

### **Appealing To the Future: Michael Kirby and His Legacy**

**Edited by Ian Freckelton and Hugh Selby**

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Published to mark Michael Kirby's retirement from the High Court in January 2009, *Appealing to the Future* is an exhaustive collection of essays from eminent figures in their respective fields. The essays in this collection detail Justice Kirby's contribution to areas ranging from constitutional law and statutory interpretation to the human genome. This collection will be both a valuable starting point for detailed study of his broad and innovative contribution to the law, and an extensive resource in its own right.

Two of the essays in *Appealing to the Future* are biographical, chronicling Justice Kirby's career and ascent to the High Court.<sup>1</sup> After graduating from the University of Sydney, Justice Kirby worked in private practice until his appointment to the Chairmanship of the Australian Law Reform Commission and the Deputy Presidency of the Commonwealth Arbitration and Conciliation Commission in 1975. Justice Kirby served as ALRC Chairman, until his appointment to the Federal Court in 1983, moving to the New South Wales Court of Appeal in 1984. Justice Kirby was appointed to the High Court by Paul Keating in the last weeks of his prime ministership, at the urgings of Gareth Evans (Kirby's former Law Reform Commission colleague), who believed that, despite his monarchist views, he would be an effective maverick on a conservative court.

The strongest criticism levelled at Justice Kirby throughout his judicial career was at his tendency to incorporate policy into his judgments. This creative decision-making was seen to be improper by those who favour a strict legalistic approach, where judges' personal attitudes to the law's merits are irrelevant. The approach taken by Justice Kirby was unconventional in the Australian legal environment, subject to particularly vehement criticism from Justice Dyson Heydon of the New South Wales Court of Appeal. Prior to his own appointment to the High Court Justice Heydon denounced the broad jurisprudential approach favoured by Justice Kirby, describing it as 'judicial immorality' and 'blind to vanity and vexation of spirit.'<sup>2</sup> While contributors to *Appealing to the Future* may share many of Justice Kirby's views, a more balanced assessment may have been achieved by featuring more critical evaluations of his approach to the law.

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<sup>1</sup> A biography of Kirby by AJ Brown is forthcoming.

<sup>2</sup> Justice Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 47(1) *Quadrant* 9, 14.

The approach to decision-making taken by Justice Kirby is evaluated by Justin Malbon in his essay on judicial values. Malbon writes that Justice Kirby was unusually explicit in his use of extra-legal reasoning where the likely impact of the decision; the proper roles of the courts and legislature; the proper process of interpretation; and judicial values and intuition were considered alongside precedent. The relationship between legal and extra-legal analysis is demonstrated with regards to constitutional interpretation in *Wakim*, where Justice Kirby stated: ‘each justice reads the unchanging text [of the *Constitution*] with the eyes of his or her generation or experience, sometimes perceiving new requirements or opportunities which others did not see.’<sup>3</sup> However Kirby J later rejected any suggestion that he incorporated extra-judicial considerations.<sup>4</sup>

The extra-judicial considerations applied by Justice Kirby have engendered criticism towards many of his judgments, with some practitioners accusing him of using policy as a tool to reach the desired result that may not have been within the narrow confines of the law. This ‘agenda-judging’ was particularly apparent in circumstances of unfairness, requiring Justice Kirby to depart from established lines of reasoning to reach a preconceived agenda (the author of the contract law chapter, John Gava, nominates *Garcia*<sup>5</sup> and *Berbatis*<sup>6</sup> as examples of such agenda-judging). The editors, who present a largely favourable view of Justice Kirby, do not give sufficient space to critics of Justice Kirby’s jurisprudence, aside from authors such as Gava who object to certain areas while admiring his general perspective. In this respect the collection does not accurately show the range of opinions that exist towards Justice Kirby’s approach within the legal profession. It may have been enhanced by the inclusion of more critical essays.

While Justice Kirby has undoubtedly made an enormous contribution to Australian legal practice and scholarship throughout his career, it is uncertain whether his dissenting judgments will ever be followed by a majority of the High Court. The dissenting judgments of other renowned reforming judges, particularly Lords Denning and Scarman (Lord Scarman is one of Justice Kirby’s idols) were followed by the majority of their respective courts, both during their careers and following their retirement from the bench. It seems however, that the High Court diverged from the approach taken by Justice Kirby, becoming more conservative during his tenure. The essays in *Appealing to the Future* all

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<sup>3</sup> *Re Wakim; Ex Parte McNally* 198 CLR 511, 597-598

<sup>4</sup> *Ibid*, 616

<sup>5</sup> *Garcia v National Australia Bank* (1998) 194 CLR 395

<sup>6</sup> *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51.

provide an assessment of the impact that Justice Kirby's dissenting judgments may have on High Court jurisprudence. The consensus presented by the authors is that while the dissenting judgments are important in their own right, they are unlikely to be followed by a majority of the High Court.

While the dissenting judgments of Justice Kirby may not become binding law, an argument can be raised that they serve another purpose. More than other justices of his time, Justice Kirby wrote decisions broad in focus, considering a variety of subjects while examining the implications of the options available. This promotes discussion on the role of the law, encouraging debate on how the law should be, not just what it is. This will be the legacy of Justice Kirby; his opinions will remain valuable and provide a counterpoint to the judgments of the largely conservative High Court during his tenure. The editors of *Appealing to the Future* have succeeded in creating an authoritative text on the career of Michael Kirby. This collection will prove to be a valuable resource when considering not only the career of Justice Kirby, but the state of Australian jurisprudence and the contemporary legal environment.

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