act did not sufficiently distinguish between more culpable and less culpable conduct. It made no allowance for prisoners serving sentences of a few days or sentences of strict liability. The net of disqualification was thus cast too widely. It went beyond the reason justifying a suspension of one of the most fundamental incidents of Australian citizenship. It was therefore unconstitutional. Two judges dissented<sup>6</sup>. But the Court ordered, in effect, that prisoners serving sentences of less than three years must have the right to vote in the coming elections. Within the electoral cycle, such prisoners will ordinarily be back in the community, governed by those who are elected by the people<sup>7</sup>. They are part of the people entitled to cast their vote.

Some, of course, will say that we should not worry about prisoners. Take away their civil rights. Throw away the key. We all know the usual suspects who are of this persuasion. However, it has not been the temperate tradition of Australia. Ours is a land made up, largely, of immigrants without sharp class distinctions<sup>8</sup>. Many of our

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<sup>6</sup> Justices Hayne and Heydon.

<sup>7</sup> [2007] HCA 43 at [8] citing Keane, Poletti and Donnelly, "Common Offences and the use of Imprisonment in the District and Supreme Courts in 2002", 30 *Sentencing Trends and Issues* 1 at 3 (2004).

<sup>8</sup> [2007] HCA 43 at [6] per Gleeson CJ; [62], [72] per Gummow, Kirby and Crennan JJ.

earliest settlers were convicts. They were people who served their time. Prisoners must be able to "live it down". And as for those serving shorter sentences, they remain entitled to choose their rulers. As one of the Canadian judges put it<sup>9</sup>:

"... In deciding who may and who may not vote in its elections, a community takes a crucial step in defining its identity".

### BECKONED BY THE SOUTHERN CROSS

That is why the decision of the High Court earlier this week is such an important one. It is part of the mosaic of law that defines the identity of the Australian community. Australia remains a land respectful of human dignity, including of its prisoners. It remains an inclusive society. Unlike the United States, it would never tolerate excluding millions (or thousands) of citizens from the vote because of past convictions. It is always vigilant against alteration of voting rights for partisan political advantage<sup>10</sup>. It celebrates democracy and representative government as a core feature of what it is to be an Australian.

When we go to vote in the federal election in a few weeks time, stand in the queue proudly as a citizen. Reflect on the importance of the

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<sup>9</sup> *Sauvé* [2002] 3 SCR 519 at 585 [119] per Gonthier J.

<sup>10</sup> *cf Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 261-2 [234].

moment and on your constitutional right to choose your governors. And think of how the High Court protects that right and guards it as a constitutional entitlement that can only be taken away in the most serious and relevant and justifiable of circumstances.

Those who, in modern times, came huge distances to build a new nation in Australia were guided on their journey by the Southern Cross. They wanted to build in this land a different and more egalitarian society. It would, they hoped, be a land freed from the prejudices and inequalities of older lands.

In a new millennium, we must continue their quest, with optimism and idealism. I hope that the Southern Cross will always remind us, as it did the early navigators, of those ideals. They extend to each and every person in this distinctive country - free from prejudice, discrimination and small-mindedness. Against Aboriginals. Against women. Against people of different races and religions. Against gays. And also against prisoners.

What a symbol the Southern Cross is for this University. What an image to keep in our thoughts for this day of rededication and in all the days to come.

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