

Facets of Kirby's law

Appealing to the Future: Michael Kirby and His Legacy, edited by Ian Freckelton and Hugh Selby, Thomson Reuters, Sydney, 2009, 1091pp, \$80. ISBN 9780455226682.

By ROBERT RICHARDS, *Solicitor*

IN WHAT IS ALMOST AN OXYMORON, Justice Kirby was Australia's celebrity judge. While some might say this was because of his penchant for yellow jackets, or because he was audacious enough to lecture on love, or because of the unforgivable attack made on him by Senator Heffernan, it might also be because he was so generous in his accessibility. However, at the end of the day one might ask whether despite his iconic status he was just a judicial Paris Hilton.

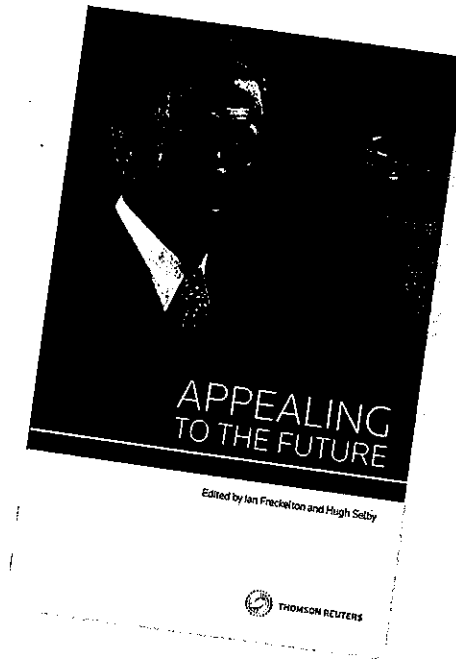
Appealing to the Future makes it quite clear he was more than that.

His Honour's life story is well known and hardly needs the reiteration given to it (albeit briefly) by *Appealing to the Future*, although I am looking forward to the forthcoming biography of Kirby by A. J. Brown, one of the contributors in this collection.

One thinks of Kirby as as an activist and, despite monarchist aberrations, a 'left-wing' judge. I first realised that there must be more to him than that when reading Meagher's *Portraits on Yellow Paper* (Central Queensland University Press, 2004), which besides hilariously claiming that Kirby once mistakenly believed that he had agreed to address a gathering of African chiefs on "breastfeeding" rather than "press freedom" concluded (by someone one would have thought would have been intrinsically antagonistic to Kirby), "he is a person of great generosity and kindness, and I have benefited from it".

The main part of *Appealing to the Future* is a collection of 33 essays which describe Kirby's approach to various – indeed,

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legendary. From personal experience I believe this is true – many years ago at a dinner Kirby (in an encounter I am sure he will have forgotten) asked me "why are you wasting your life in tax law?"

The chapter is written by Miranda Stewart of the University of Melbourne in a style indicative of most of the collection. She believes that while Kirby was neither a "Commissioner's judge" nor a "taxpayer's judge" – and, as practitioners will attest, success in a tax case, at least at first instance, is often dependent on the philosophy of the judge – his judgments indicate that raising revenue through taxes and the protection of the revenue were of considerable importance to him.

The chapter concludes by recording and approving Kirby's opposition to the establishment of a specialist tax court. However, the case books are full of examples where the quality of a judgment would have been improved had the judge had a better understanding of tax law.

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almost all – parts of the law, although it does also contain other more general chapters (for example, "Judicial Practice" and "Judicial Values"). Not only is the range of the book impressive, so too is the standing of its contributors.

Of course, what this means is most people will only read those areas of personal interest. While I suspect the editors hope it will become a compulsory textbook for law students, Selby in his pre-ambles notes that particular parts of the book form collections which will appeal to different people – for example, that commercial lawyers will enjoy the collection of tax, statutory interpretation, contract, company law "and the added spice of some equity". Certainly, these are the chapters I gravitated to.

As a tax lawyer, the chapter on tax was my starting point. Tax lawyers believe that Kirby was not favourably predisposed to them. Some of the comments he has made to tax counsel seeking special leave to appeal to the High Court have become

"adulatory and the sycophantic". However, in the main I think that many, if they have genuinely tried, have failed. Some contributors are worse – embarrassingly and pretentiously so – than others.

The contributors all demonstrate Kirby's intellect. But what is not answered is 'so what?' He is not called the "Great Dissenter" for no reason – a nomenclature that Kirby intensely dislikes ("50 Years in the Law; a Critical Self-Assessment", Kirby address to Northern Territory practitioners, 16 January 2009). In the final analysis his dissents are either correct and the majority of the High Court is incorrect (or vice versa). This is despite the valued role dissent may play (see Kirby, "Judicial Dissent – Common Law and civil Traditions", *Law Quarterly Review*, 2006).

The collection is aptly named. It is too early to say with any confidence whether Justice Kirby has changed Australian law or whether, while not being a judicial Paris Hilton, he is a judicial Don Quixote. □