

Speech delivered by Anna Katzmann SC
At the retirement ceremony of
The Hon Justice Michael Kirby AC CMG
2 February 2008

May it please the Court.

In the President's Court in the Sydney Law Court's building where your Honour served NSW with great distinction, there hangs a portrait of your Honour painted by the Sydney artist, Josonia Palaitis, which made the final of the 2006 Archibald Prize competition. When I saw it unveiled I was shocked. I was shocked because it was sombre in tone, a tone I never associated with your Honour, a man who contemporaneously sported a bright yellow blazer whilst performing a rap, accompanied by a hip hop artist with the curious name of Elf Tranzporter. It is painted in the style of Goya, a style I later learned your Honour had yourself selected, having been inspired by the portrait of Don Ramon Satu  , a judge of the Supreme Court in Madrid whom Goya painted in 1823.

When the portrait was unveiled your Honour explained your reasons for choosing Goya. His theory of portraiture, you said, was based on his notion that there are two sides to the human face, reflecting the range of human emotions and revealing the ambivalence of the human personality. I wonder, however, whether there is another explanation.

In his biography of Goya Robert Hughes noted that part of Goya's creed – what he called 'the very core of his nature as an artist' was that he thought nothing human alien to him. Hughes felt that this was 'part of Goya's immense humanity, a range of sympathy, almost literally 'co-suffering' rivalling that of Dickens and Tolstoy'.¹ Whilst comparisons are always fraught with difficulty, these features of Goya spoke to me of your Honour – a man whose long judicial career has been marked by immense humanity, a range of sympathy, almost co-suffering, to whom nothing human is alien.

In the High Court your Honour expressed this humanity through judgments that drew on international law and decisions from

¹ R Hughes, *Goya*, Alfred A Knopf, New York, 2003, p 26

other jurisdictions – whatever was necessary to reach a just result – always zealous to ensure that fundamental human rights were protected by the law to the fullest extent possible, sometimes drawing criticism – even scorn – for so doing. There are many examples of this and this is not the time or the place to deal with them.

However, I do want to mention one of your Honour’s judgments – a personal favourite – a judgment you delivered when still on the NSW Court of Appeal. This was the judgment in the case of *CES v Superclinics*², a case brought by a woman who had been the victim of repeated failures by a number of medical practitioners to diagnose her pregnancy and in which the Court held by a majority of 2-1 that negligent advice resulting in the loss of the chance to have a lawful abortion could give rise to a claim for damages. Your Honour’s judgment is both a fine piece of judicial writing and a testament to your Honour’s humanity. The empathy it displayed and the sensitivity it demonstrated put me in mind of a comment that Charles Dickens made after praising *Scenes of Clerical Life* by George Eliot: “... if those two volumes, or a part of

² *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47

them, were not written by a woman – then should I begin to believe that I am a woman myself.”³

Perhaps it is only fitting that your Honour should be replaced on this bench by a real woman.

Your Honour has made an extraordinary contribution to the law, to the legal profession and to the lives of many aspiring lawyers. In recognition of that contribution I am delighted to be able to announce that the NSW Bar Association has offered you, and you have accepted, life membership.

On behalf of the NSW Bar I congratulate your Honour on your service to this Court and to the Australian people and I wish you well for the future.

May it please the Court.

³ 18 June 1858, published in the *New York Times* 23 January 1881