Book reviews

APPEALING TO THE FUTURE: MICHAEL KIRBY AND HIS LEGACY

Appealing to the Future: Michael Kirby and his Legacy, by Ian Freckelton & Hugh Selby (eds), Lawbook Co, 2009, 996 pages + xcv tables; ISBN 9780455226699.

As Geoffrey Robertson says in his introduction, the book is what academics call a "festschrift": essays in honour of Michael Kirby. The occasion for the festschrift is the retirement of Michael Kirby as a judge shortly before his 70th birthday.

The title, *Appealing to the Future*, is explained by Hugh Selby in his Preamble as a work where Michael Kirby's speeches speak both for the present and the future.

The book contains introductory remarks plus 35 chapters. Some of these are biographical, but most deal with Justice Kirby's treatment of particular aspects of substantive law. There are 44 contributors to the book, mostly based in Sydney or Melbourne.

It is impossible in a short review to assess the overall value of the work as it covers a wide field and is composed by so many different authors. This reviewer will look at a sample of the contributions by dealing with some biographical material, two samples of substantive law, and two samples of treatment of Justice Kirby's judicial method and procedure.

In his introduction, Ian Freckleton looks at various aspects of Justice Kirby's professional life. A selection of his headings are, Kirby the Reformer, Kirby the Bold, Kirby the Populist Communicator, Kirby the Interdisciplinarian, Kirby the Internationalist, Kirby the Human Rights Advocate, Kirby the Civil Libertarian, Kirby the Educator, Kirby the Monarchist, Kirby the Believer, Kirby the Idealist, and Kirby the Judge. A subsection of this last heading is Kirby the "Great Dissenter".

Freckleton says that in almost every way Kirby showed a balanced approach to what he did. For instance, although a passionate law reformer, he always kept in mind the fact that there is a perennial dilemma for the law reformer to achieve the right balance. Kirby's work as a law reformer is also covered in a separate chapter by Hon Murray Wilcox, former Chairman of the Australian Law Reform Commission and retired Federal Court judge.

Justice Kirby's contribution to constitutional law occupies two chapters: Ch 5, "Constitutional Law", by Heather Roberts of the ANU and John Williams of Adelaide, and Ch 6, "Constitutional Law: Dissents and Posterity", by Victorian barristers, Gavin Griffiths and Graeme Hill. These chapters consider Kirby J's pronouncements on constitutional issues. They note that while Kirby J and Murphy J shared a common view that international law should play a role in shaping Australian law, Kirby J, unlike Murphy J, had a methodical and orthodox approach to determining the law.

As to his dissents, the essay notes that whilst Kirby J dissented more than any other judge on the High Court, he might not have had such a record had he been a member of the Mason Court. The essay analyses the basal reasons for dissent in some of the principal cases.

Chapter 13, "Equity", is written by James Edelman. This essay, not unexpectedly, is written from a restitutionalist point of view. However, it contains a fair review of the major decisions in the realm of equity that Kirby J passed upon in the course of his career both on the New South Wales Court of Appeal and on the High Court.

Justice David Ipp considers the place of Kirby J in an intermediate appellate court, and says (p 526):

> The High Court appears now to frown on judicial creativity on the part of intermediate appellate courts, and with few exceptions cites only its own decisions as authority. Nevertheless, there are areas in the law that are devoid of High Court authority, or where the High Court has spoken in different tongues. Justice Kirby never hesitated to step in (even if only temporarily) to attempt to clarify issues of this kind, and his court, under his leadership, led the way along this path.

Ian Barker QC's contribution is "Judicial Practice". It highlights the fact that Kirby P in the New South Wales Court of Appeal brought in a more courteous and kind court than New South Wales appellate advocates had previously experienced. He was a judge who sought consensus when he was President of the Court of Appeal. Moreover, his hallmark was great industry in whatever he did.

The editors of, and contributors to this book should feel pleased in their achievement of bearing witness in great detail to the achievements of one of the most significant lawyers and judges of the last 50 years.

PWY

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

This is an unusual book. It is a book about Michael Kirby but it is not written by Michael Kirby. It is a celebration of a charismatic celebrity who is, by any standard, a most unusual person.

Almost 200 years ago, in his essay "The Old Benchers of the Inner Temple", Charles Lamb wrote, "Lawyers, I suppose, were children once".[1] Had Charles Lamb lived in our time, and known Michael Kirby, he may have had cause to revise that opinion because the book records that Michael said on one occasion "I don't think I was ever young". By that I do not think he meant to say that he was ancient, as I am, but that he was of serious disposition. Certainly, in all the time I have known him, he has projected an aura of authority and wisdom, a gravitas that I have envied.

This book is by far the heaviest book that I have launched. It is 996 pages in length, 1,100 if you count in the introduction and extras. It is almost as long as a Michael Kirby judgment. So weighty is it that I feel like a NASA official at Cape Canaveral at the launch of a space satellite heavily laden with combustible rocket fuel. I don't think that the launch will be endangered by a loose tile. But perhaps I am over-confident. With all that has been said by and about Michael in the last week, maybe there is a risk of over-heating.

The book contains more than 35 essays by various contributors covering various aspects of Michael's life and work. Although I have had a fairly clear appreciation of Michael's activities over the years, reading the book brought home to me the extent and scope of his achievements. Reading the book also brought home to me the regard and affection which all the contributors, in common with many other people, have for him.

At the same time, Michael has his critics, as you would expect of a judge who has been outspoken on controversial issues and has nudged the so-called conventional "boundaries" relating to judicial speech. But I have no doubt that his admirers and supporters outnumber his critics, certainly in this gathering.

Michael became a celebrity as a law reformer and a judge – by no means an ideal launching pad for the attainment of celebrity status – by speaking and writing about the law and many other things – but mainly about the law and matters related to the law. In doing so, he succeeded in bringing the law to life and enabling both law students and non-lawyers, as well as lawyers, to appreciate its vitality and the importance it has for all of us. More than anyone else in our generation, a generation in which there have been persistent attempts to marginalise the place of law in our society, he has consistently proclaimed that law can and should be seen as a key to the attainment of a just and humane society.

Michael's abiding interest in the law became evident to the public when, at the age of 35, he became foundation Chairman of the Australian Law Reform Commission (ALRC). He served in that capacity for almost 10 years. As David Weisbrot points out, in that time, he not only gained acceptance for institutional law reform in Australia, he was also instrumental in establishing a law reform methodology and technique which set new standards and became influential with other law reform agencies overseas. In this respect Lord Scarman, whose name was synonymous with law reform in England, paid a handsome tribute to him. Critical elements in the ALRC approach were the use of surveys, public hearings and interdisciplinary consultations, as well as an insistence on high standards of research and scholarship and wide-ranging consultation with stakeholders and the community. In these activities Michael's acute sense of public relations and his skills as a publicist

[1] *Essays of Elia* (Uni of Iowa Press, 2003) p 193.

and communicator played a large part. Invariably the Commission's review of the existing law was of invaluable assistance to judges concerned to ascertain what the law was on a particular point.

A feature of the Commission's work at that time was the quality of the discussion papers and the reports in which the relevant policy considerations were clearly identified and evaluated. This aspect of the Commission's work clearly had an impact on Michael's work as a judge. As a judge he was always concerned to ascertain – and rightly so – what was the policy underlying a rule or principle of law.

This influence was apparent in his early years as President of the New South Wales Court of Appeal where his very strong emphasis on the necessity of identifying policy and his evaluation of policy considerations in his judgments came as a surprise to professional lawyers unaccustomed to such an overt policy-oriented approach to judicial work.

There was some scepticism (a scepticism which I shared) about Michael's appointment as President of the Court of Appeal on the strength of his previous experience as Chairman of the ALRC, as a Deputy President of the Commonwealth Conciliation and Arbitration Commission and as a Federal Court Judge. But by the time Michael left the Court of Appeal to take up his appointment to the High Court, he had earned a reputation in the legal profession as a fine judge and President of the court. His energy and industry were legendary, his administration of the court made it an effective working unit which delivered timely judgments, and his unfailing courtesy meant that for responsible practitioners it was a pleasure to appear in the Court of Appeal.

To those of you who are less ancient than I am – in other words, all of you – you should read Ian Barker's chapter on "Judicial Practice" and Dennis Mahoney's comments as recorded in that chapter. They convey the message that at an earlier time, courtesy was neither an essential nor an often-encountered, judicial quality. Indeed, the chapter resonates with a sense of injustice that one tends to associate with the Spanish inquisition rather than an Australian court. As you would expect, Michael emerges from this discussion as no threat to Torquemada. Michael's sense of fairness and courtesy contrast mightily with the striking lack of those qualities on the part of some of those who have seen fit to criticise him. Unlike Michael, they seem to have been unaware that civil discourse and respect for the opinions of others are the hallmarks of a civilised society.

Some contributors in the book point up a contrast between Michael's career on the Court of Appeal and his career on the High Court where he was frequently in dissent. But he was also a dissenter, though less notably so, in the Court of Appeal.[2] I do not think that it is right to contrast the two experiences as instances of influence and non-influence respectively. In the Court of Appeal, Michael's leadership took the form of facilitating a working régime in which the talents of all members of the court (and they were at the time an extremely talented group of lawyers) were encouraged to flourish individually and collectively. In the High Court he did not have an opportunity for leadership.

Sir Owen Dixon and Sir Frederick Jordan were two judges of whom, it can be said, that they influenced the thinking of other judges. Otherwise, commentators all too readily speak of the influence one judge may have on others. Appellate courts are collective, collegiate institutions in which it is the decision of the court rather than the judgment of the individual judge that is important. And the individual judgments as well as the decision of the court are very often the outcome of the interaction between the members of the court in response to argument and discussion. So, when we speak of judicial leadership in a collegiate court, we should be thinking not so much of influence as fostering a climate in which the talents of the group can thrive and generate decisions and judgments of high quality.

The chapters of the book, designated by reference to subject matter, present a series of discussions of Michael's judgments. Needless to say, I shall refrain from summarising them and from presuming to evaluate the judgments which the contributors discuss at some length. But I shall offer some general comments.

[2] Sheller S, *The Oxford Companion to the High Court of Australia*, under "Kirby, Michael Donald", p 395.

The Kirby judgments are eminently readable, even if, at times, they are rather long. They do not exhibit the heavy, grinding style which has been a feature of some High Court judgments. More so than other High Court judgments they meticulously set out the arguments presented to the court. It has been said that, if you want to find out what a High Court case is about, you should first read the Kirby judgment.

Next, the Kirby reasoning is transparently open. This characteristic of the judgments is the product of the author's willingness to identify and discuss relevant policy considerations and to trace the way in which they shape or contribute to the formulation of legal principles. Michael is not a judge who seeks refuge in the discussion of arcane and esoteric doctrine in preference to examining issues of policy and substance. And while he appreciates the importance of history in the development of legal principle, he is no legal antiquarian. Nor is he a legalist, using that term in its sense of signifying a legal formalist. To my mind, he is a legal realist, as you would expect of someone who was a law reformer. Americans might describe him as a legal pragmatist, a description which, in the American sense of that expression, might be accurate; to others, however, it may inaccurately convey the notion of a sailing ship that puts out to sea, while leaving its anchor, compass and sextant on shore.

Michael has generally been regarded as a "progressive" judge. This impression is no doubt correct. A reading of the book, however, reveals that in some matters – notably property rights, parliamentary supremacy, commercial matters, and in expanding the principles of criminal law[3] – he is quite conservative. And we know, of course, that he is a monarchist. I can see him in my mind's eye as Viceroy of India, some time after Lord Curzon, a benevolent imperial pro-consul leading the sub-continent towards independence, democracy and the rule of law, in the declining years of the British Raj.

An integral element in Michael's transparent approach to the law has been his willingness to take advantage of international and comparative law and of academic writings, a topic discussed by Judge Weeramantry in his chapter. One of his colleagues in the Court of Appeal described Michael's research into these materials as "awesome". For Michael, Australian law is not a legal counterpart to Fortress Australia in which foreign ideas are to be resisted lest they contaminate the pure waters of Australian law. It is indeed a curious idea that, in of all things law (a heritage we derived from England), we should be reluctant to profit from the learning of others on the basis that the home-grown product is necessarily superior to any import. The jurisprudence of human rights is not a national discipline; its origins can be traced back to natural law, the United States Constitution and international law. Certainly we need to be circumspect in what we import and make sure that it "fits" with what we have but that is all.

Constitutional interpretation is another matter. The relevance of international and comparative law and legal materials to constitutional interpretation was the subject of a robust debate between Michael Kirby and Michael McHugh, as it was between Justice Scalia and his colleagues on the United States Supreme Court. This is not the occasion to adjudicate that debate, except to say that I would probably dissent from both Michaels. On the other hand, I have difficulty in understanding how it can be said that international and comparative law have no relevance at all to constitutional interpretation. That is a wild and unsustainable notion.

Michael's use of international law is, of course, very much associated with human rights. The protection of the rights and the dignity of the individual has been one of his abiding concerns. Much of his jurisprudence revolves around the tension between legislative supremacy and the protection of human rights, including the right to due process. His dissenting judgment in *Al-Kateb v Godwin* (2004) 219 CLR 562, speaks eloquently on this score. Michael's interest in human rights is a central element in his concern for justice which is, or should be, one of the elements at the very heart of the judicial formulation of legal principles.

Roderic Pitty tells us that Michael is a supporter of a statutory Bill (or Charter) of Rights, that is, a Bill that is not constitutionally entrenched and can therefore be amended specifically by statute. The strident opposition to the introduction of a federal Bill of Rights and the grounds on which that

[3] See *Osland v The Queen* (1998) 197 CLR 316.

opposition is based explain why such a Bill is desirable. The opposition is led by political commentators and politicians who idealise the existing political process notwithstanding its evident weaknesses, notably in matters concerning personal liberty and due process and its failure adequately to protect freedom of information and expression. The opponents of a statutory Bill continue to assert that it would limit the powers of our democratically elected representatives notwithstanding that their capacity to override or qualify the statutory provisions would be expressly preserved. The thrust of a statutory Bill is that it would require our politicians to specifically consider clearly identified human rights, in particular due process rights, and override or qualify them, if they be so minded. In this way, a Bill would not dictate or impose outcomes but would enhance the political process and improve the quality of our democracy. A Bill would help to ensure that human rights violations could not be swept under the carpet. Of course, very careful attention must be given to identifying those rights which should receive statutory protection.

The title of the book, *Appealing to the Future*, is a reference to Michael's reputation as "The Great Dissenter" – a label he evidently views with distaste – the notion being that a dissenting judgment is an appeal to the future, written in the hope (even the expectation) that it will be vindicated by a later decision of the court or of a higher court or even by statute. Although there is certainly support for this romantic notion, I doubt that many dissenting judgments are written with that end in view. Judgments are primarily written for the parties, to decide their legal dispute, and for the legal community. And the lesson of history is that the future is an unpredictable and eccentric court of appeal. The weight of precedent inhibits courts from engaging in the overruling of past decisions except on a minor scale. Far more likely, I think, that he wrote dissenting judgments to persuade that mythical beast, the well-informed and intelligent reader, that his judgment was right. If we had the equivalent of a New York Review of Books in Australia – and unfortunately we don't – Michael would have been writing for its readership.

All that said, one would hope that the future might look favourably on some of the major dissents with which Michael has been associated. There were three powerful dissenting judgments in *Al-Kateb* and two in *Combet v Commonwealth* (2005) 224 CLR 494 (where in the joint judgment a fundamental constitutional principle seems to have been rather blithely dismantled). In *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 (the case concerning the conferral of federal jurisdiction on State courts), Michael was a lone dissenter but the court earlier had been evenly divided upon a cognate question in *Gould v Brown* (1998) 193 CLR 346, where Brennan CJ and Toohey J, along with Michael, concluded that the legislation was valid.

And, in the light of statutory advances and modern developments, a similar view might be expressed about the judgment which was overruled in *Osmond v Public Service Board (NSW)* [1984] 3 NSWR 447, where Michael was part of a majority in the Court of Appeal that held that, at common law, a statutory tribunal is under a duty to give reasons for an administrative decision despite the absence of a statutory requirement so to do.

As many of you will be aware, Mary Gaudron, while acquitting Michael of the charge of omniscience, went on to pay tribute to his courage. Michael has never wavered in the face of criticism which might have deterred or discouraged a judge of lesser steel. Who will ever forget the shameful attack upon him by Senator Heffernan? And the way in which it was dealt with by those in authority who might have been expected to see that a Justice of the High Court, highly regarded both in Australia and internationally, was given the benefit of the presumption of innocence? The silence on this score was both overwhelming and dispiriting.

Although Michael's industry and energy are legendary, his writing of judgments in order to present his view was phenomenal. For any Justice of the High Court, the workload of the court is oppressive as Sir Owen Dixon made clear. I agree wholeheartedly with that view. And I was not a Great Dissenter. For the most part I was party to, or in agreement with, unanimous or majority judgments. For a High Court Justice who is not in that position, the burden of constantly writing one's own comprehensive judgment must be a labour of Hercules. Yet Michael not only did that, he continued to speak and write articles as he has always done. And he found time to do other things, such as acting as Special Representative in Cambodia for the UN Secretary-General for Human Rights, a responsibility which he undertook notwithstanding the dangers which were involved.

I have spoken about the man rather than the book but the book is largely about the man and it will spell out for you in greater detail what I have sketched in outline. But the book is not only about the man. It discusses many fundamental and interesting legal issues on which conflicting views have been expressed.

What I have said this evening, together with Michael's response, marks the end of Michael Kirby Festival Week. It can take its place with the Melbourne Cup, the Australian Tennis Open and the Country Music Festival as one of the great festivals of the year.

I conclude by saying that the book is a record of conspicuous, indeed spectacular, achievement in many areas of vital concern to the community. I have much pleasure in launching it.

Sir Anthony Mason AC KBE

RESPONSE FROM MICHAEL KIRBY

Michael Kirby responded by thanking the editors and chapter writers, expressing astonishment that "such an unruly crew" could be persuaded or coerced to deliver their chapters in time for publication in the very week of his retirement from the High Court, and thanking Thomson Reuters and the editors for their "flawless production". He expressed the hope that it would be "followed up with a mini series and even an opera".

It is understood that a biography of Justice Kirby is being written by Professor A J Brown of Griffith University and will be published later in 2009 by Federation Press.

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