

OCCASIONAL ADDRESS

Delivered to graduates from the Faculty of Business and Faculty of Law
at the UTS Graduation Ceremony
Great Hall, City Campus, Tuesday 26 September 2006, 10.30am

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Chancellor, Vice-Chancellor, Sir Gerard Brennan, the Deans of Law and Business, other University colleagues, distinguished guests, and graduates, their families and friends.

I too commence by acknowledging the Gadigal and Guring-gai peoples of the Eora nation, the traditional and enduring owners of the land on which we meet today.

Today's ceremony celebrates and salutes the graduates' achievements. They are hard won. Even with the help of devoted lecturing and other University staff, you have had to draw upon your capacity for hard work, self-discipline, perseverance and independence. These qualities, strengthened by your studies, will sustain you in the years ahead. However, your success is probably not due to these qualities alone. Two hundred and fifty years ago, the great mathematician Isaac Newton said that, if he had been able to see further, it was by standing upon the shoulders of giants. We all think of the family and friends whose love for and service to the graduates enabled their success. You are the giants upon whose shoulders the graduates have stood. This ceremony also honours these giants, including many not here today.

I have been appointed to a position that honours Sir Gerard Brennan's contributions to the University as Chancellor and to the Australian people in many roles of public service. His landmark judgment in the *Mabo* case led the High Court to renew Australian law with its determination that the Crown's acquisition of sovereignty over a settled colony did not of itself extinguish the interests and rights of its indigenous inhabitants in land of the colony. The earlier legal theory that the indigenous inhabitants of a settled colony had no proprietary interest in land, Sir Gerard wrote, depended on a discriminatory denigration of the indigenous inhabitants, their social organization and customs. "[I]t is imperative in today's world", he wrote, "that the common law should neither be nor be seen to be frozen in an age of racial discrimination."¹ He was supported in this view by the changing expectations of the international community expressed in universal human rights standards and international instruments to which Australia has acceded.

¹ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 41-42.

This task of renewal of institutions and doctrines faces today's graduates. As graduates in law and business, you may spend a considerable part of your working lives in or advising organizations such as business corporations. These are devices that enable us to live together peacefully and cooperate for common goals. The business corporation is a crucial tool for the economic and social development of peoples across the globe.

Almost 60 years ago the United Nations General Assembly adopted the Universal Declaration of Human Rights to express the minimum standards of what is essential for respect for human dignity. International human rights instruments are made between states and are predominantly addressed to state conduct. This is largely on the basis that the state's monopoly of coercive power made it the principal threat to the enjoyment of human rights. While that was the case 60 years ago in the aftermath of the Second World War, it is not necessarily the case now and the operations of non-state actors such as corporations may pose significant threats to human rights.

Apart from a few very serious crimes, there is no body of international regulation of corporate activities and no mechanism for redress for breaches of human rights standards beyond the courts of the state which is host to their overseas operations. However, the leverage of host governments, especially of developing countries, over foreign companies is weakened by power differentials resulting from differences in relative economic size, the increased mobility of investment capital and the resulting competition between potential host countries for lower regulatory barriers to foreign direct investment. Another consequence of the statist character of international human rights is that little guidance is given to companies as to the norms that should frame their human rights observance and define their responsibilities in social roles that are very different from those of states.

In this area of business and human rights, we currently rely upon the compass of corporate self-interest to guide us to wise global outcomes. Thus, some companies signal their commitment to human rights standards by adoption of voluntary codes of conduct, particularly where the company sells branded goods into markets whose consumers might be sensitive to the circumstances of their production. However, relatively few companies sell into such markets. Self-interest is a powerful and generally positive stimulus. "It is not from the benevolence of the butcher, the brewer or the baker that we expect our dinner, but from their regard for their own self-interest," wrote Adam Smith 230 years ago.² Smith's faith was in a providential invisible hand guiding those who pursue their economic self-interest to achieve

² Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), Book 1 Ch 2.

desirable social outcomes. There are good reasons to doubt, however, whether the dictionary of the corporate conscience and the press of its self-interest will by themselves produce the optimal body of standards of corporate responsibility and corporate accountability with regard to human rights. As with the problem of global warming, the logic of collective action is not necessarily the aggregate of the logic of individual actors.

These collective action problems in business, law and society need a nudge along from those with commitment to the common good. The High Court did not commence the litigation that led to their decision in the *Mabo* case. In addition to the redoubtable Eddie Mabo, that litigation depended on the idealism and energy of a group of talented lawyers and their personal commitment to the public good of law's renewal. There was a powerful stimulus also in the persistent questioning by Nellie Castan of her husband, the late Ron Castan QC, who became lead counsel for the indigenous plaintiffs, as to why native title might not be asserted in Australia. Happily, as a non-lawyer she was not intimidated by the weight of old legal authority against this proposition. Happily also, Ron Castan listened to her. Both of them are etched in our history.³

Let me conclude with these remarks. There is a modern school of ethics that says that the correct course of action in a particular situation is not determined by its inherent correctness or its consequences but by consideration of what a virtuous person would do in the circumstances. Virtue, Aristotle said, is that quality of character that makes for a life well lived. Whatever the merits of virtue ethics, it encourages us to look for models of conduct and to ask how would that person act in this situation? Australian lawyers have found models in people such as Sir Gerard Brennan and Ron Castan QC. I hope that today's graduates find someone who provides an inspiring model for the years ahead. Perhaps they are here today celebrating your success with you. Cherish them.

May they inspire you to give the business and legal systems a nudge in the direction of renewal and make you alert always to the collective interest, the common good, and not merely individual advantage. You will find satisfaction in such service. Our integrity and, indeed, survival as a community depends on graduates in law and business who can see beyond their own interests.

Thank you for your attention. And good wishes for the journey ahead.

³ This exchange is reported and preserved by the Hon Justice Michael Kirby AC, CMG in his address *Ron Castan Remembered* delivered at the Dinner to Honour the Memory of the late A R Castan AM QC held by the Koorie Heritage Trust Inc, Melbourne, 15 November 1999 <http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_castan.htm>.