THE UNIVERSITY OF NEW SOUTH WALES

FACULTY OF LAW

25 MAY 2006

PROFESSOR MARK ARONSON - DOYEN OF AUSTRALIAN ADMINISTRATIVE LAW[*]

The Hon Justice Michael Kirby AC CMG[**]

The rumour that Professor Mark Aronson was retiring from his post as Professor of Law in the University of New South Wales caused widespread gnashing of teeth and renting of clothes. Indeed, so much wailing has probably not been heard since the Sabine women lamented the defeat of their soldiers by the Romans in the third century BC. Happily, we now find that he is actually to return to work the very day after his 'retirement': teaching the advanced course in administrative law and tutoring graduates and undergraduates as he has been doing at this University these past thirty years. True, he is putting down the burden of full-time teaching. That certainly marks a watershed in the life of a much loved teacher and scholar. So it is appropriate that we should pause

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[*] Text of remarks at the celebration of the work of Professor Mark Aronson, Law School, UNSW, 25 May 2006.

[**] Justice of the High Court of Australia. Foundation member of the Administrative Review Council of Australia 1976-1984.

and celebrate his life to date and reflect on what may be ahead. I am glad to do so in the company of another hero of administrative law from New Zealand, Professor Michael Taggart.

I have been coming to this University since 1962. That was the year I was first elected President of the Students' Representative Council of the University of Sydney. That office carried with it the right and obligation to attend the meetings of the Students' Union in the Round House of the freshly minted second University of Sydney, newly renamed the University of New South Wales. I came to know wonderful student leaders including John Niland, Alf van der Poorten, Heinz Harrant, Ian Ernst, Helen Duff and the marvellous Jessica Milner whose service to the University has continued into the present age. In those days, Sir John Clancy, a judge of the Supreme Court of New South Wales, was the Chancellor of this University. Sir Phillip Baxter was Vice-Chancellor. The soon to be Sir Rupert Myers and Professor John Clark were the Deputy Vice-Chancellors. The place was buzzing with scientists, technologists, economists and dramatists. It was a vibrant, confident, optimistic environment. But no lawyer was in sight, save for the Chancellor. The Law School was still a gleam in the eye of Mr Hal Wootten QC, then practising at the Bar. It was not to open for another decade[1].

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[1] P O'Farrell, *UNSW - A Portrait* (1999) 88, 169. Professor J H Wootten was appointed foundation Dean in 1979.

Also in 1962, in my presidential capacity, I went to a meeting of the National Union of Australian University Students at the equally new campus of Monash University in Melbourne - the second University of that city. It was then a place of fields and paddocks. Yet it too would grow into a great centre of scholarship and teaching. I have often thought of the Law Schools of Monash University and the University of New South Wales as twin creations of a confident era in Australia's history that saw the importance of tertiary education and did a lot about it.

At the time of my visits to UNSW and Monash, Mark Aronson was a boy of sixteen, still at school in Melbourne. He had been born in May 1946, just after the great and terrible War that had caused so much bloodshed and misery, including to his forebears in Europe. He was a bright student at school and opted for Monash University and its new Law School. He took the B Juris Degree in 1967. Two years later he graduated LLB with First Class Honours. He was awarded the Supreme Court Prize in Victoria in 1970. These brilliant results earned him a Commonwealth overseas postgraduate scholarship. He elected for Oxford University where he took the D Phil degree, studying under the redoubtable Professor (later Sir William) Wade.

Mark Aronson's special interest at the time was privative clauses. It is rumoured that he is one of only three people in the world who have ever fully understood the mysteries of the law on such attempts to oust the jurisdiction of the courts from review of administrative action in

designated circumstances. He alone could work out the riddle that is Justice Dixon's opinion in *Hickman's Case*[2]. Sir Owen Dixon is dead and the second has lost his mind. But Mark Aronson remains[3].

Having emerged from Oxford, where he taught as a casual tutor at Merton College, Mark Aronson returned to Australia and opted for Sydney and the new UNSW[4]. The Law School here had just been created. It says something about his sense of adventure that he applied to Dean Hal Wootten. He was one of a brilliant group of young academics whom the Foundation Dean recruited. He joined the Law School with Susan Armstrong, John Basten, Julian Disney and others who were to go on to fame as jurists and teachers. I urge Mark Aronson to record his memories of those early days of the Law School. He should subject himself to oral histories. He is one of those people, like my father and my brother David, with a perfect recollection of facts long ago and far away. He should put them down for the future. Rarely was there such an exciting moment in legal education as the foundation of the Law School at UNSW in 1971.

Such were Mark Aronson's credentials that, in 1973, Hal Wootten offered him tenure as a lecturer and opportunities, with Professor Harry

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[2] (1945) 70 CLR 598.

[3] But cf *Plaintiff 157/2002 v The Commonwealth* (2003) 211 CLR 476 at 499ff.

[4] M Dixon, *Thirty Up, the Story of the UNSW Law School* (2001) 41.

Whitmore, to build a centre of true excellence in public and administrative law at this University. Mark Aronson seized the chance. He was fortunate to have Professor Whitmore as his mentor[5]. What Whitmore exuded in experience and wisdom, Mark Aronson supplemented with prodigious energy and enthusiasm.

Within two years of his arrival, we met. In February 1975, I had taken up the office of foundation Chairman of the Australian Law Reform Commission. The Commission's first projects concerned complaints against police[6] and criminal investigation[7]. On the latter, we needed sharp minds and energetic co-workers to match the talents of the Commissioner-in-charge of the project, Gareth Evans. Mr Evans was then a young academic from the Melbourne Law School and one of the first part-time Commissioners of the ALRC. Another, who was working on the project, was Mr F G Brennan QC, who was later to be so instrumental in the building of the new administrative law and who went on to become the Chief Justice of Australia. Professor Alex Castles, John Cain and Associate Professor Gordon Hawkins combined with a brilliant group of consultants to make a formidable team.

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5 Professor Harry Whitmore was later Dean from 1973 to 1976. See M Dixon, *Thirty Up*, 141.

6 ALRC 1, 1975.

7 ALRC 2, 1975.

We borrowed under-graduate researchers to supplement our meagre resources. We drew on the young lecturers at UNSW to lead the enterprise. They came forward with enthusiasm. I remember visiting the UNSW Law School at that time. It had just welcomed my own great mentor, Julius Stone, as an Emeritus Professor. Here Stone found refuge from the sometimes unhappy rivalries of Sydney Law School, as it was then. Stone had great expectations of the ALRC, and so did all of us. If that body has succeeded as a useful institution for the reform of the law in Australia, it is because of the participation of first class scholars throughout its history. Fortunate it was in the participation of Mark Aronson and his colleagues from this faculty in the earliest days.

Mark Aronson made a big impact on our work in the project on criminal investigation. Curiously enough, it produced the Commission's report which was effectively the first Australian book on the processes of police investigation, arrest, summons and pretrial procedure. The young Mr Aronson struck me as a clear thinker, an able expositor of the law and possessed of boundless energy. He was also a good looker, as his photo in the history of the law school attests[8]. It was at a time before he fell in love with leather coats and the other academic accoutrements of the 1980s.

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[8] M Dixon, *Thirty Up* (2001), 41.

We both count those optimistic years of the 1970s as a special period in our lives. He used them well. He wrote large contributions to the two major books that were to be the foundation of his future academic life. In 1976 he published *Litigation*[9]. In 1978 he published *Review of Administration Action*[10].The latter ultimately gave way to the magnificent work *Judicial Review of Administrative Action*[11]*,* for which he is justly famous. Each of these books was published with co-authors. But the idiosyncratic style of Mark Aronson is visible throughout its pages. He was the major contributor, as the whole world knows.

His academic life continued to flourish. His popularity and success as a communicator and lecturer, and his devotion to his students, were rewarded. In 1975 he had been promoted to senior lecturer. In 1979 he became an Associate Professor. In 1993 he was appointed Professor of Law. It was a golden path that was assured to him from the moment of his arrival.

In 1988, for almost three years, Mark Aronson worked as Senior Policy Adviser to the then Attorney-General of New South Wales (the Hon John Dowd QC MP). During this time he was on leave without pay

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9 Butterworths, 1976 (1st ed), 1979 (2nd ed), 1982 (3rd ed), 1988 (4th ed), 1995 (5th ed), 1998 (6th ed).

10 Law Book Co, 1978.

11 LBC Info Services (1st ed, 1996), (2nd ed, 2000), (3rd ed, 2004; 4th ed 2008 forthcoming).

from the University. Effectively, it is the only period, following his arrival, that parted him from his university obligations. Whilst working for the Attorney-General he devoted himself to a number of important tasks. They included the abolition of the New South Wales *Transcover* Scheme and its replacement with a significantly modified common law entitlement to allow once again recovery of damages for transport injuries. He developed the Evidence Bill 1991 (NSW). This became the vehicle for implementing the ALRC *Uniform Evidence Act*. The decision of New South Wales to opt-in to this scheme was a critical moment in the advance of a national evidence law.

Mark Aronson also worked on the review of the law of damages for professional liability and for personal injuries and death. In this work he sought to devise an acceptable social trade-off between caps on damages and increased harm minimisation in areas governed by professional supervision and regulation. Whilst working for the Attorney-General he developed proposals for a wide-ranging review of criminal procedures; suggestions for new laws to reform vicarious liability in respect of police[12] and prisons; and reviewed the law on racial vilification provisions in the *Anti-Discrimination Act* 1977 (NSW). The racial vilifications provisions that followed were the first of their kind in Australia. They aroused considerable anxiety at the time from those concerned about their possible impact on free speech. However, ethnic

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[12] cf *Enever v The King* (1906) 3 CLR 969. See also ALRC 1, *Complaints Against Police*, Ch III, Vicarious Liability, pp 58ff.

communities and Aboriginal Australians supported the Aronson proposals, knowing the harm that racial vilification can cause.

Mark Aronson continued his association with the ALRC. This extended over his work on the Evidence Bill that evolved into the *Evidence Act* 1995 of the Commonwealth and of New South Wales. The same law has since been accepted in Tasmania and the Australian Capital Territory. More recently, it has been accepted in principle in Victoria. The circle is closing and the achievement is mighty. An important part of the credit belongs to Mark Aronson.

He worked with the ALRC as a consultant in its project on the *Trade Practices Act*[13] and on grouped proceedings in federal jurisdiction[14]. I feel sure that when he arrived in the Attorney-General's office to begin his three year stint, Sir Humphrey and Sir Claude must have welcomed into their midst as a formidable academic foe whom they hoped to seduce into their ways. Actually, it is a wonder that he was not elevated to the peerage during this service. But he maintained his independence and critical approach. After he completed this interval of interaction with ministers and officials, he went straight back to his critical writing and his advocacy of effective, but limited, review mechanisms for the lawfulness, fairness and rationality of administrative decisions.

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13 ALRC 68, *Compliance with the Trade Practices Act* (1994).

14 ALRC 46, *Grouped Proceedings in the Federal Court* (1988).

But we should not praise Mark Aronson too much. He has had a lucky life. His arrival at UNSW coincided with the most remarkable development of administrative law that Australia has ever seen, and probably will ever see. The advent, in federal jurisdiction, of the Administrative Appeals Tribunal, the Administrative Review Council, the Ombudsman, the *Freedom of Information Act*, the passage of the *Administrative Decisions (Judicial Review) Act* and all the other developments of administrative law were a godsend to a young scholar who had chosen administrative law as his vocation. It cannot be said that he sat down to plan a career in an area that was bound to grow. He could not have known these amazing federal developments when he elected to study privative clauses at Oxford in 1969. Yet come they did.

These developments were also an important development in my own life. They encouraged my enthusiasm for law reform. They saw me appointed to the first Administrative Review Council which oversaw the changes under the leadership of Attorney-General Robert Ellicott QC MP. For Mark Aronson, the changes provided an enormous stimulation to his writing and thinking. They afforded a mighty contribution to his relevance. Suddenly, he was at the cutting edge of some of the most exciting Australian developments in law that had happened for decades. Had he chosen another field of law, say the Rule against Perpetuities, it is unlikely that he would have had so many challenging opportunities. But he chose administrative law at the dawn of its golden age.

I cannot understand how some people consider administrative law dull. It is never dull. Why, for example, do they say that administrative law is "no glamour subject". It is a whole lot more glamorous than most legal subjects. Indeed, I declare that it is in the Dame Edna class of glamour. It is always about power. Who enjoys it? Who can tame its exercise? Who abuses it? And who makes sure that it is exercised for the people in accordance with principles of legality, fairness and rationality? Those three little words sum up the essence of the developments of administrative law. Yet in between there is much effort and a great deal of law.

In the High Court, when we have a day in public law, when issues of administrative law are before the Court, my heartbeat quickens. I cannot say I feel quite the same emotions when the case concerns the *Income Tax Assessment Act* 1936 (Cth). But when a case on administrative law arrives, I always reach for the provocative, stimulating, insulting, upsetting, insightful opinions of Mark Aronson. His books are full of wisdom, criticism (much of it deserved) and constructive energy. He is a person of energy, even of excess:

> "If music be the food of love play on
> Give me excess of it"

It is Mark Aronson's success, as a scholar and as a teacher, that has made him noticed. In the High Court, he has been repeatedly cited. If I look at the cases in recent years in which I have cited his opinions, they appear in a list that is like a modern history of Australian

administrative law[15]. In one case, *Re Minister of Immigration and Multicultural Affairs; Ex parte Applicants S 134/2002*[16], he appeared as junior counsel with John Basten QC to defend a decision that had

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[15] Re *Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128 at 148 [58] See also at 140 [37] fn 46; *Ousley v The Queen* (1997) 192 CLR 69 at 131 fn 270 (Aronson and Dyer, *Judicial Review of Administrative Action*, (1996)); *Abebe v Commonwealth* (1999) 197 CLR 510 at 587 [223] fn 209 (Aronson and Dyer, *Judicial Review of Administrative Action* (1996)); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 129 [126] fn 175 (Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000)); *Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 116 [191 fn 158, 116 [192] fn 163, 117 [194] 169, 118 [195] fn 171, 123 [211] fn 186 (Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000)); *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 359 [110] fn 110 (Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000)); *Re Minister for Immigration and Multicultural Affairs; Ex parte PT* (2001) 75 ALJR 808 at 813 [27] fn 15 (Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000)); *Re Minister for Immigration and Multicultural Affairs; Ex parte Holland* (2001) 185 ALR 504 at 509 [22] fn 8 (Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000)); *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 440 [173] fn 221 (Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000)); *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222 at 250 [96] fn 60 (Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000)); *Goldsmith v Sandilands* (2002) 76 ALJR 1024 at 1034-1035 [56] fn 57 and 58; 190 ALR 370 at 384-385 (Aronson and Hunter, *Litigation: Evidence and Procedure*, 6th ed (1998)); (2003) 211 CLR 441 at 472 [90] fn 92 (Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed, (2000)); *Griffith University v Tang* (2005) 221 CLR 99 at 133 [100] fn 133 (Aronson and Franklin, *Review of Administrative Action*, (1987)), 146 [142] fn [214]; *Ruddock v Taylor* (2005) 79 ALJR 1534 at 1560 [160] fn 145; 221 ALR 32 at 67 (Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 3rd ed (2004)); *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 80 ALJR 367 at 388 [96] fn 106; 223 ALR 171 at 194 (Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 3rd ed (2004)).

[16] (2002) 211 CLR 441.

involved the *Hickman* principle. He convinced Justice Gaudron and myself. But alas, the majority (Chief Justice Gleeson and Justices McHugh, Gummow, Hayne and Callinan) saw things differently. In the remaining three years of my service I look forward to his return to the Bar Table at the High Court in his spare time so that we can together correct this record.

Mark Aronson's colleagues regard him with respect and affection. Some of the comments on him that have been made by them include:

- "When you walk past his classrooms, you frequently hear laughter";
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- "The quantity of food consumed by him is similar to quantity of judgments/legislation gobbled up: he is a man with hollow legs";

- "He has strong opinions on law and all other matters - and states those opinions in strong terms - 'That's self-indulgent crap' is one of the milder opinions expressed in the common room that might be modified slightly when put in his books; but still there are very few 'with respects'"; and

- "He is generous with knowledge, ideas and time. His colleagues can't count the number of times he has answered questions on litigation and administrative law matters (the number of times when the answers were understood might be a trifle lower)".

Justice Beazley of the New South Wales Court of Appeal, tells me of his vast contributions to the Australian Institute of Administrative Law. He is an ever-ready participant to teach, instruct, discuss and entertain. For all of these contributions as a teacher, a scholar and a stimulus, on behalf of lawyers throughout Australia and of the judiciary, I express thanks.

In the end, it is not Mark Aronson's colleagues in this fine law faculty, that he has helped to build, that are the most important people in his intellectual life. It is not the judges or the tribunal members whom he has sought to educate, to correct and to stimulate, that matter most. Those who matter most are his students. It is upon them that he will have his most profound impact, just as Julius Stone had upon me when he taught me jurisprudence and international law fifty years ago. Twenty and thirty and forty years on his lectures and his enthusiasm, his laughter and his energy will be in the minds of those who go on to become the leaders of the Australian legal profession. That is the way the wheel turns. That is the great contribution that scholars and teachers make to our discipline.

In the words of Sir Harry Gibbs[17], speaking of Sir Samuel Griffith, Mark Aronson has been an exemplar of unselfish dedication to the law.

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[17] Cited in J D Heydon, "Chief Justice Gibbs: Defending the Rule of Law in a Federal System", Inaugural Sir Harry Gibbs Memorial

Footnote continues

That dedication does not dry up now. On the contrary, it will expand and it will continue. I hope that he will find time to come to court more often, for he is a natural advocate. I hope that he will go overseas and share his wisdom with law schools far from here. It would also be timely if he could undertake empirical research with administrators (perhaps some of those he met in the New South Wales Attorney-General's Department) to see how administrative law truly operates on the ground. What happens when an administrative decision is quashed and the administrator is ordered to start again? To what extent are the assumptions of administrative law born out in practice? How can we research the impact of administrative law in action? All of these would be worthy topics of enquiry of a scholar who has an unrivalled grasp of the law and of its principles[18].

Perhaps too he could venture into new and challenging fields of law. Constitutional law is the older sibling of administrative law. Mark Aronson's insights into the Constitution and its operation could draw on his understanding of our polity and how its civil society operates under the law. As human rights law expands in Australia, there could be no

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Oration, 26 May 2006, unpublished, 33 citing H T Gibbs, Sir Samuel Walker Griffith Memorial Lecture, 30 April 1984, 1.

[18] Trail-blazing work in this respect has been performed by two other leaders in Australian administrative law. See Robin Creyke and John McMillan, "Executive Perceptions of Administrative Law - An Empirical Study" (2002) 9 *Australian Journal of Administrative Law* 163 and *ibid*, "Judicial Review - An Empirical Study" (2004) 11 *Australian Journal of Administrative Law* 82.

better exemplar of its principles and teacher of the international dimension that liberates us from being captives of our jurisdiction or, indeed, the common law throughout the world. Great adventures lie ahead of Mark Aronson. We will watch them with great expectations.

Above all I hope that he will be acknowledged by the UNSW Law School. It is an amazing achievement to have taught in this Faculty, virtually from its beginnings: To have given such devoted service; to have taught thousands of law students; and to be cherished by virtually every one. On their behalf and on behalf of citizens beyond the ivy walls for whom administrative law is so important, I say a fellow lawyer's grateful thanks. In Kipling's words, speaking of his teachers, it can be said of Mark Aronson that his work endures:

> "For his work continueth
> And his work continueth
> Broad and deep continueth
> Great beyond his knowing".

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