

## The portrait of Sir Kenneth Jacobs

In early 2011 the Bar Association commissioned a portrait of Sir Kenneth Jacobs, a former president of the Court of Appeal and a justice of the High Court of Australia. Members gathered at the unveiling ceremony in the Bar Association Common Room on 10 August. The Hon Sir Anthony Mason AC KBE, the Hon TEF Hughes AO QC and Mr Cal Callaway QC spoke. The portrait is to be donated to the Supreme Court and displayed in the President's Court on Level 12 of the Law Courts Building.

The work is by Ralph Heimans, a well-known Australian portrait artist who painted the portrait of the Hon Justice Michael Kirby AC CMG and a portrait of Crown Princess Mary of Denmark, displayed at the Royal National Portrait Gallery of Denmark in Copenhagen. A number of members of the Bar Association contributed towards the cost of the portrait.

The following speech was delivered by the Hon Sir Anthony Mason AC KBE.

It is an honour to speak at this unveiling of the Bar Association's portrait of Sir Kenneth Jacobs. My brief from the organisers is to speak about what they are pleased to describe as 'Sitting with Sir Kenneth Jacobs'. I shall ignore the limitations implicit in that invitation.

Although Ken Jacobs was some six years my senior, I came to know him at the bar and ultimately we became close friends. We had both read with Ken Asprey before he took silk and we both practised in the equity jurisdiction. He was, of course, an expert in that field of law and was the foundation author of the leading text book on the law of trusts in New South Wales. He was also the Challis Lecturer in Equity 1953–1960, a position to which I succeeded on his retirement from it in 1960. He was appointed a queen's counsel in 1958, eleven years after he was admitted to the bar.

He continued to be a member of the Faculty of Law, while a judge, after his retirement as a lecturer. The history of the Law School *A Century Downtown* records a faculty meeting about 1970 which convened to consider, as it did with monotonous regularity, a motion to rescind a previous decision either to move or not to move to the main university campus. On this occasion Professor W L Morison presented the motion to rescind the decision to move to the main campus. Following his address in support of the motion, Professor Morison records what happened in these words:

At the conclusion of my address the future Sir Kenneth Jacobs summed it up by saying that he had no doubt the same points had been made centuries before in attempts to get the surgeons out of the barbers' shops.

When the rescission motion was carried, the dean said it was probably the most disastrous decision ever taken in the history of the Law School.

Ken Jacobs was certainly not a 'Bleak House' type equity lawyer of the kind that the reader encounters in Charles Dickens' famous novel of that name. He



was a creative lawyer with wide-ranging interests both within and outside the law. He was always interested in constitutional law. In 1958, four years after he was admitted to the bar, he appeared with Bruce Macfarlan (who was also then a junior) for Marcus Clark & Co Ltd, then a well-known retail store, in its challenge to the Defence Preparations (Capital Issues) Regulations which were based on an exercise of the defence power in peacetime. The Commonwealth's demurrer to the plaintiff's statement of claim was overruled, so the two juniors had a win. But as the case was left to be tried on the facts, it was not a comprehensive victory. Even so it was a considerable achievement for two junior counsel to win a major constitutional case.

In 1960 he was appointed a judge of the Supreme Court in Equity. His appointment was enthusiastically received. It was a pleasure to appear before him. He was invariably courteous and gave close attention to the evidence and the arguments. He was noted for his excellent judgments which not infrequently turned on the reason for the rule rather than the rule itself. So it was no surprise when he was appointed to the newly-established NSW Court of Appeal.

One of his achievements after he was appointed a judge was that he was nominated as the judge of a Constitutional Court established for the island of Cyprus.





The old antagonism between the Greek and the Turkish communities in Cyprus had once again welled up – if, indeed, it had ever abated – and the establishment of the new court was thought to be a means of resolving or alleviating the tension. Unfortunately – or perhaps fortunately – before Ken could take up the position, Turkey invaded Cyprus and took over the government of the northern part of the island. So a martial solution avoided the need for a judicial solution. I looked in *Who's Who* for a reference to his Cyprus appointment but there was none. His entry in that volume is sparse and typical of his modesty.

He achieved fame by his celebrated comment on the proposed *Supreme Court Act 1970* prepared by the Law Reform Commission. The Act was designed to give NSW a judicature system to replace this state's old common law/equity jurisdictional divide which had provoked lawyers in other jurisdictions to regard NSW as a legal museum. His deflating comment was that the Supreme Court Act was 'a great leap forward to 1870'.

My first experience as a judge was sitting with him on the NSW Court of Appeal and my friendship with him gave me a confidence I would not otherwise have had for he was most generous in making available his experience in working with the other members of the court. He took me to a dinner the first day I sat in the Court of Appeal and I well remember the evening as I am sure he does. In the well-known case of *Barton v Armstrong* his dissenting judgment<sup>1</sup> in the Court



of Appeal was upheld by the Privy Council majority decision.<sup>2</sup> In his judgment there is a reference to a passage in *Bracton* which, it is believed, had never been judicially cited before. It is understood that the English translation in the judgment was made by the judge himself.

He was in the Court of Appeal, as he was later in the High Court, always prepared to discuss his views on the arguments presented so long as there was a prospect of an instructive exchange of views. That is not always an ever-present prospect in courts of appeal of which



I have been a member. My recollection is that both in the Court of Appeal and in the High Court he did not intervene excessively in the argument and confined himself to asking questions to assist his thinking about the issues, the particular difficulties that were troubling him.

When president of the Court of Appeal he was appointed to the High Court in 1974. Due to severe ill-health he retired from the High Court in 1979, long before the statutory retirement age. In the five years he was on the court he made a distinctive contribution to the work of the court, as he had earlier done in the Court of Appeal. Had he been able to serve his full term on the court, he would have achieved a reputation as one of the outstanding justices of that court.

I would not presume to evaluate his qualities as a judge, except to say that he had a strong sense of the continuity of the law. To the extent that there was movement in judge-made law, it moved along the line of a continuum. That meant that binding precedent must be respected. He was certainly not, however, a lawyer of whom it could be said that precedent was an attitude of mind. While he appreciated the great value of certainty in matters of property and commerce, he had a close eye for justice in the shaping and re-shaping of the law on doubtful points, particularly on questions outside those areas of the law.

His concern was with the justice of the applicable rule, not with unruly or instant justice. The outcome in the

particular case must be consistent with the justice of the rule so that the outcome in the particular case fitted the general framework of the law and did not damage it. In all his work, his extensive knowledge and interests played an imperceptible part. He was an avid reader, keenly interested in history and the classics, as his MA degree in ancient history, for which he studied after he retired from the High Court, attests.

When he left the court, I greatly missed the interesting conversations I had with him, not only on matters of law, but about public affairs, literature, history and personalities. They were conversations made all the more illuminating by his distinctive learning, humanity and understanding.

And, last but not least, of course, he was a keen gardener, though he left no trace of it in his judgments. But his garden at Crook's Lane Corner near Marlborough in Wiltshire was a tribute to his artistry and vision as a gardener. There, apart from gardening, he enjoyed book binding. It is a pity he is not with us this evening; he would have enjoyed the occasion and all the more so as so many of his relatives and friends are here this evening.

#### Endnotes

1. [1973] 2 NSWLR 598.
2. [1976] AC 104.