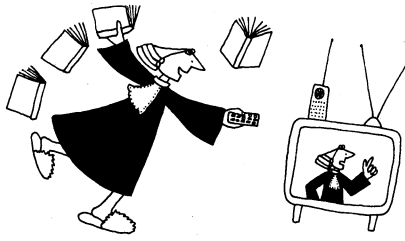


LAW & CULTURE



APPEALING TO THE FUTURE: MICHAEL KIRBY AND HIS LEGACY

Ian Freckelton and Hugh Selby (eds);
Thomson Reuters, 2009, 996 pp.
\$84.00 (paperback)

In light of the paltry tradition of Australian judicial biography, the scheduled appearance of not one but two major studies of the same jurist in the one year signifies much about the individual concerned. But then Michael Kirby, who retired from the High Court in February, is a figure quite unlike any other who has risen to the heights of the legal profession in this country. In addition to the forthcoming biography by A J Brown, we have this rather more unconventional celebration of Michael Kirby, the judge and law reformer. I say this even though many of the 37 contributions to this tome (and at just shy of 1000 pages the book cannot be described as anything else) offer sober academic analyses of the substance of Kirby's judicial decisions in almost every area of the law and would be entirely at home within the pages of a law journal. But while the style of much of the book is familiar, its very existence — including its release by a major commercial, rather than a boutique, publisher — is hardly in the normal course of things. Only the judicial decisions of Kirby's hero and the man who helped launch him on his unique trajectory to the High Court, Justice Lionel Murphy, have received similar treatment — indeed, on more than one occasion.¹ Although the labours of the 'Mason Court' have been collectively assessed,² the legal career of no judge but Murphy has been singled out for such a sustained assessment as Freckelton and Selby have brought together as the editors of this volume.

The obvious connection between Murphy and Kirby is their outsider status on the courts on which they served, and it is a fascination with the record of both as frequent dissenters that has clearly inspired these studies. So much is apparent from this collection's very title which references the United States' Chief Justice Hughes's unmatched lyricism when he called a dissent 'an appeal to the brooding spirit of the law, to the intelligence of a future

day'.³ The absence of any similar study gathering a range of diverse experts to dissect the influence of such judicial titans as, say, Sir Owen Dixon and Sir Isaac Isaacs may in part be understood by their evident dominance in shaping the law while on the High Court. And while a case might be made for retrospectives in the same vein to measure whether the influence of these judges has waned, the standing of opinions which attracted majority support when issued is regularly at the heart of today's decisions, and professional and academic discussion of the same. Instead, it is the slumbering potential of those who give much of their careers to the construction of an anti-canon to 'the law', as determined by their colleagues,⁴ which excites our attention.

This unifying theme — of how Kirby's contribution to Australian jurisprudence will fare — is one that invites almost as much attention to his judicial strategy as to the substance of his opinions. Former High Court Justice, Michael McHugh, recently described Justice Gummow as 'a great judicial politician' on account of the fact that 'he always had three votes', while suggesting that Kirby had no head for alliance building.⁵ An underlying premise of this book is that over his time on the High Court, Kirby resigned to his apparent inability to persuade his colleagues and instead wrote quite consciously for future audiences (Freckelton, pp 42–4).⁶ In part that must be the lot of any author of a dissenting opinion, but one of the editors argues that Kirby is distinctive for his lack of any of the 'dissent aversion' usually displayed by appellate judges (Freckelton p 42).

Contrasting the approaches of Kirby and Murphy to the expression of disagreement (Roberts & Williams pp 180–3; Orr & Dale p 663), several contributors make it clear that in making an 'appeal to the future', it is not enough simply to dissent. Whereas Murphy's tendency was to assert, rather than reason, his way to a conclusion, Kirby is a model of traditional legal method, albeit candidly acknowledging the legitimate scope for choice within that approach. (The role of extra-legal reasoning and values in Kirby's judicial work is considered directly by Malbon in the chapter entitled 'Judicial Values'.) As a consequence,

his opinions appear to be painstakingly constructed to ensure an accessible and thorough persuasiveness. That Kirby has regularly told undergraduate audiences he strives to write his reasons in a way which will make them easier to read is a very deliberate reinforcement of his efforts to ensure his legacy is influential beyond his immediate contemporaries in the law.

There is general consensus across the contributors to this book as to the high quality of Kirby's judgments in terms of the depth of his consideration of the legal materials on point and his transparent articulation of the reasons for his decision. So, for example, in her chapter on administrative law, Wendy Lacey, describing Kirby as a 'traditionalist with a clear appreciation of the bounds of judicial review', decries that he was 'incorrectly portrayed as a radical dissenter and activist judge on a conservative Bench' (p 83). John Gava, finding Kirby generally in step with majority opinion in contract cases, concludes that 'in the main, he is a careful judge in the common law tradition with a particular concern to be transparent in his reasoning and to pay due deference to the legislature'. Gava is on the lookout for any signs of the 'hero-judge', but spots only two decisions in which Kirby engaged in 'agenda-judging' as a 'departure from his normal method of legal reasoning' (p 263).

One of the two cases identified by Gava is *Garcia v National Bank of Australia*,⁷ in which the High Court unanimously set aside a wife's guarantee for the debts of her husband's business. Kirby's concurring opinion reflected his unwillingness to be constrained by anachronistic and discriminatory legal precedent. His attempt to establish a general principle beyond a relationship of emotional dependency within marriage was a lone one despite support in a House of Lords case of a few years earlier.⁸ James Edelman, in discussing the *Garcia* decision in his chapter on 'Equity' points out that their Lordships adapted the principle in English law 'in a very similar manner to the modifications suggested by Kirby J' (p 382). Edelman argues that what distinguished Kirby so often from his colleagues on the Court, despite his fidelity to the transparent application of legal methodology, was 'his

view of the just result and the view that his colleagues took of the limits of judicial power, particularly *stare decisis* and the underlying analogical incrementalism of the common law and equity' (p 386).

It is interesting to consider Edelman's assessment of Kirby as impatient with the incremental development of the law alongside Roderic Pitty's suggestion that in the area of human rights, he has been something of a gradualist — at least in so far as the domestic protection of these rights is concerned (p 517). In a similar vein, Melissa Perry, in her examination of Kirby's contribution to the development of the law of native title, stresses his pragmatist streak and recognition that 'if fundamental human rights are to influence the development of Australian law in a meaningful way, their translation into domestic legal principle must have regard to practical realities' (p 659). Other authors (Roberts & Williams p 188–90; Orr & Dale p 682) highlight the nuances of Kirby's approach to historical considerations — whether in constitutional interpretation or the common law — in such a way as to challenge those tempted to resort to lazy stereotypes. Less complicatedly, contributors throughout the book strongly emphasise Kirby's abiding concern with fairness (eg Chisholm p 418; Creighton p 369).

Ultimately, this book, operating as a kind of index to Kirby's mind, illustrates with admirable clarity the complexity which inheres in judicial reasoning. In recognition of his quest 'for an approach that justifies and grounds legal creativity in principles, rather than pure subjectivism, and in a humanistic, rather than pseudo-scientific, method', Graeme Orr and Gregory Dale contend that Kirby not only demonstrates Llewellyn's 'Grand Style' of legal reasoning but is the living incarnation of Dworkin's mythical judge, Hercules (p 681–3). Heady stuff indeed.

Just as difficult as categorising Kirby is the task of prophesying his likely impact. This endeavour requires the marshalling of expertise across the spectrum of Australian law, but no simple picture emerges. So it is fascinating to learn of how some of Kirby's dissenting opinions in corporate regulation

have been mirrored by later legislation (Jewell p 178), while his 'authoritative voice' in the majority on the issue of jury directions in sexual offence cases has been reversed by some State parliaments (Gans & Palmer p 401). Even within specific areas, his influence is highly variable. Freckelton, writing on health law issues, reports that Kirby's views on patient access to medical records have been positively acted upon by legislatures while 'the legal mainstream is formidably against' his acceptance of wrongful life actions (p 451). In the field of trade practices, Warren Pengilly offers a criticism of Kirby's judicial style at odds with the praise of most other contributors when he describes it as 'significantly personal,' and says that Kirby 'has not canvassed the wider picture and has not applied the principles he has articulated' (p 858). While his assessment is that Kirby's judgments, on the whole, will not be vindicated he nonetheless still identifies specific questions on which he thinks the judge has foreshadowed inevitable developments (pp 858–9).

The two chapters discussing Kirby's influence in constitutional law deal with cases most familiar to me (Roberts & Williams; Griffith & Hill). The decision to accommodate two chapters on this topic seems rather odd given the already ample dimensions of the book. There is significant repetition between the two chapters — with many of the same cases receiving a slightly different treatment again by Orr and Dale in their contribution on 'The Political System'. Of the two chapters squarely dedicated to constitutional law, the stronger is that authored by Heather Roberts and John Williams. Admittedly it appears their brief from the editors was wider than that given to Gavan Griffith and Graeme Hill who address 'Constitutional Law: Dissents and Posterity', but as both chapters assess the likelihood of Kirby's views being vindicated one day (about which they are both optimistic) inevitably the more expansive treatment of Kirby's methodology offered by Roberts and Williams has the upper hand. Roberts and Williams do a very thorough job of examining Kirby's 'living force' interpretation of the Constitution — its roots and theoretical legitimacy,

his fidelity to it in application and its relationship to his advocacy of greater recourse to international legal materials and standards. As Kirby's promotion of his methodology has probably been grist to the mill of Australia's recent debates over legal method, this chapter is accordingly an important highlight in what is already an accomplished collection.

There is far more in this book than any reviewer can hope to do justice to. There are chapters examining Kirby as an internationalist and human rights champion (Pitty; Arbour & Heenan; Weeramantry), others dedicated to exploring his contribution to human genome research and HIV/AIDS awareness (Henaghan), judicial practice and professional standards (Ipp; Barker) and, of course, his impact as first President of the Australian Law Reform Commission (Weisbrot; Wilcox). In his preamble, Hugh Selby helpfully suggests the way in which a reader might structure their use of the book around certain themes and individual interests. This is indeed the most sensible way of approaching such an overwhelming coverage and getting a sense of Kirby in his several guises.

Lastly, we are left with Michael Kirby the man — the sum of all the several parts examined here. A J Brown delivers a taste of what we can expect from his full-scale biography later this year with a rollicking account of Kirby's life in short-hand, illuminating particularly the politics behind his appointment to the High Court and the 'judicial battlelines' which hardened amongst its members during his tenure. It may have been with this account in mind that Geoffrey Robertson, in his distinctly personal and affectionately witty introduction to proceedings, observed that he did not have 'the impression that your last ten years have been entirely happy' (p xvii). Robertson's substantial homage to Kirby is characteristically irreverent, and is bound to offend and amuse in equal measure. His regret that there is no word from Kirby's usual critics amongst the contributions is perhaps a pertinent one — but the non-Kirby 'fans' (Burnside p 894) are represented through quotes and discussion of their views. In any case, their more deliberate inclusion would sit

very oddly with the book's unabashed celebratory tone.

Regardless of one's attitude to its subject, it must be recognised that *Appealing to the Future* is a major event in Australian legal publishing. It adds enormously to our understanding, not just of the deeds of Justice Michael Kirby, but to the recent history and decisions of the High Court itself. Of Kirby's ultimate legacy, Freckelton writes that 'the future will be his judge' (p 46). Until then, this collection will certainly serve to keep the dream alive.

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3. Charles E Hughes, *The Supreme Court of the United States* (1928) 68; See also *Federation Insurance Limited v. Wasson and Others* (1987) 163 CLR 303, 314 (Mason CJ, Wilson, Dawson & Toohey JJ).
4. Richard Primus, 'Canon, Anti-Canon, and Judicial Dissent' (1998) 48 *Duke Law Journal* 243.
5. David Marr, 'Now history will be the judge', *Sydney Morning Herald*, News Review 3 (31 January–1 February 2009).
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THE HUMAN RIGHTS ENTERPRISE IN AUSTRALIA AND INTERNATIONALLY

Peter Bailey; Lexis Nexis Butterworths, 2009, 976 pp, \$140.00 (paperback)

On first sight, there are three features which intrigue about Peter Bailey's new book on human rights. The first is its weight — coming in at 976 pages, this tome is in the heavyweight category. This appearance is deceptive, in the sense that whilst extremely comprehensive in its breadth and deep in its insight, it is a very accessible book aimed at all comers, which

can be dipped into as required or read straight through as a ripping yarn.

The second eye-catching feature is the use of the term 'enterprise' in the title, a word which can be defined as 'a bold, arduous, or momentous undertaking' (*Oxford English Dictionary*). Bailey defines the objective of the human rights enterprise as being 'to enable each human being to enjoy a desirable standard of life in a community with a rights-based culture and to realize their full capacity without adverse discrimination' (p 57). He focuses on the place of law in this endeavour (specifically Australian and international law), in terms of 'what it can do and how it should change' (p 3).

This unusual choice of the word 'enterprise' is apt not just as a description of the task to be analysed but also for the concinnity and energy Bailey displays in the objectives, tone and structure of the book. Boldness and engagement with controversy are the hallmarks of this text. It is obvious that Bailey has been teaching recalcitrant students about human rights for many years, as almost every salient legal point is illustrated with a 'controversy' box, an engaging example of a human rights debate or issue which gives difficult concepts a 'hook' and some human interest aimed at better understanding. At the same time, the foundations of human rights law and concepts are clearly explained and accessible to a non-legal or government policy audience.

Finally, upon first inspection, the cover illustration of a monarch butterfly is intriguing. Perhaps thanks to Amnesty International, the cover of almost every book on the subject of human rights depicts an emotionally strained face or barbed wire, or both. At first blush I thought the butterfly was a comment on the twinned beauty and fragility of human rights. Once I had looked at the detailed table of contents, I wondered if it related to the amazing colour and variegation of human rights issues captured in the book, or even a clever reference to migration issues discussed in Chapter 13 (the monarch butterfly migrated to Australia from North America and is often called the 'wanderer' butterfly here), or perhaps even

the calls for an Australian republic touched on briefly in Chapter 3. Whatever the intent, the choice of image is an inspired one, because it asks the reader to consider the concept of human rights in a different frame to the usual one of violations and denunciation. The reader is immediately engaged in the task of moving the human rights enterprise forward.

So now to outline one reader's reactions upon finishing this book (alas, due to its length, not in one sitting). Again, there are three features that deserve mention. The first is that this book will serve as an invaluable teaching resource, partly because it covers, with accuracy and clarity, every human rights and discrimination issue or debate I have come across in my career, and much more besides. When launching the book at ANU in March 2009, Michael Kirby described it as a 'marvelous cornucopia of material ... every nook and cranny of the subject of human rights in Australia is examined', and I heartily concur. Without limiting himself to the more traditional areas of human rights law or civil liberties such as the death penalty or a fair trial, Bailey brings a human rights lens to many and varied topics, including providing some of the first academic treatment of very recent events such as the Dr Haneef incident, the 2008 Apology and the Northern Territory Intervention.

He also includes many examples from the under-represented areas of economic, social and cultural rights, such as health policy, housing and cultural rights. Finally, Bailey displays in this text his mastery of Australian discrimination law. Combined with a casebook (such as *Australian Anti-Discrimination Law* by Rees, Lindsay and Rice), this is all a practitioner or a teacher would ever need. The only flaw from a teaching point of view is the lack of personal names in the index, so that one cannot easily look up the musings of, for example, Justice Kirby in a particular case.

The second insight about this book flows from the first, in that this book represents much more than a teaching text. The comprehensiveness of the text springs from the broad range of experience on the part of the author. Peter Bailey is an Adjunct Professor at