# THE RISE (AND FALL?) OF THE BARRISTER CLASS

## BY THE HON MICHAEL McHUGH AC

## INTRODUCTION*

### The Hon Justice Michael Kirby AC CMG

As barristers go, Michael McHugh's career was unusual. There was little about it that was privileged - except his intellect and drive.

Born in Newcastle, he moved with his family to North Queensland at the age of seven because his father was seeking wartime work in the mines. On his return to Newcastle, at the age of thirteen, he attended the Marist Brothers' school. There, and from his father Jim, he learned two Irish Catholic lessons that were to remain with him throughout his life in the law. First, that there are rules to be obeyed. And secondly, that civil liberties matter.

To the disappointment of Jim McHugh, the young Michael left school at age fifteen. He took odd jobs, including that of the proverbial telegram boy. But his questioning intellect soon took him back to the

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* Notes on which were based remarks in the Common Room of the New South Wales Bar Association on 20 August 2007 on the delivery by the Hon Michael McHugh AC of a Lecture in the series on Rhetoric.

Hamilton High School at night. He gained his matriculation. In 1958 he commenced studies for the Barristers' Admission Board, working during the day as a clerk for the Broken Hill Proprietary Co.

Michael McHugh was admitted to the New South Wales Bar in 1961. He read with two fine advocates who once frequented this common room: John Wiliams QC, himself from Newcastle, and John Kearney QC. Both were later distinguished judges.

For a time, Michael McHugh returned to practice at the Newcastle Bar. However, his legal and forensic talents quickly brought him to the notice of two stars of rare ability: Harold Glass QC (also a mentor of mine) and Jack Smyth QC (the legendary cross-examiner).

Michael McHugh was appointed to silk in 1973. Soon after he began his service on the New South Wales Bar Council. In 1982 he was elected President of the New South Wales Bar and in 1983 this was followed by Presidency of the Australian Bar Association.

It was at this time, in October 1984, that we came to work closely together. A few weeks earlier, I had been appointed President of the New South Wales Court of Appeal on the retirement of Justice Athol Moffitt. Michael McHugh's appointment as a Judge of Appeal followed the retirement of Justice Frank Hutley.

Those were memorable days. The Court of Appeal was a court of rare strength. It combined in its members judges of great experience and new appointees who brought fresh and different talents. It mixed differing viewpoints and legal philosophies in potent combinations. Sometimes, sitting together in the High Court as we later did, an advocate of discernment would cite decisions that we had written in the five years when we sat together in the Court of Appeal. We would read the reasons we then wrote with admiration bordering on astonishment. We would agree, at least between ourselves, that those had been glory days for our professional work. They were also very happy days, as life in a collegiate court can sometimes be.

During his years on the Court of Appeal, Michael McHugh made many contributions to legal doctrine. None was probably so influential as his opinion in *Kingston v Keprose Pty Ltd*[1]. In his dissenting reasons in that case, calling on English authority, Michael McHugh profoundly reshaped the approach of Australian courts to the task of statutory interpretation. As this is now the major function of courts, at least of appellate courts, it was a vital contribution[2]. Henceforth, context as well as text was to be important in deriving legislative meaning. Words would no longer be read in isolation. In *Bropho v Western Australia*[3], the Full

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1 (1987) 11 NSWLR 404 (CA).

2 cf Judicial Commission of New South Wales, *Statutory Interpretation - Principles and Pragmatism for a New Age* (Education Monograph 4, 2007) (Ed Tom Gotsis).

3 (1990) 171 CLR 1 at 20.

High Court endorsed the McHugh approach. It is now the established way in which problems of statutory interpretation are considered in the Court[4].

I remember the day in 1989 that he was plucked from our midst and elevated to the High Court. I can recall how I put a brave face on his departure. It was part of my good fortune in life that in 1996 I joined him again on the bench in the High Court. We sat together. As our colleagues retired or resigned, we moved our seats. But our chairs were yoked together and we constantly revived the happy association of earlier times.

When Michael McHugh retired from the High Court of Australia in 2005, to the acclaim of the legal profession which recognised him as a life-long leader, something of the pleasure of sitting in the High Court departed for me. I miss his presence. His skills of communication, his encyclopaedic memory of the cases and his incisive questioning were helpful to the entire Court. He would help focus and shape debate. He was equally at home in questioning legal authority or legal principle and

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[4] The cases are collected in M D Kirby, "Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts" (2003) 24 *Statute Law Review* 95 at 99. See esp *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Newcastle City Council v GIO Ltd* (1997) 191 CLR 85 at 112-113; *Project Blue Sky Ltd v Australian Broadcasting Corporation* (1998) 194 CLR 355 at 381 [69], 384 [78].

policy. Communication skills vary greatly amongst lawyers. Michael McHugh's are of the highest order.

In the High Court we but rarely see instances of rhetoric of the first class. In part, this is a reflection of the temper of the times, the changes in curial habits and the urgency of modern business. Yet there was a day when Michael McHugh and I were sitting together in the number 1 courtroom in Canberra when we saw rhetoric skilfully deployed. He will remember it, I am sure, for he has a photographic memory for such things.

The case was *The Wik Peoples v Queensland*[5]. The report shows that the day was 11 June 1996. I had been a member of the High Court for four months. Before us sat two tiers of the highest talent of the Australian Bar. The occasion was even photographed to commemorate such a grand assembly of advocates. It was to be the last occasion on which Sir Maurice Byers QC, himself a past-President of the New South Wales Bar Association, would address the High Court which, as Solicitor-General for the Commonwealth, he had so profoundly influenced during the Mason years.

Argument began with the submissions of Walter Sofronoff QC, appearing for the Wik Peoples. He is now the Solicitor-General of

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[5] (1996) 187 CLR 1.

Queensland. A hush fell on the courtroom as he approached the central podium. He did not squander that historic moment. He opened his submissions in a most unusual way. He did so by talking in word pictures.

His submissions commenced, as I recall, with a vivid description of the beauty of the Wik country in the northern part of Queensland. On 1 April 1915, in that country, he said, the Wik people were going about their daily lives as they and their ancestors had done for aeons. The men were getting their bark boats ready to fish because it was a clear day. The women were sitting with the children, teaching them about their traditions. Some older children were running off into the bush. At the very same moment, in the Land Titles Registry in Brisbane, the representatives of the Mitchelton Pastoral Holding were registering a pastoral lease under the Queensland Act. In the old measurements, it laid claim to an area of 535 square miles, approximately 1385 square kilometres[6].

Sofronoff took our minds up to the Holroyd River district. The Wik people continued to live after their traditions. They went about their daily lives, untroubled and unconcerned by the happenings under white man's law in the Land Titles Office of which they had no knowledge. They rarely came into contact with the leaseholders. A vivid picture was

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[6] (1996) 187 CLR 1 at 231.

painted of two communities, each with legitimacy according to its own perspective and laws. But could their legal claims live so quietly together?

As things transpired, Michael McHugh and I took different views of the Wik claim to native title, notwithstanding the due registration of the Mitchelton pastoral lease[7]. He agreed with Chief Justice Brennan[8], as he had in *Mabo*[9] - the pathbreaking decision that had opened the possibility of native title claims in Australia. This time, he rejected the Wik claim, as incompatible with the survival of native title. I was to be in favour of the claim. Michael McHugh went with what he took to be the rules. However, in this area, the rules were new and uncertain.

My decision in *Wik* was not shaped only by Walter Sofronoff's rhetoric. You can read my reasons in the report of the case to see them. Yet with a few vivid sentences, at the outset of his submissions, Sofronoff described the quandary that the High Court was facing. Where I sat in the law, such moments of rhetoric are rare. I know that Michael McHugh agrees that there should be more of them.

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**7** (1996) 187 CLR 1 at 167, 205.

**8** (1996) 187 CLR 1 at 100.

**9** (1992) 175 CLR 1.

To present the next lecture in this series on rhetoric, I introduce a master of the art. Remembered equally for his days as a powerful advocate and his years as a principled judge. I have had the privilege of a preview of his paper. It is a precious record of masterful lives from which we can still all learn. We have a verbal treat in store.

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