

Retirement of the Hon Justice Michael McHugh AC

Friday, 7 October 2005 marked the final sitting day of Justice Michael McHugh AC as a member of the full bench of the High Court. Notwithstanding its unpublicised nature, the court room was packed and privileged to hear Hughes QC pay a tribute to the judge who, since his appointment to the High Court in 1989, has participated in approximately 1000 decisions in addition to an even greater number of special leave applications. His Honour's written judgments and oral interventions in the course of argument are universally recognised as having been of the highest calibre. Few could match his almost photographic knowledge of the *Commonwealth Law Reports* or grasp of the law's historical evolution. He has made significant individual and collegiate additions to the former and has continued the latter in the tightly reasoned, incremental tradition of the common law.

McHUGH J: Do you move, Mr Hughes?

MR T E F HUGHES QC: May it please your Honours. I have the honour, by kindly presidential delegation from my learned friend, Mr Ian Harrison, to make some valedictory remarks on behalf of the Bar about your Honour Justice McHugh to mark the impending expiry of your Honour's commission as a Justice of this court.

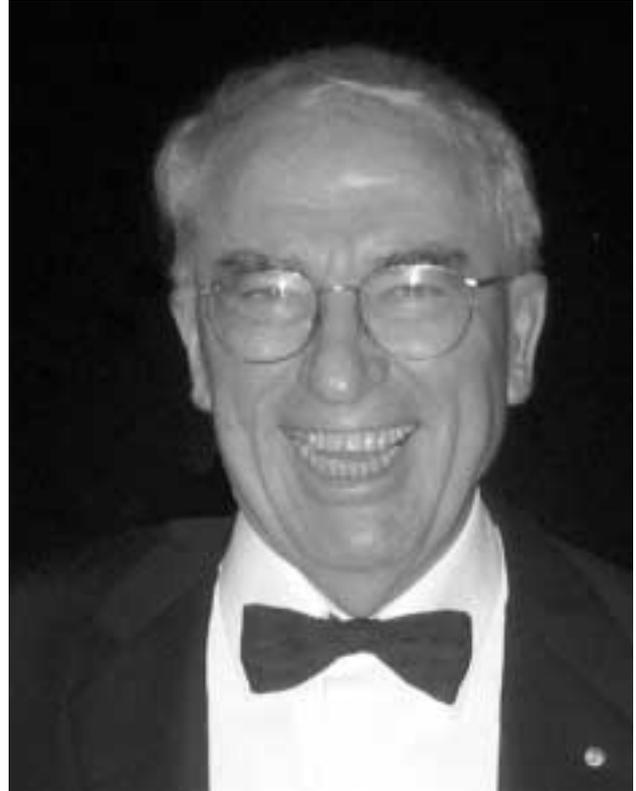
This event is an occasion for regret. It is the inexorable result of an arbitrary age limit, the product of an anachronistic misconception that people who have led an active and useful life are over the hill at age 70; that they have reached, as it were, the bank of the river Styx to be ferried over to the other side. What nonsense.

You leave the Bench while at the prolonged apogee of your intellectual powers. Your Honour's career at the Bar was stellar. You were as at home in a murder trial as in a complicated equity suit. One of my fond recollections is that our numerous forensic contests were never marred by personal antipathy or personal difference.

Like F E Smith, your career at the Bar had a provincial genesis; in his case, Liverpool, England, in your case, Newcastle, New South Wales. You moved to Sydney at the wise and timely instigation of J W Smyth QC who made a sound judgment about your potential. Your practice took off. In the course of that process, you underwent the educative experience as a frequent junior to Clive Evatt QC of seeking to moderate his forensic enthusiasms.

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Your Honour's judicial career started 20 years ago in the Court of Appeal. You came to this court in 1989. Your judgments will



live because in them you have combined a formidable grasp of legal principle with powerful felicity of expression.

The Bar wishes your Honour well on your compulsory retirement from this court. It is a safe prediction that this will be but a step in an ongoing career of service in and to the law. The Bar holds you in genuine respect and warm affection. May your future be as happy as it deserves to be. If the court pleases.

McHUGH J: Thank you for those kind remarks, Mr Hughes and I thank all those attending here today to mark my last day of sitting as a member of the full bench of this court. As you know, the traditional practice of the High Court is that there is no farewell ceremony for justices of the court other than chief justices. In the case of ordinary justices, the tradition has been for the chief justice of the day to say a few words, usually kind words, about a justice upon his or her death. That ensures that the justice does not get a right of reply, at least in this world.

As I found out yesterday, this may not be my last sitting day on the court. To my surprise – amazement may be a more appropriate description – I found that Chief Justice Gleeson intends to get the last pound of my flesh by making me the duty justice for my last week on the court, which happens to be the week my colleagues will be enjoying the pleasures of the court's annual visit to Perth, while I will be here in Sydney.

It has been a great privilege to have served on this court for almost 17 years. It is, of course, one of the three arms of

government in this country. Arguably, it is the most important. It not only declares the law for the nation, but it has the vital role of ensuring that the legislatures and executive governments of Australia act in accordance with the law and within the powers and functions allotted to them by the Constitution.

It is therefore of the greatest importance that the High Court should enjoy the confidence and respect of the people of Australia. Maintaining confidence in and respect for the court is primarily the responsibility of the justices of the court themselves and, as Chief Justice Dixon said on his appointment as chief justice, respect for the High Court, and indeed for all the courts of this country, must depend upon the wisdom and discretion, the learning and ability, and the dignity and restraint which the judges exhibit.

The date of my retirement from the court on 31 October will be exactly 21 years from the day I was appointed as a judge of the Court of Appeal of New South Wales. It is therefore a matter of especial pleasure to me that Justice Kirby, who was sitting with me on that day in October 1984 when I first sat as a judge, is now sitting with me on what is certainly my last day of sitting as a member of the full bench of the High Court. His Honour and I have often disagreed on the outcome of cases, but we have remained firm friends throughout.

During my 21 years as an appellate judge I have done my best to maintain confidence in and respect for the courts of which I have been proud to be a member. To what extent I have succeeded is a matter for others to judge. Mr Hughes, your kind words this morning indicate that to some extent at least, I may have succeeded.

You do not have to sit in this court for long before realising how central to the work of the High Court and all courts is the contribution of the practising Bar and advocates such as yourself, Mr Hughes. Few people of my age still have heroes. The experience of a long lifetime teaches that most heroes turn out to have, if not feet of clay, at least serious flaws that ultimately diminish their stature in the eyes of their worshippers. But, since I was a young man, Sir Owen Dixon has been and remains my judicial hero and his view about the contribution of advocates to the administration of justice is identical with mine. I should like to quote what he said about the importance of advocacy on the occasion when he first presided as chief justice at Melbourne. He said:

For my part, I have never wavered in the view that the honourable practice of the profession of advocacy affords the greatest opportunity for contributing to the administration of justice according to law. There is no work in the law which admits of greater contribution. A community owes a duty to a Bar composed of men –

I interpolate ‘and women’ –

who being conscious of the dignity of the profession of advocacy and possessing a proper legal equipment, conduct causes before the courts of justice from the high and very firm ground on which it is the tradition of an independent Bar to stand.

I have devoted all my adult life to the study and practice of law. Never for a moment have I regretted the choice of becoming a lawyer or practising the law

I firmly believe that what the chief justice said on that occasion is completely accurate in every respect.

If there had been no constitutional bar to my remaining a member of the court, I would have continued to serve on this court for as long as I believed I had the capacity to perform the heavy – bordering on the oppressive – workload of the court. The compulsory retirement age of 70 for federal judges no doubt seemed sensible in 1977 when it was introduced with bipartisan political support. But given the increasing longevity of Australians, I doubt if it is now.

One rationale for the amendment was that some federal judges continued to remain on the Bench after it appeared they were no longer capable of performing judicial work adequately. The real difficulty these days, however, is not to get judges to leave a court, but to stay on until 70. Apart from the three chief justices of this court, I will be the first justice of the court to serve to the age of 70 since the constitutional amendment was introduced in 1977. All other justices have retired some years before reaching the age of 70.

Mr Hughes, I have devoted all my adult life to the study and practice of law. Never for a moment have I regretted the choice of becoming a lawyer or practising the law, although of course, on some occasions, other occupations and professions seemed alluring and enticing. It should be unsurprising, therefore, that, although in a few days I must retire from this court and despite the attractions and pleasures that total retirement could give, I will almost certainly continue to study and keep abreast of the law and continue to serve it in some capacity or other.