

Remembering Sir Kenneth Jacobs KBE QC

The Hon Robert French AC delivered the following tribute to Sir Kenneth Jacobs KBE QC at a special sitting of the High Court on Tuesday, 13 October 2015.



Sir Kenneth Jacobs KBE QC. The portrait by Ralph Heimans was commissioned by the Bar Association in 2011 and donated to the Supreme Court of NSW. Photo: Murray Harris Photography.

This special sitting of the court is convened to honour the memory of the late Sir Kenneth Sydney Jacobs KBE, a former judge of this court who died on 24 May 2015. We are joined on the bench today by the Hon William Gummow AC. Also present in court are the solicitor-general of the Commonwealth, Mr Selth representing the Law Council of Australia and the Australian Bar Association and other senior counsel and counsel at the bar table. The attorney-general for the Commonwealth who had hoped to be present today has sent his apology for being unable to attend.

The court extends its sympathy upon the death of Sir Kenneth to his daughter, Rosemary Henderson, his stepson, Peter Stewart, and his partner since 2008, Christopher Horodyski.

Kenneth Sydney Jacobs was born in Sydney on 5 October 1917, the eldest son of Albert Jacobs and Sarah Aggs. His father was a hat manufacturer and was, as Sir Kenneth said in an oral history interview with Peter Coleman in 1996, 'obviously comfortably off'.

He was educated at the Knox Grammar School. He was dux in his last year there in 1934. In 1935, he commenced studies

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at Sydney University, graduating in 1938 with the degree of Bachelor of Arts with honours in Latin and Greek. One of his fellow students in classics was Gough Whitlam, whose government was to appoint him to this court in 1974. He enrolled for the LLB degree in 1938. He completed his law exams for the year 1939 in February 1940, as was then the practice, at Sydney University. However, following the invasion of France in May 1940 he enlisted in the AIF. He served with the 9th Division in Egypt, including in the Battle of El Alamein in 1942. In 1943, he was sent to New Guinea and was at the landings at Lae and Finschhafen. He was appointed as an intelligence officer.

In late 1944, or early 1945, he was discharged from the army under an arrangement by which soldiers who had interrupted their professional studies to enlist could resume those studies. He returned to Sydney University and graduated with a LLB with first class honours. He was also awarded the University Medal. In his last year at the law school he served as an associate to Justice Leslie Herron, who was later to become chief justice of New South Wales.

Kenneth Jacobs was approached to stand for the Liberal Party for a vacancy in the Legislative Council of New South Wales...He regarded membership of the Legislative Council as compatible with legal practice but had no intention, if elected, of devoting himself to politics. He said in his oral history: 'I didn't think that was what was expected of the Legislative Council'

Kenneth Jacobs was admitted to the bar in New South Wales in 1947. He read with Kenneth Asprey. One of his friends at the bar, who also read with Asprey, was Anthony Mason. He was conscious of enjoying two advantages. There was a lot of work and, being a little older than other newly admitted barristers and with the experiences of the war behind him, he had gained a certain insight into people. He practised, with notable success, particularly in the fields of commercial, taxation and equity law, and later in constitutional law. He was led in a number of cases by Garfield Barwick QC who many years later, as chief justice of this court, would swear him in as its 24th justice.

In 1952 he married Eleanor Mary Stewart nee Neal. Her son, Peter Stewart, six years old at the time, became his stepson. He and Eleanor had a daughter, Rosemary, who was born in 1953.

While at the bar, Kenneth Jacobs was the Challis Lecturer in Equity at Sydney University from 1953 to 1960. He agreed with the legal publisher, Butterworths, to write a book about trusts. The writing of it became, he said, a millstone around his neck. It was published in 1958 under the title *The Law of Trusts in New South Wales*. Even though titled by reference to trusts in New South Wales, it was then the only Australian textbook on the topic and gained wide acceptance. It was even accepted in Victoria, as the chairman of the Victorian Bar Council, Richard McGarvie QC, was to point out many years later in 1974 when welcoming Sir Kenneth to the High Court at its first sitting in Melbourne after his appointment. Sir Kenneth later said that Butterworths was quite surprised when the book sold. He thought it was popular with the profession because he had included in it discussions of specific problems faced by trustees in particular situations. Later editions were appropriately retitled *The Law of Trusts in Australia*. They continued to bear

his name and became known to students as Jacobs on Trusts. He said in his oral history that he regarded the writing of the book as a dangerous undertaking because he risked being identified as a sort of chancery lawyer. History demonstrates it did not have that effect. He would not be so confined. The authors of subsequent editions were notable names in equity: Roddy Meagher, William Gummow, Dyson Heydon and Mark Leeming.

In or about 1958, Kenneth Jacobs was approached to stand for the Liberal Party for a vacancy in the Legislative Council of New South Wales. The party was divided at the time and he lost the ballot by one vote. His agreement to stand did not

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spring from any strong political commitment. He regarded membership of the Legislative Council as compatible with legal practice but had no intention, if elected, of devoting himself to politics. He said in his oral history: 'I didn't think that was what was expected of the Legislative Council'. He was appointed as a queen's counsel in 1958.

In March 1960, Kenneth Jacobs was appointed as a judge in Equity in the Supreme Court of New South Wales. He had served as an acting judge on that court for six months. Upon his appointment he relinquished the position of Challis Lecturer in Equity and was succeeded by his friend, Anthony Mason QC. Sir Anthony, who appeared before Jacobs as a trial judge in the Supreme Court was, much later, to describe him as a creative lawyer with wide-ranging interests. He described the quality of his judgments at first instance as excellent, noting that he frequently looked to the reason underlying an applicable rule rather than the rule itself.

In 1963, Garfield Barwick, who by that time was minister for external affairs, invited Kenneth Jacobs to accept appointment as president of the Constitutional Court of Cyprus. That court had been established as part of a settlement between Greece and Turkey. It comprised a Greek Cypriot judge, a Turkish Cypriot judge, and a president who came from neither community. The first president had been appointed but did not stay the full term of three years. Kenneth Jacobs agreed to accept the appointment which was announced, but before he could take up his position, fighting broke out again on the island and the court never sat again. He said in his oral history that had he taken up the appointment he would have had his wife and daughter live somewhere peaceful. He had in mind Beirut, which answered that description at that time.

In 1966, Kenneth Jacobs was appointed to the newly established Court of Appeal of the Supreme Court of New South Wales. One of the other founding members of that court was Cyril Walsh, who was to become a member of this court in 1969. In 1969, Anthony Mason joined him on that court.

Jacobs became its president in 1972, succeeding Sir Bernard Sugarman. He was, of course, on the court in 1970, when New South Wales decided to adopt the judicature system and replace the old division of jurisdiction between common law and equity, as had been done in the United Kingdom a century earlier. He famously observed that the Supreme Court Act 1970, enacted to give effect to that change, was 'a great leap forward to 1870'.

As appears from his oral history, Kenneth Jacobs took the trouble to seek out and appoint as his tipstaff, when on the Supreme Court, a promising young Aboriginal man with a Higher School Certificate, who later undertook law studies. As he recalled it, he was the first judge to make such an appointment.

While on the Court of Appeal, he wrote a comment for the *Sydney Law Review* on the late Professor Stone's well-known book *Legal System and Lawyers' Reasonings* published in 1965. He focussed upon Stone's formulation of the relationship between law and logic and disclosed some of his own judicial philosophy when he said: 'The law develops not by deductive logic alone but largely from judicial choices.'

He described what he called a change in the judicial climate between 1946 and 1966 in the willingness in the United States and in England, but hardly at that time in Australia, to recognise the forces which operate and have always operated in judicial decisions. His respect for Professor Stone reflected that which he held for the legal academy generally, not only in relation to particular aspects of the law, but also in relation to its broad approach to the judicial task.

On 11 February 1974, Sir Kenneth Jacobs was sworn in as a justice of the High Court of Australia to replace Sir Cyril Walsh who had died in office in November 1973. At his swearing in he was described by Mr Howard Snelling QC, the solicitor-general for New South Wales, as a person whose leadership of the Court of Appeal was impressive and many of whose judgments

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were of lasting significance. His reputation as a judge of liberal views and wide cultural interests beyond the law, particularly in art and music, was also acknowledged. When he was subsequently welcomed in Melbourne by the chairman of the Victorian Bar, Richard McGarvie QC, he was described as a judge of independent and forward-looking mind who placed great importance on civil liberties.

Sir Kenneth Jacobs served as a justice of this court until 6 April 1979. He retired early because he had been diagnosed with an illness which led him to believe he would not be able to sit regularly on the court for some time. He did not wish to place a burden on the other judges.

His first substantive judgment appearing in the *Commonwealth Law Reports* was a case arising under section 92 of the Constitution: *Pilkington v Frank Hammond Pty Ltd*. He gave early an interesting consideration to the executive power of the Commonwealth to request another country to detain and return a fugitive in *Barton v The Commonwealth*. He subsequently sat on most of the significant constitutional cases which arose out of the political contests of 1974 and 1975. The last reported case on which he participated was *Bradken Consolidated Ltd v The Broken Hill Pty Co Ltd*, judgment in which was delivered on 5 April 1979, the day before he resigned from the court. His judgment in that case was a joint judgment with his long-time friend, Sir Anthony Mason.

Sir Kenneth Jacobs' judgments have variously been described as reflecting a 'principled yet pragmatic approach to democracy', a conception of Commonwealth legislative power as 'sovereign'

and 'plenary' within its specified heads of power, and a respect for legal method and precedent. In a dissenting judgment in *HC Sleigh Ltd v South Australia*, he said:

The judicial process requires that the inevitable choices which fall to be made by judges be confined within the limits which training, tradition, respect for the opinions of other members of the court, past and present, and the ordinary intellectual processes of argument impose.

As is pointed out in the entry relating to him in *The Oxford Companion to the High Court of Australia*, there was prescience in his linkage of the historical conception of judicial power with basic rights, traditionally defended by what he called 'that independent judiciary which is the bulwark of freedom'. He often gave the leading judgment in cases involving trusts, although sometimes he was in dissent appealing to what he called 'a fair and reasonable interpretation' of community experience and business expectations by judges 'representing the community of which they are part' or to 'business sense' and '[s]ubstance, not legal form'.

Sir Kenneth Jacobs' judgments were of lasting quality. They are still quoted in the judgments of this court. While their quality marks the contribution he made while he served on the court, it also tells us something of the loss to the court and the community occasioned by his early departure from it. He will long be remembered for the textbook that bears his name, and in the *New South Wales Law Reports* and the *Commonwealth Law Reports* that contain his judicial legacy.