

BOOK REVIEW**Appealing to the Future: Michael Kirby and His Legacy*

Ian Freckelton and Hugh Selby (eds)

(Pyrmont, Lawbook Co, 2009) xcv + 996 pages

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This mega-tome, ‘by far the heaviest book’ that Sir Anthony Mason AC KBE said he had ever launched,¹ was published to coincide with the 70th birthday of the Hon Justice Michael Donald Kirby AC CMG on 2 February 2009, the day on which his term on the High Court of Australia, in accordance with s 72 of the *Australian Constitution*, came to an end. Co-edited by Ian Freckelton and Hugh Selby, prolific authors and longstanding co-editors/co-authors the book contains 35 chapters, preceded by an introductory chapter as well as a preamble and a prefatory tribute, together with notes about each of the 43 contributors – who are drawn from academia, the bench, the legal profession and the law reform community. At the end is included a 43 page index and an extensive 54 page bibliography prepared by Wendy Fitzhardinge. Interleaved between pages 480 and 481 are also eight pages of black and white photographs.

The book’s intended audience is a broad one, as noted in the preamble:

Whether you are a member of our community and are interested in how the law develops, or whether you are a judge, practising lawyer or law student, this book offers an unusual, fascinating coverage of many legal topics.²

The object of the book, as Hugh Selby remarks, is to present Kirby J and his ideas ‘through many lenses’ and to reveal ‘[h]is beliefs and priorities about our law and legal system’.³ Given that the principal focus is upon his role and impact – his appeal to the future – as a judge, I have used his judicial title throughout, notwithstanding his wish, on retirement, to ‘return to the title of a citizen – “Mr”’.⁴ Keeping in mind the model of law reform consultation initiated by Kirby J at the Australian Law Reform Commission, where he was the foundation Chairman from 1975 until 1984, the co-editors seek, through the publication of

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1 Sir Anthony Mason, ‘Speech of Sir Anthony Mason AC KBE, Delivered at the Launch of *Appealing to the Future: Michael Kirby and His Legacy*, 5 February 2009, State Library of New South Wales’ (2009) 83 *Australian Law Journal* 486, 487.

2 Hugh Selby, ‘Preamble’, x.

3 *Ibid* ix.

4 The Hon Justice Michael Kirby AC CMG, ‘Judicial Farewell’ (Speech delivered at the High Court of Australia, Canberra, 2 February 2009), <http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_2feb09.pdf> at 5 August 2009. For those of the readership who are unaccustomed to the abbreviations used for judicial titles, there is a helpful note about them in the book: lii.

the book, to foster ‘community discussion about Kirby’s lasting contribution to our legal system: to improving the law, to the law we apply, and to the manner in which we apply it’.⁵

The book is part *festschrift*, part ‘Companion to Justice Kirby’ à la *The Oxford Companion to the High Court*,⁶ and very much ‘The Kirby Project’, as Geoffrey Robertson described it in his introductory tribute piece, which is titled – utilising the second person singular – ‘Your Honour...’.⁷

Selby’s preamble begins: ‘None of us can be all things to all men but a select few can set an example that inspires the rest of us. Michael Kirby is such a man.’⁸ With such an opening there may be an anticipation that one was about to read a collection in the style of a hagiography – a biography examining the life of a saint. Selby’s co-editor, Ian Freckelton, eschews this in his introductory chapter, saying that they had ‘done [their] best to avoid the adulatory and the sycophantic’, while also acknowledging that ‘there are many in this volume who are unfeigned admirers of Kirby’. Freckelton does, however, introduce the idea of ‘Kirby the Phenomenon’.⁹ Similar attributions form a recurring theme: that Kirby J is a ‘one-off’;¹⁰ ‘the rock star of the bench’;¹¹ ‘a force of nature’.¹² Perhaps it is less hagiography and more ‘smorgasbordography’ with a vast array of tasting plates, or a ‘kaleidoscography’ to try to coin a word for the monumental tome, which uses a range of different lenses on an action-packed career. An expression of the latter is the conceptual framework that Freckelton utilises in his introductory chapter, using ‘Kirby the’ as the prefix for a wide range of areas of activities including: ‘Kirby the Reformer’; ‘Kirby the Bold’; ‘Kirby the Populist Communicator’; ‘Kirby the Interdisciplinary’; ‘Kirby the Monarchist’; ‘Kirby the Idealist’ and so on. (One could be forgiven in thinking at this point that adulation was not entirely avoided.)¹³

In his preamble, Hugh Selby provides a guide to reading the edited essays. Given the daunting task of having to review the collection – because of its size, its subject, and the aura which surrounded the timing of its appearance – I was rather glad to see ‘sat-nav’ like directions as to how to proceed. This I followed dutifully, except that two chapters were not referred to at all.¹⁴ The arrangement of the chapters puzzled me nonetheless and it was only when I had almost

5 Selby, above n 2, ix.

6 Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001). Although, as the former is 804 pages, *Appealing to the Future* is longer.

7 Geoffrey Robertson, ‘Your Honour...’, xiii.

8 Selby, above n 2, ix.

9 Ian Freckelton, ‘Introduction: Appealing to the Future’, 3.

10 A J Brown, ‘The “Inevitable Judge”? A Biographer’s Note’, 80.

11 Freckelton, above n 9, 5.

12 Heather Roberts and John Williams, ‘Constitutional Law’, 179.

13 One reviewer considered that many contributors ‘if they have genuinely tried, have failed’ and that ‘some contributors are worse – embarrassingly and pretentiously so – than others’, although none are identified: Robert Richards, ‘Facets of Kirby’s law’ (2009) 47(3) *Law Society Journal* 90, 90.

14 Julian Burnside, ‘Final Thoughts’, 887 – though this could be read as a concluding chapter; and David Weisbrot, ‘Law Reform, Australian-style’, 607 – a crucial chapter on Justice Kirby’s life as a law reformer and his contributions to law reform.

finished this review and was scanning through the table of contents to find a particular point I was trying to locate, that I realised – of course, it was alphabetical! On reflection, perhaps the chapters could have been grouped differently, so that one could read sequentially, or in sections, such as one that purposefully grouped together the chapters that are focused upon Justice Kirby's contribution as a law reformer (the two main ones, by David Weisbrot and Murray Wilcox, only happen to appear sequentially as they are the only two chapters whose title starts with 'L').

There are included in the contributors – as the co-editors concede and many authors freely admit – many fans. But although Geoffrey Robertson in his introductory piece laments the lack of 'any contribution from [his] usual critics',¹⁵ it is apparent that many chapters do include a critical eye, especially the whole set of chapters – comprising the bulk of the book – that examine Justice Kirby's judgments in particular areas of law. These chapters, in the main, exhibit a clear, critical, albeit often still affectionate or admiring, eye. Fine examples include Melissa Perry's chapter on 'Native Title';¹⁶ Ian Freckelton's on 'Health Law and Bioethics';¹⁷ George Zdenkowski on 'Sentencing';¹⁸ Warren Pengilly on 'Trade Practices Law';¹⁹ and Jeffrey Barnes on 'Statutory Interpretation'.²⁰ The critical analysis is also seen in the neat division in Vincent Jewell's chapter on 'Corporate Law' where, in considering Justice Kirby's particular judgments in different areas of corporate law, he includes a section on 'The judgment of Justice Kirby' and 'The legacy'.²¹ John Gava's chapter on 'Contract' draws attention to what he describes, critically, as 'agenda-judging' in some cases – 'the desire to use cases as instruments to achieve a particular legal goal at the expense of dealing with the specific legal problem raised in a case'.²² Similarly in their chapter on 'The Political System', Graeme Orr and Gregory Dale comment that: 'there are instances of judgments where his reasoning feels like a rationalisation of an outcome preferred more because it fits with his instincts about justice than any heroic synthesis of principle'.²³ And Heather Roberts and John Williams refer to Justice Kirby's 'living force' theory of constitutional interpretation, and that it contains an 'unresolved tension regarding the relationship between historical and contemporary meaning'.²⁴

While the chapters examining various slices of 'Kirby jurisprudence' are quite formal, as would be expected, the style of others is more anecdotal or interlaced with amusing stories. In Steven Churches' chapter on 'The Courts and

15 Robertson, above n 7, xiii.

16 Melissa Perry, 'Native Title', 643.

17 Ian Freckelton, 'Health Law and Bioethics', 421.

18 George Zdenkowski, 'Sentencing', 751.

19 Warren Pengilly, 'Trade Practices Law', 843.

20 Jeffrey Barnes, 'Statutory Interpretation', 721.

21 Vincent Jewell, 'Corporate Law', 131.

22 John Gava, 'Contract', 246.

23 Graeme Orr and Gregory Dale, 'The Political System', 682.

24 Roberts and Williams, above n 12, 188. It has also been the focus of criticism by fellow judges, such as McHugh J: Ian Barker, 'Judicial Practice', 574.

Parliament', for example, he recalls travelling with Kirby J: 'The trick to 727s in 1979 was that at the front left side of the cabin was a drop table for baby changing. The judge always booked this seat if he could, so he had a desk.'²⁵ There are those who adopt a somewhat whimsical tone, such as Churches who describes when, in his terms, Kirby had been 'naughty';²⁶ and Robertson who describes him as a 'floppy Benthamite' and a 'good sport'.²⁷

Each chapter contains an opening quote which provides a delightful cameo for its particular context. All but one are from Justice Kirby's writings either extra-judicially – of which there is a vast and rich array as he was a 'prolific extra-curial commentator'²⁸ – or from his judgments.²⁹ The section of photos is charming and, given Justice Kirby's affection for photography³⁰ and its importance in historical and personal narratives, I would have loved to have seen more, although I expect the publisher's leeway of tolerance was pushed to its limit already.

Justice Kirby's contributions to law reform are a recurring theme and are highlighted in particular in the impressive chapter – effectively a stand-alone essay – by David Weisbrot, 'Law Reform, Australian-style'.³¹ It is also at the fore in Murray Wilcox's short reflective note on 'The Law Reformer';³² in C G Weeramantry's chapter, 'The Internationalist';³³ and in the section of Ian Freckelton's introductory chapter dubbed 'Kirby the Reformer'.³⁴

What is clearly evident through the pages of this vast work, although sitting behind the text, are the number of intersections that Kirby J has had with so many people, in so many walks of life over his lifetime and his great courtesy and its effect on individuals and institutions.³⁵ The impact Justice Kirby had as President of the Court of Appeal of New South Wales is particularly mentioned in David Ipp's chapter on 'Intermediate Appellate Judges'³⁶ and in Ian Barker's witty chapter on 'Judicial Practice' and his celebration of 'the phenomenon of tea and raisin toast' as a means of building collegiality and consensus among his fellow

25 Steven Churches, 'The Courts and Parliament', 284.

26 Ibid 283. Churches explains in his contributor's note that his style is informed by a desire to keep his readers awake: 'Steven Churches', xxxii.

27 Robertson, above n 7, xv, xxvii.

28 Roberts and Williams, above n 12, 179.

29 The one exception is Steven Churches, who uses a quote from Christopher St German instead: Churches, above n 25, 265.

30 See, eg, Robertson, above n 7, xxv. Sadly, 'Kirby the photographer' does not have its own index entry.

31 Weisbrot, above n 14.

32 Murray Wilcox, 'The Law Reformer', 639.

33 C G Weeramantry, 'The Internationalist', 549.

34 Freckelton, above n 9, 9–16.

35 The change he effected in the New South Wales Court of Appeal is remarked upon. See, eg, Freckelton, above n 9, 11–12 citing comments of Richard Ackland in December 2008. Freckelton also refers to Justice Kirby's 'forgiving and gracious' response in accepting Senator Bill Heffernan's unqualified apology in relation to allegations of gross impropriety the Senator had made about Kirby J: Freckelton, above n 9, 8. In launching the book Sir Anthony Mason referred to Justice Kirby's 'unfailing courtesy' and fairness and contrasts this with 'the striking lack of those qualities on the part of some of those who have seen fit to criticise him': Mason, above n 1, 488.

36 David Ipp, 'Intermediate Appellate Judges', 521.

judges.³⁷ Ipp draws attention to the ‘care and fairness’ of Justice Kirby’s treatment of counsels’ arguments, ‘which are given due respect albeit that they may in the end be totally rejected’:

By conducting himself in this way, Kirby J has performed two very important functions. First, he has gone some way to assuage the feelings of those who may be aggrieved at the treatment their work has received. Some may not consider this to be important. After all, what is the bruised amour-propre of an individual member of the Bar or Bench compared to the effectiveness of the judgment delivered by the superior court judge? The harm done to the individual in this way, however, is harm to the structural integrity of the system that is the lifeblood of the common law.

Second, Kirby J has sought to protect and preserve the mutual trust and respect on which the conventions of our system of justice are based. We take the system for granted, but it is fragile thing. Justice Kirby has constantly striven for and demonstrated intellectual honesty. What more important contribution can there be than that? And what more important influence could there be on intermediate appellate judges?³⁸

The extent of Justice Kirby’s impact on others is reflected in David Weisbrot’s opening comments about familiarity with him amongst the law reform community:

Justice Michael Kirby was the first Chair of the Australian Law Reform Commission (ALRC) and served in that capacity for about ten years (1975–1984) – but that was a quarter of a century ago. What is truly remarkable is that the institution is still so strongly identified with Kirby in the public mind. Almost any mention of the ALRC in Australia or overseas is met with a reaction along the lines of ‘Oh, so you must know Michael Kirby...’.³⁹

The intersection with, and impact upon, many people is evident also in reading through the notes of contributors, many of whom expressly identify when it was they came to know him, such as Richard Chisholm who says nothing of himself in this note, devoting all of it to his ‘encounters’ with Kirby J and what they taught him.⁴⁰ Justice Kirby’s letter writing is also legendary. As Ian Freckelton remarks in his introductory chapter,

Within a day he responds to events and developments, good or bad, by multiple thoughtful, warm, encouraging and often witty epistles. My memory from ALRC days is that it is often an early component of his day’s work but again very much a mark of the style of his outreach to others.⁴¹

The style of the section on the contributors, all in the third-person, reflects on a smaller scale the varying style of the chapters themselves, and often provides very interesting reading in their own right – such as Ian Barker’s narrative reflection on whether he should have pursued a ‘less combative vocation, perhaps oyster farming’,⁴² and Julian Burnside’s admission that ‘he became interested in computers at a time when such an interest was regarded, among lawyers at least,

37 Barker, above n 24, 565–6.

38 Ipp, above n 36, 526.

39 Weisbrot, above n 14, 607.

40 ‘Richard Chisholm’, xxxi.

41 Freckelton, above n 9, 19.

42 ‘Ian Barker QC’, xxix.

as slightly eccentric. ... He recalls being told authoritatively that computers would never have any relevance in legal practice'.⁴³

Justice Kirby's role as the foundation Chairman of the ALRC clearly had a most formative impact on his life and work. It explains in part his enduring high profile, the deliberate and purposeful creation of the 'law reform bandwagon' to 'engage not just what today we call direct stakeholders, but also the community generally'.⁴⁴ Sir Anthony Mason, in launching the book, refers to Justice Kirby's becoming 'a celebrity as a law reformer'.⁴⁵ In Kirby J, law reform found a most able and committed spokesman: 'His reputation for energy, ideas and conviction is only eclipsed by his willingness to articulate his views widely to national and international audiences'.⁴⁶ Perhaps it can also be said that the methods of research, analysis and exposition – historical, comparative, and anchored in clearly articulated principles – adopted as the mode of law reform report writing, informed his judgment writing in later years.⁴⁷ His judgments are described by Graeme Orr and Gregory Dale as 'notoriously rich, lengthy and thorough',⁴⁸ by Richard Chisholm, in the context of his analysis of Justice Kirby's contribution in the area of family law, as providing a 'characteristically detailed and erudite review of the authorities and the policy and background' of the International Child Abduction Convention.⁴⁹ This habit of writing often engendered lengthy judgments. Sir Anthony Mason joked that the book was 'almost as long as a Michael Kirby judgment'.⁵⁰ Steven Churches describes Justice Kirby's 'tour d'horizon' style of judgment writing, 'unequaled in common law jurisprudence'⁵¹ and this habit of exposition is remarked upon by Geoffrey Robertson:

Nobody in this volume has noticed that your style of judgment writing is actually of particular assistance to overseas common law courts and to the counsel addressing them. That is because it saves a lot of expository time to have a Kirby judgment setting out the history and the principles of the question at issue, whilst your application of those principles and the interpretation of local laws which affect the result can be set aside. Your decision is not binding, or even persuasive, elsewhere, but your exposition is invariably helpful. However much Australian counsel may tear out their horse hair at Kirby J's delay in coming to the crunch, the clarity and accuracy of your stage-setting soon made you internationally respected.⁵²

Perhaps one may say truly of Michael Kirby, to adopt an adage of another sort, that 'You can take the man out of the Law Reform Commission, but you can't take law reform out of the man.' But one may also argue, that 'you can't

43 'Julian Burnside QC', xxxi.

44 Freckelton, above n 9, 14.

45 Mason, above n 1, 487.

46 Roberts and Williams, above n 12, 179.

47 See, eg, Weeramantry, above n 33.

48 Orr and Dale, above n 23, 663.

49 Richard Chisholm, 'Family Law', 405.

50 Mason, above n 1, 487.

51 Churches, above n 25, 274.

52 Robertson, above n 7, xxiv.

take the Kirby out of the ALRC' as does David Weisbrot, who proclaims that the ALRC still carries 'Kirby's intellectual DNA deep within its institutional core, ethos and processes'.⁵³

This law reform style of judgment writing has, as Richard Chisholm writes in a more serious vein than Robertson, a powerful educational effect, so that even if Justice Kirby's dissents have not become law (yet), his judgments have 'contributed to our understanding of the Convention [International Child Abduction Convention], its history and its purposes'.⁵⁴ What Ian Barker describes as Justice Kirby's 'penchant for historical exegeses' means that 'if some history is needed about a legal subject it can generally be found in Kirby's writings'.⁵⁵ This was echoed by Sir Anthony Mason in launching the book, that 'if you want to find out what a High Court case is about, you should first read the Kirby judgment'.⁵⁶

There are a few typos, mostly forgivable,⁵⁷ in a work of this size and its obviously immovable publication deadline. The repetition of certain elements of Justice Kirby's life and judgments is also not surprising for the same reasons, and because it involved so many contributors. A case table is a useful addition indeed in this regard, enabling the reader to find each occasion an author has reviewed or mentioned the same case – such as *Al-Kateb v Godwin*,⁵⁸ *ACCC v CG Berbatis Holdings Pty Ltd*,⁵⁹ *Garcia v National Australia Bank Ltd*,⁶⁰ and *Harriton v Stephens*,⁶¹ to name but a few that are considered several times.

It is almost churlish to ask whether there are missing chapters when the work is already so voluminous. Perhaps it is not so much a matter of chapters missing from this book, which focuses on the idea of 'appealing to the future' and, in such a context, Justice Kirby's judgments necessarily provide the substance of the text, but rather there are other aspects of Justice Kirby's career that would make an interesting study. But the book is not a biography; such a project is currently being undertaken by one of the contributors, A J Brown, whose biographical snapshot provides an appropriate backdrop for the book and makes one look forward to the completion of his project.⁶² Justice Kirby's rate of dissent has been well analysed, but what of his use of the English language? He hailed

53 Weisbrot, above n 14, 608.

54 Chisholm, above n 49, 406.

55 Barker, above n 24, 572. It is not a surprise then that one of the foundation commissioners was the pioneering Australian legal historian, Alex Castles, from South Australia and that Kirby J himself was the first to present the Alex Castles Memorial Lecture on Legal History, established after Professor Castles' untimely death on 1 December 2003. See Justice Michael Kirby, 'Living with Legal History in the Courts' (2003) 7 *Australian Journal of Legal History* 17.

56 Mason, above n 1, 489.

57 Not, perhaps, the misspelling 'Keiffel J': 829.

58 (2004) 219 CLR 562.

59 (2003) 214 CLR 51.

60 (1998) 194 CLR 395.

61 (2006) 226 CLR 52.

62 Brown, above n 10. There is some overlap in biographical detail in other chapters, particularly Freckelton's introductory chapter: Freckelton, above n 9. However, Brown's chapter is a distinctive and stand alone contribution to the volume.

the virtue of plain English and he has been an ‘indefatigable public speaker’. Freckelton singles out an address in Philadelphia in 2001 as an example of Justice Kirby’s abilities as a public speaker.⁶³ Anyone who has heard him on the podium will attest to this. In this regard I agree with Robertson’s somewhat flippant, although seriously intended, remarks, addressed directly to Kirby J, that:

My final regret about this book is that it is not accompanied by a CD of you performing live. These are the occasions when the wisdom in your words is audible, almost tangible, in the controlled passion of your utterance, leavened with topical (but invariably polite and not over-funny) jokes and snatches of poetry.⁶⁴

The book is written and titled as an ‘appeal to the future’, the nature of which is captured in Julian Burnside’s concluding comments. They are confessedly written by a fan, but worth quoting:

Kirby’s thinking is guided by an unshakeable conviction that human dignity and human rights are the gravitational centre of any civilised society; and that a legal system which escapes the insistent pull of human rights will produce law without justice. Kirby is writing for a future which honours that role of law in society.

His appeal to the future ages will come, in large measure, from that central idea. His place in history will depend in part on whether or not we acknowledge the centrality of human rights in our system of law. That idea provokes hostility in some quarters and indifference in others. It is by no means certain that we will end up with a legal system based on the notion that law should produce a just result consistent with the principles of human rights.

If Michael Kirby writes for the future, it is a future I would wish to share. It may be difficult to attain. But he has shown us the way, and he has shown that it is worth striving for.⁶⁵

Hugh Selby states that the book offers ‘an unusual, fascinating coverage of many legal topics’⁶⁶ and that there are ‘recurring themes’:

the necessity to maintain a truly independent and separate judiciary; the necessity to look broadly for guidance when ‘interpreting’ the law; the necessity to remember that the law serves us, not the reverse; the necessity to engage with the present and not just with the past; and the necessity to recognise and respect the real audience of parties and the community, not to treat the law as some higher abstraction and the parties seeking its protection as of some lesser worth.⁶⁷

This describes the book well. It may also be described as a ‘dip in and dip out’ book – after all, it is very big. As Selby remarks in his preamble,

I have no doubt that a great many readers of this book will take it up, put it down, and take it up again feeling that Michael Kirby has not only laboured and written for our futures, but has done so quite brilliantly. He appeals to us with great appeal.⁶⁸

In so far as the editors, and the 43 contributors overall, seek to present ‘Michael Kirby and his ideas’ through many lenses, they have accomplished their goal with great distinction. It is a monumental achievement and a fine

63 Freckelton, above n 17, 470.

64 Robertson, above n 7, xxvii.

65 Burnside, above n 14, 895.

66 Selby, above n 2, x.

67 Ibid xi.

68 Ibid xii.

contribution to acknowledging and assessing Justice Kirby's achievements. In launching the book, Sir Anthony Mason said that it 'is a record of conspicuous, indeed spectacular, achievement in many areas of vital concern to the community'.⁶⁹ The book is indeed a rich read and will provide an excellent resource particularly for those fascinated by the jurisprudence of the High Court,⁷⁰ on which it provides a very distinct and distinctive lens.

69 Mason, above n 1, 491.

70 Sitting alongside books such as Peter Cane (ed), *Centenary Essays for the High Court of Australia* (2004).