APPEALING TO THE FUTURE: MICHAEL KIRBY AND HIS LEGACY

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APPEALING TO THE FUTURE: MICHAEL KIRBY AND HIS LEGACY

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For Leo

— IF

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PREAMBLE

Hugh Selby

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. His decisions and his speeches speak both for the present and the future: hence the book title, *Appealing to the Future: Michael Kirby and His Legacy*. He has that rare knack of being able to clarify the essence of a problem, to point out the perspectives from which a solution may be approached, and to offer a resolution which makes sense, all the while showing uncommon tolerance, openness and a striving for consistency across the law's broad spread.

In these pages you will find Michael Kirby and his ideas presented through many lenses. His beliefs and priorities about our law and legal system are revealed, and approved and criticised by some 44 contributors, each and every one an expert in their field, all sharing their views with you. To appreciate how useful they will be to you, take a moment and flip to the author descriptions. There is much wisdom, experience and capacity amongst the contributors to inform and entertain.

One of Kirby's early and enduring innovations as a law reformer was to present options and to seek out the views of those in the community who had been ignored. Thus, it became the norm for discussion papers calling for comments from anyone with an interest in the subject to come before the final reports of law reform bodies (see Chapters 24 and 25). This book, written and edited during his last two years on the High Court, fosters 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. In this way, the wider community, beyond the lawyers, judges and sundry experts, participates in the development of our legal system.

For about a quarter-century Kirby has been an appellate judge, first as President of an appellate court in New South Wales, and then as a member of the High Court. He believes that judges ought to educate the legal profession and he does so. His approach to writing judgments sets new standards, requiring more transparency and intellectual breadth than

traditionally required. He is open about some of his values when others prefer the pretence that silence equates to no unrevealed values at all. His openness and breadth has, however, made it easier for his detractors to attack. Those who like to criticise tend to overlook the fact that the same degree of openness, transparency and accountability cannot be found elsewhere. For some, that lack of openness in others is a perverse virtue. Kirby presents a very wide target because his canvas is so large. He is criticised for being "radical" or "too innovative". Those criticisms show an ignorance of his great respect for precedent and his resultant self-imposed limits on "judicial creativity". They also under-rate the breadth of his search for material, such as international norms – material which broadens our collective view about problems and their solutions.

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. In this age of specialisation and sub-specialisation it is hard to find a work that covers developments across an entire field of endeavour, and which enhances your understanding of how that field interacts with the society and world in which you live. For the field of law, this is such a book.

Where to start? For those who know little or nothing about Michael Kirby and who want to know something of the man, I recommend that you start with the biographical sketch by Brown (Chapter 1), then go to Robertson's appreciation and Freckelton's introductory essay before delving into the chapter on extrajudicial values by Malbon (Chapter 23) and the context pieces by Barker (Chapter 22), Ipp (Chapter 19), Weeramantry (Chapter 21) and Wilcox (Chapter 25). A glance at the Table of Contents will then reveal the many and varied subjects covered by the other chapters.

Many readers will already know something of Kirby. Their interest may be in how he dealt with a particular problem and whether they agree or disagree. But I quietly suggest that to read only one chapter is to deprive oneself. If, for instance, statutory interpretation is the area of your interest then explore, take in and engage with the courts and Parliament (Chapter 8), the political system and process (Chapter 27), constitutional highs and lows (Chapter 5), employment and industrial relations (Chapter 12), and trade practices (Chapter 33). These chapters delve into many applied instances of "interpretation".

To the same effect, it is too limiting to look at "special interests" without combining the studies of discrimination (Chapter 11), health (Chapter 16), human genome (Chapter 17), women (Chapter 34), human rights generally and internationally (Chapters 18 and 20), refugees (Chapter 28), citizenship (Chapter 3), sentencing (Chapter 30), and torts (Chapter 32).

Teachers of "Introduction to Law" courses will find that this book contains so much useful material that they can pick and choose quite differently for successive courses. A problem for many students is that they cannot see the links between the discrete areas of law that they study. This book, presenting Kirby's views on many "traditional" law topics, demonstrates the links. For example, to show the interaction between public law, administrative law and human rights, one might take the chapters on administrative law (Chapter 2), courts and Parliament (Chapter 8), citizenship (Chapter 3), refugees (Chapter 28), discrimination (Chapter 11) and indigenous issues (Chapter 26). On issues of the courts and the State, both of the constitutional chapters, political system and process, courts and Parliament, and employment and industrial law will be useful. To understand how the law develops, refer to the chapters on contract (Chapter 7), criminal law (Chapter 9), torts (Chapter 32), equity (Chapter 13), damages (Chapter 10), and trade practices (Chapter 33). Further, for an examination of the roles of the judiciary, combine the contributions of Ipp (Chapter 19), Griffith and Hill (Chapter 6), Churches (Chapter 8), Gans and Palmer (Chapter 14), Barker (Chapter 22), and Malbon (Chapter 23).

Commercial lawyers will enjoy the combination of tax (Chapter 31), trade practices (Chapter 33), statutory interpretation (Chapter 29), contract (Chapter 7), company law (Chapter 4), and the added spice of some equity (Chapter 13).

For those who share the notion that one world can strive towards avowing and implementing a common set of core values, not only in international, but also in domestic forums, there is much to consider: international human rights (Chapter 20), health law and bioethics issues (Chapter 16), the human genome (Chapter 17), human rights generally (Chapter 20), refugee and humanitarian issues (Chapter 28), indigenous rights (Chapter 26), sentencing (Chapter 30), and relocation issues in family law (Chapter 15).

Given that many of the contributors do not know each other, or even of each other, one of the delights of this book is the recurring themes across the many topics: 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.

A further delight is that the pursuit of such principles does not lead to clear, readily discernible answers, but instead to conundrums which will have you muttering, "and what about …?" It is that result – that the reader is left pondering – which makes the efforts of Kirby, the writers and the readers worthwhile. We are all the better for it: better informed,

better educated, better able to participate. As Chisholm puts it, "In a democracy, raising the level of public understanding of the law and its underlying values is no small thing" (Chapter 15). For experienced lawyers, too, this is a road to a better understanding. Whether one agrees or disagrees with Kirby, the journey is worthwhile. One of our authors – and I'll leave you to find who – makes the exquisite comment that no-one does "more in sorrow than in anger" as sweetly as Kirby.

For my part, I was introduced to Kirby by his observation a long time ago that a judge's reasons are set out for the loser – because that's the party needing to understand. At the time his appellate career was mostly in front of him. He has stayed true to that principle, often as the dissenter being the only bearer of solace for the loser. However, 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.

YOUR HONOUR ...

Geoffrey Robertson

Happy Birthday! Michael, at three score years and ten you have reached the age that Shakespeare allots for one life – yet as the size of this book attests, you have lived so many. It celebrates most of them, as they have impacted upon every aspect of law and its reform in Australia, as they have inspired several generations of law students, academics and practitioners, as they have served the wider community by finding reasoned ways through thickets of prejudice and ignorance and outmoded beliefs. It pays tribute to your kindness to friends and strangers alike and surveys your work for humankind: all the lives you have saved through your prescience over HIV/AIDS, how you have given the Human Genome Project its charter and provided an ethical base for modern reproductive medicine; how you have contributed to the reconstruction of war-torn Cambodia and drafted at Bangalore the international code by which judges of the world conduct their business. Life is better – in Australia, and elsewhere – because you have lived.

This book is what academics call a *festschrift* – essays in honour of Your Honour. Its contributions have been solicited by Ian Freckelton and Hugh Selby under the rubric "The Kirby Project" and in them you will read (if you have the time) your story so far, with predictions for the fate of all those dissenting judgments with which you have doubled the size of the *Commonwealth Law Reports* over the past decade. They recount the multifarious ways in which your decisions and law reform proposals and the recommendations in your lectures and books have reshaped thinking in the legal world. They pay tribute to your phenomenal industry, to your powers of historical exposition, to your creative imagination and ability to marshal all that is to be known under the sun on any particular subject and then to distil it into readily understood principles. I shall not repeat the encomiums further – my junior Mr Burnside (Chapter 35) will in due course summarise them with a practitioner's admirable brevity.

My only regret – and I am sure you will share it – is that the volume lacks any contribution from your usual critics. It would have been useful

to hear from a barrister who finds life too short to read your judgments, or from a judge who disagrees with your appeals to international Conventions, or from one of those newspaper commentators who find it convenient and lucrative to fill their columns with bile about you. It is a pity that our privileged wordsmiths are so ignorant of their own best interests (free speech will only be secure in Australia come the Bill of Rights that they so foolishly deride) as well as of the best interests of our citizens. The ironic thing about their criticism, of course, is that you relish it, as proof of the fact that your ideas are having an impact – enough to unsettle those whose vested interests they disturb. A few of your judicial colleagues have had understandable anxieties that your high profile might attract unfair criticism or unwanted attention to the Bench, but we live in an age that demands greater transparency and accountability and, in any event, you have done the judiciary proud: your public image has served to reassure the public that judges are indeed judicious. (I have never known you to be anything other than judicious, except at the Old Guard balloon game, over which I shall draw a veil that not even AJ Brown could pierce.)

There is of course a raging debate over judicial activism. I take a novel position, neither for nor against, because I think all judges are activists, especially those of your High Court brethren who so actively deploy strict construction to reach conservative conclusions. But the issue goes back long before your time on that court. It was best articulated in the debate between Lord Denning – a passionate exponent of creative law-making, and Lord Devlin, a cool advocate of judicial restraint.[1] Ironically, Devlin's own judgments were rather like yours – lengthy and full of history, policy and principles. He had a wide-ranging, inquiring mind, wore his hair long and his floral shirts bright purple, and retired early from the House of Lords because he found his judicial colleagues were too boring. Denning – on whom you have partly modelled your own style (those very short sentences) – disguised his massive erudition in tabloid prose and rewrote the law of contract and tort to serve the needs of modern society. The man himself, alas, was stuck in pre-war middle-class morality, and his prejudices later came to disfigure judgments which discriminated against women, denied rights to prisoners, foreigners, and trade unionists and yielded all power to the state in matters of national security. He refused to retire ("I have every virtue except resignation") but then repeated in one of his books some racist scuttlebutt he had picked up at a Temple dinner, about black jurors being untrue to their oaths. They became my clients and I had dutifully to draft the libel pleadings that forced him from office.

1 See Lord Denning, *Due Process of Law* (Butterworths, London, 1980); Lord Devlin, *The Judge* (Oxford University Press, New York, 1979); G Robertson, "Trial and Error", *New Statesman* (23 March 1980).

It was Denning who made the jejune distinction – which I am afraid you have picked up – between "bold spirits" and "timid souls". The words "courage" and "cowardice" are overused and neither is relevant to the judicial task. In a democracy, leaving aside the common law, Parliament makes rules and judges apply them. The virtue of this approach lies primarily in its predictability – no mean thing, since those of us who urge a belief in the rule of law are made to look silly when it turns out to be the length of the Chancellor's foot. After all, as Devlin points out, most judges (with your ALRC background, you are a rare exception) are ill-equipped for excursions into law-making because "like any other body of elderly men who have lived on the whole unadventurous lives, they tend to be old fashioned in their ideas", and anyway, learning in law is no guarantee of reasonableness.

What the "judicial inactivist" school overlooks, however, is the extent to which discretion and choice are involved in curial decision-making. This is obviously so at first instance, in deciding the length of sentence or finding facts on conflicting testimony or determining whether to reject evidence which has been illegally or immorally obtained. Personal outlooks and prejudices will, sometimes unconsciously, inform these decisions. So, too, at appellate level, where the alternative interpretations of statute or the plasticine of case law leaves a choice – often between arguments that are good and arguments that are better. In the rarefied classroom of the High Court, there is no such thing as a judicial "error": you do not make mistakes of logic or science, but deliver an arguable opinion, which is often outnumbered by other arguable opinions. Most cases at appellate level are not straightforward – that is why they have gone on appeal – and here the art of judging becomes the art of juggling, of shading and eliding, and ultimately the art of choosing. The English language is rich with ambiguity and Australian jurisprudence is teaming with precedents: whenever legislative words have more than one meaning, or where case law points in different directions or offers different solutions, there comes the necessity for choice.

The best judges are reckoned to be those whose choices pass the Benthamite calculus, producing the greatest happiness for the greatest number. I've always thought of you as a floppy Benthamite, refined by Julius Stone's teaching of Roscoe Pounds' methodology for weighing the interests involved in a judicial decision but, more importantly, by an understanding of Ronald Dworkin's "crucial idea" that democracy is not the same thing as majority rule:[2] the greatest number might have to suffer a slight degree of mortification when the courts uphold the fundamental right of a minority they dislike to pursue happiness. Although minorities are unprotected in Australia by any Bill of Rights, since you are a member of one of them I suspect that the choices you

2 See R Dworkin, *A Bill of Rights for Britain* (Chatto & Windus, London, 1990) p 13.

have made, influenced also by your lengthy experience as a law reformer, are better than most on offer. When the best choice is radical, however, you do sometimes falter: law reform commissioners tend to caution, even conservatism, because they have to craft their recommendations to suit what politicians will accept.

Critics of your work fail to grasp that a judgment is not a computer printout from fed-in facts, but a decision between competing and tenable arguments. Although law is "settled", many issues are not – which is why they come to court. They may be thrown up by the advance of technology or the sophistication of police and criminals, or the aspiration of groups and individuals who want to live better or more convenient lives. The choice you make will affect those lives, and although your judicial colleagues say they make a "policy" decision, these are really political decisions, in the sense that the policy is influenced by subjective feelings and philosophies. Ultimately, of course, it must measure up to the standard of justice – but which standard? For Devlin (and for Michael McHugh in *Al Kateb*[3]), "justice" lies in the merit of the principle upon which the choice is made, whilst for Denning – (and for you in *Al Kateb*) – it lies in the merit of the result of that choice. Which raises the question whether, in hard cases, courts should opt for just means or just ends.

There is no difficulty in rejecting the austere literalists, wilfully blind to the results of their decisions. A few of your High Court colleagues still seem to live in Diceyworld, but for grown up judges, literalism is dead. As Lord Steyn reminds us:

> [T]he tyrant Temures promised the garrison of Lebastia that no blood would be shed if they surrendered to him. They surrendered. He shed no blood. He buried them all alive. This is literalism. If possible it should be resisted in the interpretative process.[4]

Activists are more appealing, but not when they echo Denning's arrogant and simplistic boast that "I must do justice, whatever the law may be", if only because justice eventually meant for Denning what fiction meant to Miss Prism – "the good end happily, the bad unhappily". (The "bad" in his anachronistic moral vision included prisoners, feminists, trade unionists, immigrants and gays.) The proper approach to interstitial law reform remains more or less that of Portia in the *Merchant of Venice* – implement Parliament's purpose, with an interpretation of its statute which serves the values of humanity, compassion and mercy "as far as possible" – that is, so far as language allows this choice. Pick from the available grab-bag of precedents the one which seems most to advance the needs of modern society, or at least fashion the common law according to universally accepted (if not universally applied) principles

3 *Al-Kateb v Godwin* (2004) 219 CLR 562.

4 The example is from William Paley. See *Sirius International Insurance Co v FAI General Insurance* [2004] 1 WLR 3251.

and values of the kind that are set out in international Conventions or Bills of Rights.

Devlin, interestingly enough, saw no inconsistency whatsoever between his philosophy of judicial restraint and a Bill of Rights, the introduction of which he supported for the very good reason that it would better guide the policy decisions made by higher courts. He would have been enthusiastic about the *Human Rights Act 1998* (UK) in Britain, which requires statutes to be interpreted "as far as possible" consistently with guarantees of fundamental freedoms, not only where there is ambiguity but where the parliamentary purpose can be better effected.[5] As many contributors point out, it has been your (really, our) tragedy not to have had a Bill of Rights for you to interpret. You have made do with reliance on international human rights Conventions, and criticism of your work in this respect is misplaced. Interpretation of Australia's statutes by reference to the assumption that they should, so far as possible, be read consistently with international treaties that Australia has ratified without reservation, is a time-honoured rule of common law construction. Although "Parliament's intention" is a polite fiction (MPs rarely understand what they are doing) – the rule itself is unexceptional. Governments need not ratify human rights treaties (many do not) and if any provision is antipathetic, then they can enter a reservation. It follows, as a matter of logic and common sense, that in divining Parliament's intention in enacting a law passed thereafter, any ambiguity in the statutory language can be resolved by assuming that Parliament intended the reading that is most consistent with the treaty obligations that have been accepted on behalf of Australia.

Many of our contributors think you would have been more at home on the Mason court, and undoubtedly your legal archaeology would have assisted their excavation of "implied rights" from the barren field of our Federal *Constitution*. This seems to have become that court's controversial legacy, although we forget just how good were its developments of the common law. Had there been an Olympic team medal for judging (and since there are now such medals for taekwondo and beach volleyball, why not?), the Mason court would have won gold every time. Comparisons are invidious, although not even the most passionate conservatives could fail to throw their hands up in horror at the mess your lot made of the law of negligence. Bring back Victor Windeyer.

I do not get the impression that your last ten years have been entirely happy, which is not surprising given your record of dissent. At least you have been spared the fate of that great British judge, Lord Atkin, whose colleagues petulantly refused to dine with him after his famous dissent

5 For example, the case, much misunderstood by Australian media critics of a Bill of Rights, where the law lords effectuated Parliament's purpose in protecting long-term relationships by extending the protection to long-term homosexual parties: *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

in *Liversidge v Anderson*,[6] which everyone now accepts as courageous and correct. Have any of your brethren dined with Johan, by the way? Of course the High Court has never been a particularly congenial place – the spats between Evatt and Dixon are legendary, and was it Starke who said to Rich, at the cemetery as they buried Isaacs, "you look so ill – why bother to go home?" My only appearance there was the result of the worst piece of advice I have ever given a client. Dow Jones was looking for a court to decide the question of where an internet libel was committed – in every country where it could be downloaded (that is, all 192 of them) or only in the place it was uploaded. "Try Australia", I said. "It has a progressive High Court which might protect the internet from golddiggers." Fat chance. After a parish pump-priming judge in Victoria, who thought "free speech" meant speech made expensive by libel damages, we came to Canberra. There you all were, trooping in suddenly like seven black cockatoos (whatever happened to the usher shouting "oyez"?) and then taking up your pecking order. And I do mean pecking. To the Chief's right were Hayne, Gaudron and Gummow JJ. After they had asked a few questions, they chattered amongst themselves, especially when you or Ian "the Tub" Callinan asked questions. "The Tub", on the Chief's far left, could not understand the difference between newspapers and the internet: I gather from his judgment that I failed to enlighten him. You asked most of the questions and wrote a long concurrence, showing an encyclopaedic knowledge of the worldwide web, but failing to find a way of freeing it from the constraints of 19th century Victorian defamation theory. Murray Gleeson, I have to say, impressed me with his Chairmanship as he struggled to keep his judges in some sort of order. Your seven–nil decision against Dow Jones has, I am pleased to say, already become outdated and is increasingly disdained by courts in Canada, the United States and Britain. Nevertheless, you were prepared to debate it later with Dow Jones lawyers at a good-natured session at the Commonwealth Law Conference, a form of accountability to which you are one of the few judges to submit.

I should perhaps make this point – because no-one else does, except Arbour and Heenan (Chapter 20), and then only in a footnote. Your international work has been astonishing and outstanding – your Chairmanship of the International Commission of Jurists in Geneva, projects at the Organisation for Economic Co-operation and Development and the United Nations Educational, Scientific and Cultural Organization, lectures in London and your United Nations positions in New York and Cambodia and Bangalore, not to mention your famous lecture in Zimbabwe on breastfeeding. For an Australian holding down a full-time job, to make this contribution to international civil society must come at severe personal cost. Notwithstanding the internet, the tyranny of

6 *Liversidge v Anderson* [1942] AC 206 at 244.

distance exacts a heavy personal toll in jetlag and sleep deprivation. Tireless in your toil to build a better world, you have taken no payment for all this work. What is more, doing it often for cash-strapped organisations, you have insisted on flying economy class. When you arrive at Heathrow, you always take trains or buses, never a more expensive taxi. This kind of integrity is rivalled by no-one I know in the field, other than Julian Disney. It is a rare self-sacrificing quality, and probably contributed to your recent heart problem.

I am the contributor best qualified to say that your Australian citizenship has been a source of great pride to expatriates. I am dubious about what it means to be called a "great Australian" – Rupert Murdoch, for example is a great Australian, in the sense that Attila is a great Hun. I always thought of Owen Dixon as a great Australian – he was the greatest common lawyer of his time and such success as I had at the English Bar was a result of my grounding in his judgments. So I was shocked to read (in the Joe Lash biography of Eleanor Roosevelt[7]) about how, when Australian Ambassador in Washington, Dixon used his friendship with Felix Frankfurter to get messages to the United States President in support of the "save Europe first" policy. His old foe Evatt, our Foreign Minister, flew to Washington to beg for a reversal of this policy and for more United States troops to protect Australia, but for Dixon and no doubt his Melbourne club cronies, the cathedrals of Europe were more worth saving than Australian lives in Queensland and the Pacific. Perhaps because my father was at the time an Australian fighter pilot in the Pacific, I regard Dixon's behaviour as almost treasonable. Later, reading those disgusting letters he wrote to the Lord Chancellor over the proposal to include on the Privy Council judges from the new Commonwealth – Dixon confessed a pathological inability to sit next to a black man – I realised just how racist he was.[8] Still, he was a monumental judge, who could stand up to government (the *Communist Party Case* and his decision to stop the Tait hanging[9]) and, at times, could be as reform-minded as you (for example, his dissent in *Sodeman*[10]). It just goes to show that you can be a great judge, without being a great man or a Great Australian. However, many contributors to this book think that, at 70, you have achieved this trifecta.

★★★★

The editors seem to think that I may have snapshots, so to speak, from the student political album at Sydney University, or from occasional

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7 J P Lash, *Eleanor: The Years Alone* (WW Norton & Co, New York, 1972).

8 Mentioned in passing in P Ayres, *Owen Dixon* (The Miegunyah Press, Melbourne, 2003).

9 See Hayne J, "Remarks on Judicial Independence: The Situation of the US Federal Judiciary" (Speech in reply to the Hon Ruth Badger Ginsburg, Melbourne, 1 February 2001): http://www.hcourt.gov.au/speeches/haynej/haynej_ruthbad.htm (accessed 13 December 2008); S E K Hulme, "Tait's Case, and Sir Owen Dixon" (Winter 1997) *Victorian Bar News* 34; C Burns, *The Tait Case* (Melbourne University Press, Melbourne, 1962).

10 *Sodeman v The King* (1936) 44 CLR 192.

encounters since. You have told others that I influenced you at various times, but when offering you advice I always have the advocate's sense when talking to a judge, that his mind is probably made up already. A J Brown gives an account of your personal history, so let me try to put some more flesh on the skeleton he has assembled.

You were born in 1939 – the generation ahead of me, although we were both what my wife (a denizen of Cronulla beach) derisively terms "westies". We both attended "opportunity class", a curious invention of Darwinians at the New South Wales Department of Education, who thought that precocious boys from the city's lower middle classes could compete with the progeny of private schools by being made to feel, at the age of 12, separate and superior. Then came a selective State school – Fort Street, in your case. (I chose a new and unselective boys' school at Epping – more greenery, and I could spend an extra hour in bed.) Would you have been quite so pompous in your early career had you attended a non-selective school? Perhaps your sights might have been set lower – you might have followed the career in history you have always secretly craved – and you could by now have written more books (with more television tie-ins) than Simon Schama. We should not bother about the paths we did not take into the hypothetical rose garden, except for this: had you gone to Sydney Grammar, been articled at a prestigious commercial law firm like Allens or Freehills, then married and had three children and a home on Sydney's North Shore, would anyone have found your judgments in the least bit controversial?

As a Cromwellian, I can only paint a picture of you "warts and all", so allow me to recall that we both had bad acne – yours left traces – a deterrent to social life but an incentive to scholarship in formative years. We spent too much time with our books and avoided the beach (happily for our skin, it now transpires). You may not have missed socialising with girls, or maybe you did: the times were painful enough for heterosexuals, and I cannot imagine how hard it was to cope with your own "spring awakenings". Later generations just do not realise how tormenting it was, to be hormonal in the '50s. Outside marriage, sex was illegal (remember how they prosecuted teenagers for the crime of "carnal knowledge") and homosexuality was never mentioned other than in derisory terms such as "poofter" or "shirt lifter". It was something that visiting English actors and opera singers occasionally did in park toilets. The only sex education at State schools was provided at "father and son" evenings once a year, when embarrassed fathers and even more embarrassed sons would sit through some lantern slides of swimming tadpoles. This was organised through the Father and Son Movement Ltd (later incorporating Mother and Daughter Inc), a well-meaning Christian group which issued pamphlets about the dangers of masturbation along with a picture of a teenager on a rocking horse beneath the slogan "puberty means leaving childish things behind". Since you were

a fervent Anglican, I don't know how you coped with being told you would burn in hell for an abominable crime, but cope you did. Perhaps it was by immersing yourself in work and cultivating an image of a double-breasted, hymn-singing, pillar of society with, by the time I met you, three degrees (BA, LLB, BEc), a lucrative practice in workers' comp and a distinguished career in student politics.

When I came up to Sydney University you were still around – the student solicitor, the student senator, the saviour of students in any sort of trouble. You told me you would wake at 4.30 am, do the papers in three workers' comp cases before a day in court, and spend afternoons and evenings in voluntary legal work. This was the period of growing dissent over Vietnam, street demonstrations ("run the bastards over", said Premier Askin to LBJ when students blocked their motorcade) and your work with the Council for Civil Liberties was invaluable. As a solicitor who always made himself available for the underdog, you were our local Atticus Finch – a friend indeed to anti-Vietnam and anti-apartheid protestors, to Aboriginals and immigrants who came before Sydney's irascible magistrates, several of whom were corrupt and one, at least, certifiably insane. There is a marvellous Bob Ellis short story, "My life in the lower courts", in which you make an appearance defending the young author in the celebrated case in which he was caught up his girlfriend's drainpipe and was accused of burglary at the insistence of her father, the irascible David McNicholl. Ellis changed the names in the story, as he put it, "to protect the guilty" – so he left only yours.[11] Your own life in the lower courts, in Sydney's corrupt society where "the best burglars burgle naked", must have brought you close to despair. Even your beloved Anglican church was knee-deep in hypocrisy: I was confirmed in it by Archbishop Gough, who shortly after laying his hands on me denounced the younger generation as "wallowing in a mire of immorality". He certainly was – as reported in *Oz*, after being caught *in flagrante* with a Sydney socialite, the poor old Primate was shipped back to occupy the smallest parish in England. Not a word in the newspapers, of course: what went on in Sydney was well known but never made public. The city was full of police and political corruption, of severe intolerance of dissent, of public double standards. Many talented people of your generation simply left the country: I'm still not sure why you stayed.

When I became Students' Representative Council (SRC) President for 1966/67, I needed your advice on a regular basis. Jim Spigelman had returned from America full of Martin Luther King and the freedom rides – with Charlie Perkins and others, they planned a bus trip to the deep north of New South Wales. Could the SRC financially support it? With the help of your opinion, we could and did. Then there was the help

11 See *Blackacre '68* (Sydney Law School) p 48.

you gave me over "the Humphries affair", that fraught conflict with the university's Vice-Chancellor (Stephen Roberts) and the Professorial Board who had expelled a student without bothering to give him a hearing. They were paranoid about "student power", but instead of marching upon the administration we gave them a taste of real student power: we took them to court for breach of natural justice, represented by Gordon Samuels, and we won. The student was reinstated and they were forced to have student representatives on disciplinary boards in future.

In the '60s, SRCs provided teeth-cutting forums for future participants in public life. I remember my first National Union of Students Conference in 1965 with other teenage tyros – John Bannon, Robert Holmes-à-Court, Richard Carleton and others. We sat around a table in the upstairs room of the Old Windsor Pub in Melbourne, as two veterans from the older generation – you and Gareth Evans – vied to impress us. Gareth was heavily into pipe-smoking, affecting a Ben Chifley persona, and I remember taking a bet with Richard Carleton that in 25 years' time he would make it to Foreign Minister – in your Cabinet.

You had, of course, made all the right moves for a political career. You sounded like Robert Menzies, wore double-breasted suits, sang hymns (low church, of course – "Onward Christian Soldiers"), admired Doc Evatt and had cultivated close Labor connections. I had no idea that you were gay, and nor did anyone else. Did you? The realisation may have altered your career plans. I did not find out until late in the '70s, when it was reported that you had borrowed a kombi van from a lawyer for a trip to Europe with a male friend and returned it in a state that permitted a deduction to be made from the sleeping arrangements. We had figured that you simply had no time in your workaholic schedule for romance.

On 6 January 1975, I dropped into your new chambers – a room without a view in an anonymous Commonwealth building – to congratulate you on your appointment (at the age of 35) to the Arbitration Commission. I was back on a Christmas visit from London, where I had commenced practice with John Mortimer, and I was frankly a bit dubious about your decision to assume the Bench – it gave you a title ("Mr Justice") which perhaps your insecurity craved, but this particular Bench would provide no obvious outlet for your talents. When you told me that Lionel Murphy was thinking of appointing you to head the Australian Law Reform Commission, I was very excited for you. You appeared to be in two minds, so I waxed lyrical about Gerald Gardiner, the great reforming Labour Lord Chancellor, who had plucked Lesley Scarman from similar obscurity in the Family Division to become a household name for his efforts at reforming a common law desperately in need of updating. Australian law in 1975 was basically still English law (incredibly, it was to be another 12 years before Gareth would abolish the Privy Council's role as Australia's highest court) and the case

for law reform was irrefutable, no matter which party was in power. I suggested a "public hearings" model being trialled by the Canadian Law Commission – you could hold seminars and public meetings, give lectures and appear on television. This I truly believed to be the best model (I had written on the subject for *The New Statesman*) but I also had in mind its value to what I assumed would be your political career (I still had to collect on that bet with Carleton). It would, I pointed out, be the best possible way to get yourself known, travelling the country promoting changes that were obviously necessary.

Suddenly your telephone rang. You took the call and put your hand over the mouthpiece: "It's the Attorney. He wants to offer me the Law Reform Commission. Now ... He says for you to come up as well." So to the Attorney-General's spacious chambers at the top of this building we took the elevator, and I guess you took your decision. Lionel Murphy knew what was good for Australia (if not always for himself). He greeted us with his lopsided cheshire cat grin and laughed at your by now half-hearted objections (that you were only 35 and perhaps should be a judge for more than a month before essaying the reform of the law). He beamed when I volunteered a few reasons why you were the best possible appointment. "Well, it's settled then" he said, ambling over to his large fridge, from which he extracted a bottle of French champagne. He poured us a glass (probably the only alcohol you have ever taken at 10.30 am in the morning) and raised a toast "To Justice Kirby – your first step to the High Court Bench!"

Legal appointments in Australia are to some extent a matter of luck – you are in the right place at the right time and have a connection with the right political party (that is, the party in power). This is not as it should be: in my view appointments federally and in all States should be made on merit, by an expert and apolitical selection committee, preferably after a competitive examination. Still, after your admirable work for ten years on the Australian Law Reform Commission (ALRC), both Neville Wran (your sometime leader in court) and Nick Greiner (another admirer from our SRC days) would have been happy to have you as President of the New South Wales Court of Appeal. You took that office in September 1984. The New South Wales law against the abominable crime of buggery was repealed in August 1984. A coincidence? I suspect not.

Your years as President were probably your happiest on the Bench. As Denning said, when he insisted on taking the unprecedented step down from the House of Lords (Britain's highest court) to the Presidency of the English Court of Appeal as Master of the Rolls, "the chances of doing justice in the Court of Appeal are only 2-1 against; in the House of Lords, the prospects are 4-1". You were fortunate in having such outstanding colleagues as Bill Priestley and Gordon Samuels, and slowly your judicial decisions began to filter through the fax machines

to be cited in Commonwealth courts around the world. It was a real, if private, pleasure for me to introduce English courts to your decision in *Osmond*[12] about the duty to give reasons (far preferable to the High Court decision[13] that overruled you), and in media law I was able to cite your decision in *Rajak*,[14] which summed up the reasons for and the basis of the principle of open justice. 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.

That mean trick you played on me over the trial of Charles I shows both how widely you are respected by the judiciary in the United Kingdom and how difficult it is to beat you in an argument. It was the 350th anniversary of the King's trial and you asked me to comment on a paper about its unfairness which you had been invited to deliver at Grey's Inn. I soon realised that you were quite wrong about the trial – it was in fact a model of fairness for its time, certainly compared with the rigged trial of the regicides come the Restoration, so my republican sympathies were engaged. But I assumed that this event would be the usual Grey's Inn revel, and I would be speaking to lots of drunken law students, so I prepared a short speech larded with the kind of jokes about Australian actresses that would appeal to that sort of audience. You can imagine my horror as I stepped on stage to find myself staring at every Law Lord in the land, perched in the front row, and just behind them many Lord Justices and High Court judges. Men who have never shown the slightest interest in rejecting the knighthoods and peerages showered upon them by the monarch, the beheading of whose ancestor I was not only about to defend, but to celebrate! You smiled at my predicament and launched forth at interminable length into your unoriginal and mistaken thesis condemning the regicides. Eventually it was my turn: I took off like a kamikaze pilot and struggled through my jokes, to stony faces from the front rows. Not content with that humiliation, you then challenged me to repeat the debate at a dinner in the New South Wales Parliament chaired by Jim Spigelman. I should by this stage have smelled a rat, but the prospects of equal time and an Australian audience, and at least one judge with a sense of humour, were too much. I agreed, without asking

12 *Osmond v Public Services Board (NSW)* [1984] 3 NSWLR 447.

13 *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656.

14 *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47.

about the make-up of the audience that you had cunningly invited. Were they from the League of Empire Loyalists? Australians For Monarchy Forever? Perhaps they were Fred Nile's congregation – they looked and sounded like it. In revenge I took myself off for the best part of the following year to the British library to write a book expanding on my views and demolishing yours. But even then you had to have the last word – by reviewing it in *The Age*.

We have had less combative encounters. Do you remember the time, when, with Enoch Powell, we addressed 3,000 final year school students in that cavernous hall in Westminster? To my surprise and slight embarrassment you pulled a small camera from your pocket and started taking pictures of everyone. I thought this a bit naff and accused you of behaving like a Japanese tourist – I hadn't realised how this had become your harmless fetish. Nobody seemed to mind, and you must by now have many thousands of such mementos. Annie Liebowitz you're not, but as a judicial hobby I guess it beats stamp collecting. Incidentally, that rather intense woman who organised the event fell utterly in love with you: she kept writing you amorous letters and poems (she was in fact a published poet) and then sent them to me, complaining about the formality of your responses. I thought it best, in all the circumstances, not to reply.

Your integrity at the time of Heffernan's false allegations is the subject of comment in many of these essays. Politics will always attract scoundrels – the sort of MP that the more stupid of our newspaper columnists think should be entrusted with the rights of our citizens, to the total exclusion of "unelected" judges armed with a Bill of Rights. The real revelation was the mean-minded behaviour of the Prime Minister. Incidentally, everyone describes Heffernan as "abusing" parliamentary privilege – it was Enoch Powell, the great parliamentarian, who always pointed out that a privilege cannot by definition be "abused" – it can only be used. In the long run, it was probably better to have the allegations conclusively destroyed rather than have them still out there, whispered *sotto voce*. Like poor John Marsden, you've been a victim of vile people with vile prejudices – at least your ordeal was soon over, unlike his, and your conduct throughout it showed your true character.

Some contributors raise metaphorical eyebrows about your beliefs in God and the monarchy, since neither institution is readily susceptible to your rigid rational powers of exposition. I have always put them down to the Ulsterman in you – you have the views of Edward Carson, circa 1922, but without the tragic consequences. Your religion is your own business, although I wonder how you get on with it in the diocese of Sydney, which still thinks you will burn in hell (a place incidentally, in serious breach of the United Nations *Convention Against Torture*). I listened to you recently giving a masterful talk in London about the total failure of the black Commonwealth to abolish the sodomy laws

which Canada, the United Kingdom, Australia and New Zealand repealed decades ago. I couldn't help wondering how much this is due to primitive Anglican bishops who threaten to secede from the church at the slightest whiff of incense from a gay ordinand. As for the monarchy, those Ulster Protestant roots must explain your veneration for it, because nothing you have ever said on the subject stands up to rational scrutiny. I can understand if you were put off by some of the shrill, pom-bashing voices before the referendum, and perhaps by the inability of the Republican lobby to agree on a method for electing their President. Your concern for decency and decorum in public life has a surface attraction, but we must learn to supply that ourselves – thanks to the monarchy, the British really are a race of courtiers. You harp on about the insecurity of many Australians who genuinely want to keep ties with the old country: I want to keep them too, but by building museums to house them and not by keeping in perpetuity a white Anglo-German protestant as Head of State of Australia.

Living as I do between these two countries, as a citizen of both, I can appreciate the strength of the bonds and the reality of the fact that British history is Australian history too, at least until 1901, and we should be proud of it. We should teach our children about the victory of Parliament in the English Civil War, the ending of torture, the abolition of the Star Chamber, the struggle for the independence of the judiciary, and so on, but appreciation of our constitutional debt and our blood ties to Britain should not depend on allowing the Windsor family to reign over us. Indeed, if all you ultra-loyal Australian judges had ever really understood that legacy, you could have turned *Magna Carta* into a Bill of Rights (as Edward Coke did back in 1628) – no need for anachronistic "constitutional implications". You could have exploited the Bill of Rights of 1689, the judgments of Lord Camden in *Entick v Carrington*[15] – all the principles of liberty that our founding father Arthur Phillip took with him and bestowed on this territory when he raised the Union Jack at Port Jackson. Sitting in a small room in the British Admiralty in 1787, insisting in his humanitarian way on proper food for the First Fleet prisoners before he set sail, he decreed what he described as the first law of this new country: "that there can be no slavery in a free land, and consequently no slaves". That was his *grundnorm* for Australia – 20 years before slavery was abolished in Britain. When have you, let alone any other Australian judge, ever cited that basic law – in any of your cases involving human rights? I fear that monarchists ignore the real achievements of British history in their increasingly frantic desire to cling to its trappings.

Our contributors give the impression that you are a workaholic (they say, euphemistically, that your "industry is phenomenal") and that

15 (1765) 19 St Tr 1030; [1765] 95 ER 807.

your work has been self-sacrificing and obsessive, and really hard. They present you, in a word, as "duty's slave". What they don't know – or at least don't get across – is that you have enjoyed every minute of it. Your mouth creases in a tight smile, your voice quavers with suppressed laughter, you are amused by the follies of your critics and the foibles of your fellows. You pull legs, you tease – and you take teasing – in short, you are a good sport. Even in those pre-dawn hours when you craft your judgments and your lectures, you must obtain satisfaction from principles precisely stated, from critics reasonably refuted and from principles neatly extrapolated from the grab-bag of precedent. Students love your self-deprecating humour. Colleagues respect you, because of your sincerity and your kindness. Unlike most men, your enjoyment of life increases with your age.

I'm writing this as you are making your farewell tour of the law schools, which I suspect will be as final as Dame Nellie Melba's endless "positively last" appearances. I am told that your student audiences sometimes ask you to identify the most important quality in a judge, no doubt expecting you to speak of independence, or fairness or patience. Instead, you answer "love".

That answer is shocking, as no doubt you intend. Love is an emotion that no-one else has associated with the law. Except W H Auden:

> Law is neither wrong nor right,
> Law is only crimes,
> Punished by places and by times,
> Law is the clothes men wear,
> Any time, anywhere,
> Law is Good Morning and Good Night ...
> Like love we don't know where or why
> Like love we can't compel or fly
> Like love we often weep
> Like love we seldom keep.

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. The packed audience in St Martin in the Fields Church, London, on World AIDS Day 1995, will never forget your delivery from the pulpit, not of a sermon but of a charter for compassionate law reform. That was your Doughty Street lecture, which brought your concerns about HIV/AIDS to the attention of the world. Incidentally, the very fact that in Britain today there are no raised eyebrows about the several openly gay High Court judges – one has just been appointed a Lord Justice of Appeal – can be attributed to your example, and to that of South Africa's Edwin Cameron.

We have not heard the chimes at midnight – you are always sound asleep, in preparation for your 4 am work schedule. But now you are 70, and unleashed from the High Court, what next? When Denning belatedly retired, Devlin said to me, "He'll be more of a menace off the bench than on it", and there is always the pleasing prospect that you might get up to some mischief. But 70 is the new 50, and I'm sure that Australia and the world will benefit from your new lease of life. Not for you, I suspect, the lucrative post-retirement career of arbitration, which attracts many Australian ex-judges (and their dependants). Nor do we need an instant autobiography (it's hardly necessary, after publication of this book). I foresee United Nations judgeships – we need your talents – and the American university lecture circuit will beckon. I hope the government will make use of you: when Australia eventually takes its place on the Security Council, you would make an outstanding ambassador (although Gareth may call in some debts on that one). I had half hoped that Mr Rudd would make you Governor-General, and give Australia a Queen's man who has come out of the closet, but you were passed over for a woman. Understandably, I think, not only because Quentin is terrific, but because other progressive countries have had women governors and we must walk before we can run – in developing our political institutions as much as developing our law.

"What is to be my destiny now?" I hear you ask anxiously of a friend you have credited with advising on your career thus far. I have given this some thought, and have come up with the perfect solution for that admixture of talents, which are to be described hereafter at interminable length. There is a momentous job that will be on offer in a few years' time, when Her Majesty the Queen of Australia graciously retires or else when Australians have the confidence in themselves to vote for a Republic. It is a job that must be yours, because no-one else could do it so well, or serve better to heal the divisions – all that wounded amour propre of mourning monarchists. Once again, you must be Mr President – not of the New South Wales Court of Appeal but of the Australian nation, no longer in thrall to a white Anglo-German Protestant and primogenitored family, to another self-opinionated King Charles or to the sprogs of the Goddess Diana. No, it must be President Kirby, and if homophobes snigger that you have become "The Queen of Australia", just make the monarchists curtsy to you. I hope that our fellow Australians will have the vision and good sense to make this come to pass.

THE CONTRIBUTORS

Louise ARBOUR was United Nations High Commissioner for Human Rights from 2004 to mid-2008. She was previously a Justice of the Supreme Court of Canada and Chief Prosecutor for the International Criminal Tribunals for the former Yugoslavia and for Rwanda. In her earlier academic career she was Associate Professor and Associate Dean at Osgoode Hall Law School of York University in Toronto, Canada. She has known Michael Kirby in her academic, judicial and international capacities and has been a great admirer for years. She of course firmly believes that judges merely apply the law and have no particular point of view to bring to bear to their interpretation of the law. However, if they were in fact discovered to have a personal perspective, hers would have considerable affinity with Kirby's, at least on human rights issues. But as there are few national judges who venture on the international scene, it is that part of Kirby's work that she wishes to particularly celebrate.

Ian BARKER QC. Almost five decades of an advocacy life was nurtured in the Alice. He'd gone there, gone west, having briefly been a solicitor at Katoomba. He stayed around Alice Springs for nine years and then Darwin for ten, along the way being the first Solicitor General for the newly independent Northern Territory. Then he moved back to Sydney, and was President of the NSW Bar Association in the last years of the last century. He has experienced the best and the worst of the Australian judiciary, from Magistrates to High Court Justices, the memorable and the well forgotten. He has done criminal and civil, judge-alone and jury trials, as well as appellate work. Along the way he has found time to write a book about democracy and jury trials, and articles about judicial activism, and human rights in an age of counter-terrorism. Ideals matter. In 1976 with Tom Pauling (now NT Administrator) he drafted the Anunga Rules, prescribed by the late Justice Forster for the Police Interrogation of Aboriginals. At the age when judges must retire he can look at his career choices and muse about why he did not, at an early age, pursue a less combative vocation, perhaps oyster farming (although there is not a lot of scope for it in Alice Springs). Particularly enduring memories which make it all worthwhile are these. Australia's worst judge was once sent to Alice Springs to preside at the trial of a man for shooting dead a heifer one night at Tennant Creek. The accused's defence was that he thought the animal was a kangaroo and he was

naturally horrified when close inspection revealed it was more bovine than macropod. Still, he could not waste it, so he butchered the cadaver and took the meat back to the mine where he worked as a cook. At the trial the man gave evidence of his mistake. Australia's worst judge became increasingly agitated, and frothed a little at the mouth as the evidence was led. Finally he could not stand it any longer. "What nonsense" he barked "everyone knows cows don't hop". He may have been right. The jury acquitted anyway.

Another enduring moment was in the old Alice Springs court when Ian sat in what passed for the library, waiting for a jury to return a verdict in a murder trial. He was reading a book, thoughtfully provided by the Commonwealth to Alice Springs practitioners, called *The Law Relating to Collisions at Sea*, when the jury room door burst open and the foreman punched another juror through it, then dragged him back and slammed the door. Unanimity was very quickly reached and they acquitted. In those days Alice Springs juries could be quite robust.

Jeffrey BARNES is a Senior Lecturer in Law and Director, Teaching and Learning, in the School of Law at La Trobe University. He lectures in Administrative Law, in Legal Change, Legislation and Law Reform, and, from 2009, in Advanced Statutory Interpretation. He also lectures in Statutory Interpretation and Legislative Drafting in the unit Legislation and Legislative Drafting in the Graduate Program in Law offered by the College of Law, Australian National University. He was Associate to Justice Kirby for 1981 during the judge's term as Chairman of the Australian Law Reform Commission. Other past appointments include Legal Member (part-time) of the Social Security Appeals Tribunal and Consultant to the Australian Capital Territory Parliamentary Counsel's Office on proposed amendments to the *Legislation Act 2001* (ACT).

A J BROWN is Senior Lecturer, Law School, Griffith University. Formerly he has been a public interest environmental advocate, Senior Investigation Officer for the Commonwealth Ombudsman, Associate to Justice G E "Tony" Fitzgerald AC, and policy adviser to the Hon Rod Welford MLA, then Queensland Minister for Environment, Heritage and Natural Resources. He teaches and researches across a wide spectrum of public law, accountability and policy, specialising in public integrity, federalism and intergovernmental relations. Since 2003 he has been researching and writing a biography of Michael Kirby, which will be published by the Federation Press in 2009. He first met Michael Kirby in 1986, as a first-year student at the University of New South Wales, after winning morning tea with Kirby P as an essay prize awarded by Associate Professor Robert Hayes. One of his most vivid recollections of that meeting was making the mistake of assuming that the portrait of Her Majesty Queen Elizabeth II was a compulsory part of the Court

décor rather than a decoration of choice, only to be told in a chilling tone, "The Queen is a wonderful woman" – a fact which he has never since doubted.

Julian BURNSIDE QC is a barrister who practises principally in commercial litigation, trade practices, and administrative law. He has acted in many major commercial cases, and pro bono in many human rights cases. In 1998 he acted for the Maritime Union of Australia in its litigation against Patrick Stevedores arising out of the waterfront dispute. In 2001 he acted for the applicant in the *Tampa* litigation and, as a result, became actively involved in pro bono work for refugees. He spent the next seven years campaigning against indefinite mandatory detention and other aspects of the treatment of asylum seekers. Burnside was counsel for Bruce Trevorrow, the first person to obtain a verdict as a member of the Stolen Generations. He became interested in computers at a time when such an interest was regarded, among lawyers at least, as slightly eccentric. In 1981 he established the Victorian Society for Computers and Law, the first such society in Australia. He recalls being told authoritatively that computers would never have any relevance in legal practice.

Burnside is the author of *Word Watching – Fieldnotes from an Amateur Philologist* and *Watching Brief – Reflections on Human Rights Law and Justice*, and of a children's book *Matida and the Dragon*. He was the architect of *From Nothing to Zero*, a book of letters written by asylum seekers held in Australian detention centres.

Richard CHISHOLM remembers encountering Michael Kirby pacing up and down on a city rail station perusing little bits of cardboard, on which, inquiry revealed, he had summarised the law of evidence. That must have been early, before Kirby was appointed to the Australian Law Reform Commission, where Richard first came to know him somewhat better, especially when working as consultant on the *Child Welfare* reference. He had various other encounters with Michael over the years, all of them pleasant and stimulating, except one – in which Michael and his colleagues on the High Court, in rare concordance, unanimously overruled a decision by a Family Court Appeal Bench that included Richard – which was merely stimulating. All these encounters taught Richard many things about the law and much else, and he hopes that some of them come across in his chapter.

Steven CHURCHES Barrister, South Australian Bar, part-time senior lecturer at the University of South Australia Law School. Dr Churches (when he manages to find a client in a newspaper) practises in appellate and judicial review work. He has appeared before Kirby J on a number of occasions with mixed results. Steven acknowledges a personal fondness

for the Judge, involving very occasional intersections going back 30 years, at least two of which have confected relevance to the chapter. This piece is written for lawyers and laymen alike. If its style seems irreverent to the former, Steven has long taken to heart the attack by Fred Rodell in "Goodbye to Law Reviews" (1936-1937) 23 *Virginia Law Review* 38 (reprinted in (1999) 73 *Australian Law Journal* 593). As Rodell said: "The law is a fat man walking down the street in a high hat." He then noted that legal writers were averse to "the judicious placing of a banana peel". Steven's concern is that the sobriety necessary for court proceedings infects too many legal writers with a faux gravitas unleavened by humour in the collective human condition. There should be an attempt to at least keep the reader awake. Steven commits the first of Rodell's sins by using the third person: so much for style.

Much of the chapter concerns contrasting approaches by Michael Kirby and New Zealand judge, Robin Cooke, who enjoyed a stellar judicial career, becoming President of the New Zealand Court of Appeal, and then, in an act of international judicial transvestism, being appointed a Lord of Appeal, that is to say, a Law Lord, taking the title Lord Cooke of Thorndon. Traditionally a Law Lord takes a title referring to his (and with the arrival of Baroness Hale of Richmond, her) place of birth. Lord Cooke's was the dock area of Wellington, Thorndon. Steven found himself sitting with Kirby J at a High Court dinner in Perth in October 1997, and told the Judge that while he had been attending a conference recently in the land of the Long White Cloud, the NZers had pointed out that the House of Lords by then contained two South Africans (Lords Steyn and Hoffmann) and one Kiwi, Lord Cooke. Where, they asked, was the Australian representative? Steven asked them whom they would suggest. Kirby J of course, they replied. His Honour took this all on board and then said that his only problem with the proposition was that he had been born in Waverley. "I can't become Lord Kirby of Waverley" he said, "because then my speeches will be compared with the Waverley novels". He decided that a boyhood spent in more centrally located suburban Sydney would allow for Lord Kirby of Strathfield.

Breen CREIGHTON is a partner in the Workplace Relations Group at Corrs Chambers Westgarth. He has taught at the Universities of Edinburgh and Melbourne, and at La Trobe University. He has published extensively in the fields of employment law, industrial law, occupational health and safety, equal opportunity and international labour law. From 1986-1988 Breen was Legal Officer at the ACTU, and was a Principal Legal Officer in the Freedom of Association Branch of the ILO from 1988 until 1991. Upon his return to Australia in 1991, he led a Commonwealth Government Interdepartmental Taskforce on Ratification of ILO Conventions. He first met Michael Kirby in

the context of his involvement in an inquiry into alleged breaches of the principles of freedom of association in South Africa which was conducted by the ILO's Fact-Finding and Conciliation Commission on Freedom of Association in 1991-1992. Later, he collaborated with Kirby in writing a chapter on "The Law of Conciliation and Arbitration" in *The New Province for Law and Order*, a work edited by Joe Isaac and Stuart Macintyre and published by Cambridge University Press to mark the centenary of the federal system of conciliation and arbitration.

Gregory DALE is the current Associate to the Hon Wayne Martin, Chief Justice of the Supreme Court of Western Australia. He has published previously in torts law, constitutional law and the jurisdiction of foreign appeal courts, such as the Judicial Committee of the Privy Council. He believes Kirby J's retirement will come as a significant loss to the court, the community, and especially academia. Academics will no longer be able to rely upon the judgments of Kirby J to release the flow of creative juices and inspire them to reflect upon the law from differing perspectives.

Patricia EASTEAL is a sociolegal academic, author and activist. Over the past 20 years, Dr Easteal has written numerous books and articles about the nexus between women and the law. Her books include *Killing the Beloved* (1993), *Voices of the Survivors* (1994), *Shattered Dreams* (1996), *Balancing the Scales* (1998), *Less Than Equal* (2001) and *Real Rape, Real Pain* (2006). The broad, long-term objective of her research (and teaching at the Australian National University and the University of Canberra) has been to advance understanding of the interaction between law and society and the criminal justice experiences for women and other minorities. Looking at criminal law, family law, discrimination law, employment law and immigration law, she has highlighted equity issues in courts, tribunals, prison and policing with particular focus on violence against women.

James EDELMAN practises law as a barrister in England and Wales and Western Australia, and researches law as a Professor of the Law of Obligations at the University of Oxford, Fellow of Keble College and Conjoint Professor at University of New South Wales. He first met Justice Kirby in 1997 when he was working as a judicial associate (law clerk) for Justice Toohey on the High Court. On one memorable occasion that year he witnessed Kirby's approach to equity in practice. One of Kirby's judicial associates had been rollerblading with other associates down the building's internal ramp. Careering out of control down the ramp, Kirby's associate landed in the arms of a bemused Commonwealth Solicitor General as he was entering the building for a black tie dinner. Confronting his associate with the rule against locomotion inside the

High Court, Kirby dispensed his equitable discretion to relieve her from any punishment with an amused, wry smile.

Michelle FOSTER is a Senior Lecturer and Director of the International Refugee Law Research Programme in the Institute for International Law and the Humanities at Melbourne Law School. Her teaching and research interests are in the areas of public law, international refugee law, and international human rights law. Dr Foster has LLM and SJD degrees from the University of Michigan Law School, where she was a Michigan Grotius Fellow. Michelle has published widely in the field of international refugee law, her latest publication being *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press, 2007).

Ian FRECKELTON SC spent five early career years working as a researcher at the Australian Law Reform Commission in the 1980s and in that context met Michael Kirby, who was its Chairman. He was challenged within his first day by Justice Kirby with "Jesuitical thinking" and has sought to transcend his background and inclinations, under his Honour's guidance, from that time onwards.

Ian practises at the Victorian Bar in the criminal, personal injury and administrative law areas, increasingly at appellate level, and appeared in front of Kirby J on a number of occasions. Ian also holds appointments as Professor at Monash University in the Law Faculty, and the Departments of Forensic Medicine and Psychiatry, Psychology and Psychological Medicine; Adjunct Professor at the Research Centre at the Auckland University of Technology; and has also served as an Honorary Professor at Sydney, Macquarie, La Trobe and Deakin Universities and a Visiting Professor at Otago University. Along with Kirby J, he is a board member of the Institute for Forensic Excellence at Bond University. He is the Victorian President and former Transnational President of the Australian and New Zealand Association of Psychiatry, Psychology and Law, of which Justice Kirby is the Australian patron; the Australasian Vice-President of the International Academy of Law and Mental Health; and the Deputy President of the International Institute of Forensic Studies, of which Kirby J is also the patron. He is a former Vice-President of the Victorian Council for Civil Liberties.

Ian has served on many tribunals as a decision-maker, involving social security, doctors, psychologists, teachers, mental health, foster parents, and Australian Rules football. He is the Editor of the *Journal of Law and Medicine* and the Editor-in-Chief of *Psychiatry, Psychology and Law*, and is the author and editor of books on expert evidence, health law, therapeutic jurisprudence, coronial law, causation, mental health law, criminal law, sentencing and policing.

Jeremy GANS is an Associate Professor at the Melbourne Law School and a consultant to a Victorian parliamentary committee on human rights. With co-contributor Andrew Palmer he is an author of the text *Australian Principles of Evidence*. He researches and teaches across the field of criminal justice with particular interests in rape, DNA, comparative law and the High Court. The Gleeson era would have led him to all but abandon the latter interest, were it not for the twin pleasures of reading Kirby J's dissents and bemoaning the regrettable occasions when he concurred with the majority.

John GAVA is a Reader at the University of Adelaide law school. He has previously taught at the law schools at Macquarie University and the University of Melbourne. He is interested in judging and the law of contract and he has published in Australian and overseas journals in both areas. His analysis of Kirby J's contract jurisprudence has allowed him to examine both judging and contract law from new perspectives.

Gavan GRIFFITH QC was Solicitor-General of Australia for 14 years from 1984 and counsel for the Commonwealth in almost all constitutional cases heard by the Full High Court over that period. He also appeared in several matters as agent and counsel for Australia in the International Court of Justice. Until his appointment to the High Court Michael Kirby and he enjoyed a friendly rivalry in the corridors of the United Nations and elsewhere, leading to an unsuccessful extortion attempt when the ubiquitous photographer Kirby offered to sell for $100 the negative of a particularly unflattering photograph of Griffith eating. Since resuming practice in 1988, Griffith has had no success at all pleading for the individual against Commonwealth interests matters such as the *Tampa Case*. He now is a "Tale from Two Cities", and practises as counsel in Melbourne and as an international commercial and investments disputes arbitrator from Essex Court Chambers in London.

James HEENAN currently works on rule of law issues in the Office of the High Commissioner for Human Rights. Prior to joining the United Nations he was research fellow in international human rights law at the European University Institute in Florence, Italy. He has worked with and admired fellow Australian Michael Kirby for many years, including through being secretary of the High Commissioner's Expert Group on Biotechnology and Human Rights, through his work as OHCHR adviser on HIV and human rights, in contributing to UNESCO's work on the human genome and, most recently, as secretary of the High Commissioner's Judicial Reference Group. He has been able to witness at close range and over a number of years Kirby J's important contribution to the human rights debate at the international level, a contribution

which, among other things, bolsters Australia's reputation as a champion of human rights promotion and protection.

Mark HENAGHAN is Professor and Dean of Law in the Faculty of Law, University of Otago, Dunedin, New Zealand. Having been enchanted by listening to him give a conference presentation to the Australian Law Teachers' Conference and the Australian Family Law Conference, Mark met Michael Kirby in person for the first time in 2006. Since then he has had regular correspondence and phone conferences with Justice Kirby, who was a distinguished visitor to the Law Faculty at Otago University in August 2007. Justice Kirby is a member of the Advisory Committee for the *New Zealand Law Foundation Human Genome Research Project (Te Kaupapa Ranghau Ira Tangata) – Law Ethics and Policy for the Future* and has overseen the research and publication of three major reports.

Professor Henaghan is the principal investigator for the *New Zealand Law Foundation Human Genome Research Project*. He has published widely in family law, children's rights and medico-legal law. His recent publications include *Family Law Policy in New Zealand* (2007), *Care of Children* (2005), and *Relationship Property on Death* (2004). He is a member of the statutory body, the Advisory Committee on Assisted Reproductive Technologies appointed by the New Zealand Government.

Graeme HILL is a public law barrister at the Victorian Bar. Before coming to the Bar, he worked as a Commonwealth lawyer, primarily in constitutional litigation. He has spent much time studying the constitutional judgments of Justice Kirby in the course of High Court litigation, both as a solicitor and as junior counsel. Graeme also gained some insight into the workings of the High Court as an associate to Justice Hayne.

David IPP AO has been involved in the practice of the law for almost 50 years, of which nearly 20 has been spent as a Supreme Court judge. For some 11 years until 2001 he was a judge of the Supreme Court of Western Australia and for most of that period was Judge in Charge of the Civil List. Since 2001 he has been a judge of the New South Wales Court of Appeal.

Vincent JEWELL is the Deputy Director of the Corporations and Markets Advisory Committee. He has considerable experience in law reform. After a period in private practice, he commenced his law reform career in 1985, when he joined the Australian Law Reform Commission (ALRC) to work with Ron Harmer on the corporate law aspects of the Commission's insolvency law review. He was subsequently involved in the ALRC's Customs and Excise reference.

After leaving the ALRC, Vincent joined the Australian Securities Commission (now the Australian Securities and Investments Commission) in 1991 to assist with policy development. In 1992, he returned to pure law reform when he was invited to join what is now known as the Corporations and Markets Advisory Committee (CAMAC).

Vincent has been closely involved in the reviews undertaken by CAMAC, including its work on takeovers, managed investments, voluntary administration, derivatives markets, corporate groups, insider trading and the social responsibility of corporations.

Wendy LACEY is currently Associate Professor at Australia's newest law school at the University of South Australia. Though happily living in Adelaide (since 2002), her Tasmanian connections are strong. Like fellow contributors John Williams and Steven Churches, Wendy studied at the University of Tasmania, completing her undergraduate degrees and PhD in the island State. Dr Lacey's particular research interest lies in the intersection between Australian public law and international legal norms – a subject in which the jurisprudence of Kirby J has been highly influential. Her contributing chapter to the book focuses, however, on the judge's contribution to administrative law - a subject that Wendy has taught at three separate institutions over the past decade.

Niamh LENAGH-MAGUIRE worked as a Research Assistant in the Australian National University College of Law before practising law. Her Honours thesis, written under the supervision of Professor Kim Rubenstein, examined the relationship between the *Constitution* and Australia's statutory form of citizenship.

Niamh's research in Australian citizenship was prompted, in part, by Justice Kirby's judgment in *Ame*, in which his Honour highlighted some of the intriguing aspects of the relationship between statutory and constitutional nationality. Her interest in broader ideas of citizenship, nationhood and allegiance is also informed by Niamh's experience as a migrant, naturalised Australian citizen and holder of three separate nationalities.

Harold LUNTZ is Professor Emeritus in the Law School of the University of Melbourne. From 1986 to 1988 he was Dean of the Faculty of Law. He was educated in South Africa. He first became interested in damages as an articled clerk in Johannesburg and was inspired by lectures on the topic while a postgraduate student at Oxford University. He began writing on the subject while teaching at the University of the Witwatersrand before his emigration to Australia in 1965.

The first edition of his book, *Assessment of Damages for Personal Injury and Death*, was published in 1974. He has remained the sole author of the three later editions and of an update of the first chapter published

separately as *Assessment of Damages for Personal Injury and Death: General Principles* (2006). He is also the principal author of *Torts: Cases and Commentary*, the latest (revised 5th) edition of which was also published in 2006. He has been General Editor of the *Torts Law Journal* since its inception in 1993 and is the author of numerous articles, notes and comments on the law of torts.

Harold continues to teach in the postgraduate program of the University of Melbourne. In 2000 he was the inaugural recipient of the John G Fleming Memorial Award for Torts Scholarship and in 2003 was awarded the AILA Insurance Law Prize.

From 1967 to 1984, Harold was the secretary of the Victorian Chief Justice's Law Reform Committee. He has acted as consultant to other law reform agencies and government bodies on legal topics such as insurance law and compensation. In 1975 he assisted the Senate Inquiry into the National Compensation Bill. Later, he served as a part-time senior member of the Workcare Appeals Board in Victoria and as Deputy Chair of the Seafarers Rehabilitation and Compensation Authority.

Justin MALBON is a Professor at the Law School, Monash University. He is a former academic and Dean of the Law School at Griffith University, and some time prior to that he was a junior academic at the Law School at the University of Melbourne. In the real world, he was a barrister and solicitor in Adelaide, frequently representing indigenous clients in criminal matters. He was also an assistant Parliamentary Counsel in Queensland. What most struck him about Kirby's judgments was their common sense, particularly as contrasted with the decisions of his colleagues on the Bench. This led him to ponder on judicial common sense – which more or less finds voice in his chapter as an examination of Kirby's "judicial values". After reflecting on his completed chapter, he now thinks Kirby's strength is not so much his consistent application of common sense – but his underlying humanity.

Danuta MENDELSON is a Professor of Law at Deakin University. She has authored several books, including *The New Law of Torts* (2007), published numerous book chapters, and over 60 peer-reviewed articles. Dr Mendelson is the co-editor (with Ian Freckelton) of *Causation in Law and Medicine* (2002), and joint editor (legal issues) for the *Journal of Law and Medicine*. Ever since Danuta first read his judgments, Kirby J's passionate conviction that those innocently harmed through another's wrongful conduct should be compensated, has been a source of inspiration. She admires his compassion and kindness, and the brilliant erudition and wit of his judgments and extrajudicial writings.

Bernadette McSHERRY is an Australian Research Council Federation Fellow and Professor of Law at Monash University. She has a PhD from

York University, Canada and a Graduate Diploma in Psychology from Monash University. Bernadette has written extensively in the areas of mental health law and criminal law. She has long been inspired by Justice Kirby's work and was delighted when he launched her co-authored book with Simon Bronitt, *Principles of Criminal Law*, in 2001 and wrote a foreword to its second edition in 2005.

Graeme ORR is an Associate Professor in Law at the University of Queensland. His research expertise is the law of politics, in particular electoral law. His PhD was on electoral bribery. Dr Orr is currently working on a definitive text on Australian electoral and party law. Previous books are the report, *Australian Electoral Systems – How Well Do They Serve Political Equality?* (2004) and, as editor, *Realising Democracy: A Century of Australian Electoral Law* (2003). Graeme has also published extensively in labour law, the law of negligence and on issues in language and law. He was attracted to write about Justice Kirby's contribution to the law of the political system given the judge's profound interest in public law and his careful attention to balancing political freedoms with equality considerations.

Andrew PALMER is an Associate Professor at the Melbourne Law School, and a practising barrister. He is the author of *Proof and the Preparation of Trials* and, with co-contributor Jeremy Gans, of *Austalian Principles of Evidence*. He has always enjoyed reading Justice Kirby's judgments, even when he disagreed with him.

Warren PENGILLEY was admitted as a solicitor in New South Wales in 1963. Among his degrees are JD (Vanderbilt); MCom, and DSc (Newcastle). He is also a Fellow of the Certified Public Accountants of Australia. Initially he practised in Tamworth, New South Wales, for 10 years and was appointed from there as a Foundation Commissioner of the Australian Trade Practices Commission. Subsequently he was, for 10 years, a Partner in Deacons and then Foundation Professor of Commercial Law at the University of Newcastle. He has written extensively on trade practices issues, both in Australia and overseas. Warren's interest in competition law began when he studied antitrust at Vanderbilt at a time when Australia had no such law. He has retained this interest over the life of the *Trade Practices Act*. His interest in the present project lies in the different approach taken by Justice Kirby to competition issues.

Melissa PERRY QC's interest in native title stems from her doctorate, which examined the impact of changes in sovereignty over territory on boundaries from the perspective of international law. Native title law, on the other hand, concerns the impact of such changes on

pre-existing land rights from the perspective of domestic law. Dr Perry subsequently appeared in many of the High Court cases which dealt with the challenges posed by the recognition of native title in *Mabo [No 2]* and in which Justice Kirby participated. She also co-authored a major textbook on native title with Stephen Lloyd. Her particular interest in Justice Kirby's contribution to the development of native title law lies in his commitment to ensuring that the law of native title develops so as to ensure that those rights have real and practical effect, drawing upon international human rights.

Roderic PITTY teaches global governance and human rights at the University of Western Australia. He has published about Russia, the International Criminal Court, cosmopolitan politics and law and the recognition of indigenous rights. Dr Pitty has provided research assistance for barristers representing families in coronial cases, principally in New South Wales. With Robert Cavanagh he wrote a legal report on the circumstances of an Aboriginal death in custody, *Too Much Wrong: Report on the Death of Edward James Murray*. He first observed Justice Kirby at work during a sentencing appeal by another Aboriginal in 1995. His Honour would have altered the minimum term to account for the appellant's special circumstances of extreme dependence upon his parents. That would have led to the man being released in 1999, six months before he subsequently died as a result of neglect in Long Bay Gaol, if one of Kirby J's colleagues on the Court of Appeal had shared his appreciation of the appellant's special need for parental care. The man's treatment in gaol was the subject of a Four Corners program, *Death by Neglect*, which showed there was no system of appropriately caring for an inmate who had substantial developmental difficulties.

Roderic first presented an interpretation of Kirby's ideas as essentially cosmopolitan at a political science conference in Hobart in 2003. Kirby's biographer, AJ Brown, was present and, upon learning that Roderic was no competitor in that marathon genre, he arranged an interview for Roderic with Justice Kirby in Melbourne soon afterwards. Having bought a new microphone battery, Roderic mistakenly thought he would remember to insert it after meeting the judge and before starting to record the interview. The judge's generosity and engagement with the ideas in the conference paper attracted his attention straight away, and the fact that nothing was being recorded became clear only 90 minutes later as the recorder was being packed away. With no notes and only a small index card of possible question areas to show for the judge's generosity, Roderic felt obliged to tell him of his mistake. Justice Kirby recalled an interview he once conducted with a High Court judge without a recorder, and advised Roderic to go straight home and write down everything he could remember. About 36 hours and 7,000 words later, Roderic had a set of assorted recollections of the interview comprising

about 25 questions. Justice Kirby was impressed that his phrasing as well as his ideas had been accurately recalled, and felt obliged to change only about 50 words. He commented about the episode: "Well, isn't the brain a wonderful thing that we should use to the full so long as it works, since there will come a day for everyone when unfortunately it no longer does."

Heather ROBERTS is a Lecturer in Law at the Australian National University College of Law. She teaches constitutional law, property law and equity and trusts. Dr Roberts' research explores Australian constitutional law, and the history of the High Court of Australia, with a biographical focus. Her doctorate examined the constitutional jurisprudence of Deane J, Kirby J's predecessor on the High Court. During this research she became fascinated by the intersections between the constitutional philosophies of Deane and Kirby JJ.

Geoffrey ROBERTSON QC is founder and head of Doughty Street Chambers in London. He serves (part-time) as an Appeals Judge of the UN Special Court for Sierra Leone. He is also a Recorder, a Master of the Middle Temple, Council Member of Justice, Trustee of the Capital Cases Trust and a Visiting Professor in Human Rights Law at Birkbeck College and Queen Mary College, University of London.

Geoffrey has argued many landmark cases in media, constitutional and criminal law in the European Court of Human Rights, the House of Lords, the Privy Council and Commonwealth courts. He has recently appeared in the Court of Final Appeal for Hong Kong, the Supreme Court of Malaysia, the Fiji Court of Appeal, the High Court of Australia (including before Kirby J) and the International Criminal Tribunal for the former Yugoslavia and the World Bank's International Centre for Settlement of Investment Disputes (ICSID).

He has also appeared before Old Bailey juries in some of the most celebrated trials including *Oz*, *Gay News*, the ABC Trial, the *Romans in Britain*, the Brighton bombing and, at appellate level, in leading cases on abuse of process and identification, and expert evidence. In 2007 he conducted the groundbreaking indigenous rights case which stopped the National History Museum from experimenting on Aboriginal skulls. As a UN Appeal Judge he has delivered internationally important decisions on the illegality of conscripting child soldiers and the invalidity of amnesties for war crimes.

Geoffrey has conducted a number of missions to South Africa and Vietnam on behalf of Amnesty International, and led the 1992 Bar Council/Law Society Human Rights mission to Malawi. In 1990 he served as counsel to the Royal Commission investigating trafficking in arms and mercenaries to the Columbian drugs cartels. He was made a Bencher of the Middle Temple in 1997.

He is the author of *Crimes Against Humanity: The Struggle for Global Justice* (3rd ed, 2006); *Media Law* (with Andrew Nicol QC, 5th ed, 2007); *Freedom, the Individual and the Law* (8th ed, 1993); a memoir, *The Justice Game* (1999) and *The Tyrannicide Brief* (2006) which won a "Silver Gavel" award from the American Bar Association for its literary and educational excellence. His other published works include *Reluctant Judas* (1976), *Obscenity* (1979), *People Against the Press* (1983), *Does Dracula Have Aids?* (1989) and Geoffrey Robertson's *Hypotheticals*. His play, *The Trials of Oz*, won a BAFTA "Best Play" nomination for 1991, and he was the recipient of a 1993 Freedom of Information Award.

Chris RONALDS AM SC is a Sydney barrister. She specialises in discrimination and employment law as an advocate and a mediator and has appeared in many landmark cases. Having authored several books and made extensive public presentations on discrimination and employment law over the past 25 years plus, Chris is a recognised expert in these areas. In the very formative years of the development of women's rights and gender equity in Australia, Chris played a pivotal role in the preparation and implementation of the *Sex Discrimination Act 1984* (Cth) and made a significant contribution to the *Disability Discrimination Act 1992* (Cth). Her most current publication is *Discrimination Law and Practice* (3rd ed, 2008). Chris frequently works with major Australian enterprises, both public and private, to help them understand the practical application of the laws of discrimination, harassment and employment in creating safer, healthier and more productive workplace environments. She has appeared on several occasions before Michael Kirby in his present and immediately past judicial roles and survived all occasions. She has engaged with him on numerous social occasions and has been present to hear him publicly deliver his thoughts and views on a wide range of subjects.

When not working on legal cases, Chris is an enthusiastic supporter of and campaigner for young indigenous lawyers and law students and for the rights and welfare of indigenous people.

While being a keen professional observer of Michael Kirby, her contact with him has never been overly close or personal and so she has been able to bring a dispassionate analysis, as well as some colour, to the material about which she writes.

Kim RUBENSTEIN is Professor and Director of the Centre for International and Public Law, Australian National University College of Law. Her scholarship over the past ten plus years has concentrated primarily on Australian citizenship law and nationality in international law. In addition to her academic work, she has appeared in three High Court cases involving citizenship issues and she answered many questions

posed by Kirby J during her oral argument in the case of *Ame,* which is one of the cases covered in the chapter.

Hugh SELBY teaches practical lawyering and witness skills around Australia and overseas. He writes on practical topics such as advocacy, appellate practice, expert evidence, inquests and inquiries, judicial appointments, pleadings, and helping jurors.

Miranda STEWART is Associate Professor and Co-Director of Taxation Studies at the Law School, University of Melbourne and consults with Greenwoods and Freehills. She has published widely on the law of income tax and on tax reform, taxation of business, managed funds and trusts, taxing the family and the role of tax in distributive justice. Her publications appear in national and international journals, including the *British Tax Review*, *Harvard International Law Journal*, *Sydney Law Review* and *Australian Tax Forum*, and she is co-author of *Income Tax: Text, Materials and Essential Cases* (Federation Press) and *Death and Taxes* (Thomson). Miranda met Justice Kirby at a conference on human rights and sexuality and has always admired his contributions on these issues. She recently assisted the Human Rights and Equal Opportunity Commission inquiry into equality of same sex couples in federal law on the topics of taxation and superannuation. Miranda has enjoyed discovering more about Justice Kirby's contributions to tax law – which is considerable, in spite of his claims to a lack of expertise in tax.

Christopher Gregory WEERAMANTRY, Doctor of Laws and Honorary Doctor of Literature of London University, was the youngest judge to be appointed to the Sri Lanka Supreme Court in 1965 and held this office for seven years. In 1972 he took up the position of Sir Hayden Starke Professor of Law at Monash University, a position which he held till 1990, when he was elected a judge of the International Court of Justice. He was Vice President of the Court from 1997 to 2000.

He is the author of 20 books and a great many chapters and articles. His book, *The Law in Crisis: Bridges of Understanding* explored the theme that the legal profession was becoming too remote from the people it served. This book resulted in *Law Week, Victoria*, in 1980.

He is currently the President of the International Association of Lawyers Against Nuclear Arms and Patron of McGill University's Centre for International Law and Sustainable Development.

He has written extensively on universalising international law by bringing in perspectives from all world cultures. In books on *The Lord's Prayer* and *Islamic Jurisprudence* he has explored the interaction of religion and legal principles.

After retirement, he has founded the Weeramantry International Centre for Peace Education and Research (WICPER) for the purpose

of cross-cultural education and spreading awareness of international law as an instrument of peace. Judge Weeramantry was awarded the UNESCO Prize for Peace Education in 2006, the Right Livelihood Award (Alternative Nobel Prize) in 2007 and the Nuclear Age Peace Foundation Lifetime Achievement Award in 2008 "for courageous leadership for peace to keep the world whole".

He is an Honorary Member of the Order of Australia and has received Sri Lanka's highest honour, the Sri Lankabhimanya Award (Pride of Sri Lanka) in 2007.

Judge Weeramantry has known Michael Kirby for many years and has also worked with him on a project aimed at evolving a set of principles of universal judicial ethics.

David WEISBROT has been President of the Australian Law Reform Commission since 1999, the fifth successor to Michael Kirby in that position. He has chaired major ALRC inquiries into (among others) the federal civil justice system, the protection of human genetic information, gene patenting and human health, the protection of classified and security sensitive information, sedition laws, and privacy laws and practice. Emeritus Professor Weisbrot is a former member of the New South Wales and Fiji Law Reform Commissions, and is currently a member of the Human Genetics Advisory Committee of the NHMRC and a Fellow of the Australian Academy of Law. In 2006, he was made a Member of the Order of Australia for services in the areas of "law reform, education, access to legal services and policy development on matters of public interest".

Murray WILCOX QC spent four youthful years (1959 to 1963) running a branch solicitors' practice at Cooma in the Snowy Mountains. When he first went there much of the road from Canberra to Cooma was unsealed. The Snowy hydro-electric scheme was under construction and most clients were European migrants who spoke little English. The Cooma Magistrates Court, an imposing Victorian era building, was a busy place and the interpreters were usually willing, but not skilled, amateurs. The daily task of explaining the relevant law to these new Australians convinced him of the need for simplification of legal procedures and reform of the substantive law. Consequently, he required no persuasion when asked, 13 years after leaving Cooma, to serve on the ALRC, which he did, in a variety of roles and times from 1976 to 1989.

He has long been interested in environmental and planning issues and was President of the Australian Conservation Foundation 1979-1984, as well as Foundation President of the Environmental Law Association.

Murray became a barrister in Sydney after leaving Cooma, became a Queens Counsel in 1977, and was appointed to the Federal Court of

Australia in 1984, retiring in 2006. During that time he was also the first and last Chief Justice of the Industrial Relations Court of Australia.

Post-retirement he has had a new career conducting hearings into the conduct of certain members of the Victoria Police.

He is the author of *The Law of Land Development* (1967) and *An Australian Charter of Rights?* (1993).

John WILLIAMS is a Professor of Law at the University of Adelaide. His research interests include public law, Australian legal history and the High Court of Australia. His most recent published works relate to the Mason Court and the issue of judicial appointments.

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We are grateful too to Janet Saleh and Leonie Young, on Justice Kirby's staff, who have assisted both the editors and a number of the contributors with access to Kirby J's speeches, articles and biographical information. They have been consistently and generously responsive to our many queries.

We acknowledge the photography of Senior Crown Prosecutor Mark Tedeschi QC who has captured with the lens aspects of Kirby J that defy comparable description in words.

We have been pleased to publish this work with Thomson Reuters with which we, as editors and authors, have had a long association. It is appropriate that they be the publishers of *Appealing to the Future* because Justice Kirby has also written extensively in Thomson Reuters journals, such as the *Australian Law Journal*, is a longtime member of the editorial boards of the *Journal of Law and Medicine* and the *Criminal Law Journal* and is a patron of the *Laws of Australia* and associated publications. We would particularly like to single out the support provided to us by Jason Monaghan and the major involvement of Tali Budlender in facilitating

the project and in grappling with the challenges posed by its visual elements.

We have been fortunate to have been looked after by two outstanding editors over our two decades of publishing with Thomson Reuters or Lawbook Co., as it used to be known. Merilyn Shields, who has edited this work is one of them. Under considerable time pressure, she has done an outstanding job in dealing with a substantial and complex work and a great many authors, as well as two demanding editors. Her refreshing characteristic from our point of view is a genuine commitment to quality in the published product and a preparedness to expend extensive efforts to achieve consistency, correctness and accessibility, both in terms of detail and style. These are fine qualities in an editor, traditional perhaps, but ones which stamp her as a fine technician in a role that demands a combination of punctiliousness and steadfastness. We have learned to have great trust in her judgment. She has been exceptionally honest, tolerant and good humoured with Ian in his pedantry, aggrievements and rewritings; he is appreciative of that.

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Ian would like to apologise to his family, friends and colleagues in Crockett Chambers for his obsession with "Kirbyana" during the second half of 2008. He undertakes from now on to improve the quality of his dinner party conversation. He is determined not to emulate Kirby J's eloquently rationalised work-life imbalance any longer and promises henceforth to throw himself into a wide range of activities unrelated to ruminating about judges. Thus far, he has identified a range of options – shell collecting at out-of-the-way beaches at Airey's Inlet, beach cricket with under 6s, a refresher massage course, learning the lute, and participating in all manner of cultural and convivial activities in locations in Australia and overseas not regularly frequented by judges in company with those who, until his recent obsessions, were prepared to acknowledge being his family and friends. In the course of these activities, should the words "Michael Kirby" intrude, he will abstain from any discourse in relation to his Honour, will conduct himself as though he has no knowledge or interest in Kirby J or any other member of the judiciary, living or deceased, and will take all reasonable steps to redirect the conversation away from judges and judging.

Ian would like to acknowledge the unflagging support, encouragement and nurture provided to him by his remarkable wife, Trish. Her respect for intellectual pursuits and creative efforts and her celebration of the fruits of such endeavours enables much of his work and makes the long and solitary hours devoted to it feel as though they have been worth the many sacrifices. This book is dedicated to his son, Leo, for whom the future holds so much now that he has completed his secondary studies and had an introduction via legal studies and time at his chambers to the world his father inhabits. He acknowledges, too, the pleasure given to him by his other wonderful children, Julia and Lloyd, of whom he is very proud; and the generosity of his parents, Joan and Brian, and of his parents-in-law, Maureen and John, all of whom have provided him with more support than he could reasonably have expected.

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- High Court of Australia: Number 15.
- Mark Tedeschi QC: Number 16.

A NOTE ABOUT JUDICIAL ABBREVIATIONS

Throughout this book Michael Kirby and his judicial colleagues are referred to by the use of various abbreviations. For the uninitiated, these are as follows:

- CJ Chief Justice of a superior court (High Court, Federal Court, Family Court, Supreme Court);
- ACJ Acting Chief Justice of a superior court;
- P President of a Court of Appeal;
- J Justice of a superior court;
- JJ Justices of a superior court;
- JA Justice of a Court of Appeal;
- JJA Justices of a Court of Appeal;
- AJ Acting Justice.

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INTRODUCTION: APPEALING TO THE FUTURE

Ian Freckelton*

Dissent, expressing disagreement over the outcome of a case, is an appeal to the future. ...Only by disclosing conflicts of judicial opinion do Parliament and the people secure the opportunity to evaluate the justice and direction of the laws considered by the nation's highest court.[1]

Everyone knows that, in today's judiciary, today's dissent occasionally becomes tomorrow's orthodoxy.[2]

INTRODUCTION

This essay seeks to put into perspective and explain some of the anomalies and apparent contradictions in Michael Kirby, including various of his controversial public stances, as well as his unparalleled rate of adopting a different view or reaching another result from that of his colleagues while sitting as a judge on Australia's High Court. It does not purport to be a traditional introduction to our book of analyses of Kirby's contribution to the law, timed to coincide with his

* The author acknowledges that the concepts and structure of this essay were developed in conversation during a weekend at Airey's Inlet with co-editor, Hugh Selby, who also holds the views expressed in this essay. The author also appreciates the helpful comments and suggestions of Dr Patricia Molloy, Simon McGregor and Professor Justin Malbon.

1 M D Kirby, "Judicial Dissent" [2005] *James Cook University Law Review* 1: http://www.austlii.edu.au/au/journals/JCULRev/2005/1.html (accessed 5 December 2008). See also C E Hughes, *The Supreme Court of the United States: Its Foundation, Methods and Achievements* (Columbia Press, New York, 1966) p 68; Lord Steyn in *Fischer v Minister of Safety and Immigration* [1998] AC 673; *Neumegen v Neumegen & Co* [1998] 3 NZLR 310 at 321 per Thomas J; M D Kirby, "Judicial Activism: Authority, Principle and Policy in the Judicial Method" (1st Hamlyn Lecture, 55th Series, University of Exeter, 19 November 2003) p 2; cf A Lynch, "Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia" (2003) 27 *Melbourne University Law Review* 724 at 744-748.

2 Kirby, 1st Hamlyn Lecture, n 1.

70th birthday and his mandatory retirement from the High Court. Far less is it any attempt to be a political or personal biography – that is the task of others.[3] Instead, often quoting from the judicial and extrajudicial words of Kirby over the past three-and-a-half decades (rather than private interviews), it seeks in a sophisticated way to understand his viewpoints, to evaluate his influence upon the law, and to reflect upon the nature of his impact as an Australian intellectual, as a law reformer, as an icon, and as a judge.

Long ago Kirby cautioned against "the industry in judicial hagiographies".[4] The editors, and our fellow contributors, have taken him at his word and have done our best to avoid the adulatory and the sycophantic, although there are many in this volume who are unfeigned admirers of Kirby. We have sought a balanced analysis of his present and future roles in the development of the law across most of its areas, both in terms of black letter interpretation and the bigger picture issues of the formulation and application of legal policy. We ask: what kind of an appeal will he have for the future and what is the Kirby legacy?

Another style of book to emerge in recent times has been the judicial taxonomy in which judges (not just their judgments) are scrutinised, classified and analysed – much like mice in a run, or, perhaps, from their point of view, rats in a cage.[5] Their every affiliation is probed, a search is undertaken in pre-judicial, judicial and extrajudicial utterances for any political element in their words, intended or unintended,[6] and their behaviours and their language are psychologically evaluated.[7] The high point of this genre is Robert Posner's *How Judges Think*[8] where, in almost Kirbyesque mode, the author (himself a judge) identified nine "theories

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3 See A J Brown's biography of Kirby (The Federation Press, forthcoming). See also S Sheller, "Kirby, Michael Donald" in T Blackshield, M Coper and G Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, Melbourne, 2001).

4 M D Kirby, "Foreword" to J A Scutt (ed), *Lionel Murphy: A Radical Judge* (McCulloch Publishing, Melbourne, 1987) p 4.

5 See, eg, C W Clayton and H Gillman (eds), *Supreme Court Decision-Making: New Institutionalist Approaches* (University of Chicago Press, Chicago, 1999); D Muttart, *The Empirical Gap in Jurisprudence: A Comprehensive Study of the Supreme Court of Canada* (University of Toronto Press, Toronto, 2007), L Epstein and J A Segal, *Advice and Consent: The Politics of Judicial Appointments* (Oxford University Press, New York, 2005), M J Gergardt, *The Power of Precedent* (Oxford University Press, New York, 2008).

6 See, eg, S B Burbank and B Friedman (eds), *Judicial Independence at the Crossroads: An Interdisciplinary Perspective* (Sage, New York, 2002).

7 See, eg, L S Wrightsman, *The Psychology of the Supreme Court* (Oxford University Press, New York, 2006). See also A E Taha, "Publish or Paris? Evidence of How Judges Allocate Their Time" (2004) 6 *American Law and Economics Review* 1.

8 Harvard University Press, Cambridge, 2008.

of judicial behaviour".[9] This is not such a book. While some reflection is given to experiences of Kirby which may have influenced his attitudes and values, and while a number of the contributors have given thought to what might have generated stances such as his "living force" approach to constitutional interpretation and what may have prompted the absence of "dissent aversion" in his High Court judgments, our authors have refrained from simplistic taxonomies. We have also avoided any temptation to judicial psychoanalysis, we assume to his relief.

Kirby is fond of quoting Lord Denning's dictum that there are two kinds of judges: "bold spirits" and "timorous souls".[10] On any view, Kirby has not been of the self-effacing disposition. Consistently, he has taken what he has described to be "robust" and "principled" stances on legal and social issues, increasingly often in dissent during his latter period as a High Court judge, and has focused on the ways in which, looking to the contemporary environment and the future, the law should evolve. Such forward-looking stances have prompted many different perspectives on "Kirby the Phenomenon". A phenomenon he has been, and is, because of the extent, nature and profile of his contribution to Australian and international public life for well over three decades.

THE KIRBY CAREER

Michael Kirby did his articles with a small Sydney solicitor's firm (after being rejected by Dawson, Waldron, Edwards and Nicholls), and then worked as a solicitor for Ebsworth and Ebsworth, followed by seven years with Hickson, Lakeman and Holcombe in Hunter Street, Sydney.[11]

9 "The attitudinal" (explained in terms of political preferences brought to judging); "the strategic" (related to the "positivist theory of law" and seen in terms of the responses of judges to how they perceive the expectations of fellow judges, legislators and the public); "the sociological" (framed in terms of small group dynamics and particularly pertinent to appellate judges who sit in courts of 3, 5, 7 or 9); "the psychological" (emphasising the importance and sources of preconceptions in shaping responses to uncertainty); "the economic" (treating the judge as a rational, self-interested utility maximiser); "the organizational"; "the pragmatic" (identifying the propensity of some judges to base their judgments on consequences, rather than on deduction from premises); "the phenomenological" (focusing upon the experience of making decisions); and "the legalist theory" (hypothesising that judicial decisions are determined by "the law" which is conceived of as a body of pre-existing rules and canons).

10 See, eg, M D Kirby, "Denning: Bold Spirit of the Law", *Australian Financial Review* (19 March 1999): http://www.lawfoundation.net.au/ljf/app/&id=A87118EDA4D534B9CA2571A40018C296 (accessed 15 August 2008). Dean Alcock, presenting Kirby with the degree of LLD Honoris Causa at Buckingham Law School, described him as "a young Lord Denning": http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_buck1.htm (accessed 17 August 2008).

11 See M D Kirby, "Lessons for a Life in the Law" (Speech, Hicksons Alumni Dinner, 12 August 2008): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_12aug08.pdf (accessed 8 December 2008); M D Kirby, "Memories of Hicksons" (unpublished speech at the celebration on 8 May 2002 of the 50th Anniversary of the founding of the Firm on 1 April 1952).

He commenced at the Sydney Bar in 1967[12] and was first appointed a judge[13] (a Deputy President of the Australian Conciliation and Arbitration Commission) in an era that has many different resonances from those of today – Dylan-days of profound socio-legal change, in 1975.[14] It was the last phase of the Whitlam Government's term in office, a period of effervescent feminism, inchoate awareness of victims' rights, emergence of gay rights, imposition of responsibilities on corporations, and fundamental shifts in conceptualisation of the family unit. The *Family Law Bill* was in draft (see Chisholm, Chapter 15). The *Trade Practices Act 1974* (Cth) had just been passed (see Pengilley, Chapter 33). State payment of criminal injuries compensation had just been born.[15] A federal Bill of Rights was in the wind, having been introduced into Federal Parliament by Attorney-General Lionel Murphy in 1973.[16] Medical and scientific discoveries, with all manner of legal implications, such as privacy, were galloping. The Vietnam War was over but questions were increasingly being posed about where Australia fitted within the world – whether still part of Europe, an appendage of Asia, or a leader in the Pacific – especially in light of the controversies and destabilisation of Labor's period in office after so long in the electoral wilderness. With the creation of the Australian Law Reform Commission under Kirby in 1975, it was to prove the beginning, too, of institutional law reform at federal level in Australia, a new kind of law reform that would embrace social influences that were changing the face of Australian society and, along with it, the role of the law and lawyers.

Just over two decades later, in 1996, after his period in office as a Federal Court judge (1983-1984) and as the President of the New South Wales Court of Appeal (1984-1996), Kirby was appointed Australia's 40th High Court judge, ultimately serving 13 years in that role

12 See M D Kirby, "Seven Ages of a Lawyer" (Leo Cussen Memorial Lecture, Melbourne, 25 October 1999): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_leocus.htm (accessed 5 December 2008).

13 Not having been admitted to the Inner Bar (taken silk), having only been at the Bar for seven years, "a disadvantage I share with at least two predecessors on the High Court, Sir Hayden Starke and Sir Cyril Walsh": Kirby, n 12; see also M D Kirby, "Lessons for Life as a Solicitor" (1999) 37 *Law Society Journal* 63.

14 Kirby even took some time off trekking across Europe and Asia in his early time as a lawyer (see photos 3 and 5), leading to the jibe later on of his being a "hippy judge": R Thomson, *The Judges* (Allen & Unwin, Sydney, 1986) p 158. Surprisingly, perhaps affected by nostalgia, Kirby was later to say: "I regard those times when I was a high class hippy, visiting Goa, not as a dignitary but just to sit on the beach and listen to tapes, examine the ancient cathedrals and read books and do all the things we are educated to do, in many ways, as the most satisfying period of my life" (*The Australian*, 31 January 1984).

15 See I Freckelton, *Criminal Injuries Compensation: Law, Practice and Policy* (LBC Information Services, Sydney, 2001).

16 See P Alston, *Towards an Australian Bill of Rights* (National Capital Printing, Sydney, 1995).

(1996-2009). For eight years until his retirement from that court in 2009 he held the mantle of being Australia's longest serving judicial officer.[17]

Repeatedly, Kirby has been hailed as one of Australia's leading intellectuals and visionary thinkers.[18] For a "man of the law" this is not unparalleled, but it is unusual. Kirby AC, CMG is the recipient of multiple domestic and international awards, prizes and honorary degrees.[19] Already there is a Michael Kirby Chambers in Adelaide,[20] the Kirby Oration at Bond University, the Kirby Lecture Series at the University of New England,[21] the Kirby Oration of the Australian and New Zealand Institute of Health, Law and Ethics,[22] and the Justice Michael Kirby Award at Griffith University.[23]

From the time the Australian Law Reform Commission was created, Kirby has become a "go to" person for the media, the "celebrity judge", "the rock star of the bench",[24] the ultimate opinion-giver in matters of law, skilled in "15 second grabs", with a thoughtful, quotable and often confronting contribution to make on most social issues with a relevance to the law. He has delivered a prodigious number of speeches to extraordinarily diverse cross-sections of the community in Australia and

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17 See M D Kirby, "The Judiciary in Federation Centennial Year: Good News, Bad News, No News" (Australian Institute of Judicial Administration, 11th AIJA Oration, Sydney, 22 June 2001): http://www.aija.org.au/KirbyOration.pdf (accessed 15 December 2008).

18 In 1993, Barry Jones ranked Kirby number 16 of Australia's leading intellectuals: "Barry Jones' List of 17 Australian Intellectuals": http://www.smh.com.au/news/National/Barry-Jones-list-of-17-Australian-public-intellectuals-1993/2005/03/11/1110417674217.html (accessed 16 December 2008). By 2005, he was rated by the *Sydney Morning Herald* in the top 10: "Australia's Top 100 Public Intellectuals": http://www.smh.com.au/news/National/Australias-top-100-public-intellectuals/2005/03/11/1110417674077.html (accessed 16 December 2008). In 1997, *The Bulletin* numbered him amongst Australia's top 10 creative minds. In 2006, he was a finalist amongst those nominated as "Australian of the Year" by the National Australia Day Council: http://www.australianoftheyear.org.au/pages/page123.asp (accessed 16 December 2008) and was declared one of the "Most Influential Australians Ever" by the *Sydney Morning Herald*: http://www.smh.com.au/news/national/the-100-most-influential-australians/2006/06/26/1151174135442.html (accessed 16 December 2008).

19 As of September 2008: Hon D Litt (Newcastle University; Ulster; James Cook University); Hon LLD (Macquarie University; Sydney University; Buckingham University; Ntl LS University (Bangalore, India); Australian National University; University of New South Wales); Hon D Univ (Griffith University).

20 See South Australian Bar Association: http://www.sabar.org.au/chamber_details.php?id=22 (accessed 2 December 2008).

21 See University of New England School of Law, "Kirby Seminar Series": http://www.une.edu.au/law/kirby_seminars/ (accessed 6 December 2008).

22 See the acknowledgment by D Weisbrot, "The Human Genome: Lessons in Life, Love and the Law" (8th AIHLE Conference, Hobart, 20 November 2003): http://www.alrc.gov.au/events/speeches/DW/20031120.pdf (accessed 1 October 2008).

23 See Griffith University Law School: http://www.griffith.edu.au/law/griffith-law-school/news-events/kirby-prize (accessed 6 December 2008).

24 See T Burke, President of the Law Institute of Victoria, introducing Justice Kirby on 21 August 2008: http://www.liv.asn.au/media/speeches/20080822_Kirby.html (accessed 16 December 2008).

in a great many other countries.[25] These have included his controversial Boyer and Hamlyn Lecture series, which are referred to by a number of authors in this volume. His portrait[26] has been painted by Judy Cassab,[27] Ralph Heimans[28] (see Mendelson, Chapter 32 and photo 12), Rodney Pople[29] and Jo Palaitis,[30] whose portrait was shortlisted for the Archibald Prize.

Kirby is the author of several books,[31] and has written countless articles, essays and book reviews in law journals, scholarly and intellectual publications and in the popular press. His engagement in these ways with the general community, while being a judge, is unparalleled.

He has also enjoyed significant longevity as a judge and as a public figure. His judicial office began in the mid-1970s, an era when a conservative role model, Sir Garfield Barwick, was still Chief Justice of Australia.[32] It concluded during the era of Chief Justice Robert French (see photo 15). Since being appointed he has played a role in many of the most significant decisions of the upper tier of Australia's courts – respectively, the Federal Court, the New South Wales Court of Appeal and the High Court of Australia – as well as the Court of Appeal of the Solomon Islands.[33] However, there is much more than the length and commitment of his service[34] to the ubiquity and influence of Kirby.

Less known in many quarters (mostly in Australia) is his extensive involvement internationally in human rights and associated endeavours,

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25 Some of these are listed on the High Court website: http://www.hcourt.gov.au/justices.html (accessed 16 December 2008).

26 See M D Kirby, "Hanging Judges and the Archibald Prize" (Speech, Art Gallery of New South Wales, Sydney, 28 March 2006): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_28mar06.pdf (accessed 2 December 2008).

27 M D Kirby, "Playing Ping Pong with Judy Cassab" in L Klepac (ed), *Portraits of Judy Cassab and Friends* (The Beagle Press, Sydney, 1998): http://www.users.bigpond.net.au/jcassab/kirby.htm (accessed 2 December 2008).

28 See National Portrait Gallery, Canberra: http://www.portrait.gov.au/site/collection_info.php?searchtype=basic&searchstring=michael%20kirby&irn=109653 (accessed 2 December 2008).

29 See Australian Galleries, Rodney Pople: http://www.australiangalleries.com.au/ag/artist/rodney_pople/ (accessed 2 December 2008).

30 See Palaitis Studio News, "Archibald 2006": http://www.jpstudio.com.au/site/studionews.php?id=40 (accessed 2 December 2008).

31 M D Kirby, *Reform the Law: Essays on the Renewal of the Australian Legal System* (Oxford University Press, Melbourne, 1983); M D Kirby, *Through the World's Eye* (The Federation Press, Sydney, 2000); M D Kirby, *The Judges: The 1983 Boyer Lectures* (ABC Books, Sydney, 1983).

32 See D Marr, *Barwick* (Allen & Unwin, Sydney, 2005).

33 See M D Kirby, "Speech Upon Being Sworn in as President of the Court of Appeal of the Solomon Islands" (Solomon Islands Court of Appeal, 28 August 1995): http://www.lawfoundation.net.au/ljf/app/&id=2857A79E7AB7A37BCA2571A8001D78F5 (accessed 15 December 2008).

34 Former High Court judge, the Hon M McHugh is reported as observing of Kirby: "It's a life that's been devoted to work and even his greatest critics would say it's been a life devoted to public service": M Pelly, "Michael Kirby: A Career Shaped by a Secret", *The Australian* (13 December 2008).

particularly in relation to Cambodia, HIV/AIDS (see Henaghan, Chapter 17), the International Labour Organisation, scrutinising South Africa's Labour Laws, the United Nations Educational, Scientific Organisation's *Declaration on Bioethics and Human Rights* (see Freckelton, Chapter 16), membership of the International Advisory Board of the Hague Institute for the Internationalisation of Law, and assisting Malawi to draft its Constitution.

There have been multiple perspectives on Kirby, many positive,[35] but plenty of them unfavourable: from his entry into public life as the first chairman of the Australian Law Reform Commission, he has been the subject of criticism, some of it vituperative and personal.[36] As Lord Scarman observed before Kirby was appointed to the New South Wales Court of Appeal, there were those who accused him of "a mischievous folie de grandeur".[37] In the High Court, McHugh J argued that the coupling of Kirby's "living force" interpretation of the *Constitution*, together with his preparedness to construe its provisions in accordance with international law, serve wrongfully to rationalise potential "amendment to the *Constitution*".[38] The fundamental differences in approach and style between Kirby J and Meagher JA of the New South Wales Court of Appeal have become well known and are referred to by a number of authors in this collection. His Boyer lectures on the judiciary attracted rancorous condemnation from within the ranks of judges.[39]

Perspectives on Kirby, however, are inevitably not wholly consistent, some of them arising more from the standpoint of commentators than from any conduct engaged in by Kirby. He is a complex person with a variety of seeming contradictions, some of which are reconcilable by reference to his background and personal life, which is introduced in this volume by his biographer, A J Brown (Chapter 1), and chronicled, too, in the preliminary pages by his long-time friend Geoffrey Robertson QC (see pp xiii–xxiii). Depending upon the observer's viewpoint, it is easy to identify aspects of Kirby that do not seem to fit together comfortably. For example, is he a judicial activist or a judicial conservative? In fact, both descriptors are simplistic and primitive to a fault. Unusually, he is a monarchist, a parliamentary supremacist and populist – Cromwell would have struggled to understand this combination. He has always thrived

35 Perhaps the high point is W Morgan, Review of M D Kirby, *Through the World's Eye* (2001) 9 *Melbourne University Law Review* 25: "Justice Michael Kirby is already somewhat of a legend".

36 See E Campbell and M Groves, "Attacks on Judges Under Parliamentary Privilege: A Sorry Australian Episode" [2002] *Public Law* 625.

37 Lord Scarman, Foreword to M D Kirby, *Reform the Law: Essays on the Renewal of the Australian Legal System* (Oxford University Press, Melbourne, 1983) p vi.

38 See *Al-Kateb v Godwin* (2004) 219 CLR 562 at 592 [68]; see, too, J Allan, "'Do the Right Thing Judging'? The High Court of Australia in Al-Kateb" (2005) 24 *University of Queensland Law Journal* 1 at 18.

39 See, eg, Connolly J, quoted in Thomson, n 14, p 157.

on authority, ritual and the opportunities that senior office in the legal domain have provided. And yet his focus is rights-oriented – seeking to redress the needs of the downtrodden, the underprivileged and the victimised.

He is a man of deep religious commitment and yet one of our time's best known humanists and rationalists.[40] He is accused by some of an array of imperfections: "trendyism"; being a self-appointed icon; being a publicity-seeking "media judge"; "political correctness"; "agenda judging"; being unable to keep his personal views out of the courtroom;[41] and even "politicising the judiciary". Yet the independence of positions he has taken has alienated radicals, progressives and conservatives alike at different times. He is one of Australia's most recognised intellectuals and faces of the modern era, having lived much of his life in the media spotlight and, latterly, on the internet, but he is also a very private man.[42]

In spite of his circumspection and personal conservatism, he often responds to criticisms in a feisty way without taking a backward step. An example was Kirby's aggressive response to allegations of gross impropriety made by Senator Heffernan (see below) and yet, upon Heffernan's unqualified apology,[43] he was forgiving and gracious: "I reach out my hand (to Senator Heffernan) in a spirit of reconciliation."[44]

In fact, while Michael Kirby in some ways has been a harmonising influence within the modern legal establishment, in others he has been divisive.[45] Throughout his career as Australia's highest profile judicial officer, many have mumbled their dislike for much that he represents and some have openly expressed their antagonism. To ascribe the significant ongoing discomfort within Australian law and among Australian lawyers to homophobia alone, or to "the tall poppy syndrome", is to downplay the extent to which Kirby's whole approach to law reform and judging remains iconoclastic and confronting to many traditionalists.

The following parts of this essay identify themes in the public life of Kirby and discuss their contribution to his appeal to the future.

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40 See Kirby's own view of his "rationality" in an interview with M Boyle, "Leadership" (High Court of Australia, 29 March 2004): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_29mar04.html (accessed 16 December 2008).

41 J Albrechtsen, "Keep Personal Agendas Off the Bench", *The Australian* (22 February 2007): http://blogs.theaustralian.news.com.au/janetalbrechtsen/index.php/theaustralian/2007/02/ (accessed 16 December 2008).

42 See Thomson, n 14, p 161.

43 ABC *Lateline*, "Heffernan Apologises to Kirby" (TV Program Transcript, 19 March 2002): http://www.abc.net.au/lateline/stories/s508589.htm (accessed 16 December 2008).

44 G Winn, "The Kirby Aftermath" (April 2002): http://www.law4u.com.au/lil/ls_kirby.html (accessed 16 December 2008).

45 See F Brennan, "Australia's Judicial Isolation", *Eureka Street* (March 2005): http://www.eurekastreet.com.au/articles/0503brennan.html (accessed 16 December 2008).

KIRBY THE REFORMER

At the heart of Kirby the "Intellectual" is his commitment to social and legal reform. However, it is reform deployed in a gradualist and conceptually considered style (see Orr and Dale, Chapter 27). He is a believer in the law and the rule of law. As he put it in an article written about the repercussions of 9/11: "The rule of law is the alternative model to the rule of terror, the rule of money and the rule of brute power. That is our justification as a profession."[46] For Kirby, making the law work more constructively for a society in the midst of a rate of change never previously experienced has unwaveringly and explicitly been at the heart of his career. His focus always carries with it a forward-looking component and patience, recognising that only so much can be done in the short term. It has micro and macro aspects. It is both about reviewing the detailed nooks and crannies of the law, but also the bigger picture – "examining law's broad canvas, so as to ensure that rules that are unjust, out of date, irrelevant, inadequate, over-complicated, unclear or mean-spirited, parochial and unkind can be changed and reformed".[47] As he put it after his experiences as Special Representative of the United Nations Secretary-General for Human Rights in Cambodia (see below): "The flame of law reform affirms a central concept of the law itself: legal renewal. … [O]ne of the greatest causes of corruption in the world is the absence of regular machinery to modernise and change the law to accord with contemporary values and needs. Where there is no law reform, corruption grows up because it may be the only way of getting things done."[48]

Kirby's origins undoubtedly contributed to the intensity of his reformist ideology. His parental home was characterised by dialectics. Kirby's parents were comfortable in giving vent to contrasting opinions about matters as fundamental as politics and religion in front of their children and expected the same unapologetic response from Michael and his siblings. The style of his schooling at Fort Street Boys' High School[49] would no doubt have prompted similar questioning. He has spoken, too, about the emergence of awareness of the risks of expressing a dissenting voice, of the potential for tyranny by the majority, and populist judgmentalism. This was brought home to him within the family home by his grandmother's experiences of persecution. She married a man

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46 M D Kirby, "Australian Law after 11 September 2001" (2001) 21 *Australian Bar Review* 253 at 264.

47 M D Kirby, "Law Reform: Past, Present and Future" (Speech, Alberta Law Reform Institute, 2 June 2008): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_2jun08.pdf (accessed 16 December 2008).

48 Kirby, n 47.

49 Fort Street was the school of many prominent lawyers, including Edmund Barton, Bert and Clive Evatt, Garfield Barwick, Alan Taylor, John Kerr, Bob Ellicott, Trevor Morling and Neville Wran.

who embraced Communism during the Depression and then had to withstand the McCarthy era: "To me he was a fine human being and idealist, indeed a man of deep spiritual and humanitarian values. Yet to society he was an ogre."[50]

We are all in part the product of our early life and our formative influences. Realisation about his homosexuality must have been fundamentally formative of Kirby's world view. In the 1960s being gay was not just illegal, it was stigmatising – in some instances dangerous because of violent homophobia and, in important ways, foreclosing of vocational and social options.[51] He experienced in a very immediate way what discrimination meant and the kinds of compromises (and even double life) required for conventional success to be an option. As Kirby has said of it, "my church, my school friends and my society expected me to be thoroughly ashamed of myself. I was supposed to keep totally silent and to completely hide my feelings. This was a lonely time of denial."[52] The stigma of being gay was made explicit to him again while he was at law school by one of his lecturers' thinly disguised detestation of homosexuality, emphasising to him that the law has the potential to be an instrument "not of liberty but of oppression".[53] If he had forgotten the price of being a member of a minority group and the levels of anti-gay antagonism still existing in some parts of the Australian community, he re-experienced them during 2002 as a result of the Heffernan allegations that Kirby used his judicial privileges to solicit for male prostitutes (see below). The attempt "to ruin the career of a High Court Judge"[54] occurred three years after Kirby openly "came out" by disclosing the status of his long-time partner, Johan van Vloten, in *Who's Who*.

Kirby probably would not have identified himself as a victim, but in this aspect of his life he learned of victimisation, judgmentalism and intolerance in a direct way. It was part of the "lived experience" that he brought with him to the judicial Bench (see Malbon, Chapter 23), which has the potential to generate a spectrum of responses in different people – resignation, smouldering anger, bitterness, radicalism, zealotry. In Kirby, by contrast, that experience, so far as his public life reveals it, has translated principally into empathy and an indefatigable determination

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50 M D Kirby, "The ALRC – A Winning Formula" (Speech, Rededication of the Michael Kirby Library, ALRC, 17 February 2003): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_AusLawReform.htm (accessed 16 December 2008); see also M D Kirby, "Surface Nugget" (2002) 46(10) *Quadrant* 56.

51 See A D Ronner, *Homophobia and the Law* (American Psychological Association, Washington DC, 2005).

52 "Asking for Trouble: Michael Kirby and the Homophobes", *Melbourne Star* (March 2002): http://www.adam-carr.net/bnews/2002/bnm2.txt (accessed 16 December 2008).

53 M D Kirby, "Remembering Wolfenden" (2007) 66(3) *Meanjin* 127 at 135-136.

54 J Lyons, "The Plot to Destroy Michael Kirby", ninemsn (14 July 2002): http://sunday.ninemsn.com.au/sunday/cover_stories/article_1103.asp (accessed 7 December 2008).

to change culture and reduce the potential for further unfairness.[55] He has learned to be a realist, though. He has become conscious that mud, once thrown, inevitably to some degree sticks. In relation to allegations made about another prominent gay lawyer, John Marsden,[56] and the ensuing (and successful) defamation proceedings that Marsden took, Kirby observed:[57] "There is no doubt that the stress [he] was placed under during, and after, the legal battle was a significant contributing factor to his deteriorating health and ultimate death."[58] He revisited the issue in his 2008 Neville Wran Lecture: "From my own experience I can confirm that this is how things happen in Australia. Falsehoods take on a life of their own. One never completely gets away from them. Whereas once they would have been lost in cob-webbed files now the internet ensures that they will live forever."[59]

At a personal and professional level, Kirby is an unusually warm man. He contagiously infects people he meets and gatherings he chairs with mischievous humour and goodwill. He is frequently encouraging of the inexperienced and the inarticulate. This extends to meetings, public addresses, his prodigious correspondence, dinners with both intimates and those he knows little, and even the courtesy of his demeanour on the Bench lacks the authoritarianism and intimidation that characterises the judicial style of some of his peers (see Barker, Chapter 22). Ackland has fairly commented of his benign manner on the Bench from Kirby's early judicial days:

> This was something novel, because until then the [New South Wales] Court of Appeal was known as a torture chamber. Grown men would faint at the withering cruelty dished out. … It was not a conducive environment for getting the best out of lawyers. Kirby changed the

55 In relation to gay law reform, see the comments attributed to Kirby by Bill Kintominas, "Judge Talks of Gay Marriage from Another Side of the Bench", *Sydney Morning Herald* (24 September 2006): http://australianpolitics.com/news/2002/03/02-03-13.shtml (accessed 1 September 2008).

56 In 1994, New South Wales MP, Deirdre Grusovin, speaking under parliamentary privilege, accused civil liberties lawyer John Marsden, who numbered amongst his clients the notorious Belanglo State Forest murderer, Ivan Milat as well as Saddam Hussein, of having sex with minors. In 1995 and 1996, the Seven Network's programs, *Today Tonight* and *Witness*, also aired the same allegations against Marsden. In response, Marsden described himself as a "promiscuous homosexual", but denied allegations of paedophilia. He sued for defamation. In 2001, after 214 days of hearings, Seven was found to have failed to prove its allegations of child sexual abuse and Marsden was awarded damages, interest and legal costs.

57 *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419.

58 M D Kirby, "The Uncomfortable Demand for Civil Equality" (Inaugural John Marsden Lecture, Rights Australia, Sydney, 15 October 2008): http://www.rightsaustralia.org.au/images/stories/docs/marsden_lecture_oct_2008%20final.pdf (accessed 15 December 2008).

59 M D Kirby, "Neville Wran, A Lawyer Politician: Reflections on Law Reform and the High Court of Australia" (Inaugural Neville Wran Lecture, Parliament of New South Wales, 13 November 2008): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_13nov08.pdf (accessed 15 December 2008).

> culture of the Court of Appeal and that was important. Quite apart from the lawyers, it was important for the clients.[60]

Many of us have grasped with gratitude the lifeline of his suggested arguments when we were foundering at the Bar table. At the heart of his interactive style can be a good humoured whimsy[61] but, more importantly, both a compassion and empathy exhibited for disempowered litigants and a righteous anger that sometimes fuels his responses to what he identifies as injustice.

There is also a steely, focused and premeditated side to Kirby, perhaps inevitably in a person as successful as he has been. At times there are elements of the crusader, determined to stimulate attitudinal change for the benefit of a range of vulnerable sectors of the community which he regards as having been treated harshly by contemporary society. Latterly, this has particularly meant persons who are gay or have HIV/AIDS. But in fact his concern is much broader, and always has been. Part of it was forged by his practice at the Sydney Bar as a compensation law barrister – on the side of injured plaintiffs (see Creighton, Chapter 12). Kirby's focus is generally upon the "little person" – the individual adversely affected by an employer, transport or industrial accident, government, or a corporation. It is for the person the subject of discrimination, harassment, oppressive behaviour, tortious indifference or criminal conduct (see Lacey, Chapter 2; Pengilley, Chapter 33): "The law matters most when it is called in aid by minorities and unpopular people. It is relatively easy for the law to protect the majority and the popular."[62] He is offended and affronted if it is claimed – for any reason, but especially because of legal authority – that the law cannot, or should not, help such persons. For him this is an example of the law not fulfilling its function of providing redress where it is deserved.

Kirby has always given short shrift to those who adopted a supine posture in face of injustice. He is a believer in the potential for change, for the better, but even more, a determined proponent of both the moral obligation to work committedly for reform and the need to grapple with

60 R Ackland, "Kirby Really is a Radical: He Made Court Courteous", *Sydney Morning Herald* (12 December 2008): http://www.smh.com.au/news/opinion/richardackland/ (accessed 16 December 2008).

61 See, eg, in one of his last judgments on the High Court in *Agricultural and Rural Finance Pty Ltd v Gardiner* [2008] HCA 57 at [137]: "Mumpsimus is never a stranger to lawyers. But conceptual thinking, identification of unifying notions and exposition of basic doctrine by reference to *principles* rather than *cases* or accidental *instances* is an essential function of a final national court such as this." "Mumpsimus" is reported by the *Oxford English Dictionary* as an allusion to the story by Richard Pace in his *De Fructu* of an illiterate English priest who read "quod in ore mumpsimus" in the Mass (rather than "quod in ore sumpsimus" (which we have taken in the mouth) and said to him "I will not change my old mumpsimus for your new sumpsimus." By extension the word has been used occasionally to mean a person who obstinately adheres to old ways or an ignorant and bigoted opponent of reform.

62 M D Kirby, "Q and A" (Speech, Lawfest Legal Studies Conference, Hobart: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_22aug08.pdf (accessed 16 December 2008).

what Lord Hailsham called "the resistance of the obscurantist and the forces of inertia".[63] His words in relation to Lionel Murphy communicate his views eloquently:

> Given the right and opportune conditions, a determined reformer can use the institutions of Australian society to effect change for the better. He or she can do so in an entirely constitutional way. The reformer in Australia needs no resort to guns. The enemies are mainly inertia, complacency, greed and selfishness. The institutions of change are there, beckoning.[64]

His message is a call to arms: "be courageous in reform of the law. In human rights, be courageous. Take courageous and principled steps. Do not be off-put by all the problems. There are always problems."[65]

Part of Kirby's law reform focus emerged during his period as chairman of Australia's first national law reform body. Perhaps significantly, its flavour was determined early. As a result of an amendment moved by the Liberal Shadow Attorney-General, Senator Ivor Greenwood QC, the Australian Law Reform Commission (ALRC) was obliged from the outset to ensure that its recommendations, so far as was practicable, were consistent with the *International Covenant on Civil and Political Rights* and did "not trespass unduly on personal rights and liberties".[66] This flavoured both the outward-looking approach of Kirby the Law Reformer and of his Commission.

During Kirby's stewardship, the ALRC met with considerable success, plaudits and media exposure on matters as diverse as video- and audio-taping of police interviews, human tissue transplants, child protection, Aboriginal customary law, sentencing, class actions, child welfare, matrimonial property, evidence and privacy. A high percentage of its recommendations were implemented by government.[67] Professor Weisbrot, a successor to Kirby as president of the ALRC, has said of Kirby the Law Reformer that he continues to enjoy "an unparalleled reputation – based upon an unparalleled record of depth, breadth and

63 Lord Hailsham, *A Sparrow's Flight: Memoirs (*Fontana, London, 1970) p 421.

64 M D Kirby, "Foreword" to Scutt, n 4, p 9.

65 M D Kirby, "Whither Human Rights" [2001] 5 *University of Western Sydney Law Review* 25: http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/UWSLRev/2001/3.html?query= "movement%20for%20the%20ordination%20of%20women (accessed 16 December 2008). See also his message to University of New South Wales graduates, "Never be content with injustice. Question old rules. Adapt to changing times": "At Our Going Out and Our Coming In" (Speech, Graduation Ceremony, University of New South Wales, 9 September 2008): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_9sep08.pdf (accessed 16 December 2008).

66 See now *Australian Law Reform Commission Act 1996* (Cth) s 24(1)(a)-(b).

67 For instance, at the time of writing, the Victorian Government was implementing the recommendations of the 1987 report of the Commission on Evidence: the *Evidence Bill 2008* (Vic).

achievement – amongst world law reformers".[68] Indeed, with the luxury of longitudinal perspective it can be said that Kirby achieved something even more, something that has an enduring significance in terms of changing the culture and methodology of institutional law reform (see Weisbrot, Chapter 24).

Law reform bodies and reports in Australia well and truly preceded Kirby.[69] But law reform Kirby-style was different.[70] It was more inclusive,[71] more energetic and with a broader vision, which influenced the subsequent approach of both State bodies and Kirby's successors at the ALRC. It utilised the fruits of a range of non-legal disciplines, including psychology, anthropology, criminology, sociology, economics and statistics. Frequently, it had an empirical element in that it was based upon what could be identified in a hard-edged way to be the problems together with what could potentially be effective solutions.

Kirby's institutional law reform was distinctive in its consultativeness. Never before had such efforts been made to engage not just what today we call direct stakeholders, but also the community generally (see Weisbrot, Chapter 24). It even incorporated "phone-ins" by members of the public and public opinion surveys. The Chairman of the Tasmanian Law Reform Commission, J B Piggott, said of him in 1984: "He [Kirby] has put Australia on the map so far as the law is concerned. But that is not his greatest contribution. The greatest contribution … he has made is that he has put law on the map so far as the people are concerned."[72] The law reform bandwagon in the Kirby era was always on the road, with Kirby front and centre, identifying complex socio-legal challenges, canvassing potential solutions and, most of all, promoting clearer public engagement by the law with issues together with the articulation of informed principles. Kirby's willingness to be constantly available to the media (especially on Saturday nights and Sundays) and to consult via public hearings, to which members of the public were invited, allowed

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68 See Kirby, n 31.

69 See S Ross, *The Politics of Law Reform* (Penguin Books, Melbourne, 1982). The New South Wales Law Reform Commission was created in 1967 (*Law Reform Commission Act 1967* (NSW)); followed by a succession of State entities: Queensland in 1968 (*Law Reform Commission Act 1968* (Qld)); Western Australia in 1972 (*Law Reform Commission Act 1972* (WA)); Victoria in 1973 (*Law Reform Act 1973* (Vic)); and Tasmania in 1974 (*Law Reform Commission Act 1974* (Tas)): see generally, Kirby, n 31, Ch 3; W Hurlburt, *Law Reform Commissions in the United Kingdom, Australia and Canada* (Jurilibert, Edmonton, 1996); Kirby, n 47.

70 B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (Federation Press, Sydney, 2005).

71 M D Kirby, "Law Reform in Australia" (Speech, Uniform Law Conference of Canada, 23-27 August 1976) p 9: see also *The Speeches of The Honourable Justice MD Kirby, CMG – Volume 1, 1975-1976* (ALRC, 1986). See further, M D Kirby, "Are We There Yet?" in Opeskin and Weisbrot, n 70, pp 433, 435-436; M D Kirby, "The ALRC – A Winning Formula" (Speech, Rededication of the Michael Kirby Library, ALRC, 17 February 2003) p 3: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_AusLawReform.htm (accessed 19 August 2008).

72 See J B Piggott (October 1984) 36 *Reform* 130.

those with adverse experiences, grievances and personal anecdotes a forum in which to express their views. They were listened to, treated with dignity and their opinions were recorded. The sum total of the profile of Kirby, and his Commissioners,[73] was a level of public engagement with reform of the law that Australia had not previously experienced.

The tension between "improving" the law in a way that is community-responsive and "leading from the front" in law reform is a perennial dilemma. Achieving the right balance between the conservative approach (which often only tinkers with the system and seeks merely to remedy the most egregious anomalies) and visionary, avant garde reformism requires a sensitivity to what is politically achievable. Kirby was not a radical at the ALRC. He was a moderate, a pragmatist in terms of what was politically acceptable, and what he would call "a principled progressive". A distinctive attribute of his approach was his determination for the Commission gently to lead the general community by sensitising it (together with politicians and the legal establishment) to issues and by providing community education about those issues. This optimised the prospect of results which were viable from the perspective of the government of the day, whichever its political complexion.

Kirby describes himself as inspired, amongst others, by Lord Scarman, well known in the United Kingdom as a law reformer.[74] In his 1974 Hamlyn Lectures, Lord Scarman[75] argued in favour of the courts playing a role in revitalising the law, in an ongoing conversation with Parliament in some matters, and by gaining the attention of Parliament in others. Lord Scarman identified a need to authorise effective law reform through judicial decisions, an idea described long after by Kirby as "bold and different. It was in some ways a huge challenge to the common law's traditional resistance to natural law notions of fundamental rights inhering in human beings as such."[76] It was an approach that Kirby embraced.

In his 1983 book, *Reform the Law*,[77] Kirby echoed Lord Scarman, and argued in favour of urgent "renewal" of the law. He repudiated the proposition that the law and legal institutions are static and maintained that societal forces, such as changing scientific and technological advances, require of the legal system that it be "re-formed". This need to respond in a constructive, flexible and community-influenced way to

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73 Kirby urged the Human Rights Commission and its head, Dame Roma Mitchell, to adopt the same strategy, exhorting the HRC "to adopt 'a frankly high public profile' so that it would engage the 'imagination' of ordinary Australians": S Magarey and K Round, *Roma the First* (Wakefield Press, Adelaide, 2007) p 289.

74 Kirby, n 59, p 25; Kirby (2005), n 71, p 434; M D Kirby, "Law Reform, Human Rights and Modern Governments: Australia's Debt to Lord Scarman" (2006) 60 *Australian Law Journal* 299.

75 Lord Scarman, *English Law – The New Dimension* (Hamlyn Lectures, 26th Series, Stevens & Sons, London, 1974).

76 Kirby, n 47.

77 Kirby, n 37.

the confronting demands of change is one of the most consistent themes in Kirby's thinking.

"Positive responsiveness" has carried over, too, into Kirby's judgments. This has been an important characteristic of Kirby the Judge. Not only has he championed courts' reference to and utilisation of the fruits of institutional law reform (by way of extrinsic aids to statutory interpretation), but he has brought, controversially at times, a law reform mindset into his role as a judge. This has included a preparedness to be innovative, albeit not generally iconoclastic – for instance, in relation to his preparedness to extend the law on fiduciaries (see Edelman, Chapter 13; Freckelton, Chapter 16) – and in his attitude generally toward the role of equitable remedies to protect the disadvantaged or those the victim of unconscionable behaviour (see Edelman, Chapter 13),[78] as well as the role of trade practices law (see Pengilley, Chapter 33) and corporate law reform (see Jewell, Chapter 4). Another aspect has been his preparedness to be clear and accountable in his procedures and reasoning processes as a judge. As Posner[79] has put it, "[a]chieving a sound understanding of judicial behaviour is … of more than merely academic interest; it is a key to legal reform." It is likely that this is a sentiment with which Kirby would agree.

KIRBY THE BOLD

One of the identifiable features of Kirby the Law Reformer and Kirby the Judge has been his preparedness to engage in a bold, progressive and rigorous way with current intellectual issues, to wrestle with them to distil their conceptual underpinnings in order to find acceptable and just resolutions. A mantra of Kirby is: "strong differences [of opinion] are inevitable and healthy and should neither be suppressed nor too closely disguised".[80] He has been praised by former High Court judge, the Hon Mary Gaudron, for his bravery on the Bench, albeit with the expression of a reservation in relation to his optimism: "Courage is his greatest attribute and that's why he has succeeded. He is truly courageous – not always right in my opinion, but that is his greatest asset. [He] genuinely thinks – in my view naively – the best of his fellow citizens, his fellow human beings."[81]

In terms of the material that should be factored into such a process, he often argues against "parochialism of the mind", contending that it is important for judges, and all of us, to take advantage of the opportunities to be put into contact with new ideas that previously, for instance

78 See, eg, *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51; *Tanwar Enterprises Pty Ltd v Cauchi* (2004) 217 CLR 315.

79 R Posner, *How Judges Think* (Harvard University Press, Cambridge, 2008) p 5.

80 Kirby, 1983 Boyer Lectures, n 31.

81 See Pelly, n 34.

in the pre-internet era, would not have been accessible.[82] In this same vein, he has written of his admiration for Sir John Barry,[83] the Victorian judge who "lifted the sights of the Australian judiciary beyond technical craftsmanship".[84]

Kirby, the judge, has been distinctive in his commitment to grapple both with issues raised by parties in specific litigation and to identify, confront and tease out the repercussions of arguments in terms of creating precedents. This might sound to be an archetypal role for judges but an alternative (and persisting) judicial approach is to refrain from deep analysis of principle and exploration of consequences wherever possible on the basis that the facts of the case do not necessitate it. The difference of approach is more than an issue of workload; it is a fundamental demarcation of judicial style and ideology.

There are also some categories of cases which inevitably are particularly politically sensitive. As Orr and Dale (Chapter 27) have pointed out, Kirby has never shirked "political cases"; rather his position has been that the courts should not abdicate justiciability to the vagaries of the political sphere. As they have put it, by contrast with many of his colleagues: "It is almost impossible to find such a hedgehog approach in Kirby's judicial career. He did not simply openly acknowledge the clashes of values inherent in many cases, but he appeared to relish such clashes" (see Chapter 27).

An aspect of the Kirby approach to decision-making has always been the contention that Australia must transcend the "dead hand of the past", ensuring that the law which is developed by judges and formulated as a result of law reform by Parliaments is a living, vibrant response to community needs and wishes. This involves drawing respectfully upon the wisdom of what has preceded but not being constrained by it. It requires revisiting, as necessary, nostrums inherited from Australia's colonial background but avoiding subservience to inherited assumptions and understandings. This has led some commentators to identify in Kirby a "judicial nationalism".[85] If so it is to be described, it is somewhat more complex, manifesting a pride in his country, tempered variously by progressivism, intellectual restraint and a commitment to contemporaneity and globalism.[86]

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82 See, eg, M D Kirby, "The Growing Impact of International Law on Australian Constitutional Values" (Australian Red Cross National Oration, University of Tasmania, 8 May 2008): http://www.redcross.org.au/TAS/media/Justice_Kirby_speech(5).pdf (accessed 30 August 2008).

83 See M Finnane, *JV Barry: A Life* (University of New South Wales Press, Sydney, 2007).

84 M D Kirby, "John Barry on Sentencing: A Contemporary Appraisal" (1979) 12(4) *Australian and New Zealand Journal of Criminology* 195.

85 See, eg, Orr and Dale (Chapter 27).

86 See M D Kirby, "Globalizing the Rule of Law? Global Challenges to the Traditional Ideal of the Rule of Law" in S Zifcak (ed), *Globalisation and the Rule of Law* (Routledge, Sydney, 2005).

In terms of style, Kirby generally is not inclined to take backward steps when assailed. Typical of his approach was his response to the 2002 Heffernan allegations (made under parliamentary privilege) that he had misused Commonwealth cars "to trawl for male prostitutes":[87]

> Senator Heffernan's homophobic accusations against me in the Senate are false and absurd. If he has such accusations, he should approach the proper authorities, not slander a fellow citizen in Parliament. In so far as he attempts to interfere in the performance of my duties as a judge I reject the attempt utterly.

Kirby's responses to criticism have generally been to hold his position, explain it further and denounce in a variety of robust terms those who have assailed his intellectual stance. This has been so in relation to highly publicised differences with McHugh J, Meagher JA and others who have been critical of his "judicial activism". In turn, this engagement with intellectual differences with his colleagues has raised traditionalist eyebrows in the face of public airing of such differences. Kirby's position is straightforward: the strongly held differences, so long as they are temperately expressed, should not reduce the standing of the judiciary; they simply make transparent varying ideologies, values and approaches that exist, whether or not they are usually publicly acknowledged.

KIRBY THE POPULIST COMMUNICATOR

Justice Kirby has always looked for, and been determined to participate in, public international life beyond the usual constraints of the judge and the law reformer. Much of this has been by way of giving addresses and writing articles, often the product of talks he has given.

Always keen to be in the vanguard of ideas, he is a promoter of "plain English" in the law,[88] even being a patron of "Clarity",[89] an international organisation devoted to improving legal writing. But such engagement has gained the attention of high profile detractors. Sir Walter Campbell, the Chief Justice of Queensland, for instance, felt no compunction in expressing his views about what he regarded as the dangerously heterodox approaches of Kirby J and his ideas about the need for law to be comprehensible and accessible: "I do not think law reform agencies should concern themselves too much with trying to make rules of law

87 AustralianPolitics.Com: "Kirby Responds to Heffernan Allegations" (13 March 2002): http://australianpolitics.com/news/2002/03/02-03-13.shtml (accessed 16 December 2008).

88 See "Judicial Attitudes to Plain Language and the Law" (Interview of Justice Kirby by Kathryn O'Brien, Law student, University of Sydney, Wednesday, 1 November 2006): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_1nov06.pdf (accessed 1 September 2008).

89 See http://www.clarity-international.net/index.htm (accessed 16 December 2008); see also A Wagner (ed), *Obscurity and Clarity in the Law* (Ashgate, Aldershot, 2008).

more intelligible to and more acceptable to every strata [sic] of society. It is a delusion to believe that the law can be made simple."[90]

Kirby recognises the strategic advantages of making the first mark – he is a modern advocate of V I Lenin's dictum that the person who writes the first draft sets the agenda.[91] This preparedness to go where other lawyers have not yet felt it comfortable to tread has led to many of his innovations, numbered amongst which have been his frank discussions about the judging process, including the toll that it can take on its practitioners. Posner,[92] himself a judge, has observed of the mystification encouraged by many members of the judiciary about the deliberation process that "judges have convinced many people – including themselves – that they use esoteric materials and techniques to build selflessly an edifice of doctrines unmarred by willfulness, politics or ignorance". This has not been so in relation to Kirby J, who has written and spoken extensively about judging, lifting the veil on not only judges' work product but also on the deliberative process itself and many of its appurtenances.

In addition, though, he has convened committees, he has been a rapporteur at international gatherings, he has co-drafted an international declaration (see Freckelton, Chapter 16), and he has occupied roles as facilitator, patron and board member. A number of contributors to this book have identified the importance of these roles (see Arbour and Heenan, Chapter 20; Henaghan, Chapter 17; Freckelton, Chapter 16).

Any analysis of Kirby the Communicator would be remiss if it did not refer to another aspect of Kirby – his letter-writing. 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.

Another important aspect of the Kirby ideology has moved with the passage of time. While in earlier phases, Kirby was a champion of the unfettered sovereignty of Parliament, he has controversially moved to contend that sovereignty belongs ultimately to the people – those who elect the politicians (see Churches, Chapter 8; Griffith and Hill, Chapter 6; Williams and Roberts, Chapter 5).[93] In a speech in Wellington in November 2004 entitled "Deep Lying Rights – A Constitutional Conversation Continues",[94] he argued:

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90 Brisbane Legal Convention (July 1983), quoted in Thomson, n 14, p 222.

91 See, eg, M D Kirby, "Three Tasmanian Law Reformers" (Speech, 2004 Bicentenary of Tasmania Training Consortium, 5 November 2004): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_5nov04.html (accessed 16 December 2008).

92 Posner, n 79, p 3.

93 See, eg, M D Kirby, "Deep Lying Rights: A Constitutional Conversation Continues" (The Robin Cooke Lecture, Wellington, 25 November 2004): http://www.hcourt.gov.au/speeches/ kirbyj/kirbyj_25nov04.html (accessed 22 August 2008).

94 Kirby, n 93.

> Of course, sovereignty does not belong to the Executive or the Governor-General or Governors, still less to the courts. A democracy and especially a federation such as Australia, is a place of shared powers. It has many checks and balances. Parliament tends to reflect, in a very general way, transient popular majorities. The sad experience of history, including recent history, is that parliaments, from time to time, overlook or even override the fundamental rights of minorities. …
>
> In such cases, to talk of parliamentary "sovereignty" is not only incorrect; it is positively misleading. It leads parliamentarians to believe that they enjoy a plenary and uncontrolled power. At least under Australia's constitutional arrangements, that is never the case. Their powers are always subject to the written Constitution and ultimately determinable by courts of law. Where governments enjoy large majorities in a unicameral parliament, or effective majorities in both houses of a bicameral parliament, the role of the courts in protecting minority rights becomes more important. It is a power to be exercised lawfully, wisely and for the purpose of protecting the true sovereign – all of the people of the polity concerned.

To this extent, Kirby has become an avowed populist, mistrustful of the propensity for Parliament to enact repressive provisions in legislation for short-term political gain, such as those to be found in the *Migration Act 1958* (Cth) and in the Howard Government's legislative responses to the perceived terrorism threats (see McSherry, Chapter 9).

As a judicial officer, the public aspect of his life has been highly unorthodox – until the Kirby era judges were expected by and large to be seen and heard only inside court rooms. Part of the rationale for this unwritten convention was a fear that "public judges" may be unable to sit on cases because of a perception on the part of participants that they hold fixed views, as evidenced by their public pronouncements.[95] Part was attributable to a concern that judges could be regarded as overly involved in political issues and "compromise their role".[96] A further part was related to the very heavy workload carried by judges and the concern that they should give priority to their judicial functions over any others.

As a series of, one suspects, uncomfortable Chief Justices and Attorneys-General have found, however, Kirby has been determined to maintain a public life and an international engagement irregardless of conventions. In doing so, he has consistently flouted the traditions in

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95 See, for instance, Murphy J and his famous question of Briese CM: "What about my little mate?" See also *Honda Australia Motorcycle v Johnstone (as State Coroner)* [2005] VSC 387 and the difficulty encountered by Victorian State Coroner Johnstone as a result of organising a conference: discussed in I Freckelton and D Ranson, *Death Investigation and the Coroner's Inquest* (Oxford University Press, Melbourne, 2006). It contrasts with Kirby's strongly expressed views on the need for decision-makers to remove themselves from apprehended bias.

96 See the discussion by Liddell in G Liddell (ed), *The Sir Anthony Mason Papers* (The Federation Press, Sydney, 2007) p 7.

respect of a non-public life for judges. But he has done so circumspectly and without bringing disrepute upon the courts upon which he has served. On those few occasions on which has been any hint of a conflict of interest – such as in relation to the ordination of women in the Anglican Church, and challenges mounted by Rodney Croome, the gay activist – he has taken the initiative in recusing himself. It can plausibly be asserted that Kirby's extrajudicial activities have enhanced the judiciary and constructed a new accessibility and awareness of it for the public. In so doing, Kirby J has laid the platform for a different style of interaction between Australian judges and the general community.

Kirby has justified various aspects of his extra-curial conduct on many occasions. In respect of contributions to law journals, for instance, he has emphasised their centrality to legal life, arguing that vibrant debate should be the heart and soul of the law, placing a spotlight on legal reasoning and thereby raising the potential for its improvement.[97] His style has been to address issues in his speeches and extrajudicial writing and to refrain for the most part from commentary on cases heard by the High Court or on subjects of obvious political sensitivity. It was only in his final years on the High Court, when it is clear that his frustration levels were becoming difficult to suppress, that on occasions he canvassed the different approaches of the court on particular issues.

Kirby's speeches are always well crafted. They are frequently witty. They are invariably well researched and of real substance. They always have "take home messages". They are quotable. Their content in terms of constructive insights into contemporary issues gives them a lifetime that is longer than most speeches that are "here today and gone tomorrow". Kirby is consciously and playfully a showman. In 2008, he prefaced further remarks on revenue law by the observation: "A generous performer will always offer his audience an encore: something additional to the advertised programme that leaves those attending convinced that they have received their money's worth."[98] Thirty pages into his 38-page speech, he then proffered two encores!

Lord Cooke of Thorndon has highlighted the educational and stimulating character of Kirby's addresses: "Kirby is a most distinguished citizen and servant of Australia. Yet it is his international impact that has most marked him out. He identifies profound modern concerns. He ransacks a wide range of materials with which we could not otherwise be familiar."[99]

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97 See, eg, M D Kirby, "Not Another Law Journal?" (Speech on the Launch of the *Northern Territory Law Journal*, August 2007): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_aug07.pdf (accessed 16 December 2008); see also M D Kirby, "Australian Law Journal at 80: Past, Present and Future" (2007) 81 *Australian Law Journal* 529.

98 M D Kirby, "Of 'Sham' and Other Lessons for Australian Revenue Law" (Annual Taxation Lecture, Faculty of Law, University of Melbourne, 20 August 2008): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_20aug08.pdf (accessed 1 October 2008).

99 Kirby, n 31.

Kirby's focus on protection of rights is very much directed toward people – by contrast with corporations (see Gans and Palmer, Chapter 14). Thus, decisions of his have sought to distinguish between the humiliation or invasion of the privacy of individuals and disparagement of the activities of businesses and corporations.[100] In a similar vein he denied a local government instrumentality the right to sue to protect its reputation on the basis that "its reputation must depend upon the opinions of citizens, earned or lost in the democratic political debate".[101] This is part of his ideology that there should be a lively and robust political discourse in relation to matters of contemporary contention and as a fundamental aspect of the operation of the Australian *Constitution*.

However, at the same time, Kirby has expressed a concern in his refugee and criminal law judgments (see Foster, Chapter 28; McSherry, Chapter 9; Zdenkowski, Chapter 30) that under the influence of media-fanned hysteria, public views, if uncritically adopted, can be oppressive and unfair. As he put it, in the context of the development of the criminal law:

> Passing fads, momentary hysteria, populist enthusiasm must all be kept firmly in check. In the matter of the criminal law, the eyes must be fixed on a distant horizon because the values at stake, and the balances struck, define the kind of society in which the law operates for all people.[102]

The very language that Kirby J has used in many of his judgments, and the direct and overt disagreement with his colleagues, has raised another issue – that of judicial style. Allied with the notion of judges existing behind a wall of removal is the fiction that judges decide cases purely on the basis of the facts before them with no other considerations mediating their responses and their approaches. As Rosenbaum[103] has put it:

> [Can] judges show themselves to be human beings while on the bench. Are they real people underneath those robes, or are they as sterilized and robbed of emotions and feelings as they wish their courtrooms to be? There is nothing that prevents judges from revealing their humanity other than their exaggerated, proprietary sense of decorum.

He calls not for any encroachment on objectivity, evenhandedness or adherence to principle but greater openness about the reality that feelings, backgrounds and personal views inevitably intrude upon the judicial reasoning process.[104] However, this requires a degree of not just personal insight, but a preparedness to engage in a measure of self-revelation. Such preparedness, both on and off the Bench, has been a characteristic of the unaffected Kirby approach and of his authenticity. He

100 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199.

101 *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 at 711.

102 M D Kirby, "Criminal Law Futurology" (2005) 17(1) *Current Issues in Criminal Justice* 122.

103 T Rosenbaum, *The Myth of Moral Justice* (Harper Collins, New York, 2004) p 165.

104 Rosenbaum, n 103, p 177.

has often spoken with passion of how he has felt about particular modes of decision-making, as well as about their consequences and/or deficiencies. The fiction of "total detachment" is nowhere near as pronounced with Kirby J as with most of his colleagues on the Australian judiciary. On the Bench, he commonly defuses courtroom tensions with a light touch but acknowledges the reasons for and existence of strong views, both on his own part and that of others. This has been part of his affective transparency, as well as his distinctive accountability as a reasoner.

Kirby attributes his communication skills in part to what he calls his "working-class background": "Law students tell me that my reasons are more accessible than others. I think that's partly because of my background, but also because I know the value of the full stop and of the subheading and of white space on a page and of dot-points."[105] Whether or not he is right, for three-and–a-half decades Kirby has long been the pre-eminent communicator within Australia's legal profession. He is a skilled and deliberate user of the media to procure attention for issues that he considers deserving (see Weisbrot, Chapter 24). He sees this as part of the phenomenon of being an opinion-maker in the public spotlight, observing that the High Court, like it or not, is on the "infotainment highway", requiring it to adapt accordingly its communication skills as an institution.[106]

KIRBY THE INTERDISCIPLINARIAN

While at the Australian Law Reform Commission, Kirby evangelised the need for interdisciplinary consultation, observing that Oliver Wendell Holmes Jr, the great United States judge, in 1897 presciently suggested that the constructive lawyer of the future would be the "man of statistics and the master of economics".[107] At the Australian Law Reform Commission under his stewardship this meant a continuing process of challenge for the lawyers to sift and dissect the thoughts of non-lawyers from many different professions – health practitioners, criminologists, economists, computer and communications experts, anthropologists, ethicists and others. A further aspect of this interdisciplinarity was his resort to surveys and questionnaires, including surveys of prisoners, in order to develop law reform proposals.[108] He has carried this over into a number of his judgments, commonly citing psychological and other literature in support of his identification of relevant policies.[109]

105 M Romei and Z Sheftalovich, "A Reasonable Person", *Lawyers Weekly Online* (23 April 2008): http://www.lawyersweekly.com.au/articles/A-reasonable-person_z170691.htm (accessed 16 December 2008).

106 Kirby, n 59, pp 35-36.

107 O W Holmes Jr, "The Path of the Law" (1897) 10 *Harvard Law Review* 457 at 461.

108 See Kirby, n 37, p 64.

109 See, eg, *Osland v The Queen* (1998) 197 CLR 316; *Melbourne v The Queen* (1999) 198 CLR 1; and *Green v The Queen* (1997) 191 CLR 334.

Kirby has played a role on many bodies which are not entirely "legal" and has weaved the fruits of this experience into the perspective he brings to his judgments. For instance, between 1983 and 1986 he was an Executive Member of the Commonwealth Scientific and Industrial Research Organisation (CSIRO) and between 1981 and 1984 he was a member of the Institute of Multicultural Affairs. This, too, provided a platform for his assumption of international roles on the World Health Organisation (WHO), the United Nations Educational Scientific and Cultural Organisation (UNESCO) and the International Labour Organisation (ILO).

Reflecting upon bioethical issues in relation to the ending of life, women's entitlement to abortion, and in-vitro fertilisation, Kirby has repeatedly argued that the development of interdisciplinary machinery is needed to facilitate consultation with experts and the general community in order to assist Parliaments to face up to the confronting developments of our era (see Henaghan, Chapter 17; Freckelton, Chapter 16; Weeramantry, Chapter 21). His argument is that the developments of science and medicine require a broad institutional response to allow democracy to function meaningfully to protect encroachment upon rights and to enable us to draw upon the new technologies in ways which enhance our humanity, rather than detract from it.[110]

KIRBY THE INTERNATIONALIST

Kirby's roles outside Australia and beyond his judicial work have been extensive. In 1996, for instance, he was appointed to the International Bioethics Committee of UNESCO, Paris, a body which, in 2005, generated the *Universal Declaration on Bioethics and Human Rights*[111] (see Freckelton, Chapter 16). In February 1994 he acted as the Independent Chairman of the Constitutional Conference of Malawi.[112] In 1995 he was appointed to the Ethics Committee of the Human Genome Organisation in London, monitoring the largest co-operative scientific project in history (see Henaghan, Chapter 17).[113] He was a Commissioner of the International Commission of Jurists between 1984 and 2000 and its President between 1995 and 1998. In 2000 he was appointed to the

110 See generally, Kirby, n 37, Ch 12.

111 See I Freckelton, "The Universal Declaration on the Human Genome and Human Rights" (2008) 16 *Journal of Law and Medicine* 187.

112 See P Mutharika, "The 1995 Democratic Constitution of Malawi" (1995) 40(2) *Journal of African Law* 205.

113 In 1999 the Human Genome Declaration was adopted by the General Assembly of the United Nations: see N Lenoir, "Universal Declaration on the Human Genome and Human Rights: The First Legal and Ethical Framework at the Global Level" (1999) 30 *Columbia Human Rights Law Review* 537; M L Lee, "The Inadequacies of Absolute Prohibition of Reproductive Cloning" (2004) 11 *Journal of Law and Medicine* 351. See, too, M D Kirby, "Legal Problems: Human Genome Project" (1993) 67 *Australian Law Journal* 894.

Board of Governors of the Kinsey Institute for Research in Sex, Gender and Reproduction at Indiana University in the United States. At the end of 2000, he was elected a Member of the American Law Institute and the next year he was appointed to the Advisory Council to the International Programme of the Institute of Advanced Legal Studies in London. Also in 2001 he was appointed Chair of an Expert Panel of UNAIDS on HIV Testing in United Nations Peacekeeping Operations.[114]

A significant experience for Kirby was his role between 1993 and 1996 as Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia. It was a hands-on responsibility taking him into the country regions of Cambodia including, in 1995, the area where three foreign tourists, including the Australian, David Wilson, were murdered.[115] In his final report he described this role as "one of the greatest professional privileges of my life".[116] As Arbour and Heenan (Chapter 20) have observed, it was something of an epiphany for Kirby, leading him to acknowledge:

> It was in my work as United Nations Special Representative that I threw off any lingering belief that human rights were effectively, and only, about what happened in police stations, polling booths and courthouses. Obviously, these are involved. But for most Cambodians, the urgent questions that they addressed when speaking to me of human rights were issues concerned with the protection of women and girls, including in education; the access of all to drinking water; the provision of basic healthcare; and the removal of landmines. Such fundamental human rights issues cannot be addressed without the establishment and maintenance of institutions of good governance. It is simply not possible.[117]

While Kirby is known for his diplomacy and charm, he did not hold back when expressing concerns during his Cambodian role, in his parting report maintaining that:

> There can be no democratic freedom without the privilege to organise parties and express dissenting views. … It would be a tragedy if Cambodia were to return to a system of government where only one point of view could be given an effective voice. After the genocide and

114 See *Report of the UNAIDS Expert Panel on HIV Testing in United Nations Peacekeeping Operations* (UNAIDS, Bangkok, Thailand, 28-30 November 2001) at [14]: http://data.unaids.org/pub/Report/2001/20011130_peacekeeping_en.pdf (accessed 16 December 2008).

115 See M D Kirby, "Human Rights, the United Nations and Cambodia" (1995) 67(4) *Australian Quarterly* 26.

116 M D Kirby, *Cambodia – A Parting Assessment*, Report (United Nations Commission on Human Rights, 1 April 1996): http://www.lawfoundation.net.au/ljf/app/&id=4E7B7449 8AA7928BCA2571A800006D07 (accessed 11 December 2008).

117 M D Kirby, "Human Rights and Good Governance – Conjoined Twins or Incompatible Strangers?" (Chancellor's Human Rights Lecture 2004, University of Melbourne, 3 November 2004): www.hcourt.gov.au/speeches/kirbyj/kirbyj_3nov04.html (accessed 16 December 2008).

> their great sufferings, the Cambodian people deserve better than this. … It is my duty to call to attention worrying evidence of a reversion to autocracy.[118]

Similarly, he expressed grave concern about "the expulsion from the National Assembly of elected members contrary to my advice, and the derogation from their rights".

In 2000[119] he recounted four particular memories of his time as United Nations Special Representative:

- The mother grieving in a village house near Kampong for the senseless death of her son, killed by the flood of guns into Cambodia, apparently used in senseless anger.
- The villagers resettled under the shadow of Vine Mountain.
- The eyes of a young judge in training at Kampong Cham to whom he spoke candidly about corruption and its insidious effects on the reputation of the judiciary and the rule of law.
- The prisoners peering from inside a darkened cell inside which they spent 23 hours of every day.

As an inspiration to his practice of drawing upon law from outside Australia Kirby has identified a meeting he attended in Bangalore, India, which was convened by Chief Justice Bhagwati.[120] He describes being "converted" to the propriety of drawing upon international human rights instruments to remove any "ambiguity or uncertainty from national constitutions, legislation or common law".[121] In multiple talks and in a series of decisions (see Pitty, Chapter 18), he has evangelised the "Bangalore method", even claiming that it has become "settled doctrine" in the High Court.[122] Whether he is right in this regard is debatable,[123] but if he is, it is largely as a result of his own efforts.

Kirby's internationalism is part of his vision that Australia's *Constitution*, and all Australian legislation, should be interpreted with a view to its speaking "to the people of Australia … It also speaks to the international community as the basic law of the Australian nation which is a member of that community."[124] He is determined to go beyond Australia's parochialism and insularity of past years and draw upon the insights, experiences and wisdom from all parts of the world. This approach remains highly contentious in the law, Australia being slower than many

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118 Kirby, n 117.

119 Kirby, n 31, pp 39-40.

120 M D Kirby, "The Australian Use of International Human Rights Norms: From Bangalore to Balliol – A View from the Antipodes" (1993) 16 *University of New South Wales Law Journal* 363 at 364.

121 M D Kirby, "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1988) 62 *Australian Law Journal* 514 at 532.

122 *Thomas v Mowbray* (2007) 233 CLR 307 at 440-441 [380].

123 See, eg, *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 224-225 [181] per Heydon J.

124 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 658.

other developed western countries to incorporate into its local law its commitment to international instruments. No doubt international law, globalism and humanitarian issues will be areas that Kirby will continue to pursue subsequent to his tenure on the High Court.

KIRBY THE HUMAN RIGHTS ADVOCATE

David Marr[125] has cynically contended that "[l]awyers are shadows falling over other people's lives. They rarely trigger the events which absorb their careers; they arrive on the scene once things have begun, mouth sentiments that are not their own, and then disappear to the next case." Too often this may be accurate, but it assuredly has not been the case with Kirby, whose passions and authenticity in terms of his beliefs about the potential for law to work for good have been integral to his approach to his life as a decision-maker and opinion-generator.

For instance, Kirby has spoken and written memorably of the Holocaust and the lessons we must learn from it.[126] The realisation of the horror of the Nazis' conduct has been a strong influence: "This happened when I was a boy, living safe in far away sunny Australia. It happened in my lifetime."[127] As he has put it:

> There will always be memories of the Holocaust. Even when every distorted mind that conceived and executed the oppression are dead, there will be memories. They are written into the consciousness of humanity forever. Human beings everywhere will continue to recall the pitch black moments of human history that come together in the Holocaust.[128]

The challenge, as Kirby conceptualises it, is to heed danger signs, even when they are subtle, to learn lessons from the 20th century and to be continuously vigilant to maintain the rights of the vulnerable:

> It did not arrive overnight. First, there were the laws. Then the yellow stars. Then banishment to the back of the tram. Then having to walk. Then closure of the businesses. Then consignment to the ghetto. Then the brutes and cries "*Juden raus!*" Then the selective deportations. Then the "final solution". It all happened gradually. It crept up insidiously. If it could happen in one of the most civilised countries on earth, it could happen anywhere. Even in Australia. We have been warned. We must heed the warning. Every diminution of freedom takes us in a wrong direction when it departs from fundamental human rights. Every act

125 D Marr, *Barwick* (Allen & Unwin, Sydney, 2005) p 300.

126 The suggestion from the Hon Professor George Hampel QC that I take note of this aspect of Kirby's thinking is acknowledged.

127 M D Kirby (Speech, Launch of M Elliott-Kleerjoper, H Gershoni and F Kalman, *Heirloom, The Second Anthology of Australian Child Survivors of the Holocaust*, Melbourne, 2 April 2006): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_2apr06.pdf (accessed 16 December 2008).

128 Kirby, n 127.

> of discrimination by our Parliaments and governments dishonours our nation.[129]

A fundamental attribute of Kirby has consistently been his evangelism (and that term is used advisedly) of the importance of enhancing and protecting human rights. He commenced his judgment in *Gill v Walton*[130] with the observation: "Typically, basic rights matter most when they seem difficult to accord."

Kirby's work in relation to human rights has comprehended all aspects of his career in the law. Sir Ronald Wilson, presenting him with an Australian Human Rights Medal in 1991, summed this up in describing Kirby as:

> an extremely warm and caring person who has devoted the major part of his life, both on a professional and private level, to the promotion, recognition and observance of individual rights. His effective advocacy and his integrity have been responsible for influencing many people both here in Australia and on the international scene.[131]

In 1998 Kirby became the Laureate of the UNESCO Prize for Human Rights Education, having been nominated by the Liberal Government of the day. He won the prize in the year of the 50th anniversary of the *Universal Declaration of Human Rights*. The Foreign Minister, Alexander Downer, stated that the government had nominated Kirby in recognition of his contribution to human rights education.[132] Similarly, in 2008 the Special Minister of State, John Faulkner, in awarding to him Australia's first Privacy Medal, said Justice Kirby had "not only grappled with the thorny issues, but communicated those challenges and opportunities to a wider audience", making an outstanding contribution to the recognition of privacy rights and the development of privacy law.[133]

Kirby's view of human rights is distinctive in its modernity. While he acknowledges that many threats to human rights are of essentially the same nature as those the pathfinding work of the *Universal Declaration of Human Rights* in 1948 sought to prevent, namely official oppression and neglect, he has identified new threats arising from emerging and evolving technologies – for instance, threats arising from the internet regarding the

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129 Kirby, n 127. See also I Freckelton, "Bioethics, Biopolitics and Medical Regulation: Learning the Lessons of the Nazi Doctors" (2009) 16 *Journal of Law and Medicine* 555.

130 (1991) 25 NSWLR 190 at 204.

131 Mary Robinson, High Commissioner for the Office of the United Nations Commissioner for Human Rights, similarly observed: "Michael Kirby's voice is one which richly deserves to be heard because of his deep knowledge of human rights issues, his leadership over many years in such bodies as the International Commission of Jurists, and his recognition of how international standards can help protect human rights at the national level": Kirby (2000), n 31.

132 See Australian Human Rights Commission: http://www.hreoc.gov.au/about/hr_awards/1991.html (accessed 16 December 2008).

133 K Deane, "Kirby Honoured Over Privacy Laws", *The Australian* (28 August 2008): http://www.australianit.news.com.au/story/0,24897,24254159-15306,00.html (accessed 16 December 2008).

individual; the impact of genetic research on human diversity; the impact of nuclear physics on global security; and the consequences of burning fossil fuels for global warming.[134] He has summed up what he perceives as a challenge for our species: "Scientists and technologists rush ahead. The ethicists ponder. The religious sermonise. The lawyers scribble. Let us hope that the minds of human beings, which are unravelling the genome, are wise enough to face and answer the quandaries that come in its train."[135] An outcome of this broad perspective on human rights and technology has found manifestation in the *Universal Declaration on Human Bioethics and Human Rights*, in which he played a significant role (see Freckelton, Chapter 16).

Kirby is acutely conscious of the transformations being wrought by the changing environment. He has argued that:

> [w]e are moving to the point in the world where more and more law will be effectively expressed, not in terms of statutes, solemnly enacted by the Parliament and sent to the Governor-General for the royal assent – but in the technology itself. What Lessig[136] calls, "Code". Embedded in the Code, on a multinational basis and effective across borders in a way that could not have been dreamt of in the past, will be effective regulation, expressed in the technology itself.[137]

His point is that we have to face the reality of the limitations of what any country can accomplish in controlling the use of the technology – and specifically the use of the internet. This is all part of the inevitable liberation of countries like Australia from legal parochialism and part of what needs to be the impetus toward participation in global initiatives.

Perhaps Kirby's clearest enunciation of his vision of human rights under criminal law was in his dissenting judgment in *Tofilau*:

> [U]nder our Constitution, courts exist to protect the legal rights of the probably guilty as well as of the possibly innocent. They exist to defend the unpopular as well as the acclaimed. We say this in the law many times in our ceremonies. But it only really matters when we are put to the test as judges to apply our rhetoric in a live case affecting real prisoners facing long sentences. If the community does not understand the importance of the rule of law and of defending the accusatorial trial and time-honoured rights against self-incrimination, it is the duty

134 See M D Kirby, "Genomics: The World's Governments Begin to Respond" (Speech, Functional Genomics Meeting, University of Melbourne, 16 March 1998): http://www.lawfoundation.net.au/ljf/app/EB2B3DF8DB8BE752CA2571A7001E773A.html (accessed 16 December 2008).

135 Kirby, n 134.

136 L Lessig, *Code and Other Laws of Cyberspace* (Basic Books, New York, 1999).

137 M D Kirby, "Four Parables and a Reflection on Regulating the Net" (Speech, Internet Industry Association Annual Dinner, Sydney, 21 February 2008): http://www.iia.net.au/index.php?option=com_content&task=view&id=622&Itemid=32 (accessed 16 December 2008).

> of judges and lawyers to explain how these principles transcend even unpopular outcomes in particular cases.[138]

However, there are times when Kirby's reasoning becomes strained – often when he appears to be attempting to reach a predetermined objective. A sign of this is when he takes refuge in reasoning that claims as its justification diffuse and nebulous sources such as common sense, common experience, or intuition. This has prompted criticism by a number in this volume (see, for example, Pengilley, Chapter 33; Mendelson, Chapter 32; Gava, Chapter 7; Churches, Chapter 8). It tends to happen when he feels either unconstrained by a pre-existing rule, precedent and legislation, or is particularly troubled by an identified injustice. It also tends to occur when he has no more by way of authority than a subjective concern to provide redress where otherwise it would not exist.

KIRBY THE CIVIL LIBERTARIAN

Kirby's roots in civil libertarianism stretch back to the formation of the New South Wales Council for Civil Liberties in 1964-1965.[139] As a barrister,[140] he took part in a number of cases that marked the early days of the Council, including the Flock Inquest into the death of a young man shot dead by the police[141] and *Crowe v Graham*,[142] a case appealed to the High Court involving publication by *Censor* and *Obscenity* of allegedly indecent material from the 18th century novel, *Fanny Hill* and a column, described as "*Playboy*'s Party Jokes". From Kirby's point of view, civil liberties organisations have fought "the good fight to keep our society a pluralistic, tolerant one in which the law made by the majority is upheld and human dignity of minorities are respected and protected".[143]

Between 1995 and 1998 Kirby was the President of the International Commission of Jurists[144] in the course of which he particularly championed the independence of judges and courts,[145] an issue to which he has continued to devote energy.

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138 *Tofilau v The Queen* (2007) 231 CLR 396 at 461-462 [206].

139 See M D Kirby, "Council for Civil Liberties – Early Days and Days Ahead" (1996) 12(1) *Liberty* 10.

140 See Kirby, n 12.

141 See R Harding, *Police Killings in Australia* (Penguin, Sydney, 1970).

142 (1968) 121 CLR 375.

143 Kirby (2000), n 31, p 90.

144 See http://www.icj.org/ (accessed 4 December 2008). Sir Owen Dixon has had a lengthy involvement with the ICJ – between 1958 and 1976.

145 See M D Kirby, "Independence of the Legal Profession: Global and Regional Challenges" (Speech, Law Council of Australia, Presidents of Law Associations in Asia Conference, Broadbeach, Queensland, 20 March 2005): http://www.icj.org/news.php3?id_article=3785&lang=en (accessed 16 December 2008).

A long-time opponent of a national Bill of Rights for Australia, around 1995 he changed his position, concluding that:

- the adoption of such a constitutional reform would legitimise moves that had already occurred to some extent in the courts, but without the specific endorsement of the Australian people;
- legislators had consistently failed to attend to the controversial issues of basic rights: "The gaps in their attention should be filled by the courts, deriving a fresh source of legitimacy and authority from a Bill of Rights adopted by the people of Australia";
- adoption of a Bill of Rights would enable and promote civic education in the fundamental bases upon which Australians live together; and
- acceptance of a Bill of Rights, limiting the powers of Parliaments, would reflect the modern understanding of democracy in Australia.[146]

In 2008[147] he expressed cautious support for the charter model of a Bill of Rights, based on the *Human Rights Act 1988* (UK), the *Charter of Human Rights and Responsibilities 2006* (Vic) and the *Human Rights Act 2004* (ACT). Emphasising that such an approach does not involve providing judges with a power to strike down laws found to be in breach of a charter of rights nor to declare them unconstitutional, and that the most that judges can do under such laws is to attempt (so far as they can) to interpret a challenged law as closely as possible to conform to the fundamental rights, he has observed: "Giving little people access to the courts and a chance to stimulate the lawmaking process in Parliament seems, on the face of things, entirely compatible with our democratic system. Only those intolerant of the initiatives of vulnerable individuals and groups would be dismissive of such a modest proposal for reform."[148]

KIRBY THE EDUCATOR

Kirby's supreme ability to explain the complex and the technical in an accessible and interesting way have made him a memorable teacher. Other judicial minds which are less transparent than his may communicate their ideas in today's intellectual marketplace, but they tend to leave little by way of a legacy for tomorrow. Over a lengthy period, Kirby has managed the unusual fusion of scholarly rigour and density with

146 M D Kirby, "A Bill of Rights for Australia: What Role Should the Courts Play" (Speech, Constitutional Centenary Foundation (NSW Branch), 31 October 1995): http://www.lawfoundation.net.au/ljf/app/AFECBDC4536286FCCA2571A80017A79A.html (accessed 12 December 2008).

147 M D Kirby, "The National Debate Around a Charter of Human Rights and Responsibilities: Answering Some of the Critics" (Speech, Law Institute of Victoria, Melbourne, 21 August 2008): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_21aug08.pdf (accessed 16 December 2008).

148 Kirby, n 58.

accessibility and comprehensibility, as a result of which his extrajudicial work is regularly used in teaching law students and continues to be widely cited. Morgan has made the point that, like Denning and Murphy, Kirby has been a godsend for legal academics because his judgments, as well as his extrajudicial speeches and publications, are such a fine stimulant to student debate about issues of legal principle.[149]

Kirby has had a long association with tertiary institutions and has frequently expressed a strong commitment to innovative and engaging legal education. This started early. He was a Fellow of the University of Sydney Senate in the 1960s, but later was Deputy Chancellor of the University of Newcastle between 1977 and 1983, and Chancellor of Macquarie University between 1984 and 1993.

However, there has been another aspect to "Kirby the Educator". It has been what he has described as his "self-appointed mantle of the educator of the legal profession"[150] in respect of a number of issues, including the legal issues posed by new biotechnologies, such as advances in genetics, the scourge of HIV/AIDS and the need for legal structures to respond in a humane and informed way to such technological challenges.

KIRBY THE MONARCHIST

Following in the footsteps of Sir Harry Gibbs,[151] Kirby is a constitutional monarchist.[152] He drafted the charter of the Australians for Constitutional Monarchy[153] and is alleged to have stated: "The freest countries are constitutional monarchies. I'm a rational republican. … England is a crowned republic. A 'vanished' head of state is a clever idea."[154] Kirby defends the monarchy as a tempering force against unhealthy nationalism.[155] However, although he concedes a level of affection for the Royal family, his endorsement of them is not uncritical and unqualified:

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149 Morgan, n 35.

150 See M D Kirby, "Health, Law and Ethics" (Inaugural Kirby Lecture, First Annual Conference of the Australian Institute of Health, Law and Ethics, Canberra, 15 November 1996): (1997) 5 *Journal of Law and Medicine* 31.

151 M D Kirby, "Tribute to the Rt Hon Sir Harry Gibbs" (Speech, University of Queensland, TC Beirne School of Law, 10 October 2005): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_10oct05.pdf (accessed 16 December 2008).

152 See, eg, M D Kirby, "Constitutional Monarchy the Radical Position" in K Healey (ed), *Towards a Republic* (The Spinney Press, Wentworth Falls, 1993).

153 See D Flint, "Nepal Faces a Bleak Future", Australians for Constitutional Monarchy: http://www.norepublic.com.au/index.php?option=com_content&task=view&id=1411&Itemid=4 (accessed 12 December 2008); L Waddy, "Memoirs of a Monarchist: Now a Trappist Judge": http://www.samuelgriffith.org.au/papers/html/volume14/v14chap8.html (accessed 12 December 2008).

154 R Ackland, "Opinion", *Sydney Morning Herald* (11 April 2008).

155 D Bennett, *Multicultural States* (Routledge, London, 1998) p 238.

> I have a slightly anarchistic view about the Crown. I think it's a good system because the Crown is physically absent. We get on with our business and it means we are spared the stretch limo from the president and the first lady and all of that sort of stuff. So it's not a system you would invent. But having got it, you've got to be very careful that you don't replace it with something that is worse.[156]

He has expressed concern that a President of Australia would be less restrained in the use of the reserve power than the Governor-General has been.[157] Significantly, his position in relation to the monarchy alienated him from many in the Labor Party and still does – former Attorney-General Michael Lavarch in 2008[158] conceded that this impacted on consideration about Kirby's appointment to the High Court.

Also in respect of the Crown, Kirby has strongly and repeatedly expressed his view that British subjects who migrated to Australia prior to 1987 and were treated, to all intents and purposes, as though they were Australian citizens, should not later be regarded as "aliens" and subject to legislation enacted under s 51(xix) of the *Constitution*. Soon after joining the High Court, Kirby J outlined his view of the rightful position of non-citizen British subjects and held that the introduction of statutory citizenship did not justify the retrospective imposition on a significant class of people in Australia of the constitutional status of "alien".[159] He regarded it as significant that they had long been absorbed into the people of the Commonwealth and been accorded full civil and political rights and duties. In turn, this has drawn criticism that Kirby engaged in positive discrimination in favour of British citizens without sufficient cause: "his defence of the 'uniquely privileged' position of British-subject migrants to Australia might seem to be out of keeping with notions of citizenship emphasising equality between citizens" (see Rubenstein and Maguire, Chapter 3).

KIRBY THE BELIEVER

Kirby is a passionate Anglican.[160] He has publicly spoken of his religious upbringing, "which was a belief in the religion of Jesus which is founded

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156 Kirby, n 40.

157 See the analysis by P Boyce, *The Queen's Other Realms* (Federation Press, Sydney, 2008) p 218.

158 See Pelly, n 34.

159 *Re Patterson, Ex parte Taylor* (2001) 207 CLR 391; see also *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28; cf *Re Minister for Immigration and Multicultural Affairs; Ex parte Te; Re Minister for Immigration and Multicultural Affairs; Ex parte Dang* (2002) 212 CLR 162.

160 See St James Institute, "Conversation Between Justice Michael Kirby and David Marr" (Supreme Court of New South Wales, Sydney, 9 April 2008): http://www.sjks.org.au/images/stories/sji/st_james_institute_-_conversation_transcript_april_2008_2.pdf (accessed 12 December 2008).

on love and reconciliation and forgiveness".[161] He has written of his early introduction to faith:[162]

> When did you first meet God? For me, it was in kindergarten: Mrs Church's school attached to the Anglican Church of St Andrew at Strathfield in Sydney. In between the plasticine and interminable concerts, I was introduced to God. Generally speaking, we have been on friendly terms ever since. In the coloured illustrations Mrs Church showed us, later confirmed in the Arthur Mee's Children's Encyclopaedia, God was portrayed as a Middle Eastern potentate with a beard and a turban. Eventually, when I grew old enough, my parents gave me a Bible which I still have. Many a judicial oath of office I have taken on it which I certainly did not foresee back in the 1940s. I took this Bible (the King James version naturally) to Sunday School at St Andrew's. At Sunday School I learned of Jesus and his love for us all. It was a wonderful discovery. Since then, I have never felt parted from that love.

In one of his most heartfelt addresses, in 1998, he spoke of his great affection for the *Book of Common Prayer*, describing it as a "true companion through life"[163] and referring to its familiarity of language as "a re-assurance that, amongst life's chaos, there is a certain order". To Kirby, the strength of the Anglican Church is that it is a "place of many mansions". In the Church, as in most other forums, he has nailed his colours to the masthead, long ago joining the Movement for the Ordination of Women and, as a result, having to disqualify himself from sitting on a case that challenged the lawfulness of such ordinations. Much of the optimism and essence of Kirby was summed up in his description in 1998 of the Anglican Church:

> [I]t will move, as well, with the times to welcome new ideas comfortable to the tongues and thoughts of new people and new generations. And they will not be turned away but welcomed in a changing Church. That tends to be the genius of English-speaking people in their civil institutions. It tends to be the genius of the Anglican church in matters religious and liturgical. And that is how most of us like it to be out of our respect for the diversity of Australian people. Diversity is the badge of freedom.[164]

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161 Kirby, n 40; see also P Gregory, "All We Need is Love, Concludes Retiring Judge", *The Age* (17 December 2008) p 5.

162 M D Kirby, "Even in the Darkest Days, My Hotline to God was Never Disconnected", *Sydney Morning Herald* (31 March 2004): http://www.smh.com.au/articles/2004/03/30/1080544483829.html (accessed 5 December 2008).

163 M D Kirby, "Journeying Through Life with the Book of Common Prayer" (Address, Prayer Book Society, Church of St Mary the Virgin, 7 November 1998): http://www.lawfoundation.net.au/ljf/app/&id=/13BE094CFEBA10ECCA2571A700041E3F (accessed 12 December 2008).

164 Kirby, n 163.

KIRBY THE IDEALIST

Perhaps an insight into the mind of Kirby can be garnered from identifying those whom he most admires: Thomas More, Charles I, Andrew Inglis Clark, the constitutional lawyer, Julius Stone, the Sydney jurisprude, Justice Cardozo of the United States Supreme Court, Lord Denning and Lord Scarman of the United Kingdom courts, Jonathan Mann, the public health lawyer, Rodney Croome, the Tasmanian activist, Lionel Murphy, a predecessor on the High Court, and the Dalai Lama. Kirby embraces optimism (see Pitty, Chapter 18) but with a realistic acknowledgment that history will remember the 20th century as a "time of terrible wars and unprecedented suffering. Of grotesque genocide and the Holocaust. Of astonishing technology often warped to the purposes of war. Of seemingly irrepressible nationalism and racial pride."[165] However, his argument is one of hope:

> We are on the high path towards human progress and enlightenment. Our journey cannot be reversed. We are guided by the wellsprings of our human nature. It is our human nature which compels us toward peace. Our human nature urges us on to economic progress, in balanced harmony with our environment. And it is our human nature that insists upon respect for the essential dignity of other human beings, sharing with others the privilege of self-determination.[166]

His assertion is that to be human "is to feel pain of brothers and sisters everywhere. Feeling that pain we must do whatever we can to build a better world. Some will call this misty-eyed dreaming. The Dalai Lama declares that it is our privilege as free spiritual beings. He is right."[167] He has argued on many occasions that global dialogue is forging a "paradigm shift" that undermines small-minded parochialism and which creates the potential for trans-national consensus on issues such as human rights. Part of what he discerns as a fundamental shift in Australian society is the change in attitudes toward sexuality and a preparedness to embrace unparalleled levels of inclusiveness: "The game of shame which oppresses homosexual Australians is now crumbling."[168] In 2002 he felt able to proclaim: "Ours is the world of love, questing to find the common links that bind all people. In our world, everyone can find their place, where their human rights and human dignity will be upheld."[169]

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165 Kirby (2000), n 31, p xxiii.

166 Kirby (2000), n 31, p 13.

167 Kirby (2000), n 31, p 13.

168 M D Kirby, "Don Dunstan's Real Legacy" (Speech, Don Dunstan Foundation NSW Launch, Sydney Opera House, 28 July 1999): http://www.dunstan.org.au/docs/JusticeKirbySpeech_1999.pdf (accessed 6 December 2008).

169 M D Kirby, "Courage" (Speech, Launch of the "Gay Games", Sydney, 5 November 2002): http://www.smh.com.au/cgi-bin/common/popupPrintArticle.pl?path=/articles/2002/11/05/1036308310233.html (accessed 6 December 2008). See also Gregory, n 161.

Kirby's warmth, caring and empathy are qualities that have been remarked upon by many. It is clear that, although he always acknowledges flaws and failings in Lionel Murphy (see Roberts and Williams, Chapter 5), it was the generosity of spirit and the humanity of Murphy that he held in highest esteem, his capacity to judge in the key of humanity: "Murphy's spirit was one which demonstrated a quality of love for fellow human beings, an obviously genuine concern for the under-privileged and disadvantaged, and a determination to turn his high legal training into progressive action."[170]

His very personal view is best summed up in his own words spoken at an exhibition of the works of Mary Alice Evatt: "In the end, it is in the love of others and in goodness and kindness and beauty that most people live on."[171]

KIRBY THE JUDGE

Kirby has had few role models but has been inspired by a number of judges. Speaking ostensibly of Lord Denning, Kirby wrote in 1999:

> [E]very judge must remember that the judicial oath binds him or her to strive for justice according to law. According to law, which must be adapted and developed by the judges themselves. But with a sense of justice for the individual as the abiding moral force of the judicial vocation.[172]

This probably captures as well as anything else his approach to judging.

Kirby's detractors have been keen to label him "an activist judge", a term Kirby has observed as tantamount to "treason against the Constitution".[173] On occasions, the grievance is that law is being made by unelected judges and therefore is undemocratic.[174] Probably the best known concern in regard to "judicial activism" is the possible politicisation of the judiciary and consequential disrespect for the rule of

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170 M D Kirby, Book Review of J Hocking, *Lionel Murphy: A Political Biography* (16 November 1997):http://www.lawfoundation.net.au/ljf/app/B55C1E841765ADBACA2571A700214917.html (accessed 12 December 2008).

171 M D Kirby, "Long Suffering Spouses" (Speech, Evatt Foundation, Opening of Mary Alice Exhibition): http://evatt.labor.net.au/publications/papers/94.html (accessed 4 December 2008).

172 M D Kirby, "Denning: Bold Spirit of the Law", *Australian Financial Review* (19 March 1999): http://www.lawfoundation.net.au/ljf/app/&id=A87118EDA4D534B9CA2571A40018C296 (accessed 12 December 2008).

173 M D Kirby, "Judicial Activism: Authority, Principle and Policy in the Judicial Method" (First Hamlyn Lecture, 55th Series, University of Exeter, 19 November 2003): http://www.smh.com.au/articles/2003/ 11/19/1069027176126.html (accessed 15 December 2008).

174 See, for instance, A Bolt, "Judicial Puppeteer", *Herald Sun* (14 June 2006). See also the discussion by B Dickson, *Judicial Activism in Common Law Courts* (Oxford University Press, Oxford, 2008).

law. This concern was enunciated by Heydon J[175] in 2003 immediately before his elevation to the High Court:

> The more the courts freely change the law, the more the public will come to view their function as political; the more they would rightly be open to vigorous and direct public attack on political grounds; and the greater will be the demand for public hearings into the politics of judicial candidates before appointment and greater control over judicial behaviour after appointment. … All would multiply the threats to the rule of law which judicial activism has created.

Frequently the term is not defined but it is counterpointed against Sir Owen Dixon's unshakeable allegiance to "legalism": "There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism."[176] Sir Owen confidently and proudly remarked that the court over which he presided was, by some, "thought to be excessively legalistic". He declared that he would be "sorry to think that it is anything else".[177]

Kirby's response in his Hamlyn Lectures was characteristically straightforward. He categorised today's "strict legalists" as falling into identifiable categories:

- "the merely nostalgic", like those who pine for the return of a faded empire;
- "the fine jurists searching for a meaning to the law that is larger and more objective than their own perceived frailties";
- "the politicians or polemicists of differing stripes who know nothing of the common law and its marvellous creativity" – these he controversially described as "bully boys (and girls)", "contemptuous of fundamental human rights and jealous of any source of power apart from their own"; and
- those representative of "powerful interests who hate it when judges express the law in terms of legal principles to protect minorities, the weak and the vulnerable".[178]

His argument, put on multiple occasions over the period of his tenure as a High Court judge, is that society has but slowly and reluctantly come to realise the "fairytale" of the declaratory theory of the judicial

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175 J D Heydon, "Judicial Activism and the Death of the Rule of Law" (2003) 23 *Australian Bar Review* 1. Compare P N Bhagwati, "The Role of the Judiciary in the Democratic Process: Balancing Activism and Judicial Restraint" (1992) 18 *Commonwealth Law Bulletin* 1262; M Coper, "Concern About Judicial Method" (2006) 30 *Melbourne University Law Review* 554.

176 See (1952) 85 CLR xi at xiv.

177 See P Ayres, *Owen Dixon* (The Miegunyah Press, Melbourne, 2003).

178 Kirby, n 173.

function (that judges do not make the law, they just declare it).[179] For him there is no clear divide marking off the limits of acceptable judicial creativity and activism.[180] It follows, therefore, that for Kirby some degree of judicial activism is inevitable in the judgments of all judges (see Malbon, Chapter 23).

What is perhaps more important is an assessment of whether Kirby J has conformed to his own rhetoric or whether he has essentially identified the position he has wanted to reach and then distorted statutory provisions or authority to attain that objective. This is a subject which has occupied the energies of a number of our contributors. The critical lens applied by a book, such as this, which reviews three-and-a-half decades of a lawyer's life, looking for consistencies and inconsistencies in positions taken and judicial and extrajudicial reasoning, is a dauntingly demanding test. Few have been responsible for as many judgments as Kirby J. All would be found wanting to some degree in terms of total conformity of outcome with articulated ideological stance.

In this volume Lacey (Chapter 2) has observed that, in most contexts, Kirby has been orthodox in his reasoning processes. In the face of clear legislative intent or binding authority, he submits and decides a case accordingly. While he has been more inclined than most of his colleagues to adopt a rights-protective stance in interpreting conferral of power and to exploit holes to provide relief to those adversely affected by government action and other exercises of power, this is never at the expense of parliamentary supremacy. Freckelton (Chapter 16) has questioned whether Kirby's orthodoxy was quite so evident in his controversial dissent in Australia's "right to life" cases: *Harriton v Stephens*[181] and *Waller v James*.[182] Gava (Chapter 7) has criticised the preparedness of Kirby in some instances to engage in "end justifying the means" reasoning and what he has termed "agenda judging",[183] on occasions using a case to broadcast a message about what he regards as unacceptable conduct. Pengilley (Chapter 33) has made something of the same point in relation to trade practices law. Mendelson (Chapter 32) has questioned Kirby J's reliance on "common sense" as a criterion for determining causation in tort, while Churches (Chapter 8) has contended that Kirby J has been

179 See Lord Reid, "The Judge as Law Maker" (1972) 12 *Journal of the Society of Public Teachers of Law* 22. The "declaratory theory" of law was also repudiated by Sir Anthony Mason: see A Mason, "The Role of the Judge at the Turn of the Century" in G Liddell (ed), *The Sir Anthony Mason Papers* (The Federation Press, Sydney, 2007) p 55; A Mason, "Legislative and Judicial Law-making: Can We Locate an Identifiable Boundary" (2003) 24(1) *Adelaide Law Review* 15.

180 See Kirby (2000), n 31, p 109.

181 (2006) 226 CLR 52.

182 (2006) 226 CLR 136.

183 Identifying judgments of Kirby J in *Garcia v National Australia Bank* (1998) 194 CLR 395; *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51.

prepared to rationalise from a fixed starting point in a number of his judgments.

There are some distinctive characteristics to Kirby's decision-making. He is ideologically committed to the giving of thorough and transparent reasons. This applies to his appellate decisions in respect of administrative and inferior court decision-makers and he has applied the same obligation in terms of accountability to his own decision-making. However, his methodology has been orthodox – searching for relevant authority, identifying principle, making findings of fact and applying the law, as identified, to the facts as found. What has been different about Kirby's decision-making has been, for the most part, the transparency of articulation of his reasoning processes (with some exceptions, as identified above) and the catholicity and thoroughness of his international search for legal principles. The advantages of this for courts outside Australia are described by Robertson in the introductory pages to this book.

Rebelling against what he regards as legalist parochialism, Kirby J has consistently sought authorities internationally so as to identify global wisdom and trends which could potentially enhance the relevance, quality and contemporaneity of Australian law. His search has taken him to far-flung jurisdictions and to prodigious numbers of writings in law reviews, legal and other literature and studies identified by him as relevant. The extent to which he has drawn upon the contributions from others has distinguished his decisions from others and has been a catalyst for the end of the "Dead Lawyers Society" – a convention that only deceased legal scholars should be cited in judgments. It has also been one of the characteristics that has attracted the most strident criticism – Heydon J, for instance, shortly before his appointment to the High Court, unmistakably targeted Kirby when he lambasted judges with "the delusion of immortality" in "its most pathetic form" and whose judgments "seem more designed to highlight supposed judicial learning than to advance the reasoning in any particular direction relevant to the issues between the parties".[184]

KIRBY ON JUDGING

The three-and-half decades during which Kirby has occupied the Bench have seen major changes in Australia's judiciary. A phenomenon that has particularly troubled Kirby is encroachment on judicial independence. In this regard he has been outspoken in voicing concern about the propensity of politicians to appoint acting judges and magistrates.[185]

184 D Heydon, "Judicial Activism and the Death of the Rule of Law" (Jan-Feb 2003) 67 *Quadrant* 9 at 14.

185 See his comments in E M Campbell and H P Lee (eds), *The Australian Judiciary* (Cambridge University Press, Melbourne, 2001) p 86.

Also during his time as a judge, the judiciary has commenced to open up in important ways to a broader range of appointees, something that Kirby has welcomed, commenting from his own experience on the High Court that "[t]he presence of Gaudron J saved the Court from excessive tendencies to blokeyness and clubiness. In significant respects, a woman's experience of society, in the law and in the legal profession, is different from that of a man."[186] Undoubtedly, he would derive satisfaction that his replacement on the High Court Bench is another woman, Justice Virginia Bell, described by Attorney-General McClelland[187] as a "judge with a social conscience". Her appointment brings the complement of women on the 2009 High Court to an unparalleled three out of seven.

During his tenure, too, other judges have begun to accept the need for judicial education and training.[188] Kirby has been instrumental in this. Armytage[189] has chronicled that in Australia, Kirby was the first to call for a formal approach to judicial education – this was while he was still at the Australian Law Reform Commission. Subsequently, he has argued that one of the advantages of such training is its potential to "open the minds of judges to new thoughts and experiences. Particularly, it helps them to understand perspectives of the law and experience of minorities."[190]

Along with the growth of judicial education and training has come a new genre of writing, not without pre-existing roots, many of them important, but new in its extent – that of reflective judges writing about judging skills, techniques, ethics, accountability[191] and stresses.[192] Justice

186 M D Kirby, "Twelve Years on the High Court Bench – Continuity and Change" (Speech, Southern Cross University, Lismore, 30 March 2007): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_30mar07.pdf (accessed 1 September 2008). See, too, M D Kirby, "Women in the Law – What Next?" (2002) 16 *Australian Feminist Law Journal* 148.

187 R McClelland, "New Justice of the High Court" (Media Release, 15 December 2008): http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases_2008_FourthQuarter_15December2008-NewJusticeoftheHighCourt (accessed 15 December 2008).

188 In the same way as ongoing legal education for solicitors and barristers has become the norm (albeit only in latter years): see M D Kirby, "Ten Parables for Freshly-Minted Lawyers" (2006) 33(1) *University of Western Australia Law Review* 22.

189 L Armytage, "The Need for Continuing Judicial Education" (1993) 16(2) *University of New South Wales Law Journal* 536.

190 M D Kirby, "Strengthening the Judicial Role in the Protection of Human Rights – An Action Plan" (Speech, Inter-Regional Conference on Justice Systems and Human Rights, Brasilia, 20 September 2006): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_20sep06.pdf (accessed 3 December 2008).

191 See, eg, M D Kirby, "Judicial Accountability" (Speech, Commonwealth Legal Education Association, University of Queensland, 6 October 2001): http://www.iipe.org/conference2002/papers/Kirby.pdf (accessed 8 December 2008).

192 Kirby has written about the need for work/life balance: see M D Kirby "Judicial Stress" (1995) 13 *Australian Bar Review* 101; M D Kirby, "Judicial Stress – An Update" (1997) 71 *Australian Law Journal* 774; M D Kirby, "Judicial Stress – A Reply" (1997) 71 *Australian Law Journal* 791. For an example of a less than enthusiastic response to the Kirby analysis of judicial stress, see J B Thomas, "Get Up Off the Ground" (1997) 71 *Australian Law Journal* 785.

Kirby has been at the forefront and in this regard has left a significant legacy both for those who will follow him to the judicial Bench and those who study the processes and rationales of judicial decision-making.

Again, though, it is important to acknowledge the entrenched opposition from influential quarters that his writing about judges and judging has prompted at various times. Only by such acknowledgment can the iconoclastic contribution made by Kirby be put into historical perspective. An example in this regard was when Kirby delivered his Boyer Lectures on the judiciary in late 1983. Justice Peter Connolly of the Queensland Supreme Court summed up the resentment of some toward the judicial upstart prepared to pontificate on the judiciary: the lectures were "shallow, superficial, trendy and ungracious. … [T]o the author of the Boyer lectures the judges of this country are indeed diligent dolts". Kirby stood his ground, stating that criticism of the lectures was "misleading, personal, over-simplistic, superficial, based on out-of-date information, parochial and humourless".[193]

Candour is a thread often to be found in Kirby's writing about the judiciary. He has argued that "[h]onesty, including intellectual honesty, is an absolute pre-requisite of the judicial function. It would be a comfortable response to recent controversies in Australia to rush back to Aladdin's cave, bar the door, and resume the fairytale. But it is not possible. Nor is it desirable."[194] Gava (Chapter 7)[195] has argued that transparency of the reasoning process and evenhandedness of reasoning have constituted hallmarks of Kirby J's judging.

Some of Kirby's writing about judging has been black letter work. For instance, he has reviewed the operation and justifications for the doctrine of precedent.[196] He has also written about judgment-writing and the giving of appellate reasons,[197] including ex tempore judgments.[198] He has also addressed subjects not easily acknowledged by lawyers keen not to show their vulnerabilities – such as the causes, nature and toll of stress upon judges, as well as measures which can be taken to alleviate such pressures.[199] It is likely that Kirby will exercise a highly influential role through his writing, both published and yet

193 See Thomson, n 14, pp 157-158.

194 M D Kirby, "Courts and Policy: The Exciting Australian Scene" (1993) 19 *Commonwealth Law Bulletin* 1794 at 1809.

195 See also J Gava, "The Perils of Judicial Activism: The Contracts Jurisprudence of Justice Michael Kirby" (1999) 15 *Journal of Contract Law* 156.

196 See, eg, M D Kirby, "Precedent Law, Practice and Trends in Australia" (2007) 28 *Australian Bar Review* 243.

197 See, eg, M D Kirby, "Appellate Reasons" in G Blank and H Selby (eds), *Appellate Practice* (The Federation Press, Sydney, 2008); M D Kirby, "Ten Rules of Appellate Advocacy" (1995) 69 *Australian Law Journal* 964.

198 See, eg, M D Kirby, "Ex Tempore Reasons" (1992) 9 *Australian Bar Review* 91.

199 See, eg, M D Kirby, "Judicial Stress" (Speech, Judicial Commission of New South Wales, 2 June 1995): http://www.lawfoundation.net.au/ljf/app/&id=E812A4B4C60E3A26CA2571A8002344A5 (accessed 16 December 2008).

to be penned, in relation to building both a bridge between Bench and Bar and also by communicating to the general population in a demystifying way how the business of judging is transacted in the trial and appellate courts.

KIRBY THE "GREAT DISSENTER"

The phenomenon of disagreement amongst appellate judges is complex. Most judges are loath to dissent other than occasionally: "Not only is it a bother and frays collegiality, and usually has no effect on the law, but it also tends to magnify the significance of the majority decision."[200] These considerations generate "dissent aversion" in many judges.

This is not a mindset which afflicted Kirby J. On many occasions he has been in dissent, increasingly often in his later years on the High Court. By 2007 his rate of dissenting had reached approximately 48 per cent of his judgments[201] and continued to rise until he retired from the Court in 2009. The journalist, Monica Attard, has labelled him "The Great Dissenter".[202] Although dissent on the High Court is not new, and although Kirby J has maintained that it has not given rise to undue tensions on the Bench,[203] he has been acutely aware of frequently disagreeing with others and of voicing a minority position on the High Court[204] and in other contexts. Increasingly, he has looked to the future both in respect of his views in dissent on the Bench and those he has expressed extrajudicially:

> Because the common law develops from hundreds of judicial decisions, sometimes over long periods of time, it is often the case that the conceptual framework that affords structure to a group of related legal principles is at first imperfect and unclear. It falls to judges and scholars to attempt to derive rules that are coherent, practical, just, and (so far as it is possible) conformable with past decisions.[205]

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200 Posner, n 79, p 32.

201 See Summary of Statistics compiled by Gilbert and Tobin Centre of Public Law and set out in the *Australian Financial Review* (16 February 2007) p 59. In 2003 Kirby's dissent rate (to that date) was approximately 33%: see C Banham, "Kirby the High Court Outsider", Fairfax Digital (24 February 2003): http://www.smh.com.au/articles/2003/02/23/1045935279581.html (accessed 16 December 2008).

202 M Attard, "The Great Dissenter: Justice Michael Kirby", ABC *Sunday Profile* (25 November 2007): http://www.abc.net.au/sundayprofile/stories/s2100123.htm (accessed 12 December 2008). Attard has also labelled him "a contrarian": see M Attard, "Bold Enough: Monica Attard": http://www.abc.net.au/sundayprofile/stories/s2106109.htm (accessed 15 December 2008).

203 See, eg, Kirby, n 186. Compare C Lloyd, "Not with Peace but With a Sword – The High Court Under J G Latham" (1987) 11 *Adelaide Law Review* 175.

204 See, eg, Kirby (2005), n 1.

205 *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at 152 [92].

In the 10th Annual Hawke Lecture in 2007[206] Kirby J squarely addressed the issue in a more systematic way. He described judicial independence, including independence of one judge from another, as a "bulwark of a free and democratic society".[207] He argued that it is inappropriate to look simply at the incidence of judges' dissents,[208] contending that a dissent can be seen as an "appeal to the future". He instanced the dissents in the United States of Justices Curtis and McLean in *Scott v Samford*[209] (on slavery), of Justice Harlan in *Plessy v Ferguson*[210] (on racial segregation), of Justices Roberts, Murphy and Ferguson in *Korematsu v United States*[211] (on wartime Japanese internment) and of Justices Black and Douglas in *Dennis v United States*[212] (on anti-communist measures), as well as a variety of important Australian[213] and United Kingdom[214] dissents which were subsequently adopted by court majorities.

Kirby has maintained that when legal precept, precedent, authority and past principles offer an insufficient guide to solve a new problem in a just way, policy becomes essential to the decision-making of judges. Thus, for him application of policy principles is something that all judges practise (see Malbon, Chapter 23). It is simply that some are more open and accountable about it than others.[215] He has pointed out that dissent is:

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206 M D Kirby, "Consensus and Dissent" (10th Annual Hawke Lecture, Adelaide, 10 October 2007): http://www.unisa.edu.au/hawkecentre/ahl/2007ahl_kirby.pdf (accessed 16 December 2008).

207 See also M D Kirby, "Independence of the Legal Profession: Global and Regional Challenges" (Speech, Law Council of Australia, Presidents of Law Associations in Asia Conference, 20 March 2005): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_20mar05.html (accessed 15 December 2008).

208 See, eg, A Lynch and G Williams, "The High Court on Constitutional Law: The 2006 Statistics" (2007) 30 *University of New South Wales Law Journal* 188; M D Kirby, "Judicial Dissent" (2007) *James Cook University Law Review* 4.

209 60 US 593 (1857).

210 163 US 537 at 552 (1896).

211 323 US 214 (1944).

212 341 US 494 (1951).

213 See, eg, *Federated Engine Drivers' and Fireman's Association v Broken Hill Pty Ltd* (1913) 16 CLR 245 at 273-275; *Federated Municipal etc Employees v Melbourne Corporation* (1919) 26 CLR 508 at 526 per Isaacs J; *Chester v Waverley Corporation* (1939) 62 CLR 1 at 14 per Evatt J. See also K Hayne, "Owen Dixon" in T Blackshield, M Coper and G Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) p 220; A Lynch, "The Intelligence of a Future Day: The Vindication of Constitutional Dissent in the High Court of Australia – 1981-2003" (2007) 29 *Sydney Law Review* 195. He also instanced the dissenting reasons of Gaudron J in relation to the constitutional corporations power in *Re Pacific Coal Pty Ltd; Ex Parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 at 375 [83], which re-emerged in *New South Wales v Commonwealth* (the *Work Choices Case*) (2006) 229 CLR 1 at 114-115 [177]-[178].

214 See, eg, *Liversidge v Anderson* [1942] AC 206 at 244 per Lord Atkin; see also J Alder, "Dissents in Courts of Last Resort: Tragic Choices?" (2000) 20 *Oxford Journal of Legal Studies* 221.

215 See, eg, M D Kirby, "Concordat" (4th Hamlyn Lecture, 55th Series, University of Cardiff, Wales, 25 November 2008): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_25nov.html (accessed 16 December 2008).

> sometimes addressed to fundamental notions about the role and limits of government and economic power. Sometimes it concerns issues that are deeply felt and incontestably important to the long term health of society, such as respect for human rights. In such cases, at least in the independent courts, there is a limit to the extent to which the judges should struggle for consensus and compromise. Occasionally progress is only attained by candid disclosure of differences, by planting the seeds of new ideas; and waiting patiently to see if these eventually take root.[216]

Justice Kirby has been explicit that he hopes that some of his own dissents in cases such as *Al-Kateb v Godwin*,[217] *Re Aird; Ex parte Alpert*,[218] *Combet v Commonwealth*[219] and *Thomas v Mowbray*[220] will one day re-emerge with majority support:

> Such dissenting opinions reflect significantly different views about the meaning of liberty; the character and purpose of our basic institutions; the role of international law in our legal system; the maintenance of a limited role for the armed forces in civilian government; the use of the judiciary in controlling the executive; and the accountability of the executive to Parliament.[221]

In short, Justice Kirby's dissents constitute his appeal to the future. Indeed, a passage quoted by Kirby from the great constitutional work of the Indian advocate, H M Seervai, might have been about himself:

> The cause I serve is that of a correct and coherent interpretation of our Constitution. If any of my criticisms are found to be correct, the cause is served; and if any are found to be incorrect the very process of finding out my mistakes may lead to the discovery of the right reasons, or better reasons, than I have been able to give, and the cause is served just as well.[222]

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216 See also C R Sunstein, *Why Societies Need Dissent* (Harvard University Press, Cambridge, Mass, 2003).

217 (2004) 219 CLR 562.

218 (2004) 220 CLR 308.

219 (2004) 224 CLR 494.

220 (2007) 233 CLR 307.

221 In his Second Hamlyn Lecture, he put it similarly: "Everyone knows that, in the judiciary, today's dissent occasionally becomes tomorrow's orthodoxy": M D Kirby, "Reformation" (2nd Hamlyn Lecture, University of Exeter, England, 21 November 2003): http://www.smh.com.au/cgi-bin/common/popupPrintArticle.pl?path=/articles/2003/11/20/1069027246995.html (accessed 16 December 2008).

222 H M Seervai, *Constitutional Law*, Preface to the First Edition, p xxiv, cited in M D Kirby, "H M Seervai's Centenary: His Life, Book and Legacy" (Speech, Bombay High Court Bench and Bar, Mumbai, India, 9 January 2007): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_9jan07.pdf (accessed 16 December 2008).

KIRBY: APPEALING TO THE FUTURE

Reviewing a book written by Meagher JA of the New South Wales Court of Appeal, Kirby wrote of the author in 2004: "Rarely, if ever, has the departure from the bench of an Australian judge been accompanied by such attention in the popular press."[223] One wonders whether he was thinking of his own circumstances five years later. In his many different roles, Kirby J has polarised lawyers and the general community, and will continue to do so. He has lived his life in the self-induced spotlight of the media and, latterly, of the internet. Some of his exhortations to his colleagues on the High Court, especially during his latter phase, have not conduced to collegiate harmony in that forum. How will he be judged when the dust clears from some of the controversies that have enveloped his time in high office? In some respects, early in 2009 is too soon to say. His career thus far has been confronting and challenging. His commitment to work is legendary,[224] but he will not be remembered for that. The fact that he is a monarchist is somewhat anomalous but relatively consistent with other aspects of his life, including his respect for tradition, ceremony and Anglicanism. This will not be of great significance when in due course Australia becomes a republic at a time when such a step has become electorally viable. The fact that as a High Court judge he "came out" will be historically important in the fillip that it will give to others to leave the closet and the "mainstreaming" that it has given to those who are gay. Again, though, that should not be his main legacy. Certainly, he would not want it so.

Some things can be said with confidence. Kirby's contribution to law reform has proved of real significance. This can be said from the perspective of a quarter of a century after he left the Australian Law Reform Commission. This is so in terms of the style of institutional law reform, its public involvement, its interdisciplinarity and its accessibility. Kirby's ALRC work remains the "gold standard".

Importantly and unusually, too, he has carried many of the values he introduced to law reform into his judicial work in the Federal Court, the New South Wales Court of Appeal and the High Court. As Ayres observed in his biography of Sir Owen Dixon,[225] legal doctrine is never a stable entity and it is unsatisfactory to measure a judge's legacy in terms of the survival or non-survival of the various positions that he or she expresses. Kirby will be remembered as the most comprehensible, articulate and transparent dissenting voice, to this point, in Australia's High Court.

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223 M D Kirby, Review of R Meagher and S Fieldhouse, *Portraits on Yellow Paper* (2004) 24 *Australian Bar Review* 304.

224 Notoriously, he nominated "work" as his "hobby".

225 Ayres, n 177, p 293.

The essence of Kirby the high profile figure, though, has been the fact that he has been an insider questioning and reflecting – a judge disagreeing, from within. Most judges dissent from time to time. Kirby has dissented a great deal, especially in the latter phases of his time on the High Court – partly, perhaps, because of something of a shift toward conservatism in the aftermath of the Mason High Court. What this means in terms of his contribution is an important issue, yet to be finally evaluated. It may be in the end that his own motivations in so high a level of dissent matter less than viewing his liberal approach within the changing times, the quality of his dissents and the transparency of his reasoning. He has appealed to the future and the future will be his judge.

Kirby is likely to be remembered for the new profile and voice that he gave to Australian judging. This is not so much Kirby as "celebrity judge", Kirby the media-accessible judge or Kirby the doyen of the talk circuit. He has brought to Australian judging a contextualisation of decision-making within the broader socio-economic-cultural place of the law. He positioned the law where it could be understood, questioned, challenged and critiqued. Sometimes, this meant that he, too, was also questioned, challenged and critiqued. For the most part, he survived the process well; sometimes he has been found wanting for succumbing to consequentialism and for what his critics have called "agenda judging". Subjected to that level of analysis, the blemishes of most would be exposed.

There is a reality to directing Kirby's work toward the assessment of the future and by the future (see Griffith and Hill, Chapter 6; Burnside, Chapter 35). He appeals to a wide variety in the population who previously had little interest in or respect for the law. His decisions, his addresses and his extrajudicial writings have been, and will continue to be, an appeal to the community for years to come, to the appellate judges who will succeed him and to legislatures grappling with unfolding complex socio-legal issues. Principally, though, the rigour and (for the most part) the intellectual honesty and the authenticity of Kirby, and his reasoning, will continue to confront us, whether we agree with his end points or not.

A challenge posed by the Kirby legacy is in terms of the relationship that law should have with other spheres of knowledge and thinking – that is, in terms of the role of the law as a regulator of relationships between different entities within our complex, pluralistic and changing society. Kirby has taught us that law and lawyers, if they are to be relevant and respected, must not be mired in the past, although they must learn from it and build upon it in a way that is responsive to major community and technology changes. They must have a much broader inter-disciplinary approach and international awareness than has been traditional for them. Part of the function of "the new lawyer"

and the post-Kirby judge will be to emerge from yesterday's parochialism, to grapple with change[226] and to draw more broadly on extra-legal ideas and knowledge. A challenge that Kirby sets for all of us is to blend flexible, principled, informed and rational evaluations with transparency and humanity if we are to resolve conflicts and dilemmas in ways which justly address the needs of our community today and tomorrow.

226 As Kirby has put it, "Today, a life in the law is a life living with reform": M D Kirby, "Value Judgments: The Ethics of Law" (Australian Law Reform Commission, 7 April 1998): http://www.lawfoundation.net.au/ljf/app/&id=3C137D4F2086201ACA2571A7001D5BF3 (accessed 8 December 2008).

Chapter 1

THE "INEVITABLE" JUDGE? A BIOGRAPHER'S NOTE

A J Brown[*]

We need to defend our legal institutions and to adhere to time-honoured legal principles. Not blindly. And not mechanically. But with eyes, minds and hearts always open to the call of justice. Only the quest for justice gives the profession of the law its claim to nobility.[1]

THE INEVITABLE JUDGE

On 6 February 1996, when Australia's legal elite gathered in Canberra to swear in Michael Kirby as the 40th justice of the High Court of Australia, there was a strong air of consummation around the event. While no-one is appointed to such a post without a public track record, in the case of Michael Kirby there seemed relatively little that he could achieve as a High Court justice that he had not already achieved in his previous two decades in the public spotlight. Federal Attorney-General, Michael Lavarch, taking time off from the election campaign that would see his government ousted, summed up the mood. Referring to Kirby's work as a President of the New South Wales Court of Appeal, as a law reformer, as "one of the great legal writers of this country, and as an Australian who has rightly earned an international reputation for your stand on human rights", Lavarch concluded that:

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* This chapter is an extract from the author's forthcoming biography of Justice Michael Kirby, to be published by The Federation Press. The author thanks Justice Kirby for his cooperation, including by way of access to personal records in his possession and held by the National Archives of Australia. Thanks also to Chris Holt of Federation Press; and the many assistants in the research, especially Dr Heather Roberts, Simon Levett, Kimberly Everton-Moore and Mark Bruerton. The research was made possible by an Inaugural Griffith University Research Fellowship (2005–2008) and a visiting fellowship with the ANU College of Law (2005–2007).

1 M D Kirby, High Court of Australia, Canberra, Transcript (6 February 1996).

> in many ways I think even a quick overview of your career shows that appointment to this Court was quite inevitable.[2]

Michael Lavarch did not know that 21 years earlier, another Federal Attorney-General had privately toasted his own act of appointing Kirby to the new post of Chairman of the Australian Law Reform Commission, as Kirby's "first step to the High Court".[3] Had he known, the sense of inevitability may have been overpowering. By the time of his retirement, Kirby was firmly entrenched as a pivotal figure in the history of Australian and international legal institutions. He had been so well known for so long, he almost seemed to have been born in judicial robes.

But exactly how "inevitable" was Kirby's ascendancy to seniority in the Australian legal profession? Once he attained judicial office, how inevitable was it that he would succeed in it, go on to be promoted through its ranks, and even survive? In many ways, the notion of Kirby's career as simply a product of destiny could not be more misleading. A decade later, despite his length of service, skill and dedication to legal work, personal urbanity and generosity, and many impacts on and off the judicial Bench, Kirby was described in 2006 as "something of a pariah to many in the judicial and political communities".[4] Perhaps only a young American political scientist would have dared to state such an assessment, at least in these terms, and it was one that left Kirby "surprised" and "even hurt".[5] Pierce's assessment said much about what had transpired in the decade since Kirby's appointment. It was primarily a reference to the likelihood of Kirby's jurisprudence coming to dominate or lead the High Court within the period of his own tenure, but the assessment was also an insight into something deeper. The idea that Kirby was nearing the close of such a distinguished period of service as something of a "pariah" touched nerves that had run through much of his legal and judicial career.

Michael Kirby's background was such that a successful career in the law was far from guaranteed. Moreover, his personal approach to many issues surrounding the law, as well as public life in general, meant that his own successes were rarely easy – in fact, his background and approach guaranteed that many were hard won. Throughout the decades

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2 High Court of Australia, Canberra, Transcript (6 February 1996). See also (1996) 70 *Australian Law Journal* 274.

3 M D Kirby, "ALRC, Law Reform and Equal Justice Under Law" (Speech, Australian Law Reform Commission 25th Anniversary Conference Dinner, Regent Hotel, Sydney, 19 May 2000): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_alrc26may00.htm (accessed 11 December 2008); also titled "ALRC: After a Complicated Birth the Baby is Doing Just Fine": *Speeches of Michael Kirby* (hereafter *Speeches*) Vol 45, No 1661.

4 J L Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Carolina Academic Press, Durham, 2006) p 286.

5 M D Kirby, Correspondence, 29 January–5 February 2007, in "Special 2007", Item 2, National Archives of Australia (hereafter NAA), series and item reference awaiting classification.

of his career, he balanced almost constantly on the sharp point between being both an insider and an outsider to the mainstream of the law. His own sense of destiny, personal love of and faith in legal institutions, and manifest achievements, all meant he could never positively be considered an "outsider". And yet often, from an early stage, Kirby found himself occupying roles that involved questioning and challenging legal institutions and methods, opening them up to public scrutiny, in a manner not possible for anyone who is truly and only an "insider" to the law.

The conflicts generated by this unique balancing act – usually unintended, but sometimes deliberate – provide large windows into the development of the law, legal institutions and politics generally, over more than four decades. Michael Kirby's survival through these conflicts, as much as the esteem in which his legal contributions are held, marks out a unique personal and professional path.

THE UNLIKELY JUDGE?

Michael Donald Kirby was born in March 1939, the first child of Donald and Jean Kirby. From the age of three, his family home was in Sydney Street, Concord, now regarded as "inner west" but then firmly part of the western suburbs of Sydney. Before he had even hit adolescence, when interviewed at the Summer Hill Opportunity School, he told two visiting sociologists that he wished to grow up to be either "a bishop or a judge".[6] In a family with no tertiary education, no strong connections to the clergy, not much money and no links with the legal profession, this statement was more an indication of the social values surrounding Kirby's childhood, than any kind of prediction as to what direction his life was likely to take in the future.

The Kirby household put the best possible face on its social position, emphasising the relatively cultivated history of Jean Kirby's family, the Knowles clan. When Jean was born in rural Victoria in 1915, the stern journalist, William Spotswood Knowles, and his bubbling wife, Margaret Rushe, had only relatively recently emigrated from Northern Ireland. This side of the family was able to claim many of the values that pointed to social success in suburban Australia in the 1940s and 1950s. Knowles' career in publishing was a link with a family that, in Northern Ireland, had been more educated and intellectual than most. The first Knowles in Ulster – James – had been granted the family farm in Cromwell's time, and was believed to have been an Ironside, part of the English conquest of Ireland. This strongly Protestant, loyalist, establishment identity flowed on in Australia. Between the wars, Jean's elder sister was

6 M D Kirby, "Has The Legal Profession Lost Its Soul?" (Speech, Conferment of the Honorary Degree of Doctor of Laws, University of Sydney, 1996).

disowned, entirely, when she established a relationship with a Catholic.[7] Jean Kirby was not so humourless, and became increasingly like her own mother in later life, whom her husband Donald likened to the actress Katherine Hepburn.[8] Nevertheless, Jean was a stickler for hard work, loyalty, propriety, and self-improvement – "at one" with the values of Robert Menzies' middle class suburban Australia. According to her husband, throughout her life she resolutely voted conservatively.[9]

Donald Kirby was just as strong a character and, in some respects, both the equal and opposite of Jean. Born in Sydney in 1916, he was raised as the only son of a single working mother, Norma Gray, who was assisted by her own mother and sisters. Finishing a disjointed school education at the height of the Great Depression, he found and clung to a series of jobs as a salesman in Sydney's tool manufacturing industries. After meeting and marrying Jean, he was equally as strong in his support for their children's education, lamenting the limitations of his own, and concluding in later life that ideally, he wished he could have been a teacher. But while Jean's personality provided many of the drivers of success in their children, it was Donald's interests and skills that provided the fertile ground for a future highly successful lawyer. On top of his own sharp intellect, intimidating memory for forensic detail, love of argument and theatrical good humour, he loved "whodunit" mysteries and popular films with legal themes, and repeated these to his children as bedtime stories. In his own later career, he became trusted as a trouble-shooter and problem-solver for large Australian manufacturing companies, working in procurement, distribution and insurance.[10]

Donald Kirby's background produced quite different political views from those of his wife. He was instilled with both a deep sense of history and politics as well as a first-hand knowledge of social hardship and injustice. Above all, Donald Kirby possessed a strong awareness of the value of tolerance and fairness – both inside the family, and outside it. More questioning of authority and conservative traditions, in contrast to Jean, he generally voted Labor. However, his sympathy for the organised labour movement was frequently tested – for example, between 1946 and 1952, when he attempted his own small business manufacturing woodworking tools. Moreover, during Michael Kirby's childhood, Donald was also directly engaged in Sydney's communist circles, not least because his mother Norma met and married Jack Simpson, a World War I veteran and senior official of the Communist Party of Australia. At the age of 12, Michael Kirby was first made aware of the

7 M D Kirby, *Jean: A Family History of Jean Langmore Kirby* (unpublished manuscript, 1998) pp 9-10.

8 Author's interview with Donald Kirby Senior (unpublished transcript, 11 October 2006) p 21 (hereafter Kirby Senior).

9 Kirby Senior, n 8, pp 27-28.

10 Kirby Senior, n 8, pp 12-14.

existence and power of the High Court of Australia when it lifted the very real threat of his step-grandfather's prosecution and imprisonment, by declaring Menzies' *Communist Party Dissolution Act 1950* (Cth) to be beyond Commonwealth power.[11]

From an early age, Kirby developed an unusual passion for scholastic and academic study. There was no question that he would grasp the opportunities offered by the selective streaming of the New South Wales public education system at that time, and take a Menzies' Commonwealth Scholarship to the University of Sydney. Receiving his leaving certificate from Fort Street High School in 1955, Michael Kirby was not dux of the school, but came 24th in the State overall, and first in the State in Modern History. He was not captain of the school, but he was a prefect. Such achievements, and the promise of a tertiary education and an upper-middle class, traditional, professional career were – in themselves – pinnacles of success for the Kirby family.

Had there not been financial pressure steering him directly towards a well-paying profession, Kirby's destiny may well have led to university, but not beyond it, where he considered he may have settled as a history scholar. However, he was not simply one of 49 students from Fort Street to be awarded a Commonwealth Scholarship. He was also one of only four to be awarded a University Bursary[12] – a clear sign that when it came to basics, the household was financially disadvantaged. His career would reveal a fastidious attention to historical scholarship, indexing, the recording of events, libraries, archiving and legal biography – and his own sense of his own history, which included photography.[13] From these combined passions for detail, history, the propriety of institutions and the value of social intellectual inquiry, together with the intersecting political outlooks of his parents and their ambitions for him to succeed, came the unique mix of qualities that skilled Kirby so well for legal practice.

In 1958, as he completed his Arts degree and moved into law studies, Kirby faced the challenge of securing an articled clerkship without any existing family connections to the legal profession. Revealing a distinctive and unusually strong commitment to the principles of merit and due process, he tried repeatedly to win articles by "cold calling" through written applications, dutifully typed for him by his aunt Lillian. Displaying a naive degree of trust in the "proper" way of doing things, Kirby ploughed on with his applications in the face of repeated rejections, either unaware or undeterred by the reality that success lay as much in *who* as *what* he knew. It was only when he confided his difficulties to his tutor in criminal law – Barry O'Keefe, later himself a Supreme Court

11 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1. Kirby Senior, n 8, pp 24-26.

12 See *The Fortian* (Fort Street High School, Sydney, December 1956) p 8.

13 See, eg, S Sheller, "Kirby, Michael Donald" in A Blackshield, M Coper and G Williams, *Oxford Companion to the High Court of Australia* (Oxford University Press, Melbourne, 2001) p 396.

judge but then a junior barrister – that he was steered in the direction of the small firm of M A Simon, where most of his work involved workers' compensation.[14]

Upon completion of his law degree in 1961, graduating in April 1962, Kirby spent five years in the larger, primarily conveyancing and property firm, Hickson Lakeman and Holcombe. Kirby's role, unusually for that time, was to manage and conduct the bulk of the firm's non-property litigation, including workers' compensation matters, but also involving research and advocacy across a wider range of fields.[15] He juggled his practice with postgraduate studies in law and economics, and an extended stint in student politics, including as President of the University of Sydney Students' Representative Council in 1964. Granted considerable autonomy by the firm, he found himself organising and providing free legal services for a range of student and other causes, many through the New South Wales Council for Civil Liberties. Many who knew him regarded him as destined for political office.

Encouraged by Neville Wran, whom he briefed regularly in the compensation courts, Kirby moved to the Bar in 1967. Over the next seven years he built an eclectic practice based mainly in workers' compensation and insurance, mixed with continued pro bono work. Kirby's practice was both successful and lucrative, and in Sydney he was well known throughout legal, university and civil liberties circles. Between 1967 and 1974 he appeared in five reported cases of the High Court as junior to Ken Horler, Frank Hutley, Dennis Mahoney and (twice) Lionel Murphy. He became technically proficient in diverse areas, and earned a reputation for working long hours, rivalled only by Wran himself, with whom he often appeared in compensation cases.

After a decade of legal practice, however, Michael Kirby was still some way from achieving the type of prominence as a barrister that conventionally led to either political life or judicial appointment. What was holding him back? A partial, but easy explanation is that he was still "finding himself" in a personal sense. His later judicial colleague, Simon Sheller, noted that, in fact, "politics was the obvious career choice for him", but he had been forced to accept a life of more "austere self-sufficiency, in part the price of his homosexuality".[16] In February 1969, he met Johan van Vloten, and commenced what by 1974 would cement itself as a life partnership. It was at Johan's suggestion that they twice embarked on lengthy overland odysseys by Kombi van, across South Asia, the Middle East and Europe, firstly taking the entire calendar

14 Kirby Senior, n 8, pp 31-32; National Library of Australia, Oral History Section, Recorded Interview with Justice Michael Kirby (8 July 1995 amd 20 March 1996, TRC 3296 2A) pp 37-38 (hereafter Kirby 1995/96).

15 Kirby 1995/96 (TRC 3296 2A) pp 44-45; "Memories of Hicksons", *Speeches* No 1797 (Sydney, 8 May 2002).

16 Sheller (2001) p 394.

year of 1970 and then another twelve months in 1973–1974. While contemporaries guessed that the journeys were related to Kirby's private life, they knew nothing of Johan's existence and growing importance for Kirby. From at least 1971, it was different within their immediate family circles, where the truth of the relationship was known, accepted and, increasingly, celebrated. Personally, Michael Kirby became confident that "God and nature" had made him homosexual so that he could see "the ugly face of discrimination", sharpening his ability to combat "irrational prejudice and hatred in all its forms".[17]

Despite being well known and widely respected, Kirby had also settled into a pattern of professional practice that would leave some contemporaries surprised and quizzical as he began to make a heavier public mark. There was little about him, externally, that made judicial appointment seem likely. Those who worked closely with him were in little doubt of his technical skill or capacity – but even Wran did not in his "wildest dreams" expect Kirby to "finish up on the High Court".[18] Kirby was already very financially successful by his family's standards, and largely satisfied with a professional world in which he got to mix with, and learn from, those he considered more senior. Thus, he was often the chief legal architect of the outcomes achieved by others. In Wran's view, a major reason for Kirby's popularity with senior barristers was their trust in "that powerhouse brain of his, to sort out the law", leaving them to manage the evidence and present the case:

> As a workhorse for his leader … [Kirby] was very unselfish with his knowledge, which made his senior look better than he probably was.[19]

A major catalyst for Kirby's rise was his own decision to put himself forward. In early 1974, he was still pondering his life and career options in London, when news came through that Mary Gaudron had been appointed as a Deputy President of the Commonwealth Conciliation and Arbitration Commission. This was an appointment to quasi-judicial office of someone he not only knew, but who at the age of 33 was even younger than he was, and whose personal background was even more from the wrong side of "establishment" political tracks. Having only been in office for about 18 months, and already lurching between crises, the over-energetic Whitlam Government had more than a few roles that needed filling.

Within days of his return to Australia, Kirby appeared in the High Court as the most junior in a team of five barristers in *Cormack v Cope*,[20] where the Federal Opposition and Queensland Government challenged

17 M D Kirby, "Coming Out Alive: Perspectives on Homosexuality", *Speeches*, Vol 45 No 1644 (2000).

18 Author's interview with Hon Neville Wran AC (5 May 2008), hereafter Wran.

19 Wran, n 18.

20 *Cormack v Cope; Queensland v Whitlam* (1974) 131 CLR 432.

the constitutional validity of a suite of Whitlam Government legislation, passed via joint sitting as a means of overcoming their soon-to-be-famous lack of a Senate majority. The respondents' team was led by the Attorney-General, Senator Lionel Murphy, himself. After they won the case, Kirby continued to work with Murphy, assisting on a range of political defamation actions. However, it was not from Murphy that the first major invitation came, but from the Federal Minister for Labour, Clyde Cameron, who was casting around for further appointees to the Arbitration Commission. Already well known in Australian Labor Party circles from his days in student politics and ongoing roles in civil liberties, word of Kirby's suitability and interest reached Cameron from other New South Wales Labor lawyers, in particular Lionel Bowen.[21] In early November 1974, Kirby was approached with Cameron's offer by Justice Jack Sweeney, a Cameron appointee to the Commonwealth Industrial Court, and a QC with whom Kirby and Wran had both worked closely.

As with almost any issue, Kirby consulted family and friends, and weighed up the pros and cons. Others rising in the Sydney Bar warned him that the Arbitration Commission was a sideshow to the mainstream of the law, and that Kirby would "sink like a stone without a trace" – this advice he attributes to Michael McHugh,[22] just three years older and appointed a QC the previous year. Wran, now devoting most of his time to politics as New South Wales Opposition leader, similarly advised that Kirby "was likely to get landed there and never get out ... [I]t'd be a fate worse than death".[23] But Kirby was ready for public service, holding a high opinion of the Commission's social importance. He was also ready for the title "Mr Justice" that came with a Deputy Presidency – an opportunity that might never come again. He anticipated the work would be rewarding, seeing the Commission's role in the national wage cases, equal pay and award decisions as "basically power wrapped up in law".[24] Kirby was duly sworn in as a Deputy President of the Arbitration Commission in December 1974.

The sequence of events that then catapulted Kirby into the law reform role that made him famous – and vice versa – included a more genuine accident of fate. On 29 November 1974, as he prepared for his swearing-in, Kirby attended the annual Bench and Bar dinner held by the New South Wales Bar Association. Early in the evening, on his way into the function, he was metres away from Sir Douglas Menzies when the High Court judge, and cousin to the former Prime Minister, collapsed. The event was etched in Kirby's memory, not least because some barristers went on conversing and eating canapés while Menzies

21 Author's interview with Hon Clyde Cameron AO (23 December 2005).

22 Kirby 1995/96 (TRC 3296 3A) p 53.

23 Wran, n 18.

24 Kirby 1995/96 (TRC 3296 3A) p 52.

lay dying.[25] It also galvanised action on the part of Lionel Murphy, who later that night, having invited a small group of barristers including Kirby back to his apartment in Darling Point, was already considering the issue of a replacement. Murphy asked Kirby for his "curriculum vitae", but did not take it forward in discussions with Whitlam or others about the court appointment – indeed, before long it was clear that it was himself that Murphy had foremost in his mind. There were other appointments pending, however, which needed to be finalised. One was the long delayed issue of the new Australian Law Reform Commission, which had been enabled by legislation at the end of 1973, but not yet established.

Initially, in December 1974, Kirby accepted Murphy's invitation to become one of the first tranche of Law Reform Commissioners, on a part-time basis. Together with Gareth Evans, Alex Castles and Gordon Hawkins, his statutory appointment commenced on 1 January 1975. But there was also another, full-time role that stood empty, that of the Commission's chairmanship. The envisaged full-time term was five years. To Kirby, the prospect was not immediately attractive, as he prepared to take up actual duties at the Arbitration Commission in the New Year. However, Murphy was insistent, telling Kirby he did not want "an old troglodyte", but "somebody young who'll breathe life into this institution".[26] The precedent for seconding talent from the Arbitration Commission to law reform tasks had also already been set by Elizabeth Evatt, who was by then heading the Royal Commission into human relationships, and herself later became a President of the Australian Law Reform Commission.

Over Christmas and the New Year, Kirby again consulted family and friends about this further prospect. On 6 January 1975, on his very first day at work as head of the Arbitration Commission's maritime panel, events conspired against him – with the result that by 10 February, when he issued orders in the last of his three formal arbitration cases, he would have already moved on to the new full-time role. Visiting Kirby's new Chambers on that first day was Geoffrey Robertson, later of *Hypotheticals* fame, who had followed Kirby as a President of the Sydney University Students' Representative Council and had since established himself at the London Bar, as well as being one of those whom Kirby consulted about his career during his travels. Hearing of the offer of the Australian Law Reform Commission chairmanship, Robertson insisted that he take it, noting the achievements and public stature of the English equivalent, Sir Leslie Scarman. It was advice Robertson then had opportunity to repeat in Murphy's presence, when the Attorney-General followed up his most recent approach to Kirby – in the lift of the same Commonwealth

25 Kirby, Correspondence (25 July 2007) "Special 2007", NAA, Item 2.

26 Kirby 1995/96 (TRC 3296 2B) pp 54-55.

building that morning – by calling him up to his own Chambers to press the offer.[27]

Kirby was left with no avenue of refusal. As Murphy reached for the celebratory champagne, Robertson continued to assure the first-day judge that the further post would be "a great mind-opener".[28] Few could have anticipated the degree to which it would be a great mind-opener not only for Kirby, but the nation.

THE INAPPROPRIATE JUDGE?

Over the next ten years, Michael Kirby made famous the role of the Australian Law Reform Commission. In the process he also became Australia's most widely known judicial figure. However, for the first eight of those years, "The Honourable Mr Justice Kirby" was not, in reality, a member of any judiciary. From this fact stemmed many lingering tensions in his relation with sections of the Australian legal profession.

While Kirby's judicial title contributed immeasurably to the impact and real-world relevance of the Australian Law Reform Commission, it rested on his appointment to the Arbitration Commission. There, the roles of Commissioners were not judicial, but administrative, following the rule that judicial and executive powers could not be vested in the same body without breaching the separation of powers guaranteed by the *Constitution*.[29] The *Conciliation and Arbitration Act 1904* (Cth) provided for the independence of senior Commissioners through quasi-judicial tenure, but amendments in 1972 had confirmed that new Deputy Presidents – such as Kirby – should not have the "designation" of a judge, even when deemed to have the same "rank, status and precedence".[30] The designation "Justice" was only preserved after an approach to Cameron by Elizabeth Evatt's father, Clive, brother of the former High Court judge and himself a well-known QC. Evatt observed it would be "nice" if his daughter could be addressed as "Justice Evatt", and inquired if the government might bring back the title. According to Cameron:

> [F]or two reasons, because I liked Clive (although I agree that was not a very good reason) and also to rub salt into the wounds of those who thought women should not be judges, that was one of the amendments I made to the *Conciliation and Arbitration Act*. I mention that story

27 See G Robertson in this volume (pp xiii–xxviii).

28 Kirby 1995/96 (TRC 3296 2B) p 56.

29 *R v Kirby* [no relation]; *Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; see also A J Brown, "The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge" (1992) 21 *Federal Law Review* 48; A Blackshield and G Williams, *Australian Constitutional Law and Theory* (Federation Press, Sydney, 2006) pp 654-658.

30 *Conciliation and Arbitration Act 1904* (Cth) s 7(5), as substituted by Act No 37 (1972).

> only because it shows how things that are unimportant to some have enormous importance for other people.[31]

Both Michael Kirby and the Australian Law Reform Commission benefited greatly from this decision. But to legal purists, there was something questionable about his continued use of the title, not only because the role of an Arbitration Commissioner was merely quasi-judicial, but because the role of the Australian Law Reform Commission was not judicial at all. For his part, Kirby came to see the issue of his judicial status somewhat in reverse. He always saw himself as only "on leave" from the Arbitration Commission. Once he had successfully established the Australian Law Reform Commission as a national institution, he also came to the view that its head should not only be a quasi-judicial figure, but "a judge of a national court".[32] The more traditional assessment, from within the Federal Government and most of the judiciary, was that judges were appointed to be judges in court, and any non-judicial service beyond that was extraordinary, not something that itself justified judicial status or appointment. Under Attorney-General Bob Ellicott QC, the Fraser Government happily reappointed Kirby for a second term as Australian Law Reform Commission Chairman, but did not accept suggestions of a judicial upgrade.

One person who agreed with Kirby, however, was Gareth Evans. Elected as a Senator for Victoria in 1977, he continued to closely follow the work of the Australian Law Reform Commission. Days after the election of the Hawke Government in March 1983, and his own appointment as Attorney-General, Evans cured the problem. On 30 March 1983, he appointed Kirby as a judge of the Federal Court of Australia, an elevation which coincided neatly with Evans' launch of Kirby's first book of speeches: *Reform the Law!*[33] Both men rejoiced in the prospect of a reunited effort in federal law reform, Evans telling journalists that he and Kirby would now be "to law-making what Butch Cassidy and the Sundance Kid were to law-breaking".[34]

Nevertheless, the Federal Court appointment was not merely an honorary appointment. Sworn in during April 1983 and ceremonially welcomed in July, Kirby sat on a total of eight Full Court cases.[35] From the time of his appointment, he made it clear that he considered his

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31 C Cameron, *The Confessions of Clyde Cameron 1913-1990: As Told to Daniel Connell* (ABC Books, Sydney, 1990) pp 209-210. Act No 138 of 1973 amended s 7(5)(a) of the *Conciliation and Arbitration Act 1904* so that the judicial "designation" would also be given to any new Deputy Presidents with "qualifications" as a barrister or solicitor, such as Evatt and Kirby, but not to other new Deputy Presidents, even if they were doing an equivalent job.

32 Kirby 1995/96 (TRC 3296 3B) p 87.

33 M D Kirby, *Reform the Law! Essays on the Renewal of the Australian Legal System* (Oxford University Press, Melbourne, 1983).

34 As quoted by *The Canberra Times* (31 March 1983): see K Scott, *Gareth Evans* (Allen & Unwin, Sydney, 1999) p 152.

35 M D Kirby, Personal Papers, NAA Series C1399/T1, Boxes 220, 236, 243.

time at the Australian Law Reform Commission was at an end, and sought a transition to full-time judicial work by mid- or late 1984.[36] But there remained professional disquiet that until such a transition occurred, his primary and full-time role was to remain non-judicial. The welcome from some judicial colleagues was warm: G E "Tony" Fitzgerald, then the Federal Court's first judge in Brisbane and also a part-time Australian Law Reform Commissioner, telegrammed that he agreed the "appointment [was] long overdue – stop – all minority groups should be judicially represented, even monarchists".[37] But several Federal Court colleagues welcomed him by expressing disappointment that he was apparently unlikely to sit much on actual cases. Another early Australian Law Reform Commissioner, by then High Court Justice Sir Gerard Brennan, wrote:

> I confess to sadness that you will not be taking your seat on the Court and that Gareth thought that the Court's status should enhance your prestige, instead of vice versa. Though I rejoice in your appointment to a judicial office *stricto sensu*, ... I fear that your continued absence from its work will deprive you of a most valuable stimulus, and will deprive the Court of a pillar of strength. However it is the privilege of friends to respect an order of priorities which they do not share, and thus I offer you my warm good wishes on your translation.[38]

To the wider Australian community – the world that to Kirby, and objectively, mattered most – the translation made little difference. Despite being now slightly more formally correct, his title and capacity to contribute publicly to the burning issues of law reform did not change. He was already Australia's first, and perhaps only, "celebrity" judge. This status was consummated later that year with his delivery of the ABC Boyer Lectures, *The Judges*.[39] So, too, was the antagonism towards the 44-year-old Kirby from many establishment judges and legal figures.

Kirby's 1983 lectures provided the most read, cited and accessible windows into the nature and trajectory of Australian judicial institutions compiled to that date. The mere fact that anyone would provide such a window, inviting listeners to imagine life "behind the purple curtain" of the judicial world, was itself more controversial than the actual content.[40] Kirby needed no more authority to discuss life on the other side of the curtain than confidence in his own accuracy, based on his

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36 Michael Kirby to Sir Nigel Bowen, Correspondence (12 July 1983, 13 February 1984) NAA Series C1399/T1, Box 220.

37 M D Kirby, Personal Papers (31 March 1983) NAA C1399/T1, Box 220.

38 Sir Gerard Brennan to Michael Kirby, Correspondence (31 March 1983) NAA C1399/T1, Box 220.

39 M D Kirby, "Behind the Curtain" in *The Judges: The 1983 Boyer Lectures* (ABC Books, Sydney, 1983) p 9.

40 One reviewer described the first lecture as characterised by "patronising obviousness": B Hill, "Justice, but not quite for all", *The Age* (Melbourne, 17 November 1983).

quarter-century in the legal profession, including 13 years as a legal practitioner. Nothing in the lectures professed special knowledge derived from his own handful of decided cases. Indeed, he compensated for his inexperience by including, for the first time ever, voice recordings from a range of iconic judicial figures. However, it was obvious to critics that a magical ingredient was the notion that this was also an "inside" view. Confirming for many why the judiciary could benefit from having its curtain lifted, critics reacted not only to Kirby's moderate predictions as to the likely course of reform, but also to innocent comments in which he seemed to speak with the voice of experience:

> The mixture of drama and boredom, a question or two, a touch of humour and kindliness and a refreshing glass of cold water when things get really tedious, are the ways by which good Judges get through their day.[41]

The most vociferous attack came from 63-year-old Justice Peter Connolly of the Supreme Court of Queensland, a former senior Army officer and State politician.[42] Kirby responded that Connolly's review was "misleading, personal, over-simplistic, superficial, based on out-of-date information, parochial and humourless". His most direct response to Connolly was on his critic's implication that commentary on judicial issues and methods should remain a "closed shop":

> [The] hidden premise ... is that only a sitting judge, and indeed one of long-standing who has written many judgments, has the real warrant to write or talk about the judicial office. That is a view I reject. In my novel duties as chairman of the national Law Reform Commission, I have had a rare opportunity to see the entire operation of our legal system from new perspectives, to meet most of its *dramatis personae*, to travel to all parts of the country and to engage in a dialogue with lawyers and citizens, such as has not been previously attempted. Of course, my opinions may be debatable. Some may be erroneous. But the way to criticise such opinions, in an ancient profession of high intellect and great integrity, is to address the issue.[43]

When Kirby finally made his own transition to a "real" judgeship, in the form of full-time service, it was not as a member of the Federal Court. By early 1984, it was known that Sir Athol Moffitt, President of the New South Wales Court of Appeal, would soon retire. With Neville Wran now Premier, and Lionel Murphy supporting him from the High Court, Kirby's prospects were good. In the view of almost anyone who had worked with him, his technical skill and capacity for a senior

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41 Kirby, n 39, p 15.

42 P Connolly, "The Judges Judged", *Proctor* (Queensland Law Society Newsletter, March 1984); see also Kirby, *Speeches*, Vol 13, No 501 (1984).

43 M D Kirby, "The Judges Judged – Part 2", *Speeches*, Vol 13, No 499 (1984). See also D Armstrong, "Verbal sparks fly as judges clash", *The Bulletin* (3 April 1984).

judicial appointment were not in doubt; and to these had been added the powerful demonstrations of his intellectual vision and leadership in the Australian Law Reform Commission. The presidency of an appellate court required energy and administrative skill – second only to the chief justiceship. The vacancy was also the most senior judicial post that the Wran Government would ever have the opportunity to fill. According to Wran, there was no serious contest between "a relatively young, go-ahead lawyer that would change, hopefully, the dynamics of the court" and an appointment from within, based on seniority, where the judges tended to be "associated with yesterday as distinct from what we were thinking, about tomorrow ... black and white lawyers who did nothing to inspire you that the law was part of a moving, growing organism".[44]

For exactly the same reasons the government found him attractive, Kirby continued to be seen by some legal insiders as inappropriate. Sensing his prospects, some brought him under direct pressure to back away from accepting any offer of appointment. Invited in for a cup of tea by the retiring Moffitt, with other judges of appeal in attendance, Kirby was quizzed on whether he had been approached, reminded of his junior status, and left with the clear understanding that the position should be allowed to fall to one of the existing, more senior judges.[45] When his appointment was announced and confirmed, it was criticised by almost as many who hailed it. Kirby would go on to win or receive the trust and respect of all the appeal judges, regardless, with the collegiality of the New South Wales Court of Appeal delivering the most satisfying decade of his judicial career. Twelve years later, at his High Court welcome, David Bennett QC would comment that on his departure from the New South Wales Supreme Court there had been "standing room only":

> Never before have all 44 judges of that court attended a swearing in or swearing out of a judge. Never before has there been a ceremony at which so many craved the opportunity to farewell and honour the achievements of a great judge.[46]

Yet Bennett also noted that 12 years earlier, in 1984, "the court room was comparatively empty". His only explanation, euphemistically, was that when appointed as President of the Court of Appeal, Kirby was still "relatively unknown to much of the profession" – a telling explanation, when speaking of a man who for the bulk of Australian citizens was already the nation's best known judge.

Michael Kirby's substantive contributions at the Australian Law Reform Commission, along with those as a full-time judge on the New South Wales Court of Appeal and the High Court of Australia, are the

44 Wran, above, n 18.

45 Kirby 1995/96 (TRC 3296 4A) pp 91–93.

46 High Court of Australia, Canberra, Transcript (6 February 1996).

subject of the rest of this book. Throughout these roles, there remained an ebb and flow of opinion that even if his use of the judicial title was now quite clearly appropriate, there were questions of appropriateness surrounding how he conducted himself in his judicial office. At base, many undercurrents stemmed from uncertainties about the very concept of the "celebrity" judge. Conservatives in the profession found it unseemly. Many thought that any such scrutiny created dangers for the judiciary as a whole, personalising them all and exposing them as individuals to unwanted pressure and attention.

However, by the mid-1980s, it was too late to contemplate that Michael Kirby would cease to be the powerful public reference point for legal, ethical and social issues that he had become through his Australian Law Reform Commission service. In a country that tended to both love and hate its tall poppies, often at the same time, a tall poppy he would remain. Soon he was one of only four current or former judges on the roll of the National Trust's "100 Living Treasures". In 1997, *The Bulletin* magazine would list him as one of the nation's ten most creative minds, and then in 2006 as among the "100 Most Influential Australians" of all time.[47] In 2002, *Who Weekly* magazine even included him in its annual survey of the nation's 25 "most beautiful people".[48]

For Kirby, there was also no retreating to a quiet judicial life behind the purple curtain that he had been so keen to lift. Towards the close of his career he simply said "my engagement with the world of ideas is part of myself", something on which the clock could not be turned back as long as "the world of ideas and the law" remained "under-represented in our public discourse".[49] Yet this did not mean that his role as an active public intellectual was one that all colleagues would ever fully accept or understand. In 1989, Kirby's court was joined by a long-term critic since student days, Roddy Meagher QC, who, despite appearances as his political nemesis, was in fact a close friend. As he retired in 2004, Meagher reflected on Kirby's double public lives with characteristically savage humour:

> He loves making speeches. It does not, seemingly, matter to whom … [n]or does it matter on what subject. He will speak on any aspect of the law, on modern medicine, on dental decay, on child welfare, on the activities of UNESCO, on the Arab-Jew problem, on music, on economics, on the Stock Exchange, and on the multiple complications of the computer. Recently he spoke to the Loya Jirga at Kabul on "The

47 See *The Bulletin* (Sydney, 4 July 2006).

48 *Who Weekly* (Sydney, 27 May 2002).

49 Quoted in A Fraser, "The legal-eye view: Michael Kirby's perspective on life", *The Canberra Times* (23 April 2005) pp B1, B6–B7.

> Message of Islam" and to a gathering of senior monks at Phnom-Penh on "The Necessity for Silence".[50]

Meagher was also largely responsible for spreading a story that Kirby mistakenly delivered a lecture on the value of breast-feeding to a gathering of African tribes, having misunderstood a phone call inviting him to speak on "press freedom", not "breast feeding", in the third world. The story of Kirby's supposed mistake became apocryphal.[51] In fact, there was no mistake. In January 1983, Kirby had researched and written at length for a workshop on "Implementation of the International Code of Marketing of Breastmilk Substitutes" in Zimbabwe, which he attended at the invitation of the Commonwealth Foundation, the Commonwealth Secretariat, UNICEF and the World Health Organisation.[52] The invitation recognised the groundbreaking work of the Australian Law Reform Commission on a range of issues surrounding bio-medical ethics and regulation. In this case, the question was how to regulate to slow the rates of infant morbidity and fatality caused by "commerciogenic malnutrition" resulting from breastmilk substitutes. Those laughing in Phillip St, Sydney, may not have realised the extent of the concern, nor the extent of the international regard in which Kirby was now held.

A great paradox of Kirby's second career as an intellectual and statesman, was that more people encouraged it than deprecated it, even from within the judiciary. Indeed, many influential contemporaries readily did both, over time, depending on the issue. His outspokenness challenged assumptions, and concerned many, that it was not possible for a judge to hold and proclaim a view on a wide variety of public issues, and still convince litigants that, in every case before the court, he would bring a fair and open mind. Yet his skills as a communicator on law-related issues were such that, from the highest levels of public life in Australia and internationally, he constantly received praise for the fact that he was *not* simply a traditional judicial officer. Writing in the foreword to Kirby's second book of speeches, *Through the World's Eye,* his New Zealand colleague Sir Robin Cooke, Lord Cooke of Thorndon, celebrated him as a "publicist, in the best sense of the word" – maintaining it was simply "artificial" to try to distinguish between his judicial and public roles.[53]

It was also in international fields, and the status he brought many of his Australian judicial colleagues through international activities, for which Kirby attracted strong domestic support. From early work on

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50 R Meagher and S Fieldhouse, "Michael Kirby" in *Portraits on Yellow Paper* (Central Queensland University Press, Rockhampton, 2004) p 40.

51 See Pierce, n 4, p 118.

52 M D Kirby, "Breastmilk Substitutes, Bioethics and Law Reform" (*Speeches*, Vol 10, No 377) (17-21 January 1983); see also "The Role of Law Reform in Bioethics: The Case of Breast-Milk Substitutes" (1983) 6 *University of New South Wales Law Journal* 67.

53 M D Kirby, *Through the World's Eye* (Federation Press, Sydney, 2000) pp xii-xiii.

information privacy and security with the Organisation for Economic Cooperation and Development, through his service as President of the International Commission of Jurists, through to his role as the United Nations Secretary-General's Special Representative on Human Rights in Cambodia, he came to rival both Sir Owen Dixon and Sir Ninian Stephen as Australia's internationally best-known judge. In 2000, the United Nations Education, Science and Cultural Organisation awarded him the UNESCO Prize for Human Rights Education. At the time of his retirement, three of his 11 honorary doctorates came from nations other than his own.[54] As David Bennett told his High Court welcome, "unlike many of us for whom travel is an attractive perquisite, your Honour travels in sections of aeroplanes other than the front to places most Australians would fear to visit".[55] Kirby once emailed his nephew, Nicolas, in Canada to apologise for being unable to meet him on a flying visit, observing that "only a Kirby would travel all that way for two days". He was met with a characteristically pertinent response:

> You are absolutely right ... However I read that particular sentence with a slightly different emphasis ... When you say "only a Kirby", I read "only one Kirby". I defy you to name one other Kirby who would travel to the other side of the globe for two days. You won't be able to. There isn't one. And the only reason you do it is because you're quite mad.[56]

A similar effect was created by one of the most important issues that Kirby was to help Australians, and the world, confront – the public health risks of HIV and AIDS. Kirby entered the public debate about the Australian response in November 1985, urging an informed and moderate approach on legal measures at the first National Conference on AIDS in Melbourne.[57] From a career perspective, his involvement in the AIDS response was a triple-edged sword. With gay men emerging as the highest risk community in developed countries, including friends and acquaintances, he felt a moral obligation to play a role. It was also a decision involving a degree of liberation, as a de facto "coming out". When Kirby observed that the issue appeared to have rekindled and fuelled anti-gay sentiment, "just as our community was lifting itself out of the morass of primitive prejudice against homosexual men and women",[58] he knew that if it had not already ended, the period of public silence about his own sexuality was over.

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54 University of Ulster (D Litt); University of Buckingham (LLD); National Law School of India (LLD).

55 High Court of Australia, Canberra, Transcript (6 February 1996).

56 M D Kirby, Correspondence (7-8 August 2006), "Siblings", NAA, series and item reference awaiting classification.

57 M D Kirby, "AIDS Legislation – Turning up the Heat?", *Speeches*, Vol 15, No 598: see also (1986) 60 *Australian Law Journal* 324.

58 Kirby, n 57 at 325.

The fact was, however, that Kirby would have been sought out by governments to advise on HIV/AIDS, even if he was not gay. His interest and expertise in issues of biomedical policy, ethics and regulation – all unprecedented for a legal figure of his stature – all predated the first cases of AIDS. From the outset of the crisis in 1983, the fact of his sexuality made him almost the perfect person to provide advice and leadership on the issue. In 1986 he was asked to join the New South Wales Government's Ministerial Advisory Committee and not long after, at the invitation of the Federal Minister for Health, the foundation trustees of the AIDS Trust of Australia. He went on to provide extensive international leadership on legal responses to the issue through the World Health Organisation's Global Program on AIDS.

Almost more than any other issue, however, the spectre of sexual difference made more obvious by his visibility on HIV/AIDS became the sharpest point of attack on Kirby's "appropriateness" for, or in, judicial office. Some colleagues from the New South Wales Supreme Court made known their views that he should not be speaking on the matter. After years of discretion, by extending his public profile to an issue that so clearly involved the gay community, he was, in effect, "flaunting it". Despite being relatively widely known, his sexuality had not been a barrier to any previous appointment – yet after 1986, it was rumoured to become one. The first of a series of allegations of impropriety linked to his sexuality began to circulate in conservative social circles, only to be dismissed by a range of authorities. After rejections by police and media over a period of several years, one such allegation finally resurfaced in an infamous abuse of Federal parliamentary privilege in March 2002.[59] The failure of the parliamentary attack, by the New South Wales Liberal Senator and Federal Cabinet Secretary, Bill Heffernan, was ultimately far more spectacular than the core allegation itself, had it even proved true. However, these repeated undercurrents were clearly adding to debate – legitimate or not – over the appropriateness of his appointment. In 1999, three years before Heffernan's misdirected attack, Kirby had moved to ensure his sexuality was public knowledge, by publishing Johan's name as his partner in *Who's Who*. But few could challenge Kirby's private assessments that had his sexuality been as widely known in public and media circles before his judicial appointments, then those appointments would have been far less likely.[60]

As with the Court of Appeal in 1984, when Kirby came to be offered appointment to the High Court in late 1995, the offer was made in full knowledge of his sexuality. Within the Keating Government, where

59 E Campbell and M Groves, "Attacks on Judges under Parliamentary Privilege: A Sorry Australian Episode" [2002] *Public Law* 626; H Patapan, "High Court Review 2002: The Least Dangerous Branch" (2003) 38(2) *Australian Journal of Political Science* 299.

60 M D Kirby, Correspondence (16 August 1999), "Special", NAA, Item 1/A, series and item reference awaiting classification.

Gareth Evans was now Foreign Minister, the fact that Kirby was gay was "far from being a show-stopper, [and] was if anything a slight positive" in his prospects for appointment.[61] Alongside this, as Evans argued to the Prime Minister of the day, Kirby was by then clearly a "huge success" at what he had done, his service on the Court of Appeal having even secured him "a grudging acceptance … right across the legal profession as a highly competent technician". For a brief time, all else remained equal enough to allow Lionel Murphy's 1974 prophesy to come true, and for Kirby to secure appointment to the High Court.

Even then, however, the offer was far from inevitable. It came late in 1995, as a result of the opening created by Sir William Deane's retirement to take up the post of Governor-General. Just a few months earlier, Kirby had missed out on a more widely expected opportunity, when the Chief Justice Sir Anthony Mason had retired upon approaching the constitutionally proscribed age of 70. This more obvious opportunity came and went without Kirby's name even being "in the frame".[62] Instead, the Chief Justiceship went to Brennan, and the offer of a puisne appointment to Justice William Gummow of the Federal Court.

Why did Kirby almost miss out altogether on appointment to the High Court? In part it may have been because of his reputation in the field of law reform, at a time when the Keating Government did not have reformist appointments in mind. Announcing Gummow's appointment, Attorney-General Michael Lavarch openly described the lesser-known judge as a "lawyer's lawyer", and confirmed that "a factor" in the appointments was a desire to rein in the sometimes celebrated "judicial activism" of the Mason court.[63] Irrespective of his actual judicial record, had Kirby been a contender, the perception may have been that he was pointing in the wrong direction – while Gummow was regarded as a simple "technician", skilled but harmless.[64]

But in fact there was another more fundamental problem. By 1995, the Keating Government had aligned itself closely with the campaign to replace Australia's absentee, hereditary monarch with a resident President, appointed solely in the name of the Australian people. Consistently with his family roots, Kirby's long-held position was one of undiluted loyalty to the monarchy, and fondness for preserving Australia's institutional links with the former British Empire. More than any other issue, it was an attachment that revealed the true complexity of Kirby's political values. As far back as 1983, he had recoiled against public attempts to classify him as someone whose "political philosophy lies to the left of

61 Author's interview with Hon Gareth Evans (27 March 2008), hereafter Evans.

62 Author's interview with Hon Michael Lavarch (28 April 2008), hereafter Lavarch.

63 See S Horsburgh, "Judges best guardians of rights: Mason", *The Australian* (Sydney, 4 April 1995) p 6. Lavarch, n 62.

64 Pierce, n 4, p 277.

centre".[65] Alongside the many Liberal figures and politicians with whom he had worked over the years, the closeness of his alliances with political conservatives in the monarchist cause continued to bear this out. In 1992, he was instrumental in the establishment of Australians for Constitutional Monarchy (ACM). In 1993, the ACM engaged Tony Abbott as its first full-time executive director – an emerging conservative leader who had worked for Liberal Party leader John Hewson, and who would go on to be a senior Minister in the Howard Government. Abbott's assessment of Kirby's values was akin to that of many people. Having previously dismissed Kirby as a left-leaning progressive, Abbott would come to praise him as someone whose apparent radicalism, if any, involved "more a question of helping our society to better reflect its best self, than wanting to change it fundamentally because he thought that it was basically flawed".[66]

For the government of Prime Minister Paul Keating, any other issues about Michael Kirby faded into insignificance compared with his outspokenness in favour of the constitutional status quo. For many of his supporters, the issue revealed that Kirby had blind spots, and even in Gareth Evans' view, his organisational role in the campaign against the republican proposals "was not the smartest thing to do".[67] On the eve of the 1993 federal election, at which the Keating Government only narrowly survived, Kirby was campaigning actively in terms that were at best thinly veiled – indeed, using the same words Liberal and monarchist leaders would make famous in the defeat of Keating's plans:

> No self-respecting country should abandon its history and institutions out of deference to the misunderstandings of its neighbours. No country should alter its constitutional arrangements, if they work well, simply because neighbouring countries do not fully appreciate its history or understand its independence. ... Much of the rhetoric of republicanism smacks of nineteenth-century nationalism. In my view this is completely outdated and unsuitable rhetoric and we should grow beyond it. ... In the words of the poet laureate of a practical people, "if it ain't broke, don't fix it".[68]

Such interventions were not lost on the Prime Minister or other members of the government. With Keating "more than conscious"[69] of Kirby's role in the debate, by his own hand Kirby had nearly destroyed his chances of appointment to the High Court. When Deane's retirement

65 M D Kirby, "The Judges Judged – Part 2", *Proctor* (Queensland Law Society Newsletter, April 1984); see also *Speeches*, Vol 13, No 499 (1984).

66 Author's interview with Hon Tony Abbott (2 June 2008).

67 Evans, n 61.

68 M D Kirby, "The Australian Constitutional Monarchy and its Likely Survival" (Speech, Australian Society of Labor Lawyers, South Australia, 12 March 1993); see also *Speeches*, Vol 28, No 998 (1993); and G Grainger and K Jones (eds), *The Australian Constitutional Monarchy* (ACM Publishing, Sydney, 1994) pp 89, 95, 101.

69 Lavarch, n 62.

reopened the opportunity, it took "several detailed conversations"[70] for Evans and Lavarch to talk Keating around to considering Kirby, with the republic issue as "the only real hurdle".[71] According to Lavarch, Kirby was "certainly the most creditable ... sanest, rational spokesperson for the monarchist position" – a fact that he and Evans tried to turn to advantage by arguing to the Prime Minister that Kirby's appointment would "take him out of having this very prominent and creditable role ... he'd have to shut up about it".[72]

Eventually, Lavarch and Evans persuaded the Prime Minister that Kirby's views on the republic could be divorced from the actual role he would fulfil on the court. It was a success Lavarch never regretted, in hindsight seeing Kirby's appointment as, "from a political point of view, in a lot of ways the best of all worlds". For the same reasons that Kirby defended the monarchy, he espoused a strong belief in the basic principles of parliamentary sovereignty and it was this, "against the backdrop of an implied rights agenda" such as was developed by most of the Mason court, which helped define Kirby as a relative conservative. Yet Kirby was also a perfect replacement for Deane, embodying the "same sort of tradition" in social justice and liberalism.[73] The tipping point came in the fact that Evans and Lavarch knew that Keating had other fish to fry when it came to his High Court appointments:

> I just said to Keating: "Look, you're a tribal character, he's a tribal character, [the monarchy] is a tribal issue, it's got nothing to do with rationality. … It won't have any influence at all ... it's not going to affect his decision-making on anything of significance. What *does* matter is federal-state relations, what *does* matter is constitutional interpretation, what *does* matter is civil liberties. ... And what matters is having an adventurous spirit up against all those other f★★★ing Tories."[74]

THE INDEFATIGABLE JUDGE?

Within weeks of Kirby's ceremony of welcome to the High Court, 13 years of Labor Government were over. Within four years, the balance of the High Court had shifted dramatically, with three Howard Government appointments to the court, including two after a semi-official policy of only appointing "Capital C conservative[s]".[75] Through Kirby's own

70 Lavarch, n 62.

71 Evans, n 61.

72 Lavarch, n 62.

73 Lavarch, n 62.

74 Evans, n 61.

75 T Fischer, Deputy Prime Minister, as quoted by N Savva, "Fischer seeks a more conservative court", *The Age* (Melbourne, 5 March 1997); see also P Rees, *The Boy from Boree Creek: The Tim Fischer Story* (Allen & Unwin, Sydney, 2001) pp 203-205; D Solomon, *The Political High Court: How the High Court Shapes Politics* (Allen & Unwin, Sydney, 1999) p 35; H Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (Cambridge University Press, Cambridge, 2000).

13 years on the court, on top of his 11 years at the helm of the New South Wales Court of Appeal, the focus would shift squarely back to a question that had occupied him since before his original Boyer Lectures. How do, and should, senior appellate and constitutional judges go about their vital judicial role, since by definition it was not simply a legal role, but also a political, social and economic one?

The products of his own judicial efforts are reviewed in the chapters that follow. What was clear from the outset, was that with Kirby on the High Court, the question of judicial method would not drift back into quiet seclusion behind the purple curtain. At his welcome, David Bennett QC foreshadowed some of the likely impacts:

> On the Bench, your Honour has educated us and caused us all to revise our approach to legal research in three principal ways. First, we look to different judicial sources. To some of us, it comes as a shock on the first occasion to be asked why one is citing foreign authority when one reads from a speech in the House of Lords. That shock develops into incredulity when your Honour gently reminds the advocate of directly relevant authority in Upper Pradesh, Cyprus or the Turks and Caicos Islands. It is interesting to note that a high proportion of the few Australian cases reported in the Law Reports of the Commonwealth (which the cognoscenti no longer confuse with the Commonwealth Law Reports) are decisions of your Honour. The universality and breadth of your Honour's approach to law will be of great benefit to this Court.
>
> Secondly, your Honour has taught us to look beyond black letter law to considerations of policy. This is not to say that your Honour seeks in any way to administer some sort of palm tree justice in specific cases rather than to decide them according to law. What it does mean is that, where law is being developed and where, for one of the reasons adumbrated by Professor [Julius] Stone in his categories of indeterminate reference, there is a genuine and proper judicial choice about the direction of that development, your Honour wishes to appreciate the policy considerations before making a decision, and counsel is expected to identify and discuss those factors. Your Honour's pioneering efforts in this area will be of even greater significance in this Court.
>
> Thirdly, your Honour has encouraged advocates to cite academic writings without the quaint and incomprehensible limitation we were taught at law schools that only a dead writer could be cited. The days of the Dead Lawyers Society have passed largely because of your efforts.[76]

In reply, Kirby staked his own judicial colours to the mast:

> Perhaps the sole speech of this kind which is known to every Australian lawyer is that of Sir Owen Dixon at his swearing-in as Chief Justice. It was then, in that little courtroom in Darlinghurst, in Sydney, where,

76 High Court of Australia, Canberra, Transcript (6 February 1996).

20 years ago I saw Lionel Murphy sworn, that Chief Justice Dixon uttered his well-known words:

> "There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism."

Since that April day in 1952 much has changed. The world, our country and its law have changed. Technology has put our species into space. Scientists have unravelled the double helix of DNA. Information technology has revolutionised our planet and now reaches even towards simple artificial intelligence. But the abiding judicial duties of neutrality, integrity and the provision of persuasive reasoning remain as strong today as they were in Sir Owen Dixon's time. The termination of Privy Council appeals has finally released Australian law from accountability to the judicial values of England which lasted so long. The slow realisation of this fact, and of its implications, in a profession which is often resistant to change, presents to this, as to other Australian courts and courts of the region, challenges which are both exciting and sometimes very difficult.

There will be no returning to the social values of 1952, still less those of 1903 when this Court was established. It falls to each generation of Australian lawyers, led by this Court, to fashion new principles of the Constitution, of common law, and of equity, which will contribute wisely to the good governance of the Australian people. There is now a greater public understanding of the limited, but still very real, scope for judicial creativity and legal development. Judges are now more candid about this aspect of their function. Without a measure of creativity how else would the common law have survived seven centuries, from feudalism to the space-age? How else would it have endured in so many different lands after the sun set on the British Empire?

In any case, the "good old days" were not always so good in the law in Australia, including in the common law. They were not so good if you happened to be an Australian Aboriginal. Or indeed, a woman. Or an Asian confronted by the White Australia policy. Or a homosexual Australian. A conscientious objector. A person with heterodox political views. A homeless person. A publisher of the mildly erotic. A complainant against official oppression. A person struggling in litigation with an imperfect understanding of the English language. For these Australians, judicial words on occasions such as this seemed boastful and empty.

But we in Australia have now taken a confident turn in our legal journey towards enlightenment and justice for all under the law. Yet the lesson of the present enlightenment must be that there are other injustices to which we are still impervious, or indifferent or which we do not yet see clearly. We need to defend our legal institutions and to adhere to time-honoured legal principles. Not blindly. And not mechanically. But with eyes, minds and hearts always open to the call of justice. Only the quest for justice gives the profession of the law its claim to nobility.[77]

77 High Court of Australia, Canberra, Transcript (6 February 1996).

For Kirby, it remained axiomatic that judges have a creative role, sometimes making law and always helping shape it, rather than simply "discovering" or "applying" it. Even within conservative legal circles, few souls would honestly argue this is not so. In the real debate over the interwoven forces of creativity and restraint that define the judicial role, the issues are ones of *method* and *degree* – when and how do judges, individually and collectively, go about their task of either letting declared legal rules remain unchanged, adapting them subtly to suit changing circumstances and needs or, occasionally, wiping the slate clean and rebuilding them from first principles?[78] In a functioning democracy, when the issues are governed by parliamentary statutes that are current and perfectly clear, these questions themselves have clearer answers. But in the many circumstances when this is not so, the need to answer these complex questions explains why we have an independent judiciary, and what judges get paid for.

As the 40th justice of the High Court, Kirby inherited a changing political environment and judicial context in which few political leaders and increasingly fewer colleagues were much interested in these questions. Instead, the late 1990s became a period in which any attempt to intellectualise the process offered few rewards. The concept of judicial creativity became conflated with the notion that any creativity involved "activism" which, in turn, was synonymised with those cases where, it was alleged, judges went beyond the bounds of their legitimate role. While accepting that the term "activism" was taking this increasingly pejorative twist, Kirby saw the fundamentals of the judicial role as basically unchanged, and continued to articulate his understanding of the methods routinely applied – not only by himself but by any diligent common law judge:

> Sometimes we will err, for that is inherent in the human condition. But if we search for the solution to the particular case with the illumination of legal authority, legal principle and legal policy and are sometimes called "judicial activists", we must accept that label with fortitude.[79]

In his new role as a constitutional judge, Michael Kirby paid special attention to articulating his approach to constitutional interpretation. This most vital part of the role of a High Court judge was different from a traditional common law judicial role, since it revolved around a specific and explicit text. The Australian *Constitution* was now turning 100 years old, however, and the question of whether it was to be interpreted primarily in terms of its drafters' "original intent" or as a more "living

78 See, eg, K M Holland (ed), *Judicial Activism in Comparative Perspective* (Macmillan, London, 1991); J Daley, "Defining Judicial Restraint" in T Campbell and J Goldsworthy (eds), *Judicial Power, Democracy and Legal Positivism* (Ashgate, Aldershot, 2000) pp 279-314; B Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (Oxford University Press, Oxford, 2008).

79 M D Kirby, "Judicial Activism" (Bar Association of India Lecture, New Delhi, 6 January 1997); see also Kirby, n 53, p 109.

force" was a significant one. He concluded that judges should make their definitional choices about particular words in a manner that "protected and advanced the essential character of the polity" that the *Constitution* established:

> In Australia, this function is to be performed without the need constantly to look over one's shoulder and to refer to understandings of the text that were common in 1900 when the society the Constitution addresses was so different. Reference to 1900, if made at all, should be in the minor key and largely for historical interest. Not for establishing legal limitations.[80]

By 2002, now aged 63, Kirby was still working 13-hour days and seven-day weeks, in large part to maintain his continuing double careers as a full-time judge and world-roaming public intellectual. On top of this he had endured the stress of the attack by Senator Heffernan, coupled with its preludes and ongoing ripples – and made his own workload greater by maintaining the principle that it was the duty of all appellate judges to reach and write their own individual opinion, unless in all truth they simply and totally agreed with everything a colleague had written. Fulfilling this principle became increasingly onerous, the less he found himself agreeing.

Under this pressure of work, Kirby had little time to provide – other than by demonstration – any major new insights into larger questions of the judicial role. When it came to his views on the art of judging, everyone understood what he meant by the "illumination of legal authority" or precedent. Apart from this, however, what was really meant by his references to "legal principle" and "legal policy" as determinative influences, and as discussed in his 1996 speech and recognised by Bennett at his 1996 swearing-in? The answers might ever have remained more elusive, had it not been for another attack – one indicating just how far Kirby's values remained from the ruling political values of the day. He accepted the invitation to deliver Britain's Hamlyn Lectures, the vehicle for his third book, and a major opportunity to speak to these larger issues. As late as September 2002, he flagged to the Hamlyn Trust a range of topics which, for him, did not provide new ground: "the impact of science and technology on the law", or "giving effect to human rights principles through common law" or general speeches on Australia's common law history.[81]

Then, with the retirement of Mary Gaudron, speculation arose about the Howard Government's likely fourth appointment to the court. On 30 October 2002, Justice Dyson Heydon of Kirby's former court delivered

80 M D Kirby, "Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?" (2000) 24 *Melbourne University Law Review* 1 at 14.

81 M D Kirby, Correspondence (2 September 2002) "Hamlyn" Series, NAA, Item 2/K, series and item reference awaiting classification.

an address at the invitation of *Quadrant* magazine, which became widely known as his "acceptance speech" – or, if not that, his application, given his appointment was not announced for another month.[82] Heydon circumscribed his attack on "Judicial Activism and the Death of the Rule of Law" as being unconcerned with constitutional interpretation or statutory construction, making it only an attack on judicial development of the common law. In a further ex post facto critique of the Mason court, Heydon expressed himself in terms that, on any assessment, were also personally directed at Kirby:

> There is within [the judiciary's] increased ranks a large segment of ambitious, vigorous, energetic and proud judges. Ambition, vigour, energy and pride can each be virtues. But together they can be an explosive compound. ... Judgments tend to cite all the efforts of their author, of their author's colleagues, of other state courts and English courts and American courts and Canadian courts and anything else that comes to hand. Often no cases are followed, although all are referred to. There is much talk of policy and interests and values. ... [H]uge footnotes ... containing copious references to articles in Australian and overseas university or professional law reviews ... seem more designed to highlight supposed judicial learning than to advance the reasoning in any particular direction relevant to the issues between the parties. They appear designed to attract academic attention and the stimulation of debate about supposed doctrines associated with the name of the judicial author.
>
> Here the delusion of judicial immortality takes its most pathetic form, blind to vanity and vexation of spirit. In all, the words Gladstone used about the annexation of the Transvaal in 1879 might be applied to the new judicial class: "See how powerful and deadly are the fascinations of passion and of pride."[83]

In case the prime example of such behaviour was not sufficiently clear, Heydon went on to cite Kirby's appointment as Chairman of the Australian Law Reform Commission as one of only a few identified "significant" events in the deterioration of judicial standards over the previous 47 years. This was notwithstanding that Heydon had himself worked with Kirby as an honorary consultant to the Commission, among other links. Heydon also cited Kirby's opinions regarding the domestic application of international rights norms as the major ongoing example of unacceptable activism.[84] Most of the critique was presented not as a difference of methodological opinion, but a direct attack on the

82 Pierce, n 4, p 281.

83 D Heydon, "Judicial Activism and the Death of the Rule of Law" (2003) Vol XLVII No 1-2 *Quadrant* 9 at 14. See also (2003) 23(2) *Australian Bar Review* 110; and (2003) 14(2) *Australian Intellectual Property Journal* 78.

84 Heydon, n 83 at 16, 21.

propriety of any judge so-described, under the heading "Challenges to Probity".

The most direct intellectual challenge to Kirby, however, came early in the speech when Heydon defined the judicial role as simply "the disinterested application by the judge of known law drawn from existing and discoverable legal sources independently of the personal beliefs of the judge".[85] The idea that the law was only ever pre-existing, discoverable, and applied disinterestedly by judges, totally independently of them personally, was the direct antithesis of Kirby's remarks at his swearing-in.

Justice Heydon's attack – for Kirby, the second major personal attack after Senator Heffernan's allegations within the same year – reinvigorated Kirby's commitment to articulating, in detail, the larger, real questions of judicial method. Deciding to take Heydon head on, he refocused and retitled his Hamlyn Lectures, delivered one year later. Together they were published as his third book and most substantial work on the art of common law judging: *Judicial Activism: Authority, Principle and Policy in Judicial Method*.[86] Responding to the "Counter-Reformation" advanced by Heydon and others, over two nights Kirby told the University of Cardiff:

> I used to share some of these views. Fortunately, I grew out of the spell of legal formalism and its infantile over-simplifications. We need a middle ground that reflects the pragmatic character of the common law in contemporary times. The extremes of unbounded judicial creativity and invention will be tamed. But so too will be the extreme of mechanical application of old law without considering the context in which it must operate and its justice and conformity to basic principle. The call for a return to the "strict and complete legalism" must be rejected as the fairytale that the legal Reformation taught it was. But what do we put in the place of fairytales?"[87] ...
>
> [The] legal Counter-Reformation ... is made up of those who denounce as "judicial activism" the time-honoured role of our judges to adapt and adjust the law to the age of cyberspace, the genome and global human rights. This Counter-reformation should not be allowed to succeed. If it does, ... we may witness the bullying of judges in the attempt to force them to draw back from honesty in the discharge of their functions so as to avoid threatened political heat from people who

85 Heydon, n 83 at 10.

86 (Sweet & Maxwell, London, 2004).

87 M D Kirby, "Counter-Reformation" (Third Hamlyn Lecture, University of Cardiff, 24 November 2003); see also M D Kirby, "Beyond the Judicial Fairy Tales" (2004) Vol XLVIII, No 1-2 *Quadrant* 26 at 31-32; and M D Kirby, "Judicial Activism? A Riposte to the Counter-Reformation" (2004) 24 *Australian Bar Review* 219 at 230-231.

> prefer an inert judiciary: one that denies its legitimate creative role in defending justice.[88]
>
> Somewhere between the spectre of a judge pursuing political ideas of his or her own from the judicial seat irrespective of the letter of the law, and the unrealistic mechanic deified by the strict formalists, lies a place in which real judges perform their duties: neither wholly mechanical nor excessively creative.
>
> We must now face up to the difficulty of identifying the criteria by which the contemporary common-law judge can legitimately exercise the judicial power in a given case to express, or to decline to express, a new rule of law or to state an existing rule in new and different terms. Without a theory to govern such activity, it is difficult to have a serious debate about judicial activism and restraint, except in terms of visceral reactions to particular outcomes.[89]

In his final lecture, Kirby went on to lay out for examination and critique his own understanding of the theory of judicial method. It was to be the most detailed contribution provided so far by an Australian judge to the solution of this larger and most pivotal question. Is Kirby's guide a fair description of what he himself does in the course of judging, or of others? Is it a fair guide to what good judges *should* do? If not, what are the better explanations and prescriptions for the methods involved in the discharge of these vital legal, political, social and economic functions? While Kirby's own answers can be contested, the ultimate service is often provided by those who identify – with clarity – the right questions. Understanding the public impact of Michael Kirby is largely about understanding his ability, in the eyes of many, to do just that.

Nevertheless, the provocation of Kirby into presenting the Hamlyn Lectures came at a price. Perhaps thinking it humorous, Heydon had introduced a degree of personality into the debate over common law judicial method. Focusing on individual judges as protagonists and antagonists had previously, generally, been left to politicians and media commentators, and not taken up in the brotherly or sisterly language of judges. And as he had to Connolly 20 years earlier, Kirby responded in kind. However, as he calmed down, he tried to retreat. He had opened his fourth and last lecture by effectively calling his own critics "bullies", apparently intent on persuading "honest" judges to compromise in order to avoid "political heat". Kirby dropped this paragraph not only from the final book, but also from the summary version of his lectures, systematically sent to every publication that had reproduced Heydon's speech. But his description of Heydon's arguments as "infantile over-simplifications" – which also never made

88 M D Kirby, "Concordat" (Fourth Hamlyn Lecture, University of Cardiff, 25 November 2003).

89 Kirby, n 88; see also Kirby, *Quadrant*, n 87 at 32; *Australian Bar Review*, n 87 at 231; and Kirby, n 86, pp 63-64.

it into the final book[90] – did survive in the summaries published in *Quadrant* and the *Australian Bar Review*. While many, including other former and serving judges, agreed with Kirby's description, Heydon's labelling of judicial activists as "deluded", "pathetic" and "blind to vanity and vexation of spirit" had clearly lowered the tone.

With Heydon on the High Court, the mediating influence of Mary Gaudron gone, and wounds still fresh from the Heffernan attack, the second half of Kirby's period of service was characterised by a number of judicial battlelines, more clearly drawn than perhaps at any other time in the court's history. Soon an exchange occurred in which Michael McHugh, himself only a year out from retirement after 15 years on the court, was widely seen as abandoning Kirby in his tensions with the judicial conservatives. In *Al-Kateb v Godwin*,[91] when Justices Kirby, Gummow and Chief Justice Murray Gleeson would have found that the Federal Government did not have the constitutional power to keep asylum-seekers in indefinite detention, Justice McHugh led a narrow majority of the court in the opposite direction. Only Kirby saw the outcome as influenced by international standards of human rights. McHugh entered into a lengthy rejection, describing the "claim that the Constitution should be read consistently with the rules of international law" as "heretical", and accusing Kirby of trying to "amend ... the Constitution under the guise of interpretation".[92] Knowing he was in a minority of one on this issue, Kirby responded to the reply by suggesting that McHugh was being inconsistent to the point of potential disingenuousness, and predicted that "opinions that seek to cut off contemporary Australian law (including constitutional law) from the persuasive force of international law" were "doomed to fail", and would be viewed "in the future ... with a mixture of curiosity and embarrassment".[93]

Initially, Kirby put a brave face on the trajectory indicated by such an exchange:

> There were similar exchanges in the 1930s and earlier in the life of the court. Don't get too anxious about it all. These exchanges are the mark of honest judges and strong institutions. Hiding differences or refusing to exchange on important points is not a mark of a confident democracy.[94]

However, things did not improve. A further low point was reached when Kirby used similar and stronger language to respond to a majority of

90 Kirby, n 86, p 60.
91 (2004) 219 CLR 562.
92 (2004) 219 CLR 562 at 589 [63] and 595 [74] per McHugh J.
93 (2004) 219 CLR 562 at 629 [190] per Kirby J.
94 Quoted in Fraser, n 49, B1, B6–B7.

colleagues in *Thomas v Mowbray*,[95] where he disagreed that the *Constitution* authorised federal legislation for the imposition of anti-terrorism control orders, thus severely restricting the liberty of a citizen, without the citizen having been charged or convicted of any relevant offence under normal criminal law. With less than two years to go before his own retirement, Michael Kirby's life completed a great circle. The court's majority now reached opposite conclusions to those he had always drawn from the *Communist Party Case*,[96] of such direct relevance to his family over half a century earlier:

> In the past, lawyers and citizens in Australia have looked back with appreciation and gratitude to this Court's enlightened majority decision in the *Communist Party Case*. Truly, it was a judicial outcome worthy of a "free and confident society" which does not bow the head at every law that diminishes liberty beyond the constitutional design.
>
> I did not expect that, during my service, I would see the *Communist Party Case* sidelined, minimised, doubted and even criticised and denigrated in this Court. Given the reasoning expressed by the majority in these proceedings, it appears likely that, had the [Communist Party] Dissolution Act of 1950 been challenged today, its constitutional validity would have been upheld. This is further evidence of the unfortunate surrender of the present Court to demands for more and more governmental powers, federal and State, that exceed or offend the constitutional text and its abiding values. It is another instance of the constitutional era of laissez faire through which the Court is presently passing.
>
> Whereas, until now, Australians, including in this Court, have generally accepted the foresight, prudence and wisdom of this Court, and of Dixon J in particular, in the *Communist Party Case* (and in other constitutional decisions of the same era), they will look back with regret and embarrassment at this decision when similar qualities of constitutional wisdom were demanded but were not forthcoming.[97]

As in *Al-Kateb*, Justice Kirby was not alone in dissent, with Justice Hayne also finding that the Commonwealth's anti-terrorism laws went beyond its constitutional power. But given the language, it was not surprising that the public focus was all on Kirby.[98] And in response, Kirby was prepared to concede publicly that there was inevitably a personal side to the professional schism that had come to afflict the court:

> When I was president of the Court of Appeal of New South Wales it was a court with a range of different philosophies amongst the judges. It was a bigger court. There were more judges and there was more

95 (2007) 233 CLR 307.

96 (1951) 83 CLR 1; see n 11.

97 (2007) 233 CLR 307 at 442-443 [385]-[387] per Kirby J.

98 N Robinson, "Judge blasts bench for terror 'surrender'"; and C Merrit, "Times change, but Kirby doesn't", *The Australian* (Sydney, 3 August 2007) p 1.

> room for difference of philosophy and there were judges of different philosophies and that was a very beneficial thing because then you have an interaction and a frisson of opinion within the court.
>
> That doesn't exist in the High Court of Australia at the moment. I'm off in a minority of one, not always but sometimes, and that really is different and you can't have as rich a human relationship with people in those circumstances.
>
> But you have nothing to do with the people who are appointed. They are appointed by government but once appointed you have to work with them as colleagues and that's what I do and that's what they do. ...
>
> I don't feel as congenial towards all of my present colleagues as I did, for example, to the judges in the Court of Appeal, and that's just a factor of personality.[99]

THE INEVITABLE JUDGE?

When Attorney-General Michael Lavarch described as "inevitable" the appointment of the nation's best-known judge to the High Court in 1996, it was partly meant as a ceremonial flourish. It was also a genuine recognition of Michael Kirby's public achievements. But viewed across the wider canvas of Kirby's life, the legal profession and Australian politics, it was a claim both bold and fragile. Lavarch himself confirmed this, when he later described Kirby's appointment – of which he remained irreversibly proud[100] – as "reasonably controversial in the sense that he had always been in effect a prominent lawyer, law reformer, judge in the public debate, certainly more so than most judicial officers are ... Love him or hate him, he's a bit of a polarising figure in a sense".[101] These are not the hallmarks of most who rise to the highest ranks of judicial office.

Michael Kirby's judicial career was not simply the product of destiny. On the one hand, even in Kirby's own view, how would one explain such a career path – such an unexpected rise, such public resonance, such persistence, such survival – without recourse to a sense of fate, especially if one takes a linear, progressive view of history? But to attribute such a career simply to destiny would be to perpetuate the myth that senior judges fall to their vital roles through some kind of divine intervention, and give their utterances the type of unquestionable authority that Kirby himself has always decried. It would also gloss over the social and political forces that came to bear on such an accession, to misunderstand the complexity of the forces of conservatism and radicalism that are so

99 M D Kirby, Interview with Monica Attard, "Sunday Profile", ABC Radio National (27 November and 2 December 2007).

100 Lavarch, n 62.

101 Quoted in A Fraser, n 49, p B1.

finely balanced in Kirby's views, and to underestimate the particular strengths of character and skill – carefully cultivated and honed – that enabled him to succeed against, at times, powerful odds.

To attribute Kirby's contributions to destiny would also be to diminish the uniqueness of the individual. One thing held in common between the many who celebrate Michael Kirby's judicial career, and the smaller, but nevertheless significant, number of his critics, is the conviction that Michael Kirby is a "one-off" personality – someone whose mould, if there ever was one, was used once and immediately broken. It may be that Kirby's own sense of the uniqueness of the individuals who make up any society, and all societies, provides the only real unifying logic for understanding why his passions for detail, history and service have produced not just a lawyer, but one who, if he is to err, intends to err on the side of individual justice.

How often he has erred is for others to judge, including through the contributions in this book. But the fact that it was so far from inevitable that someone of such diligence and skill would necessarily succeed, with such a philosophy, says much about the peak legal and political institutions of our time. While Michael Kirby's philosophy is marked by constant calls for respect and faith in those very institutions, it is also marked by a countervailing need for the law to always retain its basic humanity. The result is perhaps best captured in the summation of his role on the nation's highest court given by Bill Pincus, himself a distinguished former State and federal judge:

> [I]t does not seem too excessive to have, in a court of seven, one judge (Kirby) who persistently favours the little guy.[102]

102 W Pincus, "Who's for the little guy in the High Court?", *Australian Financial Review* (1 June 2007) p 64.

Chapter 2

ADMINISTRATIVE LAW

Wendy Lacey

The legislature reacts to the same growth in the number and importance of administrative decisions of a discretionary character. So too may the courts. Particularly may they do so in an area where the common law has proved so creative and adaptable.

[W]here a number of relevant Parliaments have enacted laws elaborating modern conceptions of administrative justice and fairness, it is appropriate for the judiciary in development of the common law in those fields left to it, to take reflection from the legislative changes and to proceed upon a parallel course …[1]

INTRODUCTION

Administrative law, like constitutional law, involves the courts in reviewing the legality of government action. It frequently involves sensitive and politically contested government policy and legislation and, consequently, can result in controversial decisions where the intentions of government or the hopes of objectors are thwarted. In administrative law, this occasionally controversial process of institutional dialogue occurs through the judicial review of administrative decision-making. Administrative law, and judicial review in particular, ensures that government decision-making is exercised in accordance with the law and provides a mechanism for accountability and transparency in administrative decision-making. The judicial review, however, is conducted against a constitutional backdrop which, for Australia, includes a commitment to parliamentary supremacy and the separation of powers. When it comes to the making of government decisions, Parliament – and not the courts – ultimately controls what substantive

1 *Osmond v Public Service Board (NSW)* [1984] 3 NSWLR 447 at 465 per Kirby J.

and procedural limits apply to the making of a particular decision. However, the *Constitution* ensures that the courts remain the final arbiter in disputes regarding the legality of government decision-making. In this sense, the rule of law is constitutionally protected.

Hence, administrative law affects fundamental aspects of the system of government in Australia. The administrative law decisions of Australia's appellate courts, and particularly the High Court, have a political impact. Not every judge who conducts judicial review of administrative action can claim to have made a significant jurisprudential contribution to administrative law, yet every judge who conducts judicial review has the potential to significantly affect government practices and policies. Justice Kirby has made many notable contributions to the development of Australian administrative law, with some of his most significant coming in dissenting opinions, or opinions which were later overturned on appeal. Some of those more recent dissents – those involving the exercise of public/private distinction – are likely to inform and influence future decisions of the High Court.

It is telling that lawyers throughout the country would be just as aware of his Court of Appeal decisions in *Osmond v Public Service Board (NSW)*[2] (despite its eventual fate on appeal[3]) and *Rendell v Release on Licence Board*,[4] as they are of the more recent powerful dissents in *NEAT Domestic Trading Pty Ltd v AWB Ltd*[5] and *Griffith University v Tang.*[6] It is no accident that Kirby J's principled reasoning in each of those earlier judgments is still taught in administrative law courses throughout the country. Justice Kirby's jurisprudence in this field, though certainly not limited to this area of the law, has been consistently characterised by a number of themes: the commitment to a substantive conception of the rule of law; the desire to preserve human rights and freedoms unless faced with the clearest statutory language indicating otherwise; a commitment to open and transparent decision-making both by the courts and government officials and bodies; an appreciation of international and overseas developments in administrative law and human rights; and a desire to balance appropriate judicial creativity whilst maintaining judicial legitimacy.

Justice Kirby's decisions in administrative law confirm that he has been a principled decision-maker whose approach was generally consistent throughout his judicial career. His judicial review was never "empty review", whereby the court would be seen to "give the stamp

2 [1984] 3 NSWLR 447.

3 The decision was reversed on appeal in *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656.

4 (1987) 10 NSWLR 499.

5 (2003) 216 CLR 277.

6 (2005) 221 CLR 99.

of legitimacy to the executive by permitting a thin veneer of legality to substitute for the substantive protection of the rule of law".[7]

In order to understand Kirby J's contributions in specific areas of administrative law, it is helpful to first consider his broad approach to the judicial review of administrative action. Justice Kirby was prepared to creatively develop the law where others were not, and yet his judgments were always respectful of the legitimate bounds of judicial review. Understanding how he managed this balancing of creativity and legitimacy is critical to understanding the nature of his contribution in key cases.

THE LEGITIMATE BOUNDS OF JUDICIAL REVIEW

In the Gleeson High Court, Kirby J was often incorrectly portrayed as a radical dissenter and activist judge on a conservative Bench.[8] However, in many ways Kirby J was a traditionalist with a clear appreciation of the legitimate bounds of judicial review. His strongest critics tended to be those who simply did not agree with his reasoning or conclusion in a case. In the face of clear legislative intent or clear binding authority, Kirby J would decide a case in accordance with that intent or authority. However, where he did differ from other judges (particularly on the High Court), was the extent to which he would expressly declare his dissatisfaction with what he perceived to be a wrong, outdated or illogical rule or principle. Furthermore, Kirby J would always conduct a thorough analysis of the law in searching for gaps and uncertainties, often finding opportunities for judicial creativity where other judges had not, particularly where human rights or fundamental freedoms were concerned.

In other words, Kirby J was always transparent in performing his judicial role. He was certainly more inclined to find gaps, ambiguities and irregularities in the law and more inclined than other judges to adopt a rights-protective stance when interpreting the statutory conferral of power. Yet, such an approach is entirely within the legitimate scope of judicial choice which characterises the common law system. Whilst

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7 D Dyzenhaus and R Thwaites, "Legality and Emergency – The Judiciary in a Time of Terror" in A Lynch, E McDonald and G Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, Sydney, 2007) pp 9-27, 16.

8 This was so much the case that Kirby J himself would often respond to the exaggerated claims of (what his Honour referred to as) "media bullies": M D Kirby, "Judicial Activism: Power Without Responsibility? No, Appropriate Activism Conforming to Duty" (2006) 30 *Melbourne University Law Review* 576 at 590; M D Kirby, "The High Court and the Creative Role of the Common Law Judge" (1994) 6 *Legaldate* 1.

he was quick to locate and utilise the "leeways of judicial choice",[9] the traditionalist in Kirby ensured that the bounds of legitimate judicial review were never crossed. His concern for human rights, for example, never came at the expense of ignoring the doctrine of parliamentary supremacy. In the procedural fairness case of *Lisafa Holdings Pty Ltd v Gaming Tribunal*,[10] Kirby P offered the following (and hardly unorthodox) account of his approach to judicial review:

> Courts and tribunals must faithfully carry into effect the purpose made clear in the express language of Parliament, even though they may consider an injustice to be occasioned thereby. They have no legitimacy or authority to substitute their will for that which Parliament has clearly or expressly enacted. In this jurisdiction, the notion that there are fundamental rights which even Parliament cannot override has not been accepted … Courts will strain to adapt the express language of Parliament to respect for basic rights, including those to procedural fairness.

Justice Kirby constantly grappled with obedience to the doctrine of parliamentary supremacy and with the need to preserve the rule of law.[11] However, he always accepted that Parliament was the supreme law-making authority and that no human right lay beyond its legislative power to remove. In 1984, he stated that "courts must not too readily surrender the beneficial facility of judicial review which is the ultimate machinery to protect the rule of law".[12] For Kirby J, Parliament was supreme, but the process of judicial review could never simply involve the automated application of a statute; the rule of law required a more rigorous approach to statutory construction.

In *Lisafa*, Kirby P referred to the "techniques of statutory construction", which enable judges to legitimately "strain to adapt the express language of Parliament".[13] In support of the approach that judges should take to the task of construction, Kirby P referred to the words of Deane J in *Laws v Australian Broadcasting Tribunal*[14] where his Honour had stated that laws should not be used as an instrument of injustice. Justice Kirby interpreted the "presumption to which Deane J gave voice" as meaning that Parliament should not be taken to envisage that its laws "should become an instrument of oppression or injustice,

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9 A phrase coined by Julius Stone in *Precedent and Law: Dynamics of Common Law Growth* (Butterworths, Sydney, 1985) pp 4, 271. See also M D Kirby, "Julius Stone and the High Court of Australia" (Speech, Symposium to mark the 50th anniversary of "Province and Function of Law" by Professor Julius Stone, University of New South Wales, 1996): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_stone.htm (accessed 29 November 2008).

10 (1992) 26 NSWLR 391 at 402.

11 [1984] 3 NSWLR 447 at 451.

12 [1984] 3 NSWLR 447 at 451.

13 (1992) 26 NSWLR 391 at 402.

14 (1990) 170 CLR 70 at 96 per Deane J.

denying fundamental rights".[15] There is nothing radical in this approach, as long-standing interpretive principles of the common law already warrant such an approach.[16] However, the application of those principles involves an element of judicial discretion and, whereas most judges use them intermittently where they are considered applicable, Kirby J was consistent in their application. Indeed, he seemed to approach the interpretive principle regarding human rights and freedoms almost in the nature of a rebuttable presumption as opposed to a discretionary principle of construction.

Where the words of the enactment are "clear and explicit", as they were in *Lisafa*, Kirby J held that "there is no warrant in a court of law to ignore or circumvent those words".[17] Thus, although Kirby J differs in the extent to which he felt compelled to apply techniques of statutory construction to avoid oppression or injustice, his approach to judicial review was always constrained by his ultimate adherence to orthodox views on the outer limits of (legitimate) judicial review. That Kirby J may have pushed the limits according to what some commentators would perceive as being legitimate may be true. However, such appraisals are more accurately viewed as critiques of the wisdom or correctness of what Kirby J did within the legitimate bounds of judicial review. Justice Kirby was a traditionalist in the sense that he never ultimately flouted the doctrine of parliamentary supremacy, and avoided the "attempt to legislate and to tread forbidden ground".[18] Where he was to an extent non-traditionalist was in his understanding of the judicial task of statutory construction, particularly his perception that judges should construe statutes in a manner which is least offensive to notions of liberty and justice.

Acutely aware of the formality and inflexibility that often accompany the application of legislation, Kirby J often referred to "the justice of the common law",[19] borrowing from the words of Byles J in *Cooper v Wandsworth Board of Works*.[20] The work of Julius Stone – his "great professor and teacher of jurisprudence" – had clearly influenced his judicial

15 (1992) 26 NSWLR 391 at 403.

16 The presumption that Parliament does not intend to infringe upon fundamental rights and freedoms unless it uses clearly unmistakable and unambiguous language is a principle of long standing in Australia: *Potter v Minahan* (1908) 7 CLR 277 at 304; *Coco v The Queen* (1994) 179 CLR 427 at 437; *Wentworth v NSW Bar Association* (1992) 176 CLR 239 at 252.

17 (1992) 26 NSWLR 391 at 402.

18 A point made in the case of *Osmond v Public Service Board (NSW)* [1984] 3 NSWLR 447 at 469, citing the opinion of Barwick CK in *Mutual Life & Citizens; Assurance Co Ltd v Evatt* (1968) 122 CLR 556 at 563.

19 *Osmond v Public Service Board (NSW)* [1984] 3 NSWLR 447 at 469; *Macrae v Attorney-General for New South Wales* (1987) 9 NSWLR 268 at 273.

20 (1863) 14 CB(NS) 180 at 194; 143 ER 414 at 420.

approach,[21] as the "leeways of judicial choice" which Stone described in the common law have a particular resonance when reviewing the judgments of Kirby J. This view of the common law as a moderating influence on the inflexibility of statutes has influenced his approach to statutory construction. Furthermore, Kirby J was never a judge who shied away from developing the common law where development was seen as necessary and appropriate. Silence, or partial silence, on the part of the legislature was never viewed as a reason why judicial development of the law (administrative law included) should not occur:[22]

> The legislature reacts to the same growth in the number and importance of administrative decisions of a discretionary character. So too may the courts. Particularly may they do so in an area where the common law has proved so creative and adaptable.
>
> … [W]here a number of relevant Parliaments have enacted laws elaborating modern conceptions of administrative justice and fairness, it is appropriate for the judiciary in development of the common law in those fields left to it, to take reflection from the legislative changes and to proceed upon a parallel course.

This statement, made in 1984 during Kirby J's first year on the Court of Appeal, offered a strong early indication of his approach to the judicial review of administrative action. It is an approach that characterised his judicial decision-making throughout his career. There are two further aspects of his judicial style which have characterised his decision-making, including the judicial review of legislative and executive action. The first is his commitment to the articulation of reasons that expose the policy considerations underlying a judicial decision. The second, which flows from the first aspect, is the reference to overseas and international authorities in considering the issues presented before the court.

Justice Kirby's openness to judicial creativity was paralleled by a commitment to transparent decision-making. He has always strongly supported openness in the conduct of proceedings, whether curial[23] or non-curial,[24] and his reasons have tended to be well structured, with appropriate use of subheadings and summaries. The principal complaint that can be levied against Kirby J is the length of his judgments. However, this is largely the product of his approach to, and philosophy regarding, written judgments. Justice Kirby believed that since it was now acknowledged that judges are presented with opportunities for

21 See Kirby (2006), n 8 at 578: "I did not think, so long after I was taught these basic rudiments about judicial choice, by my great professor and teacher of jurisprudence Julius Stone, that I would be obliged to come to an intellectual occasion to repeat the self-evident truths that he imparted nearly 50 years ago at the Sydney Law School."

22 *Osmond v Public Service Board (NSW)* [1984] 3 NSWLR 447 at 465.

23 *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 at 59.

24 *John Fairfax Group Pty Ltd (Receivers and Managers Appointed) v Local Court of New South Wales* (1991) 26 NSWLR 131 at 140.

judicial development of the law, it consequently followed that judges had an obligation to disclose the reasons upon which a decision rested.[25] According to Kirby J:[26]

> The obligation to think out and articulate these reasons, justifying them in a public way, is likely to provide a discipline that will ensure that the decision is better as a consequence.

In this respect, Kirby J shares the view of Wade, that the duty to provide reasons is "a healthy discipline for all who exercise power over others".[27]

References to international and overseas authorities, particularly from common law jurisdictions, have featured throughout Kirby J's entire jurisprudence. In *Osmond v Public Service Board (NSW)*, his resort to developments outside Australia was justified by Kirby J in the following terms:[28]

> It is important to be aware of like developments that have been occurring in other jurisdictions which derive their legal systems from the same source.
>
> I have mentioned these authorities from other common law jurisdictions, including some to which Australian courts rarely look, to illustrate the universality of the problem being addressed in the courts and the commonality of the approach being taken throughout the common law world.

In cases such as *Goktas*,[29] references to overseas authorities were used to support Kirby J's approach where that differed from existing authority in Australia. Occasionally, authorities were used to highlight what Kirby J perceived as deficiencies or "defects" in Australian law,[30] and where the latter was seen as falling short of its overseas counterparts. However, often references to overseas authorities were simply used to highlight trends and developments in a particular area of the law,

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25 See *Osmond* [1984] 3 NSWLR 447 at 463: "There are opportunities for judicial restraint and judicial development of the law. Nowadays these opportunities are more openly acknowledged than in times gone by. But the consequence of this acknowledgement is an obligation to consider relevant policy considerations which, consistent with legal authority, may properly be taken into account in determining whether, as in the present case, to take the next small step in the elaboration of the common law or to hold back."

26 *Osmond* [1984] 3 NSWLR 447 at 463.

27 H W R Wade, *Administrative Law* (5th ed, Clarendon Press, Oxford, 1982) p 486, cited by Kirby J in *Osmond* [1984] 3 NSWLR 447 at 463.

28 [1984] 3 NSWLR 447 at 462.

29 On the application of waiver in cases of apprehended bias involving judges, see *Goktas v Government Insurance Office (NSW)* (1993) 31 NSWLR 684 at 687.

30 *Macksville and District Hospital v Mayze* (1987) 10 NSWLR 708 at 724-725. This case involved an order declaring that the plaintiff was entitled to damages for the wrongful revocation of his appointment as a visiting practitioner to the defendant. The order was set aside by the Court of Appeal.

often in a way that simply clarified the position in Australia,[31] or placed Australian law in a positive light.[32]

For Kirby J, effective judicial review is premised on a strong conception of the rule of law. Formalised "empty review" – to use the words of Dyzenhaus and Thwaites – is foreign to Kirby J's approach, which has always engaged with the substantive content of judicial review. In this sense, Kirby J has never sought to avoid "opportunities … for judicial development" of the grounds of review or administrative law principles, but has always remained similarly alert to the "opportunities for judicial restraint". He was often unconventional to the extent that he adopted a creative and rights-protective stance in the development of administrative law. This unconventionality may have created the perception of Kirby J as being an "exceptionalist",[33] but any exceptionalism was always manifested within the legitimate bounds of judicial review.

The cases discussed below relate to the duty to accord reasons at common law, the application of the apprehended bias rule to judges and the reviewability of decisions by bodies or in circumstances that straddle the public/private divide.

THE DUTY OF DECISION-MAKERS TO PROVIDE REASONS

Government decision-makers should provide reasons justifying their decisions. Reasons can help to explain the decision to affected individuals, including the matters which were taken into account by the decision-maker. Reasons thus provide greater transparency in government decision-making. By being provided with reasons, a concerned individual is also placed in a better position to assess whether or not the decision should be challenged, either on appeal or by way of judicial review. Each of these arguments has its counter-argument,[34] although, as Aronson, Dyer and Groves comment, "[f]ew would now dispute that it is generally desirable for decision-makers to give reasons for their decisions."[35]

The decision of the New South Wales Court of Appeal in *Osmond*[36] saw Kirby P form a majority with Priestley JA (Glass JA dissenting) to

31 *Johns v Release on Licence Board* (1987) 9 NSWLR 103 at 113; *Tectran Corporation Pty Ltd v Legal Aid Commission of New South Wales and Rajski* (1986) 7 NSWLR 340 at 342; *Johnson v Johnson* (2000) 201 CLR 488 at 499-511 [29]-[57].

32 (2000) 201 CLR 488 at 499-500 [35].

33 I am indebted to Professor Mark Aronson for this point.

34 R Creyke and J McMillan, *Control of Government Action: Text, Cases and Commentary* (Butterworths, Sydney, 2005) pp 892-893.

35 M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd ed, Lawbook Co., Sydney, 2004) p 555.

36 [1984] 3 NSWLR 447.

find that a general duty to provide reasons is required at common law. The case involved a public servant who had unsuccessfully applied for an appointment by way of promotion. He appealed the decision to the Public Service Board and, following an oral hearing, was informed that his appeal was also unsuccessful. Osmond's request for reasons from the Board was refused. The Board was under no statutory duty to provide reasons under the *Public Service Act 1979* (NSW), but Osmond sought declaratory relief in the Supreme Court, which was, at first instance, denied, but later granted by the Court of Appeal.

The decision in *Osmond* offered a clear range of arguments supporting the identification of a duty to provide reasons at common law:[37]

> [F]irst, the assurance which a reasoned opinion provides that the decision has been properly thought out … Secondly, if the person has a right to appeal, the facility of reasons will enable him to determine whether he should do so, and on what basis. Thirdly, reasons will make the tribunal more amenable to the supervisory jurisdiction of the courts and provide assurance that it has acted within its limited powers. Fourthly, reasoned decisions will help promote public confidence in the administrative process … The fifth value of reasons … is that they constitute a check on the exercise of discretion, prevent arbitrary action and provide guidance for future cases.

Justice Kirby considered a number of counter-arguments but felt that the common law was sufficiently flexible to enable varying standards to attach to the duty to accord reasons in different cases.[38] He also considered that legislative developments requiring the giving of reasons should be viewed as supporting the common law's development in a parallel manner.[39] Furthermore, existing High Court authority did not prevent the common law's development on the matter of a duty to furnish reasons. Of significance is the fact that Kirby P identified the basis of the common law duty as being twofold: the duty was linked with the requirement of fairness in public administration, as well as being necessary to facilitate an appeal or judicial review.[40] This dual basis for Kirby P's development of the common law continues to have relevance to the debate on the duty to provide reasons in Australia.[41] The decision of the Court of Appeal was reversed on appeal to the High Court; however, as Pittard writes, "[t]he judgment of Kirby P … remains a focus today for an evaluation of the rationale for the duty; and

37 [1984] 3 NSWLR 447 at 463.

38 [1984] 3 NSWLR 447 at 464.

39 [1984] 3 NSWLR 447 at 465.

40 [1984] 3 NSWLR 447 at 467.

41 With regard to reasons facilitating a statutory right of appeal, see the cases cited by Aronson et al, n 35, p 560 n 708. In relation to procedural fairness, see the cases cited by the same authors on p 561.

is exemplary of the possible role of the judiciary in resolving the law in favour of appropriate social and administrative 'good'".[42]

The basis for the High Court decision was essentially one of policy: "it is a change which the courts ought not to make, because it involves a departure from a settled rule on grounds of policy which should be decided by the legislature and not by the courts".[43] Despite the fact that Kirby P's approach was rejected by the High Court in a decision which still represents binding authority in Australia, his reasoning remains persuasive. Particularly given the increasing number of statutory requirements to provide reasons for decisions,[44] the policy arguments of the High Court in 1986 carry less weight after 20 years, whereas those adopted by Kirby P continue to have appeal. For many, a general duty to provide reasons is too broad to properly differentiate between various types of decision-makers, who range from highly trained tribunal members to low level officers in government departments. Yet a "blunt" requirement need not necessarily be adopted as part of a general common law duty, and the content of any duty to furnish reasons may differ depending on the nature of the decision and decision-maker, as well as its effect upon the individual concerned. Decisions which impact on the liberty of individuals, such as deportation and detention orders, may be distinguished from decisions that carry less significant consequences. In the United Kingdom, where an incremental approach has been taken to the duty to provide reasons,[45] some decisions have been held to lack such a requirement. English case law demonstrates the potential for the common law to adopt a nuanced approach which focuses on the need to explain a decision rather than provide technical legal reasons supporting it.[46] If anything, the developments in English law demonstrate that the common law can be far from blunt and undiscriminating.

As Aronson, Dyer and Groves have stated, the real debate surrounding *Osmond's* case and the duty to provide reasons centres, not on whether a retreat from the High Court authority is warranted, but on questions such as "how far obligations to give reasons should extend, who should

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42 M Pittard, "Reasons for Administrative Decisions: Legal Framework and Reform" in M Groves and H P Lee, *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, Melbourne, 2007) p 178.

43 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 at 669.

44 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 13; *Judicial Review Act 1991* (Qld) ss 20 and 32; *Judicial Review Act 2000* (Tas) s 29; *Administrative Appeals Tribunal Act 1975* (Cth) s 26; *Administrative Decisions Tribunal Act 1997* (NSW) s 49; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) Pt 3, Div 3; *State Administrative Tribunal Act 2004* (WA) s 21.

45 See Aronson et al, n 35, pp 556-558. The authors describe the approach in the United Kingdom as "classic incrementalism": "The interesting thing about the approach of the English courts is that it would seem that, while they are heading in a similar direction to that advocated by Justice Kirby, they are doing so in a very different fashion. Their approach is classic incrementalism, displaying little concern as to how the limits of the emerging duty might be defined."

46 See, eg, *English v Emery Reimbold and Strick Ltd* [2002] 1 WLR 2409.

define the limits (and how), and what approach reviewing courts should adopt when scrutinising reasons for decisions".[47] In this respect, the dual limbs supporting the common law duty in Kirby P's decision remain to be separately explored. According to Aronson, Dyer and Groves, they represent two possible avenues for circumventing the High Court decision in *Osmond*.[48] A third option is for the High Court to overrule *Osmond* and accept the existence of a common law duty.[49] Looking forward, the question is not whether Kirby P's broad approach to the provision of reasons will be ultimately vindicated in Australian law, but how that approach will manifest itself in Australian common law.

THE SCOPE OF THE APPREHENDED BIAS RULE

Throughout his judicial career, Kirby J applied exacting standards of independence and impartiality to judges, an approach which was to influence his understanding of the apprehended bias rule in administrative law. In this area, he demonstrated an approach to the resolution of disputes in administrative law that looked beyond the immediate facts of the case to the consideration of the broader underlying principles or aims of public law – legality, fairness, accountability and transparency. This approach was most clearly apparent in cases concerning the apprehended bias rule – the rule derived from procedural fairness (or natural justice) which requires decisions not simply to be free of actual bias, but also free of the perception or apprehension of bias. As the well-known adage provides, "justice should not only be done, but should manifestly and undoubtedly be seen to be done".[50]

In Australian case law, the rule is rigidly applied with respect to judicial officers, but a case of bias may be "waived" by the parties to a dispute.[51] Justice Kirby, however, has, since his time on the Court of Appeal, questioned the applicability of waiver to the judiciary. He has also tended to apply the apprehended bias rule more strictly to administrative decision-makers and Ministers during his period on the High Court Bench. As already mentioned, Kirby J has always been guided in cases of bias by the broader principles and policies which underpin the rule, namely impartiality and integrity in decision-making. In this sense, his Honour has tended to downplay the subjective views of individuals, preferring to focus on the objective perceptions of the wider public. This concern with the wider public interest in our governmental

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47 Aronson et al, n 35, p 555.

48 Aronson et al, n 35, pp 560-562.

49 Aronson et al, n 35, p 562. The authors accept that this is a more ambitious approach, but one that has wider application than a duty based on procedural fairness – it would enable a court engaged in judicial review to assess whether a decision involves "irrationality".

50 *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259 per Lord Hewart CJ.

51 *Vakauta v Kelly* (1989) 167 CLR 568.

institutions regularly saw Kirby J adopt an uncompromising approach to the apprehended bias rule, often in sole dissenting opinions.[52]

It was in *Goktas v General Insurance Organisation of New South Wales*[53] that Kirby J questioned the availability of waiver where apprehended bias was alleged in relation to judges.[54] Here, appeals to wider public concerns with the administration of justice are evident:[55]

> [T]he existence and appearance of impartiality on the part of the judiciary belongs not to the litigant alone but to the public at large and to the legal system of which the judge is a member. My opinion in this regard appears to be borne out by the test for apprehended bias which is accepted by our law. The ultimate criterion is not the subjective opinion of the litigants or of their lawyers, but the objective opinion of the hypothetical reasonable member of the community who is taken to be sitting at the back of the court observing the court proceedings … If the litigant can waive (or, by omission to object, lose the right to complain of) a reasonable apprehension of bias on the part of the hypothetical representative of the community what is the result? The confidence of the community in the impartiality of the judicial system is, by reference, damaged, yet the appellate court must simply ignore the complaint. It must do so by reference to a rule of procedure.

Typically, Kirby P referred to overseas authority in support of his own approach, in this case the United States decision of *United States v Lustman*.[56] However, he accepted that High Court authority in Australia tended towards a contrary view to which he was ultimately bound,[57] but not before querying the principle or policy upon which it rested (which Kirby P felt was unclear).[58] On this issue, Kirby P felt that, whatever its rationale, "the holding clearly exists and it must be accepted and applied".[59]

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52 See, eg, Kirby J's decisions in *Hot Holding v Creasy* (2002) 210 CLR 438 and *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507.

53 (1993) 31 NSWLR 684.

54 (1993) 31 NSWLR 684 at 687: "My own view is that it is not ordinarily open to a litigant unilaterally to waive an appearance of bias on the part of the judge."

55 (1993) 31 NSWLR 684 at 687.

56 258 F 2d 475 at 478 (1958). Kirby P wrote, in relation to the United States position that, "[t]here, it has long been held that it is, as a general rule, not for the individual litigant to waive the public's rights to a manifestly fair conduct of a public trial": (1993) 31 NSWLR 684 at 687.

57 (1993) 31 NSWLR 684 at 687: "Nevertheless, I must now accept that the High Court of Australia has held that, in this country, the individual litigant does have a privilege of waiver: see *Vakauta v Kelly* (1989) 167 CLR 568 at 586ff."

58 (1993) 31 NSWLR 684 at 687: "It is not yet entirely clear whether this holding rests upon a principle, akin to estoppel, to prevent a party taking advantage, as against another, of its own silence, or on a wider rule deriving from the need, for reasons of public policy, to secure finality of litigation and to reduce the delays, costs and inconvenience of repeated hearings."

59 (1993) 31 NSWLR 684 at 687.

In *Goktas*, both the conventional and the creative elements of the judge are apparent. In one sense Kirby P is acutely aware of the legitimate bounds that flow from having to follow a binding High Court authority. In this regard, he was conventional in his approach. However, his creative flair was able to manifest itself through his comments on the rationale of the waiver rule to judges. Here, Kirby P was unconventional in the sense that he conformed with binding authority, whilst at the same time loudly expressing his dissatisfaction with that authority. Nevertheless, it is worth noting that, on the question of whether an objection on the grounds of apprehended bias needed to be recorded in the official transcript – in which case a party would not be seen to have waived their right to subsequently make such an objection – Kirby P offered only qualified support. His Honour agreed that the recording of objections in the transcript of proceedings should be encouraged "as a rule of practice", but not treated "as a rigid rule of law", for "[t]he Court is not concerned with judicial sensibilities."[60]

The importance that Kirby J attached to the independence and impartiality of judges was also evident in the High Court decision in *Johnson v Johnson*.[61] There, his Honour elaborated upon the knowledge attributed to the fictitious bystander in apprehended bias cases, using the opportunity to outline the importance of the rule regarding apprehended bias in protecting the "manifest integrity of judicial decision-making",[62] and providing three reasons which explained the court's approach to apprehended bias.[63] In his outline of the rationale which lies behind the fictitious bystander test, Kirby J's comments hark back to his decision in *Goktas* on the waiver rule and the importance of the wider public's interest in the rules of administrative law:[64]

> [T]he interposition of the fictitious bystander and the adoption of a criterion of disqualification expressed in terms of possibilities rather than "high probability" are both intended to serve an important social interest which must be restated in disposing of this appeal. Each of the considerations lays emphasis on the need to consider the complaint made ultimately, not by what adjudicators and lawyers know, but by how matters might reasonably appear to the parties and to the public.

Later, his Honour added the following:[65]

> [I]n deciding whether there is an apprehension of bias, it is necessary to consider the impression which the same facts might reasonably have upon the parties and the public. It is their confidence that must be won and maintained. The public includes groups of people who are

60 (1993) 31 NSWLR 684 at 688.

61 (2000) 201 CLR 488.

62 (2000) 201 CLR 488 at 495-509 [20]-[54].

63 (2000) 201 CLR 488 at 499-504 [35]-[45].

64 (2000) 201 CLR 488 at 506 [49] (citations omitted).

65 (2000) 201 CLR 488 at 508 [52].

> sensitive to the possibility of judicial bias. It must be remembered that, in contemporary Australia, the fictitious bystander is not necessarily a man nor necessarily of European ethnicity or other majority traits.

Unsurprisingly, in responding to an assertion that detailed reasons were not needed in relation to the principles applied, or the basis of those principles, he restated the importance of giving detailed reasons to the parties.[66] In relation to bias, although his preferred approach to waiver has not been revisited, Kirby J's commitment to the importance of institutional integrity and impartiality in respect of the rule of law remained a guiding force in his judgments. In this respect, his approach to transparent decision-making clearly informed his approach to judgment writing and was closely linked with his concern to ensure impartiality and fairness by the judiciary.

THE PUBLIC/PRIVATE DISTINCTION IN ADMINISTRATIVE LAW

Towards the end of his period on the High Court Bench, Kirby J's decisions often began or ended with dramatic, if not despondent, flair, as his Honour lamented the approach taken by the majority in the case at hand. From the validity of control orders under anti-terrorism legislation[67] to the indefinite detention of illegal immigrants,[68] Kirby J found himself adopting an (often starkly) opposing viewpoint to the majority judges. One of these areas of opposition was the public/private distinction in administrative law. In this respect, two decisions stand out as being among Kirby J's most significant dissenting opinions, *NEAT Domestic Trading Pty Ltd v AWB Ltd* [69] and *Griffith University v Tang*.[70] Each is likely to play an important role in the future development of Australian law, particularly as the composition of the High Court changes with time.

As Aronson has observed,[71] the issues and decisions in *NEAT* were complex. (The eyes of administrative law students tend to glaze over when the facts are first described to them; it can often take a while to get one's head around the acronyms alone!) The decision of Kirby J in *NEAT* began with the statement from an earlier decision expressing the inability of any Australian Parliament to confer absolute power on anyone.[72] According to Kirby J, *NEAT* provided an opportunity to reaffirm that very principle to a case where public power had been "outsourced". In the very first paragraph of the opinion, the implication

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66 (2000) 201 CLR 488 at 510-511 [58]-[60].

67 *Thomas v Mowbray* (2007) 233 CLR 307.

68 *Al-Kateb v Godwin* (2004) 219 CLR 562.

69 (2003) 216 CLR 277.

70 (2005) 221 CLR 99.

71 M Aronson, "Is the ADJR Act Hampering the Development of Australian Administrative Law?" (2004) 15 *Public Law Review* 202 at 210.

72 (2003) 216 CLR 277 at 300 [66].

is that the majority had failed in its task. The importance of the case and the principle to which it related was obvious for Kirby J from the outset:[73]

> The question of principle presented is whether, in the performance of a function provided to it by federal legislation, a private corporation is accountable according to the norms and values of public law or is cut adrift from such mechanisms of accountability and is answerable only to its shareholders and to the requirements of corporations law or like rules.
>
> Given the changes in the delivery of governmental services in recent times, performed earlier and elsewhere by ministries and public agencies, this question could scarcely be more important for the future of administrative law. It is a question upon which this Court should not take a wrong turning.

NEAT involved the now notorious company, Australian Wheat Board (AWB),[74] the "single desk" policy established to maximise the export and marketing of Australian wheat, and the role of AWB (International) Ltd (AWBI) (a wholly owned subsidiary of AWB) in relation to decisions of the Wheat Export Authority (WEA). NEAT was a competitor of AWBI and a trader in wheat. The *Wheat Marketing Act 1989* (Cth) prohibited the export of wheat from Australia without the consent of the WEA. The only exception applied to AWBI, with which the WEA was required to consult. The WEA was prohibited from granting any consent until it had received the approval of AWBI in writing. Thus, in practical terms, the real responsibility for the export of wheat was conferred on AWBI and not the WEA. NEAT applied for consent to export wheat and was refused by AWBI, thus obliging the WEA to refuse consent. NEAT applied for review of AWBI's decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act).

Both AWB and AWBI were incorporated. However, each company was conferred with significant powers under the Commonwealth Act. AWBI effectively exercised a veto power in relation to the export of wheat from Australia. Thus, the High Court was required to determine whether a private company exercising very significant powers under legislation was subject to administrative law and, specifically, the ADJR Act. The case offered the first opportunity in which the High Court could consider the issue that had arisen in the English decision of *Datafin*.[75] There, the Court of Appeal had held that private bodies entrusted with the exercise of what could be classified as "public power" would be subject to judicial review and the province of administrative

73 (2003) 216 CLR 277 at 300 [67]-[68] (footnotes omitted).

74 See Australian Government, Attorney-General's Department, *Report of the Inquiry into certain Australian companies in relation to the Oil-for-Food Programme* (Commonwealth of Australia, 2006): http://www.oilforfoodinquiry.gov.au/agd/WWW/unoilforfoodinquiry.nsf/Page/Report (accessed 4 December 2008).

75 *R v Panel on Take-overs and Mergers; Ex parte Datafin plc* [1987] QB 815.

law. The decision of AWBI to refuse consent for NEAT to export wheat was a decision of a private organisation in competition with NEAT, but a decision which had particular significance under federal legislation – it effectively bound the relevant government authority (WEA) to refuse NEAT's application.

Of the nine judges who heard the case at various stages of the litigation, only three (Matthews J in the Federal Court, and Gleeson CJ and Kirby J in the High Court) favoured the application of the ADJR Act and, thus, the judicial review of AWBI's decision. However, only one of those three judges, Kirby J, considered that AWBI had fallen into legal error in making its decision. On the applicability of the ADJR Act, the High Court effectively divided 3:2, although Gleeson CJ's comments were obiter only (that is, not a necessary part of his decision).[76] The fact that Gleeson CJ considered that no legal error had taken place meant that it was unnecessary for him to elaborate in detail on the circumstances in which the decisions of a private company will be susceptible to judicial review. Justice Gleeson did, however, make it quite clear that the position of AWBI under federal legislation meant that it could not simply pursue "purely private interests".[77] In this regard, the opinion of Gleeson CJ (along with Kirby J) differed from that of McHugh, Hayne and Callinan JJ. The joint reasons of those judges offered three bases for dismissing the appeal by NEAT:[78]

> First, there is the structure of s 57 and the roles which the 1989 Act gives to the two principal actors – the Authority and AWBI. Secondly, there is the "private" character of AWBI as a company incorporated under companies legislation for the pursuit of the objectives stated in its constituent document; here, maximising returns to those who sold wheat through the pool arrangements. Thirdly, it is not possible to impose public law obligations on AWBI while at the same time accommodating pursuit of its private interests.

The joint decision provides little substantive reasoning in support of these grounds. Indeed, it has been strongly criticised:[79]

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76 (2003) 216 CLR 277 at 290 [27].

77 (2003) 216 CLR 277 at 290 [27]: "While AWBI is not a statutory authority, it represents and pursues the interests of a large class of primary producers. It holds what amounts, in practical effect, to a virtual or at least potential statutory monopoly in the bulk export of wheat; a monopoly which is seen as being not only in the interests of wheat growers generally, but also in the national interest. To describe it as representing purely private interests is inaccurate. It exercises an effective veto over decisions of the statutory authority established to manage the export monopoly in wheat; or, in legal terms, it has power to withhold approval which is a condition precedent to a decision in favour of an applicant for consent. Its conduct in the exercise of that power is taken outside the purview of the *Trade Practices Act*."

78 (2003) 216 CLR 277 at 297 [51].

79 See generally, C Mantziaris, "A 'Wrong Turn' on the Public/Private Distinction: *NEAT Domestic Trading Pty Ltd v AWB Ltd*" (2003) 14 *Public Law Review* 197.

> The reasoning was brief and the precise basis for the decision opaque.[80]

> It is difficult to state the net effect of *NEAT Domestic* … Its conclusion that the company was free of all administrative law restraints … was disappointing, unnecessarily wide and taken without discussion of the interesting constitutional issue of whether there might be limits to Parliament's ability to confer power on private sector bodies without public-regarding limitations.[81]

The authority of *NEAT* is susceptible to challenge and one could easily see the decision being distinguished in a future case, particularly where the relevant statutory scheme was significantly different. While the opinions of Gleeson CJ and Kirby J will both be important in such cases, it is likely to be the detailed analysis provided by Kirby J that will prove most helpful in illuminating the broader considerations which underlie the review by the courts of public decisions made by private bodies. The dissenting opinion of Kirby J was premised on the need and desire to uphold the rule of law and the *Constitution*.[82] His Honour's opinion involved fairly conventional approaches to the interpretation of statutes (both the *Wheat Marketing Act 1989* and the ADJR Act) and the application of administrative law principles. The decision is logical, well reasoned and, although some might disagree with Kirby J's conclusions,[83] his decision can hardly be described as radical or "activist".

Justice Kirby was able to find that the decision was reviewable under the ADJR Act by approaching it in a contextual manner and focusing on the "decision" (as required by the ADJR Act) as opposed to focusing on the nature of the "decision-maker" (as occurred in the joint reasons).[84] Unlike McHugh, Hayne and Callinan JJ, who approached the requirements of the ADJR Act, which necessitated that the decision be "required or authorised" by the Act narrowly, Kirby J adopted a broader approach. In the joint reasons, only the WEA's decision, and not AWBI's (which was simply a condition precedent to the decision of the WEA), was considered to be the "operative and determinative decision" reviewable under the ADJR Act. Justice Kirby, however, accepted that administrative decisions reviewable under the ADJR Act extended to those "made in executing or carrying into effect the laws of the Commonwealth".[85] Concluding that AWBI's decision was such a

80 P Cane and L McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, Melbourne, 2008) p 66.

81 Aronson, n 71 at 211-212.

82 (2003) 216 CLR 277 at 307-309 [94]-[96].

83 See C Campbell, "The Public/Private Distinction in Australian Administrative Law" in Groves and Lee, n 42, pp 44-45.

84 (2003) 216 CLR 277 at 307-309 [94]-[99].

85 In reference to the primary judge's comments referring to the words of Ellicott J in *Burns v Australian National University* (1982) 40 ALR 707 at 714.

decision, Kirby J added the following reasons as to why the decision was reviewable:[86]

> AWBI's approval decision is fully integrated into the regulatory scheme created by the statute. AWBI holds, in effect, a veto over the statutory consent of the Authority, which is without doubt a public body …
>
> Further, the interests involved in and affected by AWBI's decisions to grant or withhold the approval required by the Act are much wider than the private interests of an ordinary corporation. The Act not only grants AWBI the privileged position of a statutory monopoly, but it involves that corporation in the scheme of regulation established.
>
> … Remedies under the TPA were also foreclosed. As such, the only way that the decisions of AWBI, with their wide and significant impact, could be exposed to legal scrutiny or accountability was by way of administrative review.

Kirby J adopted a similarly broad view of the ADJR Act's "made … under an enactment" requirement, finding that AWBI's decision met the statutory criterion:[87]

> The only way that AWBI's "decision" could take on a legal character affecting the conduct of the Authority, and the economic rights of NEAT (and its growers) and of other Australian growers who wished to export wheat to the world market, is by force of the Act …
>
> AWBI was an identified repository of a power conferred upon it by an Act of the Parliament …
>
> It follows that it is the Act that provides for, requires, and gives legal force to, AWBI's "decisions" relevant to NEAT's applications. It is the role performed for the purposes of the Act, and not the corporate structure of AWBI, that determines the character of the "decisions" in question in this appeal. Other decisions made by AWBI may indeed have the character of decisions by a private corporation operating within the private sphere. But, at least in so far as its decisions have the consequences provided for in s 57(3B) of the Act, they are decisions outside the private curtain. They are subject to public scrutiny.

Justice Kirby's dissenting opinion stands out for offering detailed reasons that engage properly with central issues at play in the case. The failure of McHugh, Hayne and Callinan JJ to explain the premises upon which their judgment rested has been the principal criticism levelled at the decision.[88] As commentators have noted, "[t]he need for further judicial guidance in this context is obvious."[89] With the growth in privatisation

86 (2003) 216 CLR 277 at 310-311 [103]-[105].

87 (2003) 216 CLR 277 at 316-317 [121]-[123].

88 See, eg, Aronson, n 71 at 212; Cane and McDonald, n 80, p 66.

89 W B Lane and S Young, *Administrative Law in Australia* (Lawbook Co., Sydney, 2007) p 30.

and out-sourcing of governmental functions in Australia, *NEAT* will certainly not be the High Court's last word on this subject.

With *Griffith University v Tang*, Kirby J had the opportunity to revisit the court's approach to the public/private distinction in administrative law. His Honour's decision began with customary dramatic flair:[90]

> For the second time in less than two years, this Court adopts an unduly narrow approach to the availability of statutory judicial review directed to the deployment of public power …
>
> Correctly in my opinion, *NEAT Trading* has been described as a "wrong turn" in the law. Its consistency with past authority of this Court has presented difficulties of explanation. Its outcome has been described, rightly in my opinion, as "alarming", occasioning a serious reduction in accountability for the exercise of governmental power. Now, the error of approach, far from being corrected, is extended. This constitutes an erosion of [referring to the ADJR Act] one of the most important Australian legal reforms of the last century. This Court should call a halt to such erosion.

The case concerned an application for review of a decision made by Griffith University to exclude Tang from the PhD program in which she had been enrolled, on the basis that Tang had "undertaken research without regard to ethical and scientific standards". The applicant alleged a denial of procedural fairness and sought review of the decision under Queensland's *Judicial Review Act 1991*. The Act, following the ADJR Act, provided that decisions were reviewable if "made … under an enactment".[91] At issue was whether the decision to exclude Tang was such a decision, given that the source of the power to exclude was a Policy on Academic Misconduct developed by the Academic Committee, a body established by, and permitted to exercise delegated powers of, the University Council in accordance with the *Griffith University Act 1998*. The question before the court was, therefore, whether the decision under the policy was a decision "made … under an enactment". Tang had previously been successful before a single judge of the Supreme Court of Queensland[92] and the Court of Appeal.[93] A majority of the High Court (in a separate decision of Gleeson CJ and a joint decision of Gummow, Callinan and Heydon JJ) held that the decision had not been made "under an enactment". Justice Kirby dissented.

Judicial review legislation has never been accepted by the courts as extending review to all decisions made by a statutory authority conferred with wide powers, such as a university. Although every decision of a university is, in one sense, made under the enactment conferring powers

90 (2005) 221 CLR 99 at 133 [99]-[100] (footnotes omitted).

91 Section 4(a) of the Queensland Act. The same phrase is found in s 3(1) of the Commonwealth Act.

92 [2003] QSC 22.

93 [2003] QCA 571.

on the university, decisions such as those made in relation to employment contracts entered into by the university have been excluded from review under the ADJR Act.[94] In determining which decisions were made "under an enactment", the courts have adopted various tests, including one which limited review to only those decisions which were clearly "authorised or required" by the statute.[95] For Tang, however, who had no contractual relationship with the university, her case depended on the decision to exclude her from the PhD program being treated as one made "under" the *Griffith University Act 1998*. According to the majority judges, Tang and the university had only entered into an arrangement based on mutual consensus, and not even subject to the law of contract.[96] This view of the relationship between the parties would prove to be fatal to the claim that the decision was one "made … under an enactment".

In finding that the decision was made under an enactment and was thus reviewable under the *Judicial Review Act 1991* (Qld), Kirby J was influenced by a number of factors, including the nature of Australian universities as (predominantly) public institutions supported by significant government funding,[97] and the need to interpret the review legislation in a manner that "did not contradict express provisions of such law or deny, or frustrate, its application".[98] Consequently, Kirby J adopted a test for determining whether a decision had been made "under an enactment" which asked the following questions:[99]

1. Does the lawful source of the power to make the decision lie in the enactment propounded?
2. Would the decision-maker, apart from that source, have the power outside the enactment (either under common law or another statute) to make the decision concerned?

An affirmative answer to question (1) and a negative answer to question (2) would mean that the relevant decision was one made "under an enactment". This approach was preferred by Kirby J over the narrower "rights and obligations" test adopted by the majority, whose approach Kirby J considered to involve an inappropriate limiting "gloss" on the statutory phrase "under an enactment":[100]

94 *Australian National University v Burns* (1982) 64 FLR 166.

95 *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164.

96 (2005) 221 CLR 99 at 131 [91].

97 (2005) 221 CLR 99 at 137 [110]: "By federal and State legislation, then, universities in Australia are not wholly private bodies, entitled to govern themselves or enter private arrangements as they please. With their establishment by public law and with large subventions of public funds, they are rendered part of the network of public authorities which, to the extent provided, must conform to the law – relevantly, to the legal requirements of procedural fairness and administrative justice."

98 (2005) 221 CLR 99 at 152 [152].

99 (2005) 221 CLR 99 at 151 [149].

100 (2005) 221 CLR 99 at 153 [153].

> [C]ourts should not strain themselves to adopt artificial interpretations in order to confine the text. The text itself provides for its own restrictions. Unnecessary restraints, without the clearest foundation in the statute, should not be introduced by judges to undermine beneficial legislation of this kind.

The test propounded by the majority also involved two steps:[101]

> [F]irst, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense, the decision must derive from the enactment.

As Kirby J pointed out,[102] the approach of limiting review to decisions which only affect "legal rights or obligations" is inconsistent with the standing requirements under the Act which are concerned with an applicant's "interests" as opposed to "legal rights". It is also at odds with the similarly broad approach taken in relation to the application of procedural fairness requirements.[103] The majority's approach in *Tang* has been widely criticised. It introduced a number of technical hurdles that will (when followed) inevitably limit the review of decisions by public authorities that do not neatly fit into either the public law or private law domain, but seem to straddle both. As Cane and McDonald have pointed out, the majority's approach has concealed, rather than revealed, the policy considerations relevant to deciding when such decisions will be subject to administrative law norms.[104] The majority's approach was not clearly justified. The fact that administrative law had no application to *Tang's* case and, in the absence of a formal contractual relationship, left Tang in the position where no set of legal rules applied to her case, was another fundamental flaw in the judgment. In contrast, the opinion of Kirby J was transparently principled. Although one may disagree with his Honour's reasoning or ultimate decision in the case, at least the premises informing his opinion are clearly articulated. Three points upon which Kirby J's opinion contrasts with those of the majority include his consideration of the broader public context of the relationship between Tang and the university, his desire to interpret the review Act consistently with its purpose as a remedial statute, and his consideration of the wider debate surrounding the public/private distinction in administrative law.

Justice Kirby's opinion was premised on the rule of law notion that public authorities (including universities) should be accountable to act in accordance with the law when exercising public power. The rule of law "renders the recipients of public power and public funds answerable,

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101 (2005) 221 CLR 99 at 130 [89].

102 (2005) 221 CLR 99 at 152 [152].

103 A point also made by commentators: Cane and McDonald, n 80, p 63.

104 Cane and McDonald, n 80, p 64.

through the courts, to the people from whom the power is ultimately derived and the funds ordinarily raised by taxation, and for whose interests such recipients are, in a sense, public fiduciaries".[105] Whilst acknowledging that many decisions of a university are ones that courts will decline to review,[106] he endorsed the distinction, made by an English court,[107] between disciplinary cases and others involving pure academic judgment. And with customary articulate flair, he concluded:[108]

> The suggestion that a candidate part-way through the University's procedures for admission to the higher degree of Doctor of Philosophy has had no "interests" affected by a finding of academic misconduct, exclusion from the University, removal from the prospect of a degree and with a permanent or long-term blight on any chances of academic advancement elsewhere and termination of career progression is, self-evidently, unrealistic …
>
> The respondent has clear "interests" that were affected by the University's decisions. Those "decisions" were "made … under an enactment", namely the University Act. They were directly traceable to the University Act. They were of a character, and with consequences, that only a university operating under the Higher Education Act could lawfully perform. The Review Act applied. The judges of the Supreme Court of Queensland were correct to so hold. Not only for the erroneous outcome in this case, but also because of the uncertain consequences that the distinction now drawn may bring to the beneficial accountability of public decision-makers to the law in Australia, I respectfully dissent.

CONCLUSION

In the field of administrative law, the dissenting opinions of Kirby J are just as likely to feature in administrative law textbooks as the reasoning of the majority in many High Court cases. The value of Kirby J's decisions is that they are detailed and disclose the underlying premises and policy considerations upon which they are based. Judicial review by Kirby J was never timid or "empty", but rigorous, engaged and transparently principled – a point that even his detractors should acknowledge. Within the legitimate bounds of judicial review, Kirby J was a fierce defender of the broader aims of administrative law – giving effect to the rule of law, ensuring the legality and accountability of government action and protecting the rights and freedoms of individuals from indirect and unintended encroachment. When it came to administrative law, Kirby J espoused a completely orthodox view of the supremacy of Parliament.

105 (2005) 221 CLR 99 at 153 [154].

106 (2005) 221 CLR 99 at 156-157 [165].

107 *R v University of Cambridge; Ex parte Persaud* [2001] ELR 64 at 72-74 [20]-[21] (QBD), cited at (2005) 221 CLR 99 at 157 [166].

108 (2005) 221 CLR 99 at 159 [173]-[174].

Yet, within the outer limits of what was legitimate for a High Court judge to do, Kirby J was an active and creative common lawyer – one who never overlooked or downplayed either the presence or importance of the "leeways of judicial choice".

Chapter 3

CITIZENSHIP LAW

Kim Rubenstein and Niamh Lenagh-Maguire

> *Once, after their arrival, [non-citizen British subjects] were absorbed into the Australian community they could not, retrospectively, be reclassified as "aliens" for constitutional purposes. They were not only beyond the operation of the immigration power. They were also then beyond the aliens power.*[1]

INTRODUCTION

This chapter analyses Justice Kirby's constitutional judgments, drawing out various themes in his approach to Australian citizenship law, and considers whether his approach to citizenship has been influenced by underlying ideas that are supranational (acknowledging nationality as a status beyond one nation-state) and universal, as applying to all citizens in all states, or indeed colonial (that is, influenced primarily by Australia's British subject origins).

One of Justice Kirby's distinguishing approaches to citizenship is his desire to explore the constitutional counterpart to the statutory status of "Australian citizen". His emphasis in recent citizenship cases highlights that individuals possess dual forms of nationality status – the statutory, and the constitutional – and there is danger in conflating the two. In particular, Kirby J rejects the idea that the statutory form of citizenship adopted by the Federal Parliament can define conclusively those who are Australian nationals, and thus "non-aliens"; that interpretation, he argues "deprives the separate constitutional idea of Australian nationality of any content".[2]

Justice Kirby has emphasised that the *Constitution* was drafted with reference to prevailing ideas about the meaning of "nationality" and, in particular, the nationality status of British subjects throughout the

1 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 494 [308] per Kirby J.

2 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 239 at 482 [114].

Empire. While the *Constitution* does not recognise a form of "Australian citizenship", Kirby J argues it does contain a constitutional concept of nationality which has survived "the evolution of the statutory expression of citizenship, and the gradual emergence of ideas of national independence and a distinctive national identity in Australia".[3] He has cautioned repeatedly against confusing "the *statutory* status of citizenship with the *constitutional* status of nationality".[4]

While Justice Kirby is keen to develop a contemporary understanding of the meaning and significance of constitutional nationality, applied in a social and political context far removed from the understanding of the framers of the *Constitution*, his broadest view of membership beyond statutory citizenship status includes only those non-citizens who hold British subject status and who enjoy most of the rights normally attributed to democratic citizenship (such as voting). This "broad" view does not necessarily include those non-British-subject permanent residents who have spent almost their entire life in Australia and have been absorbed in most other social and political ways. To this extent, his view of citizenship is not supranational or universal, but linked directly to Australia's historical colonial origins.

More broadly, however, Kirby J argues that the sections of the *Constitution* dealing with qualifications for election to Federal Parliament, the equal protection guaranteed to "subjects of the Queen" by s 117 and the references to "the people of the Commonwealth" and to federal "electors" are premised on, and reflect, an underlying constitutional concept of nationality. In his view the full meaning and potential of constitutional nationality as a concept and status has yet to be fully explored, and he predicts "further constitutional implications will be derived for the idea of citizenship to which the political institutions established by the *Constitution* give effect".[5]

A BRIEF HISTORY OF CITIZENSHIP IN AUSTRALIA

Citizenship in Australia is a confused legal concept sitting on weak constitutional foundations. The *Constitution* does not mention Australian citizenship, although citizenship of a foreign power is referred to in s 44(i) as a disqualification for membership of the Australian Parliament. Proposals to include clauses defining entitlements to Australian citizenship, or conferring a power on the Federal Parliament to make laws with respect to citizenship, were debated during the drafting of the *Constitution*, but were ultimately rejected.[6] As Justice Gaudron stated

3 *Koroitamana v Commonwealth* (2006) 227 CLR 31 at 47-48 [56].

4 (2006) 227 CLR 31 at 47-48 [56].

5 *DJL v Central Authority* (2000) 201 CLR 226 at 278 [135].

6 See K Rubenstein, *Australian Citizenship Law in Context* (Lawbook Co., Sydney, 2002) Ch 2.

in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*:

> Citizenship, so far as this country is concerned, is a concept which is entirely statutory … it is not a concept which is constitutionally necessary, which is immutable or which has some immutable core element ensuring its lasting relevance for constitutional purposes.[7]

For the first 48 years of Australia's federated history there was no formal, legal status of Australian citizenship – laws providing for naturalisation in Australia were primarily concerned with the acquisition of British-subject status rather than a specifically Australian form of nationality. Since 1948, the Federal Parliament has used its power over "naturalisation and aliens" in s 51(xix) of the *Constitution* to create a statutory form of citizenship. Significantly, the *Australian Citizenship Act 1948* (Cth) (now the *Australian Citizenship Act 2007* (Cth)) simply regulates how Australian citizenship is obtained and lost, rather than setting out the rights and obligations concomitant with the status of "Australian citizen".

Citizenship involves a range of legal, political and social identities and experiences, which are not all captured by a statutory model of citizenship. As Rubenstein has argued elsewhere, the lack of any constitutional provision acknowledging and defining entitlements to Australian citizenship, let alone its substantive content in terms of rights and obligations, means that as a legal concept, citizenship is ambiguous and inconsistently applied.[8]

THE MAIN CASES

To make the thematic argument clear, the main cases dealing with citizenship during Justice Kirby's time on the High Court are examined below.

The citizenship status of British subjects

The supranational concept of citizenship in Australia has evolved from cases concerning British subjects. By "supranational" we mean a vision of citizenship extending beyond the nation-state, in contrast to a concept defined by reference to an individual's relationship with a particular country. Many of the cases heard by the High Court have concerned the citizenship status of current or former British subjects, and the contemporary significance of British subject-hood in terms of Australian nationality.

7 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 54.

8 Rubenstein, n 6, p 278.

Re Patterson; Ex parte Taylor[9]

Mr Taylor was born in the United Kingdom, but had migrated to Australia as a child. He had not applied for Australian citizenship nor a visa to allow him to remain in the country; he had, however, been listed on the electoral roll since the age of 18. British subjects on the electoral roll before 26 January 1984 were entitled to remain on the electoral roll after the term "British subject" had been removed from the statutory framework of citizenship.[10]

Mr Taylor challenged attempts to cancel the visa he was deemed to hold and to remove him from Australia after he had been convicted of certain criminal offences. He argued he was not, and had never been, an "alien" for constitutional purposes, and he had, by being absorbed into the Australian community, ceased to be an immigrant for the purposes of s 51(xxvi).

Justice Kirby was part of the majority of the court who held that Mr Taylor was a British subject who entered Australia before Australia achieved constitutional "independence" from Britain and had been absorbed into the Australian community. He was neither immigrant nor alien, and could not be subject to laws enacted under either relevant head of Federal legislative power. There was some disagreement between the majority judges over when exactly the relationship between Australia and the British Crown became so far removed that British subjects migrating to Australia were not automatically regarded as constitutional nationals or non-aliens, but all agreed this change had been effected in the case of Mr Taylor.

Shaw v Minister for Immigration and Multicultural Affairs

Re Patterson was followed very shortly by *Shaw v Minister for Immigration and Multicultural Affairs*,[11] a case involving broadly similar facts. Adhering to the view he expressed in *Re Patterson*, Justice Kirby was this time in the minority due to the fact that a member of the majority in *Re Patterson*, Justice Gaudron, had retired and been replaced by Justice Dyson Heydon. The majority decision in *Shaw* is now authority for the principle that British subjects who have migrated to Australia but have not become Australian citizens are, constitutionally, aliens, despite the fact that those who migrated to Australia before the 1980s continue to enjoy many of the rights and opportunities available to Australian citizens, in particular the federal franchise.

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9 (2001) 207 CLR 391.

10 *Commonwealth Electoral Act 1918* (Cth) ss 93-97; see further Rubenstein, n 6, p 86, n 119.

11 (2003) 218 CLR 28.

Other significant citizenship cases

Justice Kirby's contribution to the High Court's citizenship jurisprudence extends beyond a concern with the position of British subjects in Australia. In a number of cases, the court has examined the constitutional status of other categories of people, including refugees, individuals born in Australia to non-citizen parents and those born in Australian-controlled Territories.

Te and Dang

The cases of *Te* and *Dang*[12] differed from *Re Patterson* as the applicants were not and never had been British subjects. Mr Te and Mr Dang had been born outside the dominions of the Crown and therefore had never been British subjects or naturalised Australians. Their argument had, however, drawn from the outcome in *Re Patterson*, and asked whether the identification of a non-citizen non-alien class in that case necessarily permits the existence of a *broader* category of non-citizen non-aliens which would include non-citizens such as Mr Te and Mr Dang.

Three reasons were advanced to support this conclusion. First, each applicant had renounced his allegiance to the country of his birth and signified his allegiance to Australia by coming as a refugee to make a new life, thus being subject, upon arrival, to the obligations of such allegiance and owing allegiance to no other country. Second, each had become a member of the Australian community constituting the body politic of Australia and owed allegiance to the Queen of Australia. Finally, each applicant had been in Australia for a period of time sufficient for him to have been absorbed into the Australian community so that, by analogy with the court's decisions on the immigration power,[13] the legislative power of the Parliament to enact a law based on the "aliens" power no longer extended to the applicant or persons in a similar position.

Justice Kirby, as part of the majority, accepted none of these arguments in principle or on the facts, and so the applicants' non-British-subject status became determinative of the issue: they were always within the concept of "aliens" as envisaged by s 51(xix) of the *Constitution*. Justice Kirby's views are set out further below.

Singh v Commonwealth

Singh v Commonwealth[14] concerned the applicability of s 198 of the *Migration Act 1958* (Cth) (which provided for the removal from Australia of unlawful

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12 *Re Minister for Immigration and Multicultural Affairs; Ex Parte Te; Re Minister for Immigration and Multicultural Affairs; Ex parte Dang* (2002) 212 CLR 162.

13 A person who is "absorbed" into the Australian community ceases to be an immigrant for the purposes of s 51(xxvii) of the *Constitution*: see *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36.

14 (2004) 222 CLR 322.

non-citizens) to a child born in Australia to non-citizen parents. Tania Singh was born in Australia in 1998. Her parents were Indian nationals, but were not Australian citizens, and neither was she. Ms Singh argued that despite not holding statutory Australian citizenship, she could not be considered an alien for the purposes of s 51(xix) (the power to make laws with respect to naturalisation and aliens) because of her birth in Australia.

Justice Kirby did not accept Ms Singh's argument that the *Constitution* recognises a form of birthright nationality based on the ius soli (right of the soil). His approach to the interpretation of constitutional terms and phrases, including "aliens", is discussed in more detail below. Unlike other members of the majority in *Singh*, Kirby J did not base his decision on the allegiance said to be owed by Tania Singh to another foreign power; he doubted whether Ms Singh was, in fact, entitled to claim Indian citizenship by descent, but considered that nevertheless she was a constitutional alien in Australia.

Koroitamana v Commonwealth

The two infant plaintiffs in *Koroitamana v Commonwealth*[15] were in a similar position to Ms Singh. They had been born to non-citizen parents (Fijian nationals) in Australia and challenged their detention and removal from Australia under the *Migration Act 1958* (Cth). They argued that laws enacted under s 51(xix) could not apply to them, as they were not aliens.

The relevant difference between the plaintiffs in *Koroitamana* and *Singh* was their entitlement to foreign citizenship – it was accepted between the parties in *Singh* (though not necessarily by Kirby J) that the plaintiff was an Indian citizen by descent, whereas in *Koroitamana* the plaintiffs did not acquire Fijian citizenship automatically by descent and had not been registered as Fijian citizens.

Justice Kirby accepted that the authority of the majority in *Singh* was confined to cases in which a non-citizen child, born in Australia, has acquired the citizenship of its parents in accordance with the ius sanguinis of a foreign power. He therefore viewed the circumstances in *Koroitamana* as distinguishable from those in *Singh*. However, he rejected the suggestion that, without Australian nationality, the plaintiffs would be stateless. They were eligible to be registered as Fijian citizens if they, or their parents, chose to do so. Whether the plaintiffs were constitutional aliens or not could not depend on their personal election not to take up another form of citizenship that was available to them. The Australian Parliament, in turn, is entitled to adopt a hybrid ius soli/ius sanguinis model of Australian citizenship and, conversely, of alienage, provided

15 (2006) 227 CLR 31.

it does not deem people to be alien who could not truly answer that description.

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame

Mr Ame[16] was born in 1967 in Papua, now part of Papua New Guinea. At the time of his birth, Papua was an Australian-administered Territory and a part of Australia for the purposes of the *Australian Citizenship Act 1948* (Cth). A person born in Papua after the commencement of the *Australian Citizenship Act* acquired Australian citizenship, but was also required to obtain an entry permit under the *Migration Act* in order to enter Australia (unlike other Australian citizens, who enjoyed automatic entry rights).

When Papua became part of the independent state of Papua New Guinea in 1975, the new Papua New Guinea *Constitution* did not allow Papua New Guinean citizenship to be held concurrently with citizenship of any other country, reflecting the drafters' belief that "no man can stand in more than one canoe".[17] Regulations were passed in Australia providing that certain Australian citizens who gained citizenship of Papua New Guinea upon independence would lose their status as Australian citizens.

In 2005, Mr Ame challenged this unilateral revocation of his Australian citizenship in the High Court. He argued that the purported removal of his Australian citizenship, a consequence of the interaction between the Papua New Guinea *Constitution* and Australian regulations, had failed on technical grounds; alternatively, even if technically his Australian citizenship had been revoked, Mr Ame argued it was beyond the legislative competence of the Federal Parliament to take such action.

The second of Mr Ame's submissions to the High Court is more significant. The High Court was asked to decide whether the Federal Parliament can enact legislation revoking, unilaterally, a previous statutory grant of Australian citizenship. Although the majority of the court, including Kirby J, found it was competent for the Parliament to remove Papuans' Australian citizenship as part of Papua's transition to independence in 1975, the majority judges were careful to emphasise the limited application of their decision in *Ame*. Justice Kirby considered that the citizenship conferred on Papuans was "nominal … applicable for limited purposes, such as securing a passport for overseas travel. It conferred few rights".[18] There is a sense in which he clearly considered

16 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439.

17 (2005) 222 CLR 439 at 464 [53].

18 (2005) 222 CLR 439 at 471 [76].

it better for Papuans to be entitled to a fully effective form of new Papua New Guinean citizenship rather than a nominal Australian status from which rights were deliberately withheld on racial grounds: "In place of a veneer of citizenship were substituted substantial and enforceable rights of citizenship of Papua New Guinea that conform to international law."[19]

This qualitative difference between Papuans' Australian citizenship and the status enjoyed by most other Australian citizens (a form of second-class citizenship) confines the precedent established in *Ame.* However, Kirby J emphasised that his decision in *Ame* should not be read as an endorsement of statutory revocation of Australian citizenship under other circumstances: "[T]he decision in *Ame* affords no precedent for the deprivation of constitutional nationality of other Australian citizens whose claim on such nationality is stronger in law and fact than that of the applicant".[20]

Citizenship cases not concerning citizenship status

Justice Kirby understands "citizenship" to mean more than an individual's legal status within a statutory framework. He has demonstrated in his judgments, and particularly in his prodigious extra-curial contributions, a broader, more normative understanding of what citizenship means in social and political terms.

For instance, in *Roach v Australian Electoral Commission*,[21] a case concerning voting rights, Kirby J emphasised the significance of the franchise as a constituent right and obligation of Australian citizenship. The existence of the federal franchise, he argued, "reflects notions of citizenship and membership of the Australian federal body politic".[22] Conversely, citizens' participation in the franchise is a central part of the way in which they experience their citizenship, and represents an ongoing obligation to participate in the body politic of which they are a part. Thus, in *Roach*, his Honour found:

> Prisoners who are citizens and members of the Australian community remain so. Their interest in, and duty to, their society and its governance survives incarceration. Indeed, upon one view, the *Constitution* envisages their ongoing obligations to the body politic to which, in due course, the overwhelming majority of them will be returned.[23]

While the question of voting rights will be discussed again further below, the above coverage of cases means that we are now in a position to analyse the various themes in Kirby J's approach to citizenship.

19 (2005) 222 CLR 439 at 474 [90].
20 (2005) 222 CLR 439 at 483 [117].
21 *Roach v Australian Electoral Commission* (2007) 233 CLR 162.
22 (2007) 233 CLR 172 at 198-199 [83].
23 (2007) 233 CLR 162 at 199 [84].

THE SPECIAL POSITION OF NON-CITIZEN BRITISH SUBJECTS

The statutory and constitutional status of non-citizen British subjects in Australia is a recurring source of concern to Justice Kirby. Since joining the High Court he has demonstrated a particular interest in the position of British subjects who arrived in Australia before the 1980s and were treated, for a variety of purposes, as though they were Australian citizens despite not having undergone formal naturalisation.

Over the course of Kirby J's membership of the court, the citizenship status of this particular class of non-citizens has altered drastically as a result of political and legal changes largely beyond their control – including the changing composition of the High Court itself. Justice Kirby has, however, adhered to a view that British subjects who migrated to Australia prior to 1987 and were treated as though they were Australian citizens, cannot now be regarded as "alien" and subject to legislation enacted under s 51(xix).

Soon after joining the High Court, Justice Kirby outlined his view of the rightful position of non-citizen British subjects in *Re Patterson* (the facts of which are described above). He held that the introduction of statutory citizenship did not justify the retrospective imposition of the constitutional status of alien on a very large class of people in Australia. This was particularly so where they had long been absorbed into the people of the Commonwealth and had been accorded full civil and political rights and duties.

This remains the essence of Kirby J's objection to the treatment of non-citizen British subjects as "aliens", and susceptible to removal from Australia – having offered British-subject migrants to Australia an almost comprehensive set of "citizenship" rights and obligations without requiring them to be naturalised under statute, it is unfair that they should later be disadvantaged by their failure to have obtained formal citizenship status:

> The proposition that such change was competent to the Parliament, under the aliens power, must be tested not only by reference to the [Mr Taylor's] case but by reference to all other non-citizen British subjects who may have lived in Australia even longer and have worked, voted and raised children here at the invitation of Australia.[24]

Justice Kirby accepted that "in the course of a century, the essential characteristics of an 'alien' in the Australian constitutional context [had] changed" and that British subjects arriving in Australia from 1987 onwards "might be treated as 'aliens' for constitutional purposes".[25] Yet the question at issue in *Re Patterson* was whether a person who had

24 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 491 [301].
25 (2001) 207 CLR 391 at 495 [312].

previously been a non-alien for constitutional purposes could now acquire the status of alien, involuntarily, and be subject to legislation enacted under s 51(xix). Justice Kirby decided the aliens power could not be so revived:[26]

> Once, after their arrival, [non-citizen British subjects] were absorbed into the Australian community they could not, retrospectively, be reclassified as "aliens" for constitutional purposes. They were not only beyond the operation of the immigration power. They were also then beyond the aliens power.[27]

In rejecting the "revival" of the aliens power in its application to non-citizen British subjects, Kirby J claimed to be drawing a line to limit the applicability of the aliens power to people who have previously ceased to be aliens. If the application of the aliens power could be revived and applied to non-citizen British subjects retrospectively, then in theory "it could (in terms of principle) be revived and applied to other persons and groups within Australia who themselves, or whose families, were made up of immigrants and those descended from, or adopted by, them".[28]

Justice Kirby also attached considerable significance to the extension of the federal franchise to non-citizen British subjects already on the electoral roll by 1984.[29] In *Re Patterson* Kirby J accepted that the applicants in both *Re Patterson* and, by extension, *Shaw*, possessed a constitutional status as "electors" among "the people of the Commonwealth". He noted that when electoral laws were amended to confer the right to vote on "Australian citizens" there was no attempt to deprive non-citizen British subjects of the voting rights they already held.[30] They continued to occupy the constitutional position of "electors". This, he considered, amounted to evidence that, despite the changed relationship between Britain and Australia, British subjects who were already resident were regarded as full members of the community, whose entitlement to vote was equal to that of Australian citizens.

Four of the seven judges found in favour of Mr Taylor in *Re Patterson*, but any certainty offered by the decision to British migrants in Australia was short-lived. When the issue arose again in *Shaw v Minister for Immigration and Multicultural Affairs*, the composition of the court had changed and there was some doubt as to whether any consensus had emerged from the court's earlier decision in *Re Patterson*.[31]

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26 (2001) 207 CLR 391 at 493-494 [306]-[308].

27 (2001) 207 CLR 391 at 494 [308].

28 (2001) 207 CLR 391 at 492 [304].

29 (2001) 207 CLR 391 at 487 [287].

30 (2001) 207 CLR 391 at 487 [287].

31 See *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 43-45 [33]-[39] per Gleeson CJ, Gummow and Hayne JJ; at 47 [49] per McHugh J. See also *Re Te and Dang* (2003) 212 CLR 162 at 187-188 [86]-[89] per McHugh J.

Justice Kirby rejected the suggestion that no ratio emerged from *Re Patterson* to bind subsequent courts, arguing that the separate majority judgments had reached a broad consensus insofar as they had rejected the existence of a strict dichotomy between the statutory status of "citizen" and the constitutional status of "alien".[32] He adhered to his view in *Re Patterson*, holding that Mr Shaw was a member of the Australian community, and had been so since his arrival – he was not an alien or an immigrant for constitutional purposes, and could not retrospectively acquire the status of "alien".

In concluding his examination of the aliens power in *Shaw,* Kirby J observed that the obligation to retain a problematic individual in the Australian community is a small price to pay in order to extend constitutional protection to an entire class of full and loyal members of that community:

> The present case is thus not concerned merely with the constitutional position of persons such as Messrs Nolan, Taylor and Shaw, with their discouraging criminal records. If constitutional power exists to deport *them*, it would equally exist to expel *others* who, like them, came to this country and enjoyed the special status of a "subject of the Queen", recognised in the *Constitution*, that persisted well into the second half of the twentieth century. To render such a large and loyal section of the Australian community vulnerable to retrospective treatment as constitutional "aliens" would be an extremely grave step.[33]

The majority of the court disagreed; rather than follow *Re Patterson*, the High Court reverted to the doctrine adopted originally in *Nolan v Minister for Immigration and Ethnic Affairs*[34] – that is, British subjects who are not Australian citizens are constitutionally "aliens"; they are entitled to remain in Australia only while they hold a valid visa.[35]

While accepting that a majority of his colleagues reached a consensus on the point, Justice Kirby continues to criticise the decision in *Shaw*, arguing that the *Shaw/Nolan* doctrine:

> exposes to expulsion and seriously unfair treatment subjects of the Queen who have lived in mainland Australia for years, voted in elections and referenda, performed jury service and other civic duties and fought in the Australian Defence Forces. To me this is an offensive doctrine affecting hundreds of thousands of persons in a residual class of effective Australian nationals. I hope that it will be reversed as its offensiveness to

32 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 56-57 [79]-[80].

33 (2003) 218 CLR 28 at 63 [98] (emphasis in original).

34 (1988) 165 CLR 178.

35 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 43 [32] per Gleeson CJ, Gummow and Hayne JJ, at [190] per Heydon J.

> constitutional concepts of nationality and allegiance becomes obvious, and before more wrongs are done under it.[36]

Clearly, Kirby J regards the decision in *Shaw* as both a serious legal error and an injustice. Indeed, his judgment in *Ame* is indicative of the seriousness with which he takes issue with the *Shaw/Nolan* doctrine – the case did not concern a non-citizen British subject directly, but rather the position of a particular class of Australian citizens who had since lost their statutory citizenship status. Nevertheless, Kirby J took the opportunity to reiterate his criticism of the law as it applies to British subjects. If, he asks, "British subjects long resident as of right in the Australian mainland (most of them born in the United Kingdom) enjoy no status as Australian nationals protected by the Australian *Constitution*, how much weaker is the applicant's claim?"[37]

CONSTITUTIONAL DESIGN

The special position of non-citizen British subjects links back directly to the way the *Constitution* was framed, and in particular to the fact that the *Constitution* does not mention or anticipate expressly the status of "Australian citizenship". As Rubenstein has argued previously, the omission of any reference to citizenship of the new Australian Commonwealth was based on contentious grounds, many of which remain live issues in contemporary public policy, such as dual citizenship and the regulation of immigration.[38] The rejection of a constitutional form of Australian citizenship is also a reflection of the close relationship between the Australian colonies and the British Empire, which the drafters of the *Constitution* intended would endure. "Citizenship" was regarded as an idea more suited to republics than to the *Constitution* of an emerging nation within the British Empire, whose people would continue to owe allegiance directly to the British Crown. Indeed, British subject status at the time of Federation was a supranational concept, and this, too, is an important linchpin of Kirby J's approach, to which we will also later return.

Moreover, in *Re Patterson*, *Singh* and *Ame*, Justice Kirby makes much of the fact that the framers of the *Constitution* deliberately chose to leave the regulation of aliens (and the transition from alienage to nationality) to the Parliament, rejecting the United States model of constitutional conferral of citizenship.[39] In *Singh*, Kirby J reiterated his view that the omission of citizenship-conferring provisions from the *Constitution* was not a regrettable oversight, but a deliberate and informed decision.

36 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 at 480 [110].

37 (2005) 222 CLR 439 at 481 [111].

38 Rubenstein, n 6, Ch 2.

39 *Singh v Commonwealth* (2004) 222 CLR 322 at 416 [260].

He noted that the *Constitution* could have been drafted in a way that conferred the sort of ius soli birthright citizenship the appellant claimed, but it was not.[40] The court could not interpret into the *Constitution* a guarantee the framers had deliberately omitted.[41]

The changing role of the Crown

Fundamental to the issue of British subject status is the particular relationship between Australia and Britain and the changing role of the Crown.

Justice Kirby accepts that, around 1900, allegiance to one British Crown was the common element of nationality shared by all British subjects, wherever they were born, including those in Australia. Thus, for constitutional purposes, to be a "subject of the Queen" was the precise antithesis of being an "alien".[42] When British subjects entered Australia they enjoyed a protected position derived "from the fact that they shared the nationality of the people of the Commonwealth, in the sense that they shared a common allegiance. They were thus entitled to the protection of the Crown in its Australian dominion. They were not 'aliens'."[43]

From this early "supranational" status, whereby "citizenship" rights and responsibilities depended on a relationship of "subjecthood" to the British Crown rather than necessarily requiring any close ties or allegiance to Australia, Kirby J has recognised that "the concept of citizenship in Australia has evolved in harmony with the emergence of Australia to full nationhood and independence".[44] In essence, his argument has been that the scope of "constitutional nationality" and concepts of membership of the community have contracted as Australia's relationship with the Crown became more distant.

While the form of nationality recognised and contemplated by the *Constitution* was once a wide, almost all-encompassing category, taking in any person who owed allegiance to the British Crown by virtue of their birth or naturalisation within the British Empire, now the *Constitution* recognises a smaller class of people as nationals. The emergence of the doctrine of a divisible Crown has narrowed the form of allegiance underpinning constitutional nationality. Allegiance to the British Crown is insufficient; rather, "subject of the Queen" is now understood to refer to a subject of the Queen of Australia, in the person of the British monarch.[45]

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40 (2004) 222 CLR 322 at 416 [260]-[261].

41 (2004) 222 CLR 322 at 416 [260]-[261].

42 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 481-483 [272]-[276].

43 (2001) 207 CLR 391 at 484-485 [280].

44 (2001) 207 CLR 391 at 478 [263].

45 *Nolan v Minister of State for Immigration and Ethnic Affairs* (1988) 165 CLR 178.

Justice Kirby considers that as the scope of constitutional nationality has contracted, the power over aliens has expanded to fill the gap, "as the counterpart to modern Australian nationality".[46] Consequently, much of his citizenship jurisprudence has been concerned with identifying the limits of constitutional nationality to determine where nationality stops and alienage begins. He has not been content to allow statutory citizenship to define, by exclusion, "alien" for the purposes of s 51(xix). In particular, he has been critical of the proposition advanced in 1982 by Chief Justice Gibbs in *Pochi v Macphee*[47] and its interpretation by subsequent courts when they have been considering the limits of the aliens power.

In *Pochi*, Gibbs CJ held "the Parliament can in my opinion treat as an alien any person who was born outside Australia, whose parents were not Australians, and who has not been naturalized as an Australian".[48] This proposition has been cited repeatedly in support of the argument that naturalisation is the only path by which a person can cease to be an alien for the purposes of s 51(xix) – the so-called citizen-alien dichotomy.[49]

However, in his dissenting opinion in *Shaw*, Kirby J described it as a "serious legal error … built upon overstated legal propositions".[50] Chief Justice Gibbs stated his views in broader terms than were necessary to decide the case at hand, argued Kirby J; thus, to the extent the majority in *Nolan* accepted the existence of the citizen-alien dichotomy on the basis of Gibbs CJ's ratio in *Pochi*, they were mistaken. In *Shaw*, Kirby J suggested the majority simply perpetuate the error.

Rather than embracing a clear-cut dichotomy between statutory citizenship and constitutional alienage, Justice Kirby suggests that Australia's history and the text of the *Constitution* demand a more "complex" understanding of nationality.[51] In particular, he is concerned with the historical and social circumstances which led to the development of a British migrant population who were granted many of the rights of citizens, performed the duties of citizens and were given to understand they did not need to be naturalised. He has held that these people should occupy a "uniquely privileged position" as non-citizen British subjects

46 *Singh v Commonwealth* (2004) 222 CLR 322 at 417 [264]; see also *Koroitamana v Commonwealth* (2006) 227 CLR 31 at 54 [80].

47 (1982) 151 CLR 101.

48 *Pochi v Macphee* (1982) 151 CLR 101 at 109 per Gibbs CJ.

49 See *Nolan v Minister of State for Immigration and Ethnic Affairs* (1988) 165 CLR 178; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 489-491 [295]-[300]; *Shaw v Minister of State for Immigration and Ethnic Affairs* (2003) 218 CLR 28 at 53-55 [69]-[76]; *Singh v Commonwealth* (2004) 222 CLR 322 at 372-373 [118]-[120].

50 *Shaw v Minister of State for Immigration and Ethnic Affairs* (2003) 218 CLR 28 at 53 [70].

51 (2003) 218 CLR 28 at 54-55 [73].

who were not aliens when they arrived in Australia and who had not subsequently become aliens.[52]

In essence, this revolves around different understandings of membership. Constitutionally speaking, it comes back to theories of interpretation and it is that aspect we now consider.

CONSTITUTIONAL INTERPRETATION

Justice Kirby's citizenship judgments highlight his approach to constitutional interpretation, which has guided his approach to constitutional questions involving difficult policy issues.

In *Singh*, Kirby J expressed his sympathy for the plaintiff's position: "[i]f I were a legislator, I would not favour a law depriving her of Australian nationality and providing for her involuntary removal."[53] However, he was unable to sustain the interpretation of the *Constitution* advanced on the plaintiff's behalf: "my function is to give meaning to constitutional concepts. I must do so in a way that is consistent with my notion of how the *Constitution* must be interpreted when it refers to a word such as 'aliens'."[54]

Ultimately, it is his approach to interpreting words and phrases in the *Constitution* that has shaped Justice Kirby's decisions in recent citizenship cases – principally, his insistence that the meaning of the term "alien" in s 51(xix) is not fixed as it was understood by the drafters of the *Constitution*. Instead, a constitutional term or phrase must be:

> construed according to its meaning, as derived from its context. That context is, in part, provided by the language, and apparent purpose, of other provisions of the *Constitution*. In part, it is provided by the historical context against the background of which the *Constitution* is to be read and the changing circumstances to which it has had to be applied since its adoption in 1901.[55]

Thus, the plaintiff's attempt in *Singh* to confine the meaning of "aliens" to its definition at Federation failed, for several reasons. Justice Kirby rejected the plaintiff's assertion that there was one fixed meaning of "aliens", available to the Parliament circa 1901, which recognised "birthright" citizenship according to the ius soli. He accepted that ius soli and ius sanguinis theories were in favour in different states at the time, and that the *Constitution* contained no inherent preference for one approach over the other:

> Why could the Parliament not adopt, wholly or in part, elements of the alternative legal approach to the issue of alienage accepted by many

52 (2003) 218 CLR 28 at 59 [86], citing *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 496 [314].

53 *Singh v Commonwealth* (2004) 222 CLR 322 at 411 [243].

54 (2004) 222 CLR 322 at 411-412 [243].

55 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 477-478 [262].

> legal systems of the world? After all, each approach was an endeavour to identify the feature of a relationship between the individual and a nation on the basis of which loyalty and membership could generally be imputed and demanded.[56]

However, even if the term "alien" did have a particular meaning at Federation, based on the ius soli doctrine, that historical meaning does not limit its contemporary constitutional definition:

> [W]hilst the task of interpretation remains anchored to the text of the *Constitution*, the ambit of the power is not limited by the wishes, expectations or imagination of the framers. They did not intend, nor did they enjoy the power, to impose their wishes and understanding of the text upon later generations of Australians ...
>
> It follows that the legislative power afforded to the Parliament to make laws with respect to "aliens" is capable of application to a larger, contemporary, condition of things beyond what might have been the generally accepted meaning of the word at the time of Federation.[57]

Essential character

Although the definition of constitutional terms such as "aliens" is not limited by or confined to their meaning as it was understood when the *Constitution* was drafted, the scope of constitutional terms is not unconstrained or "open-ended". Rather, Kirby J suggests that constitutional terms and phrases should be defined by reference to their "essential character". So, when considering the definition of "aliens" for the purposes of s 51(xix), Kirby J seeks to reduce the meaning of the term to its core elements in order to discover what underlies the use of the term, rather than its particular connotations at a given time.

In Kirby J's view, the idea of an alien is one who is outside the Australian community and its fundamental loyalties – on that view, emigrant British subjects who had "by law and fact the attributes that the *Constitution* itself continued to recognise as Australian nationality" ought not to be considered aliens. As a class, they were clearly within the Australian community, and shared the "fundamental loyalties" of that community.

His Honour has reiterated that the capacity to determine the constitutional meaning of "aliens" lies with the court – legislation on its own cannot convert a non-alien to an alien, or determine the point at which constitutional nationality became coextensive with statutory citizenship. Rather, he declared in *Singh*: "[t]he ultimate responsibility of expounding the meaning of a constitutional word belongs to this Court."[58]

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56 *Singh v Commonwealth* (2004) 222 CLR 322 at 414 [252] (footnote omitted).

57 (2004) 222 CLR 322 at 412-413 [247], [249] (footnotes omitted).

58 (2004) 222 CLR 322 at 413 [249].

THE BIG PICTURE

Citizenship cases rarely involve individuals whose circumstances are unique – behind each constitutional litigant is a class of people in identical or similar situations. From his judgments it is clear that Justice Kirby views the applicants in *Re Patterson*, *Shaw*, *Singh* and *Ame* as members of a particular group or section of Australian society, and understands each case to be a decision not only about the fate of the individual applicants but about the rights, expectations and entitlements of people in Australia whose circumstances are identical or potentially may be viewed as similar.

As he observed in *Te and Dang*, while litigants such as Mr Taylor bring their cases for themselves, "it is impossible to regard his case as one confined to him personally. Necessarily, the decision in *Taylor* was concerned with persons in the class of which Mr Taylor is a member."[59]

Indeed, the significance of citizenship litigation is not necessarily confined to members of a particular class of people in Australia – Kirby J considered the issues at stake in *Ame*, for instance, to be relevant to all Australians, with regard to the security of their status and rights as citizens: "in short, could they be stripped of their status and rights as citizens in the same way as federal law has purported to provide in the case of the applicant?"

This appreciation of the broad significance of decisions about individuals' nationality status has informed Justice Kirby's reasoning in citizenship cases. In *Re Patterson*, he tested the Commonwealth's argument at its widest possible application:

> If a change in nationality status could be effected in respect of the prosecutor in the way supported by the respondent in this case, a law could be enacted by the Parliament, even today, expelling all non-citizen British subjects who migrated to Australia before May 1987, at least those who had not been naturalised.[60]

Justice Kirby considered such a law could not be within the legislative power of the Federal Parliament, given the "uniquely privileged" position of this category of migrants to Australia. The fact that the law in question did not purport to apply to the entire class of non-citizen British subjects did not make it any more valid in its application to Mr Taylor: "[i]t does not become valid because it applies only to selected persons within the class."[61] Similarly, in *Shaw,* Kirby J considered that upholding the Minister's decision in Mr Shaw's case would have significant implications for a large group of people (non-citizen British subjects) and, as a result, the Minister bore a heavy burden of establishing that her decision was lawful (rather than the onus resting on Mr Shaw to show that it was

59 *Re Te and Dang* (2002) 212 CLR 162 at 210 [176].

60 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 496 [315].

61 (2001) 207 CLR 391 at 496 [315].

not): "The Minister must justify a constitutional principle that has such serious results for the applicant and that could also validly affect the nationality status of so many people in a like position."[62]

Protection of minority rights

Justice Kirby has also demonstrated a keen awareness that citizenship and citizenship rights have historically been of particular significance to minorities. He took seriously the applicant's argument in *Ame* that the court should be reluctant to establish a precedent for depriving minorities of their nationality status in Australia: "The deprivation of nationality … has been such a common affront to fundamental rights that I would not, without strong persuasion, hold it to be possible under the *Constitution* of the Australian Commonwealth."[63] These possibilities are not abstract or purely theoretical – access to citizenship rights, and the enormous difficulties faced by those who are stateless, are very much contemporary human rights concerns.[64] While accepting that constitutional arguments cannot be tested against the worst scenario imaginable in an attempt to intimidate decision-makers into favouring the narrowest possible construction of a head of power, Kirby J defends the validity of references to the possible consequences of a propounded constitutional interpretation in order to assess whether that interpretation will lead to a result that is "inimical to freedom".[65] However, these dangers, he believes, cannot be allowed to confine the interpretation of the aliens power so as to limit its potential abuse. Rather, constitutional terms are to be interpreted "with all the generality that the words used in the *Constitution* admit",[66] with the court assuming the responsibility of determining whether particular applications are impermissibly broad.[67]

A more inclusive citizenship?

While it is obvious that his appreciation of the context of citizenship litigation has informed his decisions in cases involving non-citizen British subjects, it is less clear whether Kirby J's treatment of this particular class of people fits cohesively within a broader conception of Australian citizenship. He has not advocated for a more inclusive understanding of

62 *Shaw v Minister of State for Immigration and Ethnic Affairs* (2003) 218 CLR 28 at 51 [63].

63 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 at 466-467 [96].

64 United Nations High Commissioner for Refugees, *Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons* (6 October 2006, No 106 (LVII) – 2006): UNHCR Refworld, http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=453497302 (accessed 8 December 2008). See also M Lynch, "Lives on Hold: The Human Cost of Statelessness" (Report for Refugees International, 2005): http://www.refugeesinternational.org/sites/default/files/LivesonHold.pdf (accessed 15 December 2008).

65 *Singh v Commonwealth* (2004) 222 CLR 322 at 418 [268].

66 (2004) 222 CLR 322 at 413 [249].

67 (2004) 222 CLR 322 at 418 [269].

Australian nationality in respect of any other category of people within the Australian community.

While accepting the aliens power functions in a similar way to the immigration power, in that it is possible to cease to be an alien just as immigrants cease to be within the scope of s 51(xxviii) once they have been absorbed into the Australian community, Justice Kirby has not identified any instance of this transformation having occurred. British migrants to Australia, he seems to have concluded, were never alien, although they were "immigrants" until absorbed into the community.[68] Conversely, Messrs Te and Dang remained aliens despite having been absorbed – they could not demonstrate the required commonality of allegiance that Kirby J considers to be the "essential characteristic" of non-alien status. Why, other than their failure to obtain naturalisation under statute, do these members of the community, some of whom have lived virtually their entire lives in Australia and maintain no connection with their country of formal nationality, remain constitutionally alien?

To the extent that Justice Kirby's conception of "constitutional nationality" is based on the federal franchise, it currently operates so as to exclude all but British-subject non-citizens. As he stated in *Te and Dang*:

> If, however, membership of the body politic of the nation involves an idea in any way broader than, and different to, the notion of allegiance, the applicants' assertion that they qualify by this test is not available on the facts of their cases. Neither applicant went through the formal process of naturalisation. Neither was, by Australian law, an "elector", as Mr Taylor was, for federal and State elections. Neither was qualified, as Mr Taylor was, to participate in a referendum to alter the *Constitution* of the Commonwealth. Neither was liable, as Mr Taylor was, to jury service and other like civic responsibilities and privileges in Australia. There are therefore a number of important and relevant distinctions between Mr Taylor's case and those of the applicants.
>
> Such features of Mr Taylor's case contributed to my conclusion that he was not an "alien" because, although not an Australian citizen, he was effectively equated to one from the moment he arrived in Australia with his family as an assisted migrant. This was a position that was maintained and reflected in the legislative provisions that applied to people such as Mr Taylor arriving before 1 May 1987. No such considerations applied to either of the applicants. They are not, nor ever have been, non-citizen British subjects with a special status in Australia.[69]

The link between voting and citizenship

Justice Kirby's recognition of the constitutional concept of nationality appears to be based on the particular role "the people of the Commonwealth"

68 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 476-477 [258].

69 *Re Te and Dang* (2002) 212 CLR 162 at 215-226 [193]-[194] (footnotes omitted).

and federal "electors" are expected to play in Australia's constitutional arrangements, and the protection afforded to "subjects of the Queen", particularly by s 117. (Having accepted that "subjects of the Queen" are now "subjects of the Queen of Australia", Kirby J recognises that people who owe their allegiance to the Queen in one of Her Majesty's other capacities are not within the meaning of that constitutional phrase.)

British subjects who enrolled to vote by mid-1984 are the only group of non-citizens who are able to vote in federal elections. There is a much more numerous class of non-citizens who, despite having been absorbed into the community for most other purposes, do not possess the franchise. They cannot obtain voting rights because they lack statutory citizenship; they cannot be recognised as constitutional nationals in part because they cannot vote. De facto, statutory citizenship remains a defining condition of constitutional nationality.

However, as Kirby J has acknowledged, there are dangers in regarding status as an "elector" as conclusive proof of a person's constitutional nationality. At least in respect of British subjects, their voting rights are not the linchpin of their constitutional status – this is amply demonstrated in *Shaw*, which concerned a non-citizen British subject who could not vote (having not enrolled prior to 1984). Justice Kirby nevertheless considered Mr Shaw to be a constitutional national. Conversely, being a federal elector and a member of the "people of the Commonwealth" does not, ultimately, mean a person cannot be an alien. His Honour has struggled with the hypothetical scenario in which an "alien" is given the right to vote under Australian electoral law. In *Re Patterson* Kirby J suggests it would be possible, albeit "an odd result", for a constitutional elector and a person who has been a member of "the people of the Commonwealth" to simultaneously be a constitutional alien.[70] He suggests there could be difficulty in reconciling the constitutional concept and consequences of "alienage" with a situation in which "aliens" were also "electors". Later in his judgment, however, he acknowledges that the status of "elector" is not conclusive proof of a person's status as a constitutional national, as there may be circumstances in which nationality is not a prerequisite for an entitlement to vote.[71] Equally, as has been recently confirmed by the High Court, Australian citizenship is not a *guarantee* of the entitlement to vote.[72]

Perhaps it is better to regard the right to vote as a consequence of constitutional nationality, rather than as a prerequisite for attaining that status. Something more than the status of "elector" and membership of "the people of the Commonwealth" is clearly required in order to constitute constitutional nationality and to protect an individual from being treated as an alien. Had electoral laws allowed Mr Te and

70 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 481 [270].

71 (2001) 207 CLR 391 at 492-493 [305].

72 *Roach v Australian Electoral Commission* (2007) 233 CLR 162.

Mr Dang to vote in Australia, it is by no means clear that they would have been regarded as non-aliens. For Kirby J, the nature of "alienage", with nationality (as distinct from statutory citizenship) as its constitutional counterpart, appears to be based on notions of allegiance. Once a person has demonstrated the required allegiance to Australia, they may no longer be considered an alien but instead acquire the status of constitutional national, with the attendant rights and obligations envisaged by the *Constitution*.

An unfair distinction?

How, then, do individuals demonstrate their allegiance to Australia in order to place themselves beyond the meaning of the term "alien"? Justice Kirby has rejected the proposition that migrants are capable of severing their allegiance to their country of birth unilaterally, without formally transferring their loyalty to Australia. In the case of *Re Te and Dang*, the applicants (both of whom were refugees) had argued that:

> by proceeding to Australia, asserting a refugee status and seeking protection here … they had publicly and effectively renounced any residual allegiance to their country of nationality and affirmed their desire and intention to make Australia their permanent home and place of allegiance and personal loyalty.[73]

Justice Kirby regarded this submission as unsound: at international law, it is clear refugees retain their original nationality despite seeking protection in another country.[74] More broadly, Kirby J considered the transfer of allegiance from one country to another could not simply be a matter of "subjective alterations of feelings on the part of the individual concerned"; rather, "[a] change of allegiance, in the sense of adherence to one nationality in the place of another, normally involves reciprocal conduct by a formal and public act, signifying the solemn change and the acceptance of the new privileges and responsibilities that are involved".[75] It is entirely within power for the Parliament to provide for "a formal, public and reciprocal acknowledgment of 'naturalisation', in accordance with statute".[76]

Although he was concerned in *Re Patterson* to limit the expansion of the aliens power in ways that might adversely affect all migrants and their families, Justice Kirby is unapologetic about the "special" position he argues is occupied by British subjects who migrated to Australia before 1987 and have not been naturalised. He has recognised, but refuted, the suggestion that it is unfair, particularly in a society so strikingly composed of migrants, to afford a particular class of non-citizens protection from

73 *Re Te and Dang* (2002) 212 CLR 162 at 213 [188].
74 (2002) 212 CLR 162 at 214 [190].
75 (2002) 212 CLR 162 at 214 [191].
76 (2002) 212 CLR 162 at 215 [191].

the reaches of the aliens power by recognising that they possess a constitutional nationality not available to other non-citizens. In the cases of *Te* and *Dang*, heard together in 2002, he acknowledged that the applicants – nationals of Vietnam and Cambodia who had lived in Australia since childhood, had not been naturalised, and were facing deportation after extensive criminal conduct – might consider that they were unfairly distinguished from the applicant in *Re Patterson* on the basis that he was a British subject and they were not. However, his Honour explained, "that distinction lies deep in Australia's history, constitutional arrangements and earlier legislation. The special association with the Australian body politic to which Mr Taylor could appeal is not available to either of the applicants."[77]

SUPRANATIONAL OR COLONIAL?

Justice Kirby has maintained that nationality, as a constitutional concept, began in Australia as a "supranational" concept. When the *Constitution* was drafted, it reflected existing international law and political realities governing the status of British subjects within the Empire. The relationship between the Queen and her subjects was consciously preserved in the new Australian *Constitution*. As Kirby J noted in *Re Patterson*:

> [T]his *supranational* concept of British nationality survived well into the latter part of the twentieth century. It did so both in popular ideology and, more relevantly for present purposes, in the express status recognised by Australian law … It remained the case … until the changes brought about in the 1980s.[78]

Other than the historical circumstances which led to its adoption, are there broader reasons to support the continued recognition and, indeed, continued privileging, of a supranational conception of Australian constitutional nationality which has since been overtaken by legal and political events? In other words, is there an explanation for Justice Kirby's approach to non-citizen British subjects other than the historical relationship between Australia and the British Crown? Identifying an alternative source of validity or justification for continuing to recognise the "supranational" conception of nationality which underpinned the *Constitution* might provide proponents of a broader vision of citizenship with a basis on which to argue for an expansion of the concept of "constitutional nationality" in its application to non-British non-citizens. That is, if the basis on which non-citizen British subjects are considered to be constitutional nationals is, essentially, their status as British subjects, then the principles which apply to them are limited to other individuals who are also British subjects. Alternatively, if non-citizen British

77 (2002) 212 CLR 162 at 216 [194].

78 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 480 [271] (emphasis added).

subjects are constitutional nationals for another reason, or combination of reasons, the class of non-citizen, non-alien "constitutional nationals" may not be as tightly confined.

International law might, prima facie, provide considerable support for the argument that once a group of people has been afforded citizenship rights by a nation-state, these should not unilaterally be withdrawn. So much was recognised by Justice Kirby in *Ame*, where he dealt briefly with the possibility that international law may restrict Australia's capacity to deprive people of their nationality. He acknowledged there are rights at international law to return to one's own country, and not to be deprived arbitrarily of one's nationality,[79] and concluded that the provisions of the First Optional Protocol to the *International Covenant on Civil and Political Rights* are available to influence the interpretation of Australian laws even where those laws were made before ratification of the Protocol.[80] While rejecting the submission that Papuans were deprived of their Australian citizenship "arbitrarily", Kirby J appeared to accept that the Australian laws stripping Papuans of their citizenship upon Papua New Guinea's independence may have been in breach of international law in that the law assumed Papuans' "own country" to be Papua irrespective of their Australian citizenship.[81] However, curiously, Kirby J diluted the significance of this finding with the observation: "This may have been in breach of international law, especially as it is now understood. But so have been many aspects of Australian statute law governing immigration before the independence of Papua New Guinea and perhaps since."[82] Crucially, the difference between the applicant in *Ame* and the non-citizen British subjects considered in *Re Patterson* and *Shaw* is that Papuans actually had a form of statutory Australian citizenship, which they lost, whereas British subjects had a bundle of rights and opportunities equivalent to those of an Australian citizen, but were not formally Australian. The applicants in *Te and Dang*, *Singh* and *Koroitamana* were even further removed from a claim that they had been deprived of nationality under international law, as they had not enjoyed full citizenship rights in Australia prior to attempts to remove them under the *Migration Act*.

Alternatively, is there something in the *Constitution* itself to support the conclusion that non-citizen British subjects should not retrospectively have been classified as "aliens"? In *Re Patterson*, Justice Kirby suggested that any abrogation of citizenship rights would need to be achieved via legislation in express terms, in keeping with established principles of statutory interpretation governing the deprivation of rights

79 United Nations, *Universal Declaration of Human Rights* (adopted by GA Res 217A (III) of 10 December 1948) Arts 13, 15.

80 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 at 473-474 [87].

81 (2005) 222 CLR 439 at 473-474 [88].

82 (2005) 222 CLR 439 at 473-474 [88].

and liberties.[83] Further, he suggested Ch III of the *Constitution* would impose procedural limitations on how a person's nationality status could be changed: "any such change might only be effective if made with due notice to the person concerned and the provision of a real opportunity to be heard in a court of law as to whether such a change could or should be made in that person's case".[84] The protection afforded by Ch III does not arise as an incident of a person's citizenship – in *Vasiljkovic v Commonwealth*[85] Kirby J confirmed that, "save in particular cases, the *Constitution* does not distinguish between citizens and non-citizens in the entitlements that it confers. Citizens and non-citizens are entitled to invoke the *Constitution* without discrimination based on their nationality."[86] However, Ch III protects citizens from deprivation of their nationality status without being afforded what might broadly be termed natural justice. Again, though, it should be noted that in order to avail themselves of the protection of Ch III, individuals would need to demonstrate they had a form of nationality status which was removed without due notice or procedural fairness – something the applicants in *Te and Dang*, *Singh*, and *Koroitamana* would have failed to do.

Ultimately, however, these broader ideas are not the basis of Justice Kirby's decisions in cases involving non-citizen British subjects; nor have they been protective of the rights of non-citizens in other cases. He considers that British subjects who arrived in Australia before its transition to constitutional independence was "completed" should be recognised as possessing constitutional nationality, even absent statutory citizenship, for reasons which are unique to their particular category of migrants. Given the nature of the relationship between Australia and Britain:

> [t]here seems little doubt that, in 1900, in the view of the law applicable in Australia, a British subject was one who owed allegiance to the Queen … Allegiance to the Crown, and the monarch who was for the time being its visible and personal embodiment, was the common element of nationality shared by all British subjects, including those born in Australia.[87]

Justice Kirby considered that these constitutional facts mandate the conclusion that "a 'subject of the Queen', wherever born and however owing that allegiance, was not and could not be an 'alien' for Australian legal purposes".[88] Having never been aliens, they could not have that status conferred upon them retrospectively.

83 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 494 [309].
84 (2001) 207 CLR 391 at 494 [309].
85 (2006) 227 CLR 614.
86 *Vasiljkovic v Commonwealth* (2006) 227 CLR 614 at 675 [215].
87 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 482-483 [278].
88 (2001) 207 CLR 391 at 483 [276].

This form of supranational citizenship is, by its nature, only available to non-citizens who are British subjects. They enjoyed, until relatively recently, a unique capacity to *enter* Australia as non-alien immigrants. Their acceptance as constitutional nationals is not based on any qualitative assessment of their individual membership of the community. The position of non-British non-citizens is much less clear. Although, as described above, Justice Kirby has been receptive, in principle, to the argument that it is possible to lose the status of alien by being absorbed into the community, he has declined to recognise any instance in which such absorption has occurred. Ultimately, in the cases of *Te* and *Dang*, he avoided making a finding as to the consequences for aliens of absorption into the community by finding the two applicants had failed to be absorbed – their extensive criminal histories being evidence of their "public renunciation of the norms of the community".[89]

Nevertheless, *Te* appears to leave open a slim possibility that it is constitutionally possible to lose the status of alien through absorption into and long-term membership of the Australian community. Justice Kirby accepts the respondent's arguments that a line of precedent excludes the possibility of naturalisation by absorption, but is also conscious of the danger of allowing statutory citizenship to become, de facto, the only guarantee of "non-alien" status, given the potential for citizenship laws to operate unfairly and the sound reasons some long-term members of the community may have for not obtaining statutory naturalisation.[90]

CONCLUSION

As this chapter has shown, Justice Kirby's citizenship jurisprudence has been characterised by several recurring themes and issues. Some of these are specific concerns about the nature of Australian citizenship – most notably, his continued criticism of the current court's position on British subjects' nationality in Australia. Others are reflective of his broader judicial priorities; his opinions in a series of citizenship cases provide a worked example of the application of his approach to the interpretation of constitutional text. Similarly, his awareness of the global context in which citizenship operates – both in terms of international law and the history and experience of other nations – is further proof of Kirby J's enduring focus on Australia's relationship with the international legal order, and in particular with how well human rights are safeguarded under the *Constitution*.

Finally, Justice Kirby, perhaps more than any other member of the court, has explored the vacuum created by the omission from the *Constitution* of provisions conferring or defining Australian citizenship

89 *Re Te and Dang* (2002) 212 CLR 162 at 218 [201].

90 (2002) 212 CLR 162 at 217-218 [200].

– his exploration of the meaning of "constitutional nationality", and his signalling of the procedural limitations the *Constitution* may impose on the treatment of Australian citizens, are a reminder that Australian citizenship law is far from settled, and the substantive meaning of citizenship far from certain.

Given this complex body of jurisprudence, one of the recurring themes in Kirby J's citizenship judgments might seem incongruous. In broader policy terms, his defence of the "uniquely privileged" position of British-subject migrants to Australia might seem to be out of keeping with notions of citizenship which emphasise equality between citizens. The fact remains that Kirby J's stated preference is for a form of constitutional nationality which recognises the claim of one group to full membership of the community without requiring them to indicate their allegiance to Australia, but has not yet developed a mechanism for recognising any other categories of non-citizen until they undertake formal naturalisation.

At a time in which the process of obtaining naturalisation has been made more onerous,[91] Kirby J's clear distinction between long-term-resident British subjects and migrants from other backgrounds serves as a reminder that citizenship law in Australia has always been exclusionary. To this extent, judges of the High Court are constrained by historical and legal frameworks in their approach to citizenship issues. No doubt Justice Kirby's active approach to engagement with public debate and discussion will ensure he continues to make a contribution to Australian constitutional law and public policy after his departure from the High Court. He may well find more opportunities, post-retirement, to elaborate on his preferred model of constitutional nationality and citizenship rights.

91 The *Australian Citizenship (Amendment) Act 2007* (Cth) introduces a more formal citizenship testing framework for some citizenship applicants.

Chapter 4

CORPORATE LAW

Vincent Jewell

The needs of the economy change and are reflected in the law. But no participant in the delicate work of corporate law should forget the essential character of the trading corporation as a risk-taker and the inevitable consequence that some risks, honestly, diligently and carefully assumed, will sometimes not come off. To forbid this by law might save a few investors from unexpected losses. But it would be to destroy the brilliant idea of the corporation which remains one of the few truly creative contributions of the law to the economic well-being of the world and the economic liberty of its people.[1]

THE HISTORICAL BACKGROUND

Michael Kirby's judicial career has largely coincided with a period of significant developments in corporate law.

A few years before his appointment in 1984 as President of the New South Wales Court of Appeal, the Commonwealth and the States established a national corporate law scheme. The Commonwealth Parliament enacted, as laws for the Australian Capital Territory, the *Companies Act 1981*, the *Companies (Acquisition of Shares) Act 1980* and the *Securities Industry Act 1980*. The States and, in 1986, the Northern Territory enacted complementary legislation adopting these three laws as Codes in each jurisdiction. To co-ordinate enforcement of the laws, a national regulatory body, the National Companies and Securities Commission (NCSC), was established to work co-operatively with the State and Territory Corporate Affairs Commissions.

Further significant corporate law developments took place after Justice Kirby's appointment to the Court of Appeal.

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1 M D Kirby, "Rethinking Company Law and Practice" (Speech, National Corporate Law Teachers' Conference Dinner, 6 February 1995).

In 1989, the Commonwealth enacted a single national statute, the *Corporations Act 1989* (Cth), to replace the separate companies and securities statutes. The Commonwealth also passed legislation to establish the Australian Securities and Investments Commission (ASIC, originally the Australian Securities Commission or ASC), replacing the NCSC and the Corporate Affairs Commissions.[2] The same legislation also established a number of other bodies. The Takeovers Panel was set up to be the primary forum for resolving disputes about takeover bids during the life of those bids.[3] The Companies Auditors and Liquidators Disciplinary Board (CALDB) was created to consider applications by ASIC, as well as the Australian Prudential Regulation Authority (APRA), to cancel or suspend the registration of auditors and liquidators.[4] The Corporations and Markets Advisory Committee (CAMAC) is a corporate law reform body consisting of persons with experience in business, financial services, law, economics and accounting.[5] CAMAC undertakes law reform projects on its own initiative, as well as at the request of the Government.

In 1990, the High Court ruled that the parts of the *Corporations Act 1989* dealing with incorporation of financial and trading corporations were unconstitutional.[6] In response to the High Court decision, the Commonwealth and the States in 1991 enacted their own separate Corporations Acts and ASC Acts, each of which applied the *Corporations Law* and the ASC Law, respectively, as set out in the Commonwealth legislation.

As Kirby J has pointed out, the *Corporations Law* was in many ways "merely the continuation of the essence of the old company laws inherited from legislation enacted in England in the middle of the 19th century".[7] The period since its enactment has seen substantial corporate law reform.

The *Corporate Law Reform Act 1992* (Cth) contained the first major set of reforms to the corporations legislation. It introduced new provisions

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2 *Australian Securities Commission Act 1989* (Cth).

3 *Australian Securities Commission Act 1989* (Cth) Pt 10. For the Panel's role as the forum for resolving disputes about takeover bids, see *Corporations Act 1989* (Cth) ss 732-735. The Panel's powers are now found in *Corporations Act 2001* (Cth) Pt 6.10 Div 2. The Panel was originally called the Corporations and Securities Panel.

4 *Australian Securities Commission Act 1989* (Cth) Pt 11. For the CALDB's cancellation and suspension power, see *Corporations Act 1989* (Cth) s 1292 (the section number is the same in the *Corporations Act 2001* (Cth)).

5 *Australian Securities and Investments Commission Act 2001* (Cth) Pt 9. Under the *Australian Securities Commission Act 1989* (Cth), CAMAC was originally called the Companies and Securities Advisory Committee (CASAC). In March 2002, it became the Corporations and Markets Advisory Committee under the *Financial Services Reform Act 2001* (Cth). The more recent name will be used in the remainder of this chapter.

6 *New South Wales v Commonwealth* (1990) 169 CLR 482.

7 M D Kirby, "Australian Corporations Law and Global Forces" (Speech, Australasian Law Teachers' Association, Annual Conference, Adelaide, 11 July 1996).

governing transactions by companies with related parties. It also implemented recommendations in the report of the General Insolvency Inquiry conducted by the Australian Law Reform Commission (ALRC) for a new voluntary administration procedure for insolvent companies, as well as other insolvency law reforms.[8]

Subsequent amending statutes have incorporated recommendations by CAMAC,[9] as well as the work of government-initiated law reviews, such as the Simplification Task Force[10] and the Corporate Law Economic Reform Program.[11]

The other major corporate law development arose from the High Court decision in *Re Wakim; Ex parte McNally*.[12] Prior to that decision, the law made provision for the Federal Court and State Supreme Courts to exercise jurisdiction under the national corporate scheme, with Commonwealth cross-vesting legislation conferring jurisdiction on the Supreme Courts while State cross-vesting legislation conferred jurisdiction on the Federal Court. In *Re Wakim*, the High Court held (with Kirby J dissenting) that the State cross-vesting legislation was unconstitutional, on the basis that the Commonwealth *Constitution* did not permit the States to confer jurisdiction on a federal court.[13] After *Re Wakim*, the States referred power to enable the Commonwealth Parliament to enact national corporations statutes – the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth). While the decision in *Re Wakim* was of major significance for corporate regulation in Australia, no more will be said about it in this chapter, as it affects all efforts by the Commonwealth and the States to set

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8 Australian Law Reform Commission (ALRC), *General Insolvency Inquiry* (ALRC 45, 1988). This report is known as the Harmer Report, after the Commissioner-in-Charge, Mr R W Harmer.

9 For instance, the continuous disclosure provisions introduced by the *Corporate Law Reform Act 1994* (Cth) implemented CAMAC's report, *An Enhanced Statutory Disclosure System* (1991), the managed investment provisions in Ch 5C, which were introduced by the *Managed Investments Act 1998* (Cth), implemented *Collective Investments: Other People's Money* (1993) (this report was prepared in conjunction with the ALRC), the reforms to the takeover provisions introduced by the *Corporate Law Economic Reform Program Act 1999* (Cth) included reforms recommended in *Anomalies in the Takeovers Provisions of the Corporations Law* (1994) and *Compulsory Acquisitions* (1996), the *Financial Services Reform Act 2001* (Cth) adopted recommendations in *Regulation of On-exchange and OTC Derivatives Markets* (1997) and many insolvency reforms recommended by CAMAC in *Corporate Voluntary Administration* (1998), *Corporate Groups* (2000) and *Rehabilitating Large and Complex Enterprises in Financial Difficulties* (2004) were adopted in the *Corporations Amendment (Insolvency) Act 2007* (Cth).

10 *First Corporate Law Simplification Act 1995* (Cth); *Company Law Review Act 1998* (Cth).

11 *Corporate Law Economic Reform Program Act 1999* (Cth); *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth).

12 (1999) 198 CLR 511.

13 An earlier decision of the High Court, *Gould v Brown* (1998) 193 CLR 346, held that the cross-vesting legislation was valid, but, as the Court was evenly divided (Brennan CJ, Toohey and Kirby JJ favouring validity and Gaudron, McHugh and Gummow JJ considering the legislation invalid), the decision was not binding authority.

up co-operative regulatory schemes, not just corporate law regulation. The decision is discussed in more detail in Roberts' and Williams' chapter on constitutional law (Chapter 5).

THE CORPORATION AND THE ROLE OF THE CORPORATE LAW

Justice Kirby sees the corporation as an ingenious legal idea that has been crucial in promoting economic development:

> The idea of an independent corporation, governed by directors and accountable to shareholders, was a brilliant one. It permitted people to raise capital from the public, to invest it without, in most cases, a danger of personal risk and to engage in entrepreneurial activity which, otherwise, would probably not occur.[14]

The key element in the corporation's social and economic success is the ability to take risks: when the corporation "loses entirely the spark of adventure and risk-taking entrepreneurship, it has lost its raison d'être".[15]

The law encourages this risk-taking by protecting investors, as well as company officers and employees, from personal risk through the separate existence and personality of the corporation, distinct from its shareholders, its officers and its employees.[16]

Justice Kirby has described corporations law as:

> of large and still-growing importance for the economy and the nation. The protection of shareholders, creditors, employees and the community depends on the integrity of officers of corporations and, where such corporations fail, of their liquidators.[17]

The central problem for corporations law is how to secure the advantages of the corporate form while keeping the directors and the management accountable to the shareholders.[18] As Kirby J has said:

> [I]t is important always to remember what the fundamental purpose of the corporation is. It is to take risks with other people's money. Those who take risks will, inevitably, sometimes fail. If they fail without

14 M D Kirby, "The Company Director: Past, Present and Future" (Speech, Australian Institute of Company Directors, Hobart, 31 March 1998): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_company.htm (accessed 17 December 2008).

15 Kirby, n 7.

16 *Angas Law Services Pty Ltd (in liq) v Carabelas* (2005) 226 CLR 507 at 553-554 [73] per Kirby J.

17 *Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381 at 387 [26]. See also M D Kirby, "Rethinking Company Law and Practice" (Speech, National Corporate Law Teachers' Conference Dinner, 6 February 1995).

18 Kirby, n 14. See also Kirby, n 7.

illegality, dishonesty or neglect of fundamental duties, the law should be slow to impose personal or corporate sanctions.[19]

Corporate law has various ways of keeping management accountable for failure to act properly, including general law and statutory duties governing the behaviour of directors and, ultimately, disqualification from managing corporations. Justice Kirby has been "most stern" in his approach to the understanding of the duties imposed by the law upon corporations and their officers.[20] In addition, he sees disqualification as a quid pro quo for the trust which is essential to the enjoyment of the powers and privileges of corporate management: the statutory privilege of incorporation is inherently susceptible to variation or withdrawal upon demonstrated unfitness to enjoy that privilege.[21]

A major source of corporate law is the *Corporations Act 2001* (Cth)[22] (although fiduciary principles can also play an important role[23]). Justice Kirby has described the corporations legislation as "a statute with few equals for 'complexity, disorganisation and sheer weight'".[24] His starting point for interpreting it is a close analysis of the legislative text, rather than the comments of judges in earlier cases,[25] a view shared with other judges of the High Court.[26]

However, the interpretation of the text should be done in a purposive manner, taking into account its language, structure and context, the legislative history of the relevant provision and any relevant documents that throw light on ambiguities, and avoiding a construction that would result in the legislation failing to achieve its obvious objectives.[27]

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19 Kirby, n 7.

20 Kirby, n 7.

21 *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at 171 [104]. This case is discussed below: see "Rights of persons in civil penalty proceedings: Rich v ASIC".

22 All references in this chapter to statutory provisions are to that Act, unless otherwise stated.

23 See the discussion below: "Other persons: Pilmer".

24 *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1999) 195 CLR 636 at 653 [37].

25 See, for instance, *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160 at 207 [108]; *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at 201-202 [152]-[155]; *Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd* (2008) 232 CLR 314 at 330 [38].

26 See, for instance, *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at 137 [7] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ; *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160 at 174 [1] per Gleeson CJ, at 185 [34] per Gummow J, at 214 [136] per Hayne J; *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at 182 [78] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ.

27 *Emanuele v Australian Securities Commission* (1996) 188 CLR 114 at 146-147; *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at 167 [90]; *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160 at 207 [108]. See also M D Kirby, "Reformation" (2nd Hamlyn Lecture, 55th Series, University of Exeter, England, 21 November 2003): http://www.smh.com.au/cgi-bin/common/popupPrintArticle.pl?path=/articles/2003/11/20/1069027246995.html (accessed 16 December 2008).

Justice Kirby has sought to promote the policy of the legislation, unless the legislative language makes it impossible. As he said in one case:

> If in the end, a strained construction strikes the judicial eye as unacceptable, no amount of commonsense or apparent legislative policy will authorise the judge to adopt that construction.[28]

The difficulties of statutory interpretation are recognised by Kirby J in the following extract:

> In many cases which depend upon the meaning of legislation found to be ambiguous, strong arguments can be assembled for the competing points of view. … We deceive ourselves in such cases if we pretend that there is only one available interpretation. The judicial task is to seek out and to declare the preferable construction of the legislation. Only then does it become the one interpretation which the law holds to be correct.[29]

In most instances, Kirby J has resolved areas of doubt by considering the regulatory purpose of the *Corporations Act*. For instance, his dissenting judgment in *Rich v Australian Securities and Investments Commission* adopted an interpretation that favoured facilitating enforcement of the legislation over the interpretation adopted by the majority judges, which preserved a common law privilege permitting a defendant to refuse to disclose certain documents.[30]

The cases where he adopted a more restrictive interpretation of the statute involve substantial rights touching the personal liberty of individuals. For instance, in *Yuill v Corporate Affairs Commission of New South Wales*, Kirby J was prepared to interpret the corporations legislation as not excluding legal professional privilege.[31] Also, in *Macleod v Australian Securities and Investments Commission*,[32] reaching the same conclusion as the other judges, he was not prepared to interpret the *Australian Securities and Investments Commission Act 2001* (Cth) liberally to allow ASIC to conduct an appeal against acquittal. He considered that express legislative language was required to permit something that so closely affected the liberty of the individual.

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28 *North Sydney Brick & Tile Co Ltd v Darvall* (1986) 5 NSWLR 681 at 683.

29 *Emanuele v Australian Securities Commission* (1996) 188 CLR 114 at 140. See also *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160 at 209 [116]; and Kirby J's comments on the growing realisation and acknowledgment that judges have choices in the Second Hamlyn Lecture 2003, n 27.

30 (2004) 220 CLR 129 at 171 [104].

31 (1990) 20 NSWLR 386. The implication of legal professional privilege in legislation has had a chequered history. The Court of Appeal decision in *Yuill* was overturned by the High Court in *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319. However, the High Court decision in *Yuill* was not followed in *Daniels Corporation v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

32 (2002) 211 CLR 287.

Justice Kirby's judgments have also recognised the desirability of procedural flexibility. He has noted a general disfavour towards procedural rigidities and a preference for a more flexible approach to statutory preconditions where these are of a procedural character.[33] He has observed:

> In the morass of modern legislation, it is easy enough, even for skilled and diligent legal practitioners (still more lay persons who must conform to the law) to slip in complying with statutory requirements. … An undue rigidity in insisting upon strict compliance with all of the procedural requirements of the [corporations legislation] could become a mask for injustice and a shield for wrong-doing. Against that risk, courts generally retain the facility to cure slips and to repair oversights in proceedings before them, in appropriate cases where justice requires it.[34]

For the moment, the approach of the High Court majority in *Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd*,[35] discussed below (see "Time limits in a winding up: Aussie Vic"), may suggest that this more liberal approach to procedural requirements is in retreat.

Justice Kirby has frequently taken the view that the corporations legislation is a highly technical area of the law whose application is best left, where possible, to judges who have considerable experience in this area: the High Court should generally only take on a case to resolve disputes between differing approaches to the corporations legislation, reflected in the decisions of different appellate courts.[36] It is interesting to note that Kirby J was in accord with the majority of judges in the lower courts in many of the cases where he dissented from the other judges of the High Court.[37]

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33 *Emanuele v Australian Securities Commission* (1996) 188 CLR 114 at 147. See also *Bay Marine Pty Ltd v Clayton Country Properties Pty Ltd* (1986) 8 NSWLR 104 where Kirby P was the sole judge on the Court of Appeal prepared to hold that there were exceptional circumstances entitling a person not qualified as a legal practitioner to appear on behalf of a company.

34 (1996) 188 CLR 114 at 153.

35 (2008) 232 CLR 314.

36 *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1999) 195 CLR 636 at 653-654 [37]-[38]. See also *Emanuele v Australian Securities Commission* (1996) 188 CLR 114 at 153; and M D Kirby, "Australian Corporations Law in Context" (Speech, Centre for Corporate Law and Securities Regulation, Seminar on the Courts and Corporate Law, Melbourne, 31 October 1996): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_corplawm.htm (accessed 17 December 2008).

37 *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165 (agreed with Court of Appeal); *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 (agreed with Court of Appeal majority); *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 (agreed with primary judge and Court of Appeal majority); *Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd* (2008) 232 CLR 314 (agreed with the minority judges on the Court of Appeal; also, two of the majority judges would have agreed with the minority judges as a matter of policy, but considered themselves bound by earlier authority); *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd* (2000) 202 CLR 588 (agreed with primary judge and Court of Appeal).

THE ROLE OF THE CORPORATE REGULATOR

Justice Kirby has frequently emphasised the desirability of the regulator intervening to assist the court in important matters of general principle for corporate law (though not in determining the merits of the particular case[38]), particularly where the construction of the corporations legislation has been involved.[39] This has particularly been the case where the legislation specifically provides for such intervention, as does the *Corporations Act*:[40] such provisions are "clearly designed to facilitate the participation of the Commission in cases involving important questions of company law, particularly those affecting the interpretation" of the corporations legislation.[41]

The intervention of the regulator was regarded as important by Kirby J, given the need for national uniformity in the interpretation of the corporations legislation and the fact that appeals to the High Court lie only by special leave.[42]

CORPORATE LAW REFORM

In view of the fact that Kirby J is Australia's inaugural national law reformer, his observations on matters affecting the future of corporate law in Australia are of considerable interest.

One factor that law reformers should keep in mind is the role of the corporation as a means of promoting economic development by facilitating calculated risk-taking:

> The needs of the economy change and are reflected in the law. But no participant in the delicate work of corporate law should forget the essential character of the trading corporation as a risk-taker and the inevitable consequence that some risks, honestly, diligently and carefully assumed, will sometimes not come off. To forbid this by law might save a few investors from unexpected losses. But it would be to destroy the brilliant idea of the corporation which remains one of the few truly creative contributions of the law to the economic well-being of the world and the economic liberty of its people.[43]

It is also necessary to measure how well the law promotes the economic function of the corporation:

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38 *Darvall v North Sydney Brick and Tile Co Ltd* (1989) 16 NSWLR 260 at 264.

39 *North Sydney Brick & Tile Co Ltd v Darvall* (1986) 5 NSWLR 681 at 684-685; *Advance Bank Australia Ltd v FAI Insurances Ltd* (1987) 9 NSWLR 464 at 470; *Hurst v Vestcorp Ltd* (1988) 12 NSWLR 394 at 402; *Catto v Ampol Ltd* (1989) 16 NSWLR 342 at 347; *Darvall v North Sydney Brick and Tile Co Ltd* (1989) 16 NSWLR 260 at 264; see also Kirby, n 7.

40 *Corporations Act 2001* (Cth) s 1330.

41 *Catto v Ampol Ltd* (1989) 16 NSWLR 342 at 347-348.

42 (1989) 16 NSWLR 342 at 348; see also Kirby, n 17.

43 Kirby, n 17.

> The law, which should be the servant of society and a sustaining force for its institutions, should examine its own performance when its application deflects attention from "the main game of wealth creation which is, in turn, the driver of new investment and job creation".[44]

In Kirby J's view, the balance in corporate law reform is to ensure that Australia's corporations continue to promote economic growth, job creation, product quality and economic wealth, as well as ethical behaviour, without an excess of well-intentioned legislative and administrative red tape that might encourage companies to take the minimum of risks.[45]

In order to understand how the law actually operates by drawing on the experience of corporate officers, Kirby J has strongly supported the need for empirical research in corporate law reform.[46] The benefit of this approach is exemplified by the Corporations and Markets Advisory Committee (CAMAC), which is dedicated specifically to reform of the law relating to corporations and financial markets. The members of CAMAC have broad experience of business and corporate law. CAMAC publishes discussion papers and seeks submissions from interested persons and groups, including members of the business community, before making its recommendations to the Australian Government and publishing them in final reports.

As Kirby J has said, the "last word will never be written upon where the delicate balance is to be set",[47] which is perhaps good news for those of us who derive some personal fulfilment from participating in the development of corporate law policy.

DUTIES OF DIRECTORS AND OTHER PERSONS INVOLVED IN CORPORATE AFFAIRS

Duties of directors

For Justice Kirby, the facilitation of the corporation as a device for promoting responsible risk-taking is counterbalanced by ensuring that directors are held to appropriate standards of conduct in managing the affairs of corporations.

Justice Kirby's preparedness to apply high standards to directors occasionally found him in dissent. For instance, as President of the New South Wales Court of Appeal, he was alone in holding a director liable for allowing a corporation to trade while insolvent where the

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44 Kirby, n 7, quoting from F Hilmer, *Strictly Boardroom, Improving Governance to Enhance Company Performance* (Business Library, Melbourne, 1993).

45 Kirby, n 17.

46 Kirby, n 7; M D Kirby, "Securities Regulation – Business Rules, Or the Rules of Law?" (Speech, Securities Regulation and Insider Trading Seminar, University of Auckland Law School Research Centre for Business Law, 26 July 1996); Kirby, n 36.

47 Kirby, n 14.

director had simply acquiesced in another director's management of the corporation's affairs.[48] In extrajudicial comment, Justice Kirby decried the presence of "sleeping" or "passive" directors in Australian boardrooms as posing a danger to the long-term stability of Australian corporations.[49] In this respect, the law has caught up with his approach. The insolvent trading provisions that are now applicable,[50] and which were introduced following recommendations in the 1988 report of the ALRC's General Insolvency Inquiry,[51] hold directors to a much higher standard of diligence and involvement in the company's affairs.

As President, Kirby was also alone in favouring a requirement for a director who was negotiating a contract directly with the company to make a formal declaration of interest, even though the nature of the interest was apparent on the face of the record.[52]

Since his appointment to the High Court, on directors' duties at least, Kirby J has found himself in agreement with the other judges – for instance, in *Angas Law Services Pty Ltd (in liq) v Carabelas* (*Angas*)[53] and *Doyle v Australian Securities and Investments Commission*[54] (in the latter case, he participated in a unanimous judgment of the court).

Angas concerned the prohibition on officers or employees of a corporation from making improper use of their position to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the corporation.[55] In his judgment, Kirby J confirmed the importance of the company as an entity separate from its shareholders, its officers and its employees.

Other persons: Pilmer

In *Pilmer v Duke Group Ltd (in liq)*,[56] Kirby J, in dissent, was prepared to find that accountants, who were engaged by a company to prepare an independent report required by the stock exchange listing rules, owed a fiduciary duty to the company.

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48 *Metal Manufacturers Pty Ltd v Lewis* (1988) 13 NSWLR 315. See also *Darvall v North Sydney Brick and Tile Co Ltd* (1989) 16 NSWLR 260.

49 Kirby, n 14.

50 *Corporations Act 2001* (Cth) Pt 5.7B Divs 3 and 4 ss 588G-588U.

51 ALRC, n 8 at [277]-[325].

52 *Woolworths Ltd v Kelly* (1991) 22 NSWLR 189.

53 (2005) 226 CLR 507.

54 (2005) 227 CLR 18.

55 Then Companies (South Australia) Code, s 229(4), now *Corporations Act 2001* (Cth) ss 182, 184(2).

56 (2001) 207 CLR 165. This discussion focuses on fiduciary duties. The case also considered various questions concerning the appropriate measure of damages (see the judgment of Kirby J at 224-232 [148]-[176]), which raise broader questions of equity relevant to areas going beyond corporate law.

The facts

The directors of Kia Ora (the bidder), a listed company, proposed that it make a takeover bid for Western United (the target). The consideration offered to shareholders in the target for selling their shares was either shares in the bidder or a combination of shares in the bidder and cash.

As most of the bidder's directors were also directors of and shareholders in the target, and the securities to be acquired (or the value of the consideration to be paid) exceeded 5 per cent of shareholders' funds of the bidder, the relevant stock exchange listing rule at the time[57] required prior approval of the takeover at a meeting of the bidder's shareholders convened for that purpose, with shareholders associated with the target disqualified from voting. The notice of meeting had to be accompanied by a report from an independent qualified person to establish that the purchase price was fair.

Some members of the accounting firm retained by the bidder to prepare the independent report had previously had business dealings with the bidder, directors of the bidder and the target. The opinion in the report was that the consideration being offered was fair and reasonable. If the report had been prepared competently, that opinion would not have been expressed and the takeover would not have proceeded.

After the takeover offers were made, share prices, including those of the bidder and the target, fell considerably, but the takeover proceeded. The bidder was later wound up. Its liquidators sued the members of the accounting firm, alleging breach of fiduciary duty, as well as breaches of contractual and common law duties of care.

The majority view

The High Court majority (McHugh, Gummow, Hayne and Callinan JJ) held that the accounting firm owed no relevant fiduciary duty to the bidder.

The majority judges considered that no prior or concurrent engagement or undertaking by the accounting firm or any of its members presented an actual conflict, or a real or substantial possibility of conflict, in the acceptance and performance of the retainer for the provision of the report. The mere fact of past dealings or the hope of future dealings did not suffice.

The judgment of Justice Kirby

Justice Kirby agreed with the majority that the relationship between the bidder and the accounting firm did not of itself give rise to a fiduciary relationship. However, like the Full Court of the South Australian Supreme Court, he considered that a fiduciary obligation existed on the

57 Australian Stock Exchange, Main Board Official Listing Rules, r 3J(3).

facts of the particular case. The company relied on the members of the accounting firm for an independent, impartial and competent report.[58] However, various members of the firm had, over a number of years, had extensive, lengthy and close business and personal associations with the bidder, the target and one of the directors of the bidder.[59]

In Kirby J's view, unless legislation requires a different approach, equity and equitable remedies should respond to changing times, different social and economic relationships and altered community expectations (though judges should only find that fiduciary obligations arise in new circumstances by analogy with settled principles).[60] He noted with approval the observation of Professor Finn, who suggested that:

> the unifying principle of fiduciary obligations arises from the existence of a duty of loyalty which, reflecting "higher community standards or values", gives rise to a "legitimate expectation that the other party will act in the interests of the first party or at least in the joint interests of the parties and not solely self-interestedly".[61]

In deciding that the members of the accounting firm owed the bidder a fiduciary obligation, Kirby J took into account the rules of professional ethics applicable at the relevant time to chartered accountants in Australia, which, though not binding, he regarded as a reliable and important indicator of accepted opinion, requiring "integrity, objectivity, independence, confidentiality and professional competence".[62] In addition, the relevant listing rule imposed fiduciary obligations on those who accept the reporting duty,[63] which involved providing not merely factual information of an objective kind but, in effect, professional advice and a recommendation, prerequisite to the takeover proceeding.[64]

Justice Kirby also adverted to the wider implications of his view. Even though the fiduciary obligation was owed to the bidder (as distinct from its directors), the breach of that obligation also affected uncommitted shareholders (who were not, for the most part, in a position themselves to make an informed assessment of the takeover proposal or of the

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58 (2001) 207 CLR 165 at 220-221 [137].

59 (2001) 207 CLR 165 at 207 [109].

60 (2001) 207 CLR 165 at 217-220 [136].

61 (2001) 207 CLR 165 at 217-220 [136]. See P Finn, "The Fiduciary Principle" in T Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1989) pp 27-28, who, in turn, quoted from A Mason, "The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: An Australian Perspective" in D Waters (ed), *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1993) p 11 (reprinted (1994) 110 *Law Quarterly Review* 238 at 246). Essentially, this was the criterion that Kirby J favoured in his Court of Appeal decision in *Breen v Williams* (1994) 35 NSWLR 522 at 544.

62 (2001) 207 CLR 165 at 221 [138]-[139].

63 (2001) 207 CLR 165 at 221-222 [140].

64 (2001) 207 CLR 165 at 206-207 [106].

fairness of the share price), potential shareholders and the general public investing in shares.[65]

A key authority in the litigation in this case was *Breen v Williams*[66] (an appeal from a decision of the New South Wales Court of Appeal in which Kirby participated as President of the court, but was in the minority: *Breen* is discussed in this book in Chapters 13 and 16). Justice Kirby considered that nothing in *Breen* excluded the recognition of fiduciary obligations in the kind of relationship and activities proved by the evidence in *Pilmer*:

> Indeed, [*Pilmer*] was a classic case in which the proprietary interests of Kia Ora and the shareholders, independent of the directors, were at stake. Although *Breen* was an invitation to enter new territory, this case is not. It is placed squarely in the middle of the kind of circumstance in which fiduciary obligations have been upheld on countless occasions: where the obligation of loyalty to the financial interests of identifiable persons who were specially vulnerable is abused by other persons entrusted with duties permitting them to make judgments, in effect, for others which called for the selfless pursuit of the interests of others, the independent performance of their duties and (if that be not possible) a refusal to be involved.[67]

Justice Kirby endorsed the conclusion of the Full Court, in respect of fiduciary obligations, that the members of the accounting firm not only lacked independence, but were in a position where their obligation to act solely in the interests of the bidder was compromised by, and in substantial conflict with, their personal and commercial loyalty to certain of the directors of the bidder. The fact that they apparently did prefer the interests of the directors to those of the bidder is borne out by their failure to mention in their report fundamental matters of which they were, or ought to have been, aware and which, if disclosed, could only have had a substantial effect on their opinion.[68]

The legacy

Given the decision of the majority in *Pilmer*, the current law does not impose fiduciary obligations on accounting firms in preparing expert reports. However, Kirby J's judgment may raise matters for future law reform – for instance, whether there is a need to modify or supplement current requirements for companies to obtain independent reports before entering into particular types of transaction, what, if any, duties should be owed by the preparers of those reports, and to whom, and what the remedies for breach of those duties should be.

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65 (2001) 207 CLR 165 at 207 [107], 221-222 [140], 222-223 [143].

66 (1995) 186 CLR 71.

67 (2001) 207 CLR 165 at 215 [131].

68 (2001) 207 CLR 165 at 216 [134], referring to the Full Court decision, *Duke Group Ltd (in liq) v Pilmer* (1999) 73 SASR 64 at 229 [770].

TAKEOVERS

In his judgment in *North Sydney Brick & Tile Co Ltd v Darvall*,[69] Kirby, as President of the New South Wales Court of Appeal, identified an anomaly in the takeover provisions of the companies' legislation.

The takeover provisions aim at protecting minority shareholders in a company by requiring persons who want to acquire control of the company to comply with certain procedural requirements, including that the bidder send shareholders a statement containing information about the bid. The procedural requirements are triggered when a person acquires control over 20 per cent of the company's shares. The control required is described using artificial technical concepts, one of which involves a person having power to exercise control over the disposal of the shares.[70] The company in the case under consideration had articles of association which conferred on its shareholders pre-emptive rights prohibiting the transfer of shares to any person who was not an existing shareholder, unless existing shareholders had been given the opportunity to purchase the shares for their fair value. The Court of Appeal held that these pre-emptive rights conferred control over disposal under the legislation. The bidder therefore already had control over the shares and did not have to comply with the legislative procedural requirements in bidding for the shares of which he was not already the registered holder.

Kirby considered that this was "a simple case of legislative oversight or of the use of words which, in their application to the particular fact situation of the case, do not secure the apparent policy of the legislative scheme".[71] The anomaly was all the worse for the fact that the bidder had considered himself bound by the takeover provisions, had purported to issue a bidder's statement under the legislation and subsequently relied on the technicality when the statement proved to be defective.

The legislative anomaly has now been rectified.[72]

INSOLVENCY

Companies that are, or are likely to become, insolvent[73] may go into various forms of external administration, either on their own initiative or at the instance of one or more creditors. These include voluntary administration, receivership, creditors' voluntary winding up and winding up by the court. "Liquidation" is another term used to refer to the winding up of a company.

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69 (1986) 5 NSWLR 681.

70 At the time, *Companies (Acquisition of Shares) (New South Wales) Code*, ss 7(3), 9(1)(b), 11(1); see now *Corporations Act 2001* (Cth) ss 606, 608.

71 (1986) 5 NSWLR 681 at 683.

72 Under *Corporations Act 2001* (Cth) s 609(8), pre-emptive rights on transfer do not confer the relevant type of control if all members have pre-emptive rights on the same terms.

73 The test of solvency is found in *Corporations Act 2001* (Cth) s 95A.

Voluntary administration

The voluntary administration provisions came into force on 23 June 1993.[74] They implemented recommendations in the report of the Australian Law Reform Commission's General Insolvency Inquiry.[75] The provisions were intended to assist in corporate recovery or, if that is not possible, in providing a better return for the company's creditors and members than would result from an immediate winding up of the company.[76]

The first step in a voluntary administration is usually for a company that is insolvent (or is likely to become insolvent at some future time), by resolution of the board of directors, to appoint an administrator[77] to take control of the company's business, property and affairs.[78] On the appointment of an administrator, there is a stay or moratorium on actions or proceedings against the company and its property.

The administrator must investigate the company's business, property, affairs and financial circumstances[79] and convene a meeting of creditors to consider the company's future.[80] The notice convening the meeting must be accompanied by a report on the company, as well as on the appropriate future course of action for the company (winding up, a deed of company arrangement (DOCA) or a return to ordinary operation).[81] If the administrator is recommending a DOCA, the administrator must also give creditors a full statement setting out the details of the proposed DOCA with the notice to creditors of the major meeting.

MYT Engineering Pty Ltd v Mulcon Pty Ltd

In *MYT Engineering Pty Ltd v Mulcon Pty Ltd*,[82] Kirby J sought to resolve an area of uncertainty about the court's remedial powers under the voluntary administration provisions.

The creditors of the company in the *MYT* case, MYT Engineering Pty Ltd (MYT), approved a DOCA. Where creditors choose this course

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74 This summary of the voluntary administration provisions contains matters necessary for a general understanding of those provisions and aspects that arose in the matters discussed in this chapter. A more comprehensive summary can be found in the CAMAC report, *Corporate Voluntary Administration* (1998) Ch 1; and CAMAC discussion paper, *Rehabilitating Large and Complex Enterprises in Financial Difficulties* (2003) at [2.1]-[2.17].

75 CAMAC has on several occasions reviewed the voluntary administration provisions: see reports, *Corporate Voluntary Administration* (1998), *Corporate Groups* (2000) and *Rehabilitating Large and Complex Enterprises in Financial Difficulties* (2004). Recommendations from those reports were adopted in the *Corporations Amendment (Insolvency) Act 2007* (Cth).

76 *Corporations Act 2001* (Cth) s 435A.

77 *Corporations Act 2001* (Cth) s 436A. A liquidator or provisional liquidator (s 436B), or a chargee over all or substantially all the property of a company where the charge is enforceable (s 436C), can also appoint an administrator.

78 *Corporations Act 2001* (Cth) s 437A.

79 *Corporations Act 2001* (Cth) s 438A.

80 *Corporations Act 2001* (Cth) s 439A.

81 *Corporations Act 2001* (Cth) s 439A(4).

82 (1999) 195 CLR 636.

of action, the administrator of the company must prepare an instrument setting out the terms of the deed and, unless the creditors choose someone else, will be the deed administrator.[83] The company must then execute the instrument within 15 business days after the end of the meeting of creditors, or such further period as the court allows on an application made within those 15 business days.[84] Where a company fails to meet this deadline, the administration ends[85] and the company is taken to have gone into voluntary winding up.[86]

Following a telephone conversation between the only two shareholders of MYT, which occurred the day after the resolution, the company seal was stamped on the DOCA and its affixing was witnessed by one of those shareholders, purportedly as both director and secretary. This form of sealing did not comply with MYT's articles and, under the corporations legislation at that time, a person dealing with the company could only assume that a document had been duly sealed by the company if the sealing appeared to be attested by two persons.[87] The deed administrator took control of MYT and administered its affairs under the DOCA.

Some months later, an unsecured creditor of the company, Mulcon Pty Ltd (Mulcon), which had agreed not to participate in the benefits that the DOCA was to provide to other unsecured creditors (being willing to accept instead any sum recovered from the insurers of MYT), learned for the first time of how the DOCA had been executed. Mulcon claimed that MYT had failed to execute the DOCA in the stipulated time and had therefore gone into winding up.

The court has the power to declare a DOCA valid where "there is doubt, on a specific ground, whether a deed of company arrangement was entered into in accordance with" the voluntary administration provisions "if the Court is satisfied that (a) the provision was substantially complied with; and (b) no injustice will result for anyone bound by the deed if the contravention is disregarded": *Corporations Act*, s 445G. The deed administrator sought orders under that provision validating the deed.

The grant of special leave to appeal to the High Court was originally limited to the uncertainty about the court's validating power in s 445G.

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83 *Corporations Act 2001* (Cth) s 444A(2), (3).

84 *Corporations Act 2001* (Cth) s 444B(2). At the time of the *MYT* case, the statutory time was 21 days.

85 *Corporations Act 2001* (Cth) s 435C(3)(f).

86 *Corporations Act 2001* (Cth) s 446A(1)(b), (2).

87 (1999) 195 CLR 636 at 640-641 [2] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, referring to the then s 164(3)(e). The provisions governing assumptions that may be made by persons dealing with companies were later amended by the *Company Law Review Act 1998* (Cth) as applied by the *Corporations (New South Wales) Act 1990* (NSW) s 7, including to reflect the possibility that a company may have only one officer: ss 128, 129.

The majority (Gleeson CJ, Gaudron, Gummow and Hayne JJ), however, decided the case on a different ground. They accepted an argument, developed only when the case came before the High Court, that a DOCA is not a "deed" in the technical legal sense and that the steps taken by the company officers on behalf of the company to execute the DOCA satisfied the corporations legislation provisions for valid execution of a document.

Justice Kirby was critical of the majority's approach on procedural and substantive grounds. He considered it inappropriate for the High Court to decide an appeal on the *Corporations Act* on a ground that had not been argued before the primary judge or the Court of Appeal. Such an approach may be appropriate in constitutional matters, with which the High Court is obliged to have closer familiarity. However, the corporations legislation is in a different class:

> It is a statute with few equals for "complexity, disorganisation and sheer weight". Those who enter upon its terrain infrequently should do so with extreme wariness.[88]

It was Kirby J's opinion that the High Court should generally restrict itself to resolving differences in approaches to the corporations legislation in lower appellate courts.[89] There had been judicial differences of opinion about the court's power to validate deeds under s 445G in the Court of Appeal in the *MYT* case,[90] as well as in the decision of the Full Court of the Federal Court of Australia in *Commissioner of Taxation v Comcorp Australia Ltd*.[91] The judgment of the High Court majority failed to resolve the resulting doubt about the interpretation of s 445G.

Justice Kirby considered that the legislation required formal execution as a deed for a DOCA to be valid, given the legislative language (including the description of a DOCA as a "deed", rather than, say, a "memorandum of company arrangement", "minute", "contract" or "compact", and the use of the term "execute" for the act of the company in approving the deed). Furthermore, there was no indication, in either the ALRC report or the Explanatory Memorandum accompanying the Bill which introduced the changes to the corporations legislation, that the instrument contemplated could be a mere agreement or contract by the company. In fact, there was specific provision for the board to authorise the instrument to be executed by or on behalf of the company,[92] which would be superfluous if only the formalities appropriate to a written contract were required for a company to be bound.

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88 (1999) 195 CLR 636 at 653 [37].

89 (1999) 195 CLR 636 at 653-654 [38].

90 *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1997) 140 FLR 247.

91 (1996) 70 FCR 356.

92 *Corporations Act 2001* (Cth) s 444B(3).

Justice Kirby was therefore able to focus on the key point of contention, the proper interpretation of the validation power in s 445G.

The majority in the Court of Appeal had concluded that this power could not be exercised unless the DOCA had at least been lawfully executed as a deed. On this interpretation, the power would only apply in very limited circumstances – for instance, where the administrator had failed to give creditors a full statement setting out the details of the proposed DOCA with the notice of the major meeting.[93]

Justice Kirby concluded that the deed validation power was available to rectify a failure properly to execute a DOCA, as had occurred in the MYT administration. In his view, Parliament, by including the power, had recognised that slips are likely to occur in the execution of DOCAs. As a matter of policy, there was no merit in permitting a creditor, who discovered the defect belatedly, to secure an individual advantage. To do so could cause serious inconvenience and substantial injustice and loss to the company, as well as to its creditors, its employees and the public.

The other important point arising from Kirby J's judgment in this case arose from the fact that, on his view of the law, the company would have been deemed to have passed a winding up resolution on its failure to execute the DOCA. He would have used the general power in the voluntary administration provisions which allowed the court to modify the operation of those provisions in a particular case: *Corporations Act*, s 447A. This power was included on the recommendation of the ALRC, to enable the court to make orders for the effective operation of the procedure.[94] Justice Kirby would have made an order under this power in order to avoid a technical operation of the law that would have thwarted the DOCA.

The judgment of Kirby J provides authority for the proposition that the court validation power in s 445G can be used where a DOCA has not been properly executed (though the very relaxed criteria for the execution of a DOCA under the majority decision, which now represents the law on this matter, considerably reduce the likelihood of invalid execution).

Patrick Stevedores

Another contribution made by Kirby J to the law of voluntary administration came in his joint majority judgment with other members of the High Court (Brennan CJ, McHugh, Gummow and Hayne JJ) in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (the *Patrick Stevedores* case),[95] which involved questions of industrial law as well as company law.

93 As required by s 439A(4)(c).

94 ALRC, n 8 at [62].

95 (1998) 195 CLR 1.

Administrators have discretionary powers to carry on a company's business and manage its property and affairs.[96] The personal liability of the administrator for debts incurred during the period of trading protects the company's creditors.[97]

The key issue in the *Patrick Stevedores* case was the relationship between an administrator's discretionary powers and the court's general modification power under s 447A of the *Corporations Act*. The High Court majority held that s 447A did not support an order taking away the discretionary powers of the administrators. This would be an impermissible fetter on the power of the administrators to decide whether or not to carry on the company's business and the form in which it should be carried on during the administration. Justice Gaudron did not agree, on the facts of the case, that the orders that had been made by the lower court fettered the administrators' discretion.

Time limits in a winding up: Aussie Vic

Background

The winding up process has been succinctly summarised as follows:

> Winding up is the process of stopping the business of a company, realising its assets, discharging its liabilities, settling any questions of account or contribution between its members, dividing the surplus assets, if any, among the members, and terminating the existence of the company by dissolution.[98]

The court can order that an insolvent company be wound up in insolvency.[99] Creditors can apply for a court order to wind up a company that has failed to pay its debts to them.[100] The application can be based on the failure of the company to comply with a statutory demand for payment of a debt or debts which the company owes the creditor.[101] Certain time limits are relevant to this winding up procedure.

The first time limit affects the company. The company must comply with the demand within a set period after it is served.[102] That period is 21 days if the company does not ask the court to extend the period. If the company asks for an extension[103] and the court agrees, the period is that specified by the court.[104] If the court does not agree to the extension, the

96 *Corporations Act 2001* (Cth) s 437A.
97 *Corporations Act 2001* (Cth) s 443A.
98 ALRC, n 8 at [128].
99 *Corporations Act 2001* (Cth) s 459A.
100 *Corporations Act 2001* (Cth) s 459P(1)(b).
101 *Corporations Act 2001* (Cth) s 459Q.
102 *Corporations Act 2001* (Cth) s 459F.
103 *Corporations Act 2001* (Cth) s 459G.
104 *Corporations Act 2001* (Cth) s 459F(2)(a)(i).

period ends seven days after the court finally disposes of the extension application.[105]

The second time limit affects the creditor making the winding up application. For the court to be able to presume that the company is insolvent, the creditor must make its application within three months after the company's failure to comply with the demand.[106]

Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd[107] dealt with the first time limit, the company's time for compliance. In particular, the question was whether the court can extend the period for compliance where the company's application is made after that period has already expired. In making their decision, the judges had to take into account some general interpretation provisions of the *Corporations Act*, in addition to the relevant winding up provisions. Those interpretation provisions permit an application to extend a period for doing an act even if the period has ended, but only if the particular provisions for extending a period do not display a contrary intention.[108]

The majority (Gleeson CJ, Hayne, Crennan and Kiefel JJ) held that the court could not extend the period for compliance where the company's application is made after the expiry of that period. Justice Kirby registered a strong dissent. These different approaches reflected competing policy considerations.

The majority

In the view of the majority judges, the predominant legislative policy was to encourage speedy resolution of applications to wind up companies in insolvency.[109] They supported their argument by various technical arguments based on a close reading of the legislative text.[110]

The majority judges did not consider that their view would cause a problem, as the result is merely to create a presumption of insolvency, not to determine any right or liability of the company or the creditor who has made the statutory demand.[111]

The judgment of Justice Kirby

Justice Kirby argued strongly that the natural and textual meaning of the specific winding up provision allowing extension of the period for compliance provided the court with the power to grant the extension

105 *Corporations Act 2001* (Cth) s 459F(2)(a)(ii).

106 *Corporations Act 2001* (Cth) s 459C(2)(a).

107 (2008) 232 CLR 314.

108 See *Corporations Act 2001* (Cth) ss 6(1), 9 (definition of "extend"), 70. The provisions apply to initial and subsequent applications for extension.

109 (2008) 232 CLR 314 at 323 [14], 324 [17].

110 (2008) 232 CLR 314 at 324-327 [18]-[25].

111 (2008) 232 CLR 314 at 327 [26].

even though the initial period for compliance had expired.[112] He pointed out that the High Court has often reminded Australian courts of their duty to apply the law, when expressed in legislation, by starting with a close analysis of the legislative text.[113] In his view, this analysis showed that the circumstances of a particular case may require successive orders over time, whereas the majority view effectively requires the insertion of words not found in the statute, prohibiting an application for extension of a period for compliance after the expiry of that period.[114] Furthermore, the legislation elsewhere uses a specific form of words to convey the restrictive meaning favoured by the majority.[115] Justice Kirby's conclusion was strengthened by the general power for the court to extend time: it is reasonable to expect that any "contrary intention" necessary to exclude that power would be expressed with a considerable degree of precision, not be left to judicial inference.[116]

In Kirby J's view, policy considerations also supported his approach. The court can be trusted to use the extension power in a wise, prudent and just way according to the circumstances of the particular case[117] (for instance, to remedy the default of an individual officer, employee or lawyer[118] or an innocent error[119]). The courts can also meet the need for expedition by deciding extension applications promptly (if necessary, reserving reasons to be delivered at a later date).[120] The general trend in the High Court in recent years has been to uphold the broad legislative grant of power to a court so that the court can "soften the edges of overly rigid applications of procedural and other rules, and where otherwise an unyielding application of the law might defeat the attainment of justice in the particular case".[121]

The legacy

Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd has now settled the law on this matter. It remains to be seen whether Parliament will amend the law to ensure the flexibility that Kirby J considered the court should have. There is no doubt that speed is a goal of the insolvency provisions, as stated by the majority judges. Creditors may appreciate

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112 (2008) 232 CLR 314 at 330 [37], 334 [47].

113 (2008) 232 CLR 314 at 330 [38].

114 (2008) 232 CLR 314 at 330 [39].

115 (2008) 232 CLR 314 at 332-334 [46], referring to *Corporations Act 2001* (Cth) s 459R(2)(b) (time for determining an application to wind up a company), which was inserted in the Act at the same time as the extension provision under consideration in *Aussie Vic* (ie s 459F(2)(a)(i)).

116 (2008) 232 CLR 314 at 330-331 [40].

117 (2008) 232 CLR 314 at 331 [41]-[42].

118 (2008) 232 CLR 314 at 332-334 [46].

119 (2008) 232 CLR 314 at 334 [48].

120 (2008) 232 CLR 314 at 332-334 [46].

121 (2008) 232 CLR 314 at 331-332 [43].

the greater certainty that the majority judgment provides. However, the insolvency provisions have also placed an emphasis on enabling the courts to make orders ensuring that the insolvency procedures operate flexibly and in accordance with their underlying purpose.[122]

Company charges in a winding up: Associated Alloys

When a company goes into liquidation, creditors who have a valid security over property of the company are paid out of the proceeds of sale of that property in priority to unsecured creditors and any other creditors who have a lower ranking security over the property.

Where the security is a charge,[123] Ch 2K of the *Corporations Act* requires the chargee (with certain limited exceptions) to register the charge so that current and prospective unsecured creditors can be aware of any debts that the company has agreed will be paid first out of specified assets, and prospective secured creditors can be aware of whether assets over which they intend to take security are already encumbered. The Australian Securities and Investments Commission registers charges in the Australian Register of Company Charges.[124]

A charge that requires registration, but which has not been registered within a stipulated time,[125] while not invalid, is void against an external administrator (a liquidator, an administrator or a deed administrator).[126] Thus, the chargor, who would have otherwise had priority for repayment of the debt secured by the charge, will only be an unsecured creditor of the company.

Over the years, a question has arisen in common law jurisdictions whether "retention (or reservation) of title" clauses, otherwise known as "Romalpa clauses" (after the decision in *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd*[127]), constituted a registrable charge.

Parties to a contract for the sale of goods are permitted to specify in the contract the time at which the property in the goods is to be transferred.[128] Romalpa clauses provide that title to goods does not pass from the seller to the purchaser until they have been paid for. If this is done successfully, the goods do not become company property at all until that time and there is therefore no question of there being a charge over company property. Thus, if the company goes into external

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122 See, in the context of voluntary administration, *Corporations Act 2001* (Cth) s 447A.

123 "Charge" is defined to mean "a charge created in any way and includes a mortgage and an agreement to give or execute a charge or mortgage, whether on demand or otherwise": see *Corporations Act 2001* (Cth) s 9 (definition of "charge").

124 *Corporations Act 2001* (Cth) s 265(1).

125 That is, 45 days after its creation or at least six months before a day specified in the legislation and determined by reference to the commencement of the relevant form of external administration.

126 *Corporations Act 2001* (Cth) ss 262(11), 263, 266(1), (2), 266(8), Pt 5.6 Div 1A.

127 [1976] 1 WLR 676.

128 See, for instance, *Sale of Goods Act 1923* (NSW) s 22.

administration, the seller can simply repossess the goods and sell them to cover the debt that the company owes the seller.

Companies need to deal with goods as part of their stock in trade and Romalpa clauses have increasingly been drafted to permit companies to use the goods in a manufacturing process and otherwise deal with them. Where this is done, the seller typically seeks to retain a right to the proceeds of sale until payment for the goods has been received. However, the rights that sellers have sought to retain in some Romalpa clauses have raised the issue whether the seller has not, in fact, retained title, but merely a right to repossess and sell the goods. In effect, this constitutes a charge over company property, which must be registered.

This issue came before the High Court in *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd* (the *Associated Alloys* case).[129] This case centred on whether a seller, who has parted with possession of goods to the buyer, can, by means of a Romalpa clause, and without registration of its interest, defeat the priorities in corporate insolvency and afford itself an effective preference over unsecured creditors of the insolvent company.

The facts

Associated Alloys Pty Ltd (the seller) sold steel to Metropolitan Engineering and Fabrications Pty Ltd (the buyer), with invoices containing a Romalpa clause, which provided, in essence, that:

- the title to the steel would not pass to the buyer until payment in full of the purchase price;
- the buyer could resell the steel at arm's length and on market terms as the seller's agent, or use it in manufacturing;
- in the meantime, however, the steel was to be kept separate from the buyer's own property and properly stored, protected and insured;
- the buyer had to keep all proceeds of any sale of the steel in trust for the seller in a separate account until the seller was paid;
- the seller had the discretion to decide to what goods and accounts any payments should be attributed; and
- if the buyer used the steel in manufacturing or construction, the buyer had to set aside out of the proceeds any amount still owed to the seller, in trust for the seller ("the proceeds subclause").

The buyer did not pay the seller the full amount owing under the invoices, but used the steel in the fabrication of pressure vessels, heat exchangers and columns.

The buyer went into voluntary administration. A bank, which held a fixed and floating charge over the buyer's assets, appointed a receiver and manager later the same month (a creditor with a charge over all, or

129 (2000) 202 CLR 588.

substantially all, the property of a company can do this, notwithstanding the moratorium that comes into effect on commencement of a voluntary administration[130]). Subsequently, the buyer went into liquidation.

The liquidator argued that the proceeds subclause constituted a "charge" that was void as against him for want of registration, with the seller ranking equally with other unsecured creditors in the winding up. The primary judge (Bryson J) and the Court of Appeal of New South Wales (Sheller JA, with whom Beazley and Stein JJA concurred) agreed.

The majority in the High Court

The High Court majority (Gaudron, McHugh, Gummow and Hayne JJ) considered that the proceeds subclause was not a charge requiring registration under the *Corporations Act*, but rather an agreement to constitute a trust of future-acquired property. The law does not require the registration of trusts or agreements to create trusts. Thus the proceeds subclause was not void as against the administrators or liquidator of the buyer for want of registration.

The majority judges recognised that, for third parties, such as financial institutions seeking to assess the creditworthiness of the buyer, the non-registration of the proceeds subclause on a public register may create practical difficulties, but they considered that these difficulties are capable of legislative remedy.[131] At the same time, they saw the current law as providing commercial incentives for buyers and sellers to incorporate Romalpa clauses – for instance, the seller's risk that the buyer will not pay is reduced and the buyer may therefore be able to negotiate a lower price for the goods.[132]

On the particular facts of the *Associated Alloys* case, however, the majority held that the seller failed in its claim for payment under the proceeds subclause for technical evidentiary reasons, as it was not possible to identify whether any payments to the buyer were related to the steel supplied by the seller.[133] Like Kirby J, therefore, they dismissed the appeal. Nevertheless, the majority judgment established the principle that a Romalpa clause that creates a trust need not be registered for a seller to retain priority in an insolvency.

The judgment of Justice Kirby

Justice Kirby considered that the proceeds subclause constituted a registrable (though unregistered) charge on a book debt within the meaning of the corporations legislation. He saw the charges provisions

130 *Corporations Act 2001* (Cth) s 441A.
131 (2000) 202 CLR 588 at 611 [49].
132 (2000) 202 CLR 588 at 611 [50].
133 (2000) 202 CLR 588 at 612-613 [53]-[54].

as essential to the protection of the corporation itself, safeguarding those who deal with it (including creditors) and the public interest.

The obvious object of those provisions is to ensure that corporations, creditors and the public generally are aware (or capable of becoming aware) of "charges" over the property of the company that may have influenced their financial dealings with that company.[134]

Justice Kirby held that a court interpreting a Romalpa clause expressed to cover debts, goods manufactured from the goods supplied, or the proceeds of on-sales should look beyond legal technique and form to the substance and reality.[135] In the *Associated Alloys* case, the amount said to be held in trust for the benefit of the seller was not held in a separate account, but was simply the balance due on a taking of accounts between the buyer and the seller for the steel supplied. Justice Kirby concluded that the proceeds subclause created a security interest over the undifferentiated book debts of the buyer, to secure the payment of the money owing by the buyer to the seller. That security interest, if unregistered, was unenforceable against the administrator or liquidator of that company.

Once again, as in the *Aussie Vic* case, Kirby J saw his view of the law as being supported by significant policy considerations. A seller who has parted with possession of goods to the buyer should not be able to defeat the priorities in corporate insolvency and afford an effective preference to itself over unsecured creditors of the insolvent company by means of an unregistered security interest. Also, to other creditors who may be unaware of the private contractual dealings between the buyer and the seller, the property in the steel would have appeared to pass with the sale of the steel and the buyer's subsequent physical acquisition of the steel.[136]

Justice Kirby's approach to the law is consistent with that taken in overseas jurisdictions. United Kingdom courts have been reluctant to give effect to Romalpa clauses, particularly where goods have lost their original identity by being used in a manufacturing process, or have been sold to third parties who had no notice of the Romalpa clause, or where the proceeds of sale of the goods were mixed in the financial records of the buyer. The law in the United States (under the Uniform Commercial Code) and Canada requires registration of retention of title interests to secure priority over other interests in goods in an insolvency.

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134 (2000) 202 CLR 588 at 623 [84].

135 (2000) 202 CLR 588 at 625 [91]. Kirby J cited Mummery J in *Compaq Computer Ltd v Abercorn Group Ltd* [1991] BCC 484 at 493: "What on the face of it may appear to be an out-and-out disposition of a legal or equitable interest in property by way of assignment or conveyance or an out-and-out disposition of a beneficial interest in property by way of trust, may in fact be by way of security only, with a right of redemption and, therefore, in the nature of a charge."

136 (2000) 202 CLR 588 at 619 [74].

The legacy

There has been a long history of attempts at reform of the law of personal property securities, which would cover Romalpa clauses, dating back to the early 1970s.[137] The Australian Law Reform Commission favoured a new system of registration of such interests.[138]

In May 2008, the Federal Government released a Consultation Draft of the *Personal Property Securities Bill 2008.* That Bill is intended to cover securities "created when a financier takes an interest in personal property as security for a loan or other obligation, or enters into a transaction that in substance involves the provision of secured finance".[139] It provides for the registration of all "security interests", defined to include "a conditional sale agreement (including an agreement to sell subject to retention of title)"[140] and "a trust receipt".[141] These provisions would generally be in line with the approach of Kirby J. The final form of the legislation is still to be settled.

Respective rights of creditors and shareholders: Sons of Gwalia

Background

The issue raised by *Sons of Gwalia Ltd v Margaretic*[142] was a largely unanticipated conflict between investor protection law and insolvency law.

Various investor protection provisions give shareholders the right to claim damages from a company for loss to the value of their shares as a result of the company's misconduct (for instance, failure to comply with the continuous disclosure obligations[143] or making false, misleading or deceptive statements, or engaging in misleading or deceptive conduct[144]), including in a liquidation.[145] Over time, enforcement of these provisions

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137 Australian Government, Attorney-General's Department, *Personal Property Securities Bill 2008 Commentary* (May 2008) at [1.10].

138 ALRC, n 8 at [753]-[755]; *Personal Property Securities* (ALRC 64, 1993) at [5.24].

139 Australian Government, n 137 at [1.3].

140 *Personal Property Securities Bill 2008* (Cth) s 21(2)(d).

141 *Personal Property Securities Bill 2008* (Cth) s 21(2)(h).

142 (2007) 231 CLR 160.

143 *Corporations Act 2001* (Cth) ss 674, 675, 1325.

144 See, for instance, ss 670A, 670B(1) (takeovers), 728, 729(1) (fundraising), 1041E, 1041H, 1041I, 1325 (market misconduct); see also *Australian Securities and Investments Commission Act 2001* (Cth) ss 12DA, 12GF, 12GM (financial services); *Trade Practices Act 1974* (Cth) ss 52, 82 (misleading or deceptive conduct).

145 Unliquidated damages are generally provable in a liquidation as a result of a change to the law under the *Corporate Law Reform Act 1992* (Cth), implementing a recommendation in ALRC, n 8 at [786]. See *Corporations Act 2001* (Cth) s 553.

has been assisted through the recognition and development of class actions and litigation funding.[146]

The insolvency provisions of the *Corporations Act* reflect traditional principles of postponing claims by persons as members of the company behind those of conventional unsecured creditors in a corporate insolvency.

In *Sons of Gwalia*, the High Court had to decide whether a claim for damages under the investor protection provisions, which affected the value of a person's shareholding, was the type of claim that would only be paid after all other claims had been satisfied. In an insolvent liquidation, this generally means that the claim is not paid at all, as creditors usually receive less than full payment. An investor in that situation might conclude that the investor protection rights were not worth very much.

The facts

The shareholder alleged that he had bought shares in Sons of Gwalia Ltd when it was in breach of its continuous disclosure obligations or had engaged in misleading and deceptive conduct in relation to the shares. The company had gone into voluntary administration and subsequently entered into a deed of company arrangement. The deed adopted the liquidation rules for determining the order of payment of creditors. As a result, the court had to consider the meaning of a provision requiring that payment of a claim by a person "in the person's capacity as a member of the company, whether by way of dividends, profits or otherwise" be postponed until all other debts or claims had been satisfied.[147]

The decision

A majority of the court, including Kirby J, held that the damages claim was not "in the person's capacity as a member of the company" (Callinan J dissented). This meant that the claim ranked equally with debts or claims of other unsecured creditors. The resolution of the issue focused on the construction of the relevant provision in the *Corporations Act*.[148] The court rejected the alternative approach of interpreting the provision in the light of earlier case law, which, on one view, might support postponing a damages claim based on the value of a person's

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146 In relation to the law on litigation funding, see *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.

147 *Corporations Act 2001* (Cth) s 563A.

148 (2007) 231 CLR 160 at 179-180 [16] per Gleeson CJ, at 185-186 [34]-[35] per Gummow J, at 205 [102], 207 [108], 208-210 [114]-[117] per Kirby J, at 214 [136], 217 [148], 230-231 [192] per Hayne J. Crennan J agreed with the reasons of Gleeson CJ and Hayne J (at 255 [265]).

shareholding.[149] In fact, Kirby J described an earlier High Court case,[150] which had interpreted an equivalent provision in this way, as "proof once again (if further proof is needed) of the dangers of attributing undue weight to what was said in England in the nineteenth century when attempting to construe contemporary Australian legislation".[151]

Justice Kirby's view was based on analysis of the legislative text. He observed that Parliament did not postpone a debt merely because the person is a member of the company. Rather, the debt is postponed only if it is owed "to a person in the person's capacity as a member".[152] The legislation further explains the restriction on the type of debt that is postponed by describing it as being "by way of dividends, profits or otherwise". Justice Kirby noted that the words "or otherwise" might be thought to cover a debt owed by a company pursuant to a claim for unliquidated damages for misleading and deceptive conduct under the specified federal legislation. However, "the specification of 'dividends' and 'profits' suggests that what is involved in the postponement are sums constituting the ordinary revenue (and possibly the capital) of the company and not claims of an extraordinary and exceptional kind for false and misleading conduct".[153]

Justice Kirby also canvassed the competing public policy considerations. On the one hand, he considered it odd to conclude that the shareholder was not claiming as a member. The claim was made against the company of which the shareholder was still a member, concerned the value of the very shares by which his membership of that company was procured, and was based on legislation designed to protect potential shareholders contemplating the acquisition of shares in, and membership of, the company. These facts made it arguable that the debt was owed to the shareholder in his capacity as a member of the company.[154] Justice Kirby also considered it difficult not to feel greater sympathy for general creditors and their claims to priority in the recovery of their debts, rather than for investing shareholders, the latter of whom become members of a company that fails and who then seek to recoup their resulting losses from the assets of the company itself.[155] Investment involves risks taken with a view to profit, albeit risks increasingly informed by mandatory disclosures: the cost of speculation would ordinarily be expected to fall

149 *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas 317.

150 *Webb Distributors (Aust) Pty Ltd v Victoria* (1993) 179 CLR 15.

151 (2007) 231 CLR 160 at 205 [104].

152 (2007) 231 CLR 160 at 210-211 [121]. Gleeson CJ identified recovery of paid-up capital and avoiding a liability to make a contribution to the company's capital as claims in the capacity of a member that would be postponed: (2007) 231 CLR 160 at 185 [31].

153 (2007) 231 CLR 160 at 211 [124].

154 (2007) 231 CLR 160 at 205-206 [103]-[107]. The dissenting judge, Callinan J, took a similar view of the conclusion that the shareholder claim was not in the shareholder's capacity as a member: (2007) 231 CLR 160 at 246 [241].

155 (2007) 231 CLR 160 at 208 [112]. See also the dissenting judge, Callinan J, at 246 [241].

on the shareholders themselves, not shared with general creditors who would thereby end up underwriting the investors' speculative risks.[156]

On the other hand, the investor protection provisions were not necessarily intended to give rights to members as such. The disclosure requirements are also of concern to persons other than members of the company, such as corporate regulators, media, industry and university observers, macro-economists, bankers, employees and the general public having an interest in corporate disclosures. In *Sons of Gwalia*, the shareholder received the inadequate disclosure as a consumer of corporate information and an investor, not as a member of the company.[157]

The legacy

The strong sympathy of Kirby J for the rights of conventional unsecured creditors over shareholders in an insolvency has an intrinsic appeal. On the other hand, Parliament's decision to impose continuous disclosure obligations on companies and give investors rights to compensation where they have been misled or deceived has been widely accepted.

There are substantial arguments for keeping the law as decided in *Sons of Gwalia*.

Subordination of the claims of aggrieved shareholders in an insolvency would substantially weaken the statutory investor protection provisions.[158] Justice Kirby recognised that the continuous disclosure obligations were specifically designed to protect shareholders and potential shareholders from losses that might be suffered from undisclosed facts and to prevent, compensate for and reduce the incidence of such losses.[159] Failure to make disclosure or misleading conduct is likely to precede an insolvency, where it is very rare for funds to remain available for distribution to shareholders after payment to creditors.

Furthermore, the ability of shareholders to claim damages for breach of the investor protection provisions provides an incentive for companies to maintain statutory disclosure and other standards, which benefit the market generally. Furthermore, shareholders cannot simply claim the value of their shareholding in all insolvencies: there must have been some kind of misconduct constituting a breach of the investor protection provisions.

However, there are also strong arguments for reversing *Sons of Gwalia* by ensuring that a shareholder's claim for damages for the loss of value of the shareholding is placed on the same footing as a claim "in the person's capacity as a member".

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156 (2007) 231 CLR 160 at 207 [109].
157 (2007) 231 CLR 160 at 211 [122].
158 (2007) 231 CLR 160 at 180 [18] per Gleeson CJ.
159 (2007) 231 CLR 160 at 206 [106].

The current legal position, ranking aggrieved shareholder claims equally with, for instance, the claims of creditors who have lent the company money may decrease the availability of credit or increase its cost. It may also place an undue burden on a liquidator or an administrator of a deed of company arrangement, who may be required to deal with a potentially large number of aggrieved shareholder claims.

Care would need to be taken if the law were to be changed. One possible approach mentioned by Kirby J[160] would be to postpone "a debt owed by a company to a person who is a member of the company". However, this approach would, for instance, postpone a claim in contract for the supply of goods by a person who also happened to own shares in the company,[161] or damages for personal injury of a person who happened to be a shareholder and who was injured by property of the company. The postponement would have to relate only to claims that bore some relationship to a person's shareholding in the company, as in the United States of America[162] (Kirby J also mentioned the United States approach as a possible precedent[163]).

Subsequent to the High Court decision, the government asked CAMAC to review the issues raised by *Sons of Gwalia*. The CAMAC report, "Shareholder claims against insolvent companies: implications of the Sons of Gwalia decision" (December 2008), is available on its website.[164]

Voidable transactions

The *Corporations Act* contains voidable transaction provisions, which seek to protect the interests of unsecured creditors of an insolvent company that is being wound up. These provisions[165] give the court powers to set aside particular transactions that were entered into by the company before the winding up began and that may give an undue advantage to counterparties or beneficiaries of those transactions over other creditors in obtaining payment out of corporate assets.

In three High Court decisions, Kirby J was in the minority in attempting to uphold a thoroughgoing application of the voidable transaction provisions. Two of the decisions[166] related to unfair preferences, which are transactions that result in an entity receiving from the company more than it would receive if the transaction were set aside

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160 (2007) 231 CLR 160 at 212 [129].

161 See, for instance, the judgment of Gleeson CJ: (2007) 231 CLR 160 at 184 [29].

162 See *Bankruptcy Code* §510(b) (US).

163 (2007) 231 CLR 160 at 213 [130].

164 See http://www.camac.gov.au.

165 *Corporations Act 2001* (Cth) Pt 5.7B Div 2.

166 *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151; *Sheahan v Carrier Air Conditioning Pty Ltd & Campbell* (1997) 189 CLR 407.

and it were to prove for the debt in a winding up.[167] The third decision, *Cannane v J Cannane Pty Ltd (in liq)*,[168] dealt with transactions at least one of whose purposes is to defeat, delay, or interfere with, the rights of any or all of the company's creditors.[169]

Unfair preferences and clearing house arrangements: IATA v Ansett

In *International Air Transport Association v Ansett Australia Holdings Ltd* (*IATA v Ansett*),[170] the question was whether the clearing arrangements of the International Air Transport Association contravened the liquidation provisions of the *Corporations Act* requiring equal or "pari passu" distribution among unsecured creditors.

The facts

International airline operators commonly pay other airlines to transport passengers and goods on their behalf. The International Air Transport Association (IATA) provides for Multilateral Interline Traffic Agreements (the Agreement) to streamline those payments. Rather than participating airlines making and receiving numerous payments between themselves, payments are made through the IATA Clearing House and governed by its regulations and clearance procedures. Debits and credits for carrying passengers and cargo are made in the clearing house accounts of the airlines and netted out at the end of every month. Airlines with a net credit balance receive a payment from the clearing house and airlines with a debit balance make a payment to the clearing house.

Ansett was a member of IATA. It experienced serious financial difficulties resulting in its collapse in 2001-2002. It appointed administrators on 12 September 2001 and, following a resolution of its creditors in March 2002, entered into a deed of company arrangement in May 2002. The deed incorporated the procedures for proofs of debt and the ascertainment of claims that would apply in a winding up.[171]

The legal issues

The key question was how the unfair preference provisions should apply to the payments made through the IATA Clearing House.

On one view, under the clearing house arrangements, there was no debt between individual companies that were IATA members and therefore clearing house participants. By the contractual arrangements

167 *Corporations Act 2001* (Cth) s 588FA.
168 (1998) 192 CLR 557.
169 The current provision is s 588FE(5). *Cannane* dealt with *Bankruptcy Act 1966* (Cth) s 121(1), which applied to companies by virtue of the then *Corporations Law*, s 565(1).
170 (2008) 234 CLR 51.
171 (2008) 234 CLR 151 at 172 [43] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ.

to which those members had agreed, the only relevant liability of an insolvent member company such as Ansett, which was in debit with the clearing house, was the amount that the member owed the clearing house. This was the view taken by the majority in *IATA v Ansett*.

The opposing view was that the clearing house merely provided a convenient means for airlines to pay their debts to each other. However, debts still existed between the airlines that were participants in the IATA Clearing House. Those debts should rank equally with all other ordinary unsecured debts. One method for achieving this is found in the provisions for recovery of unfair preferences.[172] On this approach, airlines that had in effect received 100 cents in the dollar in relation to a debt owed by Ansett under the clearing house arrangements would have to surrender the amount of that debt to the liquidator and prove rateably with other unsecured creditors in the liquidation. They should not be permitted to achieve a position analogous to that of secured creditors without the need for the creation and registration of charges on the book debts. This view was in line with an earlier English House of Lords authority, *British Eagle International Airlines Ltd v Compagnie Nationale Air France*.[173]

An important factor was that IATA had changed the clearing house rules since the *British Eagle* decision in an attempt to make it clear that there was no debt between the individual airlines, but only between each airline and the clearing house.

The majority

The majority view (delivered in two separate judgments, one by Gleeson CJ, the other by Gummow, Hayne, Heydon, Crennan and Kiefel JJ) was that, on the true construction of the Agreement, Ansett's property did not include debts owed to it by other airline operators and its liabilities did not include debts owed by it to other airline operators. Rather, the relevant property of Ansett was "the contractual right to have a clearance in respect of all services which had been rendered on the contractual terms and the right to receive payment from IATA if on clearance a credit in favour of the company resulted".[174]

According to the majority, there was no rule of public policy that required the court to treat parties as having entered into different contractual arrangements: the insolvency rules requiring pari passu distribution could only operate on the debt that existed – that between Ansett and the clearing house. The rules did not operate on supposed debts, which did not exist, between Ansett and each individual airline.

172 *Corporations Act 2001* (Cth) s 588FA.

173 [1975] 1 WLR 758.

174 (2008) 234 CLR 151 at 167 [23] per Gleeson CJ.

The judgment of Justice Kirby

Justice Kirby held that, on the proper interpretation of the Agreement, the debts between the individual airlines continued to exist, even though they were generally to be enforced (in the absence of any complication, such as supervening insolvency) by adjustment through the IATA Clearing House. In his view, various factors supported this conclusion, including the lack of novation to IATA of debts originally incurred between the issuing and carrying airlines, and the provision for direct enforcement by the carrying airline against the issuing airline on the occurrence of specified events, such as suspension of the issuing airline and exclusion of protested or rejected claims from clearance.[175] By contrast, the clearing rules for transactions on the Australian Securities Exchange provide for novation.[176] Furthermore, other multilateral netting arrangements required specific legislation to ensure their validity.[177]

Notwithstanding his view on the proper interpretation of the Agreement, Kirby J went on to consider whether public policy considerations would also result in the unfair preference provisions prevailing over the clearing house arrangements. He considered that permitting the clearing house to secure for participating airlines full payment of unsecured obligations owed to them by the insolvent airline was inconsistent with the policy of the unfair preference provisions that all unsecured creditors should share equally in an insolvent company's property. To hold otherwise would in effect render optional the operation and policy of the statutory administration of a company in insolvency. It was irrelevant that the parties to the clearing house arrangements had good business reasons for entering into those arrangements and did not consider how the arrangements might be affected by the insolvency of one or more of the parties.[178]

Justice Kirby recognised that his approach would inconvenience IATA and its members.[179] On his view of the law, it would require statutory intervention for the clearing house arrangements to survive an insolvency (though he allowed for the possibility that alternative contractual clearing house arrangements involving novation may suffice).[180]

The legacy

It is not likely that Kirby J's view of the law applicable to the clearing house rules will be adopted. Justice Kirby himself recognised the

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175 (2008) 234 CLR 151 at 198–199 [142].

176 (2008) 234 CLR 151 at 197–198 [137] fn 98.

177 Compare the *Payment Systems and Netting Act 1998* (Cth), introduced following the CAMAC report, *Netting in Financial Markets Transactions* (1997). See also *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at 188 [104].

178 (2008) 234 CLRl 151 at 204–205 [164].

179 (2008) 234 CLR 151 at 207 [173].

180 (2008) 234 CLR 151 at 207–208 [176].

commercial inconvenience that his view of the law would entail. There are strong commercial policy reasons for clearing house arrangements not to be affected by the voidable transaction provisions. If Kirby J's view had prevailed, it is likely that there would have been pressure for specific legislation along the lines of the *Payment Systems and Netting Act 1998* (Cth).

Unfair preferences and receivership: Sheahan

A company may grant a charge over some or all of its property as security for money lent to it. If the company defaults on the loan, the lender can appoint a receiver or other person to take control of the relevant property and sell it to satisfy the company's debt.

The facts

In *Sheahan v Carrier Air Conditioning Pty Ltd & Campbell*,[181] a bank appointed a receiver and manager to the property of a company under powers in a mortgage debenture. Before the appointment, the company had engaged subcontractors who were still owed substantial amounts at the time of the appointment and refused to complete their work unless those amounts were paid.

The receiver promised to pay the amounts and the subcontractors returned to work. The receiver subsequently made the payments out of a statutory receiver's account that he had opened and into which had been deposited money obtained from realising the company's assets. The company went into liquidation shortly thereafter. The liquidator sought to recover the payments made to the subcontractors as preferences.

The majority

The majority of the High Court held that the payments were not preferences. All the majority judges regarded the bank, not the company, as being entitled under the terms of the security to the proceeds of the sale of the company's assets.

Chief Justice Brennan held that the payments did not confer an advantage over other unsecured creditors as they did not adversely affect those other creditors. The bank would be disadvantaged since there were insufficient funds to pay its secured debt in full. Nevertheless, it had consented to the payments. The general unsecured creditors would not receive payment in any event and so could not be disadvantaged by the payment to the subcontractors.

The other majority judges (Dawson, Gaudron and Gummow JJ) held that the payments were made by the receiver on behalf of the bank, not from money of either the company or an agent of the company.

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181 (1997) 189 CLR 407.

The judgment of Justice Kirby

Justice Kirby dissented. He recognised that there were two possible interpretations of the law. Holding that the payments were preferences would advance the general objects of the corporations legislation by protecting the company's unsecured creditors. By contrast, the interpretation taken by the majority judges effectively immunises the actions of the receiver, regarding them as personal, so that payments by the receiver do not constitute preferences and the advantage secured by the specially benefited creditors is left untouched. In his view, common sense, corporate realism and practicality, as well as the proper understanding of the corporations legislation, favoured the first interpretation.

Justice Kirby regarded the issues as very significant for the law of company receivership, liquidation and preferences, since receivership quite frequently precedes liquidation. In his view, the receiver had made preferential payments as the agent of the company (as envisaged in the charge document) and not in a personal capacity, even though unsecured creditors generally could not benefit as there were not even sufficient funds to pay the secured creditor.

Recognising "the important social and commercial purposes" of the preference provisions, "to protect creditors against any attempt to favour one creditor or group of creditors over others during the time immediately before winding up",[182] Kirby J observed:

> [T]here would be serious consequences for unsecured creditors in a less powerful bargaining position although equally deserving of payment once the debtor company became insolvent. … The payments to [some] creditors from the funds of the company necessarily reduce the amount of funds available to pay other creditors. If a principle were established which would permit such payments to stand outside the power of recoupment by a liquidator, the pari passu principle, which lies at the very core of the administration of insolvency law, would be subverted.[183]

The legacy

In May 2007, the government asked CAMAC to consider a proposal that transactions conducted under the authority of a receiver should be exempted from the voidable transaction provisions. This proposal would entrench the view taken by the majority in the *Sheahan* case on the effect of the unfair preference provisions on transactions by receivers and extend it to all types of voidable transactions.

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182 (1997) 189 CLR 407 at 463.
183 (1997) 189 CLR 407 at 463–464.

In November 2008, CAMAC published a report,[184] available on its website,[185] which recommended against any statutory amendment in this area.

Transactions intended to defeat creditors: Cannane

The facts

In *Cannane v J Cannane Pty Ltd (in liq)*,[186] the issued share capital of a shelf company consisted of two shares, one held by Cannane and the other by a family company that he controlled. Cannane transferred his share to his son and the family company transferred the second share to Cannane's wife, each for a nominal consideration (one dollar), which was fair at the time of the transaction.[187]

Cannane subsequently went into bankruptcy and his family company was wound up.

Before the insolvencies, Cannane had been involved in a proposal for a transaction involving the acquisition of shares in another company (CCI). The shelf company subsequently entered into the transaction, which turned out to be profitable.

Cannane admitted that the shares had been transferred in anticipation of his bankruptcy and the family company's insolvency and that he was concerned to ensure that neither his creditors nor those of the family company would have access to the profits of the proposed transaction. The trustee of Cannane's estate and the liquidator of the family company applied to have the transfers to the son and wife declared void.

The majority judges

The majority judges (Brennan CJ, Gaudron, McHugh and Gummow JJ) held that the transfers to the son and wife were not void under the *Bankruptcy Act 1966* (Cth)[188] or the *Corporations Law*[189] because there was no intent to defraud creditors. In essence, the majority judges considered that the only property, in relation to the shelf company, to which the creditors of Cannane and his family company were entitled at the time of the relevant share transfers consisted of the shares in the shelf company.

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184 CAMAC, Report, *Issues in External Administration* (November 2008) Recommendation 13.

185 See http://www.camac.gov.au.

186 (1998) 192 CLR 557.

187 Kirby J also agreed that this was the case (at 584 [74]), given that the debts of the shelf company far outweighed either its assets or any prospects (other than those raised by the transactions involved in the *Cannane* case).

188 *Bankruptcy Act 1966* (Cth) s 121(1): the history of this provision goes back to the *Statute of Elizabeth* (13 Eliz 1, c 5) in England: see Kirby J at 588-589 [85]-[88].

189 *Corporations Law*, s 565(1). At the time of the transactions in *Cannane*, the voidable transaction provisions of the *Corporations Law* operated by applying to an insolvent company the provisions that would apply if the company were a natural person who had become bankrupt. It was therefore necessary to look to the relevant provision of the *Bankruptcy Act 1966* (Cth), in this case, s 121(1), to determine the relevant law.

Having sold those shares for fair value, it was irrelevant that their value increased, even though the transaction that caused the increase (the acquisition of shares in CCI) was foreseen and was in fact the reason for the transfer.

The judgment of Justice Kirby

Justice Kirby dissented. In his view, the three conditions necessary for setting the transaction aside were satisfied: the impending winding up of Cannane's family company, the disposition of property the family company owned at that time, and the intention of putting the property outside the reach of the creditors. Cannane clearly intended that, if his family company were to be wound up, creditors at that time should not have available to them the shares in the shelf company for whatever they were then worth. The shares were obviously not sold for the purpose of receiving the one dollar consideration.

According to Kirby J, the purpose of the law is to discourage persons facing the prospect of bankruptcy from endeavouring to put their assets out of the reach of creditors, often with the assistance of their spouses, family members or other trusted persons with whom they are connected. He noted that the law attempts to protect dispositions deemed proper and innocent of fraudulent design by exempting transfers of property where there is proof that good consideration has been given and the property has been lawfully conveyed in good faith.[190] Where one person simply does a second person's bidding (as Cannane's son did in becoming the transferee of his father's share), the relevant intention is that of the second person – namely, in this case, Cannane's intention to place the share in the shelf company in the son's name so that it would be beyond the reach of the father's creditors. Otherwise, a corporation facing liquidation could immunise its position by choosing as disponee of property a person incapable of understanding, or incompetent or unwilling to question, the transfer of property.

It was not relevant that Cannane could have effected the profitable share transaction otherwise than by using the shelf company or that the shelf company had no legal right to the CCI shares at the relevant time. As it happened, Cannane's intention at the moment of disposal was that the shelf company would acquire the shares in CCI, that value of those shares would substantially increase and that the family company's creditors would be deprived of the benefit of the increase in the value.

Justice Kirby gave a succinct response to the complaint that Cannane would have used another shelf company as a vehicle for the CCI transaction if he had been aware that his proposed course of action would result in a voidable transaction: "What might have been is not what was."[191]

190 These grounds are now reflected in *Corporations Act 2001* (Cth) s 588FG.
191 (1998) 192 CLR 557 at 595 [99].

The legacy

The relevant provision of the current *Corporations Act* is couched in somewhat different terms. Instead of an intent to defraud, it now makes a transaction voidable if "the company became a party to the transaction for the purpose, or for purposes including the purpose, of defeating, delaying, or interfering with, the rights of any or all of its creditors on a winding up of the company".[192] This language would probably have the same result on the view of the majority judges, given that they considered that Cannane and his family company had no rights to the CCI shares.

This case probably has no longer-term implications, given Kirby J's view that the result would have been different if a completely different company had been used.

ROLE OF THE REGULATORS

Decision-making powers of ASIC, the CALDB and the Takeovers Panel

Three decisions in this area, while based on constitutional rather than corporate law, should be mentioned in this chapter, as they go to the heart of the powers exercised by three of the central bodies responsible for administering aspects of the *Corporations Act*. Two of the cases, *Albarran v Companies Auditors and Liquidators Disciplinary Board; Gould v Magarey* (*Albarran*)[193] and *Visnic v Australian Securities and Investments Commission* (*Visnic*)[194] dealt with powers to take disciplinary action against persons involved in the management of corporations. *Albarran* involved the power of the Companies Auditors and Liquidators Disciplinary Board (CALDB) to suspend a liquidator's registration.[195] *Visnic* dealt with the power of the Australian Securities and Investments Commission (ASIC) to disqualify a director from managing corporations.[196] The third case, *Attorney-General (Cth) v Alinta Ltd* (*Alinta*),[197] concerned the power of the Takeovers Panel to make a declaration of unacceptable circumstances in a takeover.[198]

In each case, it had been argued that the powers that Parliament had conferred on the relevant body involved the judicial power of the Commonwealth, contrary to the strict separation of legislative, executive and judicial powers required under the Commonwealth *Constitution*.

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192 *Corporations Act 2001* (Cth) s 588FE(5).
193 (2007) 231 CLR 350.
194 (2007) 231 CLR 381.
195 *Corporations Act 2001* (Cth) s 1292.
196 *Corporations Act 2001* (Cth) s 206F.
197 (2008) 233 CLR 542.
198 *Corporations Act 2001* (Cth) s 657A.

The judicial power must be vested in a court established under Ch III of the Commonwealth *Constitution*, not in a legislative committee, an officer or a body established within the executive government.[199] This separation ensures impartial decision-making where there would otherwise be a risk of partiality in the administration of federal laws affecting the "life, liberty or property" of those subject to such laws.[200] In Kirby J's opinion, this separation is more important now in view of the growth of the modern regulatory state, and of powerful and opinionated officials in the executive government answerable to political Ministers.[201]

In each case, the High Court unanimously held that the powers did not involve the judicial power.

Justice Kirby's reasons, as well as those of the other judges, included factors common to all the cases. First, the bodies have no power to enforce their own decisions.[202] Second, the decisions are not conclusive about existing rights,[203] but form a basis, where necessary, for new curially enforceable rights and liabilities.[204] The fact that the relevant power was to be exercised in the public interest was also relevant, though not conclusive.[205]

Some of Kirby J's reasons in *Albarran* were specific to the powers of the CALDB. Those powers (including being able to suspend a liquidator's registration for a specified period for a proved failure to carry out or perform, adequately and properly, his or her duties) were part of a legislative scheme that aimed at upholding the standards of liquidators and played an integral part in the maintenance of high standards in the governance of corporations in Australia and the administration of those corporations during winding up.[206] The board's powers protect company shareholders, creditors, officers and employees, as well as the public, and uphold professional and business expectations.[207]

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199 *Albarran v Companies Auditors and Liquidators Disciplinary Board; Gould v Magarey* (2007) 231 CLR 350 at 364 [39] per Kirby J.

200 (2007) 231 CLR 350 at 368-369 [62].

201 (2007) 231 CLR 350 at 370 [67].

202 See Kirby J in *Albarran* (at 380 [100]), Kirby J in *Alinta* (at 562 [44]), Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ in *Albarran* (at 355 [4]), Hayne J in *Alinta* (at 576-577 [91]-[92]), Crennan and Kiefel JJ in *Alinta* (at 599 [175]).

203 See Kirby J in *Visnic* (at 395 [46]), Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ in *Albarran* (at 356 [6]), Hayne J in *Alinta* (at 569 [71]).

204 See Kirby J in *Visnic* (at 395 [46]), Kirby J in *Alinta* (at 561-562 [42]-[43]), Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ in *Visnic* (at 386 [14]-[15]), Gleeson CJ in *Alinta* (at 550 [2]-[3]), Gummow J in *Alinta* (at 553-554 [14]), Hayne J in *Alinta* (at 569 [71]), Crennan and Kiefel JJ in *Alinta* (at 584-585 [124]).

205 See Kirby J in *Alinta* (at 561 [40]); see also Gleeson CJ (at 550 [2]). Other judges also noted that consideration of policy matters is not *necessarily* a sufficient indicator of non-judicial power: see Gummow J (at 553-554 [14]), Crennan and Kiefel JJ (at 597 [169]).

206 See *Albarran* (at 366 [50], 378-379 [96], 380 [100]).

207 See *Albarran* (at 378-379 [96]).

In addition, the determination of whether a liquidator has failed to perform adequately and properly his or her duties requires testing of performance against professional standards, of which CALDB members can be taken to have detailed knowledge.[208] Justice Kirby noted that the CALDB included members with accounting and business experience: this means that the Board, unlike a non-expert generalist court, can act with full knowledge of ordinary practice and with sensitivity to proper professional standards, without the need to prove all the details of such practice and standards.[209]

Another consideration against a finding that the CALDB exercised judicial power is that an order by the CALDB is not a kind of public punishment for past conduct (even though it may seem to be from the liquidator's point of view).[210]

Justice Kirby also took into account economic factors. The establishment of professional disciplinary boards to supervise the registration of company liquidators was a logical and natural development from the need for more systematic and detailed regulation arising from the growth of the economy. They would offer advantages such as cost savings, speed, flexibility and specialist knowledge, as well as less publicity and less formality than are usually associated with court proceedings.[211]

In *Visnic*, Kirby J expressed some reservations about holding that ASIC's disqualification power was not judicial.[212] Unlike the CALDB, which is an independent panel, ASIC is the corporate "watchdog", with an expected and proper commitment to policing corporations and to corporate law enforcement: it cannot exhibit the appearance of institutional independence and impartiality. In the end, however, he concluded that ASIC's power, too, was not judicial, for several reasons.[213] First, there was the essentially disciplinary character of the power. Also, ASIC's power is different from the larger and more open-ended powers conferred on the court. Finally, ASIC's decision is not conclusive or enforceable, but forms a basis, where necessary, for curially enforceable rights and liabilities, and its power cannot fairly be characterised as determining basic legal rights.

In *Alinta*, Kirby J made observations specific to the role of the Takeovers Panel in the corporate regulatory scheme. He considered

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208 See Kirby J in *Albarran* (at 366-367 [53]-[54], 380 [100]); see also Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ (at 359 [18], 360 [24], 361-362 [29]).

209 See *Albarran* (at 366 [52]-[53], 379 [97]). See also Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ (at 359 [19]). The *Australian Securities and Investments Commission Act 2001* (Cth) s 203 requires that CALDB members include persons nominated by professional accountancy bodies, as well as "business members".

210 See *Albarran* (at 378-379 [96]); see also Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ (at 356 [8], 358-359 [17]).

211 See *Albarran* (at 378 [95]).

212 See *Visnic* (at 393-394 [43]).

213 See *Visnic* (at 395 [46]).

that it was open to Parliament to conclude that the nature of takeover disputes was such that they ordinarily required prompt resolution by decision-makers who enjoyed substantial commercial experience and could look not only at the letter of the Act, but also at its spirit, and reach outcomes according to considerations of practicality, policy, economic impact, commercial and market factors and the public interest.[214] Justice Kirby presaged the establishment of a body such as the Takeovers Panel in his decision as President of the Court of Appeal in *Darvall v North Sydney Brick and Tile Co Ltd*.[215]

Requirement for ASIC to obtain leave before insolvent winding up application

The Australian Securities and Investments Commission (ASIC) has standing to apply for winding up in insolvency,[216] but can only do so "with the leave of the Court".[217] ASIC can also apply for a winding up order on various other grounds without having to obtain leave, but only where it is investigating, or has investigated, the company.[218]

In *Emanuele v Australian Securities Commission*,[219] the Australian Taxation Office (ATO) applied to the Federal Court for an order that a number of companies be wound up. A subsequent deed of company arrangement prohibited the ATO from proceeding with its winding up application.[220] The Australian Securities Commission (ASC, now ASIC) intervened in the application to wind up the companies[221] and gave notice of its intention to apply for an order for the winding up of the companies in insolvency.[222]

The primary judge (O'Loughlin J) made an order for winding up in insolvency. However, the ASC had not sought, and was not granted, the required leave. The Full Federal Court noted the failure to obtain leave, but held that leave could be granted "nunc pro tunc" ("now for then").

There was a clear conflict of authority on this point between cases opposing granting leave after the purported commencement of proceedings[223] and cases where the court was prepared to give leave.[224]

The High Court (with Kirby J joining Toohey J and Dawson J in the majority, Brennan CJ and Gaudron J dissenting) held that the court had power to grant leave nunc pro tunc.

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214 See *Alinta* (at 562 [45]).
215 (1989) 16 NSWLR 260 at 264.
216 *Corporations Act 2001* (Cth) s 459P(1), (3), (5).
217 *Corporations Act 2001* (Cth) s 459P(2).
218 *Corporations Act 2001* (Cth) ss 461, 462(2)(e), 464.
219 (1996) 188 CLR 114.
220 *Corporations Act 2001* (Cth) s 444E(2)(b).
221 *Corporations Act 2001* (Cth) s 1330.
222 *Corporations Act 2001* (Cth) s 459A.
223 For instance, *Re Excelsior Textile Supply Pty Ltd* [1964] VR 574.
224 For instance, *Re Testro Bros Consolidated Ltd* [1965] VR 18.

Justice Kirby acknowledged the force of the arguments for requiring ASIC to obtain leave before making a winding up application. In particular, he recognised that the very commencement of insolvent winding up proceedings and the accompanying publicity may do irreparable damage to a company's reputation, its capacity to raise capital for its continued operations, the value of its shares and the interests of its shareholders, officers and employees. Other adverse consequences could include the crystallisation of contingent liabilities of the company and of guarantors of the companies' debts, contractual default under security documents as a result of these winding up applications, and creditors who come to know of the application pressing for payment of their own debts. Furthermore, the supervision of the court may become illusory if it were obliged to deal with the inevitable inconvenience flowing from a refusal to grant retrospective leave.[225]

Nevertheless, Kirby J considered that there were stronger considerations favouring a court power to grant ASIC retrospective leave. The general rule is that superior courts, such as the Federal Court, have retrospective power to correct obvious procedural slips where justice requires. Judges experienced in company law matters have favoured retrospective leave, notwithstanding strongly worded provisions requiring leave before certain steps were taken to wind up companies.

From a practical point of view, too, Kirby J considered it unlikely that the legislation would impose a strict requirement for ASIC to obtain prior leave. The objective of the reforms recommended by the Law Reform Commission of making the insolvent winding up process speedier and more efficient would not be promoted by too strict a construction of the leave requirement, particularly in urgent cases, which are not uncommon.[226] Also, it might have been expected that the statute would have provided expressly for the consequence of the absence of leave if it imposed a strict requirement of prior leave in all cases.[227]

In addition to these considerations, it was plainly in the public interest, and the interests of the creditors, for the companies in the *Emanuele* case to have been wound up in insolvency as soon as possible so that control of the companies' affairs could be placed with an official liquidator, who could examine the activities of the directors. The proceedings had been on foot for a considerable time, the companies had a negative net worth of more than $192 million, there were allegations highly critical of the conduct of the directors and the deed administrator reported that material information had not been made known to him when the deeds were entered into.[228]

225 Brennan CJ relied on these grounds in his judgment.

226 (1996) 188 CLR 114 at 155.

227 (1996) 188 CLR 114 at 154–155.

228 Toohey J made a similar point: (1996) 188 CLR 114 at 132.

Justice Kirby pointed out some policy oddities in the current requirement for ASIC to obtain leave to apply for an insolvent winding up order.[229] ASIC also has standing under the provisions for winding up other than in insolvency[230] on various grounds, including that the Commission "has stated in a report ... that, in its opinion ... the company cannot pay its debts and should be wound up",[231] yet there is no requirement for ASIC to obtain leave, even though the potential to damage the reputation of the company and undermine its capacity to trade is the same as under the insolvent winding up provisions. Furthermore, it is unclear why ASIC should have to obtain leave whereas a "prescribed agency" does not.[232]

Rights of persons in civil penalty proceedings: Rich v ASIC

Background

The civil penalty provisions were introduced into the corporations legislation by the *Corporate Law Reform Act 1992* (Cth) as a new Pt 9.4B, to give greater flexibility in imposing sanctions on corporate officers, ranging from civil to criminal, depending on the seriousness of the offence. Where an offence under the corporations legislation is identified as a "civil penalty provision",[233] the court can make a range of orders, including a declaration of contravention,[234] a pecuniary penalty order[235] or a compensation order.[236]

The court, on application by ASIC, can disqualify a person from managing corporations where a court has made a declaration that the person has contravened a "civil penalty provision" and the court is satisfied that the disqualification is justified.[237]

The question that arose in *Rich v Australian Securities and Investments Commission*[238] concerned the rights of persons against whom a civil

229 (1996) 188 CLR 114 at 145-146.

230 *Corporations Act 2001* (Cth) ss 462(2)(e), 464. These provisions apply where ASIC is investigating, or has investigated, the affairs of a company.

231 *Corporations Act 2001* (Cth) s 461(h).

232 A "prescribed agency" is one of the permitted applicants for winding up in insolvency: *Corporations Act 2001* (Cth) s 459P(1)(g). However, it is not one of the applicants mentioned in s 459P(2) as having to obtain leave. The Australian Prudential Regulation Authority is currently the only "prescribed agency": *Corporations Regulations 2001* (Cth) reg 5.4.01.

233 *Corporations Act 2001* (Cth) s 1317E.

234 *Corporations Act 2001* (Cth) s 1317F.

235 *Corporations Act 2001* (Cth) s 1317G.

236 *Corporations Act 2001* (Cth) ss 1317H, 1317HA.

237 *Corporations Act 2001* (Cth) s 206C. The court can also disqualify a person from managing a corporation on application by ASIC on certain grounds relating to insolvency or non-payment of debts (s 206D) or for repeated contraventions of the *Corporations Act* (s 206E). ASIC can disqualify a person in certain circumstances without a court application (s 206F). A person can also be automatically disqualified if convicted of certain types of offence (s 206B).

238 (2004) 220 CLR 129.

penalty was sought, given that the proceeding exposed them to disqualification from managing corporations. The relief sought by ASIC included the making of declarations of contravention of the duty of care and diligence.[239] As part of the litigation, ASIC sought to employ a procedure known as "discovery". Under this procedure, the court makes an order for discovery of documents by a verified list, which requires the person subject to the order to disclose all documents in the person's possession that are relevant to the case. At common law, a person has a right to resist such an order where it would expose the person to a penalty. The question in *Rich v Australian Securities and Investments Commission* was whether this common law rule applied to proceedings for a civil penalty. The majority (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ, with whom McHugh J substantially concurred) held that it did apply. Justice Kirby, like the primary judge (Austin J) and the majority of the Court of Appeal, held that it did not apply.

The majority

The majority identified various factors as indicating that the disqualification order sought by ASIC was a penalty attracting the privilege against discovery. These factors were that the order was sought by a regulatory authority, its grant would be founded on demonstration of a contravention of the law, and it would lead to the vacation of existing offices in the corporation as well as the imposition of a continuing disability for the duration of the order[240] (the disqualified person may not participate in the management of a corporation without the specific permission of ASIC or the court[241]). The majority rejected a distinction between "punitive" proceedings (which would attract the privilege) and "protective" proceedings (which would not attract the privilege). For instance, in sentencing a criminal offender, a judge must take into account the need to protect society, deter the offender and others, exact retribution and promote reform.[242]

The judgment of Justice Kirby

Justice Kirby emphasised that the first consideration should be the meaning and application of the *Corporations Act*, rather than the common law privilege against exposure to penalties or forfeiture.[243] In determining that meaning, the court should give close consideration to the serious

239 *Corporations Act 2001* (Cth) s 180.

240 (2004) 220 CLR 129 at 144 [29].

241 *Corporations Act 2001* (Cth) ss 206A(2), 206F(5), 206G.

242 (2004) 220 CLR 129 at 144-146 [30]-[35] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ, at 152-155 [48]-[50] per McHugh J.

243 (2004) 220 CLR 129 at 158 [61].

Australian and global problems which the provisions of the Act were designed to address.[244] The purpose of the *Corporations Act* is to contribute to the improved management and control of Australian corporations, not, as such, to impose a penalty.[245] The statutory benefit of incorporation (including the right to participate in corporate management) is a privilege inherently susceptible to variation or withdrawal for misconduct, as well as for incompetent, improper or lax activities in corporate management. The adverse impact of withdrawing this statutory privilege does not give the disqualification order its character. That character derives from the need to regulate corporations and their officers, whom the community permits to hold themselves out as fit managers of shareholders' funds, entitled to the confidence of investors, employees, traders and the community generally.[246]

The civil penalty provisions were introduced to implement a hierarchy of sanctions in response to the complex subjects of contemporary social and economic regulation, rather than a strict civil/penal dichotomy.[247] An expansion of the penalty privilege is out of harmony with this approach.

The legislature has described the sanctions as "civil" rather than "criminal":[248] it is erroneous to approach disqualification orders as if they imposed criminal sanctions.[249] The sharp distinction between criminal and civil remedies for the enforcement of corporations law is particularly important for the regulation of economic conduct, including the management of corporations.[250] Disqualification protects the investing public, shareholders and others by depriving a proved contravener, for the specified period, of the position of trust and power that office in a corporation involves. While a disqualification order involves a very serious personal, financial and reputational burden for the officer who is disqualified, its purpose is not, as such, to impose criminal punishment.

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244 (2004) 220 CLR 129 at 158 [62].

245 (2004) 220 CLR 129 at 158 [63].

246 (2004) 220 CLR 129 at 171 [104]-[105].

247 (2004) 220 CLR 129 at 170 [101], citing Australia, Senate, Standing Committee on Legal and Constitutional Affairs, *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (1989) (the Cooney Committee Report). In relation to graded non-criminal responses to the necessities of contemporary economic regulation, see also ALRC, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, 2002) at [2.60], cited by Kirby J (at 172 [107]).

248 (2004) 220 CLR 129 at 159-160 [68]. See also, for instance, the legislative distinction between civil and criminal proceedings in *Corporations Act 2001* (Cth) ss 1317M, 1317N, 1317P, 1317Q.

249 (2004) 220 CLR 129 at 166 [87].

250 (2004) 220 CLR 129 at 160 [69], citing (at fn 151) ALRC, n 247, p 113.

The same consequences could flow from the outcome of a civil negligence or misconduct action.[251]

Justice Kirby did not accept that there was any inconsistency between his decision in *Rich v Australian Securities and Investments Commission* and his decision in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*,[252] which involved the privilege against self-incrimination and legal professional privilege, each of which has a longer history in the law, is more fundamental to its operation and is reflected in universal principles of human rights.[253] The documents in *Rich v Australian Securities and Investments Commission* were relevant to the issues concerning the management of the company by the persons involved. Those documents were not prepared for, or in relation to, obtaining confidential legal advice from the persons' lawyers and were not, as such, documents exposing them to self-incrimination. They were important for determining the disqualification issue and were prepared for corporate purposes at the very time the persons claiming the privilege were managing the corporation.[254]

The legacy

Justice Kirby's view has been vindicated by the subsequent amendment of the *Corporations Act* to make clear that there should be no penalty privilege entitling a person to resist an order for discovery of documents.[255]

Australian Securities and Investments Commission's right to appeal

In *Macleod v Australian Securities and Investments Commission*,[256] the High Court held that ASIC could not appeal against an acquittal in the absence of an express statutory power. Justice Kirby agreed with the orders made by the judges who gave joint reasons (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), but gave his own reasons.

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251 (2004) 220 CLR 129 at 170 [100]. On a further technical point, Kirby J (at 169 [97]) interpreted s 1317L, obliging the trial court to "apply the rules of evidence and procedure for civil matters when hearing [the] proceedings", not as importing the principle governing the penalty privilege, but as simply making clear that it is deliberately classifying the remedies as "civil" (regulatory), not "criminal" (penal). By contrast, the majority (at 140-141 [19]-[20], 142-143 [25]) considered that s 1317L required the application of the common law in relation to the privileges against penalties and forfeitures and hence the refusal of an order of discovery.

252 (2002) 213 CLR 543.

253 (2004) 220 CLR 129 at 179 [129]-[130], citing the *International Covenant on Civil and Political Rights*, done at New York on 19 December 1966, [1980] Australian Treaty Series No 23. See Art 14.3.b (to communicate with counsel) and Art 14.3.g ([n]ot to be compelled to testify against himself or to confess guilt).

254 (2004) 220 CLR 129 at 180 [131].

255 *Corporations Act 2001* (Cth) s 1349.

256 (2002) 211 CLR 287.

Macleod was charged with making materially misleading statements likely to induce other persons to purchase securities in a company when he ought reasonably to have known that the statements were materially misleading. A contravention of the relevant provision[257] constituted an offence,[258] proceedings for which could be taken by ASIC.[259]

Macleod was convicted by a magistrate on one count, but found not guilty in respect of the other count. The right of ASIC to appeal against the acquittal came before the High Court.

All the judges, including Kirby J, considered that ASIC's legislative power to begin or carry on a prosecution did not permit it to conduct an appeal.[260] They extended the application of the legal doctrine that protects persons against "double jeopardy" (that is, prosecution twice for the same offence) to cover a renewed jeopardy to punishment. Justice Kirby noted that the courts have extended the doctrine to protect persons from vexation by public authorities using the powers of the state in ways that may adversely affect the rights of the individual.[261]

The *Australian Securities and Investments Commission Act 2001* (Cth) has not yet been amended to give ASIC the power to appeal against an acquittal.[262]

CONCLUSION

In his speeches and in his judgments (whether concurring with the rest of the court or dissenting), Michael Kirby has made important contributions to corporate law.

In reaching a view on cases before him, he has always searched for the policy underlying the areas of law under consideration. A prominent recent example was his judgment in the *Sons of Gwalia* case, in which he discussed the competing policy considerations affecting the proper interpretation of the relevant provision of the *Corporations Act*. His concurring judgments in the constitutional law cases on whether ASIC, the CALDB and the Takeovers Panel were exercising judicial power were reinforced by his analysis of the wider economic and social purpose of the *Corporations Act* and may well prove influential in the future.

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257 See what was then *Corporations Law* (WA) s 999.

258 *Corporations Law* (WA) s 1311.

259 *Corporations Law* (WA) s 1315.

260 This confirmed an approach taken in *Byrnes v The Queen* (1999) 199 CLR 1 and *Bond v The Queen* (2000) 201 CLR 213 in relation to the powers of the Commonwealth Director of Public Prosecutions.

261 (2002) 211 CLR 287 at 310 [73].

262 The provision of the Commonwealth legislation under consideration in *Byrnes v The Queen* (1999) 199 CLR 1 and *Bond v The Queen* (2000) 201 CLR 213 was later amended to confer this power on the DPP: see *Jurisdiction of Courts Legislation Amendment Act 2000* (Cth) Sch 5. The amendments came into force on 30 May 2000.

The anomaly in the takeovers provisions that Kirby, as President of the New South Wales Court of Appeal, identified in *North Sydney Brick & Tile Co Ltd v Darvall* has now been rectified.

Even in dissent, Kirby J's views have been influential. For instance, in accordance with his view in *Rich v Australian Securities and Investments Commission*, the law has been changed to remove the privilege that permitted documents to be withheld when ASIC seeks discovery in civil penalty proceedings. Furthermore, the law now reflects his approach to the proper role of directors in ensuring that a company does not trade while insolvent. Similarly, his thoughts in the *Associated Alloys* case on the proper treatment of Romalpa clauses in an insolvency will be reflected in the law if the personal property securities legislation is enacted.

Significantly, Kirby J's view on the court's power to validate deeds of company arrangement in *MYT Engineering Pty Ltd v Mulcon Pty Ltd* is the only High Court authority on this matter, given the different grounds for judgment adopted by the other judges.

Other dissenting judgments of Kirby J that have not yet resulted in law reform may well bear fruit in the future. For instance, his willingness to apply a broader notion of fiduciary duties in the *Pilmer* case may result in a review of the appropriate duties of persons in providing companies with independent reports. It may even plant the seed for further development of the law in future judicial decisions. As Kirby J has said:

> Everyone knows that, in the judiciary, today's dissent occasionally becomes tomorrow's orthodoxy.[263]

263 Kirby, n 27. See also M D Kirby, "Judicial Dissent" (Speech, James Cook University, 26 February 2005), citing Chief Justice Charles E Hughes, *The Supreme Court of the United States* (Garden City Publishing, New York, 1936) p 68: "A dissent, expressing disagreement over the outcome of a case, is an appeal to the future": http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_feb05.html (accessed 17 December 2008).

Chapter 5

CONSTITUTIONAL LAW

Heather Roberts and John Williams

Each generation reads the Constitution in the light of accumulated experience. … Among the circumstances which inevitably affect any contemporary perception of the words of the constitutional text are the changing values of the Australian community itself and the changes in the international community to which the Australian community must, in turn, accommodate.[1]

INTRODUCTION

Michael Kirby is something of a force of nature. His reputation for energy, ideas and conviction is only eclipsed by his willingness to articulate his views widely to national and international audiences. He is identified with causes and approaches that win him both plaudits and condemnation, though not in equal measure. Any assessment of his contribution to Australian constitutional jurisprudence is inevitably drawn to the conclusion that he sits awkwardly between two eras. He is a legal realist appointed at a time when the ascendant political and legal norms were hostile to that movement. Moreover, his jurisprudence, it would appear, is not developed solely for his time on the Bench but for some future era when his view may gain greater currency. Michael Kirby is a judge who stands out of his time.

This chapter explores the key attributes of Kirby's interpretative methodology and significant aspects of his understanding of the nature and operation of the Australian *Constitution*. Although Kirby has been a prolific extra-curial commentator on the Australian *Constitution*, this chapter draws principally from his reasons for judgment in constitutional cases while a member of the High Court. It commences by examining the larger context within which Kirby's jurisprudence can be viewed. It reflects briefly on two key influences on his judicial approach: Lionel

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1 *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 400 [132] per Kirby J.

Murphy and the Mason court. The chapter then investigates particular aspects of his jurisprudence, drawing together some underlying themes that inform his approach to interpreting the Australian *Constitution*.

MURPHY AND KIRBY

Justices Murphy and Kirby are often linked when constitutional interpretation, rights and judicial dissent are discussed, but is Kirby merely the torchbearer of the Murphy legacy? As with many questions of intellectual influence, the answers to that question are complex.

Kirby was a personal friend of Murphy and has written on a number of occasions of his great affection for and the debt he owed to the former Labor politician turned High Court judge. They were, however, different characters, as Kirby himself acknowledged:

> In very many ways I am quite different. I confess that I was always somewhat puzzled about what it was about me that he liked. We were, in a sense, children of the contrasting communities of Ireland. He: ebullient, gregarious, a lover of parties and champagne, light of touch and quick of mind. I: serious, dutiful, applied – more at home in a library than at a party.[2]

Notwithstanding the difference in personalities, Murphy and Kirby shared a common concern about human rights and what may be characterised as an enlightenment-inspired view of judicial method. In 1996, seven years after Murphy's death, Kirby presented a special Lionel Murphy Foundation memorial lecture, entitled "Lionel Murphy and the Power of Ideas", in which he outlined the increasing influence that Murphy was having on the current direction of Australian law,[3] an influence that Kirby believed had not been properly acknowledged. A contemporary reader of this lecture cannot escape the tendency to interpose into Kirby's account of Murphy an autobiographical reflection on what would be Kirby's own High Court career. Indeed, Kirby commenced his lecture by noting that during Murphy's 11 years on the High Court Bench his rate of dissenting judgments was 22 per cent, a dissent rate "hugely higher than that of any other High Court Justice and well up in the league of American dissenters".[4] A recent analysis of the High Court demonstrates that Kirby J has gone well beyond the Murphy J benchmark. In 2007 Kirby J dissented from his colleagues on

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2 M D Kirby, "Lionel Murphy – Ten Years On" (10th Lionel Murphy Memorial Lecture, 21 October 1996), p 9: http://lionelmurphy.anu.edu.au/10%20years%20on.pdf (accessed 1 September 2008).

3 See M D Kirby, "The Power of Lionel Murphy's Ideas" in M D Kirby, *Through the World's Eye* (Federation Press, Sydney, 2000).

4 See Kirby, n 3, p 128.

21 occasions in 51 cases (41 per cent).[5] Even by Murphy J's standard, Kirby J is in a league of his own.

Comparing Kirby J's constitutional jurisprudence with Murphy J's highlights the important similarities and differences between the jurists. Both were concerned with human rights and civil liberties. However, for Murphy J these rights could be found within the "nature of our society" established by the Australian *Constitution*. As Murphy J noted in *McGraw-Hinds (Aust) Pty Ltd v Smith*:

> Because of the brevity of constitutions, implications are a prominent feature in the history of their judicial interpretation. The Australian *Constitution* does not express all that is intended by it: much of the greatest importance is implied. Some of the implications arise from consideration of the text; others arise from the nature of the society which operates the constitution. Constitutions are designed to enable a society to endure through successive generations and changing circumstances.[6]

As discussed below, Kirby has clearly demonstrated a greater precision when developing constitutional implications and has not evoked the abstract, and highly contestable, notion of what is the nature of contemporary Australian society as a foundation of his constitutional methodology.

Both Kirby and Murphy shared a common view that international law should play a role in shaping Australian law. For Murphy the common law could not be allowed to languish in the face of developments in international law. So, for instance, in *Dugan v Mirror Newspapers Ltd*, Murphy J declared that the doctrine of attainder – that is, upon conviction for a felony an individual lost certain rights in law such as the power to sue for damages – was not part of the common law of New South Wales.[7] If it had been, according to Murphy J, "the universally accepted standard of human rights as spelled out in the International Bill of Human Rights would be violated".[8] Murphy J also famously warned against a narrow reading of the external affairs power. To do so would mean that "Australia would be an international cripple unable to participate fully in the emerging world order".[9]

Despite a common interest in expanding constitutional protections, there are marked differences in the jurisprudence of Murphy J and Kirby J. Justice Kirby alludes to them in another speech given in honour of Murphy J:

5 A Lynch and G Williams, "The High Court on Constitutional Law: The 2007 Statistics" (2008) 31 *University of New South Wales Law Journal* 238 at 245.

6 (1979) 144 CLR 633 at 668.

7 (1978) 142 CLR 583 at 606.

8 (1978) 142 CLR 583 at 607.

9 *New South Wales v The Commonwealth* (*Seas & Submerged Lands Case*) (1975) 135 CLR 337 at 503.

> [Murphy J's] techniques of opinion writing and reasoning were undoubtedly unique and offended some of the orthodoxy. Indeed, they are unique. They are, for example, different in many ways from my own.[10]

Justice Murphy came to the High Court with a complete view of the Australian *Constitution*. There was little, if any, deviation over time, from what appeared to be his theory of the Australian *Constitution*. Not for Murphy J incremental developments, rather he boldly unfolded his interpretation with a politician's flair and little or no inclination for self-doubt. His approach has been criticised both in terms of its form and substance. For instance, there is a marked difference in the style of Murphy J's judgments when compared to other judges of the High Court. His judgments were short, clearly structured, influenced by American jurisprudence and written for legal as well as general audiences.[11] While this may have been a break with the Australian tradition, it is the criticism relating to the substance of his judgments that is more telling. As George Winterton opined:

> Murphy's judgments were unorthodox in more troubling ways: conclusions were frequently merely asserted, rather than reached by reasoned argument; the reasoning was occasionally sloppy, with essential steps omitted; and social and policy considerations sometimes appeared to constitute the sole foundations for conclusions, rather than being cited in support of legal argument, which is unexceptionable. There is a take-it-or-leave-it quality to many of Murphy's judgments, little effort being made to persuade others to his point of view. Perhaps he considered his colleagues too unenlightened to be converted, but overall, his judgments can hardly have impressed such a master craftsman as Gibbs, Stephen and Mason. Moreover, taking so little notice of his colleagues' views, Murphy could hardly expect them to respect his.[12]

Winterton's assessment of Murphy J highlights at least one distinction between the two great dissenters: Kirby J, in contrast to Murphy J, is methodical and orthodox in his approach to determining the law. Even those who may disagree with Kirby J's conclusions would acknowledge that his judgments are reasoned and adorned with comprehensive accounts of the relevant precedents and legal arguments. Where Kirby J has recourse to social and policy considerations it is explicative and usually contemplates the latest academic literature on the matter.[13] As to the "take-it-or-leave-it" approach associated with Murphy J, far too little is known of the inner workings of the current Australian High Court to draw such a conclusion. By contrast with the United States

10 Kirby, n 3, p 88.

11 G Winterton, "Murphy: A Maverick Reconsidered" (1997) 20 *University of New South Wales Law Journal* 204 at 206.

12 Winterton, n 11 at 206.

13 M D Kirby, "Welcome to Law Reviews" (2002) 26 *Melbourne University Law Review* 1.

Supreme Court, where judicial alliances are cultivated and celebrated, the Australian judicial temperament is less overtly political.[14] Even without such information, there is perhaps no surprise in the rigidity of approach of persistent dissenters such as Murphy and Kirby JJ. By definition, "dissent" is the manifestation of disagreement.[15] When that disagreement is not merely one related to a particular conclusion, but founded upon a principle (including a vision of the judicial role), then the dissident has but one of two options: abandon the principle or adhere to it. Justice Murphy was not for turning.

Justice Kirby has often written on the contribution of Murphy J to Australian constitutional jurisprudence. Perhaps more than others, Kirby J would have cause to reflect upon the differences in style and content between himself and his mentor. Ultimately, they share at least one critical similarity. Both articulated a constitutional method that was influenced by what may be described as enlightenment and realist principles. Both would have found their intellectual home on the Mason court.[16] The Mason court was a period of richness in constitutional interpretation, and has been the subject of much debate, alternatively praised as a period of welcome innovation or condemned as a time of egregious judicial activism.[17] Justice Kirby has openly defended the Mason court and acknowledged an intellectual affinity with its role in constitutional interpretation.[18] For these reasons Kirby J has opined extra-curially that had he been appointed to the Mason court he may not have found himself so frequently in dissent.[19] Perhaps Murphy J could have drawn a similar conclusion.

CONSTITUTIONAL METHODOLOGY

Justice Kirby has distinguished himself amongst his contemporaries on the High Court by self-consciously endorsing a single approach to

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14 For a recent account of the United States Supreme Court, see J C Greenburg, *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court* (Penguin Group USA, 2007).

15 A Lynch, "Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia" (2003) 27 *Melbourne University Law Review* 724 at 740.

16 Justice Kirby was appointed on 6 February 1996. Sir Anthony Mason retired as Chief Justice on 20 April 1995. Justice Murphy preceded the Mason court and Kirby J followed it.

17 See F Wheeler and J Williams, "'Restrained Activism' in the High Court of Australia" in B Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (Oxford University Press, Oxford, 2008) pp 32-33.

18 See, eg, Kirby J's rejection of the "furious charges of 'judicial activism'" levelled against the Mason court decisions in *Dietrich v The Queen* (1992) 177 CLR 292 and *Mabo v Queensland [No 2]* (1992) 175 CLR 1 in M D Kirby, "Beyond Judicial Fairy Tales" (2004) (January-February) *Quadrant* 26 at 30-31. See also, M D Kirby, "Consensus and Dissent in Australia" (10th Annual Hawke Lecture, 10 October 2007) p 13: http://www.unisa.edu.au/hawkecentre/ahl/2007ahl_kirby_paper.pdf (accessed 24 November 2008).

19 See, eg, M D Kirby, "Ten Years in the High Court – Continuity and Change" (2005) 27 *Australian Bar Review* 4 at 17.

constitutional interpretation. Both curially and extra-curially he has advocated a theory he describes as a "living force" interpretation.

Our discussion of Kirby J's constitutional methodology is in three parts. First we place Kirby J's theory in its historical context, exploring the influence of the original proponent of "living force" interpretation – Andrew Inglis Clark – on Kirby J's theory and noting the significance of Kirby J's endorsement of any *single* theory of interpretation in the context of the court's vision of its role in constitutional interpretation. Second, we examine the consistency of Kirby J's application of his "living force" theory, particularly in reference to the role of original intention and historical meaning within his overtly non-originalist theory. Finally, we consider the place of international law in Kirby J's "living force" theory. This feature of his jurisprudence is both the most innovative and controversial element of his constitutional methodology.

Justice Kirby, Andrew Inglis Clark and the "living force"

The "living force" approach to the Australian *Constitution* can be traced to the Tasmanian framer of the *Constitution*, Andrew Inglis Clark.[20] There is some irony in Kirby J's embrace of the views of a framer "long since dead" to support a progressive interpretation of the Australian *Constitution*. Writing in 1901 in his *Studies in Australian Constitutional Law*, Inglis Clark explained that:

> [T]he social conditions and the political exigencies of the succeeding generations of every civilised and progressive community will inevitably produce new governmental problems to which the language of the *Constitution* must be applied, and hence it must be read and construed, not as containing a declaration of the will and intentions of men long since dead ... but as declaring the will and intentions of the present inheritors and possessors of sovereign power, who maintain the *Constitution* and have the power to alter it, and who are in the immediate presence of the problems to be solved. It is they who enforce the provisions of the *Constitution* and make a *living force* of that which would otherwise be a silent and lifeless document.[21]

In a collection of essays honouring the Tasmanian, published in 2001, Kirby J acknowledged his intellectual debt to Inglis Clark, and his application of Inglis Clark's interpretative theory. Kirby stated:

> In my reasoning, I have left no doubt as to where I stand. I stand with A I Clark, Windeyer, Murphy and Deane. I stand with the proposition

20 On Inglis Clark's influence on Australian constitutional thought, see R Ely and J Warden (eds), *A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth* (Centre for Tasmanian Historical Studies, University of Tasmania, 2001).

21 A Inglis Clark, *Studies in Australian Constitutional Law* (Maxwell, Melbourne,1901) p 21 (emphasis added).

> that the Australian *Constitution* is a living document whose meaning must necessarily vary with the ages and be ascertained, from time to time, by those who are trusted by the *Constitution* itself with its authoritative exposition.[22]

Questions have been raised by scholars such as Goldsworthy as to whether or not Inglis Clark's "living force" theory did in fact deny the continuing relevance of the original intended meaning in constitutional interpretation.[23] This is because Inglis Clark, continuing his explanation of a "living force" approach, emphasised that the language of the Australian *Constitution*:

> [M]ust be interpreted by the judiciary consistently with a proper use of it as an intelligible vehicle of the conceptions and intentions of the human mind, and consistently with the *historical associations* from which particular words and phrases derive the whole of their meaning in juxtaposition with their context.[24]

We may never know the extent to which Inglis Clark was an originalist at heart, though there is much to suggest that he preferred renewal and reform over uncritical restraint based on past practices.[25] Ultimately, Inglis Clark's approval or otherwise of Kirby's approach would be immaterial in the context of an assertion (by both) that the framers' hand rests but lightly on the direction of Australian constitutional jurisprudence. There are, however, a number of important points to be made about Kirby's endorsement of a "living force" approach as his constitutional methodology.

The first is that Kirby joins a small band of Australian judges who have consciously articulated and adopted a single approach to constitutional interpretation.[26] In *Eastman v The Queen*, for example, Kirby J stated:

> The Court should adopt a single approach to the construction of the basic document placed in its care. Constitutional elaboration, above all, should be approached in a consistent way, lest the inconsistencies of an

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22 M D Kirby, "Andrew Inglis Clark and the High Court of Australia" in Ely and Warden (eds), n 20, p 388. See also Kirby's extra-curial statement that he had "endeavoured to apply" Inglis Clark's "living force" approach in his decisions in a number of cases: M D Kirby, "Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?" (2000) 24 *Melbourne University Law Review* 1 at 11.

23 See J Goldsworthy, "Originalism in Constitutional Interpretation" (1997) 25 *Federal Law Review* 1 at 17; J Kirk, "Constitutional Interpretation and a Theory of Evolutionary Originalism" (1999) 27 *Federal Law Review* 323 at 333.

24 Inglis Clark, n 21, pp 21-22 (emphasis added).

25 J M Williams, "With Our Eyes Open: Andrew Inglis Clark and Our Republican Tradition" (1995) 23 *Federal Law Review* 149.

26 The list would not be extensive but would arguably include Mason CJ, Murphy, Deane and McHugh JJ. On Deane J's constitutional methodology, see H J Roberts, *"Fundamental Constitutional Truths": The Constitutional Jurisprudence of Justice Deane, 1982-1995* (PhD Thesis, Australian National University, 2007).

> *originalist* approach here and a *contemporary* approach there be ascribed to the selection of whatever approach produces a desired outcome.[27]

For Kirby J the requirement of consistency is enhanced by the adoption of a single constitutional methodology by the court. His advocacy of this position was, however, made in the face of the preferred case-by-case approach of Gleeson CJ and other members of the court.[28]

A second important point regarding Kirby J's articulation of his "living force" principle is that it evidenced his understanding of the need for openness and accountability by the court in its decision-making. This was a view of the court's role that gained ascendency during the Mason era. If choices were to be made the Mason court believed they should be informed by, though not necessarily determined by, contemporary social values.[29]

For Kirby J the means (or method) to constitutional conclusions, as much as the ends themselves, were an issue for open discussion and conclusion. Thus he frequently articulated the constitutional methodology he supported, and endorsed an approach that requires the court to consider contemporary Australian social values. Advancing his constitutional theory in *Kartinyeri v Commonwealth* (*Kartinyeri*), for example, Kirby J explained:

> Each generation reads the *Constitution* in the light of accumulated experience. … Among the circumstances which inevitably affect any contemporary perception of the words of the constitutional text are the changing values of the Australian community itself and the changes in the international community to which the Australian community must, in turn, accommodate.[30]

In this passage, early in his High Court career, Kirby J articulated the heart of his interpretative approach. Thus, for Kirby, the meaning of the Australian *Constitution* must conform to the values both of the international community, expressed through international law, and the values of the contemporary Australian community. Two years later, in 2000, in the Sir Anthony Mason Lecture, Kirby J gave his constitutional

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27 *Eastman v The Queen* (2000) 203 CLR 1 at 81 [245] (emphasis in original). Justice Kirby also remarked in *Brownlee*: "[e]ither this Court should adhere to construing the words of the Constitution according to the understandings of 1900, or it should accept another approach, such as I favour. In my respectful opinion, a *hybrid approach is intellectually incoherent*": *Brownlee v The Queen* (2001) 207 CLR 278 at 322-323 [127] (emphasis added).

28 See, eg, the statement by Gummow J that interpretative questions "are not to be answered by the adoption and application of any particular, all-embracing and revelatory theory or doctrine of interpretation": *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51 at 75 [41]. See also M Gleeson, "Foreword" in M White and A Rahemtula, *Queensland Judges on the High Court* (Supreme Court of Queensland Library, Brisbane, 2003) p ix.

29 Sir Anthony Mason, "Rights, Values and Legal Institutions: Reshaping Australian Institutions" in G Lindell (ed), *The Mason Papers* (Federation Press, Sydney, 2007) pp 84-89.

30 *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 400 [132].

methodology its name, a "living force"[31] theory, and argued that constitutional meaning is determined by contemporary social values, rather than the framers' intentions.

Whether Kirby J's "living force" theory has itself evolved over the course of his High Court jurisprudence is a question examined below. However, the importance of his frequent and overt exploration of his own constitutional theory cannot be underestimated. It is no coincidence that discussion and debate on the appropriate approach to constitutional interpretation in the Australian context flourished after Kirby J's appointment to the High Court. The fierce debate between McHugh and Kirby JJ on the role of international law in constitutional interpretation, for instance in *Al-Kateb v Godwin*, merely placed this discussion in another context.[32]

Judicial methodology and the problem of consistency

In reviewing the High Court and its methodology in 2003, Justice Bradley Selway concluded that the Gleeson court consisted of the "flexible five" with Kirby and McHugh JJ being the two members of the court to have expressly endorsed (or rejected) a constitutional theory.[33] According to Selway the "flexible five" have "declined to be bound by any particular approach to constitutional interpretation" and, indeed, have made this a matter of "principle".[34]

There are obvious advantages in articulating an approach to constitutional interpretation. It fosters transparency and predictability. However, by emphasising the importance of consistency in constitutional theory, and by articulating the key principles of his own constitutional methodology, Kirby J has exposed himself to criticism at many levels.

One obvious criticism is that a "living force" theory is the wrong methodology to apply or, indeed, that the court should refrain from adopting *any* theory in constitutional interpretation. This latter criticism commences from the view that a theory of interpretation is external to the document and represents illegitimate "top-down" reasoning.[35]

Perhaps the more searching criticism is that Kirby J has misapplied his chosen theory. Some commentators have questioned whether he has been consistent in his application of a "living force" theory.[36] Specifically,

31 Kirby, n 22.

32 See below, n 48.

33 B Selway, "Methodologies of Constitutional Interpretation in the High Court of Australia" (2003) 14 *Public Law Review* 234.

34 Selway, n 33 at 246-247.

35 See, eg, *McGinty v Western Australia* (1996) 186 CLR 140 at 231-232 per McHugh J; and cf K Mason, "What is Wrong with Top-Down Legal Reasoning?" (2004) 78 *Australian Law Journal* 574.

36 See, eg, J D Heydon, "Theories of Constitutional Interpretation: A Taxonomy" [2007] *Bar News* 12 at 22; D Meagher, "New Day Rising? Non-Originalism, Justice Kirby and Section 80 of the Constitution" (2002) 24 *Sydney Law Review* 141.

questions have been asked about his reliance on historical meaning and the framers' intentions within his "living force" approach (which is said to eschew such an inquiry). Two prominent examples of Kirby J's reasoning, drawn from either end of his High Court career, highlight the unresolved tension regarding the relationship between historical and contemporary meaning in his "living force" approach.

One of Kirby J's earliest applications of his evolutionary interpretation was in *Kartinyeri* in 1998.[37] That case concerned a challenge to Commonwealth legislation which sought to facilitate the construction of a bridge to Hindmarsh Island by excluding that area from the protection of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). A question before the court was whether the 1967 referendum amending the race power had the consequence that the Commonwealth could only enact laws for the "benefit" of the people of any race and, in particular, the indigenous peoples of Australia.[38] The court held by majority (with Kirby J dissenting) that the Commonwealth legislation was valid.

Although Kirby J did not explicitly describe his interpretative approach in *Kartinyeri* as a "living force" interpretation, he emphasised that the Australian *Constitution* must be interpreted consistently with the meaning and intentions of the contemporary Australian people. However, his reasoning in *Kartinyeri* did not examine the values of the Australian community in 1998 to the exclusion of historical sources; Kirby J relied extensively on the context surrounding the 1967 referendum. He reasoned that the court "should take notice of the history of the amendment and the circumstances surrounding it" when interpreting the race power.[39] In this way, *Kartinyeri* stands outside the evolutionary tenor of his later remarks as the history and intentions of those amending the power in 1967 were significant to his articulation of its meaning in contemporary Australia. Apart from their proximity to the Australia of 1998 the question remains why history of 1967 (and, to a degree, 1900) is to be given any role in Kirby J's constitutional methodology. Moreover, if the wishes of the people of 1967 who amended the Australian *Constitution* are relevant, why are those who drafted the original document not similarly influential?

A more recent example is Kirby J's decision in *New South Wales v Commonwealth* (*Work Choices*),[40] a decision explored below for its insights into Kirby J's federal vision. Justice Kirby's dissenting judgment in *Work Choices* is rich with the imagery of his evolutionary interpretative approach. Thus, for example, he remarked:

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37 (1998) 195 CLR 337. See also *Gould v Brown* (1998) 193 CLR 346.

38 On the history of the race power, see R French, "The Race Power: A Constitutional Chimera" in H P Lee and G Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, Cambridge, 2003) p 180.

39 *Kartinyeri* (1998) 195 CLR 337 at 413 [157].

40 (2006) 229 CLR 1.

> The desires and expectations of the founders of the *Constitution*, and the understandings of earlier Justices, do not limit the response which this Court may give to the central issue now presented. New times may give rise to new insights.[41]

However, Kirby J immediately continued his line of thought by reasoning that:

> [T]he considerations of history, purpose, envisaged institutions and outcomes over more than a century, not to say the Herculean labours of our predecessors in this Court over s 51(xxxv) which were otherwise effectively unnecessary, suggest that any construction of s 51(xx) must accommodate itself to the co-equal inclusion of a particular, and restricted, grant of power to the Federal Parliament to make laws with respect to industrial disputes.[42]

Thus Kirby J's conclusion in *Work Choices* rested on *both* considerations of contemporary need and the existence of a federal system "deliberately chosen"[43] by the framers.

Some further clarification of Kirby J's attitude towards contemporary and historical meaning emerged in *Abebe v Commonwealth* (*Abebe*).[44] In that case, Kirby J reflected on his interpretative approach in the following way:

> It is not correct to construe [the Australian *Constitution*] by a search of what its framers "intended", helpful as their remarks about those purposes may be from time to time.[45]

If this statement in *Abebe* accurately encapsulates Kirby J's approach, then historical meaning, including statements by the framers in the Convention Debates, may remain relevant – albeit not determinative – in his constitutional methodology. The challenge therefore lies with the fact that the above statement is to be found in a judgment forcefully embracing an evolutionary interpretation. On a strong reading of Kirby J's approach, any reference to the framers and the assistance they may provide, undermines his theory. Perhaps this is why having moved tantalisingly close to the framers, he firmly rejects their role. Thus, Kirby J continued his reasoning by stating:

> We are not bound to the imaginings of the men who, in the last decade of a past century, wrote the *Constitution*. It is the governmental charter of today's Australians. It belongs to the present and the future. It is not chained to the past.[46]

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41 *Work Choices* (2006) 229 CLR 1 at 215 [514].
42 (2006) 229 CLR 1 at 215 [514].
43 (2006) 229 CLR 1 at 228 [555].
44 (1999) 197 CLR 510.
45 (1999) 197 CLR 510 at 581 [203].
46 (1999) 197 CLR 510 at 581-582 [203].

It is therefore often difficult to isolate the true effect of Kirby J's "living force" approach. If his approach compels an outright prohibition on the use of the framers' authorial intention, then mention of history – "helpful" as it may be – appears to run counter to Kirby J's methodology. In any event, the subtle variation in Kirby J's expression of his approach, and its application, suggests that his constitutional methodology was not designed to itself "chain" the court to a particular outcome in its interpretation of the Australian *Constitution*.

Selway concluded that the approach of the "flexible five" was ultimately to be preferred notwithstanding the criticisms of Kirby J and others. Selway stated:

> To maintain public confidence it may well be necessary to preserve the mystery of the current approach, if only to avoid the widespread criticism that Kirby J makes of it. This may at least be part of the reason why the flexible five have been reasonably reticent in spelling out in detail that their approach to constitutional interpretation does involve a degree of flexibility.[47]

What then is to be concluded regarding Kirby J's "living force" theory? It would appear that his evolutionary approach is inherently flexible, allowing him to mould the interpretation of the Australian *Constitution* consistent with the needs of contemporary Australia. He joins the other members of the court in that challenge. What must be considered when reviewing this debate is the degree of flexibility between the two jurisprudential camps and the cost of articulating a preferred method. Justice Kirby's choice of methodology is calculated to embrace change and to do so in an open and transparent manner. It is from this position that he admonishes other approaches to the Australian *Constitution*. However, his choice does bring with it a cost which the unarticulated method does not have to endure. That is, it closes off other methods and requires him to explain the "mystery" of judicial choice, which is often finely balanced in a court of final appeal.

Constitutional interpretation and international law

As is well known, Kirby J has been a passionate advocate in both his decisions and his extra-curial remarks that the Australian *Constitution* "accommodates itself to international law".[48] This aspect of Kirby J's constitutional methodology emerged many years prior to his labelling his approach as a "living force" theory.[49] His vision for the role of

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47 Selway, n 33 at 250.

48 *Newcrest Mining (WA) Ltd v Commonwealth* (*Newcrest Mining*) (1997) 190 CLR 513 at 658. This aspect of Kirby J's constitutional methodology has been explored further in Wheeler and Williams, n 17, pp 61-65.

49 See *Newcrest Mining* (1997) 190 CLR 513 at 658; *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 417-419 [166]-[167].

international law in constitutional interpretation has attracted frequent and fierce reaction from other members of the court.[50] However, he has continued "unrepentant"[51] in his use of international law in the interpretation of the Australian *Constitution*. Indeed, this aspect of his "living force" approach is a defining feature of Kirby J's constitutional methodology, and a significant innovation in evolutionary interpretative theories in the Australian context.

In *Newcrest Mining (WA) Ltd v Commonwealth* (*Newcrest Mining*),[52] Kirby J outlined the role that international law plays in his approach to the Australian *Constitution*. He said:

> [I]nternational law is a legitimate and important influence on the development of the common law and constitutional law, especially when international law declares the existence of universal and fundamental rights. To the full extent that its text permits, Australia's *Constitution*, as the fundamental law of government in this country, accommodates itself to international law, including insofar as that law expresses basic rights.[53]

This aspect of Kirby J's constitutional vision is not particularly radical in and of itself. However, in the context of Australian constitutional jurisprudence it was a clear departure from what had gone before. The controversy appeared to have been focused upon the break with the past rather than the content of what Kirby J was advocating.

As Wheeler and Williams have explained, the traditional approach of Australian courts towards international law is that until incorporated by statute, international law did not become a part of Australian domestic law.[54] During the Mason era members of that court had become more receptive to extending the influence of international law to the development of the common law and administrative law.[55] For example, in *Mabo v Queensland [No 2]*,[56] Brennan J famously stated

50 See, eg, *AMS v AIF* (1999) 199 CLR 160 at 180 [49]-[50] per Gleeson CJ, McHugh and Gummow JJ; and, most notably, *Al-Kateb v Godwin* (2004) 219 CLR 562 at 589-595 [62]-[73] per McHugh J.

51 A Blackshield and G Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (4th ed, Federation Press, Sydney, 2006) p 893. See, eg, *Austin v Commonwealth* (2003) 215 CLR 185 at 291-293 [252]-[257]; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 622-630 [169]-[193]; *Coleman v Power* (2004) 220 CLR 1 at 91-96 [240]-[249]; *Re Colonel Aird; Ex parte Alpert* (2004) 220 CLR 308 at 344-346 [114]-[119]; and *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 at 484-485 [121]-[124]. Note also Kirby's extra-curial defence of his approach in M D Kirby, "International Law – The Impact on National Constitutions" (2005) 21 *American University International Law Review* 327.

52 (1997) 190 CLR 513.

53 (1997) 190 CLR 513 at 658.

54 Wheeler and Williams, n 17, p 61.

55 In 1945 the court had recognised a "general rule of construction" that statutes were presumed not to violate a recognised rule of international law unless a contrary intention appears: *Polites v Commonwealth* (1945) 70 CLR 60.

56 (1991) 175 CLR 1.

that "international law is a legitimate and important influence on the development of the common law".[57] In that case, international law was a factor influencing the court's recognition of common law native title.[58]

In *Minister for Immigration and Ethnic Affairs v Teoh* (*Teoh*),[59] while accepting the orthodox principle that until implemented by legislation international law does not create positive rights, a majority of the Mason court further extended its influence in domestic law.[60] In a controversial decision, the majority in *Teoh* held that the ratification of an international treaty by the executive gave rise to a legitimate expectation that the executive would act in conformity with that treaty. This legitimate expectation arose even if the treaty had not been ratified by Parliament. Mason CJ and Deane J described the ratification of an international convention by the executive as a "positive statement … to the world and to the Australian people" that the executive would act in accordance with the convention.[61] Their judgment stimulated fierce parliamentary and academic criticism, both on the grounds that the complexity of international law would introduce uncertainty into the administrative process and that the court's incorporation of international law norms in this fashion usurped the democratic mandate of Parliament.[62]

Similar concerns to those that arose in *Teoh* have attended Kirby J's "living force" theory, and the role of international law within that theory. In *Newcrest Mining*, two years after the court's decision in *Teoh*, Kirby J reasoned that:

> The *Constitution* not only speaks to the people of Australia who made it and accept it for their governance. It also speaks to the international community as the basic law of the Australian nation which is a member of that community.[63]

Like Mason CJ and Deane J in *Teoh*, in *Newcrest Mining* Kirby J utilised the image of communication between the institutions of government, the Australian people and the Australian *Constitution*. For Kirby J this metaphor of communication allows the court to utilise international human rights law to support a rights-protective interpretation of the

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57 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42.

58 Also in 1992, in *Dietrich v The Queen* (1992) 177 CLR 292, the court turned to international law to support the extension of a common law right to a fair trial in criminal cases. See further discussion in Wheeler and Williams, n 17, p 39.

59 (1995) 183 CLR 273.

60 (1995) 183 CLR 273 (Mason CJ, Deane, Toohey and Gaudron JJ in the majority, McHugh J dissenting). McCorquodale described *Teoh* as the "high-water mark in the Mason Court's application of international law to Australian law": R McCorquodale, "Teoh's Case" in T Blackshield, M Coper and G Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, Melbourne, 2001) p 665.

61 *Teoh* (1995) 183 CLR 273 at 291.

62 For an overview of the responses to the *Teoh* decision, see J McMillan, "Teoh's Case: Some Questions" in Blackshield et al, n 51, p 666.

63 *Newcrest Mining* (1997) 190 CLR 513 at 658.

Australian *Constitution*. As with Mason CJ's and Deane J's decision in *Teoh*, Kirby J's interpretative principle has been criticised as introducing uncertainty into constitutional interpretation and overstepping the judicial role.[64]

In *Al-Kateb v Godwin* (*Al-Kateb*),[65] the appropriateness of Kirby J's "interpretative principle" came under its most sustained criticism from within the court. In 2000 Mr Al-Kateb arrived in Australia and was detained under the *Migration Act 1958* (Cth). His application for a protection visa was refused and in 2002 Mr Al-Kateb requested that the Minister arrange his removal from Australia. When this did not occur, Mr Al-Kateb challenged the validity of his detention on two grounds. First, he argued that the legislation must be interpreted consistently with international law. Second, Mr Al-Kateb argued that indefinite detention by the executive under the *Migration Act* was a form of punishment. As such he contended that his detention infringed the constitutional separation of powers, which guaranteed that punishment pursuant to a Commonwealth law could only be imposed by a court established under s 71 of the Australian *Constitution*. His challenge was unsuccessful both before the Federal Court, and on appeal to the High Court.[66]

Justice McHugh, as a member of the majority of the court, rejected Mr Al-Kateb's arguments. However, a significant portion of McHugh J's reasons were directed towards what he regarded as the errors of Kirby J's "interpretative principle".[67] As Wheeler and Williams have argued, McHugh J's key criticism of Kirby J's approach was one of democratic deficit.[68] McHugh J remarked:

> Most of the rules now recognised as rules of international law are of recent origin. If Australian courts interpreted the *Constitution* by reference to the rules of international law now in force, they would be *amending* the *Constitution* in disregard of the direction in s 128 of the *Constitution*.[69]

Evolutionary theories of constitutional interpretation are frequently criticised on the basis that they permit judges to amend the Australian *Constitution* in conformity with their individual values and beliefs.[70] However, Kirby J's unique coupling of international law within a

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64 See, eg, J Allan, "'Do the Right Thing Judging'? The High Court of Australia in Al-Kateb" (2005) 24 *University of Queensland Law Journal* 1.

65 (2004) 219 CLR 562.

66 The court's decision in *Al-Kateb* has been the subject of much commentary: see, eg, Allan, n 64; M Zagor, "Uncertainty and Exclusion: Detention of Aliens and the High Court" (2006) 34 *Federal Law Review* 127.

67 For commentary on the interchange, see, eg, H Charlesworth, "The High Court on Constitutional Law: The 2004 Term" (2005) 28 *University of New South Wales Law Journal* 1 at 8-11.

68 Wheeler and Williams, n 17, p 63.

69 *Al-Kateb* (2004) 219 CLR 562 at 592 [68] (citations omitted, emphasis in original).

70 Heydon, n 36 at 22.

"living force" theory was exposed to the full force of this critique for two additional reasons.

Echoing McHugh J's criticism, Allan based his attack on Kirby J's theory on the nature of international law. Describing it as "amorphous, vague and indeterminate",[71] Allan argued that international law made an inappropriate tool to be used in constitutional interpretation. In addition, this body of law was drawn from broad principles capable of varying levels of abstraction and frequently related to "emotive" concepts such as individual rights. As a consequence, Allan has argued that reliance on international law in constitutional interpretation allows a substantial transfer of power from "the people", and their elected representatives, to the unelected judiciary. Thus, as McHugh J reasoned in *Al-Kateb*, the court cannot itself sanction such an approach. Instead, nothing short of a constitutional amendment or the introduction of a Bill of Rights would be required to empower the court to rely on such principles.[72]

A second reason for Kirby J's "interpretative principle" attracting such fierce criticism relates to the role of the "other" in the Australian constitutional context. During the Mason court period, it came to be acknowledged that legal sovereignty was vested in the Australian *Constitution*.[73] However, Kirby J's "interpretative principle" was seen by its critics as undermining the control of the Australian people. By allowing an interpretation to be based upon the values in the international community – and the judges of a foreign system – Kirby J was portrayed as sanctioning a change in the meaning of Australia's fundamental law. Although not referring specifically to the concept of sovereignty, McHugh J in *Al-Kateb* expressed his concern that it would be:

> difficult to accept that the *Constitution*'s meaning is affected by rules created by the agreements and practices of other countries. If that were the case, judges would have to have a "loose-leaf" copy of the *Constitution*.[74]

Theorising about the Australian *Constitution*, and the most appropriate way in which it should be understood, is not a discussion usually had in Australia. What discussion there is tends to begin and end by reference to Sir Owen Dixon's adage: "[t]here is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism."[75] The wisdom of Dixon J's comment may be that it best sums up the Australian way. Practicality, authority and certainty have long had a strong appeal in a nation not given to theoretical indulgences or normative uncertainty. Yet Kirby J has been willing to loosen the constitutional moorings in

71 Allan, n 64 at 18.

72 *Al-Kateb* (2004) 219 CLR 562 at 594-595 [73] per McHugh J.

73 See, eg, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 138 per Mason CJ.

74 *Al-Kateb* (2004) 219 CLR 562 at 595 [73].

75 *Swearing in of Sir Owen Dixon as Chief Justice* (1952) 85 CLR xi at xiv.

order to engage in a larger debate about the direction that constitutional interpretation should take and the means by which it should arrive there. In doing so, he adds his own contribution to the work of Murphy J and members of the Mason court.

THE CONSTITUTION IN ACTION – SOME CASE STUDIES

The constitutional jurisprudence preferred by Kirby J is best understood in operation. His "living force" theory with its recourse to legal realist precepts and contemporary values has meant that he has articulated a distinct approach to many areas of constitutional law. This next section will, through the use of a number of case studies, highlight his theory in action.

Chapter III

Chapter III of the Australian *Constitution* guarantees the separation of judicial power from the executive and Parliament at the federal level. Section 71 provides that the judicial power of the Commonwealth shall be exercised by courts established under that section. Section 73 of the Australian *Constitution* guarantees judicial tenure until the age of 70. It has been accepted in Australia since the *Boilermakers' Case*[76] that the separation of powers principle has two consequences, or limbs, in the Australian context. First, federal judicial power can only be exercised by a court listed in s 71 of the Australian *Constitution*. Second, a federal court can only exercise judicial power, or power ancillary or incidental to judicial power.[77]

Justice Kirby's decisions on Ch III and the separation of powers principle reflect his rights-focused approach to the Australian *Constitution*. Thus, a consistent theme throughout this aspect of his jurisprudence is the strengthening of access to federal courts, and the integrity and fairness of the curial process. His vision in this area is manifested in two streams of cases in which he passionately dissented.

The incompatibility doctrine – persona designata and protection of State courts

One of Kirby J's earliest explorations of Ch III of the Australian *Constitution* occurred in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (*Wilson*).[78] The case of *Wilson* preceded the dispute in *Kartinyeri*; however, both involved the dispute about the building of the

76 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. See generally, F Wheeler, "The Boilermakers Case" in Lee and Winterton, n 38, p 160.

77 See further, Wheeler, n 76, pp 160-161.

78 (1996) 189 CLR 1.

Hindmarsh Island Bridge in South Australia. The question in *Wilson* concerned the constitutional validity of the nomination of a federal judge (Matthews J) to report on the significance of the area proposed for the construction of the bridge and its impact on the local Aboriginal community.[79] Under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) the position of reporter required consultation with the executive. The plaintiffs argued that the appointment of a federal judge as a reporter was invalid on the basis that the appointment vested non-judicial power on a federal court, and so violated the separation of powers principle.

Before Kirby J was appointed to the court, *Grollo v Palmer* had decided that non-judicial functions could be conferred on federal judges in their personal capacity.[80] Such an appointment would be an exception to the separation of powers principle if two conditions were satisfied. First, a non-judicial function cannot be conferred on the judge without the judge's consent, and second, a non-judicial function cannot be conferred on a federal judge if it is "incompatible" with the judge's performance of his or her judicial functions or with the proper discharge of judicial functions by the judiciary.[81] In *Wilson* the Commonwealth argued that the reporting function of Matthews J satisfied these conditions and hence fell within this exception to the separation of powers principle.

The court in *Wilson*, with Kirby J in sole dissent, held that the appointment was invalid as a violation of the separation of powers principle.[82] The majority judges emphasised the importance of defending the independence of the federal judiciary from collateral attack. Justice Matthews' role, the majority reasoned, would require her to exercise discretion on political grounds and was, therefore, incompatible with the maintenance of an independent federal judiciary.[83]

Justice Kirby's dissenting judgment in *Wilson*, however, permitted the Commonwealth to utilise judicial officers, in their personal capacity, in tasks that required close connection to the executive branch. Justice Kirby himself has had such a connection when he was President of the Australian Law Reform Commission from 1975 to 1983. His judgment reflects his faith in judges to defend individual rights through their judicial training.[84] Justice Kirby's reasoning rested on three familiar aspects of his interpretative approach.

First, Kirby J emphasised the importance of a pragmatic approach to constitutional interpretation, consistent with contemporary needs and values. Second, he stressed the important rights-function served by

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79 See *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 10.

80 (1995) 184 CLR 348.

81 (1995) 184 CLR 348 at 364-365.

82 *Wilson* (1996) 189 CLR 1 at 19 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ.

83 (1996) 189 CLR 1 at 17.

84 Kirby was not alone in this belief: cf Deane J's understanding of the persona designata doctrine discussed in Roberts, n 26, pp 160-174.

Matthews J as reporter. Finally, Kirby J asserted his understanding of the role of the judge – as an individual – in the protection of individual rights. Thus, in *Wilson*, he argued:

> Far from the provision of a report damaging the federal judiciary, or Justice Mathews personally, I consider that the Australian community, in such an inquiry, would feel much more comfortable that the task of reporting was being performed by a judge, with nothing to gain or fear by the discharge of the accepted duty. Far from sapping and undermining the separation of powers, the provision of such a report of potential importance to Australians – Aboriginal and non-Aboriginal alike – would be in complete harmony with a century of unbroken experience during which numerous reports on troublesome and controversial subjects have been provided to the Executive Government by appointed judges, federal and State.[85]

He continued:

> A rigid rule would not only have been contrary to Australia's legal history. It would have deprived the Commonwealth of judicial experience and wisdom where the novelty of the functions and the sensitivity of their proper performance suggested the special utility of utilising federal judges. Far from eroding public confidence in the integrity of the federal judiciary as an institution and the independence of its members, the use of federal judges ensured the impartiality of the Tribunal, its compliance with the law and its high reputation amongst members of the community.[86]

Thus, it was the very nature of the task in reporting under the Commonwealth legislation, and the skills required in its exercise, which reinforced the validity of the use of a federal judge as reporter, rather than undermined it.[87]

During Kirby J's time on the court, the "incompatibility" doctrine was also argued to extend to provide constitutional protection to State courts. This argument was first accepted by the High Court in *Kable v Director of Public Prosecution (NSW)* (*Kable*),[88] a case decided before Kirby J's appointment to the court.[89] In *Kable*, the court recognised that the separation of powers principle does not apply to the States because State constitutions do not exhaustively vest judicial power in their courts. However, the Australian *Constitution* nevertheless guaranteed

85 *Wilson* (1996) 189 CLR 1 at 48.

86 (1996) 189 CLR 1 at 49.

87 Justice Kirby emphasised the nature of the skills required as reporter as: accuracy in legal application, independence, disinterestedness, neutrality, detachment, efficiency and skill. These, he argued, were "particular qualities which are normal to a judge in Australia": (1996) 189 CLR 1 at 48.

88 (1996) 189 CLR 51.

89 For further discussion of the *Kable* principle, and its reception by the Gleeson court, see P Keyzer, "Preserving Due Process or Warehousing the Undesirables: To What End the Separation of Judicial Power of the Commonwealth?" (2008) 30 *Sydney Law Review* 101.

some minimum qualities of State courts, especially as they can exercise federal judicial power through the operation of s 77(iii) of the Australian *Constitution*. In *Kable* the court therefore extended the "incompatibility" doctrine to hold that a State court could not be vested with powers that would be "incompatible" with their ability to receive and exercise federal judicial power. On the facts in that case, a majority of the court held that legislation authorising the New South Wales Supreme Court to order the preventative detention of Mr Kable was invalid. Despite the expectations that the *Kable* decision raised amongst the legal community, it has proved to be a relatively silent doctrine.[90]

Justice Kirby remains the only High Court judge to apply the *Kable* principle to find legislation invalid, outside the court's original conclusion in *Kable*. In two prominent examples, *Baker* and *Forge*, Kirby J was in dissent, holding that State legislation was invalid as breaching the incompatibility principle. These two cases demonstrate the strength of Kirby J's defence of the extension of constitutional protection to preserve the institutional integrity of the State judiciary.[91]

In *Baker v The Queen* (*Baker*), the court rejected an argument that s 13A of the *Sentencing Act 1989* (NSW) breached the *Kable* principle.[92] Justice Kirby stated with regard to the *Kable* principle:

> Having propounded this implication of the *Constitution*, this Court should not now unduly narrow its operation. It exists, not for the protection of the judiciary, as such, but for the protection of all people in the Commonwealth. Upholding the constitutional implication expressed in *Kable* is at least as important for the defence of the independence and integrity of the judiciary in this country as giving effect to a hitherto undiscovered constitutional implication limiting the imposition of federal taxes on some State judicial pension rights. In defining constitutional implications affecting the judiciary, and in giving them operation, this Court should be even-handed in its approach. Particularly is this so in a case where no one suggested that *Kable* was wrongly decided or in need of reconsideration.[93]

In *Forge v Australian Securities and Investments Commission* (*Forge*),[94] in his strongest defence of the incompatibility principle as it applies to State courts, Kirby J argued that the Australian *Constitution* guaranteed a level of permanency in State judicial appointments. The challenge in *Forge* was to the practice of appointing acting judges in the New South Wales

90 H P Lee, "The Kable Case: A Guard-Dog that Barked But Once?" in Lee and Winterton, n 38, p 390.

91 Note also that Kirby J was in sole dissent in *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575, holding that s 13 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) breached the *Kable* principle. See also his dissenting judgment in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 242 ALR 191.

92 (2004) 223 CLR 513.

93 (2004) 223 CLR 513 at 544 [84] (citations omitted).

94 (2006) 228 CLR 45.

Supreme Court.[95] Justice Kirby, in dissent, chronicled the appointment of acting judges to the New South Wales Supreme Court and concluded that the practice threatened the independence and impartiality of the State court. Under the *Kable* principle, supported by international human rights law,[96] Kirby J argued that the practice of appointing acting judges was an attempt "to work a change in a fundamental respect forbidden by the federal *Constitution*".[97] Such an attempt was "offensive to basic constitutional principle".[98] According to Kirby J, if the principle was not defended the perception could arise that acting judges:

> may sometimes appear to participate in order to make up the numbers and not to be as fully engaged, fully supported and equally committed judicial officers, playing a fully active, entirely equal, and proportionate role in the work of the Court as their permanent colleagues. No conclusion could be reached on this suggestion without further evidence. However, the risk is undeniable. The perception of a problem is almost as serious as the suggested problem itself.[99]

Accordingly, judges, including State judges, who perform judicial review "must be, and be seen to be, legally competent, independent and impartial in the discharge of such functions".[100] Applying the *Kable* principle, Kirby J held in *Forge* that the practice of acting judges was inconsistent with the separation of powers guarantee enshrined in the Australian *Constitution*.

Executive powers to detain and judicial power

Justice Kirby's dissenting judgment in *Al-Kateb* is a further illustration of his defence of judicial power. As outlined above, the majority judges concluded that the provisions of the *Migration Act 1958* (Cth), which provided for indefinite detention until an "unlawful non-citizen" was removed from the country, were valid. The minority judges concluded as a matter of statutory construction that the legislation did not authorise detention for a person in Mr Al-Kateb's position. However, Kirby J also reflected on the constitutional significance of the case. For Kirby J:

> The express subjection of the legislative power to the judicial power in the Australian *Constitution* is not a mere formality. The existence and predominance of the judicial power necessarily implies constitutional limitations on the use of the heads of legislative power in Ch I (or the powers of the Executive under Ch II) of the *Constitution* in providing for

95 For further discussion of *Forge*, see A Dziedzic, "Forge v Australian Securities and Investments Commission: The Kable Principle and the Constitutional Validity of Acting Judges" (2007) 35 *Federal Law Review* 129.

96 *Forge* (2006) 228 CLR 45 at 129 [214].

97 (2006) 228 CLR 45 at 94 [124].

98 (2006) 228 CLR 45 at 94 [124].

99 (2006) 228 CLR 45 at 105-106 [149].

100 (2006) 228 CLR 45 at 119 [185].

> unlimited detention without the authority of the judiciary. This is because such a power of detention can turn into punishment in a comparatively short time. And punishment, under the *Constitution*, is the responsibility of the judiciary; not of the other branches of government.[101]

In his view, defending the court's power of detention against executive or legislative interference was a matter of international standards. The High Court, he argued:

> should be no less defensive of personal liberty in Australia than the courts of the United States, the United Kingdom and the Privy Council for Hong Kong have been, all of which have withheld from the Executive a power of unlimited detention.[102]

To do otherwise, Kirby J argued, would be to derogate from the court's constitutional duty.

Federalism – "a beneficial antidote"

In the absence of a Bill or Charter of Rights, federalism has been the great legal and political battleground in Australian legal history. Geoffrey Sawer argued that the "dynamics of Australian federalism derives almost entirely from the political process, not from the law".[103] Sawer's view, while procedurally true, underplays the role of the court in encouraging or shaping the political process.

The leading cases signposting Kirby J's federal vision have emerged at the polar ends of his High Court career. In 1997, in *Ha v New South Wales* (*Ha*), Kirby J's broad definition of what was an excise duty under s 90 of the Australian *Constitution* had a dramatic effect on the fiscal balance between the Commonwealth and the States.[104] In 2006, in *New South Wales v Commonwealth* (*Work Choices*)[105] the majority's decision, with Kirby and Callinan JJ dissenting, confirmed the Commonwealth's expansive legislative power over industrial relations. Justice Kirby's conclusions in these cases may suggest different solutions to the tension between accommodating "diversity within unity"[106] in a federal nation-state. Thus, *Work Choices* raises the question whether Kirby J's federal vision evolved over his decade on the High Court and whether this evolution is consistent with, or has fractured, the coherence of Kirby J's constitutional methodology.

The court's interpretation of s 90 has had drastic consequences for State finances and the fiscal balance between the States and the

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101 *Al-Kateb* (2004) 219 CLR 562 at 617 [153] (citations omitted).

102 (2004) 219 CLR 562 at 616 [149] (citations omitted).

103 G Sawer, *Australian Federalism in the Courts* (Melbourne University Press, Carlton,1967) p 6.

104 *Ha v New South Wales* (1997) 189 CLR 465.

105 (2006) 229 CLR 1.

106 *Betfair Pty Ltd v State of Western Australia* [2007] HCATrans 660 per Kirby J.

Commonwealth.[107] Consequently, the States have fought constitutional battles in the High Court over the meaning of an "excise duty". *Ha* was the first opportunity for Kirby J to weigh into this debate.

What was striking about *Ha* is that Kirby J's conclusion saw his federal vision at odds with that of Murphy J. Although favouring strong central power in many aspects of his jurisprudence, Murphy J had been firmly of the view that s 90 had a narrow purpose.[108] For Murphy J, the section was designed solely to grant Commonwealth control over Australia's tariff policy. Accordingly, Murphy J believed that the definition of an "excise duty" was limited to taxes upon goods produced or manufactured within a State. In *Ha*, in their joint minority judgment, Dawson, Gaudron and Toohey JJ endorsed an approach broadly similar to that of Murphy J and held that s 90 only invalidated State taxes that discriminated against goods locally manufactured or produced.[109] Thus, they concluded that the New South Wales Act was valid, as the franchise fee fell indiscriminately on retailers of tobacco in the State regardless of the location of its manufacture.[110] Had Kirby J joined with the minority judges in *Ha*, Murphy J's vision of s 90 would have prevailed.

However, the majority in *Ha*, consisting of Brennan CJ, McHugh, Gummow and Kirby JJ (also in a joint judgment) held that s 90 served a broader constitutional purpose. In their view, s 90 was designed to secure the Commonwealth real control of the nation's economy.[111] The majority in *Ha* concluded that an excise duty was a tax on "the production, manufacture, sale or distribution of goods, whether of foreign or domestic origin".[112] Applying this test, the majority held that the New South Wales levy was "manifestly"[113] an excise duty and thus beyond the State's capacity to impose.

By joining the majority judgment in *Ha*, Kirby J embraced strong central fiscal control, preferencing this over an interpretation of s 90 that would preserve federal diversity by preserving a degree of economic independence of the States from the Commonwealth.

In the same year as *Ha*, Kirby J demonstrated an appreciation of the practical operation of the *Constitution*. In *Re Residential Tenancies Tribunal of NSW v Henderson* (*Henderson*),[114] the High Court re-examination of the

107 For a discussion of the court's treatment of s 90, and the impact of *Ha*, see J M Williams, "'Come in Spinner': Section 90 of the Constitution and the Future of State Government Finances" (1999) 4 *Sydney Law Review* 24.

108 See *HC Sleigh v South Australia* (1977) 136 CLR 475 at 526-527; *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 84; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 638.

109 *Ha* (1997) 189 CLR 465 at 514.

110 (1997) 189 CLR 465 at 517.

111 (1997) 189 CLR 465 at 496.

112 (1997) 189 CLR 465 at 499.

113 (1997) 189 CLR 465 at 503.

114 *Re Residential Tenancies Tribunal of NSW v Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410.

long-standing, though often inexplicable, 1962 case of *Commonwealth v Cigamatic Pty Ltd (In Liquidation)* (*Cigamatic*).[115] At base the question before the court in *Cigamatic* and *Henderson* was the ability of the States to bind the activities of the Commonwealth. For Kirby J the strength of the Commonwealth itself, using its enumerated powers, was the solution to the issue rather than recourse to implications based on the relationship between the Commonwealth and its people. The Kirby J judgment highlighted the constitutional symmetry in the federal system and relied upon known tests of invalidity, such as *Melbourne Corporation*,[116] rather than the presumptions in *Cigamatic*. In this discrete area of intergovernmental relations Kirby J's contribution has much to commend it over the majority's approach and may serve to be an elegant solution to the question.

Other early decisions by Kirby J similarly displayed a prominent trend towards national unity over federal diversity. A year after *Ha* and *Henderson*, the court was faced with challenges to the Australian cross-vesting scheme. The scheme operated to reduce jurisdictional disputes between Australian courts, and avoid multiple proceedings over a single dispute across the nine Australian legal jurisdictions.[117] As Griffith has observed, the scheme was heralded as a "striking example of the effective workings of cooperative federalism".[118] A similar cooperative scheme established a national regulatory scheme for corporations in Australia.

However, in *Re Wakim; Ex parte McNally* (*Re Wakim*),[119] the court, with Kirby J in sole dissent, ended these schemes by holding that Ch III of the Australian *Constitution* precluded the vesting of State judicial power in federal courts. Justice Kirby's dissenting judgment in *Re Wakim* emphasised the benefits of cooperative schemes for contemporary Australia.[120] His judgment did not express a concern regarding the concentration of power, or the benefits of the "checks and balances" inherent in the division of legislative power in a federation. Instead, Kirby J endorsed the essence of his conclusion in *Gould v Brown*, an earlier decision exploring the constitutionality of cooperative schemes.[121] In *Gould v Brown* Kirby J had described the nature of the Australian Federation as:

115 (1962) 108 CLR 372.

116 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

117 See further, G Griffith, "Cross Vesting" in Blackshield et al, n 51, p 185.

118 Griffith, n 117, p 185.

119 (1999) 198 CLR 511.

120 On applying an evolutionary approach to the inquiry in this case, see *Re Wakim* (1999) 198 CLR 511 at 600 [186].

121 *Re Wakim* (1999) 198 CLR 511 at 601-603 [190]-[194].

> obviously one intended to operate with a high measure of co-operation between its component parts ... It is implied in the structure and language of the *Constitution*.[122]

Applying his evolutionary approach, Kirby J concluded in *Gould v Brown* that the court should facilitate new approaches to new problems, consistent with the fundamental objective of cooperation and the text of the Australian *Constitution*.[123] Further, the cooperative scheme was supported by democratic principles, for:

> [T]he agreement of all the democratically elected legislatures of Australia that a system of cross-vesting is necessary to help avoid inconvenience and expense, and to remove injustices and uncertainties occasioned by jurisdictional conflict, provides at least persuasive evidence that the legislation serves a practical national purpose.[124]

In light of the practical benefits of the scheme, its democratic underpinnings, and the *Constitution*'s commitment to "co-operation", Kirby J concluded that only express textual prohibitions could preclude the cross-vesting of jurisdiction of the federal and State courts in the manner effected by the cooperative scheme.

It was against the general trend towards the centralisation of authority in the Commonwealth that Kirby J's dissent in the *Work Choices Case* appears all the more dramatic, both in terms of the direction of the High Court and his previous articulated views of Commonwealth power.

In November 2006, the court handed down its decision in the *Work Choices Case*. This case, delivered approximately two years prior to his retirement, marked a significant change to Kirby J's understanding of federal dynamics. The decision arose from the Howard Government's Work Choices legislation.[125] Five States challenged the constitutionality of this legislation. The key question was whether the Commonwealth's power with respect to "trading and financial corporations" extended to support legislation regulating the employment practices of those corporations. The States argued that in order to preserve the "federal balance" between the legislative powers of the Commonwealth and the States, the corporations power should be narrowly construed. Against this, the Commonwealth relied on the court's foundational interpretative

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122 *Gould v Brown* (1998) 193 CLR 346 at 477 [276]; see also *Re Wakim* (1999) 198 CLR 511 at 604-605 [198].

123 *Re Wakim* (1999) 198 CLR 511 at 603 [193]. Kirby J's judgment also colourfully rejects the attempts (successful in this case) by counsel to reopen the challenge to the cooperative scheme in *Gould v Brown* following a change in the composition of the court. He remarked, "[t]he principal arguments on each side are substantially unaltered. Few, if any, brilliant flashes of insight were offered to shine new light into dark corners of the *Constitution* previously overlooked": (1999) 198 CLR 511 at 597 [179].

124 *Re Wakim* (1999) 198 CLR 511 at 602 [193].

125 For background to the case, see A Stewart and G Williams, *Work Choices: What the High Court Said* (Federation Press, Sydney, 2007).

principle – the *Engineers' Case* – to argue that heads of Commonwealth legislative power must be interpreted broadly, without reference to preconceptions of the powers retained, or reserved, to the States.[126]

A majority of the court in *Work Choices* upheld the Commonwealth's legislation. The majority judges concluded that the corporations power must be given a broad interpretation, supporting those laws that "single out constitutional corporations as the object of statutory command"[127] – that is, whenever a Commonwealth law was directed towards the "activities, functions, relationships or business" of a constitutional corporation.[128] Kirby and Callinan JJ delivered separate dissenting judgments.

His decision in *Work Choices* was one of Kirby J's most passionate dissents. In his view, the grant of power over "conciliation and arbitration" to the Commonwealth under s 51(xxxv) of the Australian *Constitution* effected an important constitutional guarantee: that the Commonwealth industrial relations system applied to disputes of an interstate character and must be resolved through "conciliation and arbitration". These limitations ensured the maintenance of State industrial relations systems, and variety and diversity in industrial regulation.

Justice Kirby's reasoning in *Work Choices* manifested a rights-protective vision for Australian federalism. Thus he emphasised that the "divisions and limitations upon governmental powers have been *deliberately chosen* in the Commonwealth of Australia".[129] This was, Kirby J argued, because:

> the common experience of humanity [is] that the concentration of governmental (and other) power is often inimical to the attainment of human freedom and happiness. Defending the checks and balances of governmental powers in the *Constitution* is thus a central duty of this Court.[130]

He continued:

> Federalism is a system of government of special value and relevance in contemporary circumstances. It is protective of the freedom of individuals in an age when the pressures of law, economics and technology tend to pull in the opposite direction.[131]

It was, therefore, in the context of his perception of the contemporary threat to individual liberties that Kirby J located his reinvigoration of Australian federalism.[132] In this way, he equated his approach with the iconic change in direction of the *Engineers' Case*, concluding that:

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126 On the *Engineers' Case*, and its significance in Australian constitutional interpretation, see K H Booker and A S Glass, "The Engineers Case" in Lee and Winterton, n 38, p 63.

127 *Work Choices* (2006) 229 CLR 1 at 121 [198].

128 (2006) 229 CLR 1 at 121 [198] citing *Re Pacific Coal* (2000) 203 CLR 346 at 375 [83].

129 (2006) 229 CLR 1 at 228 [555] (emphasis added).

130 (2006) 229 CLR 1 at 228-229 [555]-[556].

131 (2006) 229 CLR 1 at 229 [559].

132 (2006) 229 CLR 1 at 229 [556].

> Just as the needs of earlier times in the history of the Commonwealth produced the *Engineers' Case*, so the present age suggests a need to rediscover the essential federal character of the Australian Commonwealth.[133]

Where did Kirby J's fervent desire to protect the federal division of power in the "present age" come from?

Prior to *Work Choices*, Kirby J's federal leanings had surfaced in only one case, *XYZ v Commonwealth* (*XYZ*).[134] In this case, which was handed down by the court in the period between oral argument and final judgment in *Work Choices*, Kirby J remarked that:

> The federal division of power is often the best safeguard of limited government and of personal freedom. It is therefore a division to be cherished and safeguarded. When it is at any risk [the Court should] proceed with caution.[135]

Unfortunately there have been limited opportunities for Kirby J after *Work Choices* to clarify the nature of his recent rights-focused federal vision. Two such opportunities in 2008 were *Betfair Pty Ltd v Western Australia* (*Betfair*)[136] and *O'Donoghue v Ireland* (*O'Donoghue*).[137]

Betfair concerned the impact of s 92 of the Australian *Constitution* on a Western Australian law that made it an offence to utilise an internet betting exchange.[138] A resident of Western Australia argued that the law infringed s 92, which guarantees that "trade and commerce between the states shall be absolutely free". The court's approach to s 92 has epitomised the tension of "diversity within unity"[139] under the Australian *Constitution*. The modern s 92 jurisprudence, dating from *Cole v Whitfield*,[140] identified protectionist laws as contrary to the creation of a new nation but balanced this objective against the continued importance of (proportionate) State regulation. The manner in which Kirby J resolved the tension between these conflicting interests enshrined in s 92 in *Betfair* had the potential to signal his understanding of the balance to be struck between State and national interests under the Australian *Constitution*.

At first glance *Betfair* appears to sit uncomfortably with Kirby J's emphasis on federal balance in *Work Choices*. The joint judgment, of which Kirby J was a member, held that the Western Australian law exhibited a protectionist purpose.[141] The tenor of the joint judgment

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133 (2006) 229 CLR 1 at 229 [556].

134 (2006) 227 CLR 532.

135 (2006) 227 CLR 532 at 582 [147].

136 (2008) 234 CLR 418.

137 (2008) 82 ALJR 680.

138 *Betting Control Act 1954* (WA) ss 24(1aa), 27D(1).

139 *Betfair Pty Ltd v Western Australia* [2007] HCATrans 660 (9 November 2007) per Kirby J.

140 (1988) 165 CLR 360.

141 Heydon J wrote a single concurring judgment.

was reminiscent of Kirby J's early decisions, including *Ha*. For example, the joint judgment in *Betfair* emphasised that s 92 must be interpreted within the framework of the court's interpretation of s 90 in *Ha*. Thus, the joint judgment in *Betfair* remarked of "the place occupied by both s 90 and 92" that:

> [t]he creation and fostering of national markets would further the plan of the *Constitution* for the creation of a new federal nation and would be expressive of national unity.[142]

It is difficult to locate Kirby J's voice in the joint judgment in *Betfair*. However, his comments during oral argument suggest that his emphasis on federal balance in *Work Choices* remains a continuing thread in his approach to federal issues in constitutional interpretation. For example, during oral argument in *Betfair*, Kirby J remarked:

> [T]he federal system is supposed to be a system of diversity within unity but the problem is that there is an exception under the *Constitution* for the common market.[143]

This emphasis on "diversity" as an important constitutional guarantee flowing from the federal system was later emphasised by Kirby J in his judgment in *O'Donoghue*. In that case, citing his own judgment in *Work Choices*, Kirby J affirmed his distinctive vision of the "federal idea"[144] that:

> the federal division of powers and responsibilities, although sometimes inconvenient and inefficient, affords important protections for the people of the Commonwealth. It ensures that, to the stated extent, government is decentralised and more responsive to electors than it would be in a unitary state, operating in a country of continental size. In addition, it tends to protect the liberties of the people by dividing governmental power. History, and not just ancient history, demonstrates that centralisation of governmental power can operate inimically to freedom. Modern technology has a tendency to centralise power. The federal form of government is a beneficial antidote.[145]

In the latter years of his High Court jurisprudence, Kirby J has therefore emphasised with steadily increasing force the importance of federalism within the Australian *Constitution*, particularly in its role in the protection of individual liberty. This emphasis on the "federal idea" has now become a distinctive element of Kirby J's constitutional vision, and one which harmonises with his broader emphasis on the constitutional protection of individual liberties. Critics of Kirby J could argue that this emphasis

142 *Betfair* (2008) 234 CLR 418 at 452 [12] per Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ.

143 *Betfair Pty Ltd v Western Australia* [2007] HCATrans 660 (9 November 2007) per Kirby J.

144 *O'Donoghue* (2008) 82 ALJR 680 at 696 [82].

145 (2008) 82 ALJR 680 at 697 [89], citing *Work Choices* (2006) 229 CLR 1 at 229 [558], 245 [612].

on preserving the federal balance came late and flowed from a results-oriented approach to the legislation in *Work Choices*. Notwithstanding this, the pattern of his later federal decisions located his federal vision within his broader rights-based vision of the Australian *Constitution*.

Rights

At first inspection the Australian *Constitution* contains very few expressed guarantees. This, as Deane J highlighted, can wrongly discount many structural protections such as the separation of powers and an independent judiciary provide to the individual.[146] Indeed, a written constitution itself provides an important protection in that it limits power to enumerated competences. As noted above, Kirby J has articulated the institutional protection of rights inherent in a federal structure that divides power.

Justice Kirby has been steadfast in strengthening the protection of individual rights in Australia through a broad interpretation of express and implied constitutional guarantees. His rights jurisprudence manifested both his commitment to interpreting the Australian *Constitution* consonant with international human rights norms and his distinctive vision of the proper relationship between government and the sovereign people in the 21st century. These features of his decisions, matched with the passionate tone of his reasons, frequently set Kirby J's rights jurisprudence apart from the rest of the court. In this way, his reasons were distinctive, even when in outcome he found himself a member of the court's majority. This point can be developed by an examination of Kirby J's deliberation upon the express guarantees in the Australian *Constitution*.

Section 80 – trial by jury

Justice Kirby's most passionate rights decisions, and those most frequently in dissent, concern s 80 of the *Constitution*. For Kirby J, s 80 is a "fundamental guarantee, protective of the accused and of the community alike".[147]

One of the recurring issues in the interpretation of s 80 has been the content of a "jury trial" for the purposes of the section. In a series of decisions Kirby J reasoned that the content of s 80 was to be determined from a non-originalist standpoint. Thus, for instance, in *Brownlee v The Queen* (*Brownlee*), he emphasised that jury sequestration was not a fundamental, or "essential", requirement of a jury trial in contemporary Australian society.[148] He found that sequestration would result in only those without dependants serving in juries, a result which would be inconsistent with the modern concept, in Australia and international

146 *Street v Queensland Bar Association* (1989) 168 CLR 461 at 521.

147 *Cheung v The Queen* (2001) 209 CLR 1 at 33 [95].

148 *Brownlee* (2001) 207 CLR 278 at 331-333 [150]-[157].

norms, of a body representative of modern Australian citizens.[149] In *Ng v The Queen* Kirby J also employed a "functional approach",[150] holding that a system of reserve jurors, preserving the requirement of randomness, was consistent with the system of "trial by jury" envisaged by s 80. In identifying these essential features, Kirby J's approach was similar to that of the majority of the court.

However, Kirby J's rights vision of s 80 led him to dissent from the orthodox interpretation of s 80, and thereby a majority of his contemporaries on the High Court, in two important respects. First, he rejected the traditional view that s 80 guaranteed a jury trial only when Parliament determined that a federal offence was on "indictment".[151] According to Kirby J, this interpretation renders an important constitutional guarantee "a puny thing indeed".[152] In *Re Colina; Ex parte Torney*,[153] Kirby J instead endorsed the dissenting view of Deane J in *Kingswell v The Queen*,[154] that a trial "on indictment" was a trial of a "serious" offence. Thus, s 80 guaranteed a jury in trials of federal offences punishable by imprisonment of a period of one year or more.[155] For Kirby J, such an interpretation of s 80 is essential to ensure that an important constitutional guarantee was not frustrated by legal formalism and narrow technicality.[156]

Second, in *Brownlee* Kirby J was of the view that the court's decision in *Brown v The Queen* (*Brown*) should be reopened.[157] In *Brown* a majority of the court, consisting of Brennan, Deane and Dawson JJ, held that s 80 prevented a person accused of an indictable federal offence from electing to be tried by judge alone.[158] In *Brownlee*, only Kirby J addressed the question whether *Brown* should be reconsidered and concluded that the case had been wrongly decided.[159] For Kirby J, the interpretation of s 80 by the majority in *Brown* was inconsistent with the realities of trials

149 *Brownlee* (2001) 207 CLR 278 at 332 [153].

150 *Ng v The Queen* (2003) 217 CLR 521 at 542 [72].

151 The traditional view is expressed in *R v Archdall & Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128; *Zarb v Kennedy* (1968) 121 CLR 283; *Lia Chia Hsing v Rankin* (1978) 141 CLR 182; and *Kingswell v The Queen* (1985) 159 CLR 264.

152 *Cheng v The Queen* (2000) 203 CLR 248 at 332 [250].

153 (1991) 200 CLR 386 (*Re Colina*).

154 (1985) 159 CLR 264.

155 *Re Colina* (1991) 200 CLR 386 at 422 [95]. See also *Cheng v The Queen* (2000) 203 CLR 248 at 324 [225].

156 Kirby J's commitment to interpreting s 80 to give substance to the constitutional guarantee by rejecting a formalistic interpretation of "on indictment" was confirmed in his extra-curial writings: see, eg, M D Kirby, "Are We Nominalists Now" (2004) 9 *Deakin Law Review* 523 at 529.

157 (1986) 160 CLR 171.

158 (1986) 160 CLR 171 at 201 per Brennan J, at 207 per Deane J, at 219 per Dawson J.

159 A majority of the court in *Brownlee* held that leave should not be given to reopen *Brown* in that case. Thus, only Kirby J addressed the substantive question whether *Brown* was incorrectly decided: *Brownlee* (2001) 207 CLR 278 at 291 [30] per Gleeson CJ and McHugh JJ, at 295 [48] per Gaudron, Gummow and Hayne JJ.

of offences against the laws of the Commonwealth. He reasoned that an accused could in reality elect to end a jury trial by pleading guilty to the offence.[160] This could occur at any stage of the trial and was consistent with s 80 of the Australian *Constitution*. Accordingly, as a matter of contemporary practice, Kirby J reasoned that it must be the case that an accused could waive the constitutional guarantee of a jury trial.

In addition, Kirby J argued that to hold that an accused was unable to waive a jury trial is to "impose a most capricious operation on s 80"[161] whereby the accused was granted a jury trial only when the Parliament determined that an offence would proceed "on indictment". This interpretation of s 80 marks an important point of contrast between the jurisprudence of Deane and Kirby JJ. Although both were of the opinion that s 80 was a substantial constitutional guarantee, and Kirby J agreed with Deane J's conclusion that the phrase "on indictment" must be given a substantive interpretation, Kirby J rejected Deane J's conclusion in *Brown* that an accused could not waive the requirements of a jury trial. That point of difference is made all the more striking as it occurred in the course of Kirby J's reasoning in *Brownlee*, a case where, as discussed above, Kirby J agreed with Deane J's "living force" theory of constitutional interpretation.

Section 51(xxxi) – acquisition of property on just terms

The guarantee of "just terms" compensation, in contrast with the other express rights, has been given a generous operation. However, the guarantee has also been interpreted as being subject to a range of variously expressed limitations, reflecting the provision's dual function as both constitutional guarantee of "just terms" and head of legislative power.[162] Reflecting this dual function, Kirby J's jurisprudence on s 51(xxxi) both broadened the reach of the guarantee while also acknowledging that, in certain circumstances, Commonwealth interference with valuable property rights must stand outside the Australian *Constitution*'s protection.

Justice Kirby's commitment to a broad interpretation of s 51(xxxi) was outlined by two aspects of his reasons in *Newcrest Mining*,[163] his first High Court decision on the guarantee. In *Newcrest Mining*, Commonwealth legislation enlarged the area of Kakadu National Park and prohibited mining in the park. As a consequence, the plaintiff was unable to exploit its mining tenements and sued the Commonwealth on the basis that the

160 *Brownlee* (2001) 207 CLR 278 at 318 [116].

161 (2001) 207 CLR 278 at 318 [117].

162 See generally, S Evans, "Constitutional Property Rights in Australia: Reconciling Individual Rights and the Common Good" in T Campbell, J Goldsworthy and A Stone (eds), *Protecting Rights Without a Bill of Rights* (Ashgate/Dartmouth, 2006) p 197.

163 (1997) 190 CLR 513.

legislation effected an "acquisition of property" otherwise than on just terms.

One of the issues in *Newcrest Mining* was whether s 51(xxxi) applied to laws made under s 122, the Territories power. In 1968 in *Teori Tau v Commonwealth* (*Teori Tau*)[164] the court had held that the just terms guarantee did not apply to laws made under s 122. However, Kirby J in *Newcrest Mining* overturned *Teori Tau*. Relying on his "fundamental principle" of constitutional interpretation, Kirby J concluded that an exception to s 51(xxxi) for laws under s 122 could no longer be supported, thereby significantly broadening the operation of the just terms guarantee.[165]

A second issue in *Newcrest Mining* was the meaning of an "acquisition of property" for the purposes of the guarantee. This has been an important issue in many cases decided during Kirby J's time on the High Court.[166] In *Newcrest Mining*, Kirby J embraced a broad view of the concept of an "acquisition". Although the plaintiff's interests in *Newcrest Mining* were rendered effectively useless by the Commonwealth scheme, the question at issue was whether the Commonwealth obtained an "identifiable or measurable advantage" from the extinguishment of their mining tenements. Justice Kirby rejected a narrow application of this requirement,[167] preferring to investigate the substantive effect and "economic cost" of the legislation for the plaintiff and the Commonwealth's interests.[168] The following year, in his dissenting judgment in *Commonwealth v WMC Resources Ltd* (*WMC Resources*),[169] Kirby J concluded that Commonwealth legislation altering an exploration permit in the Timor Strait effected an "acquisition" of property and so enlivened s 51(xxxi). In contrast to the majority judges, Kirby J concluded that the Commonwealth in *WMC Resources* obtained a specific and identifiable advantage from the extinguishment of the plaintiff's interests. That advantage was the "clearing the slate" of the plaintiff's interests, a step that furthered Commonwealth international relations' objectives in a manner that was as effective as a direct assumption by the Commonwealth of the plaintiff's property rights.[170] Accordingly, Kirby J concluded that the legislation effected what was in substance an acquisition of property.[171]

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164 (1968) 119 CLR 564.

165 (1997) 190 CLR 513 at 661.

166 See, eg, *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1; *Airservices Australia v Canadian Airlines International Ltd* (2000) 202 CLR 133; *Santos Ltd v Chaffey* (2007) 231 CLR 651.

167 Compare *Newcrest Mining* (1996) 190 CLR 513 at 573-574 per McHugh J.

168 *Newcrest Mining* (1996) 190 CLR 513 at 639. In *Smith v ANL Ltd* (*Smith*) Kirby J also emphasised that the court's task in applying the just terms guarantee is to "address attention to substance and not merely form": (2000) 204 CLR 493 at 525 [91].

169 (1998) 194 CLR 1.

170 (1998) 194 CLR 1 at 96-97 [246].

171 (1998) 194 CLR 1 at 96-97 [246]-[247].

Although extending the operation of the just terms guarantee in these cases, Kirby J has also acknowledged that the guarantee of s 51(xxxi) is not absolute. The history of the section demonstrates that the High Court has advanced a variety of limitations to the power.[172] In *Santos Ltd v Chaffey* (*Chaffey*),[173] Kirby J applied two well-established limitations to s 51(xxxi): first, where the Commonwealth legislation is directed towards the adjustment of rights in a particular relationship; and second, where the statutory right is inherently capable of variation.[174] He concluded in *Chaffey* that under both approaches, legislative variations to the workers' compensation scheme fell outside the protection of s 51(xxxi).[175]

Justice Kirby's reasons in *Chaffey* highlighted his concern that the variety of approaches to s 51(xxxi) would result in inconsistency and confusion.[176] He urged the court to bring "clarity" to the field by focusing on the purpose of the guarantee.[177] Although Kirby J in *Chaffey* did not offer his views on the purpose of s 51(xxxi), the broad features of his constitutional methodology suggest that, as he observed in *Smith v ANL Ltd* (*Smith*),[178] his starting point for a reinterpretation of s 51(xxxi) would be to elevate the human rights purpose of s 51(xxxi), so as to bring the section into accord with "universal principles of human rights and … the expectations of citizens".[179]

Section 117 – rights of residents in a State

Section 117 is a rare instance of the Australian *Constitution* referring to the rights of the individual. Surprisingly, however, the section has not

172 Evans has identified six distinct formulations of limitations to the just terms guarantee: S Evans, "Constitutional Property Rights in Australia: Reconciling Individual Rights and the Common Good" in Campbell, Goldsworthy and Stone (eds), *Protecting Rights Without a Bill of Rights* (Ashgate/Dartmouth, 2006) p 202.

173 (2007) 231 CLR 651.

174 *Chaffey* (2007) 231 CLR 651 at 667-669 [38]-[44]. Although *Chaffey* concerned the Northern Territory provision, Kirby J commented on the nature, scope and meaning of s 51(xxxi). In *Airservices Australia v Canadian Airlines International Ltd* (2000) 202 CLR 133 at 180 Gleeson CJ and Kirby J applied a differently framed limitation, that the legislation could not be characterised with respect to the acquisition of property to find that a forfeiture requirement did not breach s 51(xxxi). Consistent with the features of Kirby J's interpretative approach, in *Airservices* Gleeson CJ and Kirby J emphasised the contemporary context and practical realities of the legislative scheme, concluding that as it was one of the few effective mechanisms for achieving the Commonwealth's objectives in that context s 51(xxxi) did not apply to the Commonwealth scheme.

175 *Chaffey* (2007) 231 CLR 651 at 666-667 [35]-[39].

176 In *Smith* Kirby J had earlier observed that "[f]inding a touchstone to distinguish legislation which falls within, and that which falls outside, the requirements of s 51(xxxi) is not easy. No verbal formula provides a universal criterion": (2000) 204 CLR 493 at 528-529 [100].

177 *Chaffey* (2007) 231 CLR 651 at 667 [37].

178 (2000) 204 CLR 493.

179 *Smith* (2000) 204 CLR 493 at 530 [104]. See also *Newcrest Mining* (1997) 190 CLR 513 at 657-661.

elicited the same passionate defence of individual liberties from Kirby J as other constitutional provisions. His sole discussion of s 117 as a member of the High Court occurred in *Sweedman v Transport Accident Commission*.[180] In that case, he participated in a joint judgment, with Gleeson CJ, Gummow and Hayne JJ, which explored the operation of s 117 in the context of a Victorian motor vehicle compensation scheme. The joint judgment held that the Victorian legislation, which excluded out-of-State residents from access to the scheme, was not "attributable to" State residence, and so did not activate the constitutional guarantee. As Simpson has argued, the case did little to alleviate the uncertainty surrounding the operation of this provision or its significance as a guarantee of individual rights.[181]

Federalism and s 51(xxxv)

In *Work Choices* Kirby J, in a novel reinterpretation of s 51(xxxv), concluded that this head of legislative power functioned as a fundamental constitutional guarantee. His understanding of the purpose of this provision, its relationship to other constitutional guarantees, and the importance of consistent constitutional methodology, was encapsulated in the following passage from his judgment:

> When it comes to defending the rights of property owners from the purported deployment of other federal powers which would deprive them of the protections in s 51(xxxi) of the *Constitution*, this Court has been rightly protective … When it comes to defending employees from analogous legislative incursions into the protections provided to their rights by s 51(xxxv), the Court's vigilance wanes noticeably, as it has in this case. Both capital and labour deserve the even-handed protection that the *Constitution* provides in the language respectively of s 51(xxxi) and (xxxv). There should be no double standards in constitutional protection. Yet once again, it is revealed that double standards exist.[182]

The content of the constitutional guarantee in s 51(xxxv), according to Kirby J, contained two components. First, he concluded that the requirement of an interstate dispute in s 51(xxxv) reflected the *Constitution*'s commitment to federalism. Second, the provision also guaranteed "industrial fairness", by requiring independent arbitration and conciliation. This procedure, in Kirby J's view, guaranteed substantive fairness and evinced the overarching constitutional value of a "fair go", an iconic Australian value.

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180 (2006) 226 CLR 362.

181 See A Simpson, "The (Limited) Significance of the Individual in s 117 State Residence Discrimination" (2008) 32 *Melbourne University Law Review* 639.

182 *Work Choices* (2006) 229 CLR 1 at 222-223 [535].

Implied freedom of political communication

One of the most controversial developments of the Mason court era was the recognition of the implied freedom of political communication.[183] Justice Kirby's first exploration of this implied constitutional guarantee was as a member of the court's unanimous joint judgment in *Lange v Australian Broadcasting Corporation* (*Lange*).[184] In that case the court endorsed the existence of the implied freedom but reformulated the implication to place greater emphasis on a connection to the constitutional text and structure.[185] Throughout his High Court decisions, Kirby J affirmed *Lange* as providing the doctrinal framework for the implication.[186] In this way his approach to the implied freedom of political communication has moved towards the acknowledged constitutional orthodoxy.[187] Indeed, his clarification of the test for determining when a law burdens the implied freedom of political communication has been endorsed by McHugh J in *Coleman v Power* (*Coleman*)[188] as the "true test" in this area.[189] This reformulation was also applied by a majority of the court in *Coleman*.[190]

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183 See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; and *Cunliffe v Commonwealth* (1994) 182 CLR 272.

184 (1997) 189 CLR 520.

185 *Lange* (1997) 189 CLR 520 at 561-562.

186 *Levy v Victoria* (1997) 189 CLR 579 at 644-647; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 280-282 [193]-[199]; *Roberts v Bass* (2002) 212 CLR 1 at 59-60 [161]-[162]; *Coleman v Power* (2004) 220 CLR 1 at 62 [214]; and *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 439-440 [346]-[348].

187 Note also, eg, the court's acceptance (including Kirby J) that non-verbal communication is protected by the implied freedom in *Levy v Victoria* (1997) 189 CLR 579 at 594-595 per Brennan CJ, at 613 per Toohey and Gummow JJ, at 623-624 per McHugh J, at 637-638 per Kirby J. However, Callinan J, in dissent, has challenged the existence of the implied freedom of political communication: *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 330-332 [338]; and *Roberts v Bass* (2002) 212 CLR 1 at 101 [285].

188 (2004) 220 CLR 1.

189 *Coleman* (2004) 220 CLR 1 at 31 [95]-[96], affirming *Levy v Victoria* (1997) 189 CLR 579 at 646 per Kirby J. Kirby J's test was accepted even though he appeared to apply a "two-tier" approach to determine when a law infringed in the implied freedom in *Levy v Victoria*, contrary to the approach endorsed in *Lange* and later cases: (1997) 189 CLR 579 at 645. On the court's application of the "appropriate and adapted" test, see H P Lee, "The 'Reasonably Appropriate and Adapted' Test and the Implied Freedom of Political Communication" in M Groves (ed), *Law and Government in Australia* (Federation Press, Sydney, 2005) p 59.

190 See *Coleman* (2004) 220 CLR 1 at 57 [196] per Gummow and Hayne JJ, at 61-62 [211] per Kirby J. Although not expressly endorsing the Kirby/McHugh test, Gleeson CJ in *Coleman* applied a test of those terms: (2004) 220 CLR 1 at 12 [32].

However, two key aspects of Kirby J's vision of the implied freedom separate his approach from a majority of the High Court.[191] First, his decision in *Mulholland v Australian Electoral Commission* (*Mulholland*) suggested that his understanding for the implied freedom was broader than that of a majority of the court. In *Mulholland* the court was concerned with a challenge to the decision of the Australian Electoral Commission to deregister the Democratic Labor Party as a political party under the *Commonwealth Electoral Act 1918* (Cth). That Act imposed a "500 rule" and a "no-overlap rule" controlling the calculation and number of members required for the registration of an Australian political party. Registration as a political party conferred significant advantages on the group, including the recording of party affiliation next to a candidate's name on a ballot paper. Mulholland argued that the rules infringed the implied freedom of political communication and were, therefore, invalid.

Although the court was unanimous in finding that the provisions of the Commonwealth law were valid, Kirby J's reasoning was distinctive. A key question in *Mulholland* was whether the law invalidly "burdened" the implied freedom.[192] A majority of the court in *Mulholland* embraced a distinction between a constitutional "freedom" and a constitutional "right" – that is, a freedom from laws that prevent, or burden, political communication rather than a right *to* communicate.[193] In *Mulholland* these judges concluded that as the Democratic Labor Party did not have a right *to* list their party affiliation on the ballot paper, accordingly the *Electoral Act* could not be regarded as burdening their freedom of political communication.[194] Justice Kirby rejected this freedom/right dichotomy.[195] Although he concluded that the burden imposed by the *Electoral Act* was proportionate to a legitimate end, that being the protection of the integrity of the electoral process, his approach conceived of the implied freedom as significantly broader in scope of operation than did the majority of the court.[196]

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191 Note also Kirby J's consistent criticism of the "appropriate and adapted" phrase as "ungainly and unedifying": *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 266 [247]; and *Coleman* (2004) 220 CLR 1 at 90 [234].

192 Another question in *Mulholland* was whether the ballot paper constituted "communication" for the purposes of the implied freedom. Heydon J concluded that the ballot paper was merely "the medium by which a vote is cast": (2004) 220 CLR 181 at 304-305 [355]. Kirby J rejected this analysis, holding that "[o]nly the most artificial interpretation" of the scope of constitutionally protected communication could support that view: (2004) 220 CLR 181 at 277 [282]; see also Gleeson CJ at 196 [30].

193 See, especially, McHugh J's judgment: *Mulholland* (2004) 220 CLR 181 at 223-224 [107]-[110], citing his reasoning in *Levy v Victoria* (1997) 189 CLR 579 at 622-626.

194 *Mulholland* (2004) 220 CLR 181 at 224 [110] per McHugh J, at 247 [186] per Gummow and Hayne JJ, at 303-304 [354] per Heydon J.

195 *Mulholland* (2004) 220 CLR 181 at 267-268 [252].

196 See further, discussion in Lee, n 189, pp 78-80.

A second distinctive aspect of Kirby J's understanding of the implied freedom of political communication emerged in his dialogue with Heydon J in *Coleman*. That case concerned an allegation by Coleman that an officer of the Queensland police force was corrupt. Coleman was prosecuted for a number of offences involving the use of "insulting words" under the *Vagrants, Gaming and other Offences Act 1931* (Qld). Justice Kirby reasoned that the legislation, properly and narrowly construed, did not apply to the facts in *Coleman*. However, the reasons of Kirby and Heydon JJ express divergent views in respect of the nature of the Australian political system and the place of political communication within that system.

For Heydon J, insulting words could not gain the protection of the implied freedom: such "contemptuous" speech did not contribute to Australian representative democracy, indeed it was inconsistent with it.[197] Justice Kirby responded to Heydon J by remarking that he had "difficulty in recognising the Australian political system as I know it" in Heydon J's reasons.[198] Kirby J stated:

> One might wish for more rationality, less superficiality, diminished invective and increased logic and persuasion in political discourse. But those of that view must find another homeland. From its earliest history, Australian politics has regularly included insult and emotion, calumny and invective, in its armoury of persuasion. They are part and parcel of the struggle of ideas. Anyone in doubt should listen for an hour or two to the broadcasts that bring debates of the Federal Parliament to the living rooms of the nation. This is the way present and potential elected representatives have long campaigned in Australia for the votes of constituents and the support of their policies. It is unlikely to change.[199]

This defence of insulting speech is particularly striking given that Kirby J has been the subject of fierce, and frequently personal, public attacks.

CONCLUSION

Michael Kirby has been the great dissenter of the Brennan and Gleeson courts. It is a mantle that he has appeared to assume with some pride. It is also a mantle that infuses the tenor and style of his judgments. He writes with an eye to the future, reluctantly conceding that although his vision for the Australian *Constitution* has seldom gained ascendency today, his judgments can inform and persuade future generations of lawyers.

Justice Kirby has left the court having outlined a constitutional methodology and vision for the Australian *Constitution*. His approach grapples with the Australian *Constitution*'s theoretical foundation, and

197 *Coleman* (2004) 220 CLR 1 at 122-123 [324]-[326].
198 (2004) 220 CLR 1 at 91 [238].
199 (2004) 220 CLR 1 at 91 [239].

argues that only through transparency and consistency in constitutional interpretation can the court maintain its legitimacy. His vision is of a court that fiercely defends the rights of the individual, be it to parliamentary diversity through federalism, or to express or implied constitutional guarantees consonant with fundamental rights and freedoms recognised by the international community. Writing of Lionel Murphy in 1993 Kirby J concluded that when future generations of judges and advocates considered Murphy J's dissenting opinion "they will find fresh ideas and questions which should be asked and answered".[200] Justice Michael Kirby may eye the future with a similar hope.

200 Kirby, n 3, p 144.

Chapter 6

CONSTITUTIONAL LAW: DISSENTS AND POSTERITY

Gavan Griffith and Graeme Hill

To have heresy alleged by those who participated in the joint reasons of this Court in Combet is an accusation to be borne with an easy heart.[1]

INTRODUCTION

Justice Michael Kirby has delivered more dissenting judgments in constitutional cases than any other High Court judge.[2] Recently he has become impatient with his fellow judges and has given up attempting to persuade his colleagues, and instead addresses his reasons directly to the readers and, through them, to posterity. For example, in *Thomas v Mowbray*:

> Whereas, until now, Australians, including in this Court, have generally accepted the foresight, prudence and wisdom of this Court, and of Dixon J in particular, in the *Communist Party Case*[3] (and in other constitutional decisions of the same era), they will look back with

1 *New South Wales v Commonwealth* (2006) 229 CLR 1 at 203 [475] per Kirby J.

2 This claim cannot be proved because statistics are not available for the earlier years of the High Court. A study of dissenting judgments in the High Court between 1981 and 2003 revealed that Kirby J has the highest rate of dissent in all cases for that period, and the second highest rate of dissents in constitutional cases for that period (second to Callinan J): A Lynch, "Does the High Court Disagree More Often in Constitutional Cases? A Statistical Study of Judgment Delivery 1981-2003" (2005) 33 *Federal Law Review* 485 at 516-518. Statistics on constitutional cases decided between 1998 and 2005 suggest that Kirby J has a higher rate of dissent in constitutional cases than Callinan J: A Lynch, "The Gleeson Court on Constitutional Law: An Empirical Analysis of its First Five Years" (2003) 26(1) *University of New South Wales Law Journal* 32 at 50; A Lynch and G Williams, "The High Court on Constitutional Law: The 2003 Statistics" (2005) 27(1) *University of New South Wales Law Journal* 88 at 94; A Lynch and G Williams, "The High Court on Constitutional Law: The 2004 Statistics" (2005) 28(1) *University of New South Wales Law Journal* 14 at 21; A Lynch and G Williams, "The High Court on Constitutional Law: The 2005 Statistics" (2006) 29(2) *University of New South Wales Law Journal* 182 at 191.

3 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

> regret and embarrassment at this decision when similar qualities of constitutional wisdom were demanded but were not forthcoming.
>
> … It must then be left to a future time to return to that wisdom and to rediscover its source when the mistakes of the present eventually send this Court back to the wise perceptions of the past.[4]

During the history of the court, dissenting judgments have occasionally come to be accepted as doctrine by a majority of the court. For example, the dissents of Isaacs and Higgins JJ in *R v Barger*[5] foreshadowed the approach to constitutional interpretation in the *Engineers' Case*.[6] More commonly, however, even persuasive dissenting judgments do not emerge with acceptance by a later majority, even after repeated attempts at revival – one recurring issue is the trial by jury requirement in s 80 of the Commonwealth *Constitution*.[7] Justice Kirby is one of the latest in a line of dissenting judges to take the view that the rare protection explicit in the *Constitution* should not be relegated to a matter of form, and that the Commonwealth Parliament should not have unfettered power to determine whether an offence shall be tried on indictment (which engages the constitutional requirement for a jury).[8]

Justice Kirby undoubtedly is correct in his views, expressed extrajudicially, that he would not have found himself in dissent so frequently had he been sitting on the High Court in the years when Sir Anthony Mason was Chief Justice.[9] Thus, there is every chance that lawyers in the future will source Kirby J's dissenting judgments as a quarry for arguments that may persuade a High Court of a different complexion from the Gleeson court.

Ruminating upon the current positioning of the High Court on constitutional issues a decade after a 14-year term as Solicitor-General, co-author Griffith, speaking for himself (and not for co-author Hill), criticises the current "capital C" Constitutional position of the High Court, on the cusp of moving to the next Chief Justiceship, in the following terms:

First, as to judicial power, the court has maintained its zealous protection of judicial independence, unmoved even by the wilful damage deliberately made to the sensible

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4 (2007) 233 CLR 307 at 443 [387], [389]. See also *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 72 [127].

5 (1908) 6 CLR 41 at 84-85 per Isaacs J, at 113 per Higgins J.

6 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129. See L Zines, *The High Court and the Constitution* (4th ed, Butterworths, Sydney, 1997) p 7.

7 Section 80 relevantly provides that "[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury."

8 See *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 418-427 [84]-[104]; *Cheng v The Queen* (2000) 203 CLR 248 at 306-308 [174]-[177]. This view was previously expressed by Dixon and Evatt JJ in *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 581-582, and by Deane J in *Kingswell v The Queen* (1985) 159 CLR 264 at 319.

9 See, eg, M D Kirby, "Judicial Dissent" (2005) 12 *James Cook University Law Review* 4 at 8.

exercise of federal jurisdiction effected by striking down the cross-vesting scheme,[10] *whose only vice was to remove arid jurisdictional debate from Commonwealth, State and Territory jurisdictions.*[11] *On the basic issues of constitutional structures outside the exercise of judicial power, in the few years of this millennium the High Court has come to score more own goals in the constitutional arena than in the entire first century of its existence. Particulars and reasons for this assessment suffice in the consideration of three recent decisions (amongst others); namely* New South Wales v Commonwealth (Work Choices Case),[12] *which abolishes almost the entire structure of allocation of powers between the Commonwealth and the States;* Al-Kateb v Godwin[13] *and related cases on detention issues,*[14] *which entrench the concepts of indefinite executive detention; and* Combet v Commonwealth (Political Advertising Case),[15] *which does much to abolish Parliament's power effectively to control the Executive through the appropriations power.*

A disinterested, but concerned, bystander, informed by the 100 years of the constitutional history of the Commonwealth, including the decisions of the court, now has good reason to conclude that many of the Chapters of the Constitution other than Ch III (the Judicature) have been gutted. They fly more as tattered flags of surrender over a razed Crusader castle than as integral components of a living (or, as Justice Scalia would have it,[16] *a "dead") constitutional text for the establishment and maintenance of a working federal body politic as a compact between the governments of a federation and its people. Unlike the Crusades, however, here the enemy is not the infidel laying siege from without, but from within the Constitution. The High Court emerged from the impregnable safety of Ch III to descend at will like a wolf on the constitutional fold. On the issues that count, the High Court has come to abandon its role as custodian of the Constitution and the Australian constitutional compact made when the people of the colonies united to form the Federation of Australia. Apart from Ch III issues, and following the solving of s 92's riddles in* Cole v Whitfield,[17] *the result of recent decisions is that little creative or supervisory constitutional work now is left for the High Court beyond incidental matters, such as the detail of s 92;*[18] *working*

10 See, in particular, the conferral of State jurisdiction on federal courts which was struck down in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 (Kirby J dissenting).

11 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 602-603 [193]-[194] (Kirby J dissenting).

12 (2006) 229 CLR 1.

13 (2004) 219 CLR 562.

14 See particularly, *Re Woolley; Ex parte Applicant M276/2003* (2004) 225 CLR 1.

15 (2005) 224 CLR 494.

16 For Scalia J's "originalist" views on constitutional interpretation, see, eg, A Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, New Jersey, 1997); A Scalia, "Originalism: The Lesser Evil" (1989) 57 *University of Cincinnati Law Review* 849.

17 (1988) 165 CLR 360.

18 The decision in *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 suggests that the High Court may review more rigorously whether legislation is "appropriate and adapted" to achieving a non-protectionist purpose.

through the consequences of its bizarre 6:1 decision in the Incorporation Case[19] *(that the corporations power did not include the power to regulate the incorporation of corporations); the particular content of the acquisitions power;[20] and fringe controversies, such as whether prisoners have the vote.[21]*

In a real sense, during Kirby J's years of office the High Court has emancipated itself from being a true constitutional court. The structures of the Constitution regulating the exercise of Commonwealth powers have been remodelled effectively to sanction a presidential style of government, which is unfettered by what previously were regarded as the constitutional forms, and now almost unsupervised by the High Court. Small wonder that the essentially conservative Justice Kirby (at least in judicial method) has become increasingly engaged in expressing his disagreement with plainly flawed constitutional doctrine.

Against this landscape it is possible to engage in an assessment of how posterity will view Kirby J's contribution as he leaves the court and moves into considering what posterity might hold for him, having done much to feed posterity during his tenure. The focus is on the three seminal decisions noted above in which he was in trenchant dissent: *Work Choices*, *Al-Kateb* and *Combet*. The majority in each was favourable to the Commonwealth in a way that led to Kirby J's description of the current period of the Gleeson court as "a constitutional era of laissez-faire".[22]

Nonetheless, in each matter the majority against Kirby J was not unanimous: he was joined in dissent by at least one of his colleagues in each decision, albeit for differing reasons. Hence, in this assessment of the capacity of a dissentient to hibernate and revive, the reasoning of Kirby J in each case can be compared with both the reasoning of the majority, and also with the reasoning of his fellow judges in dissent.

WORK CHOICES – SCOPE OF THE CORPORATIONS POWER

In *Work Choices*, the majority of the High Court held that the Commonwealth could regulate the employment conditions of corporations which came within s 51(xx) of the *Constitution* – namely, trading and financial corporations formed within the Commonwealth, and foreign corporations.

This conclusion, and the reasoning to support it, suggest that the Commonwealth can enact any law that begins "a s 51(xx) corporation

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19 *New South Wales v Commonwealth* (1990) 169 CLR 482.

20 Section 51(xxxi) of the *Constitution* confers legislative power with respect to "the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws".

21 *Roach v Electoral Commissioner* (2007) 233 CLR 162.

22 *Thomas v Mowbray* (2007) 233 CLR 307 at 443 [386].

shall …" or "a s 51(xx) corporation shall not …".[23] When combined with the existing broad definition of "trading and financial" corporations (which was not challenged in *Work Choices*),[24] the Commonwealth thereby is vested with a wide power, bordering on unlimited, to regulate activities and matters within Australia. Already the Commonwealth has enacted legislation dealing with the use of water in the Murray-Darling Basin, relying in part on the corporations power,[25] and, since the decision, there have emerged several political threats implicit in initiatives of the Commonwealth to have resort to the corporations power in order to exercise its will over the States – for example, in defamation and other contested issues with the States on the agenda papers of the Standing Committee of Attorneys-General.

Justice Kirby – reading s 51(xx) together with s 51(xxxv); upholding federal balance

In the *Work Choices case*, Justice Kirby's dissenting judgment turned on two propositions, as outlined below.

Constitution, s 51(xxxv) confers specific power to deal with industrial disputes

Justice Kirby's first proposition was that the *Constitution* contains a specific power addressed to industrial disputes – s 51(xxxv) – which confers power with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State". The majority's interpretation of s 51(xx) would mean that s 51(xxxv) would be largely unnecessary, except in the occasional situations where neither party to an industrial dispute was a constitutional corporation.[26] However, for a century it had been assumed by legislators and courts that any Commonwealth law dealing with industrial disputes had to be enacted under s 51(xxxv). Justice Kirby stated that any conclusion that rendered s 51(xxxv) optional should not be taken lightly.[27] That was particularly so when the Commonwealth had attempted several times, unsuccessfully, to expand its powers over industrial disputes by referendum.[28]

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23 *Work Choices* (2006) 229 CLR 1 at 114-115 [177]-[178], [181] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

24 (2006) 229 CLR 1 at 74 [55]. A corporation will be a "trading" or "financial" corporation if it engages in substantial trading or financial activities, respectively: *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190; *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282.

25 See *Water Act 2007* (Cth), ss 36(2), 37(2), 60(2), 61(2), 94(2)(a) and (b), 99(2)(a), 119(2), 216(2), (3)(a) and (4)(a).

26 *Work Choices* (2006) 229 CLR 1 at 186 [434].

27 (2006) 229 CLR 1 at 190 [445].

28 (2006) 229 CLR 1 at 200-201 [468].

According to Kirby J, the relationship between s 51(xxxv) and (xx) could be explained by the general principle that:

> the conferral of "an express power, subject to a safeguard, restriction or qualification, to legislate on a particular subject" … [is] inconsistent with "any construction of other powers [that] would mean they included the same subject … and so authorised the same kind of legislation but without the safeguard, restriction or qualification".[29]

Justice Kirby considered that s 51(xxxv) contained "safeguards, restrictions or qualifications" – namely, that the Commonwealth can only legislate with respect to *interstate* industrial disputes, and can only legislate for their prevention or settlement by way of conciliation or arbitration.[30] Accordingly, Kirby J held, the Commonwealth could not rely on s 51(xx) to enact a law which dealt with the prevention and settlement of industrial disputes.[31]

The majority rejected the application of this principle, holding that it only applies if the relevant head of power contains a "positive prohibition or restriction". According to the majority, s 51(xxxv) does not contain any such positive prohibition or restriction.[32]

Constitution establishes federal division of legislative power

Justice Kirby's second proposition was that the *Constitution* establishes a federal system of government, whereby the Commonwealth Government has limited powers. It is well settled that the *Constitution* establishes the Commonwealth and the States as governments separately organised.[33] In Kirby J's view, the majority's interpretation of s 51(xx) meant that the role of State Parliaments could be reduced "unilaterally by federal law to minor, or even trivial and constitutionally disappearing functions".[34] Such a role was not compatible with the federal structure, which is designed to protect liberty and restrain the over-concentration of power.[35]

The majority of five judges robustly (and, it is suggested, too quickly) rejected arguments based on maintaining the federal balance as lacking any content. They held that the fact that the States are to continue as separate bodies politic, each having legislative, executive and judicial

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29 (2006) 229 CLR 1 at 212 [503], quoting *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

30 (2006) 229 CLR 1 at 214 [510].

31 (2006) 229 CLR 1 at 221-222 [531].

32 (2006) 229 CLR 1 at 127-128 [219]-[222]. See also *Attorney-General (Vic) v Andrews* (2007) 230 CLR 369 at 412-413 [104], where Kirby J stated that the majority's interpretation of the phrase "other than State insurance" in s 51(xiv) of the Commonwealth *Constitution* "demonstrate[s] the constitutionally disruptive journey that began with the decision in *Work Choices*".

33 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 82 per Dixon J.

34 *Work Choices* (2006) 229 CLR 1 at 227 [550].

35 (2006) 229 CLR 1 at 245 [612].

functions, does not define what those functions are to be.[36] They also observed that the idea of a federal balance misleadingly suggested that the *Constitution* gave effect to a "static equilibrium".[37]

Justice Callinan – radical re-imagining of constitutional interpretation

The dissenting judgment of Callinan J in *Work Choices* is original and more wide-ranging than the dissent of Kirby J. Whereas Kirby J used orthodox constitutional reasoning to hold the Commonwealth legislation invalid, Callinan J essayed a radical re-imagining of constitutional interpretation in Australia.

Justice Callinan's judgment would have rejected, or at least severely limited, two established doctrines of Australian constitutional law. To this extent the judgment contains surprisingly radical reasoning by a judge who was widely regarded as conservative.

First, Callinan J doubted whether the heads of Commonwealth legislative power should be construed "with all the generality which the words used admit".[38] He stated that the *Engineers' Case* (which he described as "that monument to the demolition of State power")[39] "does not deserve the reverence which has been accorded to it".[40]

Second, Callinan J simply denied that, if a Commonwealth law has a sufficient connection with a head of power to be a law "with respect to" that head of power, it does not matter that it could also be described as a law with respect to another subject matter beyond power.[41] (This doctrine is often called the principle of "dual characterisation".[42]) According to his Honour, "the jurisprudence of this Court has not been enhanced by the application of the doctrine of indirect operation".[43]

Rather, Callinan J would have preferred an approach that required the validity of a Commonwealth law to be assessed by reference to its "true nature and substance".[44] Moreover, his Honour would interpret the Commonwealth's heads of legislative power to minimise overlap, and certainly to remove any duplication, between different heads of power.[45]

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36 (2006) 229 CLR 1 at 119-121 [194], [196].

37 (2006) 229 CLR 1 at 73-74 [54].

38 *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225-226 per the court; see also *Work Choices* (2006) 229 CLR 1 at 316 [765], n 1062.

39 *Work Choices* (2006) 229 CLR 1 at 315-316 [764].

40 (2006) 229 CLR 1 at 308 [747]; see generally 305-308 [740]-[747].

41 See, eg, *Herald and Weekly Times Ltd v Commonwealth* (1966) 115 CLR 418; *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1.

42 See, eg, Zines, n 6, pp 28-29.

43 *Work Choices* (2006) 229 CLR 1 at 270-271 [677].

44 (2006) 229 CLR 1 at 319-320 [772].

45 (2006) 229 CLR 1 at 319-320 [772], 333 [798].

Commentary on Work Choices

The main difference between Justice Kirby and the majority in *Work Choices* seems to be in the relative weight given to reasoning from consequences, as opposed to reasoning from existing authorities. On the one hand, Kirby J must surely be right in considering that the result in *Work Choices* expands Commonwealth power to such an extent that it seems that there are very few aspects of Australian life that the Commonwealth cannot regulate. On the other hand, however, there is also much to be said for the majority view that, on existing authorities and using orthodox interpretative principles, there was no obvious criterion for limiting the scope of the corporations power.

Justice Kirby is correct to say that it is highly relevant to consider the effect of different interpretations of the *Constitution* on the federal division of legislative power. It is true that a majority of the High Court rejected a similar argument about federal balance in the *Tasmanian Dam Case*[46] when considering the treaty implementation aspect of the external affairs power. However, in such a situation as that, there are practical limits on the scope of Commonwealth power – in that the Commonwealth must find another country that wishes to enter into a treaty – and the Commonwealth law must be reasonably capable of being considered appropriate and adapted to implementing the treaty.[47] There is no comparable practical limit on the corporations power. That said, the result in *Work Choices* may lead to reconsideration of the current expansive view of "trading" and "financial" corporations.[48] As already noted, that issue was not explored in *Work Choices* itself.

Plainly, a judge may legitimately use the results of different interpretations of the *Constitution* as a reason to favour one interpretation over another. Of course, the text of the *Constitution* has primacy; however, in most cases it will not be determinative. Sometimes the consequences of one interpretation are so severe that this factor may outweigh competing factors, such as the trend of existing authority. In *Work Choices*, the trend of existing authority may not have invited the view that s 51(xxxv) limited the scope of s 51(xx). The circumstances in which one head of power will, by implication, limit the scope of another head of power are rare. Moreover, earlier cases had held that the existence of s 51(xxxv) did not prevent the Commonwealth from regulating industrial relations under the defence power, the external

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46 *Commonwealth v Tasmania* (1983) 158 CLR 1.

47 See, eg, *Victoria v Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 487 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

48 L Zines, "The High Court and the Constitution in 2006" (2007) 30(1) *University of New South Wales Law Journal* 174 at 181.

affairs power, or the trade and commerce power.[49] On any view, the approach of Kirby J sought to maintain the federal balance in a manner that caused minimal disruption to existing authority, which is an approach that has much to commend it.

Justice Kirby's approach is also consistent with the result in the *Incorporation Case*.[50] There, the High Court held (with Deane J dissenting) that s 51(xx) of the *Constitution* does not support a law for the incorporation of trading and financial corporations because s 51(xx) applies to "formed" trading and financial corporations. It is true that the majority judgment does not refer expressly to the desirability of maintaining a balance in the federal division of powers.[51] However, the result certainly achieves that outcome, and the majority's reasoning is strikingly formalist and unlike the reasoning in most of the other constitutional cases of the period.[52] The fact that Kirby J worked within existing doctrines in *Work Choices* means that his judgment is more likely to be picked up by future judges than the more radical approach of Callinan J. If one were starting with a clean slate, the views of Callinan J would require serious consideration. But that is not the case. Certain key choices have been made, including the two interpretative principles set out earlier. It is not feasible for each individual High Court judge to revisit these choices.[53] In our assessment, the dissenting judgment of Callinan J offers an intriguing insight into an alternative approach that might have been taken to Australian constitutional interpretation (an approach much more similar to the Canadian "pith and substance" approach).[54]

49 See *Pidoto v Victoria* (1943) 68 CLR 87 (defence power); *Industrial Relations Act Case* (*Victoria v Commonwealth*) (1996) 187 CLR 416 (external affairs); and *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* (2003) 214 CLR 397 (trade and commerce). Justice Kirby distinguishes these authorities: (2006) 229 CLR 1 at 229-237 [560]-[583].

50 *New South Wales v Commonwealth* (1990) 169 CLR 482.

51 The majority judgment refers to *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, but states that that case "was determined … by reference to purely textual considerations, quite apart from the now discarded doctrine [ie, the reserved powers doctrine]": *Incorporation Case* (1990) 169 CLR 482 at 499.

52 Justice Deane, in dissent, stated that the contrary view "propounds an unacceptably narrow and technical construction" of s 51(xx): *Incorporation Case* (1990) 169 CLR 482 at 512. On the general approach of the so-called "Mason court", see, eg, L Zines, "Legalism, Realism and Judicial Rhetoric in Constitutional Law" (2002) 5 *Constitutional Law and Policy Review* 21 at 24-26.

53 *Queensland v Commonwealth* (*Second Territories Senators Case*) (1977) 139 CLR 585 at 599 per Gibbs J.

54 As to which, see, eg, *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 191-192 per Stephen J.

AL-KATEB v GODWIN – INDEFINITE DETENTION OF ALIENS

The second case for discussion is *Al-Kateb v Godwin* (*Al-Kateb*).[55] This case concerned the validity of immigration detention when there was no real prospect that a person would be removed from Australia.

Mr Al-Kateb was a stateless person who had come to Australia without a visa. Section 189 of the *Migration Act 1958* (*Migration Act*) provided that an officer was obliged to detain a person whom the officer reasonably suspected was an "unlawful non-citizen". Section 196(1) of that Act provided that an unlawful non-citizen detained under s 189 "must be kept in immigration detention until" he or she is removed from Australia, deported from Australia, or granted a visa. Section 198(1) and (6) provided that an officer must remove an unlawful non-citizen in certain circumstances "as soon as is reasonably practicable". There was no real likelihood or prospect that Mr Al-Kateb could be removed from Australia because it was common ground that no country could be found that would accept him.[56]

Justices McHugh, Hayne, Callinan and Heydon held (with Gleeson CJ, Gummow and Kirby JJ dissenting) that, as a matter of statutory construction, ss 196 and 198 of the *Migration Act* authorised the indefinite detention of people in the situation of Mr Al-Kateb, and that, in doing so, ss 196 and 198 were constitutionally valid.

Justice Kirby decided the case on the basis of statutory construction.[57] He did not rule directly on whether the purported indefinite detention would be constitutionally invalid, although he gave strong indications that it would be.[58] In this regard, Kirby J relied on three factors to support his interpretation of the *Migration Act*.

Interpreting legislation to accord with human rights

The first factor was that the *Migration Act* should be interpreted to accord with basic human rights.[59] As Gleeson CJ stated:[60]

> Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.

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55 (2004) 219 CLR 562.
56 (2004) 219 CLR 562 at 572 [2] per Gleeson CJ.
57 (2004) 219 CLR 562 at 615 [145], 630 [193].
58 (2004) 219 CLR 562 at 614-615 [144], [146].
59 (2004) 219 CLR 562 at 616-617 [150].
60 (2004) 219 CLR 562 at 577 [19].

Chief Justice Gleeson and Justice Gummow both observed that, if there was no reasonable prospect of a person being removed from Australia, then the purpose of detention was spent.[61] The gap in the legislative scheme – that is, what to do if a person could not be removed – could not be overcome by general words.[62] As Kirby J stated, the conclusion that ss 196 and 198 of the *Migration Act* did not authorise the indefinite detention of unlawful non-citizens "is available in the language of the Act and the assumptions disclosed by that language".[63]

The majority accepted that legislation should ordinarily be interpreted to accord with human rights, but held that the language of ss 196 and 198 of the *Migration Act* was intractable.[64] Justice Hayne held that the detention provisions in the *Migration Act* (ss 189 and 196) could not be rewritten to authorise detention only for so long as there is a real likelihood or prospect of the person being removed from Australia.[65] For one thing, there would be difficulties in determining what is a "real likelihood or prospect".[66] More fundamentally, Hayne J held that such an interpretation would amount to rewriting the legislation, which a court cannot validly do in the exercise of federal judicial power.[67]

Minority approach achieves preferable result through conventional principles

As with *Work Choices*, there is much to commend the approach of the minority. The result in *Al-Kateb* does not reflect well on Australia's constitutional arrangements. On one view it is a shameful result, exposing either the inadequacies of the High Court to reach a proper result, or the fact, as accepted by McHugh J, that the result is reason to call for a Bill of Rights.[68] The minority approach enabled the contrary result to be achieved through the application of conventional legal principles. For that reason it is an attractive alternative to a bare wringing of constitutional hands.

We note that since the decision the interpretative principle relied on by the minority has since been enshrined, and extended, by statute in Victoria and the Australian Capital Territory. Section 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) provides that "[s]o far as it is possible to do so consistently with their purpose, all

61 (2004) 219 CLR 562 at 578 [22] per Gleeson CJ, at 608 [122] per Gummow J.

62 (2004) 219 CLR 562 at 577-578 [21] per Gleeson CJ.

63 (2004) 219 CLR 562 at 630 [193].

64 (2004) 219 CLR 562 at 643 [241] per Hayne J (Heydon J agreeing); see also at 581 [33]-[35] per McHugh J, and at 659-660 [292], 661-662 [298] per Callinan J.

65 (2004) 219 CLR 562 at 641 [234], quoting the decision of the Full Court of the Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 at 88 [136].

66 (2004) 219 CLR 562 at 641 [235].

67 (2004) 219 CLR 562 at 641 [237].

68 (2004) 219 CLR 562 at 580-581 [31], 594-595 [73].

statutory provisions must be interpreted in a way that is compatible with human rights."[69]

These statutory provisions raise the question whether the result in *Al-Kateb* would have been any different had there been a statutory Bill of Rights at the Commonwealth level.[70] At the State and Territory level, there seems to be no question that this sort of interpretative obligation would permit exactly the sort of "transformation" of a statutory provision that Hayne J held was not possible in *Al-Kateb*. At the Commonwealth level, however, there is the added complication that a court exercising federal judicial power cannot exercise legislative power.[71] Of some concern is that Hayne J considered that the interpretative approach favoured by the minority in *Al-Kateb* could not be exercised consistently with Ch III of the Commonwealth *Constitution*. This conclusion, if followed, would not only affect the ability of the Commonwealth Parliament to enact a statutory bill of rights, but also the ability of federal and State courts to give effect to State or Territory Bills of Rights in the exercise of federal jurisdiction.[72]

Contrary to the views of Hayne J, it is not readily apparent that the interpretative approach favoured by the dissenting judges in *Al-Kateb* gives rise to any constitutional problem. The interpretative difficulties in *Al-Kateb* arose because the *Migration Act* assumed that it would be possible to remove an unlawful non-citizen from Australia. In this sense, both the majority and the minority were required to determine how the *Migration Act* should operate in a situation not contemplated by Parliament.

Constitutional limits on detention without court order

The second factor relied on by Kirby J was the constitutional limits on the ability of a Commonwealth law to require the detention of a person without an order of a court.

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69 See also *Human Rights Act 2004* (ACT) s 30.

70 See A Rolls, "Avoiding Tragedy: Would the Decision of the High Court in Al-Kateb have been any Different if Australia had a Bill of Rights like Victoria?" (2007) 18 *Public Law Review* 119.

71 A federal court can only exercise judicial powers and ancillary non-judicial powers: *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. Moreover, the Commonwealth can only confer judicial powers (and ancillary non-judicial powers) on State courts: *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144.

72 In a State court, the court may only determine matters that come within ss 75 and 76 of the Commonwealth *Constitution* in the exercise of federal jurisdiction – s 39 of the *Judiciary Act 1903* (Cth) excludes any concurrent State jurisdiction to determine those matters. If a State statutory Bill of Rights is repugnant to the exercise of federal judicial power (because it would require the exercise of legislative power), that provision will not be picked up by s 79 or 80 of the *Judiciary Act*.

Communist Party Case principle

Justice Gummow (here also in dissent) held that ss 196 and 198 of the *Migration Act* were invalid to the extent that they purported to authorise indefinite detention of aliens. According to his Honour, the impugned provisions left to the opinion of the executive government whether the purposes of deportation were still viable.[73] However, Gummow J stated, the principle in the *Communist Party Case*[74] meant that this question was not for the executive government alone to determine because it marked out the boundary of permissible detention without a court order.[75]

Justice Kirby agreed with Gummow J that indefinite detention "at the will of the Executive, and according to its opinions, actions and judgments, is alien to Australia's constitutional arrangements".[76] However, Kirby J did not go as far as holding ss 196 and 198 of the *Migration Act* invalid; instead, he stated that the majority's interpretation would lead to "serious constitutional difficulties".[77]

The relevance of the *Communist Party Case* to this case was rejected by McHugh J.[78] The *Migration Act* did not prevent courts from examining any condition precedent to the detention of unlawful non-citizens.[79] His Honour also rejected the statement by Kirby J that indefinite detention was alien to Australia's constitutional arrangements, referring to detention that had occurred in Australia during the First and Second World Wars.[80] Justice Kirby, for his part, considered that the cases upholding the validity of this detention were a source of national embarrassment, and were now of "doubtful authority".[81]

Purpose of detention and relevance of proportionality

More generally, the majority in *Al-Kateb* held that there was no constitutional difficulty with the *Migration Act* authorising the indefinite detention of unlawful non-citizens. The purpose of detaining unlawful non-citizens was to facilitate their removal from Australia. That purpose

73 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 613-614 [140].

74 (1951) 83 CLR 1. That case held that the connection with a head of legislative power cannot be made to depend on the opinion of the Parliament or the executive government alone, but must be determined by the courts.

75 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 613-614 [140].

76 (2004) 219 CLR 562 at 615 [146].

77 (2004) 219 CLR 562 at 630 [193].

78 (2004) 219 CLR 562 at 586 [50].

79 (2004) 219 CLR 562 at 585-586 [48].

80 (2004) 219 CLR 562 at 588-589 [55]-[61].

81 (2004) 219 CLR 562 at 620-621 [163], [165].

was non-punitive, and thus the *Migration Act* was valid, even if there was no reasonable prospect of that purpose being fulfilled.[82]

Justices McHugh and Hayne specifically rejected an argument (deriving from *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[83]) that detention of an unlawful non-citizen was only valid to the extent that it was reasonably necessary or appropriate and adapted to the removal of the person from Australia.[84] Justice Kirby did not respond specifically to this aspect of the majority's reasoning. However, it is apparent from other cases that he does not share the High Court's general antipathy to the use of proportionality.[85] In our opinion, there is much to be said for the view that the majority's approach in *Al-Kateb* allows the Commonwealth too much scope to enact laws authorising detention without a court order, and further that applying a test of proportionality would provide a useful check on that power.[86]

International law

The third factor was that Kirby J supported his conclusion by referring to the international law of human rights, and the rulings of courts in other countries in comparable situations, and much of his judgment is spent defending the relevance of this factor against criticism by other members of the court, particularly by Justice McHugh.

The main area of disagreement relates to Kirby J's referring to the international law of human rights. Justice McHugh held (consistently with prevailing authority) that there is no principle requiring the courts to interpret the Australian *Constitution* consistently with international law.[87] By contrast, there was no disagreement at the level of principle about Kirby J referring to decisions of overseas courts. Rather, McHugh

82 (2004) 219 CLR 562 at 584-585 [45]-[46] per McHugh J, at 646-647 [251], 651 [268] per Hayne J (Heydon J agreeing). In general terms, a law authorising the detention of a person without an order of a court is valid, provided the purpose of the detention is non-punitive: at 584 [44] per McHugh J, at 649-650 [263], 650-651 [267] per Hayne J (Heydon J agreeing); see also at 660 [294] per Callinan J.

83 (1992) 176 CLR 1 at 33 per Brennan, Deane and Dawson JJ (Mason CJ agreeing): detention of aliens without a court order "will be valid if the detention … is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for entry permit to be made and considered".

84 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 583 [42] per McHugh J, at 648 [256] per Hayne J.

85 See, eg, the comments of Kirby J in *Leask v Commonwealth* (1996) 187 CLR 579 at 634-637; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 266-267 [247]-[251]; see also *Levy v Victoria* (1997) 189 CLR 579 at 645-646.

86 See S McDonald, "Involuntary Detention and the Separation of Judicial Power" (2007) 35 *Federal Law Review* 25.

87 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 589-594 [62]-[72] per McHugh J; see also *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 383-386 [95]-[101] per Gummow and Hayne JJ; *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 224-225 [181] per Heydon J (dissenting) and the cases cited therein.

and Hayne JJ disagreed with Kirby J as to whether the particular overseas decisions provided helpful guidance on the issue before the court.[88]

Al-Kateb was not the first time that Kirby J had referred to international law in interpreting the *Constitution*. In *Newcrest Mining (WA) Ltd v Commonwealth*,[89] he stated that, to the extent that its text permits, the Australian *Constitution* "accommodates itself to international law, including in so far as that law expresses basic rights".[90] This was an aspect of the broader proposition that, where the *Constitution* is ambiguous, the court should prefer an interpretation that conforms to fundamental rights, rather than one that departs from those rights.[91] He repeated this argument in *Kartinyeri v Commonwealth*.[92]

In *Al-Kateb*, Kirby J refined this interpretative principle. He observed that the High Court has accepted that political, social or economic developments can shed new light on the meaning of the *Constitution* which was not apparent to an earlier generation.[93] The *Engineers' Case*[94] was famously described by Justice Windeyer as the result of just such an evolution.[95] Justice Kirby stated that surely international law – at least international law that reflects the widespread practice of nations – can be the "tangible manifestation" of these political, social or economic developments,[96] and observed, further, that infamous cases such as the American decision of *Dred Scott v Sandford*[97] illustrate that "it is often helpful for national judges to check their constitutional thinking against principles expressing the rules of a 'wider civilisation'".[98]

Although we might not agree with its broadest version, this refined principle on the use of international law has some compelling aspects. It may not *always* be possible to favour an interpretation of the Australian *Constitution* that favours the protection of rights; the history of some provisions of the *Constitution* (such as the special races power) makes it difficult to interpret those provisions to conform with modern ideas

88 (2004) 219 CLR 562 at 586-588 [51]-[54] per McHugh J, at 642-643 [240] per Hayne J; cf at 616 [149], 618-620 [156]-[161] per Kirby J.

89 (1997) 190 CLR 513.

90 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 657-658.

91 (1997) 190 CLR 513 at 658.

92 (1998) 195 CLR 337 at 417-418 [166].

93 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 623-624 [173].

94 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

95 *Victoria v Commonwealth* (*Pay-roll Tax Case*) (1971) 122 CLR 353 at 396-397, endorsed in *Work Choices* (2006) 229 CLR 1 at 73-74 [54] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

96 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 624 [173].

97 60 US 93 (1856).

98 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 629 [190].

about rights.[99] However, the more obviously acceptable refined version of the principle explained in *Al-Kateb* is that international law is one of several resources that a judge can use in interpreting the Commonwealth *Constitution*. Just as it is accepted that the decisions of foreign courts on domestic constitutional arrangements of other countries can provide assistance in appropriate cases, it is difficult to see why widely accepted norms of international law cannot also provide comparable assistance.

COMBET v COMMONWEALTH – SUPERVISING EXPENDITURE OF PUBLIC MONEYS

Combet v Commonwealth[100] (*Combet*) did not involve a direct challenge to the constitutional validity of Commonwealth legislation or executive action. However, Kirby J's dissenting judgment was informed by constitutional requirements, and is thus "constitutional" in that broader sense.

The issue in *Combet* was whether it was lawful for the Commonwealth executive government to spend money on advertisements promoting proposed industrial relations legislation (incidentally, the legislation considered in *Work Choices*). The lawfulness of this expenditure depended on whether it was authorised, as a matter of statutory construction, by the *Appropriation Act (No 1) 2005-2006* (Cth) (Appropriation Act).

Constitutional and statutory provisions

The statutory construction issue in *Combet* may only be understood in the context of Australian constitutional requirements relating to appropriations, which in turn derive from English constitutional history, reflected in the requirements of s 83 that moneys may only be drawn from the Commonwealth Treasury under appropriation made by law. The Commonwealth Parliament may appropriate money "for the purposes of the Commonwealth" (s 81). Historically, the lower house of Parliament has had particular control over appropriations legislation. At the Commonwealth level, the Senate may not amend proposed laws appropriating revenue or moneys for the "ordinary annual services of government" (s 53). For this reason, the Commonwealth enacts separate appropriations legislation dealing with the annual services of government (Appropriation Acts Nos 1 and 3) and dealing with other amounts (Appropriation Acts Nos 2 and 4).

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99 The history strongly suggests that s 51(xxvi) of the Commonwealth *Constitution* is not confined to laws for the benefit of a race (at least if one puts to one side the special position of Aboriginal people): see, eg, *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 186 per Gibbs CJ; *Commonwealth v Tasmania* (*Tasmanian Dam Case*) (1983) 158 CLR 1 at 242 per Brennan J, at 272-273 per Deane J; *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 363 [33] per Gaudron J, but see also 365-367 [39]-[44] in Gaudron J's judgment.

100 (2005) 224 CLR 494.

Since 1999-2000, Commonwealth appropriations legislation has appropriated money by reference to outcomes.[101] The plaintiffs in *Combet* did not challenge the constitutional validity of this new arrangement. The Appropriation Act distinguished between "departmental items" (appropriated by s 7) and "administered items" (appropriated by s 8). The Schedule to the Appropriation Act set out the various departmental outputs and administered expenses, where relevant, for each portfolio.

During argument, the Commonwealth's primary position was that expenditure on the advertising was supported by one of the outcomes in the departmental outputs of the Employment and Workplace Relations portfolio – "higher productivity, higher pay workplaces". This argument accepted that the departmental outputs specified in the Schedule to the Appropriation Act confined the purposes for which money appropriated for departmental items could be spent.

Chief Justice Gleeson accepted that argument. Justices Gummow, Hayne, Callinan and Heydon, in a joint judgment, took a broader approach. Their Honours held that money appropriated by s 7 of the Appropriation Act for departmental items could lawfully be spent on any matters that are "departmental" in nature. It was not necessary to relate that expenditure to any departmental outputs specified for that portfolio in the Schedule to that Act. Justices McHugh and Kirby dissented, in separate judgments, holding that the expenditure of money on the advertisements was not authorised by the Appropriation Act.

Justice Kirby and joint judgment contrasted

The major contrast between the joint judgment and Kirby J's judgment is in the relative weight given to the history and purpose of appropriations legislation in comparison to textual considerations.

The joint judgment begins with a close textual analysis of the Appropriation Act, and notes that while "[d]epartmental items [under s 7] are not tied to outcomes; administered items [under s 8] are".[102] Their Honours stated that this textual difference between ss 7 and 8 "provides the starting point for the reasoning which governs the outcome of this case".[103] By contrast, Kirby J (and also McHugh J and Gleeson CJ) emphasised the general role of appropriations legislation, and interpreted the Appropriation Act in accordance with the general desirability of Parliament supervising the expenditure of public money by the executive government. They rejected the majority approach on the basis that Parliament would not have intended to give the executive

101 *Combet v Commonwealth* (2005) 224 CLR 494 at 523 [6] per Gleeson CJ.
102 (2005) 224 CLR 494 at 565 [123].
103 (2005) 224 CLR 494 at 565 [124].

government such a broad discretion to determine how to spend public moneys.[104]

The joint judgment did acknowledge the constitutional context of appropriations legislation. In addition to the provisions referred to earlier, their Honours observed that s 56 of the Commonwealth *Constitution* requires that appropriations for the ordinary annual services of government begin with a message from the executive government.[105] The joint judgment also noted that s 97 required the expenditure of public money to be scrutinised by the Auditor-General.[106] In our view, neither of these points detracts from the point made by the other members of the court. Executive accountability requires that it be possible to determine whether expenditure of money does (or does not) fall within an appropriation. On the approach of the joint judgment, however, it would be rare indeed that expenditure by a department could not plausibly be described as a "departmental" expense. Both McHugh and Kirby JJ stated that there was a serious constitutional question whether this result was consistent with s 83 of the *Constitution*.[107]

In a separate point, Kirby J was highly critical of the joint judgment for reaching a construction of the Appropriation Act that was not argued by either party.[108] There was some disagreement as to whether the Commonwealth had in fact put in issue the proposition on which the joint judgment decided the case.[109] It may well have been desirable if the court had invited further written submissions once it became clear that a proposition which had received little attention in argument would be central to the case. As Kirby J himself acknowledged,[110] however, he has sometimes decided issues, including major constitutional issues, that were not argued by either party.[111] Moreover, Kirby J has stated that a court, unlike an arbitrator, "does not exist merely to reach a conclusion wanted by one side of the contest", but "has a higher duty to the law".[112] For that reason, he has accepted that a court may (indeed, should)

104 (2005) 224 CLR 494 at 528-529 [26] per Gleeson CJ, 552 [84] per McHugh J, 580 [169], 598 [236] per Kirby J.

105 (2005) 224 CLR 494 at 580 [143].

106 (2005) 224 CLR 494 at 569 [140]; see also 570-572 [144]-[147].

107 (2005) 224 CLR 494 at 553-554 [89] per McHugh J, 614-615 [289]-[290] per Kirby J.

108 (2005) 224 CLR 494 at 615-616 [293].

109 (2005) 224 CLR 494 at 565-566 [124]-[127] per Gummow, Hayne, Callinan and Heydon JJ; contra 549-551 [75]-[80] per McHugh J, 611-612 [281]-[282] per Kirby J.

110 (2005) 224 CLR 494 at 615-616 [293] (n 338).

111 See, eg, *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at 75-81 [118]-[137] (deciding that a breach of the *Constitution* could itself give rise to an action for damages); *Chief Executive Officer of Customs v El Hajje* (2005) 224 CLR 159 at 188-189 [79]-[82] (expressing doubt whether averment provisions in customs legislation are consistent with the constitutional separation of judicial power).

112 *Australian Communication Exchange Ltd v Deputy Commissioner of Taxation* (2003) 201 ALR 271 at 283 [51]; see also at 274 [7] per Gleeson CJ; cf at 281 [41] per McHugh, Gummow, Callinan and Heydon JJ.

determine for itself the meaning of a statute, and is not compelled to choose between competing interpretations advanced by the parties. Accordingly, although an opportunity for further submissions may have been desirable in *Combet*, the court was not compelled to provide such an opportunity.

Justice Kirby and Chief Justice Gleeson contrasted

In holding that it was necessary to relate the proposed expenditure on advertising to departmental outcomes, the disagreement between the Chief Justice and Kirby J was therefore on whether this expenditure was supported by the outcome, "higher productivity, higher pay workplaces".

The Chief Justice placed great weight on the fact that appropriations are expressed in broad language, preferably in political, rather than legal, terms. For the courts to be closely involved in scrutinising the validity of expenditure would immerse the courts in that political debate.[113] Accordingly, his Honour held, it was appropriate that the outcomes specified in appropriations legislation should be "applied with the breadth and generality they bear".[114] Specifically, the meaning of these general phrases should not be limited by statements in budgetary papers.[115] The relevant constraint was that outcomes could not be so general or so abstract as to be without meaning.[116]

At the specific level, the Chief Justice noted that each of the outcomes listed for a department must authorise expenditure on developing new policies. Specifically, the outcome, "higher productivity, higher pay workplaces", must include expenditure on developing new policies that are directed toward achieving that result.[117] The Chief Justice further held that persuading the public of the merits of government policy "may be as important to successful formulation and implementation of policy as the drafting of advice and legislation".[118]

Justice Kirby disagreed with the Chief Justice, both on the general approach and on the specific application. He stated that it "puts the bar too low" to ask whether an outcome is so general as to be meaningless.[119] He found that it was a clear part of the judicial function to determine whether expenditure was authorised by an appropriation.[120] As part of that determination, he would have had regard to budgetary papers to

113 *Combet v Commonwealth* (2005) 224 CLR 494 at 525-526 [12].
114 (2005) 224 CLR 494 at 529-530 [27].
115 (2005) 224 CLR 494 at 528 [24].
116 (2005) 224 CLR 494 at 529-530 [27].
117 (2005) 224 CLR 494 at 530 [28].
118 (2005) 224 CLR 494 at 530-531 [29].
119 (2005) 224 CLR 494 at 609 [271].
120 (2005) 224 CLR 494 at 609 [271].

give content to the general outcomes in the Appropriation Act.[121] It is here that the audit function referred to by the joint judgment may be significant – the fact that there is an alternative method of scrutinising expenditure of public money may be reason for the courts not to take too strict an approach to the construction of appropriations legislation.

Again, there is much force in Kirby J's view that expenditure of public money to promote as yet unenacted legislation should require some fairly clear authority from the Parliament.[122] The public interest in such advertising (as opposed to a partisan political interest) is not self-evident. In this sense, advertisements of the sort considered in *Combet* are different from advertisements either explaining the effect of existing legislation, or calling for public participation in an inquiry.[123] Chief Justice Gleeson responded that this is merely a political objection to the use of public money.[124] Unfortunately, the conclusion in *Combet* that this sort of expenditure is lawful may be used to validate the expenditure, and thus blunt the force of such political criticism.

CONCLUSION – JUSTICE KIRBY'S DISTINCTIVE APPROACH

Each of these three recent constitutional dissenting judgments by Kirby J is mature, ready for future vindication. To adapt Groucho Marx, posterity has not yet done anything for Kirby J, but he has made his contribution, with residual dormant, if also still vital, signs for consideration, and even inspiration, by whomever constitutes our constitutional posterity. Each dissent employs orthodox judicial techniques to reach a conclusion contrary to a majority of his colleagues. When the majority in *Work Choices* described his approach to constitutional interpretation as heresy, Kirby J rejoined:[125]

> To have heresy alleged by those who participated in the joint reasons of this Court in *Combet* is an accusation to be borne with an easy heart.

So what is the core reason for the high rate of disagreement between Kirby J and his colleagues? First, it is striking how transparent Kirby J has been about considering the consequences of his reasoning. In each of the three cases here considered, he began with an idea of the sort of legal system that Australia has, and sought to interpret the relevant constitutional or statutory provisions in a way that best promoted that idea. In *Work Choices*, that idea was a federal division of powers; in *Al-Kateb*, the idea was the protection of personal liberty; and in *Combet*, the parliamentary supervision of expenditure of public money. There is clear authority supporting this sort of approach in statutory

121 (2005) 224 CLR 494 at 608-609 [267]-[270].

122 (2005) 224 CLR 494 at 608 [266].

123 (2005) 224 CLR 494 at 590 [207].

124 (2005) 224 CLR 494 at 530-531 [29].

125 *Work Choices* (2006) 229 CLR 1 at 203 [475].

interpretation cases, which treats context as not merely something that confirms textual arguments, but as a primary consideration to be ranked alongside the text.[126] However, no prior Justice of the High Court has been so plain speaking about what underlies their treatment of orthodox legal resources, such as text, case law and history.

Second, this frank assessment of consequences is allied with a less deferential approach to precedent than some of Kirby J's colleagues. Justice Kirby, like Justice Deane, would not require a person to seek the High Court's permission to challenge the correctness of an earlier decision.[127] Neither does he seem to place much weight on prudential considerations (such as inconvenience of overruling earlier decisions) in deciding whether to depart from an earlier decision.[128] These two points may well be connected: Kirby J's primary concern is whether the law (including constitutional interpretation) achieves just outcomes, and stability in the law is a secondary consideration. This is consistent with Kirby J's extensive background in law reform.

One may give less weight to other principles of constitutional interpretation invoked by Kirby J, such as his preference for a "progressive" interpretation over an "originalist" interpretation,[129] and his use of international law. Indeed, his broader discussion before *Al-Kateb* of the use of international law in constitutional interpretation possibly goes too far. The view has already been expressed here that the apparent sharp difference in principle between "originalist" and "progressive" interpretations of the *Constitution* does not often require any difference in result.[130]

The persuasive strength of Kirby J's judgments is that they are written to be publicly accessible by placing constitutional issues in a broader context and, to some extent, in the public arena. Justice Kirby has enjoyed what appears to be declining success in persuading his colleagues of his point of view, and has, because of their disdain of his approaches, increasingly come to address himself to the next generation. To this extent, Kirby J has been explicit, as no previous judge of the High Court has been, in invoking posterity to assess his contribution to the exposition of the Australian *Constitution*. His applications for vindication to following generations of both High Court judges and the people of

126 See, eg, *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.

127 See, eg, *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at 80 [134] (n 208), and the cases cited therein.

128 See, eg, *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 381-383 [151]-[154]. As an aside, it is interesting that his Honour gives weight to consequences in determining what the correct approach should be, but less so in determining whether it is appropriate to depart from earlier decisions.

129 See, eg, *Grain Pool (WA) v Commonwealth* (2000) 202 CLR 479 at 522-530 [110]-[129].

130 G Hill, "'Originalist' vs 'Progressive' Interpretations of the Constitution – Does it Matter?" (2000) 11 *Public Law Review* 159. The Chief Justice has observed how difficult it is to determine what was meant by the Founders of the *Constitution*: M Gleeson, "The Constitutional Decisions of the Founding Fathers" (2007) 81 *Australian Law Journal* 791.

Australia is strongly argued. On many issues, including those discussed here, his views have a strong intellectual and constitutional claim to be preferred, even under the heavy imprint arising from the inertia of constitutional precedent.

It was once the case that no legal writings were accepted as authoritative until the author was dead. On an assessment of Kirby J's place in posterity, neither of us yet qualifies to be authoritative. How good our attempts at assessment are must also be left for posterity. However, co-author Griffith (again, speaking for himself and not for co-author Hill) predicts Kirby J's claim for acceptance by posterity in the following terms:

In the three issues here analysed, one signpost on the road pointing to a revival of Kirby J's dissenting constitutional positions is the inherent implausibility and repugnance of the majority positions to the received structural underpinnings of the Commonwealth Constitution, based as it is on a federal system with specific allocations of powers between the Commonwealth and the States and with an effective appropriations power vested in the Commonwealth Parliament. Just as Sir Edward Coke rebuked James I almost 400 years ago in the Case of Proclamations[131] *for claiming uncontrolled prerogative powers to the exclusion of the Parliament, so, too, the people of Australia may rebuke the High Court's current majorities for establishing a supreme Federal Executive with effective supremacy over all the Parliament, the States and the people. The new doctrinal positions of the majority do not pass the test of credibility or common sense. Much as the recent rise of the neoconservative positions in American politics, some of the constitutional positions recently taken by the High Court appear to have turned their back on history. Both history and the explicit terms of the* Constitution *should deny that the allocation of powers in the federal system may be abrogated by the mere form of acting under the umbrella of the corporations power, or that one line of appropriations may destroy the power of the Parliament to control the expenditure by the Executive.*

More shocking to the conscience of the people of Australia is the majority's acceptance that under our Constitution *there may be administrative detention for life effected by unreviewable administrative fiat. Effectively, this is to vindicate the position of James I, defeated by the brave advice of Coke, to repeal the Act of 1640 for the abolition of the Star Chamber. This cannot be right. The conclusion of the majority on this issue is shameful. Such a result must be inherently proscribed by our Constitution. Chief Justice Gleeson, Justice Gummow and Justice Kirby have explained with clarity why this must be so. Until it comes to be rejected, the contrary result vindicated by the majority endures as a stain upon our public life. On this issue, the rule of law suffices to predict a short shelf life before it comes to be discarded.*

131 (1611) 12 Co Rep 74; 77 ER 1352.

Chapter 7

CONTRACT

John Gava*

> *Because the common law develops from hundreds of judicial decisions, sometimes over long periods of time, it is often the case that the conceptual framework that affords structure to a group of related legal principles is at first imperfect and unclear. It falls to judges and scholars to attempt to derive rules that are coherent, practical, just, and (so far as it is possible) conformable with past decisions.*[1]

INTRODUCTION

This chapter will examine the contracts jurisprudence of Justice Michael Kirby. In an earlier study I examined Justice Kirby's contract decisions made when he was President of the New South Wales Court of Appeal from 1984 to 1996.[2] This chapter will concentrate on Justice Kirby's contract decisions from his elevation to the High Court in 1996 to the present[3] but it will, of course, take advantage of my earlier work to try to present a coherent picture of his contracts jurisprudence. While Justice Kirby is a prolific extrajudicial writer, the concern of this chapter is to examine his judging in the area of contract and what his decisions tell us about the assumptions, theoretical and doctrinal, that may underlie his decision-making.

In the earlier study I argued that Justice Kirby was a careful and orthodox judge who was happy to work within the traditions and existing principles in the law of contract. His decision-making showed deference to authority and an appreciation of the place of the Court

* I would like to thank Paul Babie, Susan Bartie, John Keeler, Jeannie Paterson and Andrew Stewart for their helpful comments and suggestions.

1 *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at 152 [92] per Kirby J.

2 J Gava, "The Perils of Judicial Activism: The Contracts Jurisprudence of Justice Michael Kirby" (1999) 15 *Journal of Contract Law* 156.

3 For the purposes of this study, the present is 31 December 2007.

of Appeal in the Australian judicial hierarchy while, at the same time, indicating that he was not afraid to identify authorities that he believed to be wrong or deficient. He was also careful to be transparent in his reasoning when he felt that the law was uncertain or when the facts were unclear or susceptible of more than one interpretation. Nonetheless, at least one of Kirby J's decisions could be labelled a failure of judicial craft, especially when compared to the reasoning provided by the other judges in the case.[4]

In his decisions in the New South Wales Court of Appeal Kirby P was at pains to emphasise party autonomy in contract law, especially where it did not appear that one party was seriously disadvantaged. In particular, he argued that competent business people should not have their bargains evaluated by judges. Yet in a number of decisions involving sureties Kirby P did just that, openly preferring his view of commercially appropriate behaviour to the views of competent business people. I argued that his fidelity to two different conceptions of the role of contract law had led to such inconsistent reasoning in these cases.

This chapter will examine Kirby J's judicial reasoning with particular emphasis on his attitude to judicial deference and passivity, his judicial style and the quality of his judicial craft. This will be followed by a consideration of how his decisions fit within what is perhaps the most important debate in contract law today, that between those who favour a formalist, rule-based approach to contract interpretation and doctrinal development and those who favour an anti-formalist, contextualist approach to contract interpretation and the doctrinal development of the common law of contract. Finally, several cases will be examined which raise general issues about the nature of contract law or deal with significant doctrinal questions and in which Kirby J had something significant to say.

KIRBY AS A JUDGE

Judicial deference

Justice Kirby has emphasised that the duty of courts, especially lower and intermediate appellate courts, is to follow precedent. He also advanced a policy of judicial passivity, confining responsibility for change in the law to the legislature and not the courts. This raises the question as to how his elevation to the High Court affected these attitudes. Some change might be expected, due to the fact that the High Court is not bound by its previous decisions (or those of any other court). The following cases highlight these aspects of Kirby J's judgments.

4 *Wight v Foran* (1987) 11 NSWLR 470. See my discussion of this case in Gava, n 2 at 163-164.

In *FAI General Insurance v Australian Hospital Care Pty Ltd*[5] the High Court was asked to consider a contract of professional indemnity which included a condition that if, during the period of insurance, the insured were to become aware of anything which would give rise to a claim of insurance because of negligence and the insured gave notice of this to the insurer, any claim arising from that negligence was deemed to have been made during the period of cover. The insured became aware of potential negligence action against it and failed to notify the insurer. When a claim for negligence was made against the insured after the expiry of the cover, the issue before the High Court was whether the failure by the insured to give immediate notice to the insurer was an omission within the meaning of s 54(1) and (6) of the *Insurance Contracts Act 1984* (Cth). If it were such an omission the operation of the Act meant that the insurer could not refuse to pay the claim because of that failure.

In a strong dissent, Gleeson CJ argued that to view the failure of the insured to notify the insurer as an omission for the purposes of s 54 (which would have the effect of protecting the insured) was to unjustly and unnecessarily displace the agreement between two commercial parties.[6] Justice Kirby acknowledged the force of this criticism but, in a lengthy and careful judgment, explained why he could not agree:[7]

> There is merit in the argument that, as far as its words permit, in the case of claims made type policies, s 54 of the Act should be construed to afford the relief contemplated in a way consistent with the maintenance of this type of insurance and not in a way that would be destructive of its availability. However, the duty of an Australian court is, relevantly, to the law as expressed in the Act. The question is, therefore, how s 54 of the Act is to apply to "omissions" said to be applicable to a claims made type policy. Unless the meaning of the section, derived from its language, permits or requires a court to confine relief in such cases, any dissatisfaction with the operation of the section in respect of this class of insurance is a matter for legislative amendment. The judicial "struggle" with the requirements of the provision, as such requirements are found to be inherent in its language and apparent purpose, can only go so far.
>
> The history of s 54 of the Act reinforces the impression, given by the language of the section, that it is intended to have a broad remedial application.

In *Peters (WA) Ltd v Petersville Ltd*[8] the High Court was faced with a dispute over whether a contractual restraint entered into in favour of the applicant was unenforceable as being in restraint of trade. The court had to decide whether the doctrine of restraint of trade in Australian common law gave effect to a proviso contained in statements made by

5 (2001) 204 CLR 641.

6 (2001) 204 CLR 641 at 659-660 [40]-[46] per Gleeson CJ.

7 (2001) 204 CLR 641 at 671 [73]-[74] per Kirby J (footnote omitted).

8 (2001) 205 CLR 126.

Lord Pearce in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd*[9] to the effect that agreements in commercial contracts directed towards the absorption rather than the sterilisation of the parties' services did not amount to a restraint of trade.

In a joint judgment (Gleeson CJ, Gummow, Kirby and Hayne JJ), it was decided that Lord Pearce's "test" should not be accepted in Australian common law. The judges acknowledged that in Australia the common law was free to develop independently of the *Trade Practices Act 1974* (Cth), provided that the common law remained capable of operating concurrently with the Act. Nevertheless, the judges emphasised that the common law should be developed with that statute in mind.[10] In particular, they recognised that:

> [T]he *Trade Practices Act* provides a substantial statutory competition law regime to which, for example, in s 51, particular exceptions are made. The Parliament regularly adjusts this legislation in the light of what are perceived to be the changing needs of commerce and the public and the fundamental importance of competition for the economy … The formulation by Lord Pearce in *Esso* involves qualifications and indeterminacies best left to legislative provision by way of exception to the provisions of Pt IV of the *Trade Practices Act*, rather than judicial intervention of dubious justification and persuasiveness.[11]

This sits comfortably with Kirby J's oft-repeated call for judicial deference in areas best left to legislative oversight.

Elevation to the High Court has given Kirby J the freedom to examine and clarify basic contract law doctrines. *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*[12] presented him with the opportunity to re-examine the nature and description of contract terms and to postulate, in dissent, a taxonomy[13] which differed significantly from the majority's decision[14] to accept the tripartite classification of contractual terms articulated in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*.[15] *Hongkong Fir* had replaced the classical division of contractual terms as being either conditions, breach of which entitled the innocent party to terminate the contract, as well as claim damages; or warranties, which were less important terms that allowed the innocent party only to claim damages for breach. Instead, the court in *Hongkong Fir* had added a further type of contractual term, the so-called "innominate" term, which, depending on the operation of the particular contract in question,

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9 [1968] AC 269 at 328-329 per Lord Pearce.

10 *Peters (WA) v Petersville Ltd* (2001) 205 CLR 126 at 141 [32] per Gleeson CJ, Gummow, Kirby and Hayne JJ.

11 (2001) 205 CLR 126 at 143 [38] per Gleeson CJ, Gummow, Kirby and Hayne JJ.

12 (2007) 233 CLR 115. This case is discussed in greater detail in text associated with nn 112-124.

13 (2007) 233 CLR 115 at 152-160 [89]-[116] per Kirby J.

14 (2007) 233 CLR 115 at 139 [51] per Gleeson CJ, Gummow, Heydon and Crennan JJ.

15 [1962] 2 QB 26.

would entitle the innocent party either to terminate or to claim damages. The terms were described as innominate because their significance, and therefore the rights of the innocent party after breach, would not be apparent until a breach had occurred. By way of contrast, conditions and warranties were terms which could be immediately characterised on the signing of a contract.

In *Tanwar Enterprises Pty Ltd v Cauchi*[16] Kirby J saw the case as requiring the court to clarify the law dealing with time stipulations in contracts for the sale of land. This led him to examine in detail the course of legal authority and to analyse the basal assumptions about the role of contract law in commercial transacting in order to better determine the proper development of the law in this area.[17] *Garcia v National Australia Bank*[18] presented Kirby J with an "authority", *Yerkey v Jones*,[19] which, after exhaustive analysis, he found neither authoritative nor appropriate for contemporary Australia.[20]

Judicial style

One of the most distinctive aspects of Kirby J's decisions has been his judicial style:

> He is, usually, at pains to be even-handed in his description of the facts and is transparent about the state of the authorities and about his application of those authorities to the facts. This manifests itself in his habit of clearly setting out both sides of an argument and the pros and cons of competing understandings of law, fact, or the application of law to fact. It is also shown where he candidly admits that the law is uncertain in an area or that a judge has an unavoidable choice in finding the law or applying the facts to the law.[21]

It was not that Kirby J was more impartial than other judges, but that he was unusually transparent in listing the factors that led him to make the choices that he made in his decisions and that, to an unusual degree, he was willing to say that the law was uncertain or that he was faced with an open-ended choice. Justice Kirby's emphasis on being transparent about the choices provided by the law and the facts has continued since his elevation to the High Court and is readily apparent in his contracts decisions in that court.

Fitzgerald v FJ Leonhardt Pty Ltd[22] is a fine example of this style of judgment. In that case a driller sued for the price of drilling four bores. The landowner had inadvertently failed to obtain permits under the

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16 (2003) 217 CLR 315. This case is discussed in greater detail in text associated with nn 28-29.

17 (2003) 217 CLR 315 at 341-350 [81]-[105] per Kirby J.

18 (1998) 194 CLR 395. This case is discussed in greater detail in text associated with nn 39-50.

19 (1939) 63 CLR 649.

20 *Garcia v National Australia Bank* (1998) 194 CLR 395 at 417-429 [56]-[68] per Kirby J.

21 Gava, n 2 at 160.

22 (1997) 189 CLR 215.

Water Act 1992 (NT) and the construction of bores without a permit was an offence against the Act. The landowner resisted payment, arguing that, by seeking to recover from him, the driller was seeking to further an illegal purpose. In an exemplary judgment, Kirby J carefully outlined the facts, the purpose of the *Water Act*, the state of authorities dealing with illegality in contract and the inescapable choices facing judges when dealing with public policy considerations in answering illegality questions in contract.[23] Although he agreed with the rest of the court, this was not, in his eyes, a "plain case"[24] and, even though he found against the appellant landowner, he did acknowledge that the "arguments of the appellant are not without some force".[25]

Capper v Thorpe[26] similarly displays a careful and transparent style of judging. The case involved a dispute over service (the legal term for delivery) of a notice to terminate a contract for the sale of land. In a joint judgment (Gaudron, McHugh, Kirby, Hayne and Callinan JJ), the court handed down a clear, restrained judgment analysing the common law on service, the relationship between this and two relevant Western Australian statutes (the *Sale of Land Act 1970* (WA) and the *Interpretation Act 1984* (WA)), and the meaning of the terms of the contract at the heart of the dispute which dealt with the issue of if and when service had been done.[27]

In *Tanwar Enterprises v Cauchi*[28] a contract for the sale of land stipulated 25 June 2001 as the day for completion of the sale. The purchaser had arranged finance from Singapore but, because of an unforeseen delay, the funds were not made available to it until the next day, 26 June 2002. When the purchaser tried to proceed with settlement it was presented with notices of termination made in accordance with the terms of the contract between the parties. The High Court was asked to consider whether a vendor had acted in an unconscientious fashion. Justice Kirby provided a detailed examination and analysis of the various arguments for and against equitable relief in the circumstances of the case.[29]

As with all of us, however, Kirby J does not always practise what he preaches. In *Royal Botanic Gardens and Domain Trust v South Sydney City Council*[30] he seemed strangely blind to the possibility of interpretations other than his own of the facts and the law. *Royal Botanic* involved a dispute between two governmental entities over the terms of a long-term lease (entered into in 1976 for a term of 50 years) for a car park in Sydney's Domain. In particular, the court was asked to

23 (1997) 189 CLR 215 at 231-252.
24 (1997) 189 CLR 215 at 221 per Dawson and Toohey JJ, at 231 per McHugh and Gummow JJ.
25 (1997) 189 CLR 215 at 251 per Kirby J.
26 (1998) 194 CLR 342.
27 (1998) 194 CLR 342 at 346-354 [1]-[31] per Gaudron, McHugh, Kirby, Hayne and Callinan JJ.
28 (2003) 217 CLR 315.
29 (2003) 217 CLR 315 at 342-343 [84]-[85] per Kirby J.
30 (2002) 186 ALR 289.

determine whether a contractual term listing various factors which the trustee "may have regard to"[31] in determining the rent was exclusive, that is, whether the trustee could have regard to factors other than those listed in the term. The answer to this was significant because the trust had taken what was, in effect, a commercial decision that the rent which had been not much more than nominal in 1958 was now to be raised to many hundreds of thousands of dollars a year. The majority (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ, Callinan agreeing in a separate judgment) found that the contested term contained the totality of the matters to be taken into account in fixing the successive rent determinations that were envisaged under the lease.[32] This meant that the capacity of the trust to increase the rent to commercial levels was severely hampered.

Justice Kirby disagreed and his disagreement was not couched in terms that stood well when compared to his own description in an earlier case of how disagreement should be articulated:

> Disagreement should be couched in terms that allow for the possibility – faint as it may seem – that others may be right.[33]

In *Royal Botanic* Kirby J described the result following from the construction of the contract favoured by the majority as "absurd" and one which was offensive to common sense. He added the following to make his view crystal clear: "Sometimes appellate reconsideration of the facts of a case, or the constraints of binding authority, produce unexpected and even bizarre results."[34]

Judicial craft

Craft was another aspect of Kirby J's contract decisions considered in my earlier analysis of his judging:

> How does Justice Kirby shape up as a judge when, eschewing the jurisprudential complexities of a question of this kind, one simply assesses him according to the standard of an average Australian judge?[35]

Of the 39 cases examined for that study and with the surety cases[36] apart (and there were special considerations which applied to those

31 (2002) 186 ALR 289 at 291 [4]-[5] where the term is reproduced in full.

32 (2002) 186 ALR 289 at 300-301 [36]-[37] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

33 *Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (1993) 31 NSWLR 91 at 94 per Kirby P.

34 *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 186 ALR 289 at 303 [49] per Kirby J.

35 Gava, n 2 at 163.

36 *Tricontinental Corp Ltd v HDFI Ltd* (1990) 21 NSWLR 689; *Corumo Holdings Pty Ltd v C Itoh Ltd* (1991) 24 NSWLR 370; and *Bond v Hongkong Bank of Australia Ltd* (1991) 25 NSWLR 286.

cases), it was only *Wight v Foran*,[37] a case involving complex issues of repudiation and anticipatory breach, that could be seen as an example of poor judging. In that case Kirby J could be seen as careless in his analysis of the law applicable to the case and cavalier in his claim that injustice was caused by an alleged anomaly in the law, which he failed to explain in any detail. His treatment of the conceptual basis of anticipatory breach and the authorities that underpin it was so unconvincing that it seemed that he was more concerned with dealing with what he saw as an injustice, rather than with dealing with the legal issues that faced him in the appeal.[38]

While no contracts decision made by Kirby J while sitting on the High Court should be called "poor", there are two decisions which, from a craft perspective, do raise questions. In particular, both cases can be seen as examples of agenda-judging, which can be defined as 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.

As mentioned above, *Garcia v National Australia Bank*[39] involved questions of unconscionability and, in particular, whether the 1939 decision of *Yerkey v Jones*[40] was still good law in Australia. A majority (Gaudron, McHugh, Gummow and Hayne JJ,[41] and Callinan J, agreeing in a separate judgment)[42] held that it was good law and applied it to the facts at hand. While Kirby J concurred in the result, he argued that *Yerkey v Jones* was not good law and that, in any event, the rationale behind it was obsolete. Justice Kirby's analysis of the precedential status of *Yerkey v Jones* is plausible enough[43] but his treatment of the question of the appropriateness of it in 1998 is less convincing.

In his judgment, Kirby J devoted a number of pages to a discussion of several reasons why Dixon J's formulation in *Yerkey v Jones* concerning the special position of married women as sureties for their husbands was no longer appropriate. He argued that Dixon J's formulation was an historical anachronism; that it was based on discriminatory stereotypes; that marriage was not a suspect category which automatically called for examination; that there were economic arguments against the formulation; and that it was unacceptably discriminatory because it concentrated only on women.[44] He concluded by stating that *Yerkey* was "completely unacceptable as a principle of contemporary Australian

37 (1987) 11 NSWLR 470.

38 Gava, n 2 at 163-164. Interested readers might wish to compare Kirby's judgment with that of McHugh J: (1987) 11 NSWLR 470 at 478-483 per Kirby P, at 483-491 per McHugh J.

39 (1998) 194 CLR 395.

40 (1939) 63 CLR 649.

41 (1998) 194 CLR 395 at 403 [18] per Gaudron, McHugh, Gummow and Hayne JJ.

42 (1998) 194 CLR 395 at 440 [107] per Callinan J.

43 See, eg, A Phang and H Tjio, "From Mythical Equities to Substantive Doctrines – Yerkey in the Shadow of Notice and Unconscionability" (1999) 14 *Journal of Contract Law* 72 at 87.

44 (1998) 194 CLR 395 at 421-429 [65]-[68] per Kirby J.

law".[45] He favoured a reformulation of the principle in the House of Lords decision of *Barclays Bank plc v O'Brien*[46] so that it would be expressed in non-discriminatory terms.[47] Yet, he was also happy to accept that while:

> society's recognition of the equality of the sexes has led to a rejection of the concept that the wife is subservient to the husband in the management of the family's finances … The number of recent cases in this field shows that in practice many wives are still subjected to, and yield to, undue influence by their husbands.[48]

Justice Kirby recognised that this might be seen, at first glance, as raising questions about his criticism of *Yerkey v Jones*:

> The wife submitted that the principle in *O'Brien* was simply an extension of the *Yerkey* principle. In terms of operation, although not of history, that may be so. However that may be, it is an extension freed from most, if not all, of the disadvantages which attend the 1939 language of Dixon J in *Yerkey*. It is not based on out-dated stereotypes. Nor does it perpetuate a paternalistic approach to women in relation to their financial dealings. It does, however, recognise the fact that in a substantial proportion of marriages, or analogous relationships it is still the husband (or the principal male partner) who has the business experience and the wife (or subordinate partner) who is willing to follow his advice without bringing a truly independent mind and will to bear on such financial decisions.[49]

Thus, by the end of his judgment Kirby J was happy to accept that in a case where a wife was found to follow the advice of her husband without bringing a truly independent mind and will to bear on her decision, this would come within a formulation that encapsulated the *Yerkey v Jones* principle.

It is difficult to see this judgment as an example of anything other than agenda-judging. Is it unfair to suggest that Kirby J saw this case as a vehicle for his views about sexist language and sex and familial stereotyping when none of this was directly relevant or important to the case? After all, as Callinan J indicated, there was no reason in the case before the court to consider whether or not other couples, including, presumably, gay and familial ones, should come within a broader principle. And, as he suggested, wouldn't such matters be better dealt with by the legislature?[50]

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45 (1998) 194 CLR 395 at 428 [66] per Kirby J.

46 [1994] 1 AC 180.

47 (1998) 194 CLR 395 at 430-431 [73]-[74] per Kirby J.

48 (1998) 194 CLR 395 at 430 [71] per Kirby J, quoting *Barclays Bank plc v O'Brien* [1994] 1 AC 180 at 188.

49 (1998) 194 CLR 395 at 433 [78] per Kirby J.

50 (1998) 194 CLR 395 at 442-443 [109]-[113] per Callinan J.

The second example of what I have called agenda judging is Kirby J's judgment in *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd*.[51] Some lessees of Berbatis Holdings brought legal proceedings against the company for alleged overpayments of charges arising from their leases. Before the matter was determined, one of the lessees (the Roberts) entered into a contract for the sale of their business. Because the lessor's assignment of the lease was necessary, the lessee entered into negotiations with Berbatis Holdings to obtain the necessary agreement. Berbatis Holdings agreed to the assignment on condition that both assignee and assignor discharged the lessor from all claims arising from the pending legal proceedings. The Roberts valued their rights at $50,000 or so, but when the matter was subsequently settled the value of the rights which they had bargained away was something less than $3,000. The Australian Competition and Consumer Commission brought proceedings alleging that the lessors and parties associated with them had taken unconscionable advantage of a condition of special disadvantage to the Roberts.

The relevant part of the *Trade Practices Act 1974* (Cth) was s 51AA, which stated:

> (1) A corporation must not, in trade and commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.

Did this reference to the unwritten law refer to unconscionable dealing as understood in terms of knowing exploitation by one party of a special disadvantage of another, or did it extend more generally across equitable doctrines united by a general underlying notion of unconscionability? The former seems more likely, especially when it is remembered that when the legislation was introduced into Parliament in the Second Reading Speech, reference was made to *Blomley v Ryan*[52] and *Commercial Bank v Amadio*.[53] In *Berbatis*, the judges refused to deal with this broader issue and dealt with the case on the assumption that the meaning of unconscionability was that which had been given in those cases.[54]

Justice Kirby's judgment in *Berbatis* can be seen as an example of agenda-judging because he made it clear that he saw this case as involving more than merely the resolution of the legal issue before him through the ordinary application of reasonably settled legal principles of the common law, which had been incorporated into legislation: "Yet again this Court has a choice between affording a broad and beneficial application of the

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51 (2003) 214 CLR 51.

52 (1956) 99 CLR 362.

53 (1983) 151 CLR 447.

54 (2003) 214 CLR 51 at 62-63 [7] per Gleeson CJ.

relevant provision of the Act, as opposed to a narrow and restrictive one."[55]

Justice Kirby saw the dispute as a test case[56] which would "constitute a warning to others against the use of their economic power to obtain from a comparatively weak and vulnerable market player a concession not extractable from other participants in the market".[57] As a consequence of this, he argued that:

> this Court should approach a case such as the present brought under the Act, recognising that its importance extends beyond the humble case of the Roberts. By upholding the rights of the Roberts – on the face of things small and objectively of limited significance – a message is delivered that the Act is not to be trifled with.[58]

His strategy in dealing with this "test case" was as clear as it was unconvincing:

> The design of s 51AA in the Act was intended not to expand the notions of unconscionable conduct in the unwritten law but to allow the application in such circumstances of the flexible remedies available under the Act. Yet the very fact that such a provision would facilitate more cases coming before the courts than might otherwise be the case inevitably results in a closer elaboration of the concept of unconscionable conduct in new and different factual circumstances.[59]

Furthermore:

> While the present appeal was substantially argued by reference to the principles of unconscionable dealing as elaborated in cases such as *Blomley* and *Amadio*, the reach of the section, in my view, goes further. Its full scope remains to be elaborated in this and future cases.[60]

Thus, on the one hand, Kirby J recognised that the appeal before him had been argued on the assumption that unconscionable conduct is to be understood within the meaning attributed to it in the common law and, in particular, the decisions in *Blomley v Ryan* and *Commercial Bank v Amadio*, yet on the other he argued that the meaning of unconscionable conduct is not to be so limited. He seemed determined to lay the groundwork for future expansion of the operation of s 51AA beyond the confines of the common law without clearly identifying how this will happen or why it should, and all this without the benefit of full argument by counsel on these very questions.

55 (2003) 214 CLR 51 at 79 [65] per Kirby J.
56 (2003) 214 CLR 51 at 95 [108] per Kirby J.
57 (2003) 214 CLR 51 at 94 [107] per Kirby J.
58 (2003) 214 CLR 51 at 95-96 [110] per Kirby J.
59 (2003) 214 CLR 51 at 83 [73] per Kirby J (footnote omitted).
60 (2003) 214 CLR 51 at 84 [77] per Kirby J.

JUSTICE KIRBY AND FORMALISM AND ANTI-FORMALISM IN CONTRACT

In the earlier study I commented on what I described as Justice Kirby's perhaps "unconscious fidelity" to what Roger Brownsword had called "dynamic market individualism".[61] By that term Brownsword referred to an attitude that saw the role of judge as being one of moulding the law of contract to match the practice, beliefs and expectations of market players. My argument was that a number of decisions handed down in the Court of Appeal, and in particular the surety cases,[62] could be understood as giving effect to such a belief.[63]

While I would not resile from this claim, Kirby J's attitude to contract is more complex than I had originally identified. In terms that reflect current usage it can be argued that at different times Kirby J gives effect to both formalist and anti-formalist attitudes to contract law.

"Formalism" (or "neo-formalism" as it is sometimes labelled) has been described by Hunter in the following terms:

> The hallmark of this return to some of the approaches of contracts scholars of the late 19th century is reliance on the "plain meaning" of an agreement, which, if all the formal requisites are met, is to be enforced according to its letter. To the extent that strict enforcement creates results that are surprising to a party in the context of what had been thought to be mutual expectations, the cure is to be found in the marketplace, not in the interpretation of the agreement by the court … The neo-formalists reduce the public role of contract law as an ordering mechanism and turn it into a rule-based matrix that leaves ordering to the marketplace.[64]

As will be shown below, such sentiments rest very comfortably with Kirby J's deference to party autonomy and the importance of writing in commercial contracts.

Anti-formalist attitudes (to use the label preferred by United States scholars), reflect a diametrically opposed view to that of the formalists. Anti-formalists are contextualists at heart. Roger Brownsword, for example, has called for judges to apply the law and develop its doctrines in ways that track the needs and expectations of the business community although, as we have seen, he labelled this approach "dynamic market-

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61 R Brownsword, "Static and Dynamic Market-Individualism" in R Halson (ed), *Exploring the Boundaries of Contract* (Dartmouth, Aldershot, 1986) p 48.

62 *Tricontinental Corp Ltd v HDFI Ltd* (1990) 21 NSWLR 689; *Corumo Holdings Pty Ltd v C Itoh Ltd* (1991) 24 NSWLR 370; and *Bond v Hongkong Bank of Australia Ltd* (1991) 25 NSWLR 286.

63 Gava, n 2 at 164-176.

64 H Hunter, "The Growing Uncertainty about Good Faith in American Contract Law" (2004) 20 *Journal of Contract Law* 50 at 55. The literature about formalism and applications of it is huge. For further reading see, eg, D Charny, "The New Formalism" (1999) 66 *University of Chicago Law Review* 842; and A Schwarz and R Scott, "Contract Theory and the Limits of Contract Law" (2003) 113 *Yale Law Journal* 541.

individualism".[65] Another anti-formalist, Hugh Collins, has provided an exhaustive analysis of what would be required of an anti-formalist judge. Collins describes his project as the creation of a hybrid law of contract that would combine elements of law, economics and sociology in a system of rules designed to reflect the ever-changing needs, practices and expectations of business. Collins wants judges to take into account economic analysis of transacting, the results of empirical studies into the transacting behaviour in particular industries and in the market more generally, in a never-ending task of aligning contract rules to transactional practice.[66]

Underlying these different approaches to the application and development of contract law is a belief that contract law is fundamentally a tool for the marketplace. What distinguishes the two approaches is a disagreement about what business people want and need from contract law and the judges. Advocates of formalism argue that market players use contract law tactically when it suits their purposes. This means that transacting parties want predictable decision-making that gives effect to the agreements they have crafted. Anti-formalists, on the other hand, argue that contracts are only the surface manifestation of the transaction between the parties and that formalist judging, by concentrating on the words of the contract and the application of determinate rules, misses what has been called the "real deal" or the totality of a transaction of which the written contract forms only a part.[67]

In other words, the two approaches reflect radically different means of attaining the same goal of ensuring that contract law becomes an efficient tool for aiding market transacting. Once this relationship of tactical opposition and strategic congruence between formalism and anti-formalism is understood, the manifestation of both these mutually contradictory approaches in Kirby J's judgments can be seen not as a matter of poor reasoning but rather of either approach seeming to be more or less attractive or appropriate in any given situation. For

65 Brownsword, n 61, pp 49-67. Brownsword's "dynamic market individualism" can be equated with anti-formalism while his "static market individualism" is the equivalent of formalism (or neo-formalism).

66 H Collins, *Regulating Contracts* (Oxford University Press, Oxford, 1999). Collins's Hybrid Law is the equivalent of anti-formalism. See criticism of Collins's argument in J Gava and J Greene, "Do We Need a Hybrid Law of Contract? Why Hugh Collins is Wrong and Why it Matters" (2004) 63 *Cambridge Law Journal* 605.

67 J Gava, "Can Contract Law be Justified on Economic Grounds?" (2006) 25 *University of Queensland Law Journal* 253; J Gava, "False Lessons from the Real Deal: Campbell, Collins and Wightman on Implicit Dimensions of Contract – Discrete, Relational and Network Contracts?" (2005) 21 *Journal of Contract Law* 182. See also S Macaulay, "The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules" in D Campbell, H Collins and J Wightman (eds), *Implicit Dimensions of Contract: Discrete, Relational, and Network Contracts* (Hart Publishing, Oxford, 2003) p 51.

example, in *Fitzgerald v FJ Leonhardt*,[68] Kirby J described certainty and consistency as desirable objectives in the law of contract.[69] In *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*[70] he had the following to say about the role of contract:

> The principle that parties should ordinarily fulfil their contractual obligations not only underpins the law of contract, but comprises a basic assumption on which our society and its economy and well-being depend.[71]

Justice Kirby repeated these sentiments, especially with reference to those parties that have been advised by lawyers and other experts and have negotiated at arm's length in *Maggsbury Pty Ltd v Hafale Pty Ltd*[72] and in *Royal Botanic v South Sydney City Council*.[73]

In the latter case Kirby J also emphasised the significance of written obligations in a way that is consistent with formalist beliefs and inconsistent with anti-formalist strictures on the importance of context in long-term contracts:

> In the case of a complex lease, entered into for a very long term, in respect of a significant property development with high capital and income elements to it between public bodies with express or implied statutory duties to perform in ways intended to fulfil the obligations respectively imposed upon them by law, one would normally expect that their written agreement would contain all of the provisions essential to govern the relationship between them.[74]

In *Equuscorp Pty Ltd v Glengallan Pty Ltd*[75] the court, in a joint judgment which included Kirby J, was at pains to emphasise that it would enforce the written obligations contained in a contract. The judges noted that the law's emphasis on the written expression of the contracting parties' intentions accorded with the "pervasive influence" of objectivity in contract law and that writing was central to helping judges decide what the parties had agreed.[76] The court added the following:

> In a time of growing international trade with parties in legal systems having the same or even stronger deference to the obligations of written agreements … this is not a time to ignore the rules of the common law

68 (1997) 189 CLR 215.
69 (1997) 189 CLR 215 at 248 per Kirby J.
70 (2007) 233 CLR 115.
71 (2007) 233 CLR 115 at 148 [74] per Kirby J.
72 (2001) 210 CLR 181 at 205 [65] per Kirby J.
73 (2002) 186 ALR 289 at 308 [72] per Kirby J.
74 (2002) 186 ALR 289 at 308 [72] per Kirby J.
75 (2004) 218 CLR 471.
76 (2004) 218 CLR 471 at 483 [34] per Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ.

> upholding obligations undertaken in written agreements. It is a time to maintain those rules.[77]

In *Tanwar v Cauchi*,[78] a case involving time stipulations in a commercial land transaction, Kirby J repeated his admonition in *Austotel Pty Ltd v Franklins Self Serve Pty Ltd*[79] that in commercial matters the courts should be wary of substituting "lawyerly conscience for the hard-headed decisions of business people".[80]

Good faith was not comprehensively dealt with by the High Court during Kirby J's time on that court. But, in the *Royal Botanic* case,[81] as will be discussed below, he gave strong indications that he would not think it appropriate to import a covenant of good faith and fair dealing in Australian contract law because it would run counter to the "fundamental notions of caveat emptor", which are inherent in the common law.[82] Once again, his affinity with the formalist emphasis on party autonomy and certainty is to the fore in Kirby J's position.

Nevertheless, Kirby J sometimes also supports a context-based, anti-formalist attitude to contract which is directly inconsistent with the beliefs expressed above. In the surety cases decided when he was on the New South Wales Court of Appeal he displayed an anti-formalist concern to decide contract cases and to develop contract rules in accordance with the perceived needs, expectations and behaviour of business people.[83] *Roxborough v Rothmans of Pall Mall*[84] provides a neat illustration of these competing tendencies in a case decided in the High Court. *Roxborough* involved an action by tobacco retailers who had bought tobacco products from licensed wholesalers under contracts, which included a separately listed component in the price for the licence fee imposed by the State of New South Wales. When in *Ha v New South Wales*[85] the High Court held that the licence fee was invalid (because it was a duty of excise within s 90 of the *Constitution*), several retailers sued a wholesaler for the licence fee, which the wholesaler had not remitted to the State before the decision in *Ha*. The majority of the High Court

77 (2004) 218 CLR 471 at 483 [35] per Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ. Elisabeth Peden and John Carter are critical of the High Court's reasoning in this case and indicate a preference for the English approach in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98: see E Peden and J Carter, "Taking Stock: The High Court and Contract Construction" (2005) 21 *Journal of Contract Law* 21. For an alternative view on *Investors*, see R Brownsword, "After *Investors*: Interpretation, Expectation and the Implicit Dimension of the 'New Contextualism'" in Campbell et al, n 67, pp 103-142.

78 (2003) 217 CLR 315. See text associated with nn 28-29 for the facts in this case.

79 (1989) 16 NSWLR 582.

80 (1989) 16 NSWLR 582 at 585-586 per Kirby J.

81 *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 186 ALR 289 at 312 [88] per Kirby J.

82 See discussion associated with nn 95-100 below.

83 Gava, n 2 at 173-176.

84 (2001) 208 CLR 516.

85 (1997) 189 CLR 465.

(Gleeson CJ, Gummow, Hayne and Callinan JJ, Kirby J dissenting) held that there had been a failure of a distinct and severable part of the consideration for the purchase of the goods (the licence fee component) and that this meant that the amount was recoverable as "money had and received" to the retailers' use.

In coming to his decision Kirby J had cause to discuss the doctrine of implied terms in contract and had two interesting but inconsistent things to say about it. In criticising the use of fictions, such as the officious bystander, in considering claims for an implied term in a contract, he suggested that (emphasis added):

> the time might be coming where the fiction is dispensed with completely and the courts acknowledge candidly that, in defined circumstances, the law to which they give effect permits, *according to a desired policy*, the imposition upon the parties of terms and conditions for which they have omitted to provide expressly.[86]

This is entirely consistent with the anti-formalist vision of contract as a form of public regulation where desired public policy trumps individual agreement. Yet, two paragraphs later in his judgment he stated:

> Whatever may be the precise legal criterion for implying terms into a contract upon which the parties have not expressly agreed, it would always be necessary for a court in our legal tradition to be very cautious about the imposition on the parties of a term that, for themselves, they had failed, omitted or refused to agree upon. Such caution is inherent in the economic freedom to which the law of contract gives effect.[87]

When it is remembered that these conflicting sentiments are both manifestations of a deeper belief that contract exists to aid market transacting and, thus, really amount to a difference of tactics and not of the ultimate goal, such an apparent conflict becomes more understandable.

In *Australian Competition and Consumer Commission v CG Berbatis Holdings*,[88] as we have seen, the court had to determine whether an agreement between a lessee and a lessor had been made unconscionably contrary to s 51AA(1) of the *Trade Practices Act 1974* (Cth). The parties had agreed that the lessee would drop legal proceedings against the lessor in return for obtaining the lessor's permission for the lessee to assign the lease to a new lessee. Justice Kirby's approach to answering this question was essentially anti-formal. He saw the dispute as a test case[89] which would constitute a warning to others against the use of their economic power to obtain from a comparatively weak and vulnerable market player a concession

86 *Roxborough v Rothmans of Pall Mall* (2001) 208 CLR 516 at 575 [159] per Kirby J.

87 (2001) 208 CLR 516 at 575-576 [161] per Kirby J.

88 (2003) 214 CLR 51. For a description of the facts in this case see the text associated with nn 51-52.

89 (2003) 214 CLR 51 at 95 [108]-[111] per Kirby J.

not extractable from other participants in the market.[90] Consequently, his argument was that what was important here was not the "humble case of the Roberts", whose rights were "small and objectively of limited significance" but, rather, that the court would send a message about the Act.[91]

This indicates that for Kirby J the instrumental goal of sending a message to the business community far outweighed the rights of the party that had been, allegedly, the victim of unconscionable behaviour. The settlement of a legal dispute, in this view, adopts a subordinate position to the achievement of public policy goals and is entirely consistent with the goals of context-driven, anti-formalist judging. As an aside, it should be noted that Kirby J is not alone, when discussing the effect of court decisions on business behaviour, in relying on questionable assumptions about the dissemination of such decisions and their impact. Little work has been done on the mechanisms that supposedly transmit information about court decisions and on determining if and to what extent people in business have access to such information, and whether this makes any difference to their behaviour.[92]

There are hints in Kirby J's decisions, most notably in *Andar Transport v Brambles*,[93] that the emphasis he has placed on freedom of contract would not apply in cases involving consumers or, in more general terms, in cases involving parties with inequalities in bargaining power, access to legal advice or disparities in business knowledge and experience. But they are only hints and any discussion here would be too speculative to be useful.[94]

HIGHLIGHTS FROM PARTICULAR CASES

During Kirby J's time on the High Court it would be fair to say that no landmark cases in contract law have been decided. Nevertheless, some issues of general importance for contract law, as well as some particular points of doctrine, have come before the courts and in several of these cases Kirby J had something interesting to say. In chronological order, this section will examine these cases and consider the implications that flow from Kirby J's reasoning.

90 (2003) 214 CLR 51 at 94 [107] per Kirby J.

91 (2003) 214 CLR 51 at 95-96 [110] per Kirby J.

92 Gava and Greene, n 66; Gava, n 67; J McGinnis, "Carlil v Carbolic Smoke Ball Company: Influenza, Quackery, and the Unilateral Contract" (1988) 5 *Canadian Bulletin of Medical History* 121 at 138.

93 (2004) 217 CLR 424.

94 Despite the fact that he adopts an anti-formalist approach, Collins is hostile to a bifurcated approach to contracts which treats consumer and business transacting differently: Collins, n 66. For a discussion of the difficulties in trying to posit a simple consumer/business contract dichotomy, see J Wightman, "Beyond Custom: Contract, Contexts, and the Recognition of Implicit Understandings" in Campbell et al, n 67, p 143.

Royal Botanic

In *Royal Botanic Gardens and Domain Trust v South Sydney City Council*[95] the High Court was presented with an opportunity to discuss the role, if any, of good faith in Australian contract law. All the judges declined the opportunity, although Kirby J did give some clues about his attitude to good faith in contract law. In response to argument by counsel which suggested that there was a growing tendency to imply into private contracts a duty of good faith and fair dealing, he said:

> However, in Australia, such an implied term appears to conflict with fundamental notions of caveat emptor that are inherent (statute and equitable intervention apart) in common law conceptions of economic freedom. It also appears to be inconsistent with the law as it has developed in this country in respect of the introduction of implied terms into written contracts which the parties have omitted to include.[96]

This is a stance that is fully consistent with formalist reasoning in contract. In a recent article, Howard Hunter describes the impact that formalist thinking is having in United States contract law, both in academic writing and in the courts. He reports that there is now a genuine controversy in the United States about the role and extent of good faith.

> The growing reluctance of some courts to look behind the explicit language of an agreement to determine whether the conduct of the parties has been consistent with the reasonable expectations and the goals of the agreement reflects the general rise of neoformalism. The hallmark of this return to some of the approaches of contracts scholars of the late 19th century is reliance on the "plain meaning" of an agreement, which, if all the formal requisites are met, is to be enforced according to its letter.[97]

Hunter adds that this approach is attractive to judges when the parties have negotiated about the matter at hand and are similarly situated; but it is less attractive when form contracts are used or the parties are not similarly situated.[98] As we have seen, this general approach conforms with Kirby J's attitude to judicial interference and non-interference in contracts. Given the centrality of the debate over the nature and existence of good faith in Australian contract law, it seems clear that Justice Kirby is staking out a position even though he and the rest of the court declined to deal directly with the issue of good faith in this particular case.

As previously discussed, Kirby J was emphatic in his criticism of the majority's interpretation of the contract that was in dispute.[99] In his

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95 (2002) 186 ALR 289 discussed above in text associated with nn 30-34.

96 (2002) 186 ALR 289 at 312 [88] per Kirby J (footnote omitted).

97 Hunter, n 64 at 55 (footnote omitted).

98 Hunter, n 64 at 55.

99 See text associated with nn 30-34 above.

judgment he said the following about the relationship between judges and the public:

> The common law does not usually produce unreasonable outcomes. As Lord Steyn recently remarked, "the justice of the case … has been one of the great shaping forces of the common law". This is not, his Lordship pointed out, "the subjective view of the judge but what he reasonably believes that the ordinary citizen would regard as right".[100]

In *Royal Botanic* Kirby J does not explain how judges are to discover what the ordinary citizen would think about the meaning of a contract being litigated, especially given the complicated contractual and legislative history behind the dispute in this particular case. While Justice Kirby might genuinely believe that he would not be expressing his personal view, in the absence of any practical mechanism for discovering what the ordinary citizen would think it is difficult to see that this would be anything other than guesswork or the disguised preference of the judge.

Justice Kirby seems to ignore the reality that common law judges have historically owed their allegiance to the law, not to popular opinion. Justice in the common law system is dispensed according to law, not the beliefs of ordinary citizens. For good or bad, the common law is a system of law that gives effect to rules and the general principles underlying them; it is not a populist system which gives effect to the desires and views of ordinary citizens. If Kirby J is doing more than making a "throw away" comment, he is mounting a serious challenge to the very essence of the common law system.

Andar

Contracts of guarantee have been a sore point for Kirby J. In the surety cases[101] decided in the New South Wales Court of Appeal, Kirby P seemed to lose patience with his judicial colleagues and their, from his perspective, uncommercial attitude to contracts of guarantee. In *Andar Transport Pty Ltd v Brambles*[102] Kirby J was given the opportunity to revisit this topic.

Andar involved a dispute between a transport company (Brambles) and a sub-contractor company (Andar). A director of Andar was also a driver for the company and was injured whilst delivering laundry for Brambles. The director had formerly been a driver for Brambles, which had changed its business practice in 1990 and moved away from employing drivers directly, preferring instead to contract out its delivery

100 (2002) 186 ALR 289 at 303 [49] per Kirby J, citing Lord Steyn in *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 82.

101 *Tricontinental Corp Ltd v HDFI Ltd* (1990) 21 NSWLR 689; *Corumo Holdings Pty Ltd v C Itoh Ltd* (1991) 24 NSWLR 370; and *Bond v Hongkong Bank of Australia Ltd* (1991) 25 NSWLR 286.

102 (2004) 217 CLR 424.

services. The contract between the two parties contained a number of indemnity clauses, which were held by the Victorian Court of Appeal to protect Brambles against claims arising from the very sort of injury that occurred to the driver associated with Andar.[103] A majority of the High Court[104] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ in a joint judgment, and Kirby J in a separate judgment, Callinan J dissenting) found that the indemnity provisions did not extend to protecting Brambles in the circumstances of the case.

In his judgment, Kirby J noted that the "more nuanced" approach adopted by United States courts, especially when they were dealing with compensated sureties, had much to recommend it.[105] He then added:

> I would reserve my opinion about the general principles applicable to the construction of contracts of guarantee …
>
> The unyielding application of the strictissimi juris rule to *all* contracts of guarantee can certainly lead to results that strike untutored observers as unrealistic and even commercially absurd. The decision in *Tricontinental Corporation Ltd v HDFI Ltd* may be such a case. For this reason, at some future time, and in a proper case, it might be appropriate for this Court to revisit some of the observations appearing in *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd*.[106]

Zhu

The opening paragraph of the court's judgment in *Zhu v Treasurer of the State of New South Wales*[107] sets the scene for an extraordinary tale of executive arrogance, as well as discussion about one of the oldest controversies in contract law in the common law world.

> It is a truth almost universally acknowledged – a truth unpatriotic to question – that the period from 15 September 2000 to 1 October 2000, when the Olympic Games were held in Sydney, was one of the happiest in the history of that city. The evidence in this case, however, reveals that the preparations for that event had a darker side.[108]

In 1999 Mr Zhu had entered into an arrangement with one of the organising bodies for the forthcoming Olympic Games to sell memberships in an Olympic club to residents of China. For a variety of reasons, none of which in retrospect placed the Sydney Organising Committee for the Olympic Games (SOCOG)[109] in a good light, the Committee decided

103 *Brambles Ltd v Wail* (2002) 5 VR 169.
104 *Andar Transport Pty Ltd v Brambles* (2004) 217 CLR 424.
105 (2004) 217 CLR 424 at 453 [72] per Kirby J.
106 (2004) 217 CLR 424 at 453-454 [71]-[73] per Kirby J (footnotes omitted; emphasis in original).
107 (2004) 218 CLR 530.
108 (2004) 218 CLR 530 at 535 [1] per Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ.
109 The Treasurer of New South Wales succeeded to the assets and liabilities of SOCOG.

to sever relations with Mr Zhu. It would be inappropriate to consider here the facts of the case in detail. However, it is appropriate to note that the conduct of SOCOG, in purported defence of its proprietary and intellectual property rights, amounted to tortious interference with a contract. SOCOG was also instrumental in inducing the arrest of Mr Zhu on charges that were later dropped. The High Court described the behaviour of SOCOG as "precipitous, high-handed and oppressive" and added that its behaviour "fell far short of the conduct of bodies exercising powers granted by an Australian Parliament".[110]

On matters more purely contractual, the court, in discussing the nature and reach of the tort of interfering with contractual relations, said of Holmes J's celebrated and controversial suggestion about performance in contract:

> [S]ubject to the established limits on the grant of specific performance and injunctions, in Australian law each contracting party may be said to have a right to the performance of the contract by the other. It is not true here to say: "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, – and nothing else".[111]

Since it is the accepted position in Australian law that damages will normally be awarded in cases of contractual breach, with specific performance as an unusual and exceptional remedy, it will be interesting to see what impact such a view will have on concrete contractual rules and doctrines.

Koompahtoo

Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd[112] involved a dispute between an Aboriginal land council and a developer. The parties had entered into a joint venture agreement for the development and sale of a large area of land at Morisset to the north of Sydney. Because of a failure to keep proper books of account and a general failure of the project to move ahead, the administrator of the land council terminated the contract. Sanpine commenced proceedings seeking a declaration that the termination was invalid. The High Court (Gleeson CJ, Gummow, Heydon and Crennan JJ, Kirby J agreeing with the order of the majority) held that the termination was valid and that the agreement was no longer afoot between the parties. In their decision, the majority judges endorsed the tripartite classification of contract terms – conditions, warranties or intermediate terms – adopted by the English Court of

110 (2004) 218 CLR 530 at 588 [164] per Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ.

111 (2004) 218 CLR 530 at 574 [128] per Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ, quoting Oliver Wendall Holmes, "The Path of the Law" (1897) 10 *Harvard Law Review* 457 at 462.

112 (2007) 233 CLR 315.

Appeal in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*.[113] The majority accepted that there were other taxonomies for contractual terms that might be equally effective and that the High Court had not previously directly ruled on the applicability of the tripartite classification to Australian law. Nevertheless, the majority held that *Hongkong Fir* "had long since passed into the mainstream law of contract as understood and practised in Australia".[114]

Justice Kirby disagreed, noting that if "the classification of a contractual term as 'intermediate' is nothing more than a function of ex post facto evaluation of the seriousness of the breach in all the circumstances then the label itself is meaningless".[115]

Instead, he preferred the test proposed by Nick Seddon and MP Ellinghaus, articulated in the 9th Australian edition of *Cheshire and Fifoot*,[116] and which he summarised as follows:

> [A] right to terminate arises in respect of: (1) breach of an essential term; (2) breach of a non-essential term causing substantial loss of benefit; or (3) repudiation (in the sense of "renunciation"). The common thread uniting the three categories is conduct inconsistent with the fundamental postulate of the contractual agreement.[117]

In Kirby J's opinion this formulation was flexible and simple and led to clarity in reasoning.[118] For the near future, at the very least, Kirby J's preferred test will not be the law in Australia. What is especially noteworthy about Kirby J's position is his understanding of the relationship between judges and academics and what this tells us about his understanding of the nature of the common law itself. In his words:

> Because the common law develops from hundreds of judicial decisions, sometimes over long periods of time, it is often the case that the conceptual framework that affords structure to a group of related legal principles is at first imperfect and unclear. It falls to judges and scholars to attempt to derive rules that are coherent, practical, just, and (so far as it is possible) conformable with past decisions.[119]

Justice Kirby has written in the past about the important role that legal academics can play in helping judges to systematise the common law

113 [1962] 2 QB 26.

114 *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at 139 [50] per Gleeson CJ, Gummow, Heydon and Crennan JJ.

115 (2007) 233 CLR 115 at 156 [107] per Kirby J.

116 N Seddon and M P Ellinghaus (eds), *Cheshire and Fifoot's Law of Contract* (9th ed, LexisNexis, Sydney, 2007).

117 *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at 159 [114] per Kirby J.

118 (2007) 233 CLR 115 at 159 [115] per Kirby J.

119 (2007) 233 CLR 115 at 152 [92] per Kirby J.

and to provide new sources of arguments,[120] but it is not entirely clear just what he is asking of legal academics. Does he want them to tidy up the work of gifted but overworked judges who by the very nature of their work have to be generalists? Or, is he asking more of them, or does the task of tidying up involve more than we might think?

Rick Bigwood's recent exhaustive study of exploitative contracts[121] provides a wonderful illustration of what is involved in making legal doctrine more coherent from an intellectual perspective. Bigwood's analysis is driven by a desire to clean up the messy doctrinal and philosophical underpinnings of unconscionability, duress and undue influence in the common law. Bigwood used rigorous philosophical thinking and the concepts that have been developed to deal with the phenomenon of exploitation to engage in a "two-way revision and adjustment"[122] of the legal materials in order to create a more coherent, intellectually satisfying and practically workable set of legal rules and principles.

This task has implications for the judicial role. According to Bigwood's strategy, a philosophical examination of an area of law or, for that matter, an economic one, would require the use of rigorous, careful reasoning based on carefully identified assumptions. The reasoning itself would be measured against logic and empirical evidence to see whether the conclusions followed from the base assumptions and cohered with all the other reasoning and evidence in the particular matter being expounded or explored. By contrast, common law reasoning is free and easy, with liberal use of analogy, logic, pragmatic and consequentialist considerations in varying degrees of rigour. Common law reasoning is not designed to meet the standards of academic journals but rather to allow judges to give acceptable answers to pressing legal disputes.[123]

The problem with a strategy such as outlined by Bigwood is twofold. First, it is unlikely that busy judges would have the time (or desire) to master law and philosophy or economics, or whatever other academic discipline is considered appropriate for either moulding the rules and doctrines of the law into a coherent framework, or setting a standard to compare how practical or utilitarian these rules and doctrines are, or can be made. Judges are just too busy to be masters of more than one field of human endeavour. Thus, if the law were to reflect the findings and

120 M D Kirby, "Welcome to Law Reviews" (2002) 26 *Melbourne University Law Review* 1. In this chapter I have concentrated on what Kirby J's views about the relationship between legal academics and the judiciary would mean for the judges. Elsewhere I have argued that his views would also carry dangers for legal academics: see J Gava, "Law Reviews: Good for Judges, Bad for Law Schools?" (2002) 26 *Melbourne University Law Review* 560.

121 R Bigwood, *Exploitative Contracts* (Oxford University Press, Melbourne, 2003).

122 Bigwood, n 121, pp 14–15.

123 J Gava, "The Audience for Rick Bigwood's Exploitative Contracts" (2007) 32 *Australian Journal of Legal Philosophy* 140. For Bigwood's response, see: R Bigwood, "Author's Response to the Commentators" (2007) 32 *Australian Journal of Legal Philosophy* 161.

methods of academic disciplines, it would do so by reflecting the work of those academics who *have* narrowly specialised in those fields.

The second problem runs deeper. What would it mean for the common law and its judges if they were to, in effect, subcontract the development of the common law to philosophically or economically (or whatever) literate legal academics – assuming that there were enough of this type to go round?

> It would, of course, amount to a revolution. No longer would the development of the common law be driven by a caste of lawyers expert in the "artificial reason" of the law. Instead, in ways that would parallel the civil law tradition, legal scholars would take centre stage with the judges having an important decisional but lesser intellectual role than at present. The nature of the common law would change too. It would shift from being a primarily practical, craft-based discipline to a more scholarly and intellectually rigorous one.[124]

Justice Kirby's musings in *Koompahtoo* on the relationship between legal academics and judges raise serious questions about his understanding of the nature of the common law and of the role of common law judges. If these musings are intended to be taken seriously, they amount to a fundamental challenge to traditional understandings of the common law and of the work of the judges within that tradition.

CONCLUSION

When the dust settles on Justice Kirby's judicial career, it is unlikely that contract law will form a striking part of his legacy. This is partly due to the fact that during his time on the Bench, especially his time on the High Court, contract law cases were relatively few and the cases that were heard did not deal with fundamental issues. *Royal Botanic* was a potential vehicle for resolution of one of the most important issues in contract law today – the nature and reach of good faith but, as we have seen, the court was able to decide this case on other grounds. There were no equivalents of *Trident v McNeice Bros*[125] or *Waltons v Maher*[126] which dealt with basic and significant questions going to the heart of contract law. In *Trident* the court had to consider the operation of privity (that is, who can bring an action under a contract) while in *Waltons* the court analysed the relationship between consideration and reliance in the formation of contracts. In part, contract law is also likely to be a minor part of his legacy because it seems that, together with private law more generally, it was not as significant or important as public law to Kirby J in both the New South Wales Court of Appeal and, especially, on the High Court. While Kirby J may be seen as the Great Dissenter in

124 Gava, n 123 at 148 (footnote omitted).
125 (1988) 165 CLR 107.
126 (1988) 164 CLR 387.

constitutional cases, he seems to fit comfortably, in most contract cases, with the views of his fellow High Court judges.

Nonetheless, over a period of 25 years (1984-1996, NSW Court of Appeal; 1996-2009, High Court) Justice Kirby has decided a large number of contract disputes. His judgments provide a source for investigating his style and performance as a judge, as well as providing an opportunity for considering specific questions about contract and more general attitudes toward contract and its doctrines.

Justice Kirby's contracts jurisprudence shows 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 in areas of both actual and potential legislation. It also shows that very occasionally his guard slips and the careful and courteous judge that is normally on display is replaced by an impatient and less than courteous one. One area in particular, the law of sureties, seems to be something of a blind spot for Kirby J and a source of some irritation with his fellow judges.

His contracts jurisprudence shows a judge who exhibits a high standard of judicial craft but here, too, Kirby J is not totally consistent. While sitting on the New South Wales Court of Appeal, he handed down one judgment that can only be described as poor, but none of his judgments dealing with contract law in the High Court can be so described. Nonetheless, there are two decisions (*Garcia v National Australia Bank*[127] and *Australian Competition and Consumer Commission v Berbatis*[128]) which are not totally convincing. In these cases Kirby J was engaged in what I have called "agenda-judging" where clearly the cases became tools for achieving a preconceived result. Both cases were departures from his normal method of legal reasoning, leading directly to what are, frankly, unconvincing reasons.

While Justice Kirby has not had the opportunity to discuss fundamental contract doctrines, he has, nevertheless, had the opportunity to give his opinion on several important issues in contract. His discussion of the taxonomy of contract terms is one example where he stakes out a clear position on a matter of some importance in contract interpretation. His hints about the unlikelihood of a general duty of good faith being imported as a term in all contracts are just that, hints, but they do deal with one of the most controversial and important contract questions that the High Court will face.

In very broad terms, Kirby J's contracts decisions also show that he is ambiguous in his response to the most important contemporary controversy in contract law – the issue of whether courts should deal formalistically or anti-formalistically (contextually) in the application

127 See discussion associated with nn 39-50 above.

128 See discussion associated with nn 51-60 above.

and development of contract rules. Justice Kirby espouses both positions. In my earlier study I argued that this showed a form of legal schizophrenia but it is, in fact, more accurate to argue that both points of view, while inconsistent at one level, display total consistency at another. Both of these theoretical approaches at heart embody a belief that contract law exists to further efficient economic exchange in the marketplace. In other words, formalism and anti-formalism are diametrically opposed tactics aimed toward the same strategic goal – the use of contract law to aid market transacting. An evaluation of Justice Kirby's contracts jurisprudence is as good a place as any in which to consider the judicial manifestations of this debate.

Chapter 8

THE COURTS AND PARLIAMENT

Steven Churches

… I holde it nat best to reason or make argumentes whether they had auctoritie to do what they didde or nat. For I suppose that no men wolde think, that they wolde do any thynge, that they had nat power to do.[1]

The clichés and myths that swirl around Michael Kirby as "activist judge" are in a moment dispelled when his views on the relationship of the courts to Parliament are examined. It is that relationship and Justice Kirby's views upon it which this chapter will canvass.

It should be explained to those coming to this subject matter for the first time that common lawyers are concerned to find ultimate legitimacy for the law and its application. Judges are not elected, so it is argued that they lack the appropriate status to "make" law, although it is undoubtedly their role to interpret the law in individual cases. In the 800 years of the common law's existence, it is only in the last 150 years that there has been a general consensus (now under new pressure) that Parliament is supreme, or as the lawyers say, sovereign. The growth of this view was contemporaneous with the acceptance of universal (male) suffrage, and a factor not much noted, but of real consequence: the tidal wave of legislation. Parliaments now produce law on a scale never anticipated before the mid-19th century. The British determination to clean up London and then the great provincial cities dated to that period, and the engine of change was Parliament. Land was compulsorily acquired, boards set up to perform engineering works, commissions appointed to oversee the results. Politicians of later generations could hardly fail to notice the precedent.

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1 Christopher St German in 1531 in *New Additions* (in *Doctor and Student*) 91 Selden Society 317 on the perception of the power being exercised by Parliament to give effect to the revolutionary policies of Henry VIII. An excellent overview of the period is provided in J Goldsworthy, *The Sovereignty of Parliament* (Oxford University Press, Oxford, 1999) pp 51-77.

But the possibilities for using Parliament to alter the legal landscape and destroy cultural assumptions had been latent for a long time. The epigraph to this chapter was written by St German, a lawyer in Thomas Cromwell's think tank, and the assertive tone and circularity of justification (it can hardly be graced as reasoning) reflect its polemical purpose. Cromwell was the fixer for Henry VIII (although Henry fixed Cromwell by having his head cut off in 1540). The first stirrings of a modern state involved a search for the source of law-making power with legitimacy to despatch the medieval past. In discussion recorded in 1522, Coningsby J had already said: "This is an act of Parliament, which binds everybody; and all are privy to an act of Parliament."[2]

And in 1528 St German wrote of Parliament as "the hyghe soueraygne ouer the people".[3] Cromwell's purpose was to find ways for his political master, Henry VIII, the murderous Great Harry, to have his way. The nostrums of 500 years as to the relations of King to Pope, and the power of the Church were despatched in a decade, as the King employed Parliament to obtain his divorce from Catherine of Aragon, in defiance of the Pope, and then set about the biggest land grab in British history: the dissolution of the monasteries and the seizure of their lands.

With Pope and Church both hors de combat, lawyers were left looking for some point of reference by which statutes could be measured as to acceptability (already from 1610 judges worried over statutes that made groups judges in their own cause, as for example, a professional body such as the College of Surgeons that could determine to fine its members, and keep the money). The 17th century judges suggested "natural law" or "common right and reason", but that begged the question as to their content. By the 18th and early 19th centuries the judges (and the great commentator, Blackstone, himself a judge) were reduced to urging the possibility that defiance of God's law would attract invalidity (and this with a Pope and Church to state the terms of the divine will abolished for British purposes by Parliament 300 years previously)! The acceptance of parliamentary sovereignty after about 1840 came almost as a relief, and the tone of Kirby J's discourse in the field reflects just that, although it does not make his work in the related field of interpreting the parliamentary product any easier.

Justice Kirby's emphatic insistence upon parliamentary sovereignty, and its well nigh impregnable resistance to judicial intrusion, is now examined by an analysis of his approach in a number of cases and in a number of conference papers and articles. Prepare to be challenged as to your assumptions of the man.

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2 Discussion in Serjeants' Inn, *Spelman's Reports*, Vol 1, 93 Selden Society 170.

3 *New Additions* (in *Doctor and Student*) 91 Selden Society 327.

THE BLF CASE: KIRBY AS PRESIDENT OF THE NSW COURT OF APPEAL FIRES HIS FIRST SALVO ON THE TOPIC

Given Michael Kirby's endless tagging as "an activist", it comes as a surprise, when viewed over 20 years later, that while President of the New South Wales Court of Appeal, Kirby P found himself in a minority adhering to Diceyan views on the non-reviewability of Acts of Parliament.[4]

The *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (*BLF Case*)[5] involved a challenge to the validity of a New South Wales statute which provided for the cancellation of trade union registrations, the validation of ministerial certificates providing for adverse outcomes to those unions, as well as the disposition of costs in court actions, when all these matters were presently before the courts of New South Wales. Bluntly, the intent of the legislation was to ensure that ministerial determinations regarding the trade unions concerned took the place of court decisions.

The accepted dogma (certainly since Dicey) has been that in the absence of a written constitutional mandate, courts cannot review legislation as to its being within the power of the Parliament. The State of New South Wales has a Constitution which does not give the courts such power. As Kirby P said in the *BLF Case*, exhibiting impeccable orthodoxy, "The traditional view of the plenary power of Parliament can be stated in six words: The Queen in Parliament is supreme …".[6]

The judgments of the five members of the Court of Appeal (all upholding the validity of the legislation) read strangely to the modern eye: *Kable v Director of Public Prosecutions (NSW)*[7] would be handed down one month short of a decade later. *Kable* went off on the availability of State courts for the Federal Court system under Ch III of the Commonwealth

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4 A V Dicey was the author of *Introduction to the Study of the Law of the Constitution*, first published in 1885, and is regarded as the arch-prophet and theorist of the doctrine of parliamentary sovereignty.

5 (1986) 7 NSWLR 372.

6 (1986) 7 NSWLR 372 at 395.

7 (1996) 189 CLR 51. *Kable* has been applied (once) to invalidate Queensland legislation impacting on the Queensland Supreme Court: *Re Criminal Proceeds Confiscation Act 2002* [2004] 1 Qd R 40. As to why a decade passed before Sir Maurice Byers QC, counsel for Kable, engineered the success of *Kable*, the High Court under Sir Anthony Mason was laying a trail of birdseed leading to the argument that would take place after his retirement in 1995: see, eg, *Leeth v Commonwealth* (1992) 174 CLR 455 at 470 per Mason CJ, Dawson and McHugh JJ; and *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 496 per Gaudron J. *Kable* was argued prior to Kirby J sitting in the High Court, but delivered after his accession to that office. He commented in a paper delivered the year after *Kable* that the *BLF Case* would need reconsideration in the light of *Kable*: see "Lord Cooke and Fundamental Rights" (Speech, New Zealand Legal Research Foundation Conference, Auckland, April 1997): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_cooke.htm (accessed 13 October 2008).

Constitution, with the consequence that State Parliaments could not legislate for State courts in a manner inimical to their potential as Ch III courts. In short, the separation of powers was recognised in respect of State courts.

The judgments in the *BLF Case* were written with an eye to two main arguments: (1) that *Liyanage v The Queen*[8] could be applied to find the statute invalid as trespassing on the judicial function; and (2) that the doctrine of parliamentary sovereignty had evolved away from Diceyan stringency to a moderate form in which it could be said that "some common law rights … go so deep that even Parliament cannot be accepted by the Courts to have destroyed them".[9]

Street CJ explored the "sovereignty assumption" in the words "peace, order and good government" at some length[10] (he gave no space to the *Liyanage* argument at all), and then plumped for the Coke/Cooke[11] line, while acknowledging that the Act in question was "not of such a character as to infringe any such [ie, parliamentary sovereignty] doctrine".

The Chief Justice was thus engaging in purest dicta (that is, statements not necessary for the resolution of the matter before the court), as in turn was Priestley JA (with whom Glass JA substantially agreed). Priestley JA explored the inapplicability of *Liyanage* to the impugned New South Wales legislation,[12] and then, having found that the legislation was valid, delivered a page-and-a-half of dicta to the effect that "it is at least arguable" that legislation "manifestly not for the peace, order and good government of the State" might be ultra vires the State Parliament.[13]

Mahoney JA (as his Honour then was) dealt at length with the argument based on *Liyanage*,[14] coming to the conclusion that the advice of the Privy Council (that being the "name" given to the House of Lords judges when they act as the ultimate Court of Appeal for matters coming from the British Empire and more recently the British Commonwealth)

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8 [1967] 1 AC 259 (Privy Council on appeal from Ceylon). The case was a precursor to *Kable*. Ceylon, as Sri Lanka was then called, had a Constitution which made clear provision for a court system to operate separately from the other branches of government. New South Wales at the time had no such provision in its Constitution, so the basis of comparison was unavailable, the connection to Ch III of the Commonwealth *Constitution* not having been then perceived.

9 The *BLF Case* (1986) 7 NSWLR 372 at 386 per Street CJ, quoting Cooke J (as he then was) in *Fraser v State Services Commission* [1984] 1 NZLR 116 at 121.

10 (1986) 7 NSWLR 372 at 382-385.

11 Sir Edward Coke (his name must be pronounced like the New Zealand judge's, not like the beverage: late Elizabethan English appears to have been pronounced somewhat like modern Irish English, so think Irish) had started this hare in 1610 in *Dr Bonham's case* 8 Co Rep 107a; 77 ER 638 (the relevant quote appearing in the *BLF Case* (1986) 7 NSWLR 372 at 402); Sir Robin Cooke returned to the concept with relish in a series of cases in New Zealand from 1979: see the *BLF Case* (1986) 7 NSWLR 372 at 404.

12 (1986) 7 NSWLR 372 at 417-420.

13 (1986) 7 NSWLR 372 at 421.

14 (1986) 7 NSWLR 372 at 407-413.

had no bearing on the constitutional issue in New South Wales, despite the endeavours of counsel for the BLF to utilise the history of the courts in New South Wales to reveal a system of separated powers.

The judgment of Kirby P reads as a model of analysis. He examined the legislation in issue and some matters extraneous to this chapter,[15] and then commenced his survey of the possible constitutional inhibitions on a Parliament with plenary power, that is, a Parliament unconstrained by any written constitutional restraints. Comment from the Tudor period was followed by reference to Hobbes in the troubled 17th century, leading to the iconic 19th century judicial statements on the impossibility of judges sitting "as a court of appeal from parliament".[16] Then followed Dicey and the modern judicial pronouncements.

The possible inhibitions on the New South Wales Parliament were explored – for example, the *Colonial Laws Validity Act 1865* (Imp).[17] His Honour noted that the New South Wales Parliament's "legislative powers are diminished to the extent provided by the Australian Constitution",[18] but what might have led to a *Kable*-style analysis was left hanging, presumably referring to s 109 of the Commonwealth *Constitution*. That section provides for State legislation to give way before Commonwealth legislation which covers the same field. However, it does not diminish State legislative power for inconsistency with laws of the Commonwealth, any more than legislative power of a colony was diminished for repugnancy to an Imperial law. Invalidity by later determination is not the same as lack of power, as an event subsequent to the making of the State statute, the passing of a Commonwealth Act, may bring about the invalidity of the State law.

Three possible lines of attack on the capacity of the New South Wales Parliament to pass the statute in question were suggested by Kirby P: the first two involved the separation of powers. These arguments, in part involving *Liyanage*, were despatched as inapt to the New South Wales Constitution. Then, under the heading "Implied limitations", his Honour set out a five-page analysis of the possibilities of judicial review of legislation. The coverage was compendious, but extended beyond the usual suspects of the early 17th century judges (Coke and Hobart) and Dicey, to note the important decision of the House of Lords in *Oppenheimer v Cattermole*,[19] in which a majority of the Lords refused to recognise Nazi-era German law which had removed Mr Oppenheimer's German nationality. Given the analogy of presumed recognition of

15 (1986) 7 NSWLR 372 at 387-395.

16 (1986) 7 NSWLR 372 at 396, quoting Willes J in *Lee v Bude and Torrington Junction Railway Co* (1871) LR 6 CP 576, a year prior to that judge's suicide.

17 "Imp" is short for "Imperial" and refers to a statute passed by the British Parliament for application in the various colonies. It still applied to Acts passed prior to the Australia Acts 1986 (Cth) and (UK).

18 (1986) 7 NSWLR 372 at 397.

19 [1976] AC 249, cited at (1986) 7 NSWLR 372 at 403.

foreign law with the blanket acceptance of statutes of the State in which a court is sitting, Kirby P was staring at the possibility of striking down a statute for breach of human rights, but he pressed on, unswayed by the welter of judgments hinting at a power of judicial review of Parliament coming across the Tasman from the pen of Sir Robin Cooke.[20]

The conclusion, unequivocally supporting the orthodox position, rested on the speech of Lord Reid in *British Railways Board v Pickin*.[21] His Lordship was quoted at length:

> In earlier times many learned lawyers seem to have believed that an Act of Parliament could be disregarded in so far as it was contrary to the law of God or the law of nature or natural justice, but since the supremacy of Parliament was finally demonstrated by the Revolution of 1688 any such idea has become obsolete.

In the remaining two pages of his judgment, Kirby P does not merely bend his knee to authority, but prostrates himself before the altar of "unbroken law and tradition",[22] in a manner that would satisfy even the most severe of his critics, such as the commentator Dr Janet Albrechtsen in *The Australian* newspaper. But the satisfaction in reading his Honour at this point lies not in a nuts and bolts assemblage of the past authorities (the standard issue lawyer as construction engineer approach) but that Kirby P then settled down to an analysis based on political theory and reality (more the lawyer as theologian approach).

Thrice in a page his Honour rested on the absolute requirement of respect for "the democratic will of the people as expressed in Parliament".[23] If only the likes of Albrechtsen and the late P P McGuiness, constant critics ranging in their harping from savagery to lampoonery, actually read what Kirby J wrote in his judgments, such as:

> In the end, it is respect for long standing political realities and loyalty to the desirable notion of elected democracy that inhibits any lingering judicial temptation, even in a hard case, to deny loyal respect to the commands of Parliament by reference to suggested fundamental rights that run "so deep" that Parliament cannot disturb them.[24]

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20 Cited in totality at (1986) 7 NSWLR 372 at 404.

21 [1974] AC 765 at 782, set out at (1986) 7 NSWLR 372 at 404-405.

22 (1986) 7 NSWLR 372 at 405.

23 (1986) 7 NSWLR 372 at 405.

24 (1986) 7 NSWLR 372 at 405. This expression of theory inevitably reveals itself more obviously and frequently in the context of the relationship of courts to Parliaments in the interpretation by the former of the statutes produced by the latter, eg, Kirby P (dissenting) in *Turner v Morlend Finance Corp (Vic) Pty Ltd* [1990] ASC 56-006 at 59,124: "Courts must be careful, in the name of construction, not to exceed the proper function of the courts. This is, relevantly, to give meaning to the statutory language, not to indulge in judicial policy enactment. Still less may a court undo that which Parliament has enacted or provide words which Parliament has declined to enact. Cf *Metropolitan Gas Co v Federated Gas Employees' Industrial Union* (1925) 35 CLR 449, 455." Compare with Kirby J in 1997: see n 78, below. The matter of Kirby J on statutory interpretation is discussed in this book at Chapter 29.

The weight of reasoning was plainly with Kirby P's recognition of the fact that judges "lack the legitimacy"[25] to rule legislation of an "uncontrolled" Parliament invalid, but the use of the heterodox views of Sir Laurence Street and Priestley JA lingers. In 2007 the English Court of Appeal in *Secretary of State for Foreign and Commonwealth Affairs v The Queen (on the application of Bancoult)*[26] rested on the legislative limiters, Street and Priestley, to find that Orders in Council issued as "prerogative legislation"[27] under Her Majesty's hand, forbidding the residents of the Chagos Islands returning to the homes they had been removed from 40 years earlier, was invalid.

This employment two decades after the event provided a very easy shot for Professor Finnis of Oxford University in his paper[28] criticising the Court of Appeal judgment in *Bancoult*. Finnis was extremely critical of Sedley LJ for relying on Street CJ and not noting "the thoroughgoing rejection of Street CJ's 'surprising' opinion by a unanimous High Court in *Union Steamship v King* …".[29]

For as Finnis revealed, the High Court spoke on the subject shortly after the *BLF Case*. *Union Steamship* was a unanimous judgment of all seven members of the (first) Mason High Court (that is, Wilson J was present, with McHugh J yet to arrive). The court noted the current debate (in the *BLF Case*) surrounding the amplitude of the phrase "peace, order and good government" and referred to the historical reasons in issue to answer the judgment's own rhetorical flourish: "This may seem somewhat surprising."[30] The Bench then settled the issue of the plenary power of an "uncontrolled" Australian Parliament:

> Just as the courts of the United Kingdom cannot invalidate laws made by the Parliament of the United Kingdom on the ground that they do not secure the welfare and the public interest, so the exercise of its legislative power by the Parliament of New South Wales is not susceptible to judicial review on that score. Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common

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25 (1986) 7 NSWLR 372 at 405, see also 406.

26 [2007] 3 WLR 768, particularly at 788-789 [53] per Sedley LJ writing the leading judgment. Since overturned 3:2 in the House of Lords: *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] 3 WLR 955.

27 An obscure portion of the unwritten British Constitution provides for the monarch to issue laws to ceded and conquered colonies (as the British Indian Ocean Territories are) by prerogative process, not dependent on legislation at Westminster.

28 J Finnis, "Common Law Constraints: Whose Common Good Counts?" (University of Oxford Faculty of Law Legal Studies Research Paper Series, Working Paper No 10/2008, March 2008): http://papers.ssrn.com/Abstract=1100628 (accessed 13 October 2008).

29 (1988) 166 CLR 1; see n 28 of the Finnis paper, above, n 28.

30 (1988) 166 CLR 1 at 9. The surprise was expressed as to the existence of the debate rather than Street CJ's views.

> law (see *Drivers v Road Carriers* [1982] 1 NZLR 374, at 390; *Fraser v State Services Commission* [1984] 1 NZLR 116, at 121; *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, at 398), a view which Lord Reid firmly rejected in *Pickin v British Railways Board* [1974] AC 765, at 782, is another question which we need not explore.[31]

THE 1997 PAPER: "LORD COOKE AND FUNDAMENTAL RIGHTS"

Ironically, the next extended judicial pronouncement on the topic came from Dawson J dissenting in *Kable*.[32] His Honour drew on the materials employed by Kirby P in the *BLF case*, and then referred at length to the High Court decision in *Union Steamship*, and to Kirby P himself in the *BLF case*. At this point Kirby (now J, that is, he had moved to the High Court) started publishing in the field extrajudicially. His paper delivered in Auckland in April 1997, "Lord Cooke and Fundamental Rights",[33] provided a complete conspectus of the New Zealand cases already referred to above, placed in a context of the political issues at large in New Zealand at the relevant time (the later 1970s and the 1980s), and how that context led to increasingly pressing inquiry in New Zealand into the utility of a Bill of Rights. But his Honour was true to his "democratic" theory of the underpinning to parliamentary sovereignty.[34] He noted that he had been attacked by some academics

31 (1988) 166 CLR 1 at 10.

32 (1996) 189 CLR 51 at 71-76.

33 In P Rishworth (ed), *The Struggle for Simplicity in Law: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) p 331: also available by referring to Justice Kirby's website or through the list of judges' papers at the High Court website: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_cooke.htm (accessed 13 October 2008).

34 In *Levy v Victoria* (1997) 189 CLR 579 at n 144 (three months after the delivery of the Auckland paper), Kirby J gathered all the then recent academic publications on the general issue of "sovereignty": W Wade, "The Basis of Legal Sovereignty" [1955] *Cambridge Law Journal* 172 at 188; W Wade, "Sovereignty – Revolution or Evolution?" (1996) 112 *Law Quarterly Review* 568 esp at 574-575; C Forsyth, "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review" (1996) 55 *Cambridge Law Journal* 122 at 138-139; G Winterton, "Extra-Constitutional Notions in Australian Constitutional Law" (1986) 16 *Federal Law Review* 223 at 239; Laws, "Law and Democracy" [1995] *Public Law* 72 at 79; T Allan, "The Limits of Parliamentary Sovereignty" [1985] *Public Law* 614 at 635; A Ross, "Diluting Dicey" (1989) 6 *Auckland University Law Journal* 176 at 195.

for timidity in his approach to the subject,[35] but then proceeded to look at possibilities for judges to deal with extreme legislation within the "sovereignty" model.

It was at this point that *Kable* was summoned and discussed at some length. Intriguingly, his Honour provided a head of possible review separately from *Kable*, "Protecting the Integrity of Judicial Process". He lamented the refusal of special leave (he dissented) in a case which might have raised the capacity of the legislature to block the delivery of critical evidence to a trial judge (the area was that of evidence in sexual assault cases), and then moved toward the conclusion of his paper with a reference to the perceived language and structure of the Australian *Constitution*. Writing of the "separate functions" of an "independent judiciary", Kirby J wrote: "Those functions include, at least arguably, the avoidance of a trial which particular circumstances (even statutory requirements) would render a travesty of justice."[36]

His Honour may get to test this view in the year remaining to him on the High Court from the time of writing this paper (April 2008), as special leave has been applied for in *K-Generation v Liquor Licensing Court* with a view to overturning the majority judgment of the Full Court of the South Australian Supreme Court in that matter.[37] The case involved legislation providing for the police to tender documents to the Liquor Licensing Court in secret, so that the affected party, upon applying to the court for a licence for livelihood, has no idea of what has been put against him, and consequently, no idea of what to say in rebuttal. Can a

35 His Honour named amongst others Professor G de Q Walker, who in another life would appear as junior to D F Jackson QC in the remaining High Court case in this field, *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, the case with the over-length written submissions: see beginning of transcript of proceedings for a display of judicial irritation: http://www.austlii.edu.au/au/other/hca/transcripts/1999/S155/3.html (accessed 13 October 2008). The reason given for the submissions being vastly over the 20-page limit set by the High Court was, reflecting the theme of this paper, that the "topic [was] of some considerable difficulty and a matter of some substance" (per Jackson QC). The irritation was expressed by McHugh J, not Kirby J. The present writer may have got as near as counsel gets to a rebuke from the latter judge to counsel: see *Ferdinands v Commissioner for Public Employment* (2005) 225 CLR 130: http://www.austlii.edu.au/au/other/HCATrans/2005/572.html (accessed 13 October 2008) (High Court transcripts, 9 August 2005, at end). After three interjections on the trot from his Honour, "Kirby J: This seems a very long reply. Usually replies are short and sweet", counsel scuttled off very quickly.

36 See above, n 33.

37 (2007) 99 SASR 58. Kirby J is already well across the issue, having cited the unanimous Canadian Supreme Court decision in *Charkaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 350 at [64] on the "gutting" of natural justice: see *Thomas v Mowbray* (2007) 233 CLR 307 at 398 [257]. After this paper was written, special leave was granted in *K-Generation*, and the substantive hearing by all seven members of the High Court was conducted in Adelaide on 4 and 5 November 2008. The present writer was counsel for the appellants.

State Parliament so deal with a body which it calls a court, staffed by a judge from a Ch III court?[38]

DURHAM HOLDINGS

The latest High Court exercise in the field is *Durham Holdings Pty Ltd v New South Wales*,[39] concerning New South Wales legislation that provided for expropriation of property in the coal industry without full monetary compensation. Justices Gaudron, McHugh, Gummow and Hayne, with Callinan J in substantial agreement, relied upon the *Union Steamship Case*[40] to dispel any notion of limiting the ambit of "peace, order and good government" to attract judicial review of the law-making power. The joint judgment noted *Kable* amongst other examples of limitation on legislative power inferred from constitutional structure,[41] but 14 paragraphs exhausted their Honours' reasons.

Justice Kirby, however, took 64 paragraphs (agreeing with the result of the joint judgment) to perform a tour d'horizon of the matter, unequalled in common law jurisprudence. When, one asks, will the carping critics lathering on about "judicial activism" (Albrechtsen is peculiarly odious in the inverse proportion of her stridency to her factual basis) note the sheer money value of Kirby J? No easy signing off in agreement with other judges' work, Justice Kirby always does the heavy lifting himself: his labour, and not just in this perhaps recondite field, will provide a mine for exploitation by future common law judges, as was clearly the case with Dawson J's dissent in *Kable*.[42] The erstwhile Professor Walker having previously criticised Kirby (then P) for timidity,[43] and being now the author of the voluminous submissions in *Durham Holdings*,[44] was given the courtesy of a complete reply.

It must be said that some of Kirby J's vast volume comes at the expense of some small accuracy. His statement[45] that "there exist in England very old cases which suggest that a view was once held that the English Parliament was less than omnipotent, being subject to the laws of God" is not really supported by the reference to Professor Goldsworthy's *The*

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38 See the short explanation of *Kable* in n 7: Commonwealth Ch III courts (and State courts vested with Ch III jurisdiction) must be immunised against interference from the Executive (empowered by the legislature) in the performance of their judicial functions.

39 (2001) 205 CLR 399.

40 (1988) 166 CLR 1. See n 28, the reference in *Durham Holdings Pty Ltd v New South Wales* being (2001) 205 CLR 399 at 409 [11].

41 (2001) 205 CLR 399 at 410 [14].

42 See text after n 32, above.

43 See n 35, above.

44 Private conversation between the present writer and Jackson QC, in the course of preparation of the submissions in *Yougarla v Western Australia* (2001) 207 CLR 344, warning against breach of the 20-page rule. The name of junior counsel in *Durham Holdings* was not raised, or the name of the case, but it was later all very clear.

45 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 419 [43].

Sovereignty of Parliament,[46] where the most elderly case dates to 1839.[47] But this is nit-picking. The intriguing portion of the judgment lies in its conclusion, "Judicial responses to extreme laws".

Extreme laws

His Honour observed that if *Kable* worked a constitutionally based inhibition on State Parliaments in respect of State courts, then equally future laws might be invalidated for breach of other structural aspects of the *Constitution* involving the Parliament or the Executive, quite as much as the Judiciary. This was in itself an advance on the previous view of Ch III of the *Constitution*, dealing with the Judiciary, as the bastion of human rights in Australia. Justice Kirby was looking further afield, but only in the context of what was provided in the *Constitution*, for the possibility of restraint on law-making. His Honour carefully eschewed any reference to human rights and kept to structure that might be available for dealing with "extreme" laws, of which he said:

> The answer lies in the implications derived from the Constitution, not in assertions by judges that the common law authorises them to ignore an otherwise valid law of a State. Such an over-mighty assertion in relation to constitutional powers of lawmaking is as alien to our law as to our political realities. On the other hand, judicial derivation of implications from the federal Constitution is not alien but familiar.[48]

This is an easier read than the more than 12 pages in Goldsworthy under the heading "The Argument from Extreme Cases".[49] A clue to the intractability of this argument, and its popularity amongst academics with time for abstract contemplation, lies in the sheer inability to provide a touchstone for acceptability of a statute outside the terms, themselves to be interpreted, of a written constitution. This is not to say that academics are alone in using vague language that merely fans the fire. For example, Goldsworthy paraphrased Lord Irvine of Lairg in 1996, a year short of becoming Lord Chancellor, to the effect that "a government determined to enact *evil* laws could probably be defeated only on the political battlefield, and not in the courts".[50]

"Evil"? A purely relative concept, and any assumption that "the community" has an accepted standard of restraint on government action, executive or legislative, must be fatally weakened in the light of the legislative responses to perceived 21st century terror, in all common law nations. The subordinate governing districts of those nations are

46 See Goldsworthy, n 1, p 224.

47 *Stockdale v Hansard* (1839) 9 Ad & E 1; 112 ER 1112.

48 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 431-432 [75] (citations omitted).

49 Goldsworthy, n 1, pp 259-272.

50 Goldsworthy, n 1, p 270 (emphasis added).

now in a position to follow in the wake of the "war on terror" laws, with rafts of statutes based on pronouncements of a "war" on drugs, bikie gangs, or whatever fancy crosses the mind of a political leader to declare as the war du jour. It is the declaration of a state of "war", and the demonisation of a minority group for political advantage, that "justifies" such legislation in, for example, sweeping aside past understanding of the restraint inherent in, and the sanctity of, the judicial process as so much dry chaff.[51]

THE 2004 PAPER: "DEEP LYING RIGHTS – A CONSTITUTIONAL CONVERSATION CONTINUES"

Justice Kirby's remaining major contribution in this field lay in a paper given again in New Zealand, this time in Wellington in November 2004: "Deep Lying Rights – A Constitutional Conversation Continues".[52] The thread of this paper was to explain through *Durham Holdings*, and a number of other High Court decisions around that time which dealt with constitutional points, that Australia, unlike New Zealand, had a written *Constitution* that limited the ambit of federal legislative endeavour, and even that of the States to some small extent.

The major theme of the paper was to explore Australian jurisprudence as not one based on "parliamentary sovereignty" at all, but rather based in the sovereignty of "the people" – all Australian citizens. Under the heading "To Whom Does 'Sovereignty' Belong?" his Honour blended the theoretical with the organic:

> Of course, sovereignty does not belong to the Executive or the Governor-General or Governors, still less to the courts. A democracy and especially a federation such as Australia, is a place of shared powers. It has many checks and balances. Parliament tends to reflect, in a very general way, transient popular majorities. The sad experience of history,

51 See, eg, the legislation in *K-Generation Pty Ltd v Liquor Licensing Court* (2007) 99 SASR 58, and the proposed *Serious and Organised Crime (Control) Bill 2007* (SA), which provides for the police to give secret information to a court in the process of obtaining a "control order", the making of such an order having immediate impact on an affected person's freedom of association. This removes natural justice (the right to be fairly heard when one's position is being threatened) in a court, where such fairness has always been assumed. The response from the Premier of South Australia to the Law Society's criticisms of this Bill was to accuse the legal profession of having "once again been critical of the Government's tough stand against bikies and their criminal activities": The Hon M Rann to President of the SA Law Society, 13 March 2008. This titanic struggle, given its location in the wilds of South Australia, is less Kafka and more Titipu. The local bikies appear "comfortable and relaxed", perhaps because of the "million dollar lawyers" the State Attorney-General alleges are in their pay. Kafka has, however, been called in aid in the House of Lords in regard to this sort of legislative manoeuvre: see Lord Steyn in *R (Roberts) v Parole Board* [2005] 2 AC 738 at 787 [95] for an apposite quotation.

52 "Deep Lying Rights – A Constitutional Conversation Continues" (The Robin Cooke Lecture, Wellington, New Zealand, November 2004): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_25nov04.html (accessed 13 October 2008).

> including recent history, is that parliaments, from time to time, overlook or even override the fundamental rights of minorities. …
>
> In such cases, to talk of parliamentary "sovereignty" is not only incorrect; it is positively misleading. It leads parliamentarians to believe that they enjoy a plenary and uncontrolled power. At least under Australia's constitutional arrangements, that is never the case. Their powers are always subject to the written Constitution and ultimately determinable by courts of law. Where governments enjoy large majorities in a unicameral parliament, or effective majorities in both houses of a bicameral parliament, the role of the courts in protecting minority rights becomes more important. It is a power to be exercised lawfully, wisely and for the purpose of protecting the true sovereign – all of the people of the polity concerned.[53]

This material amounts to rhetorical question begging. Where does the judicial "power" for protection of the "true sovereign" come from? What does it look like? As had been the case in the 1997 New Zealand visit, the depth of affection for Robin Cooke was on display, but Kirby J would have none of the New Zealander's theory of "deep lying rights" as a restraint on legislative power. The Australian response was, however, even more inchoate.

HISTORY SUPPORTS KIRBY'S RELIANCE ON POPULAR WILL EXPRESSED THROUGH PARLIAMENTARY ELECTION

For those with a consuming interest in the historical evolution of "parliamentary sovereignty", the most recent overview is provided in "Parliamentary Sovereignty: New Zealand – New Millennium".[54] This article covers most of the material that the present writer has come across on the topic, save one case that has eluded this latest author, and all modern judges. It is raised here merely to support the present writer's thesis, which arose from teaching statutory interpretation, that judicial perception of the interpretative process as well as the acceptance of parliamentary legitimacy went through a sea change in the 19th century as universal suffrage was brought to bear. It is hardly surprising that the references to judges muttering about the possibility of invalidating statutes died out in the late 18th century,[55] and the blunt assertion of

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53 Kirby, n 52.

54 K Grau (2002) 33 *Victoria University of Wellington Law Review* 351. The case law, and articles on the cases, from Coke to Cooke, are examined at length.

55 In *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 420 [44] Kirby J listed six Chief Justices from Coke to Mansfield who had uttered these views, but Mansfield CJ retired in 1788.

parliamentary sovereignty increased and firmed from the 1830s,[56] as the first Great Reform Bill for extending (male) suffrage occurred in 1832, and the second Reform Bill, providing for universal (male) suffrage dated to 1867.

In conformity with this thesis, the present writer refers to the judgment of Best J (shortly after appointed CJ) in *Forbes v Cochrane*,[57] an 1824 case in Kings Bench concerning suit by a British slave owner, Forbes, living in (then) Spanish Florida (where slavery was legal), whose slaves swam out to a squadron of British warships commanded by Vice-Admiral Cochrane, asking for assistance to escape. The British warships took the erstwhile slaves to Britain.

This legal contest took place a half-century after Lord Mansfield's decision in *Somerset's Case*,[58] determining that the condition of slavery, in the absence of statute providing for it, could not exist in Britain. That litigation had been controversial in the extreme, and much hated by the West Indian slave owners, who lampooned and mocked the Lord Chief Justice.[59] The 20 years that it took Wilberforce from first presenting his Bill for the suppression of the slave trade till its enactment in 1807 (note, merely the trade, not slavery itself, which lingered till 1834 in the British Empire) tells of the hostile mood in the British Parliament in the weighing of "property rights" against what we now call "human rights". The judgment of Best J must be read in the light of that hostility, and the knowledge that Napoleon had reinstated slavery in the French colonies, after its abolition in the course of the Revolution, in order to curry favour with the planter class. Commercial interests in the British Empire were alert to the protection of slavery at the time Best J wrote his judgment.

In *Forbes v Cochrane* all three judges found for Cochrane, but Best J was last, and, relying on a reference in Blackstone to the supremacy of divine law, said:

> The crime of slavery is the crime of the nation, and every individual in the nation should contribute to put an end to it as soon as possible. It is

56 The material in the judgment of Kirby P in the *BLF Case* referred to above, n 15 commences in 1839. The 1839 case used at n 47, *Stockdale v Hansard*, for legislative restraint by reference to God, was the same case employed by Kirby P in the *BLF Case* to indicate judicial deference to the legislature, revealing the face of a decision at a moment of gestalt shift, looking both backwards and forwards in time.

57 (1824) 2 B&C 448; 107 ER 450. This case was cited to the US Supreme Court in *The Amistad* 40 US 518 (1841). The film of the same name is worth the price of the DVD.

58 (1772) Lofft 1; 98 ER 499.

59 "[T]he name of **** M------- shall henceforth become more popular among the Quacoes and Quashebas of America, than that of patriot Wilkes was among the porter-swilling swains of St Giles". From Edward Long, a planter, "Candid Reflections on the Judgment Lately Awarded by the Court of King's Bench, on What is Commonly Called 'The Negroe Cause'", in W M Wiecek, *The Sources of Antislavery Constitutionalism in America 1760 – 1848* (Cornell University Press, Ithaca, 1977) pp 32-33.

> a relation which ought not to be continued one moment longer than is necessary to fit the slave for a state of freedom. For our convenience or our gain it ought not to be allowed to exist.[60]

His Lordship commented on various statutes regulating the commerce in slaves in the West Indies. He referred to the "rights" which had grown from the institution of slavery, but then said:

> *If, indeed, there had been any express law, commanding us to recognise those rights, we might then have been called upon to consider the propriety of that which has been said by the great commentator upon the laws of the country, "That if any human law should allow or injoin us to commit an offence against the divine law, we are bound to transgress that human law"* [citing Blackstone, *Commentaries*, vol 1, p 42[61] (emphasis added)].
>
> It is a matter of pride to me to recollect that, whilst economists and politicians were recommending to the Legislature the protection of this traffic, and senators were framing statutes for its promotion, and declaring it a benefit to the country, the Judges of the land, above the age in which they lived, standing upon the high ground of natural right, and disdaining to bend to the lower doctrine of expediency, declared that slavery was inconsistent with the genius of the English constitution, and that human beings could not be the subject matter of property. As a lawyer I speak of that early determination, when a different doctrine was prevailing in the senate, with a considerable degree of professional pride.[62]

SOME KIRBY IDIOSYNCRASIES IN PERCEPTIONS OF PARLIAMENT

Informing Parliament: the possibilities for minority groups

In *Yougarla v Western Australia*[63] the issue at stake was whether s 70 of the Western Australian Constitution, as passed in 1889, providing for 1 per cent of public revenue to go to the indigenous, had survived all three legislative attempts to repeal it. The final repeal, in 1905, was found good by the High Court. That court was set the difficult task of teasing out a result from 19th century legislation, both colonial and Imperial, that provided for the Sovereign (on the advice of her British Ministers) to remain in effect a part of the Western Australian legislature for some limited purposes, with powers to decline assent to proposed colonial and, later, State legislation proposing to change parts of the colonial Constitution that the British Government regarded as critical. Such portions of the Constitution were said to be "entrenched", that is,

60 (1824) 2 B&C 448 at 466; 107 ER 450 at 457.
61 (1824) 2 B&C 448 at 470; 107 ER 450 at 458.
62 (1824) 2 B&C 448 at 470; 107 ER 450 at 458-459.
63 (2001) 207 CLR 344.

the Parliament set up in Perth from 1890 could not alter the entrenched provisions unilaterally. In the course of his concurring judgment, Kirby J reflected on what he saw as the inutility of the Westminster Parliament receiving a tabling:

> The settlers, after all, would be more likely to have had access to the members of the Imperial Parliament at the time than the Aboriginal people or their supporters.[64]

This "pheasant" had been lifted by Gaudron and Gummow JJ in argument, but only Kirby J thought it worth shooting in judgment. It is a regrettable misfire, as the court had before it compendious material reflecting on the Western Australian colonists' fears of the Exeter Hall faction who had been agitating successfully at Westminster for indigenous rights throughout the Empire since the 1830s.[65] For a judge who has steadily evolved his views on "sovereignty" to mean that of the "people" (voting in a representative democracy), this was remarkably blinkered.

On his Honour's thesis, slavery would still be law throughout British domains: slave owners would always have been better connected (which was true, but the "do gooders" showed extraordinary persistence). One suspects that there was a small portion of fear for the position of minorities, a topic on which Kirby J often reflects in this general field.[66] Readers all might like to contemplate that along with wider suffrage, the 19th century brought more nuanced and calculated popular pressure on Parliaments than the mob turbulence of the 18th century, and we are the heirs of that greater sophistication.

Protection for public officials: Kirby in maximum deferential pose

It is a truth universally to be acknowledged, that no Australian public servant or statutory officer goes out to bat on any working day without a full set of body armour comprising a section in his or her relevant legislation to the effect that she or he may not be sued for actions performed in good faith in the course of statutory functions or, perhaps, not sued unless proceedings commence within a period much shorter than that provided at general law. Local Government Acts all around Australia also carry such protective balm for local councils.

The effect of such a provision must be to impact on the right of members of the public to exercise their rights to litigate. In such a

64 (2001) 207 CLR 344 at 389 [130].

65 See S Churches, "Put Not Your Faith in Princes (or Courts)" in P Read, G Meyers and B Reece (eds), *What Good Condition* (Australian National University, Canberra, 2006) p 5 n 18.

66 The material quoted in the text above (see n 53) from Kirby J's 2004 paper refers in full to minority religions, communists, refugees and homosexuals as examples of minorities that have been dealt with unfairly by Parliaments.

situation the common law provides the Principle of Legality,[67] which says that the legislative removal of rights recognised by the common law (and the right to test a complaint at law is such a right) may only occur with words of clear intendment, and the limitation of the common law right will go no further than the statute expressly provides.

Where the *BLF Case* came early in the Kirby era on the New South Wales Court of Appeal, the Kirby essays in this esoteric field of officials' protection came late: the leading judgment in *Attrill v Richmond River Shire Council*[68] and a concurring judgment in *Kempsey Shire Council v Lawrence*[69] (in which Clarke JA adopted the reasoning in *Attrill*). Both cases involved suit by farmers against local councils in flood-prone northern coastal New South Wales, for construction of roads and like works that had a subsequent, and perhaps at the time of construction, unforeseen, effect of holding floodwaters or effluent on the farming properties well beyond the time taken prior to the construction.

The councils defended by calling in aid s 582A of the *Local Government Act 1919* (NSW) (which would later be replaced by the cognate s 733 of the *Local Government Act 1993* (NSW)). Section 582A(1)(b) provided:

> (1) A council shall not incur any liability in respect of –
>
> …
>
> (b) anything done or omitted to be done in good faith by the council insofar as it relates to the likelihood of land being flooded or the nature or extent of any such flooding.

What follows from Kirby P is an examination of why this provision must be read widely enough to protect the council. Most decisions in the High Court on this subject since at least *Board of Fire Commissioners (NSW) v Ardouin*[70] to the present[71] (and the leading Full Federal Court

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67 See Hon J Spigelman CJ, "Principle of Legality and the Clear Statement Rule" (2005) 79 *Australian Law Journal* 769.

68 (1995) 38 NSWLR 545.

69 [1996] Aust Torts Reports 81-375.

70 (1962) 109 CLR 105.

71 For example, *Australian National Airlines Commission v Newman* (1987) 162 CLR 466; *Webster v Lampard* (1993) 177 CLR 598; and *Puntoriero v Water Corporation* (1999) 199 CLR 575. It must be conceded that in *Webster* (a case concerning the WA police) the determination was a procedural and holding one only: a court could not rule to apply the protection unless the facts were established that a statutory function was being performed honestly. This allowed Anderson J to apply the coup de grace belatedly to the Websters at trial, where on the basis of the police notebooks opposed to the unrecorded recollections by the Websters of their eviction by the police well over a decade earlier, his Honour was able to determine the honest performance of such a statutory function: see *Webster & Anor v Banning Holdings Pty Ltd & Ors* [2001] WASC 11 (25 January 2001) (the "Ors" were Sgt Lampard and his assisting Constable). The latest High Court decision on the subject was *Bankstown City Council v Alamdo Holdings Pty Ltd* (2005) 223 CLR 660 which did apply the protection clause in favour of the council. The court noted the Court of Appeal decision in *Attrill*, but made no reference to its reasoning, and did not rely on it. Kirby J did not sit in *Alamdo*.

decision,[72] Gummow J having presided on that Bench) have favoured the plaintiff, that is, the protection clause has not been applied. Kirby (both P and J) has taken a view much favouring the enforcement of the protection, to the disadvantage of plaintiffs complaining of official actions (or omissions). And so it was in *Attrill*.

Despite the carping tone of the above paragraph, the decisions in *Attrill*, and then *Lawrence*, to give the councils the benefit of the protection (and thus deny any relief to the aggrieved rural plaintiffs) are defensible on the facts: the councils concerned got on with the business of construction of public amenities, and did not factor in the possible flood consequences. The Full Federal Court in *Mid Density Developments Pty Ltd v Rockdale Municipal Council*[73] refused a related protection clause to Rockdale Council because it was proved that its employee, in the context of a statutory power to provide advice as to likelihood of flooding, did not attend to the inspection of previous flood level records at all, before signing off on the plaintiff's application for building approval. The site later flooded, as the records, on inspection, showed was likely. Inaction was insufficient to attract the "good faith" protection.

In *Attrill* and *Lawrence* the New South Wales Court of Appeal appears to have made no investigation in that direction, despite the earlier decision in *Mid Density*. Should the northern rivers councils have ensured that they took into account the propensity of their districts to flooding before embarking on construction of public works? The *Mid Density* provision dealt expressly with the giving of advice by councils, so that investigation of past flood behaviour and forecast on that information was at the heart of the possible claim by a developer asking for the information. The process of forecasting by reference to records was not obviously at issue in the Court of Appeal litigation, or the later High Court decision in *Bankstown City Council v Alamdo Holdings Pty Ltd*.[74]

What is notable in Kirby P's reasoning in *Attrill* is the constant mantra of reference by name to "the Parliament".[75] Other judges dealing with this fraught area[76] just look to the words of the section: Kirby (both P and J) always involves himself in repetition of the name of Parliament. The effect on a reader is quasi-religious. One is subjected to the chant of claimed legitimacy. The calling in aid of "Parliament" does nothing to secure the reasoning in these decisions, and merely raises suspicion of undue deference, when the Principle of Legality demands a scrupulous

72 *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) 44 FCR 290.

73 (1993) 44 FCR 290.

74 (2005) 223 CLR 660: see discussion above in respect of n 73.

75 See (1995) 38 NSWLR 545 at 551-555, with a long excursus into the necessary reading down of these provisions (at 551), which is typically the commencement of an announcement that "nonetheless" they will have to be applied.

76 The NSW Full Court's effort in *Board of Fire Commissioners (NSW) v Rowland* (1960) 60 SR (NSW) 322 provides splendid entertainment, if it weren't for the loss of the theatre ignited by a fire officer in the dark, using matches to read a wall plaque.

judicial analysis of whether the protection clause operates at all on the particular facts.

IW v City of Perth[77] provided a forum for his Honour to muse on the utility of protection clauses. The Western Australian local government legislation on protection of councillors at a personal level had not been raised in argument before the High Court, but Kirby J aired his views anyway. From out of left field came the following assertion:

> The clear purpose of s 680 of the LGA is to afford a high measure of protection to a member of a council of a local government body. The section should not be given a narrow construction. Such members of councils are, and are intended to be, drawn from a wide cross-section of the community. Inevitably, they reflect the variety of opinions, attitudes and prejudices which exist in the community. If a narrow construction of s 680 of the LGA were upheld, it could inhibit the participation in the activities of the councils of local government bodies of many ordinary citizens who could not afford the risk that their conduct would render them personally liable, although they were attempting and purporting to discharge the performance of their duties of office.[78]

So much for the Principle of Legality! The introduction of a personal view of the efficacy of protecting public officials at the expense of those whom they damage or injure was almost as naughty as the use of a quotation from Scrutton LJ in *G Scammell & Nephew Ltd v Hurley*.[79] His Honour noted that this case had been cited in *Webster v Lampard*,[80] but then completely ignored the manner in which McHugh J had dealt with *Scammell*, which was to point out that a defendant wanting to rely on a protection clause still had to make out the facts of honest performance of public duty.[81] Kirby J followed his quotation of Scrutton LJ with the "high level of protection" manifesto set out above. This leads the law into a side alley.

The latest judgment in this field from Kirby J came as a dissent in *Puntoreiro v Water Corporation*.[82] Farmer Puntoreiro had requested water for his potato crop from the respondent Water Corporation. The Corporation sent the water, laced with a powerful herbicide, which it knew was in the water. All the potatoes died. A jury found they had been worth $1.8 million. Farmer Puntoreiro sued, and four members of the High Court were clear that the relevant protection clause could not save the Water Corporation.

77 (1997) 191 CLR 1.

78 (1997) 191 CLR 1 at 83. Compare with Kirby P in 1990; see n 24.

79 [1929] 1 KB 419 at 429.

80 (1993) 177 CLR 598: see n 71.

81 *Webster v Lampard* (1993) 177 CLR 598 at 622.

82 (1999) 199 CLR 575.

Justice Kirby, however, went into incantatory mode, calling on the name of Parliament and the legislature[83] (none of the other members of the Bench did so) to justify an acceptance of the protection provision on the instant facts: to do otherwise would involve "defeating the object of Parliament as signified in the words of its enactment".[84] He drew a distinction between "loss or damage suffered as *a* consequence of the exercise of a function" (the words used in the protection provision under scrutiny) and loss suffered as *the* consequence of exercise of a function.[85] This involves a time warp to the world of the medieval Schoolmen: occasionally Kirby J reveals a disturbing propensity for counting angels on pinheads.

This sort of reasoning does not reflect well on the law as a rational delivery vehicle for justice. A subliminal yearning for orderliness and officialdom exhibited in the years of barracking for the monarchy, not to mention the dissent in *Wilson v Minister for Aboriginal and Torres Straight Islander Affairs*,[86] still seems to inhibit a capacity for perhaps necessary flexion (that is to say, ability to articulate less officially oriented viewpoints) in his Honour's reasoning.

The irony in this criticism from the present writer is that it takes him back to his first meeting with Kirby J (as he then was, a Federal Court judge) in a queue at Melbourne airport in 1979. The present writer had shortly beforehand sent his Honour (then the Chair of the Australian Law Reform Commission) a draft of an article[87] which explored protection clauses at length, asking for some information from the Commission. Introductions were made and the judge organised the writer into the seat next to him. 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. The writer was duly informed that the article was in fact in the judge's workbag. The plane took off, and the table was allowed to be dropped. The judge started working through his files. After 30 minutes he arrived at the draft, which he skimmed, alert for references to the Australian Law Reform Commission, and then announced that his secretary would reply to the request for information.

From all this it may be deduced that his Honour has seen, if not read, this article. Before he writes again in this field he may get to read

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83 (1999) 199 CLR 575 at 598-603 [66], [69], [76] and [80].

84 (1999) 199 CLR 575 at 603 [80].

85 (1999) 199 CLR 575 at 601 [74] and [75].

86 (1996) 189 CLR 1. Six members of the High Court found that a Federal Court judge should not act as a reporter to a Minister, as that damaged the perception of the courts as insulated from executive influence. Kirby J found that judges could attend to such non-curial functions.

87 S Churches, "'Bona Fide' Police Torts and Crown Immunity: A Paradigm of the Case for Judge Made Law" (1980) 6 *University of Tasmania Law Review* 294.

it, and a later piece on the topic.[88] They both present an analysis far more stringent than his Honour's views and the line adopted by the remainder of the Australian judiciary, in terms of why plaintiffs should not often be defeated by such provisions. All Australian judges would profit from reading the leading South African case in the field, *Mjuqu v Johannesburg City Council*.[89] The argument of Du Toit, counsel for the appellant, makes clear how all Australian thinking on these clauses has become distorted at a fundamental level.

Legislation of a uniform nature allowing discretion to the Executive

In the light of the critique offered above, the writer concludes this brief view of judicial idiosyncrasies by noting the dissent of Kirby J in a special leave application that involved a Bench of five and lasted two days.[90] The other four members refused leave with some brusqueness, but Kirby J realised the importance of what was at stake. The present writer regards the references to Parliament in this dissent as having an appropriateness that was lacking in the examples above. This is because his Honour is not calling on the name of Parliament to support a particular view of construction, but rather he notes that the legislation in contest is of a uniform nature (that is, employed by State Parliaments generally), involves investing discretions in the Executive, and Parliaments need to know whether the apparent provision of terms for the exercise of those discretions, left in tatters by the Western Australian Full Court,[91] might have any efficacy.

Justice Kirby said:[92]

> [T]he legislation which has been construed here is common, or at least similar, to legislation in other jurisdictions of Australia. Environmental legislation of the kind which we have explored in this hearing is now quite common in this and other countries. The elucidation of the way in which parties claiming an interest can enforce, as against the

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88 S C Churches, "Better Not be a Victim of Government Tort in NSW" (1998) 36 (May) *Law Society Journal* 60.

89 1973 (3) SA 421 [AD]. See also the decision of the NSW Full Court in *Ardouin v Board of Fire Commissioners (NSW)* (1961) 61 SR (NSW) 910, argued by Maurice Byers QC. Sir Maurice, as he later became, was not present in the High Court appeal, but the reasoning in the Full Court is more straightforward than the turns taken in the High Court.

90 *South-West Forest Defence Foundation Inc v Department of Conservation and Land Management (No 1)* (1998) 154 ALR 405. This litigation and the surrounding environmental and bureaucratic disaster, revolving around the machinations of the Burke Government-appointed head of the Department of Conservation and Land Management, Dr Syd Shea, was written up by the present writer in "Courts and Parliament Dysfunctional in Review: Forest Management as a Case Study of Bureaucratic Power" (2000) 7 *Australian Journal of Administrative Law* 137.

91 *Bridgetown/Greenbushes Friends of the Forest Inc v Director of Department of Conservation and Land Management* (1997) 18 WAR 126.

92 (1998) 154 ALR 405 at 408-409.

> Executive Government and its agencies, environmental plans, such as the management plan principally in question in these proceedings, is an important question. It is one on which this Court has not previously passed. The management plan may appear unusual to those nurtured in more traditional expression of subordinate legislation in Australia. However, by command of the Parliament of Western Australia, the management of the land referred to in the management plan in question here must be carried out in accordance with the management plan. The applicants say, with arguable justification, that that has not occurred.
>
> …
>
> Unless corrected, if it be wrong, the holding and approach of the Supreme Court of Western Australia will stand as a serious obstacle to the enforcement of such management plans in that State, and possibly in other parts of Australia as well. It will encourage the notion that such management plans in environmental matters are mere exhortations and either not justiciable, or ultimately unenforceable rules made under the authority of the Parliament concerned and, thus, not necessarily to be obeyed by the Executive Government and its agencies as Parliament apparently requires. If that is the law it is important that Parliaments throughout this country, those concerned with the environment and indeed everyone else should know what an empty gesture is thereby established. If it is not the law, the Executive Government and its agencies should be held to the obligations ostensibly demanded by Parliament to protect the environment.

KIRBY ON COURTS AND PARLIAMENT: CONCLUDING THOUGHTS

The increasing reference by Justice Kirby to the "people as sovereign" is matched by his growing enthusiasm[93] (unechoed by any of his judicial colleagues) for the Irish Supreme Court decision in *Byrne v Republic of Ireland*[94] in which a majority of the Irish court determined that the Irish Constitution, even prior to the Republic, was based in the will of the people, so that the prerogatives of the English Crown did not inhere in the Irish State Executive. We have not heard the last of this concept.

Justice Kirby has also recently referred to the rising tide of legislation, noting its organic impact on fundamental doctrine such as precedent.[95]

Turning from the volume of legislation to the constitutional theory that might inhibit legislative reach, one notes that *Kable*, with its one application in 12 years, is now the object of derision as the "most distinguished" of all High Court decisions. (Non-lawyers may note that judges

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93 See most recently *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at 48-49 [104]-[106].

94 [1972] IR 241.

95 M D Kirby, "Precedent Law, Practice and Trends in Australia" (2007) 28 *Australian Bar Review* 243 at 251-252.

prefer to avoid directly contradicting high authority case law such as *Kable*: they "distinguish" the case on which they are working from the case they are side-stepping by enlarging on the different facts.) The jest that its impact is prophylactic in guiding legislatures to "safe legislation" now seems unlikely in the light of the anti-terror and related laws of recent years. Reflecting a conservative despair in the face of "judicial activism", Professor Goldsworthy, writing in the context of "extreme cases", argued that judges would "undermine democratic decision making" and interpret their authority too broadly once allowed by a written constitution into the process of review of legislation. He wrote:

> Even in the interpretation of a written constitution, as case after case is decided, a vast coral reef of judicial interpretation gradually accumulates around provisions limiting legislative power. Each decision may extend the judges' authority only slightly, but the eventual cumulative effect is a massive expansion far beyond what was originally intended.[96]

This is so at variance with the experience in *Kable* as to be risible. There is no "vast coral reef", only an abyss in which interpretation accumulates in opposition to the case's application. *Kable* swims on alone, the Great White Whale of Australian jurisprudence. The present writer is tempting fate: who on the High Court aspires to the role of Captain Ahab?[97]

As for the problem of extreme laws, mocked by conservative thought as a chimera, the reality revealed in 21st century legislation, drawing inspiration from the events of 9/11, is that the substantial results expected of "extreme laws" are now achieved not by a frontal assault, but more deviously by "salami slicing". The present trend is to pare incrementally at fundamentals such as natural justice, by the introduction of ever more "Executive favouring methods" of withholding evidence from the eyes of the affected person, while ensuring the evidence is used by a court to make orders against the interests of that person. Parliaments, driven by the Executive through the party system, anticipate a frog in a pot reaction: as they turn up the temperature on once fundamental procedural rights, it is hoped that the populace will not notice the progressive death of critical safeguards against the application of Executive power. The Star Chamber's capacity to act summarily on the basis of rumour seems set to reappear, rebadged, nearly 400 years after its abolition.

It is time for all to grasp the reality that in the absence of a Bill of Rights, our Parliaments (State and Federal), once the cultural inhibitions of another era on legislative reach in favour of the Executive have been discarded, are all too ready to ignore the separation of powers, with consequent disaster: see Montesquieu quoted at length by Gummow J

96 Goldsworthy, n 1, p 270.

97 The proofreading process was eased by working through some of the judicial candidates, each occasionally resurfacing, lashed to the monster, an arm beckoning to the beyond …

in *Grollo v Palmer.*[98] It is appropriate to set out the epigrammatic words of Jackson J of the United States Supreme Court on the utility of a Bill of Rights; the consequence of a lack of such enforceable restraint is inferentially obvious:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of political majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote, they depend on the outcome of no elections.[99]

This is a little unfair on Michael Kirby, as he noted the limits on judicial review of legislation in the absence of a Bill of Rights in his 1997 Auckland paper,[100] although his hopes for legislative restraint or the finding of judicial review power in an acceptable manner seem pious. He said in the last paragraph of that paper (emphasis added):

> So let us have no more talk of "deep rights" – unless they are in the constitution already or unless citizens can persuade Parliaments, and themselves to put such rights in a Bill of Rights which has the stamp of the people's legitimacy. That stamp alone, and not the opinions of judges, will give such "deep rights" the authority to check and limit what Parliament can do. It is good that Lord Cooke has sparked this debate. *But heresy is heresy. And it may be dangerous heresy besides.*

This was a firm rebuke to Lord Cooke's adventurism (but no one does "more in sorrow than in anger" as sweetly as Kirby J). What is not spelt out by all the commentators above, with the singular exception of Michael Kirby, is the sheer intractability of the debate about sovereignty. The impossibility of squaring the circle to find a "sovereign" who will always behave "acceptably" is delightfully illustrated by Professor R F V Heuston's opening chapter of *Essays in Constitutional Law.*[101]

Dripping irony from his pen, Heuston explored the career of the great parliamentary sovereignty theorists from Dicey on, Oxford men all. Dicey himself could not stomach the impending legislation providing for Irish Home Rule, so he signed the Covenant (the document signed by nearly half a million Ulster men and women in 1912 denouncing the idea of Home Rule for Ireland) and "pledged himself to armed resistance to lawful authority".[102] Sir William Anson, a Privy Councillor and the author of *Law and Custom of the Constitution*, was quoted as saying: "If the covenanters meet [the Home Rule Act] with armed resistance, I

98 (1995) 184 CLR 348 at 392–393.

99 *West Virginia State Board of Education v Barnette* 319 US 624 at 642 (1943).

100 Kirby, n 33.

101 (Stevens, London, 1961).

102 RFV Heuston, *Essays in Constitutional Law* (Stevens, London, 1961) p 3.

for one believe, with a conviction which no results of a referendum or a general election can alter, that they are justified in their resistance."[103] And so forth. Theory collapsed like a sand castle before the encroaching tide in the very persons of those propagating this faith. "Sovereignty" was the central pillar of their temple, embellished and much revered, the subject of travel reports to the faithful, until the Sovereign set out to do something utterly disapproved of by these Establishment Englishmen: to give Home Rule to the Irish.

Nothing quite so encapsulates the collapse of the pillar as the literal call to arms to destroy the product of the Sovereign legislature: Home Rule was to be resisted at any cost. Readers of the present century may struggle to understand this passion which so easily undid the acceptance of parliamentary sovereignty, but it is worth remembering that in the month before war broke out in August 1914, "the Galloper", F E Smith, soon to become the Attorney General, and by 1920 Lord Chancellor Birkenhead, had imported 20,000 brand new German rifles into Ulster with a view to resisting British Government attempts to set Home Rule in motion. Only the cataclysm of World War I staved off the catastrophe of revolt.

There is no easy present answer in Australia. Crumbs of protection against outlandish legislation are offered by the Commonwealth *Constitution*, but it is poor stuff. Rather than an endless and inevitably arid debate about whether the judiciary might protect us from the madder impulses of Leviathan, there should be a clear-eyed acceptance that at present we are stuck with Leviathan unchained. As Justice Kirby informed his audience in Auckland over a decade ago, dreaming of "deep set rights" will not provide the tools with which the judiciary might review legislation: only a Bill of Rights can provide the necessary measuring stick of acceptability.[104]

103 Heuston, n 102, p 3.

104 A Bill of Rights still has to be interpreted. The failure of *Telford v Severin* [2007] HCATrans 427 (9 August 2007) to receive special leave to appeal from the SA Full Court ((2007) 98 SASR 70) on whether legislation disallowing home detention required express words to apply to sentences already on foot, the applicant's sentence having begun with a likelihood of home detention, was a sobering reminder of how hostile might be the judicial reception of a Bill of Rights in Australia. The cases cited to the special leave panel were all from jurisdictions (in particular the US Supreme Court) with Bills of Rights where punishment, prohibited against legislative extension after commission of offence, was assumed by the judiciary to include depriving prisoners of non-custodial leave (as part of sentence) that had been in view at the commencement of sentence. The majority of the special leave panel would not accept the removal of the prospect of home detention as a form of increased punishment. Kirby J dissented at the application, indicating that he would have granted leave.

Chapter 9

CRIMINAL LAW

Bernadette McSherry

> *No civilised society removes its protection to human life simply because of the existence of a history of long-term physical or psychological abuse. If it were so, it would expose to unsanctioned homicide a large number of persons who, in the nature of things, would not be able to give their version of the facts. The law expects a greater measure of self-control in unwanted situations where human life is at stake. It reserves cases of provocation and self-defence to truly exceptional circumstances.*[1]

INTRODUCTION

Andrew Ashworth, a pre-eminent law academic, has pointed out that "[t]he contours of criminal law are not given but politically contingent. Seemingly objective criteria such as harm, wrongdoing and offence may tend to melt into the political ideologies of the time."[2] This notion of the contingent nature of the criminal law has been a major focus in the writings of Justice Michael Kirby. Further, as he puts it, "[t]he criminal law helps to define the type of society we are."[3]

This chapter focuses primarily on two areas of interest in relation to Justice Kirby's contribution to the criminal law. The first area deals with the scope of the criminal law in the light of the tension between individual rights and the power of the state and the second relates to how certain criminal law principles should best be "re-expressed". The common themes running through this analysis of Justice Kirby's contribution to the criminal law are his emphasis on the importance of

1 *Osland v The Queen* (1998) 197 CLR 316 at 375 [165] per Kirby J.

2 A Ashworth, *Principles of Criminal Law* (5th ed, Oxford University Press, Oxford, 2006) p 52.

3 M D Kirby, "Foreword to the Second Edition" in S Bronitt and B McSherry, *Principles of Criminal Law* (2nd ed, Thomson Lawbook Co., Sydney, 2005) p v.

human rights and the need for caution in relation to the expansion of criminal law principles.

THE SCOPE OF THE CRIMINAL LAW

The scope of the criminal law is forever shifting according to changing perceptions of what constitutes criminal behaviour. Sexual offences have long provided the focus for much philosophical discussion of the nature and functions of the criminal law but, in recent years, there has also been debate about balancing the power of the state with individual rights in the context of fears of terrorism and other forms of anti-social behaviour.

What follows is an analysis of Justice Kirby's approach to the scope of the criminal law in relation to, first, sexuality, second, "issue of the moment" offences, and third, the prevention of future "dangerous" conduct.

Criminal law and sexuality

In some of his articles, Justice Kirby has focused on the often cruel consequences of the criminal law in relation to sexuality. He has recalled his time as a first-year law student listening to his lecturer, Vernon Treatt QC, "spitting out" the words of s 79 of the *Crimes Act 1900* (NSW) which referred to the "abominable crime of buggery".[4] Hearing these words and knowing that the punishment was 14 years' "penal servitude" led him to believe, in relation to his own sexuality, that he "could not bear the shame".[5] He writes about such offences:

> These were the means by which law became an instrument, not of liberty but of oppression. Not of equality but of discrimination. Not of human happiness but of cruelty and unkindness.[6]

No doubt this realisation as a young law student that the criminal law's reach can reinforce shame and oppression had a strong influence on Justice Kirby's later commitment to the use of human rights principles to restrict the scope of the criminal law. He has clearly set out the powers of the state in relation to matters of sexuality as follows:

> Protecting minors is a proper role of the state. Preventing unwilling [infliction] of violence, injury and loss is a proper role of the state. Protecting the community from gross indecencies in public before unwilling observers, is part of the function of the state, derived from the sovereign's role as keeper of the peace. But intruding into the bedrooms of adults is now considered to be an excess of state power.[7]

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4 M D Kirby, "Remembering Wolfenden" (2007) 66(3) *Meanjin* 127 at 135-136.

5 Kirby, n 4 at 136.

6 Kirby, n 4 at 136.

7 M D Kirby, "Crime in Australia – Change and Continuity" (1995) 7(1) *Criminology Australia* 19 at 21.

Justice Kirby has recently focused on both the Wolfenden Committee's 1957 report in England, which recommended that consensual homosexual acts conducted by adults in private should be decriminalised, and the studies of Alfred Kinsey, which reported relatively high rates of homosexual experiences among male Americans as helping to "initiate a major movement for law reform".[8] The Australian States and Territories removed criminal offences punishing homosexual activities from their criminal legislation after the Wolfenden report – all except Tasmania. It was only after Rodney Croome and Nicholas Toonen lodged a complaint – which was upheld by the United Nations Human Rights Committee on the basis that by not abolishing such crimes, Australia was in breach of the First Optional Protocol to the *International Covenant on Civil and Political Rights* – that the *Human Rights (Sexual Conduct) Act 1994* (Cth) was passed. This legislation overrode the Tasmanian criminal offences, but it was only after a further application for a declaration of invalidity had been made to the High Court that the offences were eventually removed.

As Justice Kirby has pointed out, while the abolition of these offences in Australia was remarkable, the removal of criminal sanctions does not equate to equal civil rights.[9] In an address to members of the Australian and New Zealand Association of Psychiatry, Psychology and Law in 2000, he stated:

> Basic measures to accord homosexual citizens equal treatment with the heterosexual majority in many matters of State and federal concern remain still to be achieved. So those of us who are lawyers should not feel a comfortable smugness that all the prejudice and disadvantage are over. In many respects our laws lag behind those of other countries. In the law, the problem is apathy, complacency and indifference to injustice and to eliminating discrimination.[10]

While the intrusion of the criminal law upon matters of sexuality has thus changed in recent decades in Australia, with the focus now turning to civil law rights, the criminal law has been used in other ways to encroach upon individual rights.

Some recent trends in criminal justice include, first, the use of "issue of the moment" policies to justify the creation of new offences; second, an increasing emphasis on notions of dangerousness for a minority of criminals, for whom exceptional forms of punishment or control are

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8 Kirby, n 4 at 132.

9 Kirby, n 4 at 135.

10 M D Kirby, "Psychiatry, Psychology, Law and Homosexuality – Uncomfortable Bedfellows" (2000) 7(2) *Psychiatry, Psychology and Law* 139 at 147-148.

deemed necessary; and third, the development of new forms of criminal justice tools such as "administrative" control orders.[11]

"Issue of the moment" offences

As an example of the first trend in criminal justice relating to the creation of new crimes, some governments have enacted new offences dealing with the transmission of a serious disease.[12] This was largely in response to fears that certain individuals with HIV/AIDS were intentionally or recklessly spreading the disease. These offences have proved difficult to prosecute because they not only require expert evidence as to the risk of the victim contracting HIV, but also in respect of their chances of survival if HIV is in fact contracted.[13]

Justice Kirby has questioned the need for criminal offences in this regard.[14] In a conference paper in 2005 he stated that "[i]n shaping the future of criminal law, it is all too easy to respond uncritically and excitedly to popular political imperatives."[15] Offences concerning HIV/AIDS risk stigmatising already alienated groups and the small number of individuals actually charged gives rise to these offences being, in Kirby J's terms, a "sideshow" to the need to address the spread of HIV/AIDS through public health measures.[16]

Similarly, fears about illicit drugs have justified the prohibition of different drugs at different times. The use of the criminal law in this regard has been questioned by various commentators as having adverse consequences, such as driving prices up, which both attracts sophisticated criminal organisations and compels users to engage in money-producing crime.[17] Justice Kirby has reflected on these approaches and, in 1995, predicted that by 2015, there would be "an increasing emphasis upon looking at adult drug use as an issue of public health rather than law and order".[18]

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11 B McSherry, A Norrie and S Bronitt, "Introduction" in B McSherry, A Norrie and S Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing/Onati International Series in Law and Society, Oxford, 2008).

12 See Bronitt and McSherry, n 3, pp 517-518.

13 *Mutemeri v Cheesman* (1998) 100 A Crim R 397; M Groves, "Commentary" (1998) 22 *Criminal Law Journal* 357. See also Bronitt and McSherry, n 3, pp 540-541.

14 M D Kirby, "HIV/AIDS Criminalisation – Deserved Retribution or Capricious Sideshow" (2007) 32(4) *Alternative Law Journal* 196.

15 M D Kirby, "Criminal Law Futurology" (Paper, International Society for the Reform of the Criminal Law Conference, Edinburgh, 26 June 2005) p 29.

16 Kirby, n 14 at 197.

17 G Wardlaw, "Drug Control Policies and Organised Crime" in M Findlay and R Hogg (eds), *Understanding Crime and Criminal Justice* (Law Book Company, Sydney, 1988) Ch 7; P Grabosky, "Counterproductive Regulation" (1995) 23 *International Journal of the Sociology of Law* 347; E Drucker, "Drug Prohibition and Public Health: It's a Crime" (1995) 28 *Australian and New Zealand Journal of Criminology* 67.

18 Kirby, n 7 at 21.

These comments by Kirby J on HIV/AIDS and drug use illustrate his belief that the criminal law should only be used as a last resort. Enacting criminal offences to control what should be matters of public health may mean that those who suffer from infectious diseases or who use drugs may not seek medical care for fear of prosecution. One of Kirby J's contributions to the criminal law in this regard has thus been to question the fact that policy-makers resort to the criminal law as a form of control instead of exploring less drastic preventive measures.

The criminal law and future dangerous conduct

The second and third trends in criminal justice have arisen, to some degree, as a result of the terrorist attacks that occurred in the United States on 11 September 2001, Bali on 12 October 2002, Madrid on 11 March 2004 and London on 7 July 2005. New laws have been introduced to criminalise not only those who actually cause harm, but also those suspected of causing harm in the future or those associating with others considered "dangerous". Similarly, there has been a rise in new forms of control, including preventive detention and control orders for suspected terrorists and hybrid forms of control and punishment such as, in the United Kingdom, the Anti-Social Behaviour Order.

These trends have been addressed by Kirby J through the lens of human rights. A common thread running through his judgments is the importance of focusing on human rights when considering how broad the scope of the criminal law should be. In a paper delivered to the International Society for the Reform of Criminal Law, he stated that "[a]ll criminal laws should be regularly assessed against the standards of international human rights law. Our procedures, laws of evidence and court practices need constantly to be measured against these criteria."[19]

Justice Kirby has made the point that while international human rights have not been formally incorporated by municipal law into federal Australian law, they are relevant to the interpretation and application of Australian legislation:

> An Australian statute must be interpreted and applied, as far as its language admits, so as not to be inconsistent with established rules of international law. This Court will also refuse to uphold legislation that abrogates fundamental rights, recognised by civilised countries, unless the purpose of the legislature is clear, evidenced by unambiguous and unmistakable language.[20]

Two of the central rights set out in the *International Covenant on Civil and Political Rights*, which has been ratified by Australia, are the rights of individuals to be free of arbitrary detention and the unlawful deprivation

19 M D Kirby, "Criminal Law – The Global Dimension" (Paper, International Society for the Reform of the Criminal Law Conference, Canberra, 27 August 2001) p 13.

20 *Thomas v Mowbray* (2007) 233 CLR 307 at 440-441 [380] (footnotes omitted).

of liberty.[21] These rights have most recently informed Kirby J's dissenting judgments in two High Court cases, *Fardon v Attorney-General for the State of Queensland*[22] and *Thomas v Mowbray.*[23] Both cases deal with the validity of legislation enabling the deprivation of liberty through "administrative" forms of control on the basis of potential future harm.

Fardon's case concerned a decision to keep Robert John Fardon, a convicted sex offender, in prison after the expiry of his sentence under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld). The appeal to the High Court concerned a narrow point of law – namely, whether s 13 of the Act (which enables continuing detention and supervision orders) conferred jurisdiction upon the Supreme Court of Queensland which was incompatible with its integrity as a court. Six of the judges (with Kirby J dissenting) held that s 13 of the Act was valid. The majority judgments emphasised that the primary purpose of the Act was not punishment, but community protection, which was compatible with the exercise of judicial power.

Only Kirby J considered broader policy issues in reaching his decision that s 13 of the Act conferred jurisdiction upon the Supreme Court of Queensland, which was repugnant to its integrity as a court. He stated that "[i]n this country, judges do not impose punishment on people for their beliefs, however foolish or undesirable they may be regarded, nor for future crimes that people fear but which those concerned have not committed."[24]

A number of factors were explored by Kirby J in his dissenting judgment, including:

- the Act's regime is based on unreliable predictions of criminal dangerousness;[25]
- detention under the Act is a form of civil commitment of a person to a prison that is in essence punitive: "the imprisonment 'continues' exactly as it was";[26]
- the detention is a form of highly selective punishment directed at "a readily identifiable and small group of individuals";[27] and
- the detention is a form of double and retrospective punishment on a prisoner who has completed a judicially imposed sentence.[28]

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21 *International Covenant on Civil and Political Rights* (ICCPR) Arts 9, 14(1). The ICCPR entered into force generally on 23 March 1976 in accordance with Art 49 and entered into force in Australia on 13 November 1980: [1980] ATS 23.

22 (2004) 223 CLR 575.

23 (2007) 233 CLR 307.

24 *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 at 623 [126].

25 (2004) 223 CLR 575 at 623 [124]-[125].

26 (2004) 223 CLR 575 at 634 [156].

27 (2004) 223 CLR 575 at 641 [176].

28 (2004) 223 CLR 575 at 643-644 [188].

Justice Kirby also took the opportunity to sound a warning about German laws in the 1930s which allowed punishment to be "addressed to the estimated character of the criminal instead of the proved facts of a crime".[29]

A similar human rights approach was taken by Kirby J when considering whether the power to impose an interim control order on Jack Thomas under Div 104 of the *Criminal Code* (Cth) was constitutional. While the majority of five judges (Kirby and Hayne JJ dissented) held that the power to make an interim control order was constitutional, Kirby J concluded that it was not, on a number of grounds.

It was Kirby J's view that control orders impinged upon "the basic rights to liberty of those made subject to them".[30] He stated:

> [Division 104 of the *Criminal Code*] provides for the deprivation of liberty because of an estimate of some future act, not necessarily one to be committed by the person subject to the proposed order. To uphold the validity of that type of order for which Div 104 of the Code provides would be to erode the well-founded assumption that the judiciary in Australia under federal law may only deprive individuals of their liberty on the basis of evidence of their past conduct … [Control orders] deny persons their basic legal rights not for what they have been proved to have done (as established in a criminal trial) but for what an official suggests that they might do or that someone else might do. To allow judges to be involved in making such orders, and particularly in the one-sided procedure contemplated by Div 104, involves a serious and wholly exceptional departure from basic constitutional doctrine unchallenged during the entire history of the Commonwealth.[31]

Justice Kirby's dissenting judgments in *Fardon's* case and *Thomas v Mowbray* are thus steeped in policy issues and written from a strong human rights perspective. These dissenting judgments can be seen as part of an effort to rein in the power of the state, to "retain a sense of proportion" in responding to threats of danger.[32]

How judges should take into account policy issues has of course been the subject of considerable philosophical analysis, with some commentators confining the role of judges to declaring or "positing" the law regardless of policy issues.[33] Justice Kirby has recognised the constraints on judges by stating that "[j]udges are required to apply the law which, for the most part, is made by others. They are not, as such,

29 (2004) 223 CLR 575 at 645 [126].

30 *Thomas v Mowbray* (2007) 233 CLR 307 at 428-429 [347].

31 (2007) 233 CLR 307 at 432 [357].

32 Kirby, n 15, p 28.

33 See, eg, T Campbell and J Goldsworthy (eds), *Judicial Power, Democracy and Legal Positivism* (Ashgate Publishing Ltd, Aldershot, 2000).

morally responsible for the content of such law. If they cannot uphold the law, their duty is to resign and seek greener pastures."[34]

However, he has also pointed out the large part that judges play in developing legal principles[35] and it is difficult to understand how issues concerning the deprivation of liberty can be divorced from the broader context of the importance of principles protecting human rights.

Perhaps Kirby J's greatest contribution in relation to analysing the scope of the criminal law is that his work has helped to put human rights principles on the agenda of policy-makers. For example, in 2003 the then Attorney-General, Phillip Ruddock, stated that the "task of government is to … preserve our security without compromising basic rights and liberties".[36] The main issue is that for many policy-makers and judges, if a framework of balancing security and individual rights is used, security will ultimately be viewed as paramount.[37] The challenge remains for human rights principles to be accorded priority in both the political and legal arenas.

RE-EXPRESSING THE CRIMINAL LAW

While Justice Kirby's approach to the scope of the criminal law – which appears in his dissenting judgments – could be classified as somewhat unorthodox because of his preparedness to take on policy issues, his judgments concerning "re-expressing" certain criminal law principles generally take a cautious approach. In certain High Court cases, Kirby J's decisions have differed from the majority in concluding that the criminal law should *not* be re-expressed, despite obvious deficiencies.

For example, in his dissenting judgment in *Lipohar v The Queen*[38] Kirby J refused to re-express the principle of territoriality (the idea that the criminal law is "territorial" in the sense of being bound to a defined geographic territory) despite his being drawn to a jurisdictional test based on a "real and substantial link" between the offence and the jurisdiction seeking to try it. The other High Court judges were prepared to cast jurisdiction in terms of a "sufficient connection"[39] or a "real link",[40] but Kirby J preferred to adhere to the principle of territoriality on the basis

34 M D Kirby, "The High Court and the Death Penalty: Looking Back, Looking Forward, Looking Around" (2003) 77 *Australian Law Journal* 811.

35 Kirby, n 34 at 811.

36 P Ruddock, "The Commonwealth Response to September 11: The Rule of Law and National Security" (Speech, National Forum on the War on Terrorism and the Rule of Law, New South Wales Parliament House, 10 November 2003) at [29].

37 S Bronitt, "Balancing Security and Liberty: Critical Perspectives on Terrorism Law Reform" in M Gani and P Mathew, *Fresh Perspectives on the "War on Terror"* (ANU E Press, Canberra, 2008) Ch 5.

38 (1999) 200 CLR 485.

39 (1999) 200 CLR 485 at 501 [28] per Gleeson CJ, at 534 [122] per Gaudron, Gummow and Hayne JJ.

40 (1999) 200 CLR 485 at 588-589 [270] per Callinan J.

that the High Court would be resorting to legal fictions that could have the effect of creating new offences and applying them retrospectively.[41]

However, on occasions, Kirby J has been prepared to re-express certain principles in an attempt to "rationalise" the criminal law. The following section looks, in particular, at fault elements for serious crimes, the doctrine of complicity and the evidence that should be led to support the defences of self-defence and provocation.

Fault elements for serious crimes

The most serious crimes require proof beyond reasonable doubt of an act or omission (generally referred to as the physical element of the crime) as well as some form of "subjective" fault element, such as intention or recklessness on the part of the accused.[42]

One of the problems associated with this emphasis on subjectivity is that it necessitates the attribution of intention, knowledge or foresight to another person. Philosophers have spilled much ink debating the problem of "other minds". Because it is impossible to know what another person is thinking, mental states are attributed to individuals on the basis of those that they "ought to have, in light of [their] environment, perceptual capacities, interests, and past experiences. Moreover we expect that [they] will act as … rational agent[s]."[43]

The difficulty of determining subjective mental states was recognised by Kirby J in *Peters v The Queen*:[44]

> Absent a comprehensive and reliable confession, it is usually impossible for the prosecution actually to get into the mind of the accused and to demonstrate exactly what it finds was there at the time of the criminal act. Necessarily, therefore, intention must ordinarily be inferred from all of the evidence admitted at the trial. In practice, this is not usually a problem. But the search is not for an intention which the law objectively imputes to the accused. It is a search, by the process of inference from the evidence, to discover the intention which, subjectively, the accused actually had.

Justice Kirby's emphasis here on inferring intention from the evidence neatly targets the problem of "other minds" and the necessity of attributing a mental state to the accused. In the *Peters* case, Kirby J emphasised the need to prove a subjective fault element in serious offences in reaching the conclusion that "dishonesty" should be a separate subjective fault element for the offence of conspiracy to defraud. However, he put aside this opinion in order to allow a majority decision that while dishonesty

41 (1999) 200 CLR 485 at 563 [198].

42 *Director of Public Prosecutions v Morgan* [1976] AC 182; *He Kaw Teh v The Queen* (1985) 157 CLR 523.

43 R Dresser, "Culpability and Other Minds" (1992) 2(1) *Southern California Interdisciplinary Law Journal* 41 at 78.

44 (1998) 192 CLR 493 at 551 [134].

was not a separate element of the offence, in borderline cases, a jury could be directed to decide the question of dishonesty by applying the standards of "ordinary, decent people".

The boundaries of subjective fault, specifically in relation to recklessness, had earlier been considered by Kirby J when he was President of the New South Wales Court of Criminal Appeal. Recklessness as a fault element generally involves knowledge, foresight or realisation that an event or consequence is likely to occur. In *R v Kitchener*[45] and *R v Tolmie*[46] the New South Wales Court of Appeal was asked to consider whether a complete failure to think about whether another person is consenting to sexual intercourse amounted to recklessness for the purposes of the crime of rape.

In both *Kitchener* and *Tolmie* the main issue at trial was whether or not the respective complainants had consented to sexual intercourse, and the fault element for the offence of sexual intercourse without consent was not the primary issue.

Robert Kitchener had been charged and convicted on four counts of sexual intercourse without consent and one count of indecent assault. The complainant, who was then 16, had been standing outside a disco near where her boyfriend was selling hot dogs at a hot dog stand. The accused was the President of the Life and Death Motorcycle Club and when he arrived with some friends on motorbikes, the complainant and her boyfriend asked him whether she could have a ride on one of the motorbikes. Kitchener drove the complainant to a dark sandy area where he claimed they had consensual intercourse. The complainant said she had been crying the whole time, had told him she had a boyfriend and that she had recently had an operation for the removal of an ovarian cyst. The accused's defence was that the complainant had been consenting and he believed she had been consenting the whole time. Recklessness was not an issue at the trial but, on appeal, defence counsel sought to raise recklessness in claiming that the judge had misdirected the jury as to the fault element for the offences.

Adam Tolmie had been charged and convicted on one count of sexual intercourse without consent. He and the complainant had both been drinking at a club after a football presentation evening. The two were with a group who left the club together, but Tolmie called to the complainant to come to him at the back of the group; the others walked on. The complainant said that Tolmie propositioned her and when she said she had a fiancé, he nevertheless pulled her down on the ground and had sex with her, saying "shut up, you're going to get it anyway. It's up to you how you want it." Afterwards, she ran to the first house with a light

45 (1993) 29 NSWLR 696.

46 (1995) 37 NSWLR 660.

on and told the person who opened the door that she had been raped and that she needed to use the phone to call her friend.

Tolmie's story was that the complainant was the one who had made advances to him; she had pulled him to the back of the group and that the sexual intercourse was entirely consensual. Again, recklessness was not an issue initially, but the jury asked for directions concerning withdrawn consent and the judge directed them as to recklessness in that regard.

In both appeals, recklessness was thus raised in the context of the respective judge's directions to the jury. In both cases, the New South Wales Court of Appeal held, as a point of law, that a complete failure to think about whether another person is consenting to sexual intercourse amounted to recklessness.

Justice Kirby explained this conclusion as follows:

> To criminalise conscious advertence to the possibility of non-consent, but to excuse the reckless failure of the accused to give a moment's thought to that possibility, is self-evidently unacceptable. In the hierarchy of wrongdoing, such total indifference to the consent of a person to have sexual intercourse is plainly reckless, at least in our society today.[47]

Similarly, in *R v Tolmie*[48] Kirby J stated:

> To allow accused persons to escape conviction merely because they do not realise the significance of what they have done, where they have completely ignored the requirement of consent as a prerequisite for sexual interaction, is completely antithetical to the attainment of the goals which the criminal law properly sets for itself in this area.

Looking at these remarks now, it is perhaps difficult to appreciate just how progressive these two judgments were. This is because the traditional "subjectivist" view is that the prosecution in proving recklessness must prove *actual* rather than *imputed* knowledge. Thus, ignoring certain matters, or "wilful blindness" as it is sometimes called, should not be seen as the equivalent to knowledge.[49] Writing in 1983, Professor Glanville Williams stated in this regard:

> If knowledge is judicially made to include willful blindness, and if willful blindness is judicially deemed to equal recklessness, the result is that a person who has no knowledge is judicially deemed to have knowledge if he [or she] is found to have been reckless …[50]

From a broader social perspective, rather than a technical legal one, Kirby J's approach is more acceptable than the alternative. Ignoring the question

47 *R v Kitchener* (1993) 29 NSWLR 696 at 697.

48 (1995) 37 NSWLR 660 at 672.

49 The High Court has shown a reluctance to equate wilful blindness with recklessness in a number of cases: *R v Crabbe* (1985) 156 CLR 464 (murder); *Kural v The Queen* (1987) 162 CLR 502 (importation of drugs); *Pereira v Director of Public Prosectuions* (1988) 82 ALR 217 (possession of drugs).

50 G Williams, *Textbook of Criminal Law* (2nd ed, Stevens & Sons, London, 1983) p 125.

of whether or not another person is consenting to sexual intercourse seems just as blameworthy as being aware that the person is not, or might not be, consenting. This broad approach to the meaning of "recklessness" has been taken up by law reformers. For example, the Model Criminal Code Officers Committee, which set out to construct a Model Criminal Law for adoption across the nine different criminal law jurisdictions in Australia (six States, two Territories and federally), recommended that recklessness include "not giving any thought to whether or not the other person is consenting to sexual penetration".[51] Similarly, the Victorian Law Reform Commission suggested that because the level of culpability is similar, recklessness should cover a failure to consider whether or not the other person was consenting to sexual intercourse.[52] The fault element for rape in the *Crimes Act 1958* (Vic) has now been changed to include sexual penetration without the other person's consent "while not giving any thought to whether the person is consenting or might not be consenting".[53]

Considering the law in a societal context was central to Kirby J's approach in the cases of *Kitchener* and *Tolmie*. Interestingly, the broad approach to recklessness may not have great practical relevance. As the Victorian Law Reform Commission pointed out:

> In practice, [the broad approach] probably has little effect on the outcome of trials. Juries are unlikely to believe an accused who says that he gave no thought to whether the complainant consented to sexual penetration.[54]

This overview of Justice Kirby's approach to the fault elements of serious offences leads to the conclusion that even though the prosecution generally needs to prove subjective fault, intention and recklessness may in practice have to be inferred because of the problem of "other minds" and because of societal concerns that "wilful blindness" may be just as deserving of punishment as awareness of a lack of consent in rape cases.

The next section turns the focus to a conceptually very difficult area of the criminal law and Justice Kirby's proposal for change.

Complicity

Complicity is one of the most conceptually confusing areas of criminal law theory. The doctrine of complicity refers to assigning criminal responsibility to those who jointly participate in or assist or encourage criminal acts.

51 Model Criminal Code Officers Committee, *Chapter 5, Sexual Offences Against the Person*, Report (AGPS, Canberra, 1999) p 88.

52 Victorian Law Reform Commission, *Sexual Offences: Law and Procedure*, Discussion Paper (VLRC, Melbourne, 2001) p 71.

53 *Crimes Act 1958* (Vic) s 38(2)(a)(ii) introduced by *Crimes Amendment (Rape) Act 2007* (Vic) s 5.

54 Victorian Law Reform Commission, n 52, p 71.

Different rules apply depending on whether the participation is considered "derivative" or "primary".

For example, in order to convict an accessory to a crime, it must be shown that a crime has been committed and that another person (the perpetrator) is responsible for committing it. This mode of involvement in criminal activity is sometimes referred to as a form of "derivative liability" because it derives from a person having committed a crime in the first place.

The doctrine of complicity has also developed rules relating to "primary liability" where each offender is considered a perpetrator of the crime committed. The doctrine applies here to the situation where, for example, two or more people attack the victim and the effects of their combined blows cause death (the perpetrators are sometimes referred to here as "joint offenders"). It also applies where two or more people have a preconceived plan and perform different acts in the presence of one another which result in a crime (this is usually referred to as "acting in concert").

A great deal of confusion has arisen relating to another doctrine, called the "doctrine of extended common purpose", which extends derivative or accessorial liability in order to impose criminal responsibility for foreseen, but unintended offences committed by others. For example, where two men decide that one will pull a knife on their victim, while the other steals the victim's wallet can be viewed as a preconceived plan to rob their victim; it is their "common purpose". However, as one of them pulls out the knife, the victim tries to run away and the offender holding the knife stabs the victim to death. The other offender has not agreed to this – he has only agreed to steal the wallet – but, under the doctrine of extended common purpose, he will be convicted of murder if it can be proved such an act was contemplated as a possible consequence of the original plan.

Confusion can arise in complicity trials because of the different conceptual bases for "acting in concert" and the doctrine of extended common purpose.

Acting in concert is a form of primary liability, which means that it will be enough to establish liability as a joint offender if the acts were performed in the presence of all and pursuant to a preconceived plan. However, under this form of liability, one person may be held liable even when the other has been acquitted or is unknown, or has not been arrested.

The doctrine of extended common purpose, however, is based on the concept of derivative liability, which depends upon the commission of an offence *and* the liability of the principal offender. In *Giorgianni v The Queen*,[55] the High Court held that derivative liability requires proof

55 (1985) 156 CLR 473.

that the accessory *intentionally* assisted or encouraged the offender and that the accessory actually knew the "essential matters" concerning the crime. This implies that derivative liability is narrow in scope.

However, the doctrine of extended common purpose broadens the scope of accessorial liability considerably by imposing liability for foreseen, but *unintended*, offences committed by others. It exists because of a perceived need to protect the public from gangs of criminals whose actions may escalate into the commission of serious offences.

The doctrine of extended common purpose has been criticised as going too far on two grounds, both of which are explored by Kirby J in his judgment in *Clayton v The Queen; Hartwick v The Queen; Hartwick v The Queen*.[56]

The first basis for criticism is that the doctrine does not require any proof of the accessory's *intention* to commit the crime that was carried out by the principal offender (unlike the usual standard for derivative liability set out in *Giorgianni's* case). Rather, the common law sets out a very broad fault element – namely that the crime performed by the principal offender was contemplated by the accessory as a *possible* consequence of the original criminal agreement, even though it was not within the scope of that agreement. This is broader than the Criminal Code requirements in Queensland, Tasmania and Western Australia where an accessory will be liable for a crime committed by another that was a *probable* consequence of the pursuit of the original purpose.[57]

The second main ground for the criticism of the doctrine of extended common purpose lies in the fact that in Australia, the High Court has held that under the doctrine an accessory can be convicted of a more serious offence than the actual perpetrator.[58] This is not the case in England, where the House of Lords has refused to permit what are called "differential verdicts" under this doctrine.[59]

In the High Court case of *Clayton v The Queen*; *Hartwick v The Queen; Hartwick v The Queen*,[60] the High Court was invited to reconsider the doctrine of extended common purpose. In a joint judgment, six judges declined to do so and dismissed the applications for special leave to appeal. Only Kirby J was prepared to grant special leave to appeal and, in a comprehensive judgment, considered the criticisms of the doctrine and set out a way of rationalising it so that it reflects more readily the notion of derivative (rather than primary) liability.

The facts of the case could be analysed in terms of either primary liability, in the form of acting in concert, or derivative liability through the doctrine of extended common purpose. Lisa Hartwick, her former

56 (2006) 231 ALR 500.

57 *Criminal Code* (Qld) s 8; *Criminal Code* (Tas) s 4; *Criminal Code* (WA) s 8.

58 *R v Barlow* (1997) 188 CLR 1.

59 *R v Powell; R v English* [1977] 3 WLR 959.

60 (2006) 231 ALR 500.

husband, John Hartwick, and a friend, Celia Clayton, were convicted of the murder of Steven Borg and of intentionally causing serious injury to his girlfriend, Paula Rodwell. There had been a dispute between the offenders and victims over money and property damage and the Hartwicks and Clayton had gone to Paula Rodwell's house armed with various weapons, including metal and wooden poles and a large carving knife. Paula Rodwell was assaulted and held at knifepoint while Steven Borg was severely beaten with poles and stabbed a number of times. One of the stab wounds led to his death.

The prosecution argued that although it could not identify which of the three offenders inflicted the fatal stab wound, each was guilty of murder. The prosecution argued that this could be established *either* by way of the offenders "acting in concert", according to a preconceived plan, *or* by way of the doctrine of extended common purpose on the basis that each offender had agreed to assault Steven Borg and each offender had reasonably foreseen the possibility that death or really serious injury might result.

Six of the High Court judges were of the opinion that the doctrine of extended common purpose did not overly complicate the trial of the three offenders. The issues, they stated, were relatively simple: "What did the applicant agree was to happen; what did the applicant foresee might happen; what did the applicant do at the house?"[61]

However, Kirby J did not view the doctrine of extended common purpose as such a simple device. He considered the criticisms of the doctrine set out above and concluded that "this form of secondary liability is disproportionately broad. It tilts the scales too heavily in favour of the prosecution."[62] He believed the major problem with the doctrine was the unjustness of holding an accessory liable for murder "merely on the foresight of a possibility".[63] He found that there were "serious anomalies, disparities, inconsistencies and lack of symmetry that have been introduced into the area of secondary liability for acts done by others"[64] and was therefore prepared to re-express the law.

Justice Kirby favoured the approach developed by the legal academic, Professor John Smith.[65] This was for the judge to direct the jury "to be sure that the secondary offender either *wanted* the principal offender to act as he or she did, with the intention which he or she had, or knew that it was virtually certain that the principal offender would do so".[66]

61 (2006) 231 ALR 500 at 507 [28].
62 (2006) 231 ALR 500 at 524 [95].
63 (2006) 231 ALR 500 at 526 [108].
64 (2006) 231 ALR 500 at 526 [106].
65 J Smith, "Criminal Liability of Accessories: Law and Law Reform" (1997) 113 *Law Quarterly Review* 453 at 465.
66 (2006) 231 ALR 500 at 532 [125].

Such a direction is simple, easy to understand and ensures that the doctrine of extended common purpose is aligned with the narrow view of derivative liability set out by the majority of the High Court's decision in *Giorgianni v The Queen*,[67] which required that the accessory *intentionally* assisted or encouraged the offender and that the accessory actually knew the "essential matters" concerning the crime.

While this approach was outlined in what was ultimately the dissenting judgment, Kirby J may yet contribute to the clarification of this conceptually difficult area of criminal law theory by influencing policy-makers to reform the law. Enacting legislation in line with this proposed approach, rather than waiting for the common law to change, would be the sensible way to try to rationalise the laws of complicity.

Evidence in support of self-defence and provocation

Self-defence is a "complete" defence to a charge of murder or assault in that, if not disproved by the prosecution, it leads to a complete acquittal. Provocation, on the other hand, is said to be a "partial" defence in reducing a charge of murder to manslaughter. The latter defence has proved particularly controversial and the defence of provocation has been abolished in Tasmania and Victoria.

This section deals not so much with the elements of these defences, but with Justice Kirby's approach to the evidence that should be led in support of them.

In relation to self-defence, there must be some evidence that the accused believed on reasonable grounds that it was necessary in self-defence to do what he or she did.[68] It is then up to the prosecution to disprove this evidence beyond reasonable doubt in order to gain a conviction.

The doctrine of self-defence arose out of the regulation of duels and other forms of combat. It developed in the context of fights between two men and the use of lethal force was traditionally seen as justifying killing when the accused was responding to an imminent *life-threatening* attack.[69] Similarly, the doctrine of provocation emerged as a way of avoiding mandatory capital punishment for responses to "breaches of honour", such as an accused seeing another man in the act of adultery with the accused's wife.[70]

The doctrines of self-defence and provocation have been criticised as based on masculine responses to threat, making it difficult for women to avail themselves of these defences. During the 1990s, attempts were made

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67 (1985) 156 CLR 473.

68 *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645 at 661.

69 See I Leader-Elliott, "Battered But Not Beaten: Women Who Kill in Self-Defence" (1993) 15 *Sydney Law Review* 403.

70 J Horder, *Provocation and Responsibility* (Clarendon Press, Oxford, 1992) Ch 2.

to ensure these defences encompassed the reactions of women to violent partners by introducing evidence of "battered woman syndrome".

This "syndrome" was first mentioned in a book published in 1979 by psychologist Dr Lenore Walker.[71] She subsequently wrote a follow-up book which detailed a study of 403 battered women.[72] Walker was of the view that a "cycle of violence" was characterised by three stages: tension building, the acute battering incident and loving contrition. She defined a battered woman as one who had gone through the cycle at least twice and explained that such a woman finds it difficult to break out of this cycle because of "learned helplessness".

In Australia, evidence of battered woman syndrome was first accepted in two murder trials in 1992 to explain why the respective female accuseds' beliefs that their actions were necessary were based on reasonable grounds.[73] However, the use of such evidence proved controversial.[74]

In *Osland v The Queen,*[75] Justice Kirby made a number of salient comments about problems with the use of this form of syndrome evidence and stressed the need for caution in its reception. These comments have had a major influence on limiting the use of such evidence in murder trials.

Osland's case concerned an appeal against the conviction of Heather Osland for the murder of her husband, Frank. On 30 July 1991, Heather Osland and her son, David Albion, dug a large "hole" in the bush near Bendigo in Victoria. That evening, Heather Osland mixed sedatives into Frank Osland's dinner. David Albion then waited until Frank was lying unconscious in bed and, while Heather assisted by holding Frank down, fatally struck him on the head with an iron pipe. David then placed a plastic bag around Frank Osland's head and placed the body in the boot of Heather Osland's car. They drove into the bush and buried the body in the hole they had prepared. For the next three-and-a-half years, they acted as though Frank Osland had simply disappeared, including reporting him as a missing person. It was only after Heather's daughter-

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71 L Walker, *The Battered Woman* (Harper & Row, New York, 1979).

72 L Walker, *The Battered Woman Syndrome* (Springer Pub Co, New York, 1984).

73 *R v Kontinnen* (1992) 16 *Criminal Law Journal* 360; *R v Hickey* (1992) 16 *Criminal Law Journal* 271.

74 See, eg, J Stubbs, "Battered Woman Syndrome: An Advance for Women or Further Evidence of the Legal System's Inability to Comprehend Women's Experience" (1991) 3(2) *Contemporary Issues in Criminal Justice* 267; J Stubbs, "The (Un)reasonable Battered Woman" (1992) 3(3) *Contemporary Issues in Criminal Justice* 359; Leader-Elliott, n 69; I Freckelton, "When Plight Makes Right: The Forensic Abuse Syndrome" (1994) 18 *Criminal Law Journal* 29; G Hubble, "Feminism and the Battered Woman: The Limits of Self-Defence in the Context of Domestic Violence" (1997) 9(2) *Current Issues in Criminal Justice* 113; M McMahon, "Battered Women and Bad Science: The Limited Validity and Utility of Battered Woman Syndrome" (1999) 6(1) *Psychiatry, Psychology and Law* 23; I Freckelton and H Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (4th ed, Thomson, Sydney, 2009).

75 (1998) 197 CLR 316 at 370-373 [158]-[169].

in-law reported rumours of the killing to the police that intercepted telephone conversations led to the arrest of Heather Osland and David Albion.

At their trial, evidence was led that Frank Osland had physically and mentally tormented Heather Osland and David Albion over many years. A clinical psychologist gave evidence to the effect that Heather was suffering from battered woman syndrome and this was used by the defence in support of the defences of self-defence and provocation. On 2 October 1996, Heather Osland was convicted of murder, but the jury could not reach a verdict in relation to David Albion. He was later retried and was acquitted on 12 December 1996.

The appeal before the High Court largely revolved around the inconsistency of the verdicts under the doctrine of complicity. However, Kirby J took the opportunity to send a warning about some of the problems with using battered woman syndrome to try to bolster the defences of self-defence and provocation. Justice Kirby pointed out that the "syndrome" should not be confined to women; what was important was whether the accused showed certain characteristics that were relevant to the applicable legal rules.[76] He also cast doubt on the use of the word "syndrome" because it appeared to be an "advocacy driven construct" designed to "medicalise" the evidence in such a way that it misrepresented many women's experiences of violence.[77]

Concerns in respect of the reliability of the "syndrome" itself were also raised by Kirby J.[78] Walker admitted in 1995 that there is a definitional vagueness in the syndrome[79] and subsequent empirical research has not supported Walker's model. The use of self-report data from a voluntary sample has also been criticised, not only because the sample was small, but because it was skewed towards professionally employed women who left their abusive partners after experiencing moderate levels of abuse.[80]

Finally, Kirby J stressed the need to ensure the evidence was relevant to the facts of the particular case, rather than assuming it was a ground of exculpation in itself.[81]

On the facts, Kirby J stated that while the past conduct of Frank Osland towards both Heather and David was "deplorable", there was clear evidence (most especially in the intercepted telephone conversations) that such conduct had abated in the years immediately preceding the killing and that there was no one act that could be described as "the last straw".[82] He also stated that even if the evidence of battered woman syndrome

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76 (1998) 197 CLR 316 at 371-372 [160].

77 (1998) 197 CLR 316 at 372-373 [161] (footnotes omitted).

78 (1998) 197 CLR 316 at 374-375 [164].

79 L E Walker, "Understanding Battered Woman's Syndrome" (1995) 31(2) *Trial* 30.

80 McMahon, n 74.

81 (1998) 197 CLR 316 at 377-378 [169].

82 (1998) 197 CLR 316 at 380 [170].

was accepted, it was still necessary to distinguish between an act of self-defence – which can only be understood in the context of a history of abusive conduct – and a response "that simply involves a deliberate desire to exact revenge for past and potential – but unthreatened – future conduct".[83]

Since Kirby J's comments, there appears to have been a reluctance to raise such evidence, with Ian Freckelton commenting that "the tendency has been for such matters to be raised allusively by counsel without the support of mental health expert evidence".[84]

In *Osland's* case, Justice Kirby referred to the exceptional nature of the defences of self-defence and provocation:

> No civilised society removes its protection to human life simply because of the existence of a history of long-term physical or psychological abuse. If it were so, it would expose to unsanctioned homicide a large number of persons who, in the nature of things, would not be able to give their version of the facts. The law expects a greater measure of self-control in unwanted situations where human life is at stake. It reserves cases of provocation and self-defence to truly exceptional circumstances.[85]

This approach is also central to Justice Kirby's dissenting judgment in *Green v The Queen*.[86] The facts of that case concerned a 22-year-old man, Malcolm Green, who had been convicted of the murder of the 36-year-old Donald Gillies, one of Green's "best friends", after the latter had gently touched the accused's side, bottom and groin area. Green had punched the deceased about 35 times, banged his face against the wall and stabbed him with a pair of scissors about ten times. Green rang his brother-in-law after the attack and told him to drive him to the police station. There he admitted killing Gillies, stating that he "did worse to me" and that he had killed him "because he tried to root me".[87]

In attempting to establish provocation at his trial, the accused sought to admit evidence that he was particularly sensitive to matters of sexual abuse as a result of being told by his sisters and mother that his father had sexually abused four of his sisters, and after witnessing violent assaults by his father upon his mother. The trial judge left the issue of provocation to be considered by the jury but directed that the evidence of the abuse of family members was not relevant to the issue of provocation. An appeal to the New South Wales Court of Criminal Appeal was dismissed and a further appeal was made to the High Court on the basis that the trial judge had erred in law in determining that the evidence was not

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83 (1998) 197 CLR 316 at 382 [172], quoting *R v Secretary* (1996) 86 A Crim R 119 at 122.

84 I Freckelton, "Psychiatrists as Expert Witnesses and Report Writers" in W Brookbanks and S Simpson (eds), *Psychiatry and the Law* (LexisNexis NZ Limited, Wellington, 2007) p 257.

85 (1998) 197 CLR 316 at 375 [165] (footnote omitted).

86 (1997) 191 CLR 334.

87 (1997) 191 CLR 334 at 391 per Kirby J.

admissible in relation to the question as to whether the accused had in fact been provoked.

All five High Court judges agreed that there had been a misdirection and a majority of three judges, Brennan CJ, Toohey and McHugh JJ, held that there had been a miscarriage of justice and ordered a retrial. Justices Gummow and Kirby dissented on the basis that there had been no miscarriage of justice and Malcolm Green had been rightly convicted of murder.

At his retrial, presumably the defence of provocation was accepted as the jury convicted Malcolm Green of manslaughter. He was sentenced to imprisonment for ten-and-a-half years. An appeal against this sentence was dismissed.[88]

In his dissenting judgment, Kirby J reviewed the development of the defence of provocation and the establishment of an objective criterion – the "ordinary person" test for the measurement of self-control that is legally presumed to exist. In relation to this test, he stated:

> In my view, the "ordinary person" in Australian society today is not so homophobic as to respond to a non-violent sexual advance by a homosexual person as to form an intent to kill or to inflict grievous bodily harm. He or she might, depending on the circumstances, be embarrassed; treat it at first as a bad joke; be hurt; insulted. He or she might react with the strong language of protest; might use as much physical force as was necessary to effect an escape; and where absolutely necessary assault the persistent perpetrator to secure escape. But the notion that the ordinary 22-year-old male (the age of the accused) in Australia today would so lose self-control as to form an intent to kill or grievously injure the deceased because of a non-violent sexual advance by a homosexual person is unconvincing. It should not be accepted by this court as an objective standard applicable in contemporary Australia.[89]

Justice Kirby emphasised that the test for provocation was pitched at a higher level than "the wholly subjective responses of the most vulnerable to hurt, rage or affront".[90] As a result, he stated:

> Any unwanted sexual advance, heterosexual or homosexual, can be offensive. It may intrude on sexual integrity in an objectionable way. But this court should not send the message that, in Australia today, such conduct is objectively capable of being found by a jury to be sufficient to provoke the intent to kill or inflict grievous bodily harm. Such a message unacceptably condones serious violence by people who take the law into their own hands.[91]

Green's case concerned the accused's sensitivity to matters of sexual abuse and may be seen as distinct from other "homosexual panic" cases

88 *Green v The Queen* [1999] NSWCCA 97.

89 (1997) 191 CLR 334 at 408-409 (footnote omitted).

90 (1997) 191 CLR 334 at 412.

91 (1997) 191 CLR 334 at 416.

where the accused has used disproportionate violence in relation to a homosexual advance.[92] However, *Green's* case was considered particularly controversial by legal academics and led at least two to consider it as adding impetus to their view that provocation should be abolished as a defence.[93]

Justice Kirby's judgments in the cases of *Osland* and *Green* demonstrate his concern in respect of excusing murder via evidence of subjective characteristics of the accused or via syndrome evidence. His focus is on restricting the scope of the defences to murder on the basis that killing a human being is "still of profound concern to the community in which it occurs".[94] At the very least, Kirby J's contribution here has been to ensure that defence counsel relate the evidence raised to the elements of self-defence and provocation. At most, his judgments have given pause to those considering the scope of excusable or justifiable homicide.

CONCLUSION

Throughout this overview of Justice Kirby's contribution to the criminal law is a constant theme of caution in the face of the power of the state to determine what is criminal behaviour and what should be done to curb potential criminal conduct. There is the notion that the scope of the criminal law should be contained rather than forever expanded and that a principled approach needs to be taken to criminal law doctrines. Justice Kirby has also been prepared to consider policy issues through a human rights lens in his attempts to circumscribe the power of the state in responding to risks of potential danger.

Justice Kirby perhaps best explained his approach to the criminal law in the following quotation:

> Passing fads, momentary hysteria, populist enthusiasm must all be kept firmly in check. In the matter of the criminal law, the eyes must be fixed on a distant horizon because the values at stake, and the balances struck, define the kind of society in which the law operates for all people.[95]

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92 R Bradfield, "Green v The Queen" (1998) 22 *Criminal Law Journal* 296 at 303.

93 A Howe, "The Provocation Defence: Finally Provoking its Own Demise?" (1998) 22 *Melbourne University Law Review* 466; G Coss, "A Reply to Tom Molomby" (1998) 22 *Criminal Law Journal* 119.

94 (1997) 191 CLR 334 at 412.

95 Kirby, n 15, p 36.

Chapter 10

DAMAGES

Harold Luntz

> *Juries are often more generous to plaintiffs in defamation cases than judges would be. … It is not self-evident that judges have a greater capacity to evaluate the impact of defamation upon an individual than juries have. It is possibly true that judges are more alive than juries are to the public interest in free speech and a vigorous media and how these values may be wounded by a crippling verdict. But if juries … consistently award higher damages verdicts, whether in respect of torts generally or defamation in particular, a question is posed for judges whether they are necessarily right and juries wrong. In this sense, juries may more faithfully reflect community values which have a proper part to play in the assessment of damages in defamation.*[1]

Michael Kirby is well known as an indefatigable public speaker. He invariably brings to his speeches touches of wit and humour, though with an underlying serious message appropriate to the particular occasion. This marks him out from most of his judicial colleagues. While I would like to emulate these qualities in this chapter, I fear that, apart from my own inadequacies in this regard, the subject does not lend itself to such treatment. It certainly does not allow me to do full justice to all of his particular values, such as his humanitarian concerns, his emphasis on the need for the law to keep pace with changing social attitudes and the importance of rejecting all forms of discrimination based on race, ethnicity, gender or sexual preference. However, it does allow for a selection of cases in which some of these values may be glimpsed. In his long judicial career, especially while President of the New South Wales Court of Appeal, he has been faced with many issues relating to the law of damages. It is possible in this chapter to touch on only some

1 *John Fairfax & Sons Ltd v Carson* (1991) 24 NSWLR 259 at 271 per Kirby J.

of them and almost exclusively they will be issues relating to damages for personal injury and death.

DAMAGES FOR VOLUNTARY SERVICES

The Federal Court of Australia is not often faced with personal injury cases involving individual assessments of damages. For a time it did act as an appeal court from the Supreme Court of the Australian Capital Territory. Early in his judicial career, while a member of the Federal Court, Kirby J delivered the judgment of the Full Court in one groundbreaking appeal, *Hodges v Frost*.[2] Some background explanation is required. The traditional view espoused by the High Court until shortly before this decision was that an injured person could recover damages in respect of medical and similar care only if the victim actually incurred expenditure in meeting the needs created by the injuries or was under an obligation to pay for the care.[3] Several lower courts held that this precluded a plaintiff from recovering damages in respect of nursing or other assistance provided on a voluntary basis by a relative or friend. Nor could the person who provided the care ordinarily recover damages from the person who caused the injuries. Then a three-member High Court Bench agreed that in some circumstances the plaintiff was entitled to damages because of the need for care, even if the need had been met voluntarily.[4] Lower courts, not at all comfortable with this change in the law, interpreted it narrowly.[5] In *Hodges v Frost*, Kirby J, in a manner typical of his judgment style, stated in seven propositions the principles to be derived from the High Court decision, which, he said, should be applied without limitation. Insofar as there were expressions of view to the contrary, they should not be followed. He analysed the reasons that had led the High Court to develop the law as it did and added reasons of public policy as to why the development was desirable. For instance, he pointed out that the law of damages should encourage the provision of domestic care rather than institutional care, the former possibly being more efficacious and certainly more congenial. There can be little doubt that in most circumstances a person rendered, say, quadriplegic would prefer to have intimate needs met by domestic partners rather than by strangers and that the law should not expect such partners to enter into commercial arrangements in order to recover damages.

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2 (1984) 53 ALR 373.

3 *Blundell v Musgrave* (1956) 96 CLR 73. Some members of the more recent High Court clearly regret that this did not remain the law: see *CSR Ltd v Eddy* (2005) 226 CLR 1.

4 *Griffiths v Kerkemeyer* (1977) 139 CLR 161.

5 For example, *Burnicle v Cutelli* [1982] 2 NSWLR 26 (CA), a decision that was subsequently overruled in *Sullivan v Gordon* (1999) 47 NSWLR 319 (CA), reinstated in *CSR Ltd v Eddy* (2005) 226 CLR 1, but then replaced in New South Wales by legislation (*Civil Liability Amendment Act 2006* (NSW)).

One aspect of the decision in *Hodges v Frost* caused Kirby J problems at each later stage of his judicial career. Although he held that the plaintiff was entitled to damages in respect of the nursing care provided, he took the view that no pre-trial interest should be paid on these damages. Ten years later, when presiding in the New South Wales Court of Appeal, in the course of interpreting legislation which limited the award of interest on damages in motor accident cases, he decided that, if such interest did become payable under the statute, the damages for voluntary services should also bear interest at the full commercial rate.[6] A further seven years on, he was again faced with the issue in the High Court on an appeal from the Australian Capital Territory.[7] Explaining the difference between the two holdings as dependent on the then state of the authorities and the different statutes being interpreted, he this time opted for the payment of some interest, but at a reduced rate. Typically, he once again brought to his decision more than bare interpretation of a statute, which shed little light on the matter. He thought that to deny interest altogether would be unprincipled and illogical in the light of other decisions of the High Court; that allowing interest might promote settlements, deny defendants windfalls and provide funds from which the person who rendered the services might be compensated. On the other hand, a classical allusion to the thunderbolts that might follow the piling of Ossa on Pelion and then Olympus on Ossa warned of the danger of provoking legislative intervention. He compromised by proposing that the interest be payable at a reduced rate. In this last respect he was in the minority.

One of the decisions of the High Court that would have made it illogical not to award pre-trial interest on the damages for voluntary services, *Kars v Kars*,[8] contained a joint judgment of four members of the court that bears all the hallmarks of having been written by Kirby J. This case raised the issue of whether an award of damages for voluntary services should be made where the services had been provided by a person who was nominally the defendant to the action. In motor accident cases, it sometimes happens that the driver who is sued by a passenger is a family member who later cares for the injured passenger. Not long before this, the House of Lords had held that in such circumstances no such damages could be recovered,[9] a view which the Law Commission in England later thought to be in accordance with principle, but socially undesirable.[10] In *Kars v Kars* the High Court found a principled way to reach the socially desirable result. Unlike the House of Lords, it took account of the practical reality that in such instances the damages are

6 *Marsland v Andjelic [No 2]* (1993) 32 NSWLR 649 (CA).

7 *Grincelis v House* (2000) 201 CLR 321.

8 (1996) 187 CLR 354.

9 *Hunt v Severs* [1994] 2 AC 350 (HL).

10 Law Commission, *Damages for Personal Injury: Medical, Nursing and Other Expenses, Collateral Benefits*, Report No 262 (HC 806, 1999).

not paid by the defendant personally, but by the compulsory third-party motor vehicle insurer. It was unthinkable that a family member would sue another who was uninsured. While the role of other forms of insurance in relation to tort litigation needed investigation, compulsory insurance in motor accident cases formed part of the statutory background.

INSURANCE REALITIES

This was not the first time Kirby J had taken account of the background of compulsory third-party motor vehicle insurance in motor accident cases. As President of the New South Wales Court of Appeal, in *Cotogno v Lamb (No 3)*[11] he had accepted my published view that to award exemplary (punitive) damages which would become payable out of compulsory insurance funds was "absurd". He was able to interpret the statutory scheme so as to deny that such damages should be paid. However, his was a dissenting judgment on the point and it was the majority's contrary view that prevailed in the High Court in *Lamb v Cotogno*.[12] When himself on the High Court, he was denied the opportunity to revisit the question when the court in *Gray v Motor Accident Commission*[13] held that the defendant should not be able to challenge the earlier decision because of the lateness with which the request to do so arose and the failure to seek a reopening also of earlier decisions on exemplary damages, though he and Callinan J both encouraged defendants to seek to reopen the question on a future occasion. That occasion has not arisen and is unlikely to do so because of legislative amendments that deny courts the power to award exemplary damages in the compulsory insurance context.[14]

As noted in the previous section, the judgment in *Kars v Kars* recognised the reality of the compulsory insurance background in motor accident cases,[15] but was more cautious in calling for an investigation of the role of non-compulsory insurance in tort cases generally. This has been a theme of Justice Kirby's in several cases involving the duty of care, rather than the assessment of damages, and therefore falls outside the scope of this chapter.[16] However, in *Imbree v McNeilly*[17] he returned to the theme at length, observing that if:

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11 (1986) 5 NSWLR 559.

12 (1987) 164 CLR 1.

13 (1998) 196 CLR 1.

14 For example, *Motor Accidents Compensation Act 1999* (NSW) s 144.

15 See also *Mitchell v Government Insurance Office (NSW)* (1992) 15 MVR 369; *Holland v Tarlinton* (1989) 10 MVR 129.

16 See, eg, *Jones v Bartlett* (2000) 205 CLR 166; *Pyrenees Shire Council v Day* (1998) 192 CLR 330; *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313; cf, on vicarious liability, *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 (CA); and *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 (another joint judgment which may have been written by Kirby J and in which the presence of insurance was a known factor).

17 (2008) 82 ALJR 1374.

> compulsory insurance were *not* part of the legal background to the expression of the applicable common law, and if it were the case, or even possible, that someone in the position of the driver (or the owner) of the vehicle would, or might, be personally liable for the consequences of that person's driving affecting a passenger … or other third party it is extremely unlikely … that the courts would impose on them liability, as in the case of the appellant's claim, sounding in millions of dollars. Such a course would be unrealistic and futile, characteristics the courts usually endeavour to avoid.[18]

Gleeson CJ pointedly denied the relevance of insurance and the rest of the court ignored the issue.

FUNCTION OF APPELLATE COURTS

Interference with findings of fact

Despite most statutes providing for appeals from single judges of Supreme and District Courts stating that the appeals shall be by way of "rehearing", many appellate courts have been reluctant to interfere with findings of fact by trial judges on the basis that such judges enjoy advantages that appellate courts lack. They have generally required that, for a successful appeal on fact, it needs to be shown that the trial judge "palpably" or "glaringly" misused these advantages. This reluctance has been particularly manifest when the judge has based the findings on the credibility of witnesses. Recognising that trials miscarry probably more frequently on mistaken findings of fact than on the law, Kirby J long maintained a campaign to require appellate courts to undertake their statutory tasks without undue deference to the findings of fact of the trial judge. He concedes that there are advantages that trial judges enjoy over appellate courts, which are limited to reviewing the findings by reading desiccated transcripts, only parts of which require their attention. Such advantages stem from the way a whole case unfolds during the trial. Nevertheless, Kirby J has rejected the "lawyers' hubris" which believes a judge can rely on the demeanour of witnesses to ascertain their credibility, when science has demonstrated how unreliable this can be. Much of his philosophy on this emerged in dissenting judgments in the New South Wales Court of Appeal when reviewing awards of damages.[19] He continued the campaign on his elevation to the High Court,[20] where he was ultimately successful in persuading his colleagues to his point of view, so that the leading judgments now cited on the

18 (2008) 82 ALJR 1374 at 1396 [111] (emphasis in the original).

19 For example, *Ahmedi v Ahmedi* (1991) 23 NSWLR 288 (CA); see also *Government Insurance Office (NSW) v Bower* (1991) 14 MVR 473; *Sarelius v Tao* (1991) 14 MVR 396.

20 *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In liq)* (1999) 160 ALR 588; *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598.

issue are joint decisions in which he either participated or with which he concurred.[21]

Comparison with other awards

Another long-running campaign in which Justice Kirby ultimately triumphed, though this time only because of legislative intervention, involved the use that could be made of awards of damages in other cases. In the era of Barwick CJ, who was particularly opposed to appellate courts upsetting findings of fact by trial courts, the High Court laid down a rule that damages were to be "proportionate to the injuries"; that no norm or standard for damages could be derived from comparison with other supposedly similar cases; and that judges making their assessments could be supposed to be aware of and to give weight only to "current general ideas of fairness and moderation".[22] Perceiving in case after case that came before him in the New South Wales Court of Appeal that this led to "banal advocacy" and assertions of tedious generality as counsel sought to challenge awards below, Kirby P mounted a sustained criticism of the approach and repeatedly called for its reconsideration.[23] Obviously, the essence of justice is to treat like cases alike. Among other matters he mentioned were that consistency of awards and the establishment of norms enabled legal advisers and insurance clerks to settle cases with confidence; while reference to awards in other cases allowed parties to challenge the "general ideas of fairness and moderation" of particular judges, whose ideas might be out of date or otherwise flawed.

Justice Kirby achieved a temporary victory in this regard in relation to defamation awards. In an appeal against a very high jury award in such a case, Kirby P in typical style set out in a series of propositions the principles to be applied when an appellate court is asked to set aside a jury verdict, particularly in cases of defamation. In the course of doing so, he referred to a controversy that had developed as to whether it was permissible to compare defamation awards with awards of general damages in personal injury cases. Exercising caution because of the High Court's attitude to comparing one personal injury case with another, he nevertheless thought it relevant to show how disproportionate the award was in the case before him when compared with a case of total blindness that had recently come before the court.[24] In this respect he was vindicated when a further appeal to the High Court was dismissed and the majority indicated that it was "legitimate in considering whether

21 *Fox v Percy* (2003) 214 CLR 118; *Suvaal v Cessnock City Council* (2003) 77 ALJR 1449; *Pledge v Roads and Traffic Authority* (2004) 78 ALJR 572.

22 *Planet Fisheries Pty Ltd v La Rosa* (1968) 119 CLR 118.

23 See, in particular, *Moran v McMahon* (1985) 3 NSWLR 700 (CA); *Green v McKay* (unreported, NSW CA, Kirby P, Mahoney and Handley JJA, 24 April 1991); *CSR Ltd v Bouwhuis* (1991) 7 NSWCCR 223.

24 *John Fairfax & Sons Ltd v Carson* (1991) 24 NSWLR 259 at 274 (CA).

an award of damages for defamation is so large that no reasonable jury could have arrived at that figure if they had applied proper principles, to consider the kind of figures which have been held to be proper in cases of disabling physical injury".[25] Justice Kirby promptly made use of this permission when setting aside as excessive an award of damages for defamation in revealing a footballer's penis in a photograph published in a magazine, an award that was higher than the damages awarded to an infant who had lost the head of his penis in a circumcision operation.[26] However, even though the principle of taking account of personal injury awards for non-economic loss in assessing damages for defamation was thereafter enshrined in legislation in the *Defamation Act 1974* (NSW) s 46A, a later High Court Bench, of which Kirby J was not a member, largely robbed it of salience.[27]

The more general victory had to await legislation giving effect to the recommendation of the Ipp Committee that, in assessing general damages, a court may refer to decisions in earlier cases for the purpose of establishing the appropriate award in the case before it and that counsel may bring to the court's attention awards of general damages in such earlier cases.[28] He had called for such legislation earlier.[29] Whether the legislation will prove immune to judicial conservatism remains to be seen. Where the legislation does not apply, the old law still prevails.[30]

Respect for juries

In the course of setting out the principles on which an appellate court can interfere with the verdict of a defamation jury, Kirby P observed that "juries may more faithfully reflect community values which have a proper part to play in the assessment of damages in defamation".[31] He has displayed a similar attitude to damages awards by juries in personal injury cases, recognising that juries may offer a salutary corrective to the standards adopted by judges alone.[32] He has also remarked on the fact that local juries may have a better understanding than remote judges

25 *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44.

26 *Australian Consolidated Press Ltd v Ettingshausen* (unreported, NSW CA, Gleeson CJ, Kirby P and Clarke JA, 13 October 1993).

27 *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327.

28 Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (2002), Recommendation 46, enacted, for instance, in *Civil Liability Act 2002* (NSW) s 17A.

29 *Clutha Developments Pty Ltd v Dowd* (unreported, NSW CA, Kirby P, Sheller and Powell JJA, 5 October 1995).

30 *Collaroy Services Beach Club Ltd v Haywood* [2007] NSWCA 21.

31 *John Fairfax & Sons Ltd v Carson* (1991) 24 NSWLR 259 at 271.

32 *Pambula District Hospital v Herriman* (1988) 14 NSWLR 387 (CA); *Clutha Developments Pty Ltd v Dowd* (unreported, NSW CA, Kirby P, Sheller and Powell JJA, 5 October 1995); *Clarence Colliery Pty Ltd v Bunkovic* [1985] Aust Torts Reports 80-761. See also, in relation to the standard of care in negligence, *Swain v Waverley Municipal Council* (2005) 220 CLR 517 at 589 [231].

of what work is likely to be available to a partially disabled plaintiff.[33] On several occasions he has noted that while in the past judges feared that juries would award excessive damages, these days it is defendants who ask for juries when they are available.[34] The reason why judges have in recent times been more generous in the assessment of damages than juries is undoubtedly connected with another departure from the Barwick era with which Kirby J agrees: the requirement that judges demonstrate how the total award is made up by reference to separate heads of damages.[35] Appeals from jury trials are not by way of rehearing and, since juries give no reasons, it is seldom possible to dissect the global verdicts given in such cases.

Three-way splits

Damages appeals in intermediate courts are usually heard by three judges. It sometimes happens that no majority can be found for any particular order of the court. For instance, one judge may be in favour of dismissing the appeal, while the other two, who would uphold the appeal, arrive at different amounts in exercising their power to reassess the damages. Various permutations of this scenario occur. As President of the New South Wales Court of Appeal, Kirby P confronted this situation on several occasions. Clearly, the solution adopted in some old cases, which required the most junior of the judges to withdraw his (it was always "his" in those days) own judgment, did not always appeal to Kirby P's democratic instincts or his sense of justice. Instead, he suggested that the order embody "the highest common denominator" (presumably meaning the highest common "factor") or the highest measure of agreement among the members of the court.[36] There are numerous alternatives to this process and the issue has still not been resolved, as can be seen from the agonising it recently caused a subsequent President of the New South Wales Court of Appeal.[37]

33 *Clarence Colliery Pty Ltd v Bunkovic* [1985] Aust Torts Reports 80-761.

34 *Pambula District Hospital v Herriman* (1988) 14 NSWLR 387 at 396 (CA); *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at 501-502 [63] (joint dissenting judgment with Callinan J); *Swain v Waverley Municipal Council* (2005) 220 CLR 517 at 581-582 [206].

35 See his dissenting judgment in *Government Insurance Office (NSW) v Bailey* (1992) 27 NSWLR 304 at 318 (CA).

36 For example, *Westpac Banking Corporation v Tomassian* (1993) 32 NSWLR 207 (CA); *Lexington Constructions Pty Ltd v Coyne* (unreported, NSW CA, Kirby P, Mahoney and Cripps JJA, 24 December 1992); *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 (CA); *Australian Specialised Meat Products Pty Ltd v Turner* (1995) 11 NSWCCR 614; but cf *Government Insurance Office (NSW) v Rosniak (No 2)* (unreported, NSW CA, Kirby P, Mahoney and Meagher JJA, 29 October 1992).

37 See *Skulander v Willoughby City Council* [2007] NSWCA 116.

CHANGES IN SOCIAL ATTITUDES

No discrimination between sexes in respect of scarring

In an appeal by a young man who had suffered disfiguring injuries, Kirby P drew attention to the fact that in the past damages had been assessed by judges and juries who were always male. For such people, feminine beauty was more prized than its male equivalent. A stereotypical image had grown up, which had even infected the High Court.[38] Women judges might take a different view of male beauty. Furthermore, social attitudes had changed. Evidence of this was to be found in anti-discrimination statutes, even though they were not directly applicable to the assessment of damages for personal injury.[39] His colleagues on the Court of Appeal were not convinced that they were applying stereotypes, which they agreed should be avoided. However, it remained true that it was the effect on the individual that had to be assessed and, insofar as discriminatory attitudes continued in the community, the court might have to take account of their existence.

Marriage and other contingencies

His Honour had more success in getting his fellow judges on the New South Wales Court of Appeal to recognise that social attitudes had changed with regard to the institution of marriage. Where a widow sought damages in respect of the death of her husband, a court in an earlier era had taken the view that, while support that she received from a husband after she remarried had to be taken into account in the reduction of her damages, no similar reduction was to be made where she received support from someone to whom she was not formally married.[40] Pointing out that de facto marriages had become much more common and acceptable, Kirby P and the other sitting members held that no different principle should be applied between marriage and alternative relationships.[41]

Changes in attitudes to the institution of marriage continued after Justice Kirby's elevation to the High Court. These had the effect of eroding the decision just referred to. When the issue came before that court, Kirby J referred to a non-exhaustive list of no less than nine social assumptions that had changed radically since the law on the point had been laid down.[42] One of these was the increased independence of

38 *Pannucio v Pannucio* (1976) 50 ALJR 429 (referring to "cosmetic injuries, especially to the face and when suffered by a young woman").

39 *Ralevski v Dimovski* (1986) 7 NSWLR 487. See also *Government Insurance Office v Burbury* (1989) 10 MVR 189; *Del Ponte v Del Ponte* (1987) 11 NSWLR 498 (CA), in each of which the plaintiff was female.

40 *Wild v Eves* (1970) 92 WN (NSW) 347.

41 *AA Tegel Pty Ltd v Madden* (1985) 2 NSWLR 591 (CA).

42 *De Sales v Ingrilli* (2002) 212 CLR 338 at 392 [153].

women, which meant that they could no longer expect support from male partners, whether or not they are formally married to them. While it seems that, where a male partner is killed, women may still base their claims on the loss of the expectation of support that they would have received, the contingency of forming another relationship from which they will derive equivalent support is no longer, in the view of some members of the High Court, something to be allowed for separately in the assessment of damages. Justice Kirby found himself in the position of having to choose between the views of three members of the court who would no longer make separate allowance for the prospect of re-partnering, and three members of the court who would continue to do so. In a typical wide-ranging judgment, he discussed case law in different jurisdictions, including unreported judgments throughout Australia; recommendations of law reform bodies; legislative responses; "social facts" to be gleaned from bodies such as the Australian Bureau of Statistics; and much academic commentary. He set out the arguments that had been put forward in many of these sources or which had been urged on the court in argument and which he had considered and dismissed. And he gave his own reasons for concluding that the traditional approach was "unjust, unpredictable, anomalous and discriminatory", so that a "re-expression" of the law was required. Such re-expression required that no longer should any discount be made for the prospect of financial support from re-partnering. He perceived a possible danger that had occurred in at least one jurisdiction that had adopted a similar rule, namely an increase in the standard deduction for other contingencies with an unfortunate loss of transparency. Therefore, only the "standard" deduction for contingencies should be applied according to the jurisdiction in which the claim arose.

As Kirby J noted, this raised an issue that was tangential to the case before the court: what was the appropriate deduction for the general contingencies or vicissitudes of life which should be applied in personal injury cases? Why should there always be a deduction? Why did it vary in different jurisdictions in Australia? Why in New South Wales was 15 per cent the usual figure? This was something that had troubled him frequently in the past.[43] However, in order to answer such questions, the court would need much more evidence than it had in this case. It was therefore not appropriate to attempt to answer them on this occasion.

In *Government Insurance Office (NSW) v Rosniak*,[44] a case that came before him in the New South Wales Court of Appeal, Kirby P's sense of irony, if not actual cynicism, can be detected in relation to the whole process of weighing up the contingencies in order to arrive at the lump-sum award of damages which has to be assessed at common

43 See, eg, *Moran v McMahon* (1985) 3 NSWLR 700 (CA); *Stepanovic v GIO (NSW)* (1995) 21 MVR 327.

44 (1992) 27 NSWLR 665.

law once and for all at the time of the trial. Speaking of "unverifiable assumptions" and the desirability in some instances of adopting arbitrary rules, Kirby P "left aside" or "put out of account" such matters as "the challenges to humanity which derive from the risk of nuclear catastrophe"; "the risk of unforeseeable public health crises" (asking "who could have predicted but a decade ago the scourge of HIV/AIDS and the toll it is taking in human life?"); and "the possibility of revolution and war". He was "even" prepared to "assume that the Protective Commissioner … will still exist in some form in 50 and 60 years, resolutely supervising the [plaintiff's] fund" and "that no government will purloin the fund". He accepted that the child plaintiff would "live the life span allocated to her (no more, no less) by the average life expectancy tables"; "that current inflationary trends will remain, with interest rates, much as they have been in recent years and that income tax levels will be basically stable". He found consolation in the fact that "in the chasm of her terrible brain damage", the plaintiff at least would not be "worried by the high artificiality of the principles by which this Court is obliged to approach the calculation of a component of her damages".[45]

When, however, there were changes in social attitudes that clearly falsified past assumptions, Kirby J always moved with the times. Thus, he insisted that the contingency of early retirement should no longer automatically be applied when assessing the damages payable to women.[46]

Unwanted births

Another instance of Kirby J's recognition of changed social attitudes, which put him at odds with some of his colleagues on the Bench, is found in his consideration of what damages should be awarded for medical negligence resulting in unwanted births. The issue first came before him when he was President of the New South Wales Court of Appeal. A young student, believing herself to be pregnant and not wishing to give birth, consulted medical practitioners repeatedly, but on several occasions was assured that she was not pregnant. When eventually the pregnancy was confirmed, it was too late to undergo a termination, which she would have proceeded with if she had been correctly informed at the earlier consultations that she was indeed pregnant. The trial judge regarded any termination in such circumstances as unlawful and refused to award her any damages.[47] His view was shared on the Court of Appeal by Meagher JA, but the majority

45 *Government Insurance Office (NSW) v Rosniak* (1992) 27 NSWLR 665 at 676 (CA). However, Kirby P was probably less sceptical than his colleague Meagher JA, who lamented the "haruspical" activities of the actuaries, whom he compared to "ancient Etruscan soothsayers examining the entrails of sacrificial birds" (at 699).

46 *Harper v Bangalow Motors Pty Ltd* (unreported, NSW CA, Kirby P, Mahoney and Clarke JJA, 24 July 1990).

47 *CES v Superclinics Australia Pty Ltd* (unreported, NSW SC, Newman J, 18 April 1994).

of the Court of Appeal held that the defendant had failed to prove that a termination would have been unlawful in the circumstances. To Meagher JA it seemed "improper to the point of obscenity" that a court of law should permit an action for damages in respect of the birth of the child. He quoted the Bible in support of the notion that "[e]very child is a cause of happiness to its parents".[48] Justice Kirby, on the other hand, pointed to the "widespread use of contraceptive measures" as "an indication of a general social disagreement with the theory that every potential child must necessarily be considered an unalloyed blessing". Referring to "the modern realities of sexual conduct and birth control, and the real possibilities of obtaining a termination of an unwanted pregnancy", whether one liked that or not, he considered that it was "out of harmony with the modern Australian society in which the Australian common law must operate" to proclaim that "a conscious decision or expressed desire not to have a child is an 'unnatural rejection of womanhood and motherhood'", as some judges had done.[49] Accordingly, he rejected these (and other) arguments of asserted public policy for denying a right to recover damages and agreed with Priestley JA in ordering a new trial, though, in order to make a majority for the order of the court, he withdrew his own view that the damages could include the cost of maintaining the child after its birth. An appeal to the High Court was settled without the issue having been resolved after various parties who purported to be concerned as to the question of the lawfulness of the abortion in this case sought to intervene.[50]

Seven years later the High Court was squarely faced with the issue of whether parents could claim the cost of raising a healthy child who would not have been born if there had not been medical negligence. Justice Kirby now found himself one of a narrow majority who answered in the affirmative.[51] Once again, he referred to changes in "social attitudes to various forms of contraception, including sterilisation". These, he said, had "come about as a result of greater knowledge of, and discussion about, human sexuality". They had "in part … followed advances in the technology of contraception and sterilisation procedures; and in part … reflected social changes affecting the role of women and of marriage, the economic expectations of individuals and the altered place of religion in society". His judicial philosophy is apparent in the following quotation: "The common law does not exist in a vacuum. It is expressed by judges to respond to their perceptions of the requirement of justice, fairness and reasonableness in their society."[52] Although he would have

48 *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 at 86, 87 (CA). See also Chapter 16, "Health Law and Bioethics", in this book.

49 *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 at 74.

50 See *Nafte v CES* (unreported, S91/1996, 11 and 12 September 1996).

51 *Cattanach v Melchior* (2003) 215 CLR 1.

52 (2003) 215 CLR 1 at 43 [105], [106].

preferred to decide the appeal on the basis of what was "fair, just and reasonable", he felt constrained by the authority of the High Court itself "to approach the issues of legal principle and legal policy, relevant to this appeal, in a somewhat different way".[53] He set out the options available and proceeded to refute the public policy arguments advanced against following ordinary tort principles, which would "entitle the victims … to recover … all aspects of their harm that are reasonably foreseeable and not too remote".[54] Acknowledging that when the matter had come before him in the New South Wales Court of Appeal he was attracted to the option of making an allowance in reduction of the damages for the benefit to be derived from the joy that the child might bring, he now saw this as inconsistent with the principle that emotional benefits should not be set off against economic losses.[55]

An additional expression of policy came to the fore in Kirby J's rejection of one of the options he considered. Some courts had sought to distinguish between the costs of raising a healthy child, which were denied, and the extra costs of raising a child who was born disabled. His Honour's antipathy to discrimination made such an option flawed, since it "reinforces views about disability and attitudes towards parents and children with physical or mental impairments that are contrary to contemporary Australian values reinforced by the law".[56] Three legislatures have responded to the High Court's decision by disallowing damages for the costs of raising a child, but all of them have indeed carved out an exception for a child with special needs.[57] Perhaps they were "responding to the 'echo-chamber inhabited by journalists and public moralists'".[58]

PRINCIPLE v POLICY

Claims by disabled children

Whether or not it is invidious to distinguish between healthy children and those born disabled for purposes of the recovery of damages for the cost of their upbringing, there is no doubt that some children have special needs that should be compensated. As long as the action for negligence

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53 (2003) 215 CLR 1 at 49 [122].

54 (2003) 215 CLR 1 at 68 [179].

55 (2003) 215 CLR 1 at 66 [175]. See also Chapter 16, "Health Law and Bioethics", in this book.

56 (2003) 215 CLR 1 at 64 [166].

57 *Civil Liability Act 2002* (NSW) s 71; *Civil Liability Act 2003* (Qld) ss 49A and 49B; *Civil Liability Act 1936* (SA) s 67.

58 *Cattanach v Melchior* (2003) 215 CLR 1 at 53 [137]. This comment may be a rare instance of Kirby J's departure from his normally respectful attitude to elected Parliaments: cf M D Kirby, "Consensus and Dissent in Australia" (10th Annual Hawke Lecture, University of South Australia, 10 October 2007): http://www.unisa.edu.au/hawkecentre/ahl/2007ahl_kirby.asp (accessed 4 December 2008).

as a means of providing compensation for personal injury is retained, it is appropriate that damages include the cost of meeting such needs. Many years before the decision in *Cattanach v Melchior*,[59] I was phoned by a solicitor who was acting for a medical defence organisation. The solicitor told me that he was satisfied that a member of the organisation had been negligent in failing to detect a foetal abnormality during an ultrasound test of a pregnant woman; that had the woman been informed of the abnormality, she would have undergone an abortion; that the child was born severely handicapped; and that in these circumstances, his client was prepared to pay very substantial damages. However, he had reason to believe that once the damages were paid, the parents might abandon the child and depart with the money. Was there any means by which this could be prevented? It is trite law that the court is not concerned with what plaintiffs who are not themselves suffering from a disability do with their damages.[60] It follows that nothing can be done to protect the child if the action is seen as being the parents', rather than the child's own. For this and other reasons, it is preferable that the action be brought on the child's behalf, in which case the damages would be held on trust for the child's benefit.

However, an action by the child presents other difficulties of principle. "The one principle that is absolutely firm, and which must control all else, is that damages for the consequences of mere negligence are compensatory."[61] This requires the court to restore plaintiffs, so far as money can do so, to the position they would have occupied if there had been no negligence. But if there had been no negligence, the child would not have existed. It seems impossible as a matter of principle to allow an action by the child to succeed. And when the issue came before the High Court, this is what all the members other than Kirby J held.[62] Rejecting the label of "wrongful life" applied to actions by disabled children who would not have been born, his Honour would have found a way through principle and policy to compensate these children. His long judgment again is typical of his style. It highlights the issues to be determined; surveys existing authority, with full consideration of overseas judgments; cites academic opinion; sets out the arguments for and against the conclusion to be reached; takes account of the realities of litigation; and seeks to demonstrate his favoured conclusion's consistency with principle. In the end, his policy reasons are more convincing than the reconciliation with principle, but this should not be seen as criticism. New principles may often need to be developed to accommodate new problems. Ultimately, the law must serve the needs and expectations

59 *Cattanach v Melchior* (2003) 215 CLR 1.

60 *Todorovic v Waller* (1981) 150 CLR 402. See also *Kars v Kars* (1996) 187 CLR 354, rejecting the English theory that damages should be held on trust for a voluntary carer.

61 *Skelton v Collins* (1966) 115 CLR 94 at 128 per Windeyer J.

62 *Harriton v Stephens* (2006) 226 CLR 52; *Waller v James* (2006) 226 CLR 136.

of people; it is not a closed system in which all parts are necessarily congruent and in harmony.

LOSS OF EARNING CAPACITY

Plaintiffs in partnership

There has been a long-standing conceptual argument as to whether damages in the ordinary personal injury suit are awarded for loss of earning capacity or loss of earnings. The High Court has at the verbal level for decades favoured the former, but has rendered the distinction in most instances irrelevant by insisting that damages are awarded only for loss of earning capacity which is or may be productive of economic loss.[63] One area where the theory adopted could make a difference is where an injured person had diverted the income received through the exercise of her or his earning capacity to someone else. This is usually a family member. A partnership or company structure is mostly adopted for the purposes of minimising the total tax payable by the family unit, since each member of the unit is taxed separately and enjoys a separate tax threshold and reduced marginal rates. When the earning capacity of the active member of the structure becomes incapacitated, part of the loss of earnings falls on the non-active member of the group, who usually has no right to recover damages for this loss. Is it possible for the injured person to recover this loss as part of her or his own damages? A judge who prefers form over substance might answer "no". The High Court, with Kirby J joining three of his colleagues in a joint judgment, held that where the income had effectively been retained under the control of the injured person, the lower court was wrong to disallow the damages.[64]

Aboriginal plaintiffs

Gray v Motor Accident Commission[65] is a final example of Kirby J's concern for the underprivileged and refusal to countenance discrimination. It is a case to which I have already referred in relation to punitive damages.[66] Despite the court's unwillingness to reopen that question, all the judges agreed with Kirby J's view that the damages for the economic loss sustained by the Aboriginal plaintiff were manifestly inadequate. He found errors in the trial judge's reliance on the plaintiff's school reports for concluding that his short-term memory loss preceded the accident, which called for appellate intervention. The judge had failed to make allowance for the achievements of the plaintiff despite the disadvantages from which he

63 *Graham v Baker* (1961) 106 CLR 340; *Medlin v State Government Insurance Commission* (1995) 182 CLR 1.

64 *Husher v Husher* (1999) 197 CLR 138.

65 (1998) 196 CLR 1.

66 See above, n 13.

had suffered and had awarded a 23-year-old a sum for future economic loss of only twice the amount allowed for the past, amounting in all to only $30,000, which Kirby J described as "incongruous".

CONCLUSION

In some circles, the word "activist" has become pejorative in relation to judges. It is, however, a label that Michael Kirby can wear proudly.[67] When cases come before the High Court, there are almost always "leeways of choice".[68] Conservative judges purporting to make decisions on the basis of past principle only are in fact applying "policy" as much as activist judges.[69] The activist judge is more likely to bring her or his values out into the open for scrutiny and criticism. Justice Kirby's values – which, as this chapter has tried to show, include abhorrence of unjust discrimination, concern for the underdog, recognition of changes in social attitudes and the realities of litigation – are much needed in modern Australian society.

67 Compare M D Kirby, "Judicial Activism? A Riposte to the Counter-Reformation" (2004) 24 *Australian Bar Review* 219; M D Kirby, "Judicial Activism: Authority, Principle and Policy in the Judicial Method" (Third Hamlyn Lecture, 55th Series, Cardiff, 24 November 2003): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_24nov.html (accessed 4 December 2008).

68 J Stone, *Precedent and Law: Dynamics of Common Law Growth* (Butterworths, Sydney, 1985).

69 Compare the dissenting judgments in *Cattanach v Melchior* (2003) 215 CLR 1.

Chapter 11

DISCRIMINATION

Chris Ronalds

The past attitudes of the law towards sexual minorities was an affront to fundamental human rights.The law throughout Australia has now deleted the criminal offences that oppressed and stigmatized homosexual and bisexual men. Yet attitudes will only change when human sexual diversity is acknowledged and accepted.[1]

A PERSONAL EXPERIENCE

Michael Kirby has been subjected to various acts of discrimination throughout his life.

As a white male commencing legal practice in the early 1960s, Kirby would have expected that he would not be subjected to any acts of discrimination. He was part of the ruling elite once he entered the small, closed legal community in Sydney. While he experienced difficulty in obtaining articles,[2] once he did so he commenced a stellar legal career in which he has provided leadership and inspiration for many years.

A proud graduate of the New South Wales public education system, Kirby has often spoken about his strong belief in that system and the sound basis it gave him for his future career. Already, he stood outside the dominant paradigm of the New South Wales legal profession. The profession was dominated by men who went to private schools. There were few law graduates from public schools and then mostly from the few selective schools. There were virtually no women.

Yet there was one critical personal issue that set him apart from most of his male colleagues. His homosexuality undoubtedly put him in a completely different category from that of his peers. The profession was openly and virulently misogynistic. If it ever occurred to members of the

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1 M D Kirby, "Ten Years in The High Court – Continuity and Change" (2005) 27 *Australian Bar Review* 4; also available at: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_1005.pdf (accessed 5 December 2008).

2 M D Kirby, "Lessons from Life as a Solicitor" (1999) 37 *Law Society Journal* (NSW) 63.

legal profession to even consider the matter of homosexual lawyers, they would also doubtlessly have been homophobic. It is hardly surprising that in such a hostile environment Michael Kirby chose to keep his private life very private. He has described the period as when "attitudes to homosexuality in the 1970s were still generally primitive and punitive in Australia".[3]

Kirby's lack of public disclosure was further necessitated by the laws in New South Wales which criminalised some consensual sexual acts between homosexual males. These laws were not repealed until August 1984. The age of consent for homosexuals was made the same as that for heterosexuals, 16 years, in May 2003.

While it was an open secret in some parts of the Bar, Kirby J's homosexuality was not publicly known or acknowledged when he was appointed as President of the New South Wales Court of Appeal in September 1984 or to the High Court in February 1996. At the age of 57 and on being appointed to the highest court in Australia, he still felt unable to publicly identify his long-term partner, Johan van Vloten. Instead, he made some opaque references. In his farewell speech from the New South Wales Court of Appeal he said:

> My family and loved ones sustain me in all that I do. But some debts are too intense, enduring and private for words on a public occasion such as this.[4]

At his swearing in at the High Court, he said:

> I pay my tribute publicly … To my family and loved ones who sustain me and criticise me every day. Everyone, without exception, needs such human support and loving correction.[5]

Justice Kirby used his entry in the 1999 edition of *Who's Who in Australia*, published in November 1998, to name his long-term partner. There was significant media attention in April 1999 after the contents of the entry were widely published.

By 2005, he was openly discussing his domestic arrangements:

> My partner and I had never denied our relationship. However, a point was reached when it became appropriate to be more explicit in the acknowledgment of someone who had contributed so much to my life. The past attitudes of the law towards sexual minorities was an affront to fundamental human rights. The law throughout Australia has now deleted the criminal offences that oppressed and stigmatised homosexual and bisexual men. Yet attitudes will only change when human sexual diversity is acknowledged and accepted.

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3 M D Kirby, "Law Reform, Human Rights and Modern Governance – Australia's Debt to Lord Scarman" (2006) 80 *Australian Law Journal* 299.

4 "Current Issues" (1996) 70 *Australian Law Journal* 271 at 273.

5 "Current Issues" (1996) 70 *Australian Law Journal* 274 at 276.

> My partner comes to all High Court functions. He attends luncheons with the Queen, dinners with the Governor-General and the Prime Minister, functions at State Government Houses, as well as Court formal and social activities. People are getting used to it. Although I am a constitutional office-holder, he is not protected under federal law as a spouse or de facto spouse of a Justice would be. His open participation in my public life is proper and rational. Hiding the truth because some people do not wish to face it is over. Most people hope for such an intelligent and enduring relationship in life. But as judges and barristers know from life and work, better than most, finding it is elusive. When it occurs, it is invaluable. Law is important. Life and love are even more so. For the stressful, pressured work of a professional lawyer, a loving and supportive home life is specially precious.[6]

In 2002, Michael Kirby was subjected to an outrageous homophobic attack by a Commonwealth Senator who made false allegations about Kirby J's use of Commonwealth cars.[7] It is a simple but sad observation that this attack would never have occurred if Kirby had been heterosexual. The vilification of Kirby was an undisguised attempt to force him to resign from his appointment as a High Court judge. This attempt failed and Senator Heffernan was forced to apologise to Justice Kirby. Even he, the false accuser, had to concede that "with the recent widespread media coverage of my speech, his personal standing has been harmed … I recognise the personal hurt that must have been suffered".[8] Justice Kirby graciously accepted the apology while stating, "I hope my ordeal will show the wrongs that hate of homosexuals can lead to".

A second recent personal experience of discrimination on the ground of his sexuality suffered by Michael Kirby is the failure of any Federal Government to amend the superannuation laws. While Kirby and van Vloten "have had a loving and supportive partnership over nearly 38 years",[9] if Kirby pre-deceases his partner, there is no superannuation payable to him. This is in direct contrast to the judicial pension available to a heterosexual spouse of a deceased High Court judge. While an amending Bill passed the House of Representatives with bipartisan support in mid-2008, the Opposition legal affairs spokesman, George Brandis SC, had the legislation referred to a Senate Committee for further review and a report. This reduced the time available for the discrimination to be removed before Justice Kirby's retirement.

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6 M D Kirby, "Ten Years in The High Court – Continuity and Change" (2005) 27 *Australian Bar Review* 4: also available at: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_1005.pdf (accessed 5 December 2008).

7 Australian Government, Senate, *Hansard* (12 March 2002) p 573.

8 Australian Government, Senate, *Hansard* (19 March 2002) p 944.

9 M D Kirby, "Peter Nygh, Family Law, Conflicts of Law and Same-Sex Relations" (Peter Nygh Memorial Lecture, 12th National Family Law Conference, Perth, 23 October 2006): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_23oct06.pdf (accessed 5 December 2008).

In relation to discrimination, Kirby considers that "if you never suffer it, you are not so sensitive to it" and that "a reason for my sensitivity to justice to vulnerable groups … is because I have myself suffered discrimination in my life".[10]

DISCRIMINATION LAWS REVIEWED

Michael Kirby has been a passionate advocate for the promotion of human rights and the use of international law to provide a proper basis for the interpretation and analysis of Australian law. Other chapters in this book examine the depth of his understanding and his work within an international human rights focus.[11] That review includes an assessment of his critical role as a strong and public proponent for the adoption of the *Bangalore Principles of Judicial Interpretation*.

Within the context of Australian law, one important step in the promotion and protection of human rights was the passage of anti-discrimination laws.

As Michael Kirby has stated:

> Discrimination on the basis of sexuality is an important human rights issue; but only one. Lawyers who are committed to a vocation concerned with equal justice for all under the law, must resist unjust discrimination. They must help rid the law of its residuum of legal injustice. This applies whether the discrimination rests on a person's gender, race, genetics, age, sexuality or other like ground.[12]

Discrimination laws were designed to provide a system of rights and redress for specific acts of discrimination on specified grounds. They were always limited in their application and provided a range of protections for individuals prepared to lodge a written complaint and pursue the statutory process of conciliation and possible judicial review. Some commentators have criticised the narrow focus of these laws and their limited impact beyond the rights of the parties.[13] Often they fail to understand that the laws were never designed to have the wider application they seek.

These laws are focused on eliminating particular instances of unequal treatment on a proscribed ground. They are not designed to address systemic patterns of disadvantage, which require a different approach.

10 Interview of Justice Michael Kirby by Claire Low, Journalism Student, University of Canberra (5 September 2005) p 5: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_cl0905.pdf (accessed 5 December 2008).

11 See Chapter 20, "International Human Rights" by Louise Arbour and James Heenan and Chapter 18, "In Harmony with Human Rights" by Roderic Pitty.

12 M D Kirby, "Seven Ages of a Lawyer" (Leo Cussen Memorial Lecture, Melbourne, Victoria, 25 October 1999): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_leocus.htm (accessed 5 December 2008).

13 See, eg, M Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, Melbourne, 1990).

Early opponents of the legislation failed to understand the underlying principles of the legislation and adopted a sceptical view or disbelief about whether it was the proper function of the law to involve itself in such "social policy" matters.

Any judicial review of these laws needs to start from the knowledge that they are designed for a limited, yet important, role within the context of Australian society.

The Commonwealth legislative program commenced with the *Racial Discrimination Act 1975* and then there was a significant gap until the passage of the *Sex Discrimination Act* in 1984. The *Disability Discrimination Act* followed in 1992 and the *Age Discrimination Act* in 2004. There have been no serious attempts to introduce discrimination laws on the ground of sexuality into the Commonwealth Parliament and it is unlikely that any government will do so in the forthcoming years. Equivalent State legislation varies around the country but usually has a wider number of grounds, including sexuality, differently defined, and broader coverage for vilification and hatred laws.

There has been only limited judicial consideration of the *Racial Discrimination Act* and it is widely considered to be the least successful of all, for a variety of complex reasons. The sexual harassment provisions in the sex discrimination arena and the education provisions in the disability arena appear to have been used more often and have a wider community understanding and acceptance.

The current laws at both a federal and State level follow a similar model with two definitions, known as "direct" discrimination and "indirect" discrimination, with various grounds and areas covered.

"Direct" discrimination is where there is a comparison between the treatment of a person with the specified ground, such as sex or disability, and that of a person without the specified ground "in circumstances that are the same or are not materially different".[14] This is the definition most commonly relied on in litigated complaints. The identification of the person or group for comparison is often the critical factor in successfully establishing a claim. The circumstances must sustain careful analysis so they are sufficiently similar to provide a sound basis for evaluation of the likeness in order to identify the discriminatory characteristic that demonstrates a breach of the law.

The second definition, "indirect" discrimination, is based on the concept of examining conditions, requirements or practices to ensure that their impact is not discriminatory by having a detrimental impact on the nominated group, such as women or indigenous people.[15] A detriment or disadvantage must be identified and it must arise from the

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14 See, eg, *Sex Discrimination Act 1984* (Cth) s 5(1); *Disability Discrimination Act 1992* (Cth) s 5.

15 See, eg, *Sex Discrimination Act 1984* (Cth) ss 7B and 7C; *Disability Discrimination Act 1992* (Cth) s 6.

condition, requirement or practice being scrutinised and not from some other source. The proportionality of the impact on the nominated group and the available modes of overcoming the detriment or disadvantage are also examined.

The second leg of any complaint is the area of discrimination, including employment, education and goods and services. Each of the discrimination laws has a limited range of exceptions where discrimination is not unlawful if it comes within the terms of these various provisions. Exceptions vary on different grounds and include unjustifiable hardship in disability discrimination, pregnancy or childbirth in sex discrimination and superannuation terms in sex and age discrimination. All laws have an exception for forms of positive discrimination or special measures where programs or policies are put in place to provide direct assistance to overcome discrimination for the nominated group.

These various statutory provisions can lead to complex arguments about the interpretation of the section and sometimes the intention of the Parliament is examined to see whether the outcome is that envisaged by the legislators.

Michael Kirby had no experience in the operation of discrimination law as a practising barrister. His first appointment to the Bench in 1975 meant he had left the New South Wales Bar before the laws were passed. As a consequence, his own professional exposure has only ever been in his role as a judge.

The New South Wales Court of Appeal

Not long after his appointment to the Court of Appeal as President, Justice Kirby started hearing and determining a small flow of cases invoking the terms of the *Anti-Discrimination Act 1977* (NSW) and, less frequently, the federal discrimination laws.

In a later decision, Justice Kirby explained his approach to the interpretation of discrimination legislation as, "the modern approach to the specification of the purpose of Parliament is to search for the meaning of the statutory words with an eye fixed on the achievement of the objects apparently sought by Parliament in their enactment" and, "it is designed (as all such legislation is) to achieve a measure of social engineering".[16]

His first case in which he was a member of the Court of Appeal considered a costs question following convoluted proceedings that included the constitutional validity of terms of the State Act. A relatively simple race discrimination complaint by an Egyptian post-graduate student, Mohamed Metwally, at the University of Wollongong turned into a major constitutional challenge, which the university eventually

16 *Lorang v Mater Misericordiae Hospital* (1994) EOC 92-602.

won.[17] This meant that despite his victory in the tribunal of fact and an award of substantial damages, Mr Metwally fell foul of matters completely outside his control. The Court of Appeal ordered costs against him, while noting he was legally aided.[18] It was an unremarkable start to Kirby's line of judicial considerations of discrimination law.

A second constitutional challenge arose when two Vietnamese women challenged the fitness criteria for permanent employment by the federal postal authority. Since these criteria were based on height and gender, the women claimed race and sex discrimination against the authority. The High Court dismissed the women's appeal from the Court of Appeal decision (of which Kirby J was a member) in relation to sex discrimination, which found that the New South Wales law could not operate as it could not bind a Commonwealth agency.[19] The New South Wales law was found to be invalid to the extent of the inconsistency. On this occasion, the High Court agreed, albeit on different and more complex grounds. Ironically, having lodged their complaints in June 1981, by the time the final determination of the High Court was handed down in April 1987, the women met the criteria in respect of weight, having lived in Australia in the intervening period.

In a decision concerning the level of damages in a common law action where a distinction was made between damages to be awarded to women and men for cosmetic injuries in 1986, Justice Kirby revealed his views on sex discrimination legislation when he observed:

> At the heart of legislation to forbid discrimination on the ground of sex is an objection to stereotyping. It is an insistence on assessing and considering individuals as human beings. The developments which have occurred in legislation reflect changing community opinions. They are changes which are, in my opinion, important and beneficial. The common law should move on a parallel course. Differential approaches to the assessment of cosmetic injury to men and women, as such, should be regarded as inadmissible. Men and women who come to our courts are entitled to the assessment of their damages by judges who approach their functions without preconceived discriminating distinctions. If such distinctions are to be drawn, the only safe ground for them is to be found in evidence, properly proved, in relation to the particular individual before the court.[20]

In one of the first close considerations of the definition of "direct" discrimination, Justice Kirby joined with Chief Justice Street in reviewing

17 *University of Wollongong v Metwally* (1984) 158 CLR 447.

18 *University of Wollongong v Metwally* (1985) 1 NSWLR 722.

19 *Dao v Australian Postal Commission* (1987) 162 CLR 317; *Australian Postal Commission v Dao* (1985) 3 NSWLR 565; Kirby J also gave a lengthy and detailed decision in relation to costs awarded in part against the complainants, who were legally aided: *Australian Postal Commission v Dao (No 2)* (1986) 6 NSWLR 497. For another early decision on costs in a discrimination case, see *Commonwealth Banking Corporation v Duncan* (1988) EOC 92-216.

20 *Ralevski v Dimovski* (1986) 7 NSWLR 487 at 494A.

the operation of the *sex* discrimination provisions for a girl student for subject selection at a girls' school when offered less advantageous options than her twin brother at the local boys' school. This was almost a dream test case given the comparator was her twin brother. The girl student was successful in her complaint against the New South Wales Department of Education.[21]

There was also a detailed consideration of the capacity of young persons to make complaints under the statutory regime and whether there needed to be an adult involved. Justice Kirby took a wide view of the standing provisions and held that an infant or a child should not be prevented from lodging a complaint or pursuing proceedings in the tribunal.

In the first major *disability* discrimination case to be determined by a higher court, the Court of Appeal took a narrow approach to the *exception* to then direct discrimination provisions on the ground of "physical handicap" in the New South Wales Act. Justice Kirby referred to the provisions as a "novelty" due to their recent insertion into that Act and the lack of previous judicial consideration. His examination of the exception and the way it operated in the employment context led him to conclude that this was "somewhat opaque legislation" and that "one likes to think that it would have been possible to express these relatively simple concepts more clearly and simply".[22] The complainant lost his discrimination claim. However, it is unlikely that this would be the outcome now or that the exception would be read in the same way in terms of looking at the actual job duties to be performed.

Later court decisions examined the role and function of the statutory tribunal and the limitations on its jurisdiction and the operation of a deed of release,[23] as well as the operation of the compulsory retirement provisions for a medical specialist.[24]

At the time of his elevation to the High Court, Justice Kirby had been President of the Court of Appeal for 11 years. During that period, the discrimination laws had become an accepted part of the legal framework of Australia. They were no longer considered to be outlandish or designed to wreak social havoc. The principles of "direct" discrimination were more widely understood, especially within the business community, and the less palatable acts of blatant sex and race discrimination within the labour market had been ameliorated.

Several of the New South Wales Court of Appeal decisions in which he participated demonstrated the practical application of those

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21 *Haines v Leves* (1987) 8 NSWLR 442. In the second major test case on the marital status provisions, Kirby P did not provide reasons, agreeing with Clarke JA: *Waterhouse v Bell* (1991) 25 NSWLR 99.

22 *Jamal v Secretary, Department of Health* (1988) 14 NSWLR 252 at 263.

23 *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26.

24 *Lorang v Mater Misericordiae Hospital* (1994) EOC 92-602.

laws and the way the complaint and tribunal systems operated. These decisions were seen as important test cases because of the novelty of the legal concepts being addressed and the relatively unusual enforcement arrangements of a statutory complaint system with a specialist tribunal to hear and determine matters. The approach of the tribunal in those formative years, with its extended membership of two non-lawyers and one lawyer, was scrutinised by sceptics who opposed the creation of such specialist jurisdictions and considered that decisions involving the interpretation of complex laws should be made by judicial authorities only. The increase in such specialist courts and tribunals was seen by conservative lawyers as being an undesirable reform.

Over time, the resistance to such tribunals dissipated and this was doubtless in part led by the way the New South Wales Court of Appeal approached its review of the powers and operations of the specialist tribunal. While sometimes critical of their approach and their interpretation of the legislation, the appeal mechanism meant that there was an opportunity for judicial intervention and correction when the need arose.

An early prediction for the specialist tribunals was that they would be biased towards the complainant and so the respondent, most commonly an employer, would not be accorded procedural fairness as their case would not be properly listened to and taken into account. While some early decisions were dubious from a legal perspective, the fear that complainants would automatically win did not eventuate. Even with Justice Kirby, the complainants did not always win and, indeed, many lost their cases due to either constitutional complexities or questions of legal interpretation. The realities of costs orders and the strong possibility of a loss provided a powerful deterrent for many complainants in pursuing their matters into the court system as the tribunal was a jurisdiction where costs were rarely awarded against a losing party. No judgments of Justice Kirby tempered that reality and his decisions were not out of step with those of his fellow judges.

The High Court

In his time on the High Court, Justice Kirby has been a member of the Bench on five occasions when discrimination laws were the major issue before the court.[25] In four of these cases he was in dissent on all main points. In the fifth, he was in dissent only on some subsidiary matters but not on the main points. Four of those cases involved actions by or against a complainant alleging an act of unlawful discrimination. All

25 In other cases, discrimination law was a secondary or peripheral consideration: see, eg, *Re East; Ex parte Nguyen* (1998) 196 CLR 354; *Western Australia v Ward* (2002) 213 CLR 1; *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 216 ALR 1.

complainants were unsuccessful in their endeavours to establish that the discrimination laws had been breached.

In a sixth case, the principles of age discrimination were applied in an industrial relations claim for termination of employment. The claim was dismissed as the age discrimination was found to be an "inherent requirement" of the position.

The first discrimination decision on which Justice Kirby sat was *IW v City of Perth*.[26] This involved a 1990 complaint from an association that had been denied planning permission by the Perth council for a drop-in centre for people with HIV/AIDS. A member of the association, IW, claimed that the denial of planning permission was on the ground of "impairment", the forerunner to the disability laws. The Western Australian tribunal found that there was an act of direct discrimination on the ground of characteristics of people with HIV/AIDS. "Some of the characteristics relied upon were found by the tribunal to have involved ignorance, prejudice and stereotyping. The votes of the five [councillors] made all the difference. Without their votes, the body would have approved the application."[27]

In the 1980s in Australia there was a series of acts of discrimination on the ground of the person having HIV/AIDS. A lack of information of, and understanding about, the mode of transmission of the virus with some hysteria and ill-informed decision-making led, for instance, to HIV-positive children being expelled from and banned from child care centres. Positive gay men were denied the services of doctors, dentists, hospitals and even mortuaries. Inevitably, it was an area that was going to lead to some claims under the discrimination laws as negative stereotypes abounded in the popular press, fuelling poor debate and flawed decisions. It is perhaps surprising how few such complaints were pursued to a court or tribunal hearing. Sometimes poor settlements were reached as the HIV-positive person did not want to be identified publicly for fear of further rejection by family, friends and the general community.

The High Court decision in *IW's* case demonstrates the complexities of discrimination law, which frequently trap the unwary who mistakenly consider it will be "easy" to run a simple case. They underestimate the difficulty of the underlying principles and the impact of some of the leading authorities, which have sometimes not helped in clarifying the way the legislation should operate. *IW* sits in that category. It is a decision that remains almost incomprehensible to the uninitiated.

There were two majority decisions in *IW*, which examined the meaning of the term "services" and found that a council approving a development application was not providing a "service".[28] Gummow J

26 *IW v City of Perth* (*People Living with AIDS Case*) (1997) 191 CLR 1.

27 (1997) 191 CLR 1 at 51.

28 (1997) 191 CLR 1 at 17 per Brennan CJ and McHugh J, and at 23-24 per Dawson and Gaudron JJ.

found that there was discrimination but found against IW on a more basic issue of standing. As the original development application had been made in the name of the association of "People Living with AIDS", and as IW was not a member, Gummow J found that he had no standing to bring the matter to the High Court. Toohey J agreed with the approach and the orders proposed by Kirby J, but they were in the minority and so the appeal was dismissed and IW failed to make out his claim.

Justice Kirby noted:

> [O]ne of the objectives of anti-discrimination legislation is to secure such outcomes by the avoidance of prejudiced decision-making based upon false or stereotyped assumptions about specified considerations (for example, race, sex or impairment). Such considerations might otherwise prejudice decisions which should be made on their merits, uninfluenced by forbidden grounds.[29]

Justice Kirby's approach to interpreting this type of legislation was clear when he stated:

> The purpose of anti-discrimination legislation, such as the Act, is to ensure that, within the areas prescribed by Parliament, equals are treated equally and human rights are not violated by reference to inappropriate or irrelevant distinctions. Especially where important human rights are concerned, protective and remedial legislation should not be construed narrowly lest courts become the undoers and destroyers of the benefits and remedies provided by such legislation. Courts will not unduly stretch the language of such legislation. But they will be very slow to find that the effect of something which is discriminatory falls outside the ambit of the legislation, given its purpose. This is especially so where a complainant, who can establish unequal treatment, falls within the category of persons for whom anti-discrimination legislation has apparently been enacted. It is legitimate in giving effect to such legislation, to keep in mind its broad purposes and, to the full extent that the text permits, to ensure that the Act achieves its objectives and is not held to have misfired. To the extent that, in legislation such as the Act, courts adopt narrow or pernickety approaches, they will force parliaments into expressing their purposes in language of even more detail and complexity. This will increase the burden and costs of litigation. It will obscure the broad objectives of such statutes and frustrate their achievement.[30]

The cases of *Christie* and *X*[31] both illustrate the way in which majority decisions have meant that the *inherent requirements exception* in disability discrimination law is seen to have a broad operation. A policy applied to all employees can sustain an act of discrimination even when the policy itself relies on stereotyped notions of the particular ground, whether a

29 (1997) 191 CLR 1 at 55.
30 (1997) 191 CLR 1 at 58 (footnotes omitted).
31 *Qantas Airways Ltd v Christie* (1998) 193 CLR 280; *X v Commonwealth* (1999) 200 CLR 177.

disability or age. This results in some apparently discriminatory acts being permitted policy or decisions approaches as they are able to establish the appropriate parameters to demonstrate an inherent requirement for the position. For example, in *Christie's* case,[32] a Qantas international pilot challenged the termination of his employment when he reached the age of 60. The High Court found that the age restriction was an inherent requirement of his job as there were international restrictions on pilots over the age of 60 flying into some international air space. The majority decided that these were matters outside the control of Qantas as his employer and were part of the general flying environment.

Justice Kirby, in dissent, reiterated his approach to the construction of discrimination legislation when he held:

> Remedial legislation, designed to achieve the high public purpose of upholding equal opportunity, should be construed beneficially and not narrowly. Any other approach risks frustrating the will of Parliament. So long as that will is expressed in valid legislation, it is the function of courts to give effect as far as they can to its purpose, particularly where that purpose is designed to protect and advance basic rights. This approach should be adopted, and there should be no faltering, where the object relates to less familiar grounds of discrimination (such as age, sexual orientation ("sexual preference") and handicap) as for the more familiar grounds (such as "race, colour and sex"). Each ground is accorded equal status in the Act. Each is derived from successive elaborations of international standards.[33]

A second example of "inherent requirements of the job" is *X's* case,[34] which came before the High Court when an HIV-positive soldier challenged his discharge from the Australian Defence Force, claiming that it was an act of discrimination on the ground of disability in breach of the *Disability Discrimination Act 1992* (Cth). The majority found that the disability discrimination was not unlawful as the soldier was unable to perform the inherent requirements of the job. Thus, his circumstances fell within the *exception* in s 15(4)(a) of the Act. They found that the inherent requirements were not just the physical capacity to perform the tasks and skills of a soldier. Of critical importance was the whole scope of the employment and not just some isolated job functions.

Justice Kirby, in dissent, found that a policy which was applied across the board and also to X did not meet the terms of s 15(4)(a) as the necessary link between the individual and the individual's disability had not been made. He found that the Commonwealth, through the Australian Defence Force, as X's employer, had failed to show "a 'clear and definite relationship' that must be established between the disability in question and the way in which its very nature disqualifies the person

32 (1998) 193 CLR 280.

33 (1998) 193 CLR 280 at 332 [152(2)].

34 *X v Commonwealth* (1999) 200 CLR 177.

from being able to perform the inherent or intrinsic characteristics of the employment in question".[35]

Arising out of proceedings that involved the *Sex Discrimination Act 1984* (Cth), in *McBain v Victoria* the High Court unanimously rejected an attempt for a third party intervention to overturn a decision of a single Federal Court judge when neither party to the actual proceedings appealed.[36] The Australian Catholic Bishops Conference sought to quash that decision through the original jurisdiction of the High Court.[37] The Federal Court proceedings had made a declaration that s 8 of the *Infertility Treatment Act 1995* (Vic) was inoperative as it was inconsistent with s 22 of the *Sex Discrimination Act 1984* (Cth). The declaration enabled a gynaecologist, Dr John McBain, to offer in-vitro fertilisation treatments to a single woman. The majority of the High Court refused to hear the application as there was no "matter" within the meaning of Ch III of the *Constitution* and hence no basis to consider the decision below.

Justice Kirby also addressed the various limitations in the action and traversed the many unusual aspects of the Attorney-General's fiat being granted in the circumstances. After reviewing the discretionary considerations for the granting of a writ of certiorari, Kirby J determined that there were sufficient reasons to decline to grant the order. These considerations included the unusual way in which the action had been brought and the lack of involvement of the original parties, who at all times remained content with the decision below.

Disability discrimination complaints have been made most commonly in the area of education. In *Purvis*,[38] the High Court addressed the issues arising for Daniel Hoggan, a student with significant disabilities, which resulted in uncontrollable violence against others within the school environment. This led to his suspension and eventual exclusion from South Grafton High School. The majority found that there was no act of disability discrimination based on the identification of the comparator as a person without the relevant disability but with the same behaviours.[39] In the minority, McHugh and Kirby JJ took a different approach. In their view, the behaviour could be separated from the disability and so should not be part of the comparison. They found:

> Provisions that extend the definition of discrimination to cover the characteristics of a person have the purpose of ensuring that anti-discrimination legislation is not evaded by using such characteristics as "proxies" for discriminating on the basic grounds covered by the legislation. But the purpose of a disability discrimination Act would be

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35 (1999) 200 CLR 177 at 228 [158].

36 *McBain v Victoria* (2000) 99 FCR 116.

37 *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372.

38 *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92.

39 (2003) 217 CLR 92. The author appeared for the Department in the HR&EOC and both Federal Court proceedings, and as junior counsel in the High Court.

> defeated if the comparator issue was determined in a way that enabled the characteristics of the disabled person to be attributed to the comparator. If the functional limitations and consequences of being blind or an amputee were to be attributed to the comparator as part of the relevant circumstances, for example, persons suffering from those disabilities would lose the protection of the Act in many situations. They would certainly lose it in any case where a characteristic of the disability, rather than the underlying condition, was the ground of unequal treatment. And loss of the Act's protection would not be limited to such dramatic cases as the blind and amputees. Suppose a person suffering from dyslexia is refused employment on the ground of difficulties with spelling but the difficulties could be largely overcome by using a computer with a spell checker. The proper comparator is not a person without the disability who cannot spell. Section 5(2) of the Act requires the comparison to be between a comparator without the disability who can spell and the dyslexic person who can spell with the aid of a computer that has a spell checker. When that comparison is made the employer will be shown to have breached the Act unless it can make out a case of unjustifiable hardship as defined by s 11 of the Act.[40]

Perhaps more than any other discrimination decision, *Purvis* has been the subject of continuing criticism from lawyers and advocates representing complainants. It is regularly asserted that the decision has destroyed any chance of the disability discrimination law having an impact since the interpretation of the comparator issue means that it is impossible to prove direct discrimination in a disability claim.[41] The decision is the authoritative determination of the way in which the direct discrimination definition works and also the extent of the definition of "disability". It has been applied consistently by lower courts and there is no doubt that the application of *Purvis* has led to the dismissal of some complaints.[42]

One of the issues for the State of New South Wales in the *Purvis* litigation was that it could not argue unjustifiable hardship as a defence.[43] At the time of the complaint, that defence was only available as part of the admission process into an educational institution and not during any suspension or expulsion process. The *Disability Discrimination Amendment (Education Standards) Act 2005*[44] was subsequently enacted. It extended

40 (2003) 217 CLR 92 at 134-135 [130] (footnotes omitted).

41 See, eg, C D Campbell, "A Hard Case Making Bad Law: Purvis v New South Wales and the Role of the Comparator under the Disability Discrimination Act 1992 (Cth)" (2007) 35 *Federal Law Review* 111; K Rattigan, "Purvis v New South Wales (Department of Education and Training) – A Case for Amending the Disability Discrimination Act 1992 (Cth)" (2004) 28 *Melbourne University Law Review* 532; S Edwards, "Purvis in the High Court – Behaviour, Disability and the Meaning of Direct Discrimination" (2004) 26 *Sydney Law Review* 639.

42 See, eg, *Forbes v Australian Federal Police (Commonwealth of Australia)* [2004] FCAFC 95; *Kowalski v Domestic Violence Crisis Service* [2005] FCA 12; *Virgin Blue Airlines Pty Ltd v Hopper* [2007] QSC 75; *Queensland v Forest* (2008) 249 ALR 145.

43 See *Disability Discrimination Act 1992* (Cth) ss 11 and 22(4).

44 Act No 19 of 2005, which commenced 10 August 2005.

the coverage of the unjustifiable hardship exemption into all areas of education. This was part of the compromise with the State governments in anticipation of the passage of the *Disability Standards for Education 2005* (Cth), which commenced operation in August 2005.

The final decision in respect of discrimination laws where Justice Kirby was again in the minority was a pay equity claim by female teachers. The majority found against the teachers and dismissed their claim on the basis of statutory construction of the employment provisions in s 25(2)(a) of the *Anti-Discrimination Act 1977* (NSW). The majority relied on a narrow interpretation of the "terms and conditions" and found that permanency conferred certain benefits which meant that a female casual teacher was not the same as a permanent teacher and also that indirect discrimination was not established.[45]

Justice Kirby commenced his minority judgment with an outburst against his fellow High Court judges when he observed:

> This case joins a series, unbroken in the past decade, in which this Court has decided appeals unfavourably to claimants for relief under anti-discrimination and equal opportunity legislation.
>
> It was not always so. In the early days of State and federal anti-discrimination legislation, this Court, by its approach to questions of validity and application, upheld those laws and gave them a meaning that rendered them effective. So it was in *Ansett Transport Industries (Operations) Pty Ltd v Wardley*, an unsuccessful challenge to the applicability of provisions of the *Equal Opportunity Act 1977* (Vic) concerned with discrimination on the ground of sex and marital status. So it was in *Australian Iron & Steel Pty Ltd v Banovic*, another case of discrimination on the ground of sex in the employment context. Similar too was the unanimous outcome in *Waters v Public Transport Corporation*, a case concerning discrimination on the ground of physical disability or impairment. None of these cases was more or less arguable than those that have followed. Few cases that now reach this Court are unarguable. The Court's successive conclusions in these cases reflected the beneficial interpretation of the laws in question, ensuring they would achieve their large social objectives. In *Mabo v Queensland [No 2]*, the general approach which the Court took to discrimination (in that case on the ground of race) was stated clearly. The Court there acknowledged the need to ensure that the law "in today's world" should "neither be nor be seen to be frozen in an age of ... discrimination".
>
> The wheel has turned. In no decision of this Court in the past decade concerned with anti-discrimination laws, federal or State, has a party claiming relief on a ground of discrimination succeeded. If the decision in the courts below was unfavourable to the claimants, it was affirmed. If it was favourable, it was reversed.

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45 *State of New South Wales v Amery* (2006) 230 CLR 174.

> This is what occurred in *IW v City of Perth*, a case concerning discrimination on the ground of physical impairment. So too in *Qantas Airways Limited v Christie*, a case concerning age discrimination, in which a judgment of the Industrial Court of Australia was reversed to favour the defendant. A similar outcome was reached in *X v The Commonwealth*, a case involving HIV disability. So too in *Purvis v New South Wales*, a case involving physical and mental disability. In each of these cases, the Court produced a finding unfavourable to the complainant. The differences in the Court's present approach to anti-discrimination legislation may lie in considerations of approach. That possibility is lent further support by the outcome of the present appeal.[46]

Justice Kirby went on to determine that there were no errors in the decision of the New South Wales Court of Appeal and so the appeal should be dismissed.

CONCLUSION

Having personally experienced discrimination on the ground of his sexuality, Michael Kirby has been increasingly vocal about the rights of disadvantaged persons needing the protection of the law, both within the court and in public speeches and articles.

His views on the High Court in the last decade have been in the minority. It is too early to tell whether the High Court will turn a more favourable light on the rights of complainants in the future so that Kirby J's views will become aligned with the majority after he has left the court. If the High Court does regard such complainants more favourably in the future, then his legacy in this area will be increased. At this stage, it can only be concluded that his approach to these laws is out of step with that of his colleagues and that he is unable to convince them to move their positions and join him in upholding the capacity of these laws to provide real protections to disadvantaged people.

46 (2006) 230 CLR 174 at 200-201 [86]-[89] (footnotes omitted).

Chapter 12

EMPLOYMENT AND INDUSTRIAL LAW

Breen Creighton*

> *In my view, lawyers can be generally proud of the contribution which labour law has made to the history of the Commonwealth in the first century of Federation. It is by law and legal instruments that we created a land of general industrial justice.*[1]

Michael Kirby's interest in and involvement with employment and industrial law goes back to his earliest days at the Bar. Having been a somewhat reluctant debutant,[2] he quickly overcame his initial diffidence, and developed an extensive, and apparently lucrative, industrial practice – especially in the New South Wales industrial jurisdiction.[3] In late 1974, at the age of 35, he was appointed as a Deputy President of the (then) Australian Conciliation and Arbitration Commission.[4]

Kirby's appointment to the Commission was effective from January 1975, and he was given responsibility for the maritime industry. After "only forty days and forty nights" he took leave from the Commission to take up the position of Chairman of the Australian Law Reform

* The author wishes to thank James Farrell, Bence Teo and Annabelle Wilson for their research assistance in the preparation of this chapter.

1 M D Kirby, "Industrial Relations Law – Call Off the Funeral" (2001) 6 *Deakin Law Journal* 256 at 259-260.

2 M D Kirby, "Industrial Regulation in the 'Frozen' Continent" (1989) 2 *Australian Journal of Labour Law* 1 at 2.

3 Kirby, above, n 2.

4 The Australian Conciliation and Arbitration Commission was a lineal descendent of the Court of Conciliation and Arbitration which was established under the *Conciliation and Arbitration Act 1904* (Cth). It was reconstituted and renamed as the Australian Industrial Relations Commission by the *Industrial Relations Act 1988* (Cth). Henceforth the term "Commission" will be used to refer to the tribunal in its various iterations.

Commission.[5] Although he remained a member of the Commission until his appointment to the Federal Court of Australia in 1983, he never again sat on the industrial tribunal.[6]

Despite his short tenure as an active member of the industrial Bench, Kirby appears to have enjoyed his time there. In 2004, he noted that both he and Justice Mary Gaudron had found their time on the Commission to be "infinitely more fun" than that spent on the High Court.[7] Fifteen years earlier he had wryly observed that he might have been happier had he maintained his relationship with the "somewhat unpredictable creature" (industrial relations) that was the love of his youth rather than entering into a state of matrimony with the law, "a black robed dowager … an elegant if somewhat imperious spouse".[8]

Although his appointment to the Australian Law Reform Commission marked the end of his formal engagement with industrial law, Kirby has retained an active interest in the area throughout the rest of his career. This is reflected in his extrajudicial writings,[9] in his appointment to the International Labour Organisation's Fact-Finding and Conciliation Commission in 1991[10] and, of course, in his role as a member of the New South Wales Court of Appeal and of the High Court.

Employment law and industrial relations law were not a major focus of Justice Kirby's work on the Court of Appeal. Those industrial cases that did come before the court principally concerned the categorisation of work relationships;[11] the nature and extent of the unfair contracts

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5 M D Kirby, "Sir Richard Kirby and a Century of Federal Industrial Arbitration" (Sir Richard Kirby Lecture 2001, University of Wollongong, 16 October 2001) p 5: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_16oct01.htm (accessed 9 October 2008). The gap in the Commission's membership created by Kirby's appointment to the Australian Law Reform Commission was filled by Justice Jim Staples. The failure to appoint Staples to the Australian Industrial Relations Commission when the tribunal was reconstituted in 1988 scandalised Kirby, and he lent strong public support to Staples – see, eg, M D Kirby, "The Removal of Justice Staples and the Silent Forces of Industrial Relations" (1989) 31 *Journal of Industrial Relations* 334 (also published in (1990) 6 *Australian Bar Review* 1).

6 Kirby's tenure on the Federal Court was short in consequence of his appointment to the Court of Appeal of the Supreme Court of New South Wales in 1984, where he remained until his elevation to the High Court in 1996.

7 M D Kirby, "Industrial Conciliation and Arbitration in Australia – A Centenary Reflection" (2004) 17 *Australian Journal of Labour Law* 229 at 241-242.

8 Kirby, above, n 2 at 3.

9 In addition to the sources cited at nn 1, 5 and 7, see, eg, "Industrial Relations, Law Reform and the Constitution" (1983) 25 *Journal of Industrial Relations* 103; "Industrial Relations Reform: Impediments and Imperatives" in R Blandy and J Niland (eds), *Alternatives to Arbitration* (Allen & Unwin, Sydney, 1986) p 398; "Human Rights and Industrial Relations" (2002) 44 *Journal of Industrial Relations* 562; "The Law of Conciliation and Arbitration" (with B Creighton) in J Isaac and S Macintyre (eds), *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration* (Cambridge University Press, Cambridge, 2004) p 98.

10 See further, Kirby (2002) 44 *Journal of Industrial Relations* 562 (above, n 9) at 569-571.

11 See especially, *Connelly v Wells* (1994) 55 IR 73 at 77-89.

jurisdiction of the industrial tribunal in New South Wales;[12] entitlements under the *Government and Related Employees Appeal Tribunal Act 1980* (NSW) and the *Education Commission Act 1980* (NSW);[13] and various aspects of the State system of industrial regulation.[14]

Inevitably, the great majority of the employment and industrial cases heard by Justice Kirby on the High Court have concerned the nature and extent of the capacity of the Commonwealth Parliament to legislate with respect to industrial relations, and it is those cases that will constitute the principal focus of this chapter. However, as will appear presently, he has also sat on a number of significant cases concerning the categorisation of work relationships and various other aspects of employment law.

INDUSTRIAL REGULATION

Constitutional context

Section 51(xxxv) of the *Constitution* enables the Federal Parliament, subject to the *Constitution* itself, to make laws for the "peace, order and good government of the Commonwealth" with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State".

Until the early 1990s, this placitum provided the principal underpinning of federal regulation of industrial relations. Nevertheless, it should be noted that a number of other heads of power were called in aid in some contexts. These included the trade and commerce power in s 51(i), the public service power in s 52 and the Territories power in s 122. However, s 51(xxxv) was very much the king of the castle of industrial regulation throughout the first century of Federation. As such,

12 This jurisdiction was originally enshrined in s 88F of the *Industrial Arbitration Act 1940* (NSW) and, more recently, in s 106 of the *Industrial Relations Act 1996* (NSW): see, eg, *Daemar v Industrial Commission of New South Wales* (1988) 12 NSWLR 45 at 46-56; and *Majik Markets Pty Ltd v Brake and Service Centre Drummoyne Pty Ltd* (1991) 28 NSWLR 443 at 446-454. For Kirby's High Court pronouncements upon s 106, see *Fish v Solution 6 Holdings Ltd* (2006) 225 CLR 180 at 197-227 [46]-[159]; *Batterham v QSR Ltd* (2006) 225 CLR 237 at 250-270 [31]-[100]; and *Old UGC Inc v Industrial Relations Commission (NSW)* (2006) 225 CLR 274 at 286-300 [32]-[85]. In all three of the 2006 cases, Kirby was in dissent.

13 See, eg, *Sydney City Council v Reid* (1994) 34 NSWLR 506 at 507-521; *Matkevich v New South Wales Technical and Further Education Commission* (1995) 65 IR 46 at 46-54; *Janson v Scanlon* (1995) 63 IR 100 at 100-110; *Suttling v Director-General of Education* (1985) 3 NSWLR 427 at 429-442 (reversed on other grounds, *Director-General of Education v Suttling* (1987) 162 CLR 427). Kirby was in dissent in all of these cases, apart from *Reid*.

14 See, eg, *Ronher Pty Ltd v Waterside Workers' Federation of Australia* (1988) 90 FLR 370; *Cepus v Industrial Court of New South Wales* (1995) 60 IR 113 at 113-124.

it has generated an enormous volume of case law, and has spawned a formidable body of literature.[15]

No useful purpose would be served by rehearsing either the case law or the commentary in the present context, save to note:

- Section 51(xxxv) does not enable the Parliament to legislate directly for the regulation of terms and conditions of employment; the most that it can do is to establish procedures for the prevention and settlement of industrial disputes through the use of two specific techniques: conciliation and arbitration.
- Disputes that do not fall within the scope of the federal power (for example because there is no "dispute" in the requisite sense or because they lack the necessary element of interstateness) cannot be regulated in reliance upon s 51(xxxv) and, in the normal run, would fall to be dealt with, if at all, under State law. The States have also traditionally enjoyed the capacity directly to regulate terms and conditions of employment if they were so inclined.
- The legislative powers of the States in relation to employment and industrial law, as in other areas of law, are constrained by the fact that s 109 of the *Constitution* has the effect that a valid law of the Commonwealth will prevail over any inconsistent State law to the extent of the inconsistency. Inevitably, this has generated tension and litigation between the Commonwealth and the States over the years. Equally inevitably, the High Court has adopted different approaches in respect of the reach of federal legislative power at different times. This in turn has served to generate further tension and confusion.
- Not only has the High Court adopted different approaches to the balance of power between the Commonwealth and the States at different times, it has also adopted very different approaches to the interpretation of every aspect of s 51(xxxv), including the range of matters that can properly constitute the subject-matter of an industrial dispute; the "industries" in which disputes can occur; the nature and extent of the preventative power; and what conduct will constitute a "dispute" in the requisite sense. In addition, in the *Boilermakers' Case* the High Court, supported by the Judicial Committee of the Privy Council, determined that the same tribunal could not exercise

15 See, eg, J J Macken, *Australian Industrial Laws: The Constitutional Basis* (2nd ed, Law Book Company, Sydney, 1980); W B Creighton, W J Ford and R J Mitchell, *Labour Law: Text and Materials* (2nd ed, Law Book Company, Sydney, 1993) Chs 14-20 and 23; G Williams, *Labour Law and The Constitution* (Federation Press, Sydney, 1998) Ch 2; M J Pittard and R B Naughton, *Australian Labour Law: Cases and Materials* (4th ed, LexisNexis Butterworths, Sydney, 2003) Chs 7-8; and B Creighton and A Stewart, *Labour Law* (4th ed, Federation Press, Sydney, 2005) pp 84-105. For Kirby's assessment of the jurisprudence on s 51(xxxv) and the legislation enacted in reliance upon it, see Kirby and Creighton, above, n 9.

both judicial functions (such as enforcing or interpreting awards) and non-judicial functions (such as making awards).[16]

In this context, Michael Kirby's appointment to the High Court in February 1996 came at an interesting time. In a series of decisions, starting with the *Social Welfare Case* in 1983, the Gibbs and Mason Courts had adopted a more expansive and internally consistent approach to the interpretation of s 51(xxxv) than had been the case in the past.[17] This meant that Kirby could reasonably expect not to have to contend with some of the challenges that confronted his predecessors, such as explaining why clerical workers engaged by State governments and by the Commissioner for Road Transport in New South Wales were not engaged "in an industry",[18] whilst their colleagues who did similar work for the Tasmanian Motor Accidents Insurance Board and Victorian health funds were so engaged.[19] Cases such as *Electrolux* show that the ghosts of the past can still wield an unfortunate influence on occasion[20] but, such throwbacks aside, Kirby largely escaped the "Serbonian bog" in which the interpretation of s 51(xxxv) had become enmeshed.[21] Instead, he found himself faced with a very different challenge: the potential redundancy of the conciliation and arbitration power as a source of federal industrial regulation.

As noted earlier, despite the traditional dominance of s 51(xxxv), the Commonwealth has drawn upon a range of heads of power over the years as a basis for industrial regulation. This use of other heads of power was principally intended to complement the regulatory regime put in place in reliance upon the conciliation and arbitration power – for example,

16 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (HC); and *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529 (JCPC). For Kirby's (extrajudicial) views on the resultant bifurcation of functions, see Kirby, above, n 7 at 237-238.

17 *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297. See also *Re Manufacturing Grocers' Employees Federation; Ex parte Australian Chamber of Manufactures* (1986) 160 CLR 341; and *Re Cram; Ex parte New South Wales Colliery Proprietors' Association Ltd* (1987) 163 CLR 117.

18 See, respectively, *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Victoria* (1942) 66 CLR 488; and *R v Holmes; Ex parte Public Service Association of New South Wales* (1978) 140 CLR 63.

19 See, respectively, *R v Cohen; Ex parte Motor Accidents Insurance Board* (1979) 141 CLR 577; and *R v Holmes and Federated Clerks Union of Australia; Ex parte Manchester Unity Independent Order of Oddfellows in Victoria* (1980) 147 CLR 65.

20 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309. This case arose out of an attempt by the AWU to negotiate a certified agreement, which contained a term for the payment of a bargaining fee to the union by non-members who had, in the opinion of the union, obtained the benefit of the services of the union. The majority found that such provision could not be included in an agreement made under the federal Act because the claim did not "pertain" to the employer/employee relationship in the requisite sense. In doing so, the majority relied upon a number of pre-*Social Welfare* authorities on the interpretation of "industrial matter". Kirby vigorously dissented (at 373-389 [173]–[223]).

21 See *Australian Boot Trade Employees' Federation v Whybrow & Co* (1910) 4 CAR 1 at 42 per Higgins J.

by ensuring that the system encompassed certain categories of workers who were engaged in interstate or overseas trade and commerce.[22] However, since the enactment of the *Industrial Relations Reform Act 1993* (Cth), successive governments have increasingly turned to other heads of power, notably the external affairs and corporations powers, as the basis for federal industrial regulation.

It is true that the 1993 Act still relied to a very significant extent upon s 51(xxxv) for its constitutional underpinning. But it also drew upon the external affairs power in s 51(xxix), together with a range of International Labour Organisation Conventions and the associated jurisprudence, to make laws with respect to unfair dismissal, unlawful termination, workers with family responsibilities, equal remuneration for work of equal value, and the right to strike. It also relied (albeit to a much lesser extent) upon the corporations power in s 51(xx) as the underpinning for part of its shift away from centralised regulation of terms and conditions of employment in favour of "enterprise bargaining".

The inevitable challenge to the constitutionality of the 1993 Act was heard in September 1995, some five months before Kirby's appointment to the High Court. He was not, therefore, privy to the unanimous decision of the six-member court which was handed down in September 1996 and which upheld the validity of the legislation in all but a number of minor particulars. He was, however, a member of the court that heard a number of challenges to the rather more radical use of the corporations power by the Howard Government in the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth).[23]

In *Attorney-General (Queensland) v Australian Industrial Relations Commission*,[24] Justice Kirby joined with the six other members of the court in rejecting a challenge by several trade unions to decisions of the Commission whereby it ceased dealing with a number of applications that had been before it prior to the commencement of the 1996 amendments. The Commission felt impelled to do this because of the newly-inserted s 111AAA of the *Workplace Relations Act 1996*, which required that the Commission cease dealing with industrial disputes where it was satisfied that:

22 See, eg, para (d) of the definition of "employer" in s 6 of the *Workplace Relations Act 1996* (Cth).

23 Although the 1996 Act made extensive use of the corporations power, it significantly reduced reliance upon the external affairs power: see B Creighton, "The Workplace Relations Act in International Perspective" (1997) 10 *Australian Journal of Labour Law* 31. For commentary on the legislation as a whole, see B Creighton, "The Role of the State in Regulating Employment Relations: An Australian Perspective" (1997) 2 *Flinders Journal of Law Reform* 103; W J Ford, "Rearranging Workplace Relations: Revolution or Evolution?" (1997) 27 *University of Western Australia Law Review* 86; T MacDermott, "Industrial Legislation in 1996: The Reform Agenda" (1997) 39 *Journal of Industrial Relations* 52.

24 (2002) 213 CLR 485.

> a State award or State employment agreement governs the wages and conditions of employment of particular employees whose wages and conditions of employment are the subject of an industrial dispute … unless the Commission is satisfied that ceasing would not be in the public interest.[25]

Justice Kirby considered that the intent of the legislation was clear on its face, and that it was within legislative power. As such it should be given effect. In reaching this conclusion, he observed that:

> Industrial law represents a sensitive area of law-making. Newly-elected governments not infrequently seek prompt legislative endorsement of their policies. Such legislative changes often lie at the heart of the political and social controversies which the representative democracy established by the Constitution is designed to settle. So long as the legislation is constitutionally valid, it is no part of the function of a court to frustrate the changes of policy enacted by the Parliament.[26]

In *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union*,[27] by a 4:3 majority, the court upheld the validity of a provision of the 1996 Act which required the Commission to remove from existing awards any terms that did not pertain to "allowable award matters" within the meaning of the legislation. For Justice Kirby this amounted to an attempt to regulate industrial relations by direct legislation, whilst s 51(xxxv) permits the Parliament to make laws only for "the settlement of a question in dispute by reference to a third party or parties when those immediately involved have failed to agree".[28] Furthermore, "the process for such settlement must answer to the description of 'conciliation' or 'arbitration' or both".[29] On the other hand, Justice Kirby did accept that the Parliament could properly restrict the range of matters that could be dealt with in a new award; what it could not do was interfere with the content of an award that had already been made. To uphold a law that does this:

> in my opinion, breaks nearly a century of previously unbroken authority. It upholds, under the conciliation and arbitration power, direct regulation by the Parliament of an existing award made by the process of conciliation and arbitration in the settlement of an interstate industrial dispute.[30]

Justice Kirby's dissent in *Pacific Coal* is symptomatic of his strong attachment to the system of conciliation and arbitration as it had developed over a period of more than 100 years. He was clearly deeply uneasy at the move

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25 (2002) 213 CLR 485 at 492 [4].
26 (2002) 213 CLR 485 at 527-528 [125].
27 (2000) 203 CLR 346.
28 (2000) 203 CLR 346 at 430 [252].
29 (2000) 203 CLR 346 at 430 [252].
30 (2000) 203 CLR 346 at 448 [297].

away from the resolution of "disputes" – even allowing that the "dispute" was almost invariably an artificial construct – through processes of conciliation and arbitration in favour of direct regulation of terms and conditions of employment by legislative diktat. These concerns came to a head in 2006 in *New South Wales v Commonwealth*, the *Work Choices Case*.[31]

The Work Choices dissent

The legislative context

Soon after its re-election in October 2004, and with control of the Senate in the offing after 1 July 2005, the Howard Government set about the most radical overhaul of the federal system of industrial regulation since the enactment of the original *Conciliation and Arbitration Act* in 1904. The *Workplace Relations Amendment (Work Choices) Act 2005* (hereafter "Work Choices") was duly passed by the Parliament, and (for the most part) became operative on 26 March 2006.

Work Choices left virtually no aspect of the federal system untouched, and encroached upon State regulation of employment and industrial relations to a quite unprecedented degree. Amongst other things, it:

- reduced the range of allowable award matters even further than had occurred in 1996, in particular providing that awards could no longer set wages and salaries;
- provided for the "simplification and rationalisation" of existing awards and (in effect) provided that no new awards could be made in the future;
- stripped the Commission of its capacity to fix minimum wages and, instead, entrusted that responsibility to the newly-established Australian Fair Pay Commission;
- curtailed the capacity of the Commission to become involved in dispute resolution, except where the parties invited it to do so;
- established a set of statutory minimum employment conditions, known as the Australian Fair Pay and Conditions Standard, comprising minimum rates of pay (based on award-derived Australian Pay and Classification Scales or the Federal Minimum Wage); maximum ordinary hours of work of 38 (plus reasonable additional hours); annual leave (equivalent to four weeks); personal/carer's/compassionate leave; and (unpaid) parental leave;
- as previously, permitted employers to make collective agreements with either unions or their employees, and individual agreements (Australian Workplace Agreements) directly with employees. However, it no longer required that such agreements pass a "no-disadvantage

31 (2006) 229 CLR 1. For a detailed analysis of the decision in this case, see A Stewart and G Williams, *Work Choices: What the High Court Said* (Federation Press, Sydney, 2007).

test" relative to an otherwise applicable award or, if there was no such award, a designated award;[32]

- enabled employers who were establishing a "new business", in effect, unilaterally to set terms and conditions for employees in that business through an "employer greenfield" agreement;
- provided that both individual and collective agreements were to become operative immediately they were lodged with the Office of the Employment Advocate (OEA), whereas previously collective agreements had to be approved by the Commission, and AWAs by the OEA;
- limited the range of matters that could be dealt with by individual and collective agreements by reference to an extensive list of matters that constituted "prohibited content" (and which could be extended by regulation);
- introduced mandatory secret ballots before the taking of industrial action;
- severely curtailed the right of union officials to enter employers' premises for purposes of conducting union business; and
- imposed a number of restrictions upon access to relief in respect of unfair dismissal, including entirely excluding employers with fewer than 101 employees from the system; imposing a requirement that an employee have been employed for at least six months before they could bring an unfair dismissal claim; and introducing a defence of "genuine operational requirements" to unfair dismissal claims.[33]

Most important of all, for present purposes, Work Choices did all this in reliance upon the corporations power in s 51(xx) of the *Constitution*, with only limited support from the conciliation and arbitration, external affairs, trade and commerce, Territories and Commonwealth powers[34]

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32 The adverse public reaction to the removal of the no-disadvantage test led the Howard Government, in mid-2007, to introduce a "fairness test", which was a no-disadvantage test in all but name: see the *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* (Cth).

33 For more detailed descriptions of the key changes effected by Work Choices, see R Owens, "Working Precariously: The Safety Net After Work Choices" (2006) 19 *Australian Journal of Labour Law* 161; A Forsyth and C Sutherland, "Collective Labour Relations Under Siege: The Work Choices Legislation and Collective Bargaining" (2006) 19 *Australian Journal of Labour Law* 183; S McCrystal, "Smothering the Right to Strike: Work Choices and Industrial Action" (2006) 19 *Australian Journal of Labour Law* 198; J Fetter, "Work Choices and Australian Workplace Agreements" (2006) 19 *Australian Journal of Labour Law* 210; and M Pittard, "Back to the Future: Unjust Termination of Employment under the Work Choices Legislation" (2006) 19 *Australian Journal of Labour Law* 225. For discussion of the legislation in an international context, see C Fenwick and I Landau, "Work Choices in International Perspective" (2006) 19 *Australian Journal of Labour Law* 127.

34 For discussion of the Constitutional underpinnings of Work Choices, see W J Ford, "The Corporatisation of Australian Labour Law: Completing Howard's Unfinished Business" (2006) 19 *Australian Journal of Labour Law* 144.

plus, in the case of Victoria, referral under s 51(xxxvii).[35] Not only that, s 16 of the amended *Workplace Relations Act* evinced an express intention that the federal law should apply to the exclusion of a wide range of State and Territory laws, including "industrial laws" and those dealing with "employment generally" (other than long service leave), equal remuneration for work of equal value, unfair contracts and union right of entry. Assuming the legislation to be valid in constitutional terms, this meant that between 65 per cent and 85 per cent of the workforce would fall within the reach of the federal system, compared with the historical level of around 40 per cent.

The challenge

Self-evidently, the system outlined above is very far removed from the system of conciliation and arbitration that had evolved since the passage of the 1904 Act, and from the federal balance as it had been maintained throughout most of that period. It is hardly surprising that legislation which purported to turn the traditional system on its head in this manner should be subject to vigorous constitutional challenge. This took the form of seven sets of proceedings initiated by the States and a number of trade union bodies.[36] Given his obvious respect for the traditional system, and its role in Australian society, it is equally unsurprising that Kirby J should be reluctant to see that system consigned to the dustbin of history. What is more surprising perhaps is the basis upon which he chose to defend the old and to attack the new.

All seven members of the court heard the *Work Choices Case*. By a majority of 5:2 the court upheld the validity of the legislation in its entirety. In their joint reasons, Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ took the view that the legislative power conferred by s 51(xx) "extends to laws prescribing the industrial rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations".[37] Their Honours rejected the plaintiffs' arguments to the effect that there is a distinction between the internal and external activities of corporations, with the former being susceptible

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35 See *Commonwealth Powers (Industrial Relations) Act 1996* (Vic). For comment, see S Kollmorgen, "Towards a Unitary System of Industrial Relations? Commonwealth Powers (Industrial Relations) Act 1996 (Vic); Workplace Relations and Other Legislation Amendment Act (No2) 1996 (Cth)" (1997) 10 *Australian Journal of Labour Law* 158.

36 The plaintiff States were New South Wales, Western Australia, South Australia, Queensland and Victoria. The trade union plaintiffs were the Australian Workers Union and Unions New South Wales. Tasmania and the Territories intervened to support the positions put by the plaintiff States. The case was heard over nine days between February and May 2006, with the decision being handed down on 14 November of that year.

37 *New South Wales v Commonwealth* (*Work Choices Case*) (2006) 229 CLR 1 at 114-115 [177]-[178]. In doing so, the majority expressly endorsed the opinion of Gaudron J in *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 at 375 [83].

to federal regulation whilst the latter is not. The majority also rejected arguments based upon the need for a test of "distinctive character or discriminatory operation" in interpreting s 51(xx), which would have the effect that a law would be invalid if it applied to constitutional corporations in a discriminatory manner relative to other persons;[38] the repeated failure of referenda to amend s 51(xx) and (xxxv) to secure the requisite majority;[39] and the proposition that the inclusion of the conciliation and arbitration power in the *Constitution* in some way limited the capacity of the Parliament to rely upon other heads of power to regulate industrial relations. [40]

Justice Callinan relied upon both of these latter arguments, as well as the need to protect the "federal balance", to strike down the validity of the legislation.[41] As will appear presently, Justice Kirby based his dissent on essentially similar grounds, but with some significant differences of emphasis.

Justice Kirby's dissent

Justice Kirby began his reasons by noting that although there is no clear authority as to whether s 51(xx) will support "a comprehensive federal law on industrial (or workplace) relations", there are a number of obiter which suggest that it would. However, he also noted that none of these are binding, and that while "the past is clearly of great importance in reaching a conclusion based on the constitutional text", the text "must be read in the usual way, with the light that is cast by legal authority, legal principle and legal policy".[42]

Justice Kirby went on, at some length, to analyse the conciliation and arbitration or, as he characterised it, the "industrial disputes power", and the traditional reliance upon it.[43] He noted that the "narrow conception" of "industrial disputes" "has long been rejected", so that the term now encompasses "all manner of 'industrial affairs', 'industrial relations' and 'industrial matters' in Australia". That, however, is not to say that "the power is unfettered or unlimited".[44] On the contrary, according to Kirby J, it is confined by two "safeguards, restrictions or qualifications":[45]

(1) *Interstateness*: The necessity of the presence of an actual or potential dispute extending beyond the limits of one state; and

38 *Work Choices Case* (2006) 229 CLR 1 at 115-122 [179]-[198].

39 (2006) 229 CLR 1 at 99-101 [125]-[135].

40 (2006) 229 CLR 1 at 128 [223].

41 (2006) 229 CLR 1 at 246-385 [617]-[914].

42 (2006) 229 CLR 1 at 182-183 [425]-[427].

43 (2006) 229 CLR 1 at 183-191 [428]-[447].

44 (2006) 229 CLR 1 at 184 [429].

45 This concept is derived from the reasons of Dixon CJ in *Attorney-General Commonwealth v Schmidt* (1961) 105 CLR 361 at 371. See also *Work Choices Case* (2006) 229 CLR 1 at 212-213 [503]-[507] per Kirby J.

> (2) *Independent resolution*: The inability of the parliament itself to enact laws … to deal generically and directly with issues in dispute, and the requirement instead to provide for an independent conciliator or arbitrator to resolve the dispute between the parties by the constitutionally mandated procedures.[46]

Justice Kirby acknowledged that there was no "concluded authority" of the High Court to this effect.[47] But he was of the clear view that the power set out in s 51(xxxv) is indeed subject to such restrictions, and that they are derived from "the structure of the *Constitution* and its federal character, inherent in its overall expression and design". It can also be derived from the "clear statement in the opening words of s 51 that each grant of legislative power in that section is made 'subject to this Constitution'" – an expression that "obviously includes the other provisions in s 51, including para (xxxv)".[48]

In coming to this conclusion, Kirby J noted the importance of the interstateness requirement in helping to maintain the "federal balance" that is integral to Australia's constitutional arrangement, and in encouraging "diversity and experimentation in lawmaking" in the various State jurisdictions. The requirement for independent determination, meanwhile, has "the potential to encourage and promote collective agreements between parties and the protection of economic fairness to all those involved in industrial disputes".[49]

As far as the scope of the corporations power was concerned, Kirby J acknowledged that this had changed to a great extent since *Strickland v Rocla Concrete Pipes Ltd* in 1971,[50] and that he had endorsed much of that change.[51] This led him to what he saw as the critical issue in the present context: "whether this expansion of the ambit of para (xx), however large it may otherwise grow, is subject to restrictions or limitations,

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46 (2006) 229 CLR 1 at 184-185 [430].

47 (2006) 229 CLR 1 at 214 [511], and also at 219-220 [525], where Kirby J suggested that the independent decision-maker must be under an obligation "to take into account not only economic considerations but also considerations of fairness and reasonableness to all concerned and the consistent application of the principles of industrial relations in Australia". This proposition is also unsupported by direct authority.

48 (2006) 229 CLR 1 at 194 [459].

49 (2006) 229 CLR 1 at 190 [446]. Ironically, the conciliation and arbitration system had originally been put in place to provide a fall-back in situations where industrial parties had been unable to resolve their differences through collective bargaining (eg, because of the reluctance of an employer to recognise the right of a union to negotiate on behalf of its members). Initially, the system did indeed operate in a manner that supported regulation of terms and conditions by collective bargaining, but over time conciliation and arbitration came largely to displace collective bargaining – at least as the formal means of regulating terms and conditions of employment: see R C McCallum and G F Smith, "Opting Out From Within: Industrial Agreements Under the Conciliation and Arbitration Act 1904" (1986) 28 *Journal of Industrial Relations* 57.

50 (1971) 124 CLR 468.

51 (2006) 229 CLR 1 at 190-191 [447].

including those expressed or implied in s 51(xxxv)".[52] The answer to this question was seen as critical not just for the outcome of the present proceedings, but "for the operation of the *Constitution*, read as a whole" and for "the preservation of significant features of the … federal power with respect to the prevention and settlement of industrial disputes that has hitherto prevailed in Australia".[53]

In deciding that the reach of the corporations power must be limited by reference to s 51(xxxv), Kirby J was clearly influenced by the fact that if s 51(xx) had the scope suggested by the Commonwealth, it would have been much easier to have relied upon that power as the basis for industrial regulation than to have persevered for more than a century with the requirements of s 51(xxxv). This had not happened, and he noted that none of those who had struggled with the intricacies of s 51(xxxv) had ever appealed to the legislature "to be rid of the needless limitations of para (xxxv) of s 51" and asked it to substitute "the fructuous source of para (xx)".[54] He insisted that he was not unmindful of the fact that:

> it is part of the genius of our system of constitutional government that perceptions of the meaning of the *Constitution* change over time and that what seemed clear to earlier generations of judges sometimes appears differently to those who come later.[55]

However, he also cautioned that it is necessary at the least to pause before "nonchalantly consigning" the labours of the past "to judicial oblivion".[56]

Similarly, Kirby J clearly recognised that the mere fact that the *Constitution* contains a provision dealing with a particular issue does not give rise to an inference that it is impermissible to use other powers "in ways that also affect the nominated subject".[57] On that basis, he found that past decisions of the High Court upholding the regulation of industrial matters in reliance upon the defence, external affairs and trade and commerce powers posed no obstacle to the plaintiffs in the present case.[58]

Justice Kirby's treatment of the external affairs argument is particularly interesting in this context. He noted that in *Victoria v Commonwealth* the court had, with only very limited exceptions, upheld the validity of those provisions of the *Industrial Relations Reform Act 1993* (Cth) that were underpinned by the external affairs power (s 51(xxix)). He further noted that in the case presently before the court, the Commonwealth

52 (2006) 229 CLR 1 at 190-191 [447].
53 (2006) 229 CLR 1 at 190-191 [447].
54 (2006) 229 CLR 1 at 187 [436], and also 214-215 [510]-[514].
55 (2006) 229 CLR 1 at 189 [442].
56 (2006) 229 CLR 1 at 189 [443].
57 (2006) 229 CLR 1 at 202 [472].
58 See, respectively, (2006) 229 CLR 1 at 230-233 [562]-[569], 233-235 [570]-576], and 235-237 [577]-[582].

had argued by analogy that if s 51(xx) was subject to the interstateness and independent decision-maker qualifications, then so, too, must s 51(xxix). This argument did not find favour with Kirby J:

> [T]he legislative power granted to the Federal Parliament by s 51(xx) is quite different from that granted by s 51(xxix). The former is a power to make laws with respect to the nominated (legal) persons. The latter is a power of much greater amplitude and focus, addressed to a subject matter of general importance for the existence of the Commonwealth as an independent nation within the community of nations.[59]

That said, he was clear that the s 51(xxix) power is not unlimited: "its boundaries have been stated by this court from time to time".[60] His attitude to reliance upon different heads of power in relation to the same subject matter is best summarised as follows (emphasis in original):

> A law can validly be made with respect to more than one head of power. The fact that it might be characterised as a law with respect to some other subject matter(s) is irrelevant if it properly answers to the description of a law with respect to another subject matter designated in s 51 … What is forbidden is the making of a law in reliance upon a specified subject matter (such as s 51(xx)) when that law is properly characterised as one *with respect to* another head of power (such as s 51(xxxv)) in circumstances where the latter power is afforded to the Federal Parliament "subject to a safeguard, restriction or qualification".[61]

This goes back to what Kirby J saw as the central issue before the court: Work Choices was a law with respect to "industrial disputes" and, as such, it was subject to the safeguard, restriction or qualification that any such law must operate for the prevention or settlement of industrial disputes that were possessed of an element of interstateness and where the functions of prevention and/or arbitration were vested in an independent conciliator or arbitrator. Neither of these safeguards were present. This meant that there was no "valid constitutional foundation for its vital provisions" and therefore the legislation must fail in its entirety.[62]

"I told you so" – Attorney-General (Vic) v Andrews

Justice Kirby's dissent in the *Work Choices Case* was clearly driven in large measure by his concern at the possible effects of adopting an expansive view of the scope of the corporations power, such as that endorsed by the majority, on the federal balance. He felt that such a course risked "a destabilising intrusion of direct federal lawmaking into areas of legislation which, since federation, have been the subjects of State

59 (2006) 229 CLR 1 at 234 [574].
60 (2006) 229 CLR 1 at 234 [574].
61 (2006) 229 CLR 1 at 205-206 [483].
62 (2006) 229 CLR 1 at 238-239 [590], and also 221-222 [531].

laws",[63] and that the decision to uphold the validity of Work Choices in its entirety "reveals the apogee of federal constitutional power and a profound weakness in the legal checks and balances which the founders sought to provide to the Australian Commonwealth".[64]

These forebodings were confirmed by the decision in *Attorney-General (Vic) v Andrews*[65] – a case that was argued just months after judgment was handed down in the *Work Choices Case*.

Andrews arose out of a challenge by the Victorian WorkCover Authority to a decision by the then Minister for Employment and Workplace Relations to make a declaration that Optus Administration Pty Ltd was eligible to be granted a licence under Pt VIII of the *Safety, Rehabilitation and Compensation Act 1988* (Cth). The Minister's declaration was made in reliance upon a provision of the Act which enabled declarations of eligibility to be made in respect of corporations that competed with current or former "Commonwealth authorities". In the case of Optus, the relevant former "Commonwealth authority" was Telstra Corporation Limited.

The effect of the making of a declaration and the granting of a licence was that the corporation concerned no longer fell within the sphere of operation of the otherwise applicable State or Territory workers' compensation system and, instead, operated under the regime established by the *Safety, Rehabilitation and Compensation Act*. Not surprisingly, Victoria saw these arrangements as a threat to the integrity of its workers' compensation scheme, and initiated proceedings challenging the capacity of the Federal Parliament validly to enact the relevant provisions of the *Safety, Rehabilitation and Compensation Act*.[66]

The challenge was based principally on the proposition that the capacity of the Parliament to make laws with respect to "insurance" and corporations was limited by the words "other than State insurance" in s 51(xiv) of the *Constitution*. In other words, Victoria argued that these words constituted a "restriction" upon legislative power in the same way as Kirby J had argued that the interstateness and independent decision-maker requirements conditioned the Commonwealth's legislative power in the *Work Choices Case*. In support of its position, Victoria relied heavily upon the decision in *Bourke v State Bank of New South Wales*,[67] where the High Court had determined that the power to make laws with respect to "banking" was subject to the "restriction" implicit in the words "other than State banking" in s 51(xiii) of the *Constitution*.

63 (2006) 229 CLR 1 at 244–245 [611].

64 (2006) 229 CLR 1 at 246 [615].

65 (2007) 230 CLR 369.

66 New South Wales, South Australia and Western Australia intervened in support of the position put by Victoria.

67 (1990) 170 CLR 276.

By a 5:2 majority, the court upheld the validity of the impugned provisions of the *Safety, Rehabilitation and Compensation Act*. In doing so, the majority found that the laws in question had only an "insubstantial, tenuous or distant" connection with "insurance". This meant that they were not laws "with respect to" insurance in the relevant sense. As such, they were not subject to the "State insurance" restriction, even though they had the effect of invalidating State workers' compensation laws to the extent that they were inconsistent with the Act. For the majority, the impugned provisions constituted a valid exercise of the corporations, "postal, telegraphic, telephonic, and other like services" and insurance powers.[68]

Predictably, Kirby and Callinan JJ were the dissentients.

Kirby acknowledged that but for the restriction in s 51(xiv), the corporations and (perhaps) the postal powers would provide a constitutional basis for the relevant provisions of the *Safety, Rehabilitation and Compensation Act*.[69] However, the restriction, and the decision in *Bourke* were, in his opinion, decisive.

For Kirby J, the preparedness of the majority to reach the conclusion they did was further evidence of "the constitutionally disruptive journey" that began in the *Work Choices Case*, and of a "judicial indifference to established authority" that "seriously disturbs the federal balance which the *Constitution* was designed to achieve".[70] In his opinion, if the court wished to depart from the principles set out in *Bourke*, the case "should be overruled and its principle restated and narrowed".[71] So long as *Bourke* stands as good authority, according to Kirby it was not possible logically to "separate the insurance and the workers' compensation provisions of the State and federal acts and to sever the relationship of insurer and insured from the substantive obligations imposed respectively by the federal Act and by the State Compensation and Insurance Acts".[72] To separate the two "involves a degree of unreality that ill becomes this court".[73]

The Work Choices dissent in perspective

It is not surprising that Kirby J dissented in the *Work Choices Case*. His long association with the conciliation and arbitration system at both State and federal levels, and his strong commitment to social justice, suggest that he would be uncomfortable with a piece of legislation which, in effect, destroyed a system of workplace regulation that he clearly considered

68 Respectively, s 51(xx), (v) and (xiv) of the *Constitution*.
69 (2007) 230 CLR 369 at 411–412 [100].
70 (2007) 230 CLR 369 at 412–413 [104].
71 (2007) 230 CLR 369 at 430 [161].
72 (2007) 230 CLR 369 at 428 [154].
73 (2007) 230 CLR 369 at 429 [156].

had served Australia well for more than a century, and that, if valid, would effect a significant shift in the federal balance.

As noted earlier, it is perhaps more surprising that he should have based his dissent on what are, with respect, somewhat unconvincing arguments based on the notion that the presence of the conciliation and arbitration power in the *Constitution* imposes "safeguards, restrictions or qualifications" upon the capacity of the Parliament to make laws with respect to workplace relations in reliance upon other heads of power. As Kirby himself acknowledged, there was no "concluded authority" to the effect that s 51(xxxv) imposes any such "safeguards, restrictions or qualifications", whilst there is a substantial body of authority – such as *Victoria v Commonwealth* – which strongly suggests otherwise.

Even if it is accepted that s 51(xxxv) limits the capacity of the Parliament to make laws with respect to industrial disputes extending beyond the limits of any one State in the manner suggested by Kirby J, it does not follow that the capacity of the Parliament to legislate in relation to work-related matters that do not involve interstate industrial disputes is subject to similar restrictions. Indeed, it is counter-intuitive to suggest that this should be the case. Section 51(xxxv) was included in the *Constitution* as a reaction to a particular set of circumstances, namely the inter-colonial industrial disputes of the 1890s. The fact that conciliation and arbitration were selected as the means of preventing and settling such disputes was also the product of the circumstances of the time, including the fact that they had recently been endorsed by several left-wing English intellectuals.[74] It would not be consistent with the notion of the *Constitution* as a "living instrument"[75] if the capacity of the Parliament to make laws with respect to workplace relations were limited to circumstances involving industrial disputes of a particular kind and utilising particular means of prevention and settlement.

Indeed, Kirby himself clearly does not consider that the power of the Commonwealth is, or ought to be, limited in this manner. For example, he was clearly comfortable with the notion that s 51(xxix) of the *Constitution* could be used to make laws that directly regulate work relationships where it is necessary to do so to give effect to Australia's (voluntarily assumed) international obligations – even though there might be no interstate industrial dispute (existing on paper or otherwise) or independent conciliator or arbitrator in sight. If a law of that character is valid, why should it be beyond power to legislate directly to regulate the relationship between employers who happen to be corporations and their employees (and organisations to which they belong) even in the

74 See, eg, S Macintyre and R Mitchell, "Introduction" in S Macintyre and R Mitchell (eds), *Foundations of Arbitration* (Oxford University Press, Melbourne, 1989); R Mitchell, "State Systems of Conciliation and Arbitration: The Legal Origins of the Australasian Model" in Macintyre and Mitchell, above, pp 74-103.

75 *Work Choices Case* (2006) 229 CLR 1 at 202 [472].

absence of interstate disputation or of independent resolution? To suggest that a law that does this is, in reality, a law that "properly pertains" "to the prevention and settlement of industrial disputes inherent in the comprehensive regulation of industrial relations" is, with respect, not persuasive.[76] Could not such a law more plausibly be said to be a law with respect to the relations between incorporated employers and their employees, which may have the incidental effect of regulating industrial disputes that happen to have an interstate element as well as many that lack this characteristic?

None of this is to suggest that there are not grounds upon which the constitutionality of all or part of Work Choices might properly be challenged. For example, there is ample authority to the effect that the mere fact that a law is directed to constitutional corporations does not necessarily make it a law "with respect to" corporations for the purposes of s 51.[77]

There is also authority to different effect. For example, in her dissent in *Pacific Coal*, Justice Gaudron expressed herself in a manner that could be read to lend support to the view that s 51(xx) will support any law that regulates:

> the activities, functions, relationships and the business of a corporation described in that sub-section, the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.[78]

Significantly, these views were cited with approval by the majority in the *Work Choices Case*.[79]

It is clear, therefore, that there is room for debate as to the extent to which a law enacted in purported reliance upon s 51(xx) needs to do something more than simply be directed to constitutional corporations. That area of uncertainty seems to provide a more credible basis for impugning the validity of attempts at comprehensive regulation of workplace relations at a national level than the somewhat forced attempt to find "safeguards, restrictions or qualifications" embarked upon by Justice Kirby in the *Work Choices Case*. That is not, of course, to suggest that such arguments would have enjoyed any greater measure of success

76 (2006) 229 CLR 1 at 204 [479].

77 See, eg, *Strickland v Rocla Pipes Ltd* (1971) 124 CLR 468 at 489–491 per Barwick CJ; *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 182. See also Ford, above, n 34.

78 *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 at 375 [83]. For Kirby J's views on the reliance placed upon these observations by the majority in the *Work Choices Case*, see (2006) 229 CLR 1 at 202, 206-207 [486]-[489].

79 (2006) 229 CLR 1 at 114-115 [178].

than those upon which Kirby relied in that case, but they might at least have served as a basis for a more measured and persuasive approach to delineating the metes and bounds of the corporations power than is evident in either the dissenting or the majority reasons in the *Work Choices Case* and in *Andrews*.

THE LAW OF EMPLOYMENT

Categorising work relationships

The categorisation of work relationships is one of the central tasks of the law of employment. That is because the rights and duties of parties to any such relationship will often turn on its legal characterisation. Of particular significance in this context is the distinction between employers and employees on the one hand, and principals and independent contractors on the other. For example, "employers" will normally be vicariously liable only for the negligent acts of their "employees", whilst only employees will be entitled to the benefit of awards and agreements under the *Workplace Relations Act*, or to long service leave under relevant State and Territory legislation. In some situations, non-employees may be "deemed" to be employees for certain purposes,[80] whilst in others, employers will owe the same duties to contractors (and their employees) as they owe to those who are their direct employees.[81]

Over the years the courts have developed a range of "tests" to help with the categorisation process. The most important of these is generally considered to be the "control" test – "the final test, if there be a final test, and certainly the test to be generally applied, lies in the nature and degree of detailed control over the person alleged to be a servant".[82] This test served a useful purpose where employers typically exercised a real measure of control over the "what, the how and the when" of the work performed by their "servants" or employees. However, it was less effective in the context of work relationships involving a high degree of autonomy on the part of workers who possessed skills and qualifications that were well beyond the detailed control of those for whom they worked.

It was in order to accommodate such realities that the courts developed additional tests, such as the organisation or integration test, which looks to the extent to which the putative employee can be said to have become part and parcel of the organisation of the party for whom they perform work;[83] the economic reality test, which looks to the true character of the relationship between the parties, including the extent to which the

80 See, eg, *Workers Compensation Act 1987* (NSW) ss 2A, 3 and 8; and *Workplace Injury Management and Workers Compensation Act 1998* (NSW) ss 4 and 5; Sch 1.

81 See, eg, *Occupational Health and Safety Act 2004* (Vic) s 21(3).

82 *Performing Right Society Ltd v Mitchell and Booker Ltd* [1924] I KB 762 at 767 per McCardie J.

83 See, eg, *Australian Timber Workers' Union v Monaro Sawmills* (1980) 29 ALR 322.

worker can truly be said to be in business on their account and to run the risk of the success or failure of the business;[84] and the mixed or multiple test where the court looks to a range of indicia and then decides whether on balance they are indicative of the existence of a relationship of employer and employee, or of something else (most likely, principal and contractor).[85]

Justice Kirby was a consistent adherent to the mixed/multiple approach. For example, in *Connelly v Wells*,[86] he used this test to determine that a worker, who had been injured whilst driving a harvesting machine for a contractor who was providing services to a third party, was an employee of the contractor.[87] In the same case, Gleeson CJ found that the worker was an employee by the application of the economic reality test, whilst Clarke JA found that he was an independent contractor on the basis of the control test![88]

In the High Court in *Hollis v Vabu Pty Ltd*[89] Kirby J subscribed to joint reasons which relied upon the mixed/multiple test to hold a bicycle courier company vicariously liable for the negligence of one of its (unidentified) couriers who had injured a pedestrian whilst riding along a Sydney pavement.[90]

Hollis and *Connelly* were both cases which turned upon whether there was an employer to whom an injured party could look for compensation for an injury arising out of the performance of work by an employee. *Sweeney v Boylan Nominees Pty Ltd*[91] also concerned compensation for an individual who had suffered injury as a consequence of the negligent performance of work, but in circumstances where there could not credibly be said to be a relationship of employer and employee between the wrongdoer and the party upon whose behalf they performed work.

Mrs Sweeney suffered a head injury when the door of a refrigerator in a convenience store attached to a petrol station fell off and hit her shortly after she had removed a carton of milk from the refrigerator. The refrigerator was owned and maintained by Boylan on the basis of

84 See, eg, *Ferguson v John Dawson & Partners* [1976] 1 WLR 1213; *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374.

85 See especially, *Stevens v Brodribb Sawmilling* (1986) 160 CLR 16. In this case, Mason J (at 27) suggested that the extent to which a worker was integrated into the business of a putative employer was just one of the factors to be taken into account in applying the mixed/multiple test.

86 (1994) 55 IR 73.

87 See especially, (1994) 55 IR 73 at 85-88, where Kirby weighed up 12 factors suggesting that the worker was a contractor against 15 suggesting that he was an employee.

88 (1994) 55 IR 73 at 76-77 and 94 respectively.

89 (2001) 207 CLR 21.

90 The other parties to the joint reasons were Gleeson CJ, Gaudron, Gummow and Hayne JJ. McHugh J found that the courier company was vicariously liable for the negligent act of its agent, whilst Callinan J dissented on the basis that the cyclist was an independent contractor.

91 (2006) 226 CLR 161.

a commercial arrangement with the proprietors of the petrol station. The proprietors had reported the defective door to Boylan, and Boylan had arranged for a Mr Comninos to go to the petrol station and repair the door. He effected the repairs in a negligent manner, with the consequence that the door fell off, injuring Mrs Sweeney. In due course, Mrs Sweeney commenced proceedings against Boylan and the proprietors of the petrol station, but not against Comninos or his company, Cool Runnings Refrigeration and Airconditioning Pty Ltd. The action against the proprietor failed at first instance, and the dismissal of this claim was not contested on appeal. However, the claim against Boylan made its way to the High Court on the question of whether that company could be found to be vicariously liable for the negligent actions of Mr Comninos. By a majority of 5:1 the court found that it could not.

In his dissenting opinion Kirby J, applying the principles set out in *Hollis*, acknowledged that Mr Comninos was not an employee of Boylan.[92] However, he went on to find that Boylan was vicariously liable for the negligence of Mr Comninos even though he was not their employee. In support of this conclusion he relied upon the decision in *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd*.[93] In that case a company, which had engaged the services of an independent contractor to solicit business on its behalf, was found to be vicariously liable for slanders uttered by the contractor in the course of his activities as a representative of the company. For Kirby this provided support for the proposition that if a contractor "has been armed with the authority to act as the principal's representative" then "the principal will be liable for its representative's wrongs to others acting within the scope of that authority".[94]

Justice Kirby asserted that his reading of the *Colonial Mutual Life Case* constituted the application of "settled legal doctrine",[95] and went on to identify a number of reasons why it would not be appropriate to "read down" the principle established in that case so as to avoid the imposition of liability on Boylan. These included that "changes in workplace and employment relationships that have occurred since *Colonial Mutual Life* was decided (and which have accelerated in recent years) make the rule enunciated in that decision a particularly useful one for contemporary Australian society",[96] and that "to the extent that Boylan argued for a strict dichotomy between the liabilities of employers and of principals

92 (2006) 226 CLR 161 at 183-186 [64]-[74].
93 (1931) 46 CLR 41.
94 *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 190 [94].
95 (2006) 226 CLR 161 at 192 [101].
96 (2006) 226 CLR 161 at 192 [102].

for independent contractors, the exigencies of the times militate against such supposed strictness".[97]

Despite his insistence that his approach did not involve any "enlargement" of the rule in *Colonial Mutual Life*,[98] it must be the case that acceptance of Kirby J's position would significantly extend the range of circumstances where principals could be found to be vicariously liable for the negligent acts of their contractors. The fact that a contractor represents a principal in the sense of being "armed with the authority to act as the principal's representative" is not, with respect, the same thing as representing them for purposes of persuading third parties to enter into legal relations with the principal. On any objective reading, the former proposition is broader than the latter. The fact that Kirby was prepared to extend established principle in this way is symptomatic of his strong commitment to ensuring that parties to a work relationship are accorded a "fair go all round".

A fair go all round

Justice Kirby's commitment to the principle of a "fair go all round" is clear from his decisions on both the Court of Appeal and the High Court in relation to the unfair contracts jurisdiction in New South Wales, which were noted earlier.[99] As indicated, it is also clear from his opinions in cases such as *Boylan*, where it can readily be seen that "fairness" required that Mrs Sweeney should have some means of recourse in relation to the injuries she had suffered as a result of the negligence of Boylan's contractor. It is also evident from decisions such as *Blackadder v Ramsey Butchering Services Pty Ltd*.[100]

Mr Blackadder had worked at an abattoir in Grafton in New South Wales for a number of years. His employment came to an end in September 1999 in circumstances that were found to have constituted "constructive dismissal" and, in March 2000, the Commission ordered Ramsey to reinstate him "to the position in which he was employed prior to the termination of his employment without loss of continuity of service or entitlements"[101] within 21 days, and to reimburse "all lost salary and entitlements from the date of termination to reinstatement".[102] The employer refused to permit Mr Blackadder actually to perform any work, although it was prepared to continue to pay his wages. Mr Blackadder then initiated Federal Court proceedings to enforce the Commission's

97 (2006) 226 CLR 161 at 192 [102] and 193 [106] respectively.

98 (2006) 226 CLR 161 at 194 [110].

99 The need to ensure a "fair go all round" has been a particular driver of both State and federal unfair dismissal law – see, eg, *Re Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95; *Workplace Relations Act 1996* (Cth), s 635(2).

100 (2005) 221 CLR 539.

101 (2005) 221 CLR 539 at 542 [2].

102 (2005) 221 CLR 539 at 561 [66].

reinstatement order. At first instance, Madgwick J ordered that the employer furnish Mr Blackadder "with his usual work … excepting in case of shortage of stock to slaughter".[103] This decision was reversed by the Full Court of the Federal Court.[104] That decision was in turn reversed by a unanimous High Court.

Justice Kirby delivered a short concurring opinion. He noted the "exceptional but settled character" of orders of reinstatement as a remedy for unfair dismissal,[105] and stressed the importance of ensuring that the intention of the Parliament in providing for such relief was not frustrated or negatived "because it conflicts with common law notions of freedom of contract or with other traditional legal rules respecting the personal character of the employment contract".[106] Furthermore:

> By the Act, and the [Commission's] order, reinstatement of the appellant was meant to be real and practical, not illusory and theoretical. In effect, if the respondent's argument were correct, it would permit the respondent to thumb its nose at the heart and core of the order made, namely that the appellant be "reinstated", that is … "put back in place" in his former employment. The Act does not offer to the employer the power to buy its way out of the obligations imposed on it under a valid law of the Parliament.[107]

It is also clear that for Kirby, a fair go all round cuts both ways: just as employers cannot take unfair advantage of the system or their position within it, nor can employees and their representatives. This is neatly illustrated by his reasons in *Amcor Ltd v Construction, Forestry, Mining and Energy Union*.[108]

This case arose out of a reorganisation of the business of the Amcor group of companies. Among other things, this required that a number of employees who had previously worked for Amcor move across to a wholly-owned subsidiary called PaperlinX Ltd. All the employees concerned were offered employment with PaperlinX on identical terms and conditions to those they had formerly enjoyed at Amcor, and with full recognition of continuity of service for all employment-related purposes. They were advised that acceptance of this offer of employment was to be signified by reporting for work on the nominated date in April 2000. All, or nearly all, the affected employees duly signified their acceptance in the prescribed manner. This strategy was developed and implemented without any discussion with, or any attempt to co-operate

103 (2005) 221 CLR 539 at 553 [46].

104 See respectively, *Blackadder v Ramsey Butchering Services Pty Ltd* (2002) 118 FCR 395 and *Ramsey Butchering Services Pty Ltd v Blackadder* (2003) 127 FCR 381.

105 (2005) 221 CLR 539 at 548 [28].

106 (2005) 221 CLR 539 at 548 at [29].

107 (2005) 221 CLR 539 at 549 [33].

108 (2005) 222 CLR 241.

with, the Construction, Forestry, Mining and Energy Union (CFMEU) (being the union to which most of the employees belonged).

The affected employees were covered by an enterprise agreement which, amongst other things, provided that "should a position become redundant and an employee subsequently be retrenched" then the affected employees would receive certain benefits, including a redundancy payment calculated on the basis of three weeks' pay per year of service. There was no provision in the Agreement to the effect that such benefits would not be payable where the employee(s) concerned were offered suitable alternative employment. Subsequent to the transfer, the CFMEU claimed redundancy benefits on behalf of its members. The union's claim was upheld both at first instance and by the Full Court of the Federal Court – albeit with significant reservations as to the fairness of the outcome on the part of those who heard the case. A unanimous High Court reached a different result.

In the course of argument, Amcor placed heavy reliance upon the unfairness of allowing employees to obtain generous redundancy benefits in circumstances where their positions were not in any real sense redundant, and where they had suffered no loss or inconvenience of any kind.

Justice Kirby was not impressed by this. Having noted that Amcor's behaviour "was hardly a model case of modern industrial relations",[109] he continued: "I would therefore take the complaints about unfairness, by an employer who proceeded in such an apparently high-handed way, with a pinch of salt."[110] For Kirby, whilst "the question of construction [of the agreement] is not, in my view, clear-cut",[111] the lower courts fell into error in failing to accord to the word "redundant" the meaning in which it was repeatedly used in the agreement, that the positions occupied by the affected employees ceased to exist.[112] In arriving at this conclusion, Justice Kirby noted that the text of the agreement tended to favour the position put by the union, whilst the contextual considerations tended to favour the position of Amcor.[113]

This is not the place to argue the merits or otherwise of the decision in *Amcor*. But if, in fact, it is the case that "ultimately, a court's duty under the *Constitution* is to give effect to the meaning of each such document [ie an industrial agreement] as expressed in its words",[114] then it is hard to see how the court could do otherwise than uphold the union's claim. The Agreement was binding on Amcor. So far as Amcor was concerned the positions occupied by the affected employees had ceased to exist.

109 (2005) 222 CLR 241 at 264 [73].
110 (2005) 222 CLR 241 at 265 [74].
111 (2005) 222 CLR 241 at 261 [62].
112 (2005) 222 CLR 241 at 273 [104].
113 (2005) 222 CLR 241 at 266-271 [78]-[97].
114 (2005) 222 CLR 241 at 263-264 [70].

The fact that they continued to exist with another employer is not to the point – unless the parties had expressly stipulated that that consideration should impact upon entitlements which would otherwise be payable. Indeed, it is normal industrial practice to do exactly that: to provide that redundancy benefits will not be payable where the affected employees are offered "suitable alternative employment". If anything, the fact that the parties did not follow normal practice in this regard tends to support the view that they intended that benefits should be payable in just these circumstances.

That does not alter the fact that it would, on any commonsense reading of the Agreement, have been unjust for the benefits to have been payable in the circumstances of the *Amcor Case*. On most understandings of the term, it would not have accorded a "fair go all round" for the union claim to be upheld. It is tempting to assume, therefore, that Kirby and the other members of the court who heard the case were motivated more by a desire to ensure a fair go all round than to give effect to the expressed intention of the parties to the Agreement.

AN EVALUATION

Michael Kirby's decisions and extrajudicial writings in the fields of employment and industrial law are essentially consistent with his decisions and writings in other areas. There is a profound respect for the *Constitution* and for the values that underpin it, but there is also a recognition that it cannot be a static instrument. There is evident distress at the tendency of the Gleeson Court to acquiesce in the unbridled expansion of federal legislative power – especially in reliance upon the corporations power. There is respect for precedent, but a recognition of a creative role for the judiciary – within limits. There is a great respect for principles of international law – both as a source of municipal law, and as an aid to interpreting it. There is Kirby's scholarship, and respect for and acknowledgment of, the scholarship of others. More specifically, there is recognition of the importance of respect for the rights of the individual to be accorded a "fair go", and of the social benefits provided by the federal system of conciliation and arbitration and its State counterparts.

Given Kirby's respect, and manifest affection for, the system of conciliation and arbitration, it is to be expected that he should seek to defend it when it is perceived to be under attack. That said, as noted earlier, the basis upon which he elected to defend it in his dissent in the *Work Choices Case* is not one of his more persuasive opinions. There is a sad irony, however, in the fact that having been spared the task of trying to cut a way through the detritus of past decision-making on the nature and extent of the conciliation and arbitration power because of the timing of his appointment to the High Court, he should then

have had to witness at such close quarters, the demise of a system for which he clearly had enormous respect, and which he clearly believed had conferred great benefit upon the Australian community over many years.

Chapter 13

EQUITY

James Edelman*

> *The stamp of history may be strong in the cases. But it does not freeze the development of equitable principle. How could it do so when the current doctrine on fiduciary obligations is itself nothing more than the creation, by earlier judges, of such principle?*[1]

INTRODUCTION AND BACKGROUND: TWO FORMS OF JUSTICE

Book V of Aristotle's *Ethics*[2] is devoted to the nature and meaning of "justice". The book is devoted to notions of corrective justice and distributive justice. But Aristotle permitted himself a digression. With the subtitle "A digression on equity, which corrects the deficiencies of legal justice", Aristotle wrote:[3]

> For equity, though superior to one kind of justice, is still just, it is not superior to justice as being a different genus. Thus justice and equity coincide, and although both are good, equity is superior. What causes the difficulty is the fact that equity is just, but not what is legally just: it is a rectification of legal justice. The explanation of this is that all law is universal, and there are some things about which it is not possible to pronounce rightly in general terms; therefore in cases where it is necessary to make a general pronouncement, but impossible to do so rightly, the law takes account of the majority of cases, though not unaware that in this way errors are made. And the law is none the less right; because the error lies not in the law nor in the legislator, but in the nature of the case; for the raw material of human behaviour is essentially of this kind ... This also makes plain what the equitable man is. He is one who chooses and does equitable acts, and is not unduly insistent upon his rights, but accepts less than his share, although he has law on his side.

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* My thanks to Joshua Getzler and David Wolfson for their comments on this chapter.

1 *Breen v Williams* (1994) 35 NSWLR 522 at 543 per Kirby J.

2 J A K Thomson (trans) Aristotle, *Nichomachean Ethics* (Folio Society London, 1953).

3 1137b5–1137b20, 1137b30–1138a1.

> Such a disposition is equity: it is a kind of justice, and not a distinct state of character.

Following Aristotle, the first sentence of Justinian's Digest begins with Celsus' statement that *ius est ars boni et aequi* ("law is the art of the good and the equitable"),[4] borrowing the *aequitas* from Aristotle's ἐπιείκεια ("equity"). Justinian's *Corpus Iuris Civilis* is the bedrock of today's Continental legal systems as well as the indirect basis of much common law. And for two millennia, lawyers have, to varying extents, accepted this bifurcated concept of "justice". The individualised, discretionary justice to which Aristotle first referred is usually described as "equity".

To the extent that Aristotle can be read as describing two autonomous systems of justice (general rules that apply to particular facts and a competing notion of individualised justice) his approach was never uncontroversial.[5] In the Republican period of Rome, the *praetor's* role of "correcting" the *ius civile* was heavily circumscribed and contentious. Similarly, even in the Empire the equitable imperium of the Emperor was questioned. In his biography of Emperor Opilius Macrinus, Capitolinus explained that Macrinus wanted to abolish rescripts and establish a system of law-making by General Edict (general rules which applied to particular cases) because he could not bear the thought of individual discretion being exercised by rulers like Commodus or Caracella.[6] From Rome, through the Middle Ages,[7] Aristotle's views on justice remained controversial.

Adjudication in the early development of English law was initially bifurcated in the same manner. Courts of common law dispensed justice strictly. General legal rules governed all cases and, if a claimant could not bring his or her claim within an existing writ, the claim would fail. In contrast, the Lord Chancellor allowed a claimant to bring a petition to the Chancellor based on the facts of his individual case. A claimant's petition was a supplication seeking whatever mercy the Chancellor, and his judges, might dispense. The justice of the court of Chancery thus tempered the strict legal rules of the courts of common law at the

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4 Digest 1.1.1.pr.

5 An alternative understanding of Aristotle's digression, which is arguably more consistent with Aristotle's intentions, has a striking parallel in the Talmudic law of *lifnim mishurat hadin*. These are principles or standards of behaviour which go beyond that which the law requires. These aspirational standards are not binding but represent what is expected of a good and honourable person.

6 A Birley (trans), *Lives of the Later Caesars* (Penguin, London, 1976) p 268.

7 Responding to Augustine's objection that *epikeia* (equity) is a vice rather than a virtue because "seemingly *epikeia* pronounces judgment on the law, when it deems that the law should not be observed in some particular case", Aquinas responded with an example of a madman demanding his legal entitlement to the return of his sword whilst he was mad: "on these and like cases it is bad to follow the law, and it is good to set aside the letter of the law and to follow the dictates of justice and the common good. This is the object of 'epikeia' which we call equity." See T Aquinas *Summa Theologica* II.II, Q120, Art 1.

whim of the Lord Chancellor. But with the advent of legally trained Chancellors and law reporting the Chancery court began to develop general legal rules. Exercise of an individual, unrestrained discretion became less and less common. Prior to his appointment, the first legally trained Chancellor, Sir Thomas More, argued passionately that if judges "rule by the leading of their own nature … then the people will in no way be freer, but, by reason of a condition of servitude, worse, when they will have to obey, not fixed and definite laws, but indefinite whims changing from day to day".[8] By the start of the 19th century, the Lord Chancellor, Lord Eldon, remarked that "nothing would inflict on me greater pain in quitting this place than the recollection that I had done anything to justify the reproach that the equity of this court varies like the chancellor's foot".[9]

In 1873-1875, the Judicature Acts merged the administration of the rules deriving from Chancery and those deriving from the King's courts. Thereafter, a claimant seeking justice brought his or her claim before a single judge, who would dispense law according to the principles derived from both the common law courts and Chancery. The Master of the Rolls in 1878 remarked of his fused court that, "[t]his court is not, as I have often said, a Court of Conscience, but a Court of Law."[10] By the end of the 20th century, this approach had become orthodoxy for many. A good example is *Cowcher v Cowcher*.[11] At a time when English courts strove towards clarity in the principles governing the law of trusts, Bagnall J was confronted with a claim by a divorced wife for a beneficial interest in the family home. Bagnall J explained that the legal rule to be applied in cases of resulting trust was the long-established rule that the land was held on trust by the husband in proportion to the contributions made despite the possible unfairness of the result in the individual case:[12]

> In any individual case the application of these propositions may produce a result which appears unfair. So be it; in my view, that is not an injustice. I am convinced that in determining rights, particularly property rights, the only justice that can be attained by mortals, who are fallible and are not omniscient, is justice according to law; the justice which flows from

8 J Headley (ed), "Responsio ad Lutherum" in *The Yale Edition of the Complete Works of St Thomas More* (Yale University Press, New Haven, 1969) Vol 5, p 277.

9 *Gee v Prichard* (1818) 2 Swan 402 at 414. Harman LJ once commented that "since the time of Lord Eldon … equitable jurisdiction is exercised only upon well-known principles": *Bridge v Campbell Discount Co Ltd* [1961] 2 WLR 596 at 605.

10 *Re National Funds Assurance Co* (1878) 10 Ch D 118 at 128.

11 [1972] 1 WLR 425 at 430.

12 Compare the result which now prevails in England where courts have appropriated a power to consider all circumstances in order to "impute" a constructive trust under the guise of determining the "true" intentions of the parties. This is an approach very similar to the discretion given, by legislation, to the courts under the *Matrimonial Causes Act 1973* (UK). See *Stack v Dowden* [2007] 2 WLR 731.

> the application of sure and settled principles to proved or admitted facts. So in the field of equity the length of the Chancellor's foot has been measured or is capable of measurement. This does not mean that equity is past childbearing; simply that its progeny must be legitimate – by precedent out of principle. It is well that this should be so; otherwise, no lawyer could safely advise on his client's title and every quarrel would lead to a law suit.

EQUITY IN AUSTRALIA AND THE VIEWS OF MICHAEL KIRBY

We have seen the controversy which surrounds the history of equity as a separate form of justice. That history, entwined with the history of the courts of Chancery, was how the law was received at the time of Australian settlement.[13] The decisions of Justice Michael Kirby considered below are all concerned with the scope or operation of doctrines deriving from Chancery. But equity in its rich historical sense was not merely a synonym for the rules deriving from that particular system of courts. Although it embodied the form of justice originally vested in the Lord Chancellor, it was a notion of particular justice that applied to all judicial decision-making. Justice Kirby once expressed this by saying that the "business" of equity is "the attainment of justice",[14] perhaps suggesting to some a conception of "justice" in Aristotle's second, individual, sense. "Equity" in this sense could be attained by a discretion in a particular case to temper legal rules whose provenance lay in the courts of common law just as it could be attained by a discretion to temper rules whose provenance lay in the courts of Chancery. Further, just as the judge's equitable discretion might extend to allowing a remedy where general principles of law might deny one, it might also extend to refusing a remedy where general principles of law would allow one. In *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* Kirby J said:[15]

> The concern of equity is limited to justice in the individual case given the potential for inadequate results by reason of some of the rules of the common law. Therefore, even if conduct otherwise exhibits the elements of unconscionable dealing as understood in equity, it may still not receive that characterisation if the traditional equitable remedies (such as setting aside the transaction for instance) are not appropriate in the circumstances of the case.

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13 Indeed, separate Chancery courts only wholly disappeared in Australia when on 1 July 1972 the *Supreme Court Act 1970* (NSW) abolished the separate courts in a move described by the President of the Court of Appeal as a "great leap forward to the 19th century": see K Mason, "Fusion: Fallacy, Future or Finished?" in S Degeling and J Edelman, *Equity in Commercial Law* (Lawbook Co., Sydney, 2005) p 55.

14 *Burke v Lfot Pty Ltd* (2002) 209 CLR 282 at 324 [115].

15 (2003) 214 CLR 51 at 95 [109].

Notwithstanding these remarks by Kirby J, this chapter does not enter into this debate about legitimacy of equity as a separate system of justice for several reasons. First, despite the powerful views of antagonists ranging from Macrinus and Augustine to Justice Bagnall and Professor Birks,[16] it is extremely difficult to expunge *entirely* all instance-based legal discretion. Every law student is familiar with reasons for a decision which purport to apply general principles yet claim that they are applicable only upon the very special, and particular, facts of the case. This is just one way in which the judge, who claims always to apply general principle, subordinates discretion. Another example is the development of general principle which itself incorporates strong discretion in individual cases. Such a "guided discretion"[17] can rarely be reviewed on appeal.[18]

The second reason for avoiding engagement with the debate about the legitimacy of this alternative form of "equitable" justice is the impossibility of identifying where the limit to that form of individualised, discretionary justice lies. Even those who strongly support the bifurcation of justice will concede that the judge who too readily relies upon equity will overreach the judicial role and undermine the rule of law. In the words of Blackstone, although law without equity would be unjust, "the liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy the law, and leave the decision of every question entirely in the breast of the judge".[19]

The third, and perhaps the most important, reason for declining to enter this debate is that despite Kirby J's enunciation of the general nature of equity as a separate system of justice we will see below that he never relied upon a purely instance-specific power to ameliorate general justice. Rather, he invariably decided novel cases by reference to established general principles or by developing new ones. In other words, Kirby J's application of "equity" was not as a different form of justice but rather as a philosophy of flexibility in creating general legal rules. For Kirby J, this philosophy meant that his sense of fairness could prevail over other considerations, which many of his judicial colleagues saw as inhibitions on judicial power and which prevented them from reaching the same result – namely stare decisis (the influence of precedent) and analogical reasoning.

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16 The late Professor Birks was the strongest academic proponent of the view that "conscience of the intuitive kind is antithetical to the rule of law": P Birks, "Equity, Conscience and Unjust Enrichment" (1999) 23 *Melbourne University Law Review* 1 at 22.

17 See the discussion in J Edelman, "Judicial Discretion in Australia" (2000) 19 *Australian Bar Review* 284.

18 *House v The Queen* (1936) 55 CLR 499.

19 W Blackstone, *Commentaries on the Laws of England: Book 1* (1765, University Chicago Press, Chicago, Facsimile Reprint 1979) p 62. See also J Selden, *Table Talk of John Selden* (1689, republished 2nd ed, John Smith London, 1856) p 38: "generally to pretend conscience against law is dangerous; in some cases haply we may".

A SELECTION OF KIRBY'S EQUITY DECISIONS

The corporation that threatened not to renew its lease

The first case, to which we now turn, is the one in which Kirby J expressed the view, quoted above, that equity is concerned with justice in the individual case. Mr and Mrs Roberts were tenants of a fish and chips shop in a shopping centre. They commenced their tenancy in 1989. In 1992 they had extended it for five years. Mrs Roberts had worked in small businesses previously and had good business management experience. In 1990, Mr and Mrs Roberts joined a number of other tenants at the shopping centre to protest against charges that had been levied upon them by the owners and operators of the shopping centre. Eventually the tenants brought legal proceedings to recover the charges. Mr and Mrs Roberts were part of this action.

While the legal proceedings were ongoing, Mr and Mrs Roberts decided to sell their business. In October 1996, a purchaser agreed to buy the business for $65,500, subject to satisfactory assignment of the lease. Since the lease expired in February 1997, Mr and Mrs Roberts sought an extension of the lease from the owners. The owners agreed, provided that Mr and Mrs Roberts sign a deed which included a clause that they would abandon their legal proceedings against the owners. The legal advice to Mr and Mrs Roberts was to refuse to agree to this clause. They thought that their claim was worth as much as $50,000. Eventually, however, they signed the deed. Mrs Roberts gave evidence that she did so because she had no other choice. Without an extension of the lease she could not have sold the business. The deed was signed and the business was sold.

Despite signing the deed and promising to withdraw from the litigation, Mr and Mrs Roberts continued to take part. After a number of legal skirmishes the proceedings were settled in 1998 and the owners agreed to repay sums of up to $3,898 to each tenant. If Mr and Mrs Roberts had participated in the settlement they would have received $2,786.43. But the owners, relying upon the deed, refused to make any payment to them. The owners were sued by the Australian Competition and Consumer Commission, a regulatory body, acting on behalf of the Roberts. The Australian Competition and Consumer Commission alleged that the owners had "engage[d] in conduct that is unconscionable within the meaning of the unwritten law" in contravention of s 51AA(1) of the *Trade Practices Act 1974* (Cth).

This case, *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd*,[20] came before the High Court of Australia. The question to be decided was whether the owners had engaged in "unconscionable conduct within the meaning of the unwritten law". It was accepted by

20 (2003) 214 CLR 51.

the parties that this phrase was a reference to the doctrine developed by courts of equity where a defendant was not entitled to insist upon rights obtained by the exploitation of the weakness or "special disadvantage" of another. In the majority in the High Court of Australia, Gummow and Hayne JJ quoted from Gleeson CJ in an earlier case, and explained that the reference to "unconscientious" or "unconscionable":[21]

> leaves for decision the question of the principles according to which equity will reach that conclusion. The conscience of the [defendant], which equity will seek to relieve, is a properly formed and instructed conscience.

As Gummow and Hayne JJ explained, prior to *Berbatis*, judges in the High Court of Australia had emphasised that it was not a "special disadvantage" of a defendant merely to be in a position of weakened bargaining power. The weakness must be one which "seriously affects the ability of the innocent party to make a judgment as to his own best interests".[22] Common examples were severe drunkenness, mental infirmity or serious lack of comprehension of English. Justices Gummow and Hayne, as well as Chief Justice Gleeson and Justice Callinan, therefore refused the claim by the Australian Competition and Consumer Commission. They all remarked that all parties were businesspeople, that Mr and Mrs Roberts had obtained legal advice, and that there was no "special disadvantage or weakness" simply because Mr and Mrs Roberts were not legally entitled to renewal of their lease.[23] Further, even if there were a "special disadvantage", settlement of disputes is an everyday occurrence and it was hardly a taking of "unconscientious advantage" for the owners to require Mr and Mrs Roberts to abandon a claim which, as it turned out, was worth $2,786 in exchange for a new right worth $65,500.[24]

Justice Kirby dissented. This was a decision, quoted above, in which Kirby J described equity's concern for justice in the individual case. Although there was no category of disadvantage into which Mr and Mrs Roberts fell (illiteracy, drunkenness, mental infirmity etc), Kirby J described their disadvantage as "situational". Together, they constituted "a comparatively weak and vulnerable market player".[25] Their daughter, as the owners' agents knew, had been ill and had contracted encephalitis, a condition which was difficult and expensive to treat. However, towards

21 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 227 [45].

22 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 461-463 per Mason J; *Blomley v Ryan* (1956) 99 CLR 362 at 405, 415 per Fullagar and Kitto JJ.

23 *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2001) 214 CLR 51 at 64-65 [15] per Gleeson CJ, at 77 [56]-[57] per Gummow and Hayne JJ, at 115-116 [185] per Callinan J.

24 (2001) 214 CLR 51 at 65 [16] per Gleeson CJ, at 78 [58] per Gummow and Hayne JJ, at 113-114 [176]-[177] per Callinan J.

25 (2001) 214 CLR 51 [107].

the end of his judgment, Kirby J added an important point of emphasis – his decision should not be taken as a decision on the particular facts of the case. The presence of the doctrine of exploitation of weakness in a legislative Act took the case beyond any instance specific to the role of equity. Indeed, from "the humble case of the Roberts", Kirby J would have erected a general principle extending the doctrine of unconscionability to cases of "circumstantial disadvantage":[26]

> By upholding the rights of the Roberts – on the face of things small and objectively of limited significance – a message is delivered that the Act is not to be trifled with … [W]hat is "unconscionable" conduct of a corporation in its dealings with another corporation of roughly equal size – and especially a large trading corporation well able to be advised and look after its own interests – will be quite a different matter when compared to a context in which the complaining party is an individual trader of modest means and known circumstances of vulnerability, with restricted economic power and limited facilities to receive effective legal advice, dealing with an economically superior well-advised market player.

The corporation that wanted to pay a day late

Tanwar Enterprises Pty Ltd v Cauchi[27] involved an agreement to purchase land between Tanwar Enterprises Ltd and the vendors, who were members of the Cauchi family and Mr Dalley. The parties entered into several contracts of sale for a combined price of more than $4.5 million. Tanwar Enterprises paid deposits of almost half a million dollars. The date of completion was in February 2000. That date passed without settlement because Tanwar Enterprises did not have the funds to settle. Several months later Tanwar Enterprises paid around $400,000 of the purchase price and the vendors agreed to extend the completion date until August 2000. That date passed with Tanwar Enterprises unable to pay the remaining purchase price. The parties once again entered into a new deed, agreeing upon a completion date of 25 June 2001. That deed provided that "time was of the essence", a legal phrase well known to mean that compliance would be strictly required. Tanwar Enterprises made arrangements to obtain the remainder of the purchase money. But it arrived one day too late. This time the Cauchi family and Mr Dalley refused to extend the deadline, even for one day. Tanwar Enterprises sued. By the time the case reached the High Court of Australia the only issue was their claim that it would be "unconscionable" for the vendors to keep the land when Tanwar Enterprises had only been a day late. They claimed that this gave them a right to be relieved against forfeiting their interest in the land.

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26 (2001) 214 CLR 51 at 95-96 [110]-[112].

27 (2004) 217 CLR 315.

All the judges dismissed the appeal by Tanwar Enterprises. A joint judgment was delivered by Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ. The essence of their Honours' reasoning was that the epithet "unconscionable" was not a general equitable defence to a perceived "unfair" assertion of legal rights.[28] Tanwar Enterprises either needed to point to a proprietary right to the land to seek relief against forfeiture or it needed a basis to prevent the vendors from terminating the contract, as they were entitled to do. But Tanwar Enterprises had only personal contractual rights, which had been terminated by the vendors because of its delay. And Tanwar Enterprises did not have any argument (such as representations made by the vendor that no prejudice would flow from a short delay) to prevent the termination of the contract by the vendor.

Justice Kirby's judgment contrasts with the legalism of the joint judgment. He preferred a general principle of flexibility and saw the case as involving a question of "proportionality in the law's operation", explaining that "on many occasions the law recoils from absolute outcomes to which logic or the strict letter of the law might seem to point".[29] Although economic and contractual freedom required the strict legal agreement between the parties to be the starting point, equity would nevertheless step in and relieve against forfeiture if, in all the circumstances, it would be unconscionable for one party to enforce his or her legal rights.[30] However, in this case there were no circumstances of unconscionability – the parties had agreed on strict terms in the deed against a background of numerous delays, and the purchaser was not specially disadvantaged or in a vulnerable position.[31]

The retailer that wanted a refund without offering one to its consumers

In *Roxborough v Rothmans of Pall Mall Australia Ltd*,[32] a cigarette retailer paid a licence fee to a wholesaler as a separate part of the sale price of cigarettes. Both parties assumed that the licence fee was to be paid by the wholesaler to the State government. However, it turned out that the licence fee was not required to be paid to the government because the legislation was unconstitutional. The retailer sought restitution from the wholesaler of the amount paid for the licence fee. Justice Gummow explained how Lord Mansfield had shown that the common law action for restitution, through the form of action of money had and received, was in the nature of a bill in equity. The same equitable considerations of conscience and justice underlay the action for money had and received,

28 (2004) 217 CLR 315 at 325-326 [24], [26].
29 (2004) 217 CLR 315 at 341-342 [81]-[82].
30 (2004) 217 CLR 315 at 350-353 [106].
31 (2004) 217 CLR 315 at 354-356 [110]-[116].
32 (2001) 208 CLR 516.

but the issue remained one of general principle.[33] Four judges in the majority (Gleeson CJ, Gaudron, Gummow and Hayne JJ) reasoned that between the parties to the litigation, the plaintiff retailer had a superior claim.[34]

Although the majority used terms such as "unconscionable"[35] or "against conscience"[36] to explain the conclusion, they emphasised that the result was a matter of general principle.[37] The retailers, who had passed on the tax to their consumers, might obtain an ultimate windfall, but the point of general principle was that "no defence of 'passing on' was available to defeat a claim for moneys paid by A … where B has been unjustly enriched by the payment and the moneys paid had been A's moneys".[38]

Justice Kirby dissented. He held that the wholesaler was not required to make restitution. He reached this conclusion, in part, by invoking the same notions of conscience as the majority. But Kirby J gave substantive effect to these notions. For instance, one of the claims brought by the retailer was for a remedy which counsel described as "equitable damages" on the basis that the licence fee was held by the wholesaler on constructive trust. Justice Kirby rejected this claim along with the other arguments advanced by the retailer. One of his reasons was that the retailer plaintiff had passed on much of the tax to consumers in the form of higher prices. Without a commitment to refund any proceeds to the consumers, Kirby J considered that the retailer was not "entitled in justice and good conscience to such relief".

The wife who guaranteed the debts of her husband's company

Mr Garcia was a businessman who conducted a business of buying and selling gold. As his business expanded, Mr Garcia sought additional credit from the Commonwealth Bank. The bank required a guarantee for the repayment of the debts of his business. His wife provided the bank with that guarantee. She also had a mortgage with the Commonwealth Bank, which secured all debts owing and therefore also secured her

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33 (2001) 208 CLR 516 at 548-551 [83]-[89]; cf at 590 [203] per Callinan J.

34 (2001) 208 CLR 516 at 548-551 [27] per Gleeson CJ, Gaudron and Hayne JJ, at 542 [68] per Gummow J.

35 (2001) 208 CLR 516 at 528 [23] per Gleeson CJ, Gaudron and Hayne JJ, at 542 [68] per Gummow J.

36 (2001) 208 CLR 516 at 543 [71] per Gummow J, quoting Mason CJ.

37 Indeed, only two years earlier, Gaudron, McHugh, Gummow and Hayne JJ had acknowledged that "the statement that enforcement of the transaction would be 'unconscionable' is to characterise the result rather than to identify the reasoning that leads to the application of that description": *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 409-410 [34].

38 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 530 [28], quoting *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 90-91.

husband's business. She agreed to sign the guarantees after Mr Garcia told her there was no danger, reassuring her by saying "if the money isn't there the gold is there". The bank officer, before whom Mrs Garcia signed the guarantee, did not explain any of its terms to her and the trial judge found that, although Mrs Garcia was a capable and professional businesswoman, she did not understand the effect of the guarantee and was under the impression that it was "risk proof". When Mr Garcia's business went into liquidation, Mrs Garcia sought a declaration that she was not bound by the guarantees she had given.

In the High Court of Australia,[39] all the judges upheld the decision of the trial judge, which had set aside the guarantee. Much of the argument before the court turned upon the interpretation of a 1939 decision,[40] but all the judges were careful to say that their judgment was not based simply upon identifying the rule which derived from that 1939 case, but concerned the application of the rules and principles derived from the court of Chancery in the modern context.[41] In a joint judgment, Gaudron, McHugh, Gummow and Hayne JJ explained that the principle, which remained as applicable as it was in 1937, was that due to the relationship of confidence between a husband and a wife, if (1) the wife did not receive any benefit from the guarantee that she gave to the bank; and (2) if she was labouring under a mistake as to its nature and effect, then the guarantee would be set aside unless the bank took steps to explain its effect to her.[42] The effect of this principle is that once a bank knows that a guarantor is giving security for her husband and receiving no benefit in exchange, then the risk that the guarantee will be set aside due to a mistake by the wife will be borne by the bank. The bank can only escape the consequences by ensuring that the transaction is explained to the wife.

Justice Kirby agreed that Mrs Garcia's guarantee should be set aside, but he favoured the introduction of a new principle, borrowing from a 1994 decision of the House of Lords.[43] In a case in which a surety labours under undue influence, misrepresentation or duress by the principal debtor, the transaction should be set aside, provided that two conditions are met:[44]

> (1) the transaction is not on its face to the personal financial advantage of the party offering the security; and (2) there is a relationship which is known, or which ought to be known, by the credit provider involving an emotional dependency on the part of the surety towards the debtor.

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39 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395.

40 *Yerkey v Jones* (1939) 63 CLR 649.

41 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 403 [18] per Gaudron, McHugh, Gummow and Hayne JJ, at 430 [71] per Kirby J, at 440–442 [107]–[109] per Callinan J.

42 (1998) 194 CLR 395 at 408 [31].

43 *Barclays Bank Plc v O'Brien* [1994] 1 AC 180.

44 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 432 [76].

The second requirement would be satisfied by knowledge of cohabitation but also by marriage, de facto marriage or long-term relationships of either sex.[45] Justice Kirby emphasised that, unlike the principle favoured in the joint judgment, his principle also applied to cases in which a husband guaranteed his wife's debts, or a parent guaranteed a debt of their child, or any other case in which "a credit provider is, or ought reasonably to be, aware that the surety reposes trust and confidence in the debtor in relation to his financial affairs".[46] Kirby J argued that his approach:[47]

> (1) is expressed in non-discriminatory terms; (2) is addressed to the real causes of the vulnerability; and (3) recognises the credit provider's superior powers to insist that volunteers in a vulnerable position are afforded access to relevant information and, where necessary, independent advice.

Although the joint judgment did not rule out extending their principle beyond wives, Callinan J was more reluctant, observing that such a broad extension "may, in any event, be an area more fit for legislative than judicial intervention".[48] Indeed, several years after *Garcia*, the House of Lords adapted the very English principle in a very similar manner to the modifications suggested by Kirby J, particularly with the new insistence upon a private meeting between the bank and the surety.[49] However, this further English development was effected in a way which would have raised collective gasps of astonishment in Australian legal circles. In a development which went considerably further than Kirby J in approaching, even crossing, the invisible boundary between legislation and adjudication, Lord Nicholls, in the leading opinion, emphasised that the new rule was to apply prospectively (usually only the province of the legislature) and not retrospectively (usually only the province of judicial law-making).[50] Although such a large step towards prospective-only legal development might not have raised eyebrows across the Atlantic, and although it went largely unnoticed in England, Kirby J remained acutely aware of this boundary even when taking his more modest step. He addressed it directly:[51]

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45 (1998) 194 CLR 395 at 432-433 [76].

46 (1998) 194 CLR 395 at 433-434 [78].

47 (1998) 194 CLR 395 at 431 [74].

48 (1998) 194 CLR 395 at 442 [109].

49 Although Kirby J referred to independent legal advice, the leading speech in the House of Lords emphasised that experience had shown that the requirement of "independent legal advice" had turned into a "charade" and a "fiction": *Royal Bank of Scotland v Etridge* [2002] 2 AC 773 at 804-806 [50]-[57] per Lord Nicholls.

50 For a thorough and compelling account of why judges should not have the power to create rules with only prospective effect, see B Juratowitch, *Retroactivity and the Common Law* (Hart Publishing, Oxford, 2008) Ch 6.

51 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 434 [80].

> To the argument that this re-expression of equitable doctrine should be left to parliament, there are two answers. First, the refinement has already taken place at the highest judicial level in England, a large financial market and a major legal jurisdiction from which Australian law originally derived its equitable doctrines. Secondly, as mentioned at the outset of these reasons, equitable principles are themselves in a constant state of evolution in response to developments in society. Borrowing against the family home to support a business venture is one such development. The changing nature of domestic relationships is another such development.

The patient who wanted a copy of her doctor's records

The final case to be considered is a decision given by Kirby while he was President of the New South Wales Court of Appeal, prior to his elevation to the High Court of Australia.[52] Although it is the earliest of his decisions discussed in this chapter, it is convenient to consider it last because it highlights, perhaps more than any other, his consistent judicial methodology of flexibility. The case of *Breen v Williams*[53] was heard by Kirby P in the New South Wales Court of Appeal in 1994. The issue was whether a patient had a right of access to his or her medical records, including a right to inspect and copy the records.

Mrs Breen underwent silicon breast implant surgery in 1977. Complications developed which occasioned numerous visits to Dr Williams and a surgical procedure by him in 1978. In 1984, Mrs Breen noticed a lump in her breast. Investigation revealed it to be a silicon leak from the implant. In 1994, Mrs Breen became involved in a class action in the United States against the manufacturers of the silicon implants. A condition upon her "opting in" to the class action was the production of medical records. Time was short. Rather than an indirect process of obtaining an order for production from the courts in the United States, and then seeking to enforce that order in Australia, Mrs Breen's legal advisers sought to assert, directly, a right to her medical records in Australia. They wrote to Dr Williams requesting a copy of her records. Dr Williams, after obtaining legal advice, replied that it was a "longstanding legal tradition" that a doctor's notes were the property of the doctor. He refused to disclose them. The case came before Bryson J, at first instance, in the Supreme Court of New South Wales. Mrs Breen's claim for access to her records was put in various ways.

One basis upon which Mrs Breen argued for the existence of a right of access was that it was a consequence of an alleged doctor-patient fiduciary relationship. Ordinary legal relationships (such as buyer/seller) do not require either party to provide access to his or her information.

52 See also Ian Freckelton, "Health Law and Bioethics", Chapter 16 in this book.
53 (1994) 35 NSWLR 522.

However, it was argued that fiduciary relationships are different. From the Latin, "fiducia", these recognised relationships of trust or confidence impose higher duties upon the repository of the trust (the fiduciary). Thus, in well recognised fiduciary relationships, such as company director/company, lawyer/client and trustee/beneficiary, the fiduciary is required to subordinate his or her own interests in favour of the principal. This subordination involves a prohibition on the fiduciary making a profit or assuming a position which conflicts with the principal's interests without the informed consent of the principal. So, too, it was argued, the fiduciary is required to disclose relevant information.

Mrs Breen argued that (1) the relationship of doctor-patient was fiduciary; and (2) that an incident of that relationship was that the doctor's records must be disclosed to the patient at the patient's request. This argument faced obstacles at each stage. First, in a well-accepted opinion, Lord Scarman had rejected the view that the doctor-patient relationship was fiduciary. In his dissenting speech (on a different point) in *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital*,[54] Lord Scarman had said that "there is no comparison to be made between the relationship of doctor and patient with that of solicitor and client, trustee and *cestui qui trust* or any of the other relationships treated in equity as of a fiduciary character". Although recent Canadian decisions had accepted that the relationship of doctor-patient was fiduciary,[55] a standing joke at the New South Wales Bar suggested that Canadian courts had stretched the notion of fiduciary so far that judges were classifying every relationship that came before them as fiduciary. It was said that in Canada there were only three classes of people: fiduciaries, those about to become fiduciaries, and judges.

The second difficulty was that even if the relationship were a fiduciary one, the law had never previously recognised an unrestricted right to information as a general incident of fiduciary duties, and there were three compelling arguments against its recognition in favour of a patient: (1) disclosure of the medical records could cause serious mental harm to a patient; (2) it could breach the confidences of a third party; and (3) compulsory disclosure of irrelevant financial or administrative records could be unduly burdensome on a doctor.

At first instance, Bryson J rejected all the arguments of Mrs Breen, including both stages of the fiduciary duty argument. The New South Wales Court of Appeal and the High Court of Australia both dismissed appeals by Mrs Breen. But, as President of the New South Wales Court of Appeal, prior to his elevation to the High Court of Australia, Kirby P dissented. He considered that Dr Williams had breached his fiduciary duty by not providing Mrs Breen with access to her medical records.

54 [1985] AC 871 at 884. See also *R v Mid-Glamorgan FHSA* [1995] 1 WLR 110.

55 *McInerney v MacDonald* (1992) 93 DLR (4th) 415; *Norberg v Wynrib; Women's Legal Education and Action Fund, Intervener* (1992) 92 DLR (4th) 449.

In finding that the relationship of doctor–patient was fiduciary, Kirby P was not alone. Meagher JA in the Court of Appeal and Gaudron, McHugh and Gummow JJ in the High Court of Australia all accepted that the doctor–patient relationship could be fiduciary for some purposes.[56] There is not the space in this chapter to examine the debate about whether a doctor–patient relationship is properly characterised as fiduciary. Suffice to say that, as Kirby P observed,[57] the hallmarks of a fiduciary relationship all appear present in the doctor/patient relationship – namely, an assumption of responsibility for another, characteristics of trust and dependence on the part of the patient, and ascendancy and influence on the part of the doctor.

The second difficulty was harder to surmount. Of the nine judges who heard the case (trial judge, Court of Appeal and High Court of Australia), Kirby P was the only judge to follow the North American approach and find that inherent in the fiduciary relationship of doctor/patient was a duty upon the doctor to provide a patient with access to her medical records. He met the three objections by exceptions to this right: if disclosure would cause harm to the patient, or if confidences of third parties were threatened, or if the records were of an administrative or financial nature, then the doctor could refuse to disclose them. The result was a positive duty of disclosure subject to exceptions. As Kirby P observed, this duty seemed to fit with the reasonable expectations of many patients and the norms of society and it avoided requiring a patient to bring court process to obtain access to her records.[58]

On the other hand, the duty suggested by Kirby P raised a new set of problems. Every doctor who begins to treat a patient has the same duty to act with reasonable care as a butcher, baker or candlestick maker. Thus, the doctor is required to reasonably assess the best interests of the patient and to act accordingly. This duty might necessitate disclosure of the medical records the doctor makes about the patient, perhaps to alleviate anxiety or as part of a complete treatment of another medical professional. But reasonable care for a patient's health does not require this to be a general rule. If a doctor also owes higher, fiduciary duties of loyalty these duties oblige the fiduciary to act with a duty of loyalty. Such duties require the fiduciary to act with good faith and to avoid any conflict of interest or profit from the relationship without consent of the other party. But why should this additional, higher duty of loyalty require positive disclosure of medical records? Or, to put the matter negatively, why is it disloyal for a doctor to refuse to do any more than act in the best interests of the patient, particularly where the refusal does not prefer any particular interest of the doctor?

56 Contra Brennan CJ, Dawson and Toohey JJ.

57 *Breen v Williams* (1994) 35 NSWLR 522 at 544.

58 (1994) 35 NSWLR 522 at 547–548.

As the North American courts had showed, it was not impossible to extend a fiduciary's duty of loyalty to include disclosure of patient records. The deep source of dispute between Kirby P and the other judges was whether courts *ought* to do so. The extension of the duty of loyalty to include duties to disclose information in the interests of a patient, as Kirby P showed, required a fine balancing of policy interests and recognition of clear exceptions. For the other judges, such policy decisions were for legislatures, not for judges. In contrast, Kirby P argued that his approach was consistent with a fiduciary's other duties of loyalty, it conformed with the reasonable expectations of the public and it was "unrealistic to wait for parliament to act".[59] For Kirby P there was no impediment to judicial development of a duty of loyalty in line with community expectation:[60]

> The stamp of history may be strong in the cases. But it does not freeze the development of equitable principle. How could it do so when the current doctrine on fiduciary obligations is itself nothing more than the creation, by earlier judges, of such principle?

CONCLUSIONS

At the beginning of this chapter we saw that the rich historical sense of "equity" lay in its Aristotlean origins as a separate, individualised, system of justice. In our plural society, the legitimacy, and boundaries, of such a concurrent system of justice have been questioned. But although Justice Kirby sometimes made reference to "equity" in this rich historical sense, his decisions did not reflect such an application. For Kirby, "equity" described the creation of malleable and flexible general principles rather than a power to ameliorate clearly defined general principles on an instance specific basis. He generally enunciated this philosophy in cases that involved principles deriving from the Court of Chancery, but it was also a philosophy which underlay his decisions in relation to the common law. In both common law and equity cases it meant that Kirby J had a greater willingness than his colleagues to forge and adapt the common law to achieve what he saw as the just result. The difference between him and his judicial colleagues often involved a clash between his view of the just result and the view that his colleagues took of the limits to judicial power, particularly stare decisis and the underlying analogical incrementalism of the common law and equity. The concluding case above, *Breen v Williams*, is perhaps the best example. Of all the judges who heard the case, only Kirby P was prepared to hold that a duty of loyalty arose in the fiduciary doctor/patient relationship, which obliged the doctor to disclose medical records to the patient. The policy reasons for this were compelling, although they required a fine balancing

59 (1994) 35 NSWLR 522 at 546.
60 (1994) 35 NSWLR 522 at 543.

between the interests of the doctor and those of the patient. One of the strongest objections was that, whilst the result might be desirable, it overstepped judicial power. As Gaudron and McHugh JJ said in the High Court of Australia:[61]

> Advances in the common law must begin from a baseline of accepted principle and proceed by conventional methods of legal reasoning. Judges have no authority to invent legal doctrine that distorts or does not extend or modify accepted legal rules and principles. Any changes in legal doctrine, brought about by judicial creativity, must "fit" within the body of accepted rules and principles … In a democratic society, changes in the law that cannot logically or analogically be related to existing common law rules and principles are the province of the legislature. From time to time it is necessary for the common law courts to reformulate existing legal rules and principles to take account of changing social conditions. Less frequently, the courts may even reject the continuing operation of an established rule or principle. But such steps can be taken only when it can be seen that the "new" rule or principle that has been created has been derived logically or analogically from other legal principles, rules and institutions. In the present case … [i]f change is to be made, it must be made by the legislature.

Although he never accepted that these objections were legitimate constraints upon achieving a result which he considered to be dictated by concerns of inter-personal morality, Justice Kirby was certainly conscious of them. Responding to his detractors several years later in *Garcia v National Australia Bank*, Kirby J concluded:[62]

> We have it on the authority of Lord Radcliffe that judges, holding to the "conviction of Galileo", know that "somehow, by some means, there is a movement that takes place" in the exposition of legal principle. The movement may be readily perceived at a distance. Yet, although we may sometimes be unable to say how the law gets from one point to another, no one doubts that movement occurs or that it is "in response to the developments of the society in which [the law] rules".

POSTSCRIPT

On 19 November 2008, shortly after this chapter had been completed and edited, Justice Kirby delivered the WA Lee Lecture entitled "Equity's Australian Isolationism". It was his last substantial discussion of equity whilst he remained on the High Court of Australia. The editors of this book kindly allowed me the opportunity to add this postscript to make mention of this important contribution.

Two broad themes concerning Kirby J's attitude to equity emerged from his lecture. The first related to the rich historical debate with

61 *Breen v Williams* (1996) 186 CLR 71 at 115.
62 (1998) 194 CLR 395 at 412 [47].

which this chapter began. It will be recalled that the debate concerned whether "equity" should be understood as an autonomous system of individualised justice. In Kirby J's lecture, he favoured the view that it could not. Rather than seeing equity as a power to modify rigid rules on an instance specific basis, he spoke of the development of equity in the opposite terms: an "attempt to reduce the wilderness of single case decisions". Justice Kirby also leaned towards a view which recognises that doctrines which emerge from the Court of Chancery can develop by analogy with those doctrines which emerged from the King's courts. Describing the contrary view he questioned whether "[e]quity remains a distinct source of authority in Australian law cut off from others. Is this correct? Is it necessary?" Further, he suggested that "[i]n human affairs, propinquity has a well known tendency to produce interaction and, dare I say it, occasional fusion. Why should it not be so in the case of equity's rules and remedies?"

The second theme of Justice Kirby's lecture concerning his attitude to equity was his reactionary response to the conservatism of some of his contemporaries on the High Court. Responding to an English suggestion that "[i]t is doubtful whether it is any longer open to equity to invent new principles", Kirby J suggested that "[no] convincing authority was cited to support such a sweeping assertion. Perhaps its writer had spent a holiday in Australia." Justice Kirby's frustration was most apparent when he turned to the case discussed above, *Garcia v National Australia Bank*.[63] He enunciated his disquiet with the restrained, incrementalism of the other judges in that case and expressed his desire for the law to reflect a policy of addressing the "essential circumstances and causes of vulnerability". Appealing to social norms of which he also had personal experience, Kirby pleaded against the "needless hardening of equity's arteries in Australia" and pointed out that in non-married relationships "the dangers of overbearing can be as large, if not larger, than that faced by the particular class of married women". This example, far from isolated, illustrates that for Kirby, "the business of equity" was the attainment of general justice by reference to both social and natural norms of inter-personal morality. Whether the case concerned rules deriving from common law or Chancery courts, a restrained analogical incrementalism would not restrict Michael Kirby from reasoning in a manner which stated rules in terms that he considered as fundamentally just, and equitable.

63 (1998) 194 CLR 395 at 412.

Chapter 14

EVIDENCE

Jeremy Gans and Andrew Palmer

> *[U]nder our Constitution, courts exist to protect the legal rights of the probably guilty as well as of the possibly innocent. They exist to defend the unpopular as well as the acclaimed. We say this in the law many times in our ceremonies. But it only really matters when we are put to the test as judges to apply our rhetoric in a live case affecting real prisoners facing long sentences. If the community does not understand the importance of the rule of law and of defending the accusatorial trial and time-honoured rights against self-incrimination, it is the duty of judges and lawyers to explain how these principles transcend even unpopular outcomes in particular cases.*[1]

RIGHTS OF INDIVIDUALS

If there is a common thread running through the many judgments that Justice Kirby has given on the law of evidence it is a concern with the rights of individuals. The law of evidence – although often described as "procedural" or "adjectival" – sets the ground rules by which trials are played, and is therefore one of the most important vehicles for protecting human rights in a country which has no constitutionally entrenched bill or charter of rights. Justice Kirby recognised this in *Northern Territory v GPAO*, when he held that family law's "paramountcy principle" – requiring that all judicial decisions must be made in the best interests of children – applied not only to final rulings on parenting and residence, but also to questions of procedure, such as whether a child protection agency must reveal its records to a court.[2] He condemned the rest of the court's refusal to take this step as inconsistent with Australia's obligations under the *United Nations Convention of the Rights of the Child*

1 *Tofilau v The Queen* (2007) 231 CLR 396 at 461-462 [206] per Kirby J.
2 *Northern Territory v GPAO* (1999) 196 CLR 553 at 638-643 [224]-[233].

and potentially productive of injustice, because the Family Court may reach its decision on an incorrect version of the facts.

The most important context in which rights can be protected by procedural rules is in the criminal trial, and in that context, a rights-oriented approach will, of necessity, increase the chances that a guilty person will be acquitted. Justice Kirby confronted this central fact in his dissenting judgment in the recent case of *Tofilau*, insisting that:

> under our Constitution, courts exist to protect the legal rights of the probably guilty as well as of the possibly innocent. They exist to defend the unpopular as well as the acclaimed. We say this in the law many times in our ceremonies. But it only really matters when we are put to the test as judges to apply our rhetoric in a live case affecting real prisoners facing long sentences. If the community does not understand the importance of the rule of law and of defending the accusatorial trial and time-honoured rights against self-incrimination, it is the duty of judges and lawyers to explain how these principles transcend even unpopular outcomes in particular cases.[3]

THE RIGHT TO SILENCE

The outcomes that Kirby J proposed in *Tofilau* could hardly have been more "unpopular", involving as they did the exclusion of absolutely vital prosecution evidence against persons charged with four separate murders, including the murder of a child, and the murder of one appellant's great-aunt. All four cases had remained unsolved until police employed a Canadian investigative technique involving elaborate police deception and the commitment of a large amount of undercover resources. Typically, the covert technique begins with an apparently chance encounter between the suspect and an undercover operative posing as some sort of criminal. A relationship is developed between the suspect and the initial contact person, and through that relationship the suspect is gradually drawn into the activities of the criminal gang to which the initial contact supposedly belongs. After some time, the suspect will be on the verge of full membership of the gang, and the prospect of material gain. At this point, the suspect will be made to believe that the formal police investigation has been re-activated: for example, the police will write to the suspect seeking a DNA sample. The suspect will then be confronted by his contacts and warned that his past crimes could bring "heat" onto the gang; but he will also be told that the gang can make the investigation go away, through their contacts with corrupt police officers. All that the suspect has to do, he will be told, is to tell the truth; indeed, he may be harangued into doing so, or even interrogated. The suspect may initially deny involvement,

3 *Tofilau v The Queen* (2007) 231 CLR 396 at 461-462 [206].

but as the pressure mounts to "tell the truth", a confession may be made, partial at first, and then in full.

The High Court appeal largely revolved around questions of voluntariness: in circumstances of such deception, pressure and inducements, could the suspect truly be said to have confessed "voluntarily", as the law requires? Justice Kirby was the only member of the court to answer this question in the negative. In his judgment he laid down a profound challenge to Australian courts, including, of course, his own:

> Either the courts are serious about upholding the accusatorial form of criminal trial in Australia or they are not. Either they will defend suspects from conduct of police officers who set out to extract confessional statements by undercover interrogation where earlier, regular interviews have failed to afford the necessary evidence, or they will not. Either they are willing to protect an accused's entitlement to remain silent in the presence of police or other official interrogators or they are not. A case such as the present puts our courts to the test.[4]

In a succession of cases, Kirby J's response to that test has been at odds with the remainder of the court. In the earlier decision of *R v Swaffield; Pavic v The Queen*,[5] which dealt with a simpler form of police deception also designed to elicit a confession from a suspect who had previously exercised their right to silence, he was alone in finding that the confession of Pavic should have been excluded, and was the only member of the court willing to exclude a confession on the basis that the police had exploited a personal relationship between the suspect and the person (such as a friend or family member) by whom the confession was elicited. Subsequently, in *Em v The Queen*, another case involving a covertly recorded confession from a suspect who thought he was speaking "off the record", Kirby J, again in dissent, lamented the fact that the High Court had apparently "shifted its direction" away from "upholding the basic principles of the accusatorial trial; the 'fundamental rule' of the accused's right to silence; and the privilege to speak only after a full and proper police caution is administered".[6] In the very next case delivered after *Em*, *Carr v Western Australia*, Kirby J once again found himself in solitary dissent, preferring a construction of legislation which protected suspects from confessing during informal chats with the police, at the expense of allowing an obviously guilty man to go free. As his Honour observed, the court "should uphold the appellant's rights because doing so is an obligation that is precious for everyone. It is cases like this that test this Court. It is no real test to afford the protection of the law to the clearly innocent, the powerful and the acclaimed."[7]

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4 *Tofilau v The Queen* (2007) 231 CLR 396 at 460-461 [203].

5 *R v Swaffield; Pavic v The Queen* (1997) 192 CLR 159.

6 *Em v The Queen* (2007) 232 CLR 67 at 136-137 [238].

7 *Carr v Western Australia* (2007) 232 CLR 138 at 188 [170].

Concern with the protection of suspects from improper policing is also manifested in his Honour's judgments in three cases – including *Carr* above – dealing with statutory recording legislation. This legislation, which varies in its detail from jurisdiction to jurisdiction, typically renders inadmissible a confession made to investigating officials such as the police unless it has been video- or tape-recorded. The aims of such legislation are to eliminate the problem of police "verbals", where the police falsely claim that the accused made a verbal confession which he or she subsequently refused to confirm in writing – and to provide a reliable record of precisely what the accused said. The issue of police "verbals" was highlighted by the Australian Law Reform Commission's report on *Criminal Investigation*.[8] The wording of the legislation, however, often leaves lacunae, situations where, depending on the interpretation given to it, a confession or admission made to an investigator – for example, during a break in questioning, or after its completion – may fall outside the scope of the recording requirement. Courts interpreting such legislation can either take a literal approach, which, according to Kirby J, "perpetuates the very mischief which [the provisions] were intended to prevent",[9] namely police verballing; or they can take a broad, purposive approach, which gives the legislation "a construction that ensures that it responds to the problem, so far as language permits".[10]

A PURPOSIVE APPROACH

Needless to say, Kirby J has generally preferred the purposive approach to construction, as he has in other cases. *Bull v The Queen* concerned the correct construction of some rape shield legislation. This legislation, which exists in different forms in all Australian jurisdictions, is generally designed "to prevent reasoning from stereotypes and unjust or irrelevant humiliation of complainants",[11] a purpose which it achieves primarily by placing limitations on the defence use of evidence of the complainant's sexual history, disposition, reputation or experience. The evidence in that case concerned a claim by one of the accused that the complainant had mentioned her sexual fantasies prior to her coming to the house at which she was allegedly raped; Kirby J held that the evidence was admissible because it was not "evidence of the *general* stereotyped kind which the sections are designed to exclude".[12]

Justice Kirby's reluctance to endorse reasoning from stereotype is more strongly evident in his judgment in *Osland v The Queen*, a case

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8 Australian Law Reform Investigation, *Criminal Investigation* (ALRC 2, 1976): http://www.austlii.edu.au/au/other/alrc/publications/reports/2/2.pdf (accessed 28 October 2008).

9 *Nicholls v The Queen* (2005) 219 CLR 196 at 278 [220].

10 *Kelly v The Queen* (2004) 218 CLR 216 at 265 [148].

11 *Bull v The Queen* (2000) 201 CLR 443 at 482 [133].

12 (2000) 201 CLR 443 at 486 [150] (emphasis in original).

which attracted significant media coverage because of the fact that the accused, who was charged with murdering her husband, claimed that the killing was a response to his abuse. His Honour spent a significant portion of his judgment dealing with "battered woman syndrome" evidence, noting that it tended to "reinforce stereotypes"; that it was restricted first to women, and secondly to married women, thereby excluding the possibility of analogous issues of dependence and abuse which might arise in same-sex relationships, and with unmarried partners; that it excluded forms of abuse other than physical violence; and that it was based "largely on the experiences of caucasian women of a particular social background".[13] Rather than simply admitting evidence based on the "battered woman syndrome" stereotype, the "court should focus its attention upon the relevance, if any, to the conduct of the particular accused of evidence explaining commonly observed responses of people living in an abusive relationship of dependency".[14] Justice Kirby's insistence on this is another manifestation of his commitment to the individual, in all his or her individuality.

Of course, it is not only defendants whose rights may need to be protected by the courts; there is also the victim of an alleged crime, most notably the complainant in a sexual offence trial. The balance between the two can be difficult to strike. In *Farrell*, the issue concerned the admissibility of certain psychiatric evidence relevant to the credibility of the complainant. Justice Kirby observed that the "law could not condone removing its protection from the complainant simply because his past history suggested a tendency sometimes to distort, to confuse and to lie".[15] Just as in *Bull*, however, his concerns for the protection of a complainant in a sexual offence trial were trumped by his determination to ensure that the accused received a fair trial. In *Farrell*, this meant admitting evidence which showed that "the complainant was manifesting symptoms of an established psychological condition". The general rule – that "expert evidence on the ultimate credibility of a witness is not admissible"[16] – had, therefore, to be qualified.

An awareness of the injustice which can be caused by "adhering rigidly" to a common law rule, was also shown by Kirby J in relation to the collateral evidence issue in *Nicholls v The Queen*. In *Nicholls*, the prosecution case critically depended on the evidence of a single witness, Davis. There was evidence, however, that Davis had repeatedly stated that the evidence he would give was false; this evidence was probably inadmissible, because of the collateral issues rule, a particular manifestation of the general rule excluding evidence relevant only to the credibility

13 *Osland v The Queen* (1998) 197 CLR 316 at 370 [158]-[161]. See I Freckelton and H Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (4th ed, Lawbook Co., Sydney, 2009).

14 *Osland v The Queen* (1998) 197 CLR 316 at 373 [162].

15 *Farrell v The Queen* (1998) 194 CLR 286 at 300 [28].

16 (1998) 194 CLR 286 at 300 [29]. See also Freckelton and Selby, n 13.

of witnesses. This evidence, in the context of the case, was "so clearly relevant and important to the central issue for trial that a rational system of evidence law would permit the testimony to be placed before the ultimate decision-maker, the jury".[17] Justice Kirby deplored the technicality of the current rules, and emphasised the need for the rules which trial judges must apply to be clear and simple. As he commented in the rape shield case discussed above:

> Appellate courts should not forget that rulings on the tender of such evidence must be made in the midst of criminal trials without the luxury of lengthy cogitation, analysis of case books or scrutiny of the second reading speeches of those who introduced the legislation in question.[18]

THE LIMITS OF CHANGE

In *Nicholls*, however, Kirby J declined to embark on the "significant task of law reform" which would be needed to create a simpler and more rational set of credibility rules, noting that the Australian Law Reform Commission had recently conducted a major review of evidence law, and that the report had already been adopted in several jurisdictions, and was under consideration for adoption in several others.[19] Deference to Parliament, and the process of parliamentary law reform, has also been a feature of Kirby J's approach in cases dealing with the law of privilege.

In *Esso Australia Resources Ltd v Federal Commissioner of Taxation*, Kirby J refused to join the majority of the High Court in overruling its previous decision in *Grant v Downs*[20] that communications between a client and his or her legal adviser were only privileged if they had been made for the *sole* purpose of enabling the client to receive legal advice, or in relation to anticipated or pending litigation. He commented that "[i]t is one thing for a court to act to repair defects in the common law where legislators have failed to act. It is quite another to intrude and change the established common law when relevant legislative change has been proposed and, in part, has already been adopted."[21] But this was not the only reason Kirby J gave for refusing to join the majority in replacing the sole purpose test with a dominant purpose test, which would inevitably render more communications privileged, and therefore immune from production.

Justice Kirby had previously expressed his concern that:

> a brake on the application of legal professional privilege is needed to prevent its bringing the law into "disrepute", principally because it

17 *Nicholls v The Queen* (2005) 219 CLR 196 at 272 [202].

18 *Bull v The Queen* (2000) 201 CLR 443 at 483 [136].

19 *Nicholls v The Queen* (2005) 219 CLR 196 at 273 [204].

20 (1976) 135 CLR 545.

21 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 89 [105].

> frustrates access to communications which would otherwise help courts to determine, with accuracy and efficiency, where the truth lies in disputed matters.[22]

To that concern he added another – that "the dominant purpose test is, of its nature, more likely to advantage corporations and administration at the cost of ordinary individuals".[23] And, given that, according to Kirby J, the rationale for legal professional privilege "is founded upon a notion of fundamental human rights", the idea of expanding it to benefit corporations had little merit: "Corporations and administration are not, as such, entitled to fundamental human rights. If anything, the human right of equal access to the courts argues against an expansion of privilege which, as a matter of practicality, will diminish such right, or at least its utility."[24] Given the importance of the privilege to the protection of human rights, however, it is no surprise that Kirby J has insisted on clear statutory language before being willing to concede that the privilege might have been abrogated, even in cases where the claimant of the privilege happened to be a corporation.[25]

THE COURTS AS PROTECTORS

Respect for the power of Parliament is thus balanced with the need to protect fundamental human rights. Striking this balance can be fraught when a person claims, convincingly, that Parliament's laws have occasioned a miscarriage of justice. In his first year on the High Court, Kirby J was part of a panel considering whether or not to hear a pair of convicted child sex abusers who argued that they had been denied a fair trial when the rape shield law in New South Wales[26] – one of the world's strictest – prevented them from claiming that their respective accusers had histories of false abuse allegations. The majority refused leave to appeal, expressing outrage at the suggestion that a court could pronounce that a valid statute caused a trial to be unfair. But Kirby J thought the defendants' argument had merit:

> Parliament has its rights which courts will respect, but courts have their rights which Parliament respects. The courts' rights are to ensure, in the individual and particular case as distinct from the generality with which Parliament deals, the fairness of the trial for the particular accused by the application of the law.

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22 *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 581.

23 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 91 [109].

24 (1999) 201 CLR 49 at 92 [111] (emphasis added).

25 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

26 *Crimes Act 1900* (NSW) s 409B (subsequently relocated to *Criminal Procedure Act 1986* (NSW) s 293).

As he also rather pithily put it, "fairness is not 'up there' but in every courtroom of this land".[27]

When Kirby J later identified what he considered to be the nation's three most important criminal justice cases,[28] he eschewed the many landmark Australian judgments on policing, criminal responsibility, evidence and punishment in favour of three rulings on trial procedure from the golden era of the Mason court (which also yielded *Mabo* and freedom of political communication). In its 1992 decision, *Dietrich v The Queen*, a majority of the High Court held that, where a defendant facing serious criminal charges lacks legal representation through no fault of his or her own, trial judges typically must stop the trial.[29] The foundation for this ruling was the courts' general obligation to ensure that trials are fair. This duty is the basis not only for many of Kirby J's own criminal appeal judgments but also for the two other criminal justice decisions he deemed most important.

The Mason court's *McKinney* judgment was the High Court's boldest attempt to prompt the entire executive branch of government to take steps to ensure that Australian criminal trials are fair.[30] Responding to rising concerns about police verballing, a majority ruled that juries must be warned against accepting uncorroborated police evidence that a suspect confessed in custody. The court's real goal, to prompt Australia's governments to immediately mandate and fund tape recording of all custodial interrogations, was successful everywhere except for Western Australia, which held out for a further four years.[31] In 1997, Kirby J was part of a High Court panel that refused to hear a complaint from Andrew Mallard, who made a bizarre confession to a Perth murder during this period. In his second year on the High Court, Kirby J doubted that there was any real miscarriage of justice, because Mallard's third interview, which was taped, included factual details that matched independent evidence about how the murder occurred.[32] Eight years later, the case returned to the High Court after new evidence emerged suggesting that these details, some of which now appeared to be incorrect, had been fed to Mallard by the police during the earlier unrecorded interviews. This time, the court recognised the injustice and quashed the conviction.[33]

27 *Grills v The Queen; PJE v The Queen* (transcript, application for special leave to appeal, 9 September 1996).

28 The comments were made in an untranscribed portion of a 2001 speech at the University of Melbourne to mark the publication of Bronitt and McSherry's *Principles of Criminal Law* (Lawbook Co., Sydney, 2001). Justice Kirby has kindly recently confirmed (by email, kept on file by the authors) the recollections of Jeremy Gans (who was in the audience) of what he said on this topic.

29 *Dietrich v The Queen* (1992) 177 CLR 292.

30 *McKinney v The Queen* (1991) 171 CLR 468.

31 The *Acts Amendment (Jurisdiction and Criminal Procedure) Act 1992* (WA), inserting s 570D into the *Criminal Code* (WA), was enacted but not proclaimed until 1996.

32 *Mallard v The Queen* (transcript, application for special leave to appeal, 24 October 1997).

33 *Mallard v The Queen* (2005) 224 CLR 125.

(Mallard was soon completely cleared of the murder.) In a separate judgment, Kirby J excoriated the prosecutor's failure to disclose this evidence earlier, noting that prosecutors represent "not an ordinary party but the organised community committed to the fair trial of criminal accusations and the avoidance of miscarriages of justice".[34]

The third Australian criminal justice decision feted by Kirby J, *Longman v The Queen*, is, by contrast, concerned with the obligations of the judicial branch.[35] The High Court was asked to clarify the directions that a judge should give in rape trials, in light of a statute overturning the law on corroboration as it applied to rape complainants. The judges, while criticising the old law's stereotyping of all complainants as untrustworthy, held that jurors must still be given any warning that is called for by the facts. This included the case before the court, where a woman's claim that her stepfather twice touched her genitals while she half-slept emerged over two decades later. The court held that the trial judge should have warned that convicting on the basis of the complainant's word alone was dangerous, because the long delay meant that her claims could not be adequately tested. Justice Kirby would later state a general principle that the contents of the judge's instruction to the jury are "ultimately determined by the judicial obligation to ensure that the accused secures a fair trial".[36]

During his time on the New South Wales Court of Criminal Appeal, Kirby J in fact championed a different and arguably contrary approach to jury directions, stating that "it would be highly desirable if judicial commentary upon facts were briefer than it has lately tended to become".[37] Noting that High Court decisions required judges to assist jurors on factual matters, he expressed the view that "judges should move (as far as the law permits) to a much briefer exposition of the facts", adding, "[t]he longer the exposition, the greater the peril of mistake or imbalance".[38] Indeed, he mooted the desirability of the United States practice, where judges' instructions are routinely (and sometimes constitutionally) confined to the law, not the facts.[39] The American approach, reflecting that nation's famous distrust of officials, leaves factual arguments and analysis to the duelling attorneys and to the jury. Although eschewing this "large question"[40] until a suitable case arose, Kirby J cited the dangers of long directions as a reason why "[a]ppellate courts,

34 (2005) 224 CLR 125 at 156.

35 *Longman v The Queen* (1989) 168 CLR 79.

36 *Tully v The Queen* (2006) 230 CLR 234 at 249 [46].

37 *R v Yildrimtekin* (unreported, NSW Court of Criminal Appeal, 5 September 1994).

38 *R v Yildrimtekin* (unreported, NSW Court of Criminal Appeal, 5 September 1994).

39 *R v Finn* (1988) 34 A Crim R 425 at 432; *R v Reynolds* (unreported, NSW Court of Criminal Appeal, 25 August 1994). See, eg, 23A, *CJS Criminal Law* §1752; 75A *Am Jur* 2d, §1014; see also Washington State Constitution Art 4 §16: "Judges shall not charge juries with respect of matters of fact, nor comment thereon, but shall declare the law."

40 *R v Finn* (1988) 34 A Crim R 425 at 432.

with their 'more deliberate atmosphere', must not overlook the practical circumstances of the trial, the role of counsel's addresses and the capacity of the jury to remember the evidence and to see it in its entirety".[41] In saying this, he rejected criticisms directed at a jury instruction on identification evidence in a trial of one of New South Wales's highest profile crimes, the shooting of notorious hitman, Christopher Flannery, holding that any lack of specificity in the warning was inconsequential in light of the strength of the evidence against Flannery's gangland rival, Tom Domican.

In his second year on the High Court, Kirby J repeated these views in a dissenting judgment rejecting the argument of a defendant in a child sexual offence case that a judge's direction on the dangers of delay lacked the specificity demanded by *Longman*.[42] Three years later, he gathered together a majority of judges to declare that "[o]ften, perhaps more often than not, the safer course for a trial judge will be to make no comment on the facts beyond reminding the jury … of the arguments of counsel."[43] In that judgment, *RPS v The Queen*, the High Court wound back a line of cases arising from a Mason court ruling permitting trial judges to invite jurors to reason that a defendant's failure to explain prosecution evidence meant that he or she had no explanation for it.[44] However, other cases made it clear that Kirby J's willingness to restrict factual comments to juries was now limited to directions that favour the prosecution. What trial judges should avoid is "[t]o attempt to instruct the jury about how they may reason towards a verdict of guilt".[45]

The distinct view that Kirby J came to hold about directions that favour the defence was set out the following year in *Doggett v The Queen*.[46] The case was similar to *Longman*, in that it involved a gap of over a decade between alleged child sex offences and a complaint to the police. However, it also differed from *Longman* as the evidence included a much more recent recorded phone conversation where the defendant acknowledged to the complainant that the alleged abuse was "terrible" and that he was "sorry the whole thing happened". In addressing the argument that the trial judge should have warned the jury about the disadvantages flowing to the defence because of the long delay, Kirby J again called for the obligatory component of jury directions to be limited to legal issues and, in particular, he decried the giving of "warnings … unrelated to the evidence of the particular circumstances of the case". However, he added a crucial caveat: "such matters of approach have themselves to be considered in the context of the judge's overriding duty

41 *R v Domican (No 3)* (1990) 46 A Crim R 428 at 446.
42 *Jones v The Queen* (1997) 191 CLR 439 at 462–464.
43 *RPS v The Queen* (2000) 199 CLR 620 at 637 [42].
44 *Weissensteiner v The Queen* (1993) 178 CLR 217.
45 *RPS v The Queen* (2000) 199 CLR 620 at 637 [43].
46 (2001) 208 CLR 343.

to ensure the fair trial of the accused."[47] Setting out the decisive ruling in a sharply divided High Court, he held that the *Longman* warning about delayed complaints was no less important in a trial where there was other more recent evidence against the defendant, because the obligation to ensure that a trial was fair must be applied on the assumption that any evidence might sway a jury.[48] Justice Kirby's transformation on this issue is made clear not only by the practical impact of this ruling – effectively requiring mandatory warnings on factual matters in any trial where dangerous prosecution evidence is adduced – but also by his citation of *Domican*, where the Mason court had rejected his own earlier ruling that a trial judge's duties depended on the practicalities of the evidence and arguments in each trial.[49]

STRIKING A BALANCE

Standing up for fairness to criminal defendants is not – or at least should not be – controversial, but Kirby J's stance on jury directions has some eye-opening elements. One is that the quite different approach taken to prosecution and defence evidence carries the risk that trial judges' factual comments may tend to lack balance. While imbalance was, of course, one of the reasons Kirby J once favoured the American minimalist approach, his current view is that warnings about the dangers of prosecution evidence are "an element of the balance required by law".[50] In *Crampton v The Queen*, he explained that "[t]he jury need the assistance of the trial judge to warn, from the law's long experience, that trials with such potentially grave consequences for liberty and reputation need to be fought with forensic weapons."[51] The High Court in *Crampton* unanimously held that the necessary "assistance" went well beyond merely describing the relevant problems to the jury. Rather, trial judges must warn jurors, in "an unmistakable and firm voice" of the "danger" of convicting "without the closest scrutiny" of the impugned evidence. In addition, they must eschew comments that may qualify the warning, such as alluding to other evidence that diminishes the danger described.[52] This prompted one senior New South Wales judge to characterise the required direction as "in fact sending a none-too-subtly coded indication to the jury that the dangers of convicting are such that the jury ought to return a verdict of not guilty".[53] While the complaints of judges on Kirby J's former court, the New South Wales Court of Criminal Appeal, that *Crampton* and *Doggett* had reduced

47 (2001) 208 CLR 343 at 373-374 [115]-[118].
48 (2001) 208 CLR 343 at 383 [150].
49 *Domican v The Queen* (1992) 183 CLR 555, cited at (2001) 208 CLR 343 at 383 [150].
50 *Crampton v The Queen* (2000) 206 CLR 161 at 208 [129].
51 (2000) 206 CLR 161 at 209 [132].
52 (2000) 206 CLR 161 at 181 [45] per Gaudron, Gummow and Callinan JJ; cf at 209 [132] per Kirby J.
53 *R v BWT* (2002) 129 A Crim R 153 at 197 [118] per Wood CJ at CL.

the discretion of trial judges to a "very narrow" margin[54] was simply ignored by the rest of the High Court, Kirby J unapologetically endorsed their observations as "a correct statement of the present law".[55]

The other noteworthy aspect of Justice Kirby's approach to jury directions is its particular application to trials of child sexual offences. The High Court appeals when Kirby J has found that a conviction ought to be quashed due to a trial judge's instruction on the facts being either insufficiently favourable to the defence or too favourable to the prosecution, emanate overwhelmingly from such trials.[56] While this pattern could be explained by coincidence or the nature of cases that reach the High Court, Kirby J has been explicit in viewing child sexual offence charges as requiring particular vigilance on the part of judges with respect to their obligation to ensure that trials are fair:[57]

> That duty is especially important in trials involving accusations likely to arouse strong periods of prejudice and revulsion. Accusations by a young woman, once a step-daughter of an accused, of sexual molestation when she was as young as eight years and up to the age of fifteen years, are of this kind. Trials involving such allegations impose special burdens on judges. They require the taking of particular care in summing up to the jury.

These dangers, and the concerns that Kirby J highlighted in *Crampton* and *Doggett*, were compellingly illustrated by events in the judge's own life. Seven months after the above words were published, Justice Kirby was himself the subject of a false allegation of sexual conduct involving "young male prostitutes".[58] In a telling contrast to the cases he highlighted from the Bench, the main evidence against him, a government car record, could be tested long after the events described and was speedily discredited.[59] If a criticism is to be directed against Kirby J's vigilance in such cases, it is his failure to expressly recognise that the dangers he identifies – prejudice and defendants' inability to effectively test the evidence marshalled against them – are by no means limited to child sexual offence trials.

In a major speech in 2007, Kirby J voiced his concern that key Mason court decisions that have made Australia "a juster, more equal, freer place" would "probably not" have been made by the current court.[60] Both *Dietrich*

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54 (2002) 129 A Crim R 153 at 189 [95] per Sully J (Wood CJ at CL and Dowd J agreeing).

55 *Dyers v The Queen* (2002) 210 CLR 285 at 307 [55].

56 In addition to *RPS*, *Doggett*, *Crampton* and *Tully*, see *Crofts v The Queen* (1996) 186 CLR 427; *BRS v The Queen* (1997) 191 CLR 275; *Gipp v The Queen* (1998) 194 CLR 106; *Robinson v The Queen* (1999) 197 CLR 162; and *Davis v The Queen* (2001) 205 CLR 50.

57 *Doggett v The Queen* (2001) 208 CLR 343 at 374 [118].

58 Australia, Senate, *Parliamentary Debates* (Hansard, 12 March 2002) pp 573-577.

59 Australia, Senate, *Parliamentary Debates* (Hansard, 19 March 2002) pp 944-945.

60 M D Kirby, "Consensus and Dissent in Australia" (10th Annual Hawke Lecture, Adelaide Town Hall, 10 October 2007): http://www.unisa.edu.au/hawkecentre/ahl/2007ahl_kirby.pdf (accessed 28 October 2008) pp 12-13.

and *McKinney* featured on the list, but *Longman* was absent. This is not, of course, because of any lesser significance afforded to that case but rather that, on the question of jury directions in child sexual offences, Kirby J and the Gleeson court are largely at one. The judge's uncharacteristic role as an authoritative voice has brought with it challenges that would be familiar to those on the receiving end of his many dissents. These include the above-mentioned harsh criticisms from judges lower in the hierarchy as well as some stinging remarks from his colleagues.[61] Indeed, Kirby J found himself back in the minority in the most recent case on jury directions, with the majority ruling that some child sexual abuse cases can be safely left to jurors in light of their own experiences, unburdened by a judicial warning.[62] Moreover, and perhaps uniquely in Kirby J's career, several Australian Parliaments, following the recommendations of several law reform commissions,[63] have reversed his rulings, banning the use of the language of warning in delayed sexual offence cases (overturning *Crampton*) and stipulating that delay alone is insufficient to justify any remarks about disadvantages to the defendant (overturning *Doggett*).[64] This backlash may reflect the difference between championing the obligation to ensure that trials are fair, and obliging others to follow a particular brand of fairness. Fairness is not just in the High Court, but rather is "in every courtroom of this land".[65]

61 For example, *Doggett v The Queen* (2001) 208 CLR 343 per McHugh J (Gleeson CJ agreeing).

62 *Tully v The Queen* (2006) 230 CLR 234.

63 Victorian Law Reform Commission, *Final Report: Sexual Offences* (2004) pp 370-384 and Recommendation 170; Australian Law Reform Commission, NSW Law Reform Commission, Victorian Law Reform Commission, *Uniform Evidence Law* (2004) pp 624-628 and Recommendation 18-3 (but cf the dissent of the NSW Law Reform Commission at pp 628-634); Tasmanian Law Reform Institute, *Final Report No 8: Warning in Sexual Offence Cases Relating to Delay in Complaint* (2005) pp 24-29, Recommendation 2.

64 *Crimes (Sexual Offences) (Further Amendment) Act 2006* (Vic), inserting s 61(1A) into the *Crimes Act 1958* (Vic); *Evidence Amendment Act 2007* (NSW), inserting s 165B into the *Evidence Act 1995* (NSW).

65 *Grills v The Queen; PJE v The Queen* (transcript, application for special leave to appeal, 9 September 1996) per Kirby J.

Chapter 15

FAMILY LAW

Richard Chisholm

[W]here, in Australia and like countries … true equality is the principle that the law embraces, it will be important not to overlook the practical facts that most custodial parents are women; women are no longer the adjunct to the lives of their former husband or partner; and once the relationship has irretrievably broken down it is generally in the interests of the children, and of the parties themselves, to find solutions to their ongoing contacts that respect the best interests of the children in a context that upholds the best interests of the parents.[1]

INTRODUCTION[2]

On the High Court Bench, Michael Kirby may have had only "glimpses" of family law from time to time,[3] but he has been involved in many decisions that have helped to shape today's family law. This chapter does not attempt a comprehensive account of his work in family law, but focuses on what seem to be the more important decisions, and those that best exhibit his distinctive qualities.

The decisions that are at the heart of family law are decisions about children. The main issues relating to children that have come before Justice Kirby on the High Court are the International Child Abduction Convention, relocation matters, and children in immigration detention.

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1 M D Kirby, "Family Law and Human Rights" (2003) 17 *Australian Journal of Family Law* 6 at 17.

2 Quoted passages from Kirby J's judgments omit the original citations, unless otherwise specified.

3 M D Kirby, "Opening of Family Law Chambers" (Speech, Family Law Chambers, Sydney, 6 May 2004): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_6may04.html (accessed 17 December 2008); see also (2005) 19 *Australian Journal of Family Law* 3.

THE INTERNATIONAL CHILD ABDUCTION CONVENTION

The International Child Abduction Convention provides a mechanism whereby children wrongfully abducted from one Convention country to another can be swiftly returned to their home country, so that any issues of custody and the like can be determined in that country, and the abductor deprived of any benefit from wrongfully taking the children. In Australia, the substance of the Convention has been enacted in the form of Regulations made under the *Family Law Act 1975* (Cth),[4] and the Australian law is essentially the interpretation and application of those Regulations, read in the light of the Convention. The Regulations provide, in essence, that where the necessary preconditions are established the court *must* make an order for the return of the child; the familiar principle that the child's interests are paramount does not apply in these cases. But there are exceptions, and where they apply the court has a discretion whether to order the child's return.

Two High Court cases explored the scope of two of these exceptions, which were, respectively, that the child objects to being returned, and that making a return order might expose the child to a grave risk of harm. The interpretation of these and other exceptions is of great importance, because too broad a reading of the exceptions would undermine the effectiveness of the Convention (too few children would be returned), while too narrow a reading might entail children being returned in dangerous or otherwise inappropriate circumstances.

In the first case, *De L*,[5] the mother was an Australian who married, and raised two children, in Virginia, United States of America. She returned to Australia with the children, in breach of the father's rights of custody, and the "Central Authority"[6] brought proceedings under the Convention for the return of the children to Virginia. The mother argued that the court should exercise its discretion not to return the children, that discretion being available because the children objected to being returned. At trial, the mother successfully resisted the application to have the children returned, but the Full Court allowed the Central Authority's appeal,[7] and (by majority) ordered that the children should

4 *Family Law (Child Abduction Convention) Regulations 1986* (Cth).

5 *De L v Director General, NSW Department of Community Services* (1996) 187 CLR 640 .

6 The New South Wales Department of Community Services, acting as the "Central Authority" under the regulations.

7 The Full Court unanimously held that the fatal flaw at the trial had been that the court counsellor was asked to provide evidence about the children's *wishes*, as is common in parenting cases, rather than on the legally relevant point of whether the children *objected* to being returned.

be returned to Virginia.[8] The mother appealed to the High Court, which unanimously upheld the appeal and ordered a rehearing.

The main issue was the interpretation of the exception to the effect that the court may refuse to order a child's return where "the child objects to being returned".[9] The majority of the Full Court of the Family Court had said that there should be a "strict and narrow reading" of the exception. Six of the seven High Court justices disagreed, saying in effect that there was no proper basis for doing anything other than giving the words their ordinary meaning: to read the exception narrowly would have been to give the word "objects" an impermissible "gloss".[10]

Justice Kirby disagreed with his colleagues, and in the course of a characteristically detailed and erudite review of the authorities and the policy and background of the Convention, took the view that the word "objects" should not receive a "broad construction"; he held that on the contrary it "imports a strength of feeling which goes far beyond the usual ascertainment of the wishes of the child in a custody dispute".[11] He said he agreed with the approach that "successful objections to an order for return are likely to be few and far between".[12]

Justice Kirby developed his ideas about the Convention in a later decision, *DP and JLM*,[13] comprising two appeals which the High Court heard together, both involving the scope of the "grave risk" exception. In *DP*, the trial judge had ordered the child to be returned to Greece (the argument related to whether sufficient services would be available in Greece for the child, who was autistic). The Full Court of the Family Court had considered that there were flaws in the reasoning, but reached the same conclusion as the trial judge and confirmed the orders. In *JLM*, the trial judge had declined to make a return order, holding that such an order would create a grave risk of psychological harm to the child (because of evidence that the mother might commit suicide). The Full Court had allowed the appeal and ordered the child's return, holding that there was no evidence that the mother would commit suicide rather than return with the child to Mexico and no evidence that she would not return to Mexico with the child.

In both cases the High Court, by a majority,[14] allowed the appeal and remitted the matter for rehearing. The issue of general importance was the approach to the "grave risk" exception. Most of the High Court

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8 Nicholson CJ, dissenting on this aspect, held that the matter should be remitted to the trial judge and a further report obtained relating to the children's objection.

9 Regulation 16(3)(c) (the paragraph also refers to the child having a degree of maturity).

10 In substance, the High Court majority thereby agreed with Nicholson CJ, who had dissented in the Family Court appeal decision.

11 (1996) 187 CLR 640 at 686, quoting Bracewell J in *Re R (A Minor: Abduction)* [1992] 1 FLR 105 at 107-108.

12 (1996) 187 CLR 640 at 687.

13 *DP v Commonwealth Central Authority* (2001) 206 CLR 401.

14 Gaudron, Gummow, Hayne and Callinan JJ; Gleeson CJ (Kirby J dissenting).

justices, including the other dissentient, Gleeson CJ, resisted the idea that the exception should be given a "narrow" construction.[15]

By contrast, Kirby J was more comfortable characterising the construction of the exception as "narrow". He urged that the exceptions had to be construed and applied so that they did not undermine the achievement of the overall objective of the Regulations (and the Convention).[16] He found support for this in international sources. He said that unless Australian courts upheld "the letter of the Convention", "a large international enterprise of great importance for the welfare of children generally" would be frustrated.[17] Characteristically, he developed the argument:

> Because Australia, more than most other countries, is a land with many immigrants, derived from virtually every country on earth, well served by international air transport, it is a major user of the Convention scheme. Many mothers, fathers and children are dependent upon the effective implementation of the Convention for protection when children are the victims of international child abduction and retention. To the extent that Australian courts, including this Court, do not fulfil the expectations expressed in the rigorous language of the Convention and the Regulations, but effectively reserve custody (and residence) decisions to themselves, we should not be surprised if other countries, noting what we do, decline to extend to our courts the kind of reciprocity and mutual respect which the Convention scheme puts in place. And that, most definitely, would not, in aggregate, be in the best interests of children generally and of Australian children in particular.[18]

Although in these two decisions Kirby J was in dissent, his account of the Convention and its intentions, often quoted, has contributed to our understanding of the Convention, its history and its purposes.

RELOCATION CASES

Family lawyers use the term "relocation cases" to refer to those difficult parenting cases where one parent – usually the mother – seeks to take the children to live in a place distant from the other parent, resulting in a diminished opportunity for the children and the other parent to maintain a relationship. In some cases, of course, a parent seeks to relocate in order

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15 (2001) 206 CLR 401 at 407-408 [9] per Gleeson CJ, at 417-418 [41]-[45] per Gaudron, Gummow and Hayne JJ. Gleeson CJ said that it was "unhelpful" to say that reg 16(3)(b) is to be construed narrowly, the problem was one of application, not construction; and the discretion not to make a return order existed only "where there is a grave risk of harm (the gravity being emphasised by the cognate reference to an intolerable situation)", and the onus was on the person opposing return.

16 (2001) 206 CLR 401 at 440 [125].

17 (2001) 206 CLR 401 at 449 [155].

18 (2001) 206 CLR 401 at 449 [155].

to escape violence or abuse, but where this can be established the case may not be difficult to decide.

The most agonisingly difficult cases are those where the children have a good relationship with the other parent (for convenience, that parent will be referred to here as "the father") but the mother has been the primary caregiver, and has good reasons for thinking that the proposed move will have benefits for herself and the children. For example, she may be returning to her extended family, or to a new partner, or to employment unavailable in the place from which she is seeking to relocate. Typically, the relocating mother argues that the children will benefit indirectly from the move, because she, their primary caregiver, will be happier and better off, and better able to care for them. Typically, the father argues that the move will deny the children the benefits of a close relationship with him, and sometimes also with other members of his extended family. Often, the mother will not be prepared to move unless she is allowed to take the children, and so a refusal of her application for permission to relocate the children may mean, in practice, that she herself will be unable to go: hence the references to the mother's "freedom of movement" that surface in the cases, and in the literature.[19] Sometimes the case is complicated by other possibilities: perhaps the father could also relocate to the mother's chosen destination, to keep in touch with the children; perhaps the move could be deferred for a year or two, when the children would be a bit older, or, perhaps, after they have completed a phase of their schooling.[20] But there is rarely a comfortable compromise in these cases: permitting the move will usually be intensely disappointing to the father, and preventing it intensely disappointing to the mother. The task of determining what will be best for the children is also difficult, since the consequences for everybody of either permitting or refusing the relocation will often be multiple, and highly speculative.

The governing principle in these cases is no different from other parenting (formerly "custody") decisions: the children's best interests must be regarded as the paramount consideration. Increasingly, the *Family Law Act* spells out the things to be taken into account in determining what is best for the children,[21] but, as in many jurisdictions, it does not provide specific guidance relating to relocation decisions.

19 Indeed, the topic is somewhat "gendered", with men's groups generally urging restraints on relocation and feminist commentators generally arguing in favour of permitting it, each advancing arguments based to some extent on views about what would benefit children.

20 Another possibility, in some situations, is that the mother's proposed partner might relocate to where the children live, but in Australia the Full Court seems to have ruled that the court cannot take this possibility into account: see *Taylor and Barker* (2007) 37 Fam LR 461.

21 See especially *Family Law Act 1975* (Cth) ss 60B, 60CC.

Internationally, jurisdictions differ.[22] Sometimes legislation provides guidelines or presumptions, either favouring or disfavouring relocation. Some appellate judgments adhere firmly to the view that it is a matter of working out what will be best for the children,[23] while others give such emphasis to the benefits to the child that flow from the mother's happiness and improved circumstances that it seems the court is giving some independent weight to the interests of the relocating parent.[24]

In recent times, the High Court has engaged twice with relocation cases. The first case involved a number of constitutional and technical issues that do not need to be explored here.[25] In their judgments, however, Kirby and Gaudron JJ each touched on a fundamental question by saying that the child's interests were the paramount, "but not the only", consideration, leaving it unclear whether trial courts could legitimately give any independent weight to the rights, or interests, of the relocating parent. Justice Kirby returned to this issue in the second case, *U v U*.[26] In brief, the trial judge had refused the mother's application to relocate the children to India, and the Full Court of the Family Court had dismissed the mother's appeal. The High Court also dismissed her appeal, but by a majority. Justices Kirby and Gaudron dissented. Much of the debate in the High Court related to the way the trial judge had analysed the issues and identified the competing proposals. It was common ground in the High Court that the court is not limited by the parties' proposals, although fairness requires that if the court is considering other options it must give the parties an opportunity to deal with them.

The main interest of the case for present purposes is Kirby J's approach to the principle that the child's best interests must be the paramount consideration. Justice Kirby favoured the approach of the English Court of Appeal,[27] and gave a great deal of weight to the argument that the mother's unhappiness, if the relocation were refused, would have harmful consequences for the child. He also stressed the value of electronic and web-based forms of communication in maintaining a

22 For a detailed review of the issues and of overseas developments, see *Relocation Report* (Family Law Council, May 2006): http://www.ag.gov.au/www/agd/agd.nsf/Page/FamilyLawCouncil_Publications_ReportstotheAttorney-General_RelocationReport (accessed 13 October 2008).

23 For example, California: *In re the Marriage of Burgess* 913 P 2d 473 (1996); *In re Marriage of LaMusga* 32 Cal 4th 1072; 88 P 3d 81; 12 Cal Rptr 3d 356 (2004) (Supreme Court of California); Canada: *Gordon v Goertz* (1996) 134 DLR 4th 321 (Can); New Zealand: *D v S* [2001] NZCA 374.

24 For example, the United Kingdom: *Payne v Payne* [2001] 2 WLR 1826; and see the dissenting judgments of L'Heureux-Dubé J in *Gordon v Goertz* (1996) 134 DLR 4th 321 (Can); and Abella J in *McGuyver v Richards* (1995) 11 RFL (4th) 433. The decision in *Payne* is sharply criticised by Emeritus Professor Mary Hayes in "Leaving the Loved: Children of a Shrinking World: A 21st Century Dilemma" (2007-2008) 20 *Australian Family Lawyer* 25.

25 *AMS v AIF* (1999) 199 CLR 160.

26 *U v U* (2002) 211 CLR 238.

27 *Payne v Payne* [2001] 2 WLR 1826.

relationship between a child and a parent. Justice Kirby's sensitivity to the way decisions about children impinge on the lives of parents and others is evident in this judgment; this sensitivity seems to have led him to a rather complex position about the paramountcy of the child's best interests, one subtly different from the approach of the majority. Although the limited number of suitable children's cases coming to the High Court has made it impossible to know how Kirby J might have developed his ideas about the operation of the paramount consideration principle, his judicial and extrajudicial writings on relocation cases make it reasonably clear that he tended towards the view that would generally favour the courts allowing relocations.[28] Thus he wrote in 2003:[29]

> In different societies, where family law is still patriarchal, there will be no great difficulty about cases of this kind. There will be few hard choices to be made. But where, in Australia and like countries, that approach has been overthrown and true equality is the principle that the law embraces, it will be important not to overlook the practical facts that most custodial parents are women; women are no longer the adjunct to the lives of their former husband or partner; and once the relationship has irretrievably broken down it is generally in the interests of the children, and of the parties themselves, to find solutions to their ongoing contacts that respect the best interests of the children in a context that upholds the best interests of the parents.

CHILDREN IN IMMIGRATION DETENTION

Under the *Migration Act 1958* (Cth), asylum-seekers who fail to obtain visas are characterised by the Act as "illegal non-citizens", and are liable to be held in detention until they are "removed" (that is, deported) from Australia, or granted a visa that allows them to stay here. In the 1990s and early 2000s many such families challenged adverse decisions in the Immigration Tribunal and then in the Federal Court, and sometimes in the High Court. One would not expect the issues relating to mandatory detention under the *Migration Act* to come to the Family Court, and for a long time they did not. Then, in a novel approach for Australia,[30]

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28 See in particular *U v U* (2002) 211 CLR 238 at 280-282 [149]-[159], and at 243 [16]: "Of course, the child … would wish to maintain regular physical face to face contact with her father, who … was most loving and attentive. But if excessive weight were to be given to this consideration (important as it is) it would be given at too high a price both in terms of the impact of its consequence on the wife and, thereby in the long term, on the child herself".

29 M D Kirby, "Family Law and Human Rights" (2003) 17 *Australian Journal of Family Law* 6 at 17. In the same article he expressed a preference for what has been called the "weak" view of the principle, one which gives some separate weight to interests other than those of the child.

30 The issue had arisen in the UK: *R v Secretary of State for Home Department; Ex parte T* [1995] 1 Fam Law R 293; *Re Mohamed Arif (An Infant)* [1968] Ch 643; *Re A (A Minor) (Wardship: Immigration)* [1992] 1 Fam LR 427.

in a series of cases in 2002-2003,[31] some families applied to the Family Court. They argued that provisions of the *Family Law Act 1975* entitled the court in effect to order the release of children from immigration detention. Broadly speaking, the arguments started from the proposition that the children's detention was illegal – not sanctioned by the *Migration Act* – and that the Family Court had jurisdiction to order their release: such a release would promote their best interests, and this should be decisive, because under the Act their best interests were to be regarded as the "paramount consideration".

A number of these cases came before me when I was on the Family Court. They involved the most distressing circumstances for the children I ever encountered on the Bench.[32] I cannot imagine that any judge would not have been moved and distressed by the situation of these children, and would not have wished to reduce their suffering by ordering their release. Ordinary compassion, and the familiar principle of the paramountcy of the child's best interests, pointed that way. But did the law allow the Family Court to make such an order?

In the case that was to end in the High Court, *B and B v Minister for Immigration and Multicultural and Indigenous Affairs* (*B and B v MIMIA*),[33] the Full Court said "yes". Two teenage boys applied to the Family Court for orders that the Minister release them from an immigration detention centre, arguing that their continuing detention was harmful to their welfare. In October 2002, the trial judge (Dawe J) delivered a carefully-reasoned decision holding that the Family Court had no jurisdiction to make orders in respect of children held in immigration detention, and accordingly dismissed the application. The Full Court (Nicholson CJ, Ellis and O'Ryan JJ) unanimously upheld the appeal, holding that there was such jurisdiction, and ordered a retrial.[34] The complex judgments ranged over a variety of legal issues, including the scope of s 67ZC of the *Family Law Act* (the "welfare" provision) and a number of related jurisdictional matters. In particular, Nicholson CJ and O'Ryan J in a joint judgment (with which Ellis J partly disagreed) held that if the detention of children were illegal, orders could be made releasing them from detention, and that in any case, there was scope for the court to make orders making directions about how the children should be treated

31 *KN v SD* (2003) 30 Fam LR 394 per Nicholson CJ, Ellis and O'Ryan JJ, followed by Rose J in *R v Minister for Immigration and Multicultural and Indigenous Affairs* (Sy 4075/2003, 7 August 2003); *HR v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 31 Fam LR 123; *AI and AA v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FamCA 943 per Chisholm J.

32 See, eg, the facts in *HR v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 31 Fam LR 123; see also *AI and AA v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FamCA 943 per Chisholm J; and *KN v SD* (2003) 30 Fam LR 394 per Nicholson CJ, Ellis and O'Ryan JJ.

33 (2003) 199 ALR 604.

34 *B and B v MIMIA* (2003) 199 ALR 604.

while they remained in detention. On the question of illegal detention, Nicholson CJ and O'Ryan J relied on *Al Masri*,[35] a decision of the Federal Court to the effect that where the facts showed that the detention was indefinite, it therefore fell outside the proper purposes of the *Migration Act* and was illegal.

Although there had been later developments in the *B and B v MIMIA* case by the time it was heard by the High Court,[36] the appeal heard by the High Court was from the Full Court's determination that the Family Court had jurisdiction to order the children's release, and that the matter should be remitted for rehearing. The High Court upheld the appeal, unanimously holding that the Family Court could not make orders for the release of the children.[37] Although all justices reached the same conclusion, Kirby J did so on a very different basis from that of his colleagues. All six other justices held that there was no jurisdiction under the *Family Law Act* to order the children's release, essentially because the court was limited to making orders that had to do with parents' responsibilities, despite the wide words of s 67ZK: "In addition to the jurisdiction that a court has under this Part in relation to children, the court also has jurisdiction to make orders relating to the welfare of children."

By contrast – a phrase often required when introducing one of his judgments – Kirby J based his conclusion on the view that the children's detention was not shown to be illegal, and the terms of the *Migration Act* were unequivocal and must be applied, even if they involved a breach by Australia of its international obligations. He expressed no view on the other family law jurisdictional issues.

Justice Kirby started with the "intuitive" response[38] that it seemed doubtful that the Family Court of Australia, exercising jurisdiction under the *Family Law Act*, would have jurisdiction to decide the validity of the detention of alien children under the *Migration Act* and would have the power to make orders directing the Minister and federal officials to release them for reasons of their welfare, given that the *Migration Act* required them to detain the children. The *Migration Act* established

35 *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 197 ALR 241. In a later decision, however, the High Court by a majority in effect overruled that decision: *Al-Kateb v Godwin* (2004) 219 CLR 562 per Gleeson CJ, Gummow J (Kirby J dissenting).

36 At the retrial, the trial judge was not persuaded that the orders sought on behalf of the children would have been in their interests, and he therefore refused the application. The Full Court, however, upheld an appeal, and ordered that the children be released (as indeed they were): *B and B v MIMIA (*unreported, Kay, Coleman and Collier JJ, 25 August 2003).

37 *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365.

38 Justice Kirby's judgments typically expose his reasoning clearly and frankly, and he has written extrajudicially about the process of decision-making, and the part played by the judge's values and assumptions: see, eg, M D Kirby, "Judging: Reflections on the Moment of Decision" (Speech, Fifth National Conference on Reasoning and Decision-making, Wagga Wagga, 4 December 1998): http://www.highcourt.gov.au/speeches/kirbyj/kirbyj_charles.htm (accessed 13 October 1008).

"a highly detailed and complex scheme for the determination of the rights and obligations" of "non-citizens" present in Australia, and made no relevant distinction between adults and children. Kirby J referred to this as the central problem in the appeal, and explained convincingly why the court should deal squarely with this issue, rather than decide the case on complex technical issues about the scope of jurisdiction generally under the Act.[39]

The judgment of Justice Kirby ranged widely over the provisions of the *Migration Act*, and aspects of international law. Importantly, he referred to the conclusion of the United Nations Human Rights Council that Australia had not demonstrated that less intrusive measures could not have achieved the same end of compliance with the state party's immigration policies, and that the mandatory detention of the children (and of their mother as their carer) was in violation of Australia's international obligations under the *International Covenant on Civil and Political Rights*[40] and also, probably, under the *United Nations Convention on the Rights of the Child*.

According to Justice Kirby, establishing a breach of international law was relevant to the court's task, but not the end of it. He posed the question whether such a breach of international law would sustain a reading down of the language of the detention provisions of the *Migration Act*, or instead would "involve an impermissible defiance by the courts of the clear requirements of valid Australian federal law". We can probably assume that he was less than happy to conclude, as he did, that the latter was correct. The language of the *Migration Act* was "intractable" and could not be "read down" to avoid any problems created by obligations derived from international law. Further, certain public reports[41] demonstrated that the Parliament fully intended what the Act said: it had evidently rejected pleas to distinguish between the detention of children and the detention of adults. It was, therefore, "impossible to draw any inference other than that the Australian Parliament intends a system of universal mandatory detention of unlawful non-citizen arrivals to remain in force, including in respect of children".

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39 Family lawyers, struggling to understand the complex reasoning of the other justices relating to jurisdiction, would probably wish that they also had adopted the approach of Kirby J, who said: "I prefer to chart the metes and bounds of the jurisdiction and powers of the Family Court in welfare cases in a more normal case where the welfare of children is invoked without the complications presented in this case by the detention of the respondent children under the *Migration Act*."

40 UNHRC, Views, Communication No 1069/2002: UN Doc CCPR/C/79/D/1069/2002 (29 October 2003) at [9.3].

41 Australia, Human Rights and Equal Opportunity Commission, *Those who've come across the seas: Detention of unauthorised arrivals* (HREOC Report, 1998); Australian Parliament, Joint Standing Committee on Migration, *Asylum, Border Control and Detention* (Senator J McKiernan, Chairman, February 1994).

Justice Kirby concluded this discussion with a ringing statement of legality:

> Mandatory detention of unlawful non-citizens who are children is the will of the Parliament of Australia. It is expressed in clear terms in ss 189 and 196 of the Migration Act. Those sections are constitutionally valid. In the face of such clear provisions, the requirements of international law … cannot be given effect by a court such as this. This Court can note and call attention to the issue. However, it cannot invoke international law to override clear and valid provisions of Australian national law. The Court owes its duty to the Constitution under which it is established. Pursuant to the Constitution, all laws made by the Parliament of the Commonwealth are "binding on the courts, judges, and people of every State and of every part of the Commonwealth". Those laws must be obeyed and enforced, whenever they are valid and their obligations are clear and applicable. They cannot be ignored or overridden, least of all by this Court.[42]

He added that on the facts, the detention of the children was not even arguably permanent or indefinite. Though it had lasted a long time, the period of detention "had a clear terminus": either the "voluntary election of the children (through their parents) to leave Australia" or "the completion of the legal proceedings brought by the parents on the children's behalf, with necessary consequences for the status of the children". Despite the breach of Australia's international obligations, under the relevant Australian law, the *Migration Act*, the children were lawfully detained; indeed, their detention was "obligatory". The conclusion, for Kirby J, was inevitable: whatever powers the Family Court has under its welfare jurisdiction, they "cannot be invoked to oblige contravention of the constitutionally valid legislative scheme of mandatory detention contained in the *Migration Act*".[43]

PARAMOUNTCY OF CHILDREN'S INTERESTS AND INCONSISTENCIES BETWEEN TERRITORY AND FEDERAL LAW

Northern Territory v GPAO[44] required the court to consider the paramountcy principle in connection with an apparent clash between the *Family Law Act* and a Territory law. In child proceedings, a party had a subpoena directed to the Territory child welfare authority, requiring it to produce its file relating to the child. The Territory objected on the basis that a Territory law prohibited the production of such documents in a court

42 *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 at 425 [171].

43 (2004) 219 CLR 365 at 427 [177].

44 *Northern Territory of Australia v GPAO* (1999) 196 CLR 553.

"except for the purposes of this Act".[45] Was this provision invalid for inconsistency with the *Family Law Act*, under which the child's best interests was the paramount consideration? The other High Court justices held that it was not, partly because the provision that made the child's best interests paramount, s 65E, was "directed to the final stage of the exercise by the court of its jurisdiction in proceedings for a parenting order".[46] Justice Kirby was the sole dissenter on this point, holding that there was an inconsistency, and that the federal law must prevail.[47]

The issues are too technical to pursue here, but it is notable that Kirby J's view was based firmly on the family law context. He did not accept his colleagues' view that the obligation to treat the child's best interests as paramount arose only "at the end stage of the hearing" (that is, at the point when the court is deciding what orders to make). He argued that on his colleagues' view, evidence relevant to the best interests of the child might be unavailable to the court, and "the best interests of the child, mandated by the Act as the paramount consideration", would not then govern the decision. This, he thought, would be wrong. Justice Kirby said that his own analysis, that the paramountcy principle applied to the proceedings more generally, "upholds federal law and assures to the Family Court the powers to perform the functions committed to it by federal law".[48] Typically, in support of his position Kirby J drew not only on a detailed analysis of the underlying issues in family law (including the relationship between federal and State/Territory laws about children),[49] but on international law, referring to the *United Nations Convention on the Rights of the Child* and the principle that any ambiguity in the legislation should be construed "in a way that would uphold international law and ensure Australia's conformity with it".[50]

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45 *Community Welfare Act 1983* (NT) s 97(3).

46 Section 65E provided: "In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration." The consequences of the legislative drafting that limited the application of the paramountcy principle to specific matters were discussed in the Family Law Council's *Letter of Advice on the "Child Paramountcy Principle" in the Family Law Act 1975* (2006): see above, n 22.

47 Because it was a Territory law, s 109 of the *Constitution* did not apply, but Kirby J explained that similar principles applied, and that the federal law must prevail to the extent of any inconsistency: *Northern Territory of Australia v GPAO* (1999) 196 CLR 553 at 636-638 [219]-[223].

48 The late Dr Peter Nygh, a former judge of the Family Court, agreed with Kirby J, writing that the ultimate result of the "fragmented approach" of the majority might not be in the best interests of the child, and that the majority's position appeared to contradict an earlier High Court decision, *CDJ v VAJ* (1998) 197 CLR 172: P Nygh, "Northern Territory of Australia v GPAO" (1999) 13 *Australian Journal of Family Law* 170.

49 *Northern Territory of Australia v GPAO* (1999) 196 CLR 553 at 634-635 [214].

50 (1999) 196 CLR 553 at 642 [232].

THE PARAMOUNTCY PRINCIPLE AND THE RECEPTION OF FRESH EVIDENCE ON APPEAL

The relationship between the paramountcy principle and procedural fairness arose in *CDJ v VAJ*.[51] After the completion of the parenting matter, the mother appealed, seeking to lead new evidence, some of which had been and some of which had not been available at the hearing. The Full Court admitted the evidence and allowed the appeal, ordering a rehearing. The father appealed to the High Court, arguing that the Full Court was wrong to admit the evidence. The key issue was whether in parenting cases the principles for the reception of fresh evidence on appeal were the ordinary common law principles applicable in civil proceedings[52] or were different, because of the paramountcy principle.

The High Court agreed with the Full Court that because of the paramountcy principle, the right approach was not governed by the ordinary civil principles, and the Full Court was "plainly right in concluding that that principle was relevant to the question whether further evidence should be admitted". The effect of the fresh evidence on the best interests of the child would be "one of the most important discretionary considerations to which the Full Court must have regard".[53] The court divided, however, on whether it was open to the Full Court to admit the fresh evidence in the circumstances of the case. The majority said no; Kirby and Gaudron JJ, in dissent, would have upheld the Full Court's decision and dismissed the appeal.

Justice Kirby's judgment showed a deep sensitivity to the task of family law courts.[54] He referred to parenting cases as "among the most difficult and painful that fall to any court",[55] and to the intensely personal and highly discretionary nature of the jurisdiction, in which "any two decision-makers may, with complete integrity and upon the same material, often come to differing conclusions". Accordingly, he urged judicial restraint in the High Court: it was essential that "those who decide appeals respect the onerous responsibilities of those whose decisions they review", and pointed out that the High Court should demonstrate the same appellate restraint that it requires of intermediate appellate Benches.

Characteristically, Kirby J went back to first principles, and he articulated with great clarity some of the underlying tensions that impinged on family law decision-making, and in particular the extent to which it should aspire to finality in cases where a child is "fought over by members of the family". On one hand, it would "add intolerably" to the

51 (1998) 197 CLR 172.

52 As set out in *Wollongong Corporation v Cowan* (1955) 93 CLR 435.

53 *CDJ v VAJ* (1998) 197 CLR 172 at 195 [87], [88].

54 This generic term is now used in family law to refer to the Family Court of Australia, the Federal Magistrates Court, and the Family Court of Western Australia.

55 *CDJ v VAJ* (1998) 197 CLR 172 at 225 [173].

tensions experienced by the child if residence and other arrangements were to be disturbed by successive court orders. On the other hand, the decisions about the children's lives are so important that courts should take special pains "to avoid decisions impermissibly distorted by factual or legal error, by error of principle, by prejudice or by giving weight to irrelevant considerations". He also pointed out that because of the consequences of such decisions for the community, and the public interests involved, these are cases in which the courts should treat the decisions in ways that are different from "ordinary civil litigation between parties of full capacity, represented and before the court".

CROSS-VESTING

Apart from his decisions about children, Kirby J has participated in several decisions that affected the most basic structures of family law. The most arresting decision related to the cross-vesting scheme (which of course has a wider application than family law, but is of particular importance in family law). In *Gould v Brown*[56] an evenly divided High Court had, as Peter Nygh put it, "left the cross-vesting scheme hanging by the proverbial thread".[57]

The thread was cut soon enough, by a majority of a differently constituted High Court, in *Re Wakim*.[58] Justice Kirby was again in dissent, his judgment in this case remarkable for its passion. He argued that the issue should not have been reopened: it had been decided by *Gould v Brown*, which had dismissed the challenge to the legislation's constitutional validity, and since then only one thing had changed, namely the composition of the court (Brennan CJ and Toohey J, who had upheld the validity of the scheme, had retired and had been replaced). The approach of the majority meant that the decision in *Gould* was "swept aside as an untroubling obstacle on the path to the attainment of the court's present conclusions".[59] Justice Kirby also pointed to the remarkable consequences of the majority's orders, which would invalidate "efficient legislation of great benefit to litigants throughout Australia and to the administration of justice".[60] The rare governmental and legislative unity on the issue over an extended time was, for Kirby J, an additional reason for "hesitating before adopting a view of the *Constitution* which will stamp on it a construction that will destroy the legislation". To restore the arrangement would require "the highly problematic and expensive task of proposing and securing a formal amendment to the Australian

56 *Gould v Brown* (1998) 193 CLR 346.

57 P Nygh, "Gould v Brown: is Cross-Vesting Barely Alive?" (1998) 12 *Australian Journal of Family Law* 95.

58 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

59 (1999) 198 CLR 511 at 598-599 [183].

60 (1999) 198 CLR 511 at 599 [184].

Constitution". This would be needed "to reverse an implication which this court (in my view needlessly)" read into the *Constitution*:[61]

> It would require the most compelling arguments of constitutional authority, principle and policy to persuade me that the combined parliaments of the Commonwealth of Australia cannot, after nearly a century of federation, do together (with all the travail that such a course involves) what the Imperial Parliament might readily have done in 1901 on a relatively straightforward machinery matter of this kind.

Justice Kirby's careful analysis of the issues and arguments led him to the conclusion that there were no such compelling arguments, and he concluded by expressing "heavy sorrow" at the majority's decision to strike down the scheme.

THE CHILD SUPPORT SCHEME

Justice Kirby agreed with his colleagues that the child support scheme was constitutionally valid.[62] Characteristically, in his separate judgment, he addressed the question whether the scheme was a law "imposing taxation" by examining the context and history of the relevant constitutional provisions.[63]

PROCEDURAL FAIRNESS

Some of Kirby J's judgments in family law involved aspects of procedural fairness. In *Harrington v Lowe*,[64] he delivered a separate concurring judgment invalidating a provision of the *Family Law Rules 2004* (Cth) that purported to prevent evidence being given of things said at conciliation conferences before registrars. In *Allesch v Maunz*,[65] Kirby J agreed with his colleagues that on an appeal, where the Full Court finds an appellable error and proposes to re-exercise discretion (on the basis of circumstances at the time of the appeal), it must provide the parties with an opportunity to lead further evidence. Justice Kirby's judgment contains a lucid account of fundamental principles of procedural fairness, and includes one citation of incomparable antiquity:

> It is a principle of justice that a decision-maker, at least one exercising public power, must ordinarily afford a person whose interests may be adversely affected by a decision an opportunity to present material information and submissions relevant to such a decision before it is made. The principle lies deep in the common law … Even the Almighty

61 (1999) 198 CLR 511 at 609-610 [207].
62 *Luton v Lessels* (2002) 210 CLR 333.
63 (2002) 210 CLR 333 at 365-373 [94]-[122] per Kirby J.
64 (1996) 190 CLR 311.
65 (2000) 203 CLR 172 (HC).

> reportedly afforded Adam such an opportunity before his banishment from Eden.[66]

In *DJL v Central Authority*,[67] Kirby J was in sole dissent when he held that the Family Court had power to reopen its final orders, although only in "wholly exceptional circumstances". His judgment is of particular interest for the description of the tension between the goal of finality in litigation and the goal of avoiding injustice. His resolution of the tension, to leave open the possibility of removing injustice, took into account the limited review of family law decisions that the High Court's busy program permits. Like other intermediate appellate courts, in his view the Full Court of the Family Court had the function "of preventing irremediable injustices which can be clearly demonstrated by reference to accident or oversight".[68]

CONCLUSIONS

If Michael Kirby had only "glimpses" of family law, it is obvious that on those occasions his vision was conspicuously unimpaired. He has been a great force for good in family law, for at least two reasons: his educational role, and the values he espoused and exemplified.

Kirby's astonishing output, consistently lucid and scholarly, has been a major educational contribution. His early work in the Australian Law Reform Commission had involved a remarkable engagement with the community in explaining and entering into public conversations about the law and issues of reform. A typical example was the work on child welfare.[69] On the Bench, as we have seen, this aspect of his work continued. A typical Kirby judgment is replete with insights about the purposes and history of the particular aspect of law he is considering, and identifies and articulates the basic values and principles of the law that obviously mean so much to him. Family lawyers have learned much about family law by reading Kirby J's judgments. I suspect that he always intended to perform this educational role: these substantial educational benefits are not merely by-products of the work of deciding cases and reforming the law. In this role alone he has performed a major service. In a democracy, raising the level of public understanding of the law and its underlying values is no small thing, especially in an area as sensitive and central as family law.

The values Michael Kirby has brought to family law are, in part, values of a more general character. One thinks for example, of his concern for fairness, for inclusiveness, and for adherence to legal principle – the last

66 This point was made by Byles J in *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180 at 195; 143 ER 414 at 420 with reference to Genesis III:11 (Kirby's footnote).

67 (2000) 201 CLR 226 at 266 [100].

68 (2000) 201 CLR 226 at 267-268 [103].

69 Australian Law Reform Commission, *Child Welfare* (ALRC 18, 1981).

a fundamental value which has on occasion prevented him from doing what he might have wanted to do, as we saw in relation to children in immigration detention. But his contribution to family law goes beyond this. He understands and respects family law's complexity, and he has always avoided a glib or superficial treatment of family law problems. His intellectual gifts and commitment to the law have never led to coldness or indifference to the individuals whose lives are affected. He has an instinctive feeling for family law, and his involvement has been both passionate and compassionate.[70] The family law community will regret Michael Kirby's departure from the Bench, but celebrate and treasure his achievement while he was on it, and will wish him a long, happy and (inevitably!) productive retirement.

70 His work includes acknowledgment of some of the great contributors to Australian family law: see, in particular, "Peter Nygh, Family Law, Conflicts of Law & Same-Sex Relations" (Peter Nygh Memorial Lecture, Twelfth National Family Law Conference, Perth, 23 October 2006): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_23oct06.pdf (accessed 17 December 2008); and "The Special Contribution of Alastair Nicholson" (2004) 18 *Australian Journal of Family Law* 125.

Chapter 16

HEALTH LAW AND BIOETHICS

Ian Freckelton*

> *[T]he guiding star must come to be the express or imputed agreement of the patient to anything that affects a patient's life, body and psyche. With the great privileges of, and respect for, the healthcare professions go great responsibilities. The first may be to do no harm. But the second is to have to the greatest extent practicable the fully informed consent of the patient. The law, in varying degrees, demands it. Moral and ethical principles reinforce the law. Social and technological changes give new content to what law and ethics require.*[1]

INTRODUCTION

Health law and bioethics are dynamic and socially contentious areas of debate and litigation. Michael Kirby has been at the heart of both for over three decades. From his days at the Australian Law Reform Commission, and its reference on Human Tissue Transplants,[2] he has been active in major debates about the rights and entitlements of patients and the obligations of those who deliver health services.[3] The unifying theme of his work has been the stress he has placed upon the relevance of human rights principles. This has manifested in countless public

* The author acknowledges the helpful comments and suggestions of Hugh Selby, Loane Skene and Cameron Stewart. He is also grateful for research assistance provided to him by Danielle Andrewartha.

1 M D Kirby, "Principles of Healthcare Ethics: Consent and the Doctor-Patient Relationship" (1993) 25 *Australian Journal of Forensic Sciences* 21 at 28.

2 Australian Law Reform Commission, *Human Tissue Transplants* (ALRC 7, 1977): http://www.austlii.edu.au/au/other/alrc/publications/reports/7/Report_7.txt (accessed 28 November 2008).

3 He subsequently observed that just after the completion of the reference, in 1978, the first IVF baby was born: see M D Kirby, "Reproductive Technology and Law Reform" (1994) 161 *Medical Journal of Australia* 580.

addresses on health law and bioethics subjects, his winning the Prix Pélicier from the International Academy of Law and Mental Health, and his roles as, for instance, patron of the Australian and New Zealand Institute of Health Law and Ethics (ANZIHLE), the Australian and New Zealand Association of Psychiatry, Psychology and Law (ANZAPPL) and participation on the editorial board of the *Journal of Law and Medicine*.

A series of Kirby J's decisions both in the New South Wales Court of Appeal and in the High Court have been at the heart of the distinctive development of health law in Australia, as it has forged a path different from that trodden in the United Kingdom and in North America.

Significant portions of Kirby's extrajudicial energies at an international level have also been invested in the area of health law. Between 1995 and 2005, for instance, he served on the International Bioethics Committee of UNESCO and in 2004-2005 he chaired the drafting group that prepared the *Universal Declaration on Bioethics and Human Rights*, which was adopted by the General Conference of UNESCO in 2005. Again, between 1995 and 2005 he served on the Ethics Committee of the Human Genome Organisation, London, monitoring what thus far is the largest co-operative scientific project in history. In 1997 an early outcome was the adoption by the General Assembly of the United Nations of the *Universal Declaration on the Human Genome and Human Rights*.[4]

Michael Kirby has also been at the centre of international responses to the complex problems posed by the pandemic of HIV-AIDS. He served as a member of the inaugural Global Commission on AIDS of the World Health Organisation between 1988 and 1992 and, in 2002, chaired an Expert Group convened by UNAIDS and the High Commissioner for Human Rights on HIV/AIDS and Human Rights. In 2001-2002 he was chairperson of the United Nations AIDS Expert Panel on HIV Testing of United Nations Peacekeeping Operations.[5] And since 2004 he has been a member of the UNAIDS Global Reference Panel on HIV/AIDS and Human Rights.

This chapter identifies a series of issues in respect of which Michael Kirby has made a major contribution in both the appellate courts and at a general community and international level in relation to the interface between law, health and bioethics. It explores Kirby's views on the doctor-patient relationship and the legal obligations of healthcare practitioners and hospitals in relation to the provision of treatment and information to patients. This chapter also scrutinises the decisions of Kirby J in "wrongful birth" and "wrongful life" cases, as well as

4 See N Lenoir, "Universal Declaration on the Human Genome and Human Rights: The First Legal and Ethical Framework at the Global Level" (1999) 30 *Columbia Human Rights Law Review* 537.

5 See *Report of the UNAIDS Expert Panel on HIV Testing in United Nations Peacekeeping Operations* (Bangkok, Thailand, 28-30 November 2001) at [14]: http://data.unaids.org/pub/Report/2001/20011130_peacekeeping_en.pdf (accessed 6 November 2008).

in respect of abortion, the involuntary status of mentally ill patients, regulation of medical practitioners and the conduct of coronial inquests. It concludes with a brief review of his advocacy in relation to health and human rights, his urging of tolerance in relation to the pandemic of HIV-AIDS and his insights into the challenges posed by the knowledge gained through the Human Genome Project and cognate technological developments.

THE LEGAL OBLIGATIONS OF HEALTHCARE PRACTITIONERS

The changing state of community expectations about the responsibilities of medical practitioners toward their patients was discussed by Kirby[6] in an article written tantalisingly before the 1992 decision of the Australian High Court in *Rogers v Whitaker*.[7] He noted that in both the northern and southern hemispheres inquiries had revealed an abiding complaint made by patients in developed countries, otherwise quite satisfied with their relationship with their doctors, that they had not been allowed to participate sufficiently in deciding about their treatment, nor been given enough information to enable them to do so in a meaningful way. For Kirby the relationship between doctor and patient should be collaborative and respectful:

> At the heart of the problem of consent and the doctor/patient relationship is the tension between the unquestioned need to respect the integrity and wishes of the individual patient (on the one hand) and the years of study and practical experience which go into the activities of medical diagnosis and treatment (on the other). Patients are infinite in their variety and in their inclination to know medical detail and in their capacity to understand it, if explained. Doctors and other healthcare workers are infinite in their variety as is their capacity for communication, their inclination to spend the time necessary and their conviction about its utility.[8]

Importantly, and consistently with his general approach, he conceptualised the issue for patients as one of human rights, endorsing the sentiments of Lord Kilbrandon in a foreword to a book on professional malpractice:[9] "[The relationship between doctor and patient] is not fundamentally the expert instructing the ignorant, even though those terms may accurately classify the respective parties. One free human being advises and helps another. The relevant law exists for the purpose of supporting that relationship."

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6 Kirby, n 1. See also M D Kirby, "Informed Consent: What Does it Mean?" (1983) 9(2) *Journal of Medical Ethics* 69.

7 (1992) 175 CLR 479.

8 Kirby, n 1 at 22.

9 D Giesen, *International Malpractice Law* (JCB Mohr, Tubingen, 1988) p v.

Later, in the midst of what became known as Australia's "insurance crisis",[10] and the collapse of the medical defence organisation, United Medical Protection, Kirby argued that while the defects "by which most countries of the common law deliver redress to the victims of medical misadventure are well established", so, too, are the shortcomings in most of the alternative systems on offer.[11] He argued that providing immunity from civil action to providers of health services would be inconsistent with the generally increasing obligations of professionals. He doubted the viability of a national compensation scheme. This led him to comment that the foundation for future strategies in policy formulation in relation to health practitioner liability to provide compensation to those adversely affected by practitioner errors could be learned by reformers from the techniques of medical research rather than from the law's techniques of verbal rhetoric:

> It lies not in expostulation but in painstaking empirical studies and statistical data. Lessons can be learned from those countries which have introduced improved systems of conciliation and compensation that are cheaper, quicker and less traumatic. Unless health care professionals make out a compelling case for change, it seems likely that, in most parts of the world, including Australia, negligence will continue its imperial expansion. As with other imperial forces in the past, there will be beneficiaries. And there will be victims.[12]

Prior to the High Court's decision in *Rogers v Whitaker*,[13] Kirby[14] identified a shift in Australia away from the dominance placed on the values of the health care profession. He argued that the relationship between doctor and patient should not be based any longer upon perceptions of the medical profession's standards. Otherwise:

> [i]t will tend to continue in a condescending and paternalistic approach which is fundamentally inimical to the rights of the patients and the proper limits of the intervention of the outsider, however skilled and however well intentioned. That is why the guiding star must come to be the express or imputed agreement of the patient to anything that affects a patient's life, body and psyche. With the great privileges of, and respect for, the healthcare professions go great responsibilities. The first may be to do no harm. But the second is to have to the greatest

10 Occurring shortly after the New South Wales Supreme Court ordered an obstetrician to pay approximately $13m for damages sustained by a child at birth: *Simpson v Diamond* [2001] NSWSC 925.

11 M D Kirby, "Tort System Reforms: Causes, Options, Outcomes" (2001) 8 *Journal of Law and Medicine* 380 at 388. See also D Ipp, "Negligence – Where Lies the Future?" (2003) *Australian Bar Review* 159; D Ipp, P Cane, D Sheldon and I Macintosh, *Review of the Law of Negligence Report* (10 October 2002): http://revofneg.treasury.gov.au/content/Report/PDF/LawNegFull.pdf (accessed 7 November 2008).

12 Kirby, n 11 at 388.

13 (1992) 175 CLR 479.

14 Kirby, n 6.

> extent practicable the fully informed consent of the patient. The law, in varying degrees, demands it. Moral and ethical principles reinforce the law. Social and technological changes give new content to what law and ethics require.[15]

A number of considerations flow from this analysis, including a need from Kirby's perspective to reflect on the underlying moral and ethical bases of the provision of professional services and an imperative to be conscious of the repercussions of biotechnological and scientific developments which might otherwise evolve in a way that unacceptably detracts from what should be fundamental patient rights.

THE DUTY TO WARN

In 1992, some years prior to Kirby's appointment to the High Court, there was a fundamental refocusing of the law of medical negligence in terms of the required provision of relevant information to patients.[16] With the decision of the High Court in *Rogers v Whitaker*,[17] Australia commenced to take a different course from the law in the United Kingdom,[18] which exonerated medical practitioners in relation to their treatment of, and provision of information to, their patients if they acted in accordance with a practice accepted at the time as proper by a "responsible body of medical opinion". In the United Kingdom this made the standard of care essentially a matter of medical practitioners' judgment.

In *Rogers v Whitaker*,[19] the High Court determined that the standard of care and skill required comprehensively of a medical practitioner is that of the ordinary skilled person exercising and professing to have that special skill. This can be quite specific and contextualised to the particular treatment provided – for instance, in the *Rogers* case, it was the skill of an ophthalmic surgeon specialising in corneal and anterior segment surgery.[20] However, in its patient focus the decision broke important new ground, requiring the provision of information to patients to become patient-

15 Kirby, n 1 at 28.

16 See, eg, I Kennedy, *Treat Me Right: Essays in Medical Law and Ethics* (Clarendon Press, Oxford, 1988). In terms of case law, there were important precursors to *Rogers v Whitaker*: see, eg, *Albrighton v Royal Prince Alfred Hospital* (1980) 2 NSWLR 542 at 562-563; *F v R* (1983) 33 SASR 189 at 196, 200, 202, 205; *Battersby v Tottman* (1985) 37 SASR at 527, 534, 539-540; *E v Australian Red Cross* (1991) 99 ALR 601 at 648-650.

17 (1992) 175 CLR 479.

18 See *Bolam v Friern Barnet Hospital Management Committee* [1957] 1 WLR 582: "A doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion even though other doctors adopt a different practice." This has subsequently been modified by the House of Lords in *Bolitho v City and Hackney Health Authority* [1998] AC 232 at 243, which held that a court can reject medical opinion if it is not "reasonable and responsible". See also *Smith v Tunbridge Wells Health Authority* [1994] Med LR 334; *Pearce v United Bristol Healthcare NHS Trust* [1999] Butt Med Law Rep 118.

19 (1992) 175 CLR 479.

20 (1992) 175 CLR 479 at 487 [6].

centred and rejecting the argument that if a respectable minority of practitioners would not have provided the advice in question, that constituted an acceptable defence. The High Court[21] held that a doctor has a duty to warn a patient of a "material risk" inherent in proposed treatment. It stipulated that a risk is material if, in the circumstances of the particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner is, or should reasonably be, aware that the particular patient (perhaps a patient who is especially anxious or desirous of additional information), if warned of the risk, would be likely to attach significance to it.

The decision was controversial, sparking distress and dissatisfaction from many quarters of the medical profession.[22] It was followed shortly afterward by legislative developments in the aftermath of the High Court decision in *Breen v Williams*[23] (in which Kirby P dissented in the New South Wales Court of Appeal) giving wide access for patients to their medical records. Again, this prompted great concern on the part of doctors, in particular those who feared that the incidence of litigation against them might escalate alarmingly, rendering insurance premiums impossibly high.

Thus, the healthcare provider environment was fundamentally changing: new terminology was intruding, the balance of power in the provider-consumer relationship was moving and transparency of decision-making was replacing the old world order of assumed trust in a paternalist and one-sided relationship.

By 2001, in the Australian Medical Association Oration in honour of Sir Albert Coates, Kirby looked to initiatives in The Netherlands in enhancing quality care standards in the provision of health care, and argued that "we may need to consider the innovations adopted overseas where these are shown to work".[24] He pointed out that the object of medical negligence law is not only to afford compensation to those who prove that they were injured as a result of mistake or carelessness, but also the broader public interest in stimulating procedures designed to prevent the repetition of mistakes and to avoid needless risk. He queried whether Australia's litigation system was accomplishing those objectives.

Lowns v Woods

Already, though, in *Lowns v Woods*,[25] Kirby P had been required to interpret and apply *Rogers v Whitaker* in the context of a plaintiff seeking

21 (1992) 175 CLR 479 at 490 [16].

22 See the summary given by Kirby J in *Rosenberg v Percival* (2001) 205 CLR 434 at 476-478 [140]-[144].

23 (1996) 186 CLR 71. For further discussion of this case, see Chapter 13.

24 M D Kirby, "Medical Negligence – Going Dutch" (2001) 33 *Australian Journal of Forensic Sciences* 59 at 60.

25 [1996] Aust Torts Reports 81-376.

in excess of $3m damages for negligence claimed against both a general practitioner and a paediatric neurologist. The case was particularly controversial because it raised two stark issues – the obligation of a doctor to "rescue" or provide emergency medical attention, including to a person not previously their patient (that is, the obligation on a doctor to be a "Good Samaritan"), and the application of the *Rogers v Whitaker* ruling.

The plaintiff in *Lowns v Woods*, Patrick Woods, was a boy of 11 at the relevant time. He suffered epileptic seizures. With his family, he consulted a paediatric neurologist, Dr Procopis, who did not advise the use of rectal Valium. That he should have done constituted one allegation of negligence. Later, Patrick suffered an epileptic seizure and his family called for an ambulance and dispatched his older sister to summon the aid of a local general practitioner, Dr Lowns, who had not previously treated Patrick. Dr Lowns denied being asked to attend but was disbelieved on his oath by the trial judge, whose findings in this regard were accepted by the Court of Appeal.

The decision of the New South Wales Court of Appeal was split. Both Kirby P and Cole JA (Mahoney JA dissenting) found against Dr Lowns, and Kirby P and Mahoney JA (Cole JA dissenting) found that Dr Procopis had not failed in his duty to Patrick. The decision took place in the shadow of s 27(2) of the *Medical Practice Act 1938 (*NSW), which provided that it was "misconduct in a professional respect" for a medical practitioner to refuse or fail without reasonable cause to attend a person within a reasonable time after their professional services had been requested and where they had reasonable cause to believe that the person was in need of urgent attention.

For Kirby P, the evidence overwhelmingly indicated that, in not advising Patrick's parents about the availability of rectal Valium, Dr Procopis had acted in accordance with the practice of neurologists in Australia at the time.[26] It was argued on behalf of Dr Procopis that the case was one relating to medical treatment, not advice, and that therefore the *Rogers v Whitaker* decision did not apply. But Kirby P did not agree, holding that the principles articulated by the High Court were "of general application".[27] He also found that, in respect of Dr Procopis, the issue was one of provision of medical advice. Thus, *Rogers v Whitaker* squarely applied. The conclusion of Kirby P and Mahoney JA was that by the standards of the time Dr Procopis met the prerequisites of both advice and treatment, which reasonable care and attention required of a medical practitioner of his expertise and experience. To this extent the decision relieved some of the anxieties harboured within the medical profession at the time that practitioners were unfairly burdened with

26 [1996] Aust Torts Reports 81-376 at 63,157.
27 [1996] Aust Torts Reports 81-376 at 63,157.

excessive requirements of information disclosure, which the courts would unreasonably interpret and apply.

In the circumstances of the older sister asking for help from Dr Lowns and explaining that her brother was having "a bad fit", Kirby P (with Cole JA agreeing) observed that the standard of care required of a medical practitioner asked for medical assistance is "high",[28] and beyond that which is imposed and expected of other professionals and of "ordinary citizens". He classified medicine as a "noble profession" and, while he did not find that s 27(2) of the *Medical Practice Act 1938* (NSW) of itself created a cause of action for a patient, he did find that it enunciated the expectations of doctors for the contemporary Australian community. Kirby P and Cole JA held that there was sufficient proximity between Patrick and Dr Lowns in the particular circumstances (and also for Patrick's father who sued for "nervous shock"). They found against Dr Lowns. However, Mahoney JA disagreed strongly in relation to Dr Lowns, regarding the decision of the majority as, in effect, constituting law reform from the Bench. He distinguished between obligations in morality and charity, on the one hand, and obligations under the law, on the other. He contended that "[l]aw as an instrument of social control, is a blunt instrument"[29] and, while critical of Dr Lowns, was not prepared to find him civilly liable to Patrick and his father. A consequence of the decision was the fillip that it gave to "Good Samaritan" provisions, which provide protection from civil action to doctors who intervene in emergencies as "gratuitous rescuers".[30]

Rosenberg v Percival

In 2001 the case of *Rosenberg v Percival*[31] provided the High Court, including Kirby J, with an opportunity to reflect upon whether the *Rogers v Whitaker* initiative should be persisted with or whether it placed unreasonable pressures on medical practitioners, interventionists in particular. In this instance, a doctorally educated nurse sued a dental surgeon for failing to warn her of the potential for her to be afflicted with temporo-mandibular complications, and raised the advisability of the High Court maintaining its approach in *Rogers v Whitaker.* The court declined to revisit its decision in *Rogers.*

However, Kirby J took the opportunity to review and analyse the bases upon which the *Rogers v Whitaker* decision had been singled out for criticism. These were that:

28 [1996] Aust Torts Reports 81-376 at 63,155.

29 [1996] Aust Torts Reports 81-376 at 63,167.

30 See, eg, *Civil Liability Act 2002* (NSW) s 57; *Civil Liability Act 2003* (Qld) s 26; *Civil Liability Act 1936* (SA) s 74; *Wrongs Act 1958* (Vic) s 31B; *Civil Liability Act 2002* (WA) s 5AD. See also L Crowley-Smith, "The Duty to Rescue Unveiled: A Need to Indemnify Good Samaritan Health Care Professions in Australia?" (1997) 4 *Journal of Law and Medicine* 352.

31 (2001) 205 CLR 434.

- some patients do not wish to be unsettled by unnecessary disclosures by professional experts whom they trust, or about risks and concerns that, in any case, they will only understand imperfectly;[32]
- it is impossible, within sensible time constraints, for a professional person to communicate the detail of every possible complication that may accompany medical procedures and that rare complications would take considerable time to communicate, an effort that would not be cost-effective;[33]
- the efficacy of warnings against minor risks had not been effectively established;[34]
- belief in the efficacy of warnings is a lawyer's fancy;[35]
- the decision wrongly views patients as passive and patient concurrence as taking place as a one-off;[36]
- in practice the strict standard of *Rogers* is contradicted by everyday professional experience;[37]
- the test can easily become a prop for disappointed patients resulting in the obligation of unrealistic and unreasonable professional obligations;[38] and
- the standard of care demanded was likely to lead to defensive medical practice.[39]

Justice Kirby rejected each of these criticisms and emphatically endorsed the *Rogers* approach, repeating the formulation of the court in *Schloendorff v Society of New York Hospital*[40] that a patient has "a right to determine what shall be done with his own body", and finding the *Rogers v Whitaker* materiality test to be supported by sound reasons of principle and policy.

According to Kirby J, this approach constituted:

> a recognition of individual autonomy that is to be viewed in the wider context of an emerging appreciation of basic human rights and human

32 See I H Kerridge and K R Mitchell, "Missing the Point: Rogers v Whitaker and the Ethical Ideal of Informed and Shared Decision-making" (1994) 1 *Journal of Law and Medicine* 239; G Robertson, "Informed Consent Ten Years Later: The Impact of Reibl v Hughes" (1991) 70 *Canadian Bar Review* 423.

33 P M Schuck, "Rethinking Informed Consent" (1994) 103 *Yale Law Journal* 899.

34 Schuck, n 33 at 933-934; N Olbourne, "The Influence of Rogers v Whitaker on the Practice of Cosmetic Plastic Surgery" (1998) 5 *Journal of Law and Medicine* 334 at 342.

35 Schuck, n 33 at 959.

36 Schuck, n 33 at 911, 959; Olbourne, n 34 at 342.

37 Olbourne, n 34 at 344.

38 Schuck, n 33 at 919-920.

39 Olbourne, n 34 at 344; D Mendelson, "The Breach of the Medical Duty to Warn and Causation: Chappel v Hart and the Necessity to Reconsider Some Aspects of Rogers v Whitaker" (1998) 5 *Journal of Law and Medicine* 312 at 317; M McInness, "Failure to Warn in Medical Negligence – A Cautionary Tale from Canada" (1998) 6 *Torts Law Journal* 135 at 143; S Girgis, C Thomson and J Ward, "The Courts Expect the Impossible" (2000) 7 *Journal of Law and Medicine* 273.

40 (1914) 105 NE 92 at 93.

> dignity. There is no reason to diminish the law's insistence, to the greatest extent possible, upon prior, informed agreement to invasive treatment, save for that which is required in an emergency or otherwise out of necessity.[41]

Justice Kirby noted that whilst it may be desirable to "instil a relationship between the healthcare professional and the patient", reality demands a recognition that sometimes (as in the *Rosenberg* case) defects of communication demand the imposition of minimum legal obligations, "so that even those providers who are in a hurry, or who may have comparatively less skill or inclination for communication, are obliged to pause and provide warnings of the kind that *Rogers* mandates".[42] He remarked that such obligations have the added benefit of redressing, to some small degree, the risks of conflicts of interest and duty which a provider may sometimes face in favouring one healthcare procedure over another and help to redress the inherent inequality in power between the professional provider and a vulnerable patient. He contended that even those who are dubious about obligations, for instance those stated in decisions such as *Rogers*, "commonly recognise the value of the symbolism which such legal holdings afford".[43] Not for the last time invoking "reports about healthcare practice in Australia" as well as "common experience", he maintained that while usage of the principle of "informed consent" may sometimes mislead patients into thinking that they are making decisions when, indeed, they are not, such principles can "nag and prod and disturb and ultimately bring about some change". He concluded that:

> [i]n so far as the law can influence such practice, it should tend, as *Rogers* does, towards the provision of detailed warnings so that the ultimate choice, to undertake or refuse an invasive procedure, rests, and is seen to rest, on the patient rather than the healthcare provider.[44]

However, on the facts of *Rosenberg v Percival*, Kirby J joined Gleeson CJ, McHugh, Gummow and Callinan JJ in holding that the trial judge's finding that even if the patient's attention had been drawn to the risk of temporo-mandibular complications she would still have gone ahead with the surgery, was properly open to him. This meant that causation between the failure to provide adequate information and the injuries that the patient sustained was not adequately proved, and the patient lost her action.

Chappel v Hart

Another significant decision about health practitioner liability in which Kirby J played a major role while on the High Court was *Chappel*

41 *Rosenberg v Percival* (2001) 205 CLR 434 at 480-481 [145].

42 (2001) 205 CLR 434 at 480-481 [145].

43 (2001) 205 CLR 434 at 480-481 [145].

44 (2001) 205 CLR 434 at 480-481 [145].

v Hart.[45] In this case the claim made by the patient, Mrs Hart, was against an ear, nose and throat specialist, Dr Chappel, who recommended that Mrs Hart have surgery for a pharyngeal pouch in her oesophagus, a life-threatening condition that was relentlessly progressive.[46] Mrs Hart placed herself into the first *Rogers v Whitaker* category (especially anxious and questioning, and therefore needing to be given extra information) by asking a range of questions of Dr Chappel which demonstrated her concern to know about potential adverse consequences of the remedial surgery, including whether there was a prospect that she could end up sounding like Neville Wran, the gravelly-voiced former Premier of New South Wales.[47] She was reassured by Dr Chappel and had the surgery. However, complications ensued. Her oesophagus was punctured in the course of the operation, itself not negligence on the part of Dr Chappel, and an infection (mediastinitis) followed, resulting in damage to her laryngeal nerve and paralysis of her right vocal cord.

Mrs Hart sued on the basis of having suffered damage and of not having been warned of the risk of such damage on the basis of the *Rogers v Whitaker* obligations for medical practitioners. The difficulty was that Mrs Hart had no option but to submit to the procedure at some stage; otherwise she risked choking to death. Moreover, Dr Chappel was a competent surgeon and had a reasonable level of experience in the relevant procedure, having undertaken it a number of times during his traineeship as a surgeon and also subsequently.[48] Further, he had not engaged in any negligence in his conduct of the procedure.

Thus, the question before the High Court, ultimately, was whether the failure to advise Mrs Hart of the remote potential (which in fact flowered) of an adverse effect upon her vocal cords in her case caused any damage, the procedure not being wholly elective in the sense that she had no choice but to submit to it within a relatively short time frame. This was in contrast to Mrs Whitaker who, having heard of the one in 14,000 risk of harm to her other eye, could have put off eye surgery on her good eye indefinitely, thereby avoiding the risk of sympathetic ophthalmia.

The High Court was divided on the issue. Kirby J was again in the majority, this time with Gaudron and Gummow JJ (McHugh and Hayne JJ dissenting). The majority concluded that Dr Chappel's failure to provide proper advice to Mrs Hart in response to her questions materially contributed to her injury. Justices Kirby and Gaudron held

45 (1998) 195 CLR 232.

46 (1998) 195 CLR 232 at 266-267 [91].

47 See M D Kirby, "Neville Wran, A Lawyer Politician: Reflections on Law Reform and the High Court of Australia" (Inaugural Neville Wran Lecture, Parliament of New South Wales, Sydney, 13 November 2008) p 16: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_13nov08.pdf (accessed 18 December 2008).

48 See Mendelson, n 39.

that the degree of risk to which she was ultimately subject would have been reduced had Dr Chappel properly communicated with her. This would have allowed her to delay the operation and obtain the assistance of a more experienced surgeon who would have run a lower risk of perforating her oesophagus and thereby setting in train the consequences which led to the paralysis of her vocal cord. Justice Gummow confined himself to holding that because Mrs Hart had specifically asked about the relevant risk, she would not have undergone the operation at Dr Chappel's hands if she had been given the necessary warning.

Justice McHugh concluded (in dissent) that Dr Chappel could escape liability only if the proper conclusion was that Mrs Hart did not prove that Dr Chappel's failure to warn resulted in her consenting to a procedure that involved a higher risk of injury than would have been the case if the procedure had been carried out by another surgeon.[49] He concluded that the plaintiff's condition was "relentlessly progressive" and that surgery would provide the "only relief" possible for the condition. This meant for him that Mrs Hart would have undergone the procedure in the future even if she had been given a warning. He found that nothing in the evidence suggested that there was available to Mrs Hart the services of a surgeon of such skill that he or she would never perforate the oesophagus while performing the procedure. Nor did the evidence suggest that any other surgeon was so superior in skill to Dr Chappel that an operation by that person carried with it a statistically significant lesser risk of perforation than an operation by Dr Chappel. He accepted that risk of perforation varied depending upon the degree of care taken on a particular occasion: "But the evidence did not suggest, let alone prove, that an operation by the defendant carried with it a statistically significant greater risk of perforation than that of any other qualified surgeon."[50] This meant for him that Mrs Hart had failed to prove that there was open to her an alternative course of action which would have reduced the inherent chance of a perforation and consequent onset of mediastinitis and damage to the recurrent laryngeal nerve. From McHugh J's perspective (Hayne J agreeing with him), the highest that Mrs Hart's case could be put was that Dr Chappel's failure to warn her resulted in her having the procedure at an earlier date and at a different place with a different surgeon than would have been the case if Dr Chappel had carried out his duty and warned her: "On the evidence, the carrying out of the procedure by the defendant on the day and at the place did not increase the risk of injury involved in the procedure. That being so, the defendant's failure to warn did not materially contribute to the plaintiff's injury."[51]

49 (1998) 195 CLR 232 at 248 [35].
50 (1998) 195 CLR 232 at 250 [41].
51 (1998) 195 CLR 232 at 250 [42].

Justice Kirby's judgment analysed a range of complex issues in relation to the required proof of causation in medical negligence cases. He emphasised the importance of the law (and thereby the High Court) remaining conscious of the purpose for which causation was being explored in Mrs Hart's case: "It is a legal purpose for the assignment of liability to one person to pay damages to another. It is not to engage in philosophical or scientific debate, still less casuistry." [52] The notion of "common sense" again became prominent. He embraced the line of authority that classifies causation as a question of fact to be resolved as a matter of common sense,[53] accepting the "but for test" as a relevant, but not necessarily sufficient, criterion for determining a causative relationship.

Accepting that it always remains the burden of the plaintiff to establish causation, Kirby J observed that this "not … insubstantial burden" has been described as "Herculean", the "most formidable obstacle confronting health care consumers" in mounting litigation against healthcare providers. He noted, too, that Australia's courts have adopted a subjective approach when considering the suggested consequences of a failure on the part of a healthcare provider to advise a patient of the risks of a particular procedure, which entails having regard to what the particular patient's response would have been had proper information been provided.[54]

Importantly, Kirby J contended (not uncontroversially) that an evidentiary onus may shift during a court hearing: "Once a plaintiff demonstrates that a breach of duty has occurred which is closely followed by damage, a prima facie causal connection will have been established. It is then for the defendant to show, by evidence and argument, that the patient should not recover damages."[55] He also expressed an attraction to viewing plaintiffs' damages in appropriate cases as "loss of a chance". The role of "loss of chance" at the end of Kirby J's tenure on the High Court remains finally to be resolved.[56]

As a result of the application of these (and other) principles, what Kirby J asserted to be "common sense" led him to reject Dr Chappel's appeal. He held that professionals in the position of Dr Chappel must observe the duty "of informing patients about risks, answering their questions candidly and respecting their rights, including (where they so choose)

52 (1998) 195 CLR 232 at 268-276 [93].

53 See, eg, *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 515, 522-523. See also discussions in I Freckelton and D Mendelson (eds), *Causation in Law and Medicine* (Ashgate, Aldershot, 2001); and R Travers, "Medical Causation" (2002) 76 *Australian Law Journal* 258.

54 See further, *Naxakis v Western General Hospital* (1998) 197 CLR 269 and, in particular, the judgment of Kirby J at 291-298 [61]–[83].

55 *Chappel v Hart* (1998) 195 CLR 232 at 268-276 [93].

56 See, eg, M A Meldrum, "Loss of Chance in Medical Malpractice Litigation: Expanding Liability of Health Professionals Versus Providing Justice to Those Who Have Lost" (2001) 9 *Journal of Law and Medicine* 200.

to postpone medical procedures and to go elsewhere for treatment".[57] He found that when the risks about which Mrs Hart posed questions to Dr Chappel "so quickly eventuated, commonsense suggests that something more than a mere coincidence or irrelevant cause has intervened".[58] For Kirby J this impression was reinforced by the fact that had Mrs Hart received a proper warning from Dr Chappel, she would not have undergone the operation when she did. Controversially, he concluded on the basis of what he described as a combination of "intuition and commonsense" that the higher the skill of the surgeon, the less the risk of perforation in the course of the operation, meaning that a delay consequent upon receipt of information from Dr Chappel would have allowed Mrs Hart to find a more experienced surgeon and thereby reduce the risks of the operation. Justice Kirby concluded that once Mrs Hart showed the breach, and the damage which immediately eventuated, an evidentiary onus shifted to Dr Chappel to displace the inference of causation. It was Kirby J's finding that Dr Chappel did not discharge that onus.

Justice Kirby's approach (as well as that of Gaudron J and, to a lesser degree, Gummow J) has generated controversy amongst medical practitioners and within the medico-legal literature. Part of this relates to the evaluation of the expert evidence in the case, and also to the significance given by Kirby J to common sense and intuition in arriving at his analysis.

The harsh critic might suggest that in his medical malpractice decisions Kirby J has tended to sympathise with patients who should have been enabled better to participate in decision-making about their health, and that he has utilised unarticulated notions of fairness, cloaking them variously in the language of common sense, common experience and intuition to arrive at a humane result.

With the passage of time, the feared consequences of surgeons declining to undertake difficult procedures unless already highly experienced in them have not eventuated. However, it remains true to say that the *Chappel v Hart* judgment, in which Kirby J's decision figured very prominently, continues to arouse concern within sectors of the medical profession in respect of whether unreasonable demands are likely to be made of them by Australia's legal system. To that extent, it appears likely to have played a role in the tort reforms which followed shortly after the turn of the millennium and which have curtailed plaintiffs' entitlements to sue healthcare practitioners.

THE LIABILITY OF HOSPITALS

Australia has a dual public and private health care system, which means that public hospitals are funded by a combination of State and Federal

57 (1998) 195 CLR 232 at 276 [95].

58 (1998) 195 CLR 232 at 276-277 [96].

Government moneys. The extent of services provided by public hospitals depends upon their size and the amount of their funding. A patient may elect to be admitted as either a public patient for treatment by doctors chosen by the hospital, or as a private patient, whereby they are treated by doctors of their choice and pay fees to both their doctors and the hospital. This choice can determine the feasibility of a patient obtaining recourse against a hospital.

Generally under tort law an employer is vicariously liable for the negligent acts of an employee undertaken in the course of their employment, as distinguished from wrongs committed by an independent contractor.[59] A fully satisfactory rationale for the imposition of vicarious liability has euphemistically been observed to have "been slow to appear in the case law".[60] Similarly, it has been observed that "the doctrinal roots of non-delegable duties are anything but deep or well established".[61]

A variety of policy considerations for imposing vicarious (and non-delegable duties) have been asserted to include the importance of giving plaintiffs a remedy against a defendant able to satisfy their claim (the principle of loss distribution); the notion that it is right and just to attribute responsibility to those who place in the community an enterprise from which they profit; and the importance of providing an incentive to employers to be circumspect in their choice of employees.[62]

There has been longstanding uncertainty about the extent to which principles of vicarious liability (and non-delegable duties) apply in the context of services provided by hospitals. In *Albrighton v Royal Prince Alfred Hospital*,[63] in the context of a public patient referred to a public hospital's outpatient department and treated by a number of "honorary medical officers" not subject to direct control by the hospital, Reynolds JA held that evidence supporting an employment arrangement with such officers included "their activities within the hospital, their use of, and compliance with, hospital forms and routines, and the operation of the [hospital] by-laws".[64] He also found that the evidence before the court was capable of sustaining the inference that the hospital was an institution which undertook to provide "complete medical services" through its staff to patients such as the plaintiff.

Subsequent to the *Albrighton* decision, Kirby P was called upon to rule on a related issue. In *Ellis v Wallsend District Hospital*,[65] a patient was seen initially by a neurosurgeon in his private rooms and then referred by

59 *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 167 [12].

60 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 37 [33]; see also *New South Wales v Lepore* (2003) 212 CLR 511 at 580 [196].

61 *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22 at 76 [156] per Hayne J.

62 These considerations are identified by Gummow and Hayne JJ in *New South Wales v Lepore* (2003) 212 CLR 511 at [196]-[198] 580-581.

63 [1980] 2 NSWLR 542.

64 [1980] 2 NSWLR 542 at 559.

65 (1989) 17 NSWLR 553.

him to a hospital where he held an honorary appointment. The majority of the New South Wales Court of Appeal (Samuels and Meagher JJA) held that the degree of control the hospital had over the neurosurgeon was "slight" and declined to find the hospital vicariously liable for the neurosurgeon's negligence. They concluded that a crucial distinction between the facts in *Albrighton* and those in *Ellis* was that the plaintiff in *Albrighton* went directly to the hospital for treatment and advice and first saw the doctor in the outpatient department of the hospital.

Justice Kirby dissented, noting that hospitals had been virtually exempt from liability for the negligence of staff under earlier law,[66] their only responsibility being to use due care and skill in selecting medical staff. Because the relationship of master and servant did not exist between the hospital and the physicians and surgeons who gave their services, nor between hospitals and nurses and other attendants, hospitals could not control the way in which they performed their duties and so they were not held vicariously liable for mistakes made by health staff.

It was held by Kirby P that "the gratuitous benefit" of care[67] provided by hospitals to public patients contributed to this approach. Observing that a new doctrine had emerged,[68] paralleling wider changes occurring in the law in relation to the duties of employers, he noted:

> The very nature of hospitals, the growth in the number of publicly funded hospitals, their importance as centres of assistance in times of personal crisis, their emergency wards with a burgeoning accretion of sophisticated equipment all suggested how inapposite was the old "control" approach to determining the liability of the hospital for the acts of those working "within it".[69]

He found that with abandonment of the test of "control" as the sole or principal determinant for vicarious liability it was difficult to see why "honorary consultants" should be excluded from the list of those for whom a hospital can be held liable. He noted that hospitals have their own reasons for including the "honorary" amongst their officers:

> Such persons add to the prestige and community utility of the hospital. They become inseparably connected with the activities of the employed staff. Their activities, in an operation, may be inextricably mixed with those of the employed staff. It is in the hospital's financial and professional

66 See, eg, *Hillyer v Governors of St Bartholomew's Hospital* [1909] 2 KB 820.

67 See S S Bobbe, "Tort Liability of Hospitals in New York" (1951–1952) 37 *Cornell Law Quarterly* 419.

68 Commencing with *Sisters of St John of the Diocese of London in Ontario v Fleming* [1938] SCR 172; *Henson v Board of Management of the Perth Hospital* (1939) 41 WALR 15; *Gold v Essex County Council* [1942] 2 KB 293; *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710; *O'Donovon v Cork County Council* [1967] IR 173.

69 *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 at 564.

> interest to ensure that its facilities are used to the utmost, including by such "honoraries".[70]

It was asserted by Kirby P that a patient's expectation on entering a hospital would be that they and their surgeon would be subject to the requirements of the hospital. He commented that it would be surprising to patients that in the necessarily interactive circumstances of the delivery of health care, including the provision of advanced microsurgery, surgeons could perform health care activities within the hospital but remain entirely independent of it. He determined that "[s]uch artificialities in the law should be avoided"; they represented a relic of anachronistic thinking.[71]

Furthermore, Kirby P held that if a hospital should not be regarded as vicariously liable, "there is now a new and settled basis for the liability of the hospital" – its direct non-delegable responsibilities in tort, a principle that attracted support in some quarters in Canada[72] and in comments in the United Kingdom.[73] He held that it is erroneous to view hospitals, in many situations, as the "mere venue" for the performance of surgical procedures – such an approach flies in the face of a variety of hospital-doctor arrangements, as well as the mutually beneficial synergies involved. He argued that it was "highly desirable" for the law to make plain the protection of patients who have the potential to suffer as a result of professionals' mistakes:

> So far as the patient is concerned he or she is in the hospital. He or she should be able to look to the hospital to ensure (by insurance or otherwise) that proved wrongs by health care staff occurring at the hospital or arising out of its activities are compensated in full degree.[74]

Since *Ellis*, the law in relation to non-delegable duties has continued to evolve. In *Elliott v Bickerstaff*[75] the New South Wales Court of Appeal considered whether a surgeon was liable to a patient under a non-delegable duty for the negligence of theatre staff in a private hospital, which resulted in a swab being left in the patient's abdomen following surgery. The court (Giles, Hadley and Stein JJA) held that a non-delegable duty should not be imposed on the surgeon as he had not undertaken to provide "complete medical services", but merely to provide his surgical services as part of a team. They confirmed that if the hospital's undertaking were to extend to provision of the surgeon's services, the hospital:

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70 (1989) 17 NSWLR 553 at 565.

71 (1989) 17 NSWLR 553 at 566.

72 See, eg, *Yepremian v Scarborough General Hospital* (1980) 31 OR (2d) 383 (n); *Van Ginkel v Hollenberg* (1985) 36 Man R 2d 291.

73 See *Wilsher v Essex Area Health Authority* [1987] QB 730.

74 *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 at 569.

75 (1999) 48 NSWLR 214.

> must ensure that the surgeon exercises reasonable care in its place. But if the undertaking does not extend to provision of the surgeon's services, categorising the hospital's duty of care as non-delegable will not make the hospital liable if the surgeon (not being a servant or agent of the hospital) is negligent.[76]

Importantly, and not wholly inconsistently with the position of Kirby J, in *Kondis v State Transport Authority*,[77] Mason J referred to a series of English cases and observed that:

> [t]he liability of a hospital arises out of its undertaking an obligation to treat its patient, an obligation which carries with it a duty to use reasonable care in treatment, so that the hospital is liable, if a person engaged to perform the obligation on its behalf acts without due care.[78] Accordingly, the duty is one the performance of which cannot be delegated. Not even to a properly qualified doctor or surgeon under a contract for services.[79]

With the subtleties of the *Albrighton* and *Elliott* decisions becoming increasingly difficult to apply, the Kirby approach has attracted support.[80] However, while doctors are compelled to carry professional insurance, the public policy rationale for imposing liability, vicarious or non-delegable, on the hospitals where they work has become less compelling. The law on the subject remains to be finally resolved.

ACCESS BY PATIENTS TO THEIR MEDICAL RECORDS

In *Breen v Williams*,[81] Kirby P enunciated an unorthodox view about the fiduciary nature of a doctor's relationship with his or her patient. He did so in the context of an application for access to her clinical file by a patient who was seeking information about what occurred during a bilateral augmentation mammaplasty so that she could decide whether to opt into a settlement of silicon implant litigation in the United States.

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76 (1999) 48 NSWLR 214 at 245 [96].

77 (1984) 154 CLR 672.

78 Citing as authority *Gold v Essex County Council* [1942] 2 KB 293 at 304.

79 Citing as authority *Cassidy v Ministry of Health* [1951] 2 KB 343 at 364 per Denning LJ. See also *Roe v Minister of Health* [1954] 2 All ER 131 at 137 where Denning LJ found a hospital liable for "the whole of their staff, not only for the nurses and doctors but also for the anaesthetists and the surgeons. It does not matter whether they are permanent or temporary, resident or visiting, whole-time or part-time, even if they are not servants, they are agents of the hospital to give the treatment. The only exception is the case of consultants or anaesthetists selected and employed by the patient himself."

80 See, eg, C Witting, "Breach of the Non Delegable Duty: Defending Strict Liability in Tort" (2006) 29 *University of New South Wales Law Journal* 33; see also W Whippy, "A Hospital's Personal and Non-delegable Duty to Care for its Patients – Novel Doctrine of Vicarious Liability Disguised?" (1989) 63 *Australian Law Journal* 182.

81 (1994) 35 NSWLR 522. For further discussion of this case, see Chapter 13.

Relying on United States and Canadian decisions which gave expression to the notion that it is the primary duty of the medical practitioner to act with "utmost good faith and loyalty",[82] Kirby P maintained that the "fiduciary principle" was in a state of development and that it was both "necessary and appropriate" for the courts to "recognise new fiduciary obligations".[83] He emphasised that, among other characteristics, "loyalty" should lie at the heart of the fiduciary relationship, the dominant party (such as the doctor) being bound to protect and advance the interests of the subordinate (for example, the patient) ahead of any other person with whom conflicting professional obligations might arise. He held that the duty of the medical practitioner "is at all times to act in the patient's interests"[84] and found that Dr Williams was in breach of his obligations arising from the fiduciary relationship with Ms Breen in refusing her access to her medical information on his files. By so doing, he was placing the protection of his own position (in potential litigation) before his duty of loyalty and care to his patient.

Justice Kirby's preparedness to develop the concept of fiduciary duties in the area of the doctor-patient relationship was repudiated by the High Court on appeal.[85] It was also criticised in some scholarly analyses[86] although endorsed by others.[87] Such analyses of the High Court judgments reveal that Kirby P's approach to the law of fiduciary obligations and his conceptualisation of the doctor-patient relationship were fundamentally at odds with those who by the time of their judgment were his colleagues on the High Court. Brennan CJ, for instance, accepted that the provision of care and treatment with reasonable skill and care "may not exhaust the duty of the doctor",[88] but was not prepared to emulate the Canadian (and Kirby) approach and find the relationship to be fiduciary in character. Dawson and Toohey JJ repudiated the proposition that a doctor has a duty to act on behalf of a patient with "uncompromising loyalty", expressing, rather, the view that the duty of a doctor to a patient "is established in contract and in tort and it is appropriately described

82 See, for instance, *Emmett v Eastern Dispensary and Casualty Hospital* 396 F 2d 931 (1967); *Cannell v Medical and Surgical Clinic* 315 NE 2d 278 (1974); *McInerney v MacDonald* (1992) 93 DLR (4th) 415 at 424 per La Forest J; *Norberg v Wynrib; Women's Legal Education and Action Fund, Intervener* (1992) 92 DLR (4th) 449.

83 *Breen v Williams* (1994) 35 NSWLR 522 at 543.

84 (1994) 35 NSWLR 522 at 547.

85 *Breen v Williams* (1996) 186 CLR 71 at 83 per Brennan CJ, at 97 per Dawson and Toohey JJ, at 111 per Gaudron and McHugh JJ, at 135 per Gummow J.

86 See, eg, T A Faunce, "Doctors and Fiduciaries: Implications for Resource Allocation Among Intensive Care Patients" (1997) 4 *Journal of Law and Medicine* 214.

87 See, eg, S Hepburn, "Breen v Williams" (1996) 20 *Melbourne University Law Review* 1201 at 1202: "[T]here is no reason why such obligations should not be extended to provide greater protection to the changing dynamic of the doctor-patient relationship, particularly in cases where a patient is vulnerable, heavily reliant upon a doctor and in particular need of information contained within the medical file".

88 *Breen v Williams* (1996) 186 CLR 71 at 83.

in terms of the observance of a standard of care and skill rather than, inappropriately, in terms of the avoidance of a conflict of interest".[89] Similarly, Gaudron and McHugh JJ held that, unlike fiduciaries who are obliged to give undivided loyalty to the persons they serve, the "primary duty of a doctor is to exercise reasonable care and skill in the provision of professional advice and treatment".[90] Gummow J conceded that there are "fiduciary elements" in the doctor-patient relationship but found these to have evolved from the particular reliance involved, the divulgence of confidential information and the significant impact on the economic and personal interests of the patient. He rejected uncompromisingly the position of Kirby P, commenting that:

> [i]t would be to stand established principle on its head to reason that because equity considers the defendant to be a fiduciary, therefore the defendant has a legal obligation to act in the interests of the plaintiff so that failure to fulfil that positive obligation represents a breach of a fiduciary duty.[91]

As in many instances identified in this volume, however, the dissenting view of Kirby prevailed – not (as yet at least) by the development of the law of fiduciary relationships as he wished it, but by statutory intervention to enable patients generally to have access to their medical records.[92] As to issues relating to the doctrine of equity, Kirby has replied extrajudicially, arguing that while "*Breen* states the law that Australian courts must apply … it cannot close off discussion of the majority opinion or the narrow approach that lay behind it".[93]

PSYCHIATRIC INJURIES

An ongoing issue of debate within the legal system is whether "pure psychiatric injuries" or "mental harm" should be attended by extra requirements of proof compared to those required in respect of physical injuries because of the risk of fabrication or embellishment of symptomatology. It is a subject upon which Michael Kirby has expresssed strong views. The issue is particularly significant when children, parents and partners pass away in tragic circumstances through medical negligence and the resulting litigation is the psychiatric injury

89 (1996) 186 CLR 71 at 93.

90 (1996) 186 CLR 71 at 108.

91 (1996) 186 CLR 71 at 137-138.

92 For example, under the *Freedom of Information Act 1982* (Cth); *Privacy Act 1988* (Cth); *Health Records (Privacy and Access) Act 1997* (ACT); *Privacy and Personal Information Protection Act 1998* (NSW); *Health Records Information Privacy Act 2002* (NSW); and *Health Records Act 2001* (Vic). See further, L Skene, *Law and Medical Practice: Rights, Duties, Claims and Defences* (3rd ed, LexisNexis, Sydney, 2008).

93 M D Kirby, "Equity's Australian Isolationism" (WA Lee Equity Lecture, Queensland University of Technology, Brisbane, 19 November 2008): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_19nov08.pdf (accessed 18 December 2008).

suffered by what is often a close relative.[94] In this volume, Danuta Mendelson (Chapter 32) deals with the issue in the broad context of the developing law of torts. However, Kirby and Gummow JJ in their joint decision in the twin cases of *Tame v New South Wales*[95] and *Annetts v Australian Stations*[96] made important observations in relation to the status of psychiatric injuries, commenting, for instance:

> Protection of mental integrity from the unreasonable infliction of serious harm, unlike protection from transient distress, answers the "general public sentiment" underlying the tort of negligence that, in the particular case, there must have been wrongdoing for which, in justice the offender must pay.[97]

Justices Kirby and Gummow observed[98] that there are four main reasons in the authorities said to warrant different treatment of psychiatric, as against physical, injuries:

- that psychiatric harm is less objectively observable than physical injury and is therefore more likely to be trivial or fabricated and is more captive to shifting medical theories and conflicting expert evidence;
- that litigation in respect of purely psychiatric harm is likely to operate as an unconscious disincentive to rehabilitation;
- that permitting full recovery for purely psychiatric harm risks indeterminate liability and greatly increases the class of persons who may recover; and
- that liability for purely psychiatric harm may impose an inreasonable or disproportionate burden on defendants.

They rejected these grounds, finding them not to "provide a cogent basis for the erection of exclusionary rules that operate" for psychiatric injury cases over and above physical injury cases. This led Kirby and Gummow JJ to join Gleeson CJ and Gaudron J (McHugh, Hayne and Callinan JJ dissenting) to conclude that the overarching test in respect of liability for the infliction of "pure psychiatric injury" should be the reasonableness of the defendant's conduct. It should not be necessary to establish separate prerequisites to liability in the form of the plaintiff having been shown to be of "normal fortitude", there to have been a "sudden shock", and there to have been direct perception by the plaintiff of the tortious incident or its immediate aftermath. Nevertheless, these factors all remain relevant to the reasonableness of the defendant's conduct in the circumstances.

94 See, eg, *McKenzie v Lichter* [2005] VSC 61; *Kemp v Lyell McEwin Health Service* (2006) 96 SASR 192; *Taylor v Somerset Health Authority* (1993) 16 BMLR 63; *Walters v North Glamorgan NHS Trust* [2002] Lloyd's Rep Med 227.

95 (2002) 211 CLR 317.

96 (2002) 211 CLR 317.

97 (2002) 211 CLR 317 at 379 [185].

98 (2002) 211 CLR 317 at 381 [192].

However, the decision of the majority has since been overtaken to some degree, save in Queensland and the Northern Territory, by statutory provisions that have reinstituted a provision that the defendant does not owe a plaintiff a duty of care not to cause the plaintiff mental harm "unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken".[99]

ABORTION

While Kirby P was Acting Chief Justice of New South Wales, a significant appeal came before the court, which bore upon the legality of abortion in Australia.[100] Although expressing reservations, Kirby A-CJ (in the majority) took the opportunity to express views about the criteria for lawful abortions under the *Davidson*[101] and *Wald*[102] tests, which had emerged to provide a measure of latitude for those terminating women's pregnancies. The issues arose out of an action brought by a woman and her partner who sued a clinic and various doctors within it, claiming they had been negligent in failing to detect the woman's pregnancy despite her repeated consultations with them. The woman and her partner sought damages for pain and suffering in the birth process as well as economic losses, amongst other things, arising from the need to rear the resultant child. The defendants alleged that at the time the woman's pregnancy was identified, namely at 19-and-a-half weeks' gestation, an abortion would have been illegal[103] and that therefore the plaintiff did not lose a chance of terminating the pregnancy.

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99 *Civil Law (Wrongs) Act 2002* (ACT) s 34; *Civil Liability Act 2002* (NSW) s 32; *Civil Liability Act 1936* (SA) s 33; *Civil Liability Act 2002* (Tas) s 34; *Wrongs Act 1958* (Vic) s 72; *Civil Liability Act 2002* (WA) s 5S.

100 *CES v Superclinics (Aust) Pty Ltd* (1995) 38 NSWLR 47.

101 *R v Davidson* [1969] VR 667 at 667 per Menhennitt J: "[T]he Crown must establish either (a) that the accused did not honestly believe on reasonable grounds that the act done by him was necessary to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail; or (b) that the accused did not honestly believe on reasonable grounds that the act done by him was in the circumstances proportionate to the need to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail".

102 *R v Wald* (1971) 3 NSWDCR 25 at 29 per Levine DCJ: "[I]t would be for the jury to decide whether there existed in the case of each woman any economic, social or medical ground or reason which in their view could constitute reasonable grounds upon which an accused could honestly and reasonably believe there would result a serious danger to her physical or mental health".

103 Within the terms of s 83 of the *Crimes Act 1900* (NSW): "Whosoever unlawfully administers to, or causes to be taken by, any woman, whether with child or not, any drug or noxious thing; or unlawfully uses any instrument or other means, with intent in any such case to procure her miscarriage, shall be liable to penal servitude for 10 years."

When considering the necessity and proportionality of a termination,[104] Kirby A-CJ observed that the *Wald* test allowed for a consideration of the economic demands on the pregnant woman and the social circumstances affecting her health. He noted, too, that the *Wald* test "seems to assert" that the danger being posed to the woman's mental health may not necessarily arise at the time of consultation with the medical practitioner, but that a practitioner's honest belief may go to the reasonable expectation that that danger may arise at some time during the currency of the pregnancy if uninterrupted. He commented that such considerations, "when combined with an unexpected and unwanted pregnancy, would, in fact, be most likely to result in a threat to the mother's psychological health after the child was born when those circumstances might be expected to take their toll".[105] He accepted that the *Davidson* and *Wald* formulations, in referring to an honest belief in serious danger to the woman, "are open to subjective interpretation" but observed that "[w]ith the growing recognition of such conditions as postnatal depression, not to mention other serious economic and social pressures, the gravity of the dangers posed by a pregnancy must be seen as considerations to be balanced and evaluated in their variety as applied to the case in hand."[106]

As Acting Chief Justice, Kirby took what he would call "a robust approach", acknowledging though that "termination of pregnancy is a subject which is prone to engender very strong feelings. It has a tendency, in some cases, to divide the attitudes of women (who must, in practice, bear most of the consequences) and of men (who number most of the judges enforcing the law)."[107] He said that he felt "bound to remind the Court of the reality of the application" of abortion legislation in the aftermath of the *Davidson* and *Wald* decisions – namely, that it is unlikely for a termination of pregnancy by a medical practitioner to be found unlawful in most circumstances. Whether the court felt the benefit of this "reminder" is not apparent.

Applying such considerations to the facts before him, Kirby A-CJ identified that the appellant had been 21 when she became pregnant, was a full-time student in photography, had few financial resources and little prospect of a long-term relationship with the father of her child, or, he said, "anyone else". He also took into account matters that came to light afterwards. Whether it was legitimate to do so is questionable. The matters included evidence as to the impact of the ensuing pregnancy. The appellant had to give up her studies. She was unable to obtain full-time employment in her chosen discipline. Her relationship with the baby's father did not survive. And she required treatment for depression.

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104 *CES v Superclinics (Aust) Pty Ltd* (1995) 38 NSWLR 47 at 60.
105 (1995) 38 NSWLR 47 at 60.
106 (1995) 38 NSWLR 47 at 63.
107 (1995) 38 NSWLR 47 at 70.

This led him to assert that there was sufficient evidence to conclude that a medical practitioner advising the plaintiff could honestly and reasonably have formed the view that she was facing a serious danger to her mental health by being forced to continue with the unwanted pregnancy and that a termination procedure would have been proportionate as a solution to the danger posed to her.

WRONGFUL BIRTH DECISIONS

One of the most controversial and morally fraught issues addressed by Michael Kirby during his tenure as a judge has been the compensability of child-rearing costs when a woman has become pregnant as a result of the negligence of doctors in either detecting a pregnancy or in effecting a sterilisation. Two decisions, first in the New South Wales Court of Appeal and then in the High Court, stand out.

CES v Superclinics (Aust) Pty Ltd

In *CES v Superclinics (Aust) Pty* Ltd,[108] as identified above in relation to Kirby J's stance on abortion, a young woman became pregnant and by the negligence of her doctors the pregnancy was not identified until she was 19-and-a-half weeks' pregnant. She claimed damages for the pain and discomfort associated with the birth, the loss of earning capacity resulting from the pregnancy and its immediate aftermath, and also the costs of rearing the initially unwanted child. Justice Kirby's judgment was the most extensive. He found that authority favoured the award of damages for everything save the costs of rearing the child. In this regard he was joined by Priestley JA. The more contentious issue was the award of damages to recompense the mother for the costs of rearing her child. Justice Kirby would have awarded them. His colleagues were not prepared to do so.

Justice Kirby found that the damage sustained by the mother was the damage (mental, physical and economic) associated with having to carry a child to term and give birth when the pregnancy was unexpected and unwanted. He noted the line of authority which proclaimed the birth of a child variously to be a "blessing" and a "cause for celebration" and was unequivocal in his response:

> It is quite inappropriate for a court to declare that a child, initially unwanted, and whose birth was caused by the negligence of a medical practitioner, should always be regarded for all purposes as a blessing, whatever the facts of the particular case.[109]

Similarly, he found the argument "unconvincing" that to deny recovery for accrued economic loss would demean the sanctity of human life,

108 (1995) 38 NSWLR 47.
109 (1995) 38 NSWLR 47 at 73.

whatever the circumstances of the case. He commented that "[t]he widespread use of contraceptive measures is itself an indication of a general social disagreement with the theory that every potential child must necessarily be considered an unalloyed blessing."[110] Noting that damages claims are not about love; "they are principally about recoverable costs",[111] he addressed the argument that an award of damages may undermine the family unit and cause distress to a child who discovers that he or she was initially unwanted. He expressed the view that the birth of such a child is simply the occasion by which the negligence of the doctors or clinic manifests itself in the economic injury to the parents, commenting that it is "by no means an uncommon experience" for a child to discover at some stage in its life that its birth had not been sought, or planned, or even that some measures had been taken to prevent it: "If they grow up in Australian society, at least, the discovery of such facts would rarely today cause hurt. Any such feelings would typically be overwhelmed by the knowledge of the affection usually accorded to them once they were born."[112] He went so far as to assert that "[f]ailure to award damages for the economic loss suffered as a result of negligence of supposedly skilled medical advisers in such circumstances might, in fact, produce greater friction than an award of damages."[113]

Finally, in answer to the contention that quantifying damages in such circumstances was too speculative, Kirby A-CJ responded that judges and juries are required every day to make assessments of future economic and non-economic loss on the basis of amorphous considerations – "the instant case provides no special difficulty in that regard".[114] He declined to offset the damages otherwise to be awarded by the fact that the child had brought joy to the parents.

However, the view of Kirby A-CJ in respect of the compensability of child-rearing expenses was not shared by either Priestley or Meagher JJA. The damages issue was remitted for calculation principally with reference to the costs associated with birth. No doubt envisaging an appeal to the High Court on the issue, Kirby A-CJ nonetheless pointedly suggested to the trial judge that "it could be wise" to estimate the damages on the alternate footing favoured by him "against the possibility that, at the end of this litigation, after a second trial, my opinion prevails".[115]

As it turned out, the appeal to the High Court did not proceed and clarification on the issue emerged only in 2003 in *Cattanach v Melchior*,[116] by which time Kirby J had assumed his place on the High Court.

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110 (1995) 38 NSWLR 47 at 74.
111 (1995) 38 NSWLR 47 at 74.
112 (1995) 38 NSWLR 47 at 75.
113 (1995) 38 NSWLR 47 at 75.
114 (1995) 38 NSWLR 47 at 76.
115 (1995) 38 NSWLR 47 at 78.
116 (2003) 215 CLR 1.

Cattanach v Melchior

In *Cattanach* the same issues arose in the context of a couple becoming parents of an unintended child as a result of negligent advice and failure to warn by an obstetrician and gynaecologist, who had performed a tubal ligation on the mother, Mrs Melchior, detecting and clipping only one of her two fallopian tubes. Not being warned of the risk of pregnancy, Mrs Melchior resumed unprotected sexual intercourse and, in due course, became pregnant. This resulted in the birth of the couple's third child, a healthy son, for whom the couple acknowledged their love. The couple succeeded at first instance, in suing the obstetrician and gynaecologist, gaining an award of $105,249, and successfully resisting an appeal in the Queensland Court of Appeal.

In *Cattanach v Melchior* Kirby J formed part of a 4:3 majority (joined by McHugh, Gummow and Callinan JJ, with Gleeson CJ and Hayne and Heydon JJ dissenting). By the time of the decision the House of Lords[117] had ruled against compensability for the costs of child-rearing in comparable circumstances. This was consistent with the preponderance of decisions in North America[118] but different from the South African approach.[119]

Adhering to his reasoning in *CES*, Kirby J contended that the notion that in every case and for all purposes the birth of a child is a blessing represents "a fiction which the law should not apply to a particular case without objective evidence that bears it out".[120] He denounced the emotiveness of the language employed by Hayne and Heydon JJ in dissent and argued that it is desirable for public policy considerations incorporated by the courts in their analyses to be founded in empirical evidence – not just judicial assertion. He observed that Mrs Melchior had suffered physical injury and therefore held that both parents were entitled to recover damages for the economic consequences of the physical events caused by the negligence without having to satisfy the special tests adopted by the common law for "pure economic loss".[121]

Justice Kirby denounced as "incontestably arbitrary" the distinction applied by many courts between the entitlement on the part of the mother to compensation for loss of wages arising from an unintended birth and an entitlement to the costs of child-rearing: "Both kinds of damage are equally foreseeable as a consequence of negligence. Each

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117 *McFarlane v Tayside Health Board* [2000] 2 AC 59.

118 See, eg, in Canada *Doiron v Orr* (1978) 86 DLR (3d) 719; *Cataford v Moreau* (1978) 114 DLR (3d) 585; *Fredette v Wiebe* (1986) 29 DLR (4th) 534; and in the United States see the summary of authorities in *Emerson v Magendantz* (1997) 689 A 2d 409.

119 See *Mukheiber v Raath* 1999 (3) SA 1065.

120 *Cattanach v Melchior* (2003) 215 CLR 1 at 57 [148].

121 (2003) 215 CLR 1 at 58 [150].

is directly caused. Neither is too remote."[122] He contended that for as long as child-rearing costs in such circumstances are imposed on parents alone, the purposes of the law of torts are unfulfilled: "There is neither proper compensation for the victims of the legal wrong nor the provision of a civil sanction that promotes care and discourages carelessness in the future, in the knowledge that the burden of it will fall on others."[123] Justice Kirby further contended that this "corrective justice" element of torts should not be overlooked and went so far as to suggest that to deny the long-term costs of medical error could be discriminatory "given that it involves a denial of the application of ordinary compensatory principles in the particular circumstances of child-birth and child-rearing, circumstances that biologically and socially pertain to the female experience and traditionally fall within the domain of women".[124] These considerations led him and the majority to uphold the "comparatively modest amount" of damages permitted at first instance.

Subsequently, in New South Wales,[125] South Australia[126] and Queensland,[127] the majority position (including that of Kirby J) has been statutorily overturned in relation to wrongful birth actions. The commonly asserted basis for such legislative intervention has been the need to limit the liability of insurers. The decision continues to be controversial[128] but the flow of litigation in the area thus far has been modest.[129] Almost inevitably, its application beyond healthy births was going to be attempted – and by 2006 it was.

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122 (2003) 215 CLR 1 at 62 [161].

123 (2003) 215 CLR 1 at 62 [161].

124 (2003) 215 CLR 1 at 62-63 [162].

125 *Civil Liability Act 2002* (NSW) ss 70, 71.

126 *Civil Liability Act 1936* (SA) s 67.

127 *Civil Liability Act 2003* (Qld) ss 49A(2), 49B(2).

128 See, eg, R Graycar, "Judicial Activism or 'Traditional' Negligence Law? Conception, Pregnancy and Denial of Reproductive Choice" in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (Federation Press, Sydney, 2006); B Golder, "From McFarlane to Melchior and Beyond: Love, Sex and Commodification in the Anglo-Australian Law of Torts" (2004) 12 *Torts Law Journal* 128; K Burns, "The Way the World Is: Social Facts in High Court Negligence Cases" (2004) 12 *Torts Law Journal* 215; M Vranken, "Damages for 'Wrongful Birth': Where to After Cattanach?" (2003) 24 *Adelaide Law Review* 243; J Seymour, Case Note: "Cattanach v Melchior: Legal Principles and Public Policy" (2003) 11 *Torts Law Journal* 208; P Cane, "The Doctor, the Stork and the Court: A Modern Morality Play" (2004) 120 *Law Quarterly Review* 23; P Dimopoulos and M Bagaric, "Why Wrongful Birth Actions Are Right" (2003) 11 *Journal of Law and Medicine* 230; P Telford, "Assessing the Cost of Our Children: Case Note: Cattanach v Melchior" (2003) 19 *Australian Insurance Law Bulletin* 1; B White, "Cattanach v Melchior: Babies, Pregnancy and Damages for the Upbringing of the Child" (2003) 26 *University of New South Wales Law Journal* 125; J Seymour, "Cattanach v Melchior: Legal Principles and Public Policy" (2003) 11 *Torts Law Journal* 208; J Devereux, "Actions for Wrongful Birth" (2004) 3 *INSAF* 69.

129 See, eg, *G and M v Armellin* (2008) 219 FLR 359.

WRONGFUL LIFE AUTHORITY

Thus, in *Harriton v Stephens*[130] and *Waller v James*[131] a related issue was litigated – the entitlement of a child to damages arising from a doctor's negligence, which had resulted in the birth of a disabled child when otherwise such a birth would not have taken place. Previous comparable actions in Australia,[132] the United Kingdom,[133] Canada[134] and Singapore[135] had not succeeded. Likewise, most previous actions in the United States had failed.[136]

In *Harriton* a doctor failed to diagnose rubella (in 1980) in a pregnant patient, thereby depriving her of the option of having a pregnancy termination. The patient gave birth to a child (Alexia) with serious congenital disabilities, including blindness, deafness and intellectual retardation caused by the rubella virus. Proceedings for damages were brought on behalf of Alexia for damages against the doctor, pleading pain and suffering, loss of amenities, medical expenses and the cost of personal services provided gratuitously (*Griffiths v Kerkemeyer*[137] expenses). At first instance, Alexia lost, Studdert J finding, amongst other things, public policy considerations militated against recognising wrongful life actions. He stated that accepting wrongful life actions would erode the value of human life; undermine the perceived worthiness of those born with disabilities; open the door to actions brought by anyone born with a disability regardless of the severity of their disability; enable children born with disabilities to sue their mothers for failing to undergo an abortion if advised of the risk of disability; and place unacceptable pressure on the cost of the insurance premiums of medical practitioners.

The New South Wales Court of Appeal was split, with the majority of Spigelman CJ and Ipp JA dismissing the appeal. Chief Justice Spigelman found an absence of sufficient directness in the relationship between Alexia and the doctor and inadequate evidence of clear moral support for the existence of the alleged duty. He also found that it had not been established that Alexia would have been better off had she not

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130 (2006) 226 CLR 52.

131 (2006) 226 CLR 136.

132 Prior to *Harriton* and the appeal from *Waller v James* (2004) 59 NSWLR 694 heard at the same time (*Waller v James* (2006) 226 CLR 136), three reported wrongful life actions had been brought: *Bannerman v Mills* [1991] Aust Torts Reports 81-079; *Hayne v Nyst* (unreported, Supreme Court of Queensland, 17 October 1995) per Williams J; and *Edwards v Blomeley* [2002] NSWSC 460.

133 *McKay v Essex AHA* [1982] QB 1166; see later the *Congenital Disabilities (Civil Liability) Act 1976* (UK), which expressly prevented wrongful life actions.

134 *Mickle v Salvation Army Grace Hospital* (1998) 166 DLR (4th) 743; *Patmore v Weatherston* [1999] BCJ No 650; *Andt v Smith* (1994) BCLR (2d) 220; *Jones v Rostvig* (1999) 44 CCLT (2d) 313.

135 *JU v See Tho Kai Yin* [2005] 4 SLR 96.

136 See, eg, *Gleitman v Cosgrove* (1967) 227 A (2d) 689; see, though, *Turpin v Sortini* (1982) 182 Cal Rptr 337.

137 (1977) 139 CLR 161; see also *Procanik v Cillo* (1984) 478 A (2d) 755; *Harbeson v Marke-Davis Inc* (1983) 656 P (2d) 483.

been born. The majority of the High Court (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) upheld the majority view in the Court of Appeal and determined that the doctor did not owe Alexia a duty of care. Justice Kirby dissented. The same combination, with Hayne J joining the majority, held that as the comparison was between Alexia's life with disabilities and no life, the comparison was impossible and therefore not amenable to determination by a court. On this issue, too, Kirby J dissented.

Justice Kirby commenced his dissent by repudiating the terminology of "wrongful life actions", categorising the descriptor as "seriously misleading"[138] and as emotive and demeaning of the value of human existence.[139] He pointed out that the wrong alleged by a plaintiff in such an action is not in any meaningful sense the existence of the child, but the suffering consequential upon the defendant's negligence.[140] He noted that "wrongful birth" and "wrongful life" actions are distinguishable on several grounds. Wrongful life actions are brought by or for the child, whereas wrongful birth actions are commenced at the instance of the parents. Wrongful life actions are often said to raise concerns about the relevant values of existence and non-existence but such considerations have not been prominent in opposition to wrongful birth compensability. He observed, though, that the two forms of action share a number of similarities, including that both require a birth and that the child would not have been born but for the negligence of the defendant.

In *Harriton*, although the doctor played no role in the mother contracting rubella, Kirby J asserted that this was not to the point – had it not been for the doctor's negligence the plaintiff would not have been born and her suffering, expenses and losses of which she complained to the court would have been avoided. The doctor's negligence had deprived Alexia's parents of the opportunity to terminate the pregnancy. For Kirby J this meant that the doctor was a cause of Alexia's damage. Thus, in essence, the sine qua non test of litigation played a significant role, his Honour finding no policy reason which countervailed.

Justice Kirby observed that the challenge posed by the *Harriton* case arose from "new technology that permits genetic and other tests to identify grave foetal defects in utero and medical and social changes that permit abortion to occur in some such cases that once would have been impossible, unprofessional or even criminal".[141] He rejected the proposition that special damages alone should be ordered as "incongruous", and held that "it would be wrong to deny compensation where resulting damage has occurred merely because logical problems purportedly

138 *Harriton v Stephens* (2006) 226 CLR 52 at 59 [10]. See D Stretton. "The Birth Torts: Damages for Wrongful Birth and Wrongful Life" [2005] *Deakin Law Review* 16.

139 (2006) 226 CLR 52 at 60 [13].

140 Citing P Cane, "Injuries to Unborn Children" (1977) 51 *Australian Law Journal* 604 at 719.

141 *Harriton v Stephens* (2006) 226 CLR 52 at 80 [86].

render that damage insusceptible to precise or easy quantification".[142] Addressing the key element of the reasons of the majority[143] – that because no adequate comparator existed no damages should be awarded to Alexia – he rejected the relevance of the comparator of non-existence, classifying it as "hypothetical – a fiction, a creature of legal reasoning only". He argued in terms of basic fairness to the disabled and suffering litigant – that the destination to which such a fictitious comparator takes the law is unacceptable, and as:

> offensive to justice and the proper purpose of the law of negligence. A medical practitioner who has been neglectful and caused damage escapes scot-free. The law countenances this outcome. It does nothing to sanction such carelessness. It offers no sanction to improve proper standards of care in the future.[144]

Accepting that generally a plaintiff needs to be able to show that they are worse off as a result of tortious behaviour than they otherwise would have been, Kirby J observed that people can sometimes prefer non-existence to existence. He maintained that it is arguable that "a life of severe and unremitting suffering is worse than non-existence", instancing a neonate with a very limited life span and no capacity to think or appreciate its surroundings and only capable of experiencing unrelenting and excruciating pain.[145] He argued that it is important not to distort wrongful life claims on the basis of religious beliefs: "In today's world a steady adherence to secularism in the law is more important to a mutually respectful civil society than before. Judges have no right to impose their religious convictions (if any) on others who may not share those convictions."[146]

Dealing with the argument that allowing wrongful life actions would mean regarding the life of a disabled child as less valuable than the life of a normal child, Kirby J contended that, on the contrary, such actions would provide plaintiffs with a degree of practical empowerment by enabling them to lead a more dignified existence.[147] Addressing the argument of Ipp JA in the Court of Appeal,[148] that in light of the likely unknowable advances in genetic science, courts should stay their hand

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142 (2006) 226 CLR 52 at 82-83 [96].

143 (2006) 226 CLR 52 at 103-105 [167]-[172] per Hayne J, at 112 [205] per Callinan J, and at 126-127 [252]-[253] per Crennan J.

144 (2006) 226 CLR 52 at 84 [101].

145 (2006) 226 CLR 52 at 85 [105].

146 (2006) 226 CLR 52 at 86-87 [110].

147 In relation to human rights issues and the "right to life", see P French and R Kayess, "Deadly Currents Beneath Calm Waters: Persons with Disability and the Right to Life in Australia" [2008] *University of New South Wales Faculty of Law Research Series* 34: http://www.austlii.edu.au/au/journals/UNSWLRS/2008/34.html (accessed 18 December 2008).

148 *Harriton v Stephens* (2004) 59 NSWLR 694 at 746 [338]; see also S Todd, "Wrongful Conception, Wrongful Birth and Wrongful Life" (2005) 27 *Sydney Law Review* 525 at 540-541.

in developing tort law and stop short of protecting the interest asserted by Alexia, he contended that:

> [i]n medical science there will always be imponderables. If Ipp JA's argument were taken to its logical conclusion, there would be no future for tort law in the field of medical negligence. The courts would opt out with a unilateral self-denying ordinance on the basis of the possibility (by no means certain) that the several legislatures of Australia, within their respective areas of responsibility, will energetically address the countless problems requiring legal solutions … Whether this Court likes it or not, genetic testing and other sophisticated technology is playing an increasingly significant role in reproductive decision-making and subsequent life-support to the profoundly disabled. In light of this, it would be erroneous for tort law in Australia to opt out of its function of expressing the rules that govern the rights and obligations of parties in relevant relationships.[149]

The majority decision was perhaps best summed up by Crennan J, who observed that the majority decision in *Cattanach v Melchior* represented the outer limit in respect of claims of wrongful birth and wrongful life – "Life with disabilities, like life, is not actionable." The *Harriton* and *Waller* decisions have aroused even greater controversy than *Melchior*.[150] Justice Kirby has not been without his supporters, Faunce and Jefferys, for instance, arguing that the majority in the decisions:

> have engaged in a spurious exercise of judicial pedantry to trivialize [the suffering of Alexia and Keeden, the child in *Waller*] by reference to some hypothetical alternative (non-existence). Any judge looking face-to-face at the child in *Harriton* would know that what she wants is a chance to be as normal as necessarily expensive treatment can now make her. By what principle can the great, historical body of the common law remain indifferent to the injustice of her suffering?[151]

For now the legal mainstream is formidably against Justice Kirby's approach.[152] Whether the plight of children such as Alexia and Keeden remoulds Kirby J's heterodoxy into orthodoxy with the weapon of compassion remains to be seen. It will not do so in the short term.

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149 (2006) 226 CLR 52 at 99-100 [151]-[152].

150 See, eg, G Kapterian, "Harriton, Waller and Australian Negligence Law: Is There a Place for Wrongful Life?" (2006) 13 *Journal of Law and Medicine* 336; A Coorey and P Panikabutara, "Case Note: Cattanach v Melchior" (2006) 13 *Journal of Law and Medicine* 419; T Faunce and S Jefferys, "Abandoning the Common Law: Medical Negligence, Genetic Tests and Wrongful Life in the Australian High Court" (2007) 14 *Journal of Law and Medicine* 469; W J Neville and B Lokuge, "Wrongful Life Claims: Dignity Disability and a 'Line in the Sand'" (2006) 185(10) *Medical Journal of Australia* 558.

151 Faunce and Jefferys, n 150 at 476-477.

152 See the discussion by M Fordham, "A Life Less Ordinary – The Rejection of Actions for Wrongful Life" (2007) 15(2) *Torts Law Journal* 123.

END-OF-LIFE ISSUES

In the 1980s Michael Kirby was a campaigner for the decriminalisation of suicide. He noted the rarity with which the offence was prosecuted and argued for the law's approach to this category of vulnerable people being made more compassionate:

> Some might say that if there were a real risk of prosecution the depression of the suicide would be intensified and an additional basis provided for further and unsuccessful attempts. The road to reform here requires:
>
> - Bringing the law "in the books" into line with practice;
> - Abrogation of the law under which suicide or attempted suicide is a crime;
> - Provision that the survivor of a suicide pact who kills the deceased party is guilty not of murder but of manslaughter; and
> - Provision for a specific offence of inciting, counselling, aiding or abetting the suicide or attempted suicide of another.[153]

In his judicial and extrajudicial writing, Kirby has not expressed an unequivocal view about whether physician-assisted suicide should be legalised. However, his views on end-of-life issues can, to some extent, be garnered from his citation on two occasions of the dissenting judgment of Justice Brennan in the leading United States decision on the switching off of life support, *Cruzan v Director, Missouri Department of Health*.[154] In that case, the question before the United States Supreme Court was whether the "Due Process Clause" allowed Missouri to require a by then incompetent patient in an irreversible persistent vegetative state to remain on life support without rigorously clear and convincing evidence that avoiding the treatment represented the patient's prior, express choice. Justice Brennan observed: "Dying is personal. And it is profound. For many, the thought of an ignoble end, steeped in decay, is abhorrent."[155] To use Kirby J's own words in *Harriton v Stephens*,[156] Brennan J also "suggested that control over the moment and circumstances of death was one of the most important of all rights. He thereby clearly postulated the right in some circumstances to be protected by the law in giving effect to such a preference."

In *Harriton v Stephens*,[157] Kirby J postulated a less than absolutist position on the "sanctity of life", observing that people can sometimes express a preference for non-existence. The law has recognised this by enabling

153 M D Kirby, "Mental Health Law Reform" (20th Sir Barton Pope Lecture, Adelaide, 23 September 1980).

154 497 US 261 (1990), cited in M D Kirby, "Review of R S Magnusson, Angels of Death – Exploring the Euthanasia Underground": http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_angelsdeath.htm (accessed 7 November 2008); *Harriton v Stephens* (2006) 226 CLR 52 at 85 [105].

155 Referred to in Kirby, n 153.

156 (2006) 226 CLR 52 at 85 [104].

157 (2006) 226 CLR 52 at 85 [104].

medical practitioners to cease treatment in certain circumstances and by decriminalising suicide. As discussed above, Kirby J has argued that, in certain circumstances a life characterised by dreadful suffering may be worse than no life at all, instancing the scenario of a neonate with a very limited life span and no capacity to think or appreciate its surroundings and only the capacity to experience unrelenting and excruciating pain: "In such a case, many people might think that non-existence would be preferable to existence, particularly where heroic measures were necessary to keep the patient alive."[158]

Thus, Kirby's published judicial and extrajudicial views on the end of life, while limited, suggest that he views decision-making on the subject through the lens of human rights and is concerned that where a person is able to express a preference (provided of course that it is not the product of any form of duress), such a preference should generally be given full force and effect and should detract from neither a person's dignity nor their autonomy.

REGULATION OF MEDICAL PRACTITIONERS

The regulation of medical (and other health) practitioners has evolved substantially during Kirby's tenure in judicial office.[159] There has been a shift away from deference to professional self-regulation toward more rigorous contemporary evaluation of the propriety of professionals' behaviour, greater input by members of the public, more involvement by appellate courts and something of a move away from conduct evaluation toward performance assessment.[160] However, difficult questions remain, including the substance and application of the tests for professional misconduct and the fairness of procedures deployed in inquiring into the potential commission of professional misconduct. There is often a tension in specific cases between seriously inappropriate conduct engaged in by a medical practitioner and whether they should remain in practice or be permitted to return to it.

Justice Kirby's approach to the professional responsibilities of medical practitioners was clearly expressed in a joint judgment with O'Keefe AJA in *Richter v Walton*:[161]

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158 (2006) 226 CLR 52 at 85 [105].

159 See generally, I Freckelton, "Trends in Regulation of Mental Health Practitioners" (2008) 15(3) *Psychiatry, Psychology and Law* 413.

160 See, eg, Freckelton, n 159; I Freckelton, "Non-disciplinary Regulation of Health Practitioners" in J Healy and P Dugdale (eds), *Safety First: Regulating Patient Care* (Allen & Unwin, Sydney, 2009). I Freckelton, "Regulation of Health Practitioners" in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (Federation Press, Sydney, 2006); D Thomas, "Peer Review as an Outmoded Model for Health Practitioner Regulation" in I Freckelton (ed), *Regulating Health Practitioners* (Federation Press, Sydney, 2006); A-L Carlton, "National Models for Regulation of the Health Professions in Freckelton (2006) above; A Reid, "To Discipline or Not to Discipline? Managing Poorly Performing Doctors" in Freckelton (2006) above.

161 (Unreported, NSW Court of Appeal, 15 June 1993) at p 2.

> All patients are entitled to approach their medical practitioners secure in the belief that their ills will be treated to the best of the skill and ability of their medical practitioners and without any interference of an improper kind with their persons or in relation to their affairs. Respecting the vulnerability of those who attend upon them when in need is fundamental to the practice of medicine.

One of Australia's most significant decisions in relation to the discipline of medical practitioners remains that of the New South Wales Court of Appeal in *Pillai v Messiter (No 2)*,[162] a case that arose from an appeal by a doctor who prescribed a patient with intractable epilepsy and intellectual disability four-and-a-half times her usual dosage of an anti-convulsant drug, Dilantin. This resulted in her death from a cardiac arrest consequent upon Dilantin-toxicity. The New South Wales Medical Tribunal found the dosage "obviously and grossly excessive". Dr Pillai's explanation was that his prescription had been "an inadvertent error of transcription". The response of the tribunal was to find Dr Pillai guilty of misconduct in a professional respect and to remove his name from the medical register. On this occasion the approach of Kirby was consistent with that of his colleagues.

In a customarily thorough analysis of the background and policy rationale for statutory provisions, Kirby P traced the legislative and judicial history of the different expressions relating to unprofessional conduct by medical practitioners and held that the then prevailing expression in New South Wales plainly went beyond the test for civil law negligence. He concluded that "gross negligence" might amount to relevant misconduct, "particularly if accompanied by indifference to, or lack of concern for, the welfare of the patient. Likewise, departures from elementary and generally accepted standards, of which a medical practitioner could scarcely be heard to say that he or she was ignorant, could amount to professional misconduct, but:

> the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of the privileges which accompany registration as a medical practitioner.[163]

This then required determination of whether a one-off disastrous error should be regarded as professional misconduct. It was emphasised by Kirby P that the consequence of such a finding for a professional and

162 (1989) 16 NSWLR 197.

163 (1989) 16 NSWLR 197 at 200. Samuels JA was more caustic, commenting (at 210) that the Medical Tribunal's judgment "is remarkable for the omission of any reference to the principles which regulate the translation of professional negligence into professional misconduct … It seems as if the Tribunal treated the matter as if it were an action for professional negligence rather than a charge of misconduct."

the fact that the purpose of providing for such a drastic consequence is not punishment of the practitioner, "as such", but protection of the public: "The public needs to be protected from delinquents and wrong-doers within professions. It also needs to be protected from seriously incompetent professional people who are ignorant of the basic rules or indifferent as to rudimentary professional requirements."[164] He held that such individuals should be removed from practice at least until they can demonstrate that their disqualifying imperfections have been removed. He concluded that so drastic a step was not required in relation to Dr Pillai. He classified Dr Pillai's conduct as constituting "a terribly unfortunate mistake but nonetheless an accidental one which could occur in a busy professional practice without misconduct". In addition, he categorised Dr Pillai's error, or carelessness, as not indicative of a failure to keep up with basic medical knowledge.

The approach of the Court of Appeal and, in particular, that of Kirby P, is difficult for regulators. The error of Dr Pillai was egregious and its consequences fatal. His ongoing competence to practise was open to real question. Ultimately, the approach adopted was characteristic of Kirby – rigorous legal analysis moderated in its application to the facts and the person by a significant measure of compassion, a recognition that we are all human and prone from time to time to make mistakes, which can have dreadful consequences.[165] Whether overmuch mercy was extended to a dangerous doctor is open to debate.

In *Gill v Walton*,[166] Kirby P joined Gleeson CJ (Mahoney JA dissenting) in a difficult decision to stay proceedings in the Medical Tribunal arising out of the deep sleep therapy controversies at Chelmsford. At one level the conduct concerned was of the highest level of seriousness. At another, though, there had been an egregious delay in bringing the proceedings before the Medical Tribunal. Drawing on the decision of the European Court of Human Rights in *Konig v Federal Republic of Germany*[167] to determine that a permanent stay should be granted on the basis of the unreasonable effluxion of time, Kirby P stated:

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164 (1989) 16 NSWLR 197 at 201.

165 For the expression of a similar sentiment, applying *Pillai v Messiter (No 2)*, see Morris J in *Vissenga v Medical Practitioners Board of Victoria* [2004] VCAT 1044 at [33]: "[N]either the public nor the peers of a medical practitioner expect perfection at all times. Human frailty visits every person, including those who are medical practitioners. Reasonable members of the public, and the reasonable peers of medical practitioners, understand this. Reasonable people are tolerant of occasional lapses, particularly if these lapses do not form a consistent course of conduct or, if taken separately, are insufficiently serious to warrant intervention by those charged with acting on behalf of the State." The application of a similar approach to a solicitor who had engaged in indecent sexual behaviour with the two daughters of his girlfriend and yet was readmitted to practice has proved controversial: see *A Solicitor v Council of the NSW Law Society* (2004) 216 CLR 253. See I Freckelton, "Good Character and the Regulation of Medical Practitioners" (2008) 16 *Journal of Law and Medicine* 488.

166 (1991) 25 NSWLR 190.

167 (1978) 2 EHHR 170.

> It is fifteen years since the claimants last administered [deep sleep] therapy. It is now administered nowhere in the State. It is unlawful. There is no suggestion that its use has been revived or will be used again by anyone, least of all the claimants. Such is the passage of time since the events the subject of the complaints (which date back to 1970) that one off the claimants has retired from practice. Doubtless the other claimants are now in many ways different people, exercising different skills according to different professional knowledge.[168]

He found that in such circumstances the proposition that the public interest required the disciplinary hearings to proceed in relation to matters 15-20 years before was "wholly unconvincing" and that the proceedings constituted a species of illegitimate double jeopardy.

Justice Kirby has also reflected on the contemporary validity of the concept of "good character" in the context of ongoing registration of medical practitioners. In the context of the criminal law, he has articulated grave reservations about its legitimacy as a psychological construct:

> The belief that individuals are indelibly marked by an identifiable "character" has value in the law only so far as it is based on an assumption that such "character" has a predictive value, whether for good or bad. This notion is not only challenged by the fact that every first offender once had a "good character". It is also difficult to reconcile with modern psychological experimental literature. It appears to rest, like several common law rules of evidence, "on unstudied assumptions of human nature that generally have been rejected by those who have tested the actual effects of the rules of evidence on human behaviour and decision-making.[169]

However, in the disciplinary context, he dissented in the controversial case of *McBride v Walton*.[170] The majority (Handley and Powell JJA) held that the dishonest reporting in a scholarly journal of an animal experiment on a suspected teratogen in animals established that the medical practitioner, even if otherwise of good character and reputation, was "not of good character" in respect of his practice of medicine and so not entitled to remain on the Register. It concluded that William McBride's fabrication of results revealed a serious flaw or defect in his character – a trait of dishonesty that was incompatible with his continuing registration.

However, Kirby P observed that the practitioner involved, the obstetrician and gynaecologist, Dr William McBride, was one of Australia's most famous medical practitioners, in part because of his discovery of a connection between the drug Thalidomide, a morning sickness medication for pregnant women, and the birth of offspring with defects. He held that:

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168 (1991) 25 NSWLR 190 at 206.

169 *Melbourne v The Queen* (1999) 198 CLR 1 at 40-42 [105]-[107].

170 [1994] NSWCA 199.

(a) The notion of "good character" is not at large; it has to be assessed in the context of a medical practitioner and in relation to removal from the register and morality is relevant only so far as it relates to the person's performance of the duties of medical practitioner;
(b) not every flaw of character, even a flaw relevant to a medical practitioner's entitlement to practice, will lead to a finding that a practitioner is not of good character;
(c) a single act or even a connected series of acts, even if pertinent to medical practice, may not be sufficient to establish lack of good character;
(d) wrongdoing by a practitioner extraneous to his or her profession may be relevant to demonstrating a want of good character, but only if the conduct in question showed what can be taken to be a characteristic of the individual rather than an isolated lapse which is uncharacteristic to the practitioner *or* irrelevant to the practice of the profession;
(e) where the conduct of a practitioner is shown to have fallen below the standards usually required and expected of a practitioner, the question is whether the conduct was aberrant, exceptional or an error of judgment or whether it betokens a serious flaw in the practitioner's character.[171]

He then determined that once the impugned conduct is found and classified, it is then necessary for it to be evaluated within the wider context of the practitioner's character, including evidence of his or her "good character" as demonstrated by his or her service to the profession and the community, considering "the whole character" of the person. Such an approach led Kirby P to arrive at a different result from the majority. When Kirby P looked to all of the career of the eminent Dr McBride as a distinguished citizen, researcher and obstetrician, including the many attestations of his good character, he found that the Medical Tribunal had employed an "incorrect or an unduly expansive view" of the test for "good character".[172] He concluded that "[a] man with a basically good character for the purposes of the practice of medicine made a grievous error of judgment in reporting a scientific experiment. He persisted in it." For Kirby P, though, when this error was viewed in the context of the practitioner's professional life, it was not sufficient to preclude his remaining a practitioner of "good character". He disagreed with the majority and would neither have made the adverse finding against him nor removed him from the Medical Register.

Justice Kirby's approach in regulatory cases has consistently been to be cautious about undifferentiated imputations of "bad character" and to seek to identify contextual relevance to alleged indicia of the absence of good character. Where a practitioner has made substantial contributions to the community during his or her career, this has resulted in a more

171 [1994] NSWCA 199 at [23]–[25].
172 [1994] NSWCA 199 at [35].

benevolent approach toward the practitioner's continuing registration than that adopted by many other judges on appeal. The issue that arises with Kirby J's approach is whether it adequately affords protection to the public and meets community expectations in relation to the probity and propriety of registered health practitioners' conduct. Nevertheless, an important contribution made by Kirby J to law reform currently taking place in relation to national regulation of health practitioners is to identify the conceptual shortcomings of the notion of "good character", a term that could well be usefully replaced by the requirement that practitioners be "fit and proper persons".

MENTAL HEALTH LAW

It has been observed that "how a society treats its citizens who suffer from mental illness … is often a test of fairness".[173] Michael Kirby has long exhibited an interest in the risk that mental health law can work oppressively against people's rights, and especially against the right of minority components of our society.[174] As long ago as 1980, in the Sir Barton Pope Lecture,[175] he expressed concern about a lack of precision in Australia's statutory definitions of mental illness and observed the wisdom in Brandeis J's dissenting decision when he commented that: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent … The greatest dangers to liberty lurk in insidious encroachment by men of zeal, wellmeaning but without understanding."[176] He expressed support in the Pope Lecture for the then emerging phenomenon of deinstitutionalisation, lamenting that psychiatric hospitals "are frequently oppressive to the individual, destructive of self-reliance and sometimes brutalising both to the institutionalised and those who guard them". He went on to argue that as a check and balance on clinicians, "[i]t is vital that the system of involuntary admission should be recognized as second only to the criminal justice system in the impact it can have on the civil rights of the individual to liberty." He contended that it was vital to improve the provision of legal representation of persons who were involuntary inpatients and with the ability to appear before mental health review tribunals:

> No longer is [the debate] about whether a universally available representation scheme should be available. The issue is now the form, quality and organisation of such representation and the effectiveness of

173 *Hunter Area Health Service v Presland* (2005) 63 NSWLR 22 at 121 [383] per Spigelman CJ.

174 See, eg, M D Kirby, "Law Reform, Politics and Mental Health" (1983) 17 *Australian and New Zealand Journal of Psychiatry* 39; Kirby, n 153 (1980); M D Kirby, "Psychiatry, Psychology, Law and Homosexuality – Uncomfortable Bedfellows" (2000) 7(2) *Psychiatry, Psychology and Law* 139.

175 Kirby, n 153 (1980).

176 *Olmstead v United States* 277 US 438 at 479 (1928).

> its labours. This is not necessarily a plea for more work for lawyers. Indeed, I am sure that effective representation in some cases could be offered by a skilled layman who had built up a detailed knowledge of procedures, relevant criteria and medical information, with which to test applications for committal.

Interestingly, as of 2009 the same argument is being mounted in light of the low incidence of representation before such bodies and, in light of the relative dearth of legal representation, other models of representation of involuntary patients are being championed.[177]

As President of the New South Wales Court of Appeal, Kirby dissented in what is probably Australia's most significant decision thus far in relation to mental health law.[178] It is one of his most overtly civil libertarian judgments.

Ms Harry was first admitted as a psychiatric patient in 1979 and then some 27 times between 1979 and 1992, leading to her being categorised as a "revolving door patient". She was diagnosed as having schizo-affective disorder, a mental illness with components of both schizophrenia and bipolar disorder (manic depression). She was described by her psychiatrist as lacking insight into her condition and frequently non-compliant with the prescribed medication that addressed her symptomatology. In 1993 she was placed on a community treatment order – a mandatory outpatient treatment order.[179] This order was then extended by the Mental Health Review Tribunal in Ms Harry's absence, after she failed to attend a scheduled hearing of the tribunal. However, she had not been warned of the power of the tribunal to deal with her case even if she did not attend.

Kirby observed that the history of mental health legislation has often evinced a vacillation between, on the one hand, a paternalistic treatment model and, on the other hand, a due process model strictly protective of individual rights. He commented that many reports of official bodies in Australia and other countries have demonstrated the way in which

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177 See V Williams, "The Challenge for Australian Jurisdictions to Guarantee Free Qualified Representation Before Mental Health Tribunals and Boards of Review: Learning from the Tasmanian Experience?" (2009) 16 *Psychiatry, Psychology and Law* (forthcoming); see also S Delaney, "Mental Health Tribunals and Decision-Making" (2003) 10(1) *Psychiatry, Psychology and Law* 71.

178 *Harry v Mental Health Review Tribunal* (1994) 33 NSWLR 315.

179 A mainstream of contemporary involuntary mental health treatment in Australia; for a discussion of the controversies, see J Dawson and R Mullen, "Insight and Use of Community Treatment Orders" (2008) 17(3) *Journal of Mental Health* 269; J Dawson, S Romans, A Gibbs and N Ratter, "Ambivalence about Community Treatment Orders" (2003) 26 *International Journal of Law and Psychiatry* 243; V Aldige'Hiday, "Coerced Community Treatment: International Trends and Outcomes"; J Monahan, "Mandated Community Treatment: The Potential Role of Violence Risk Assessment"; A I F Simpson, "A Clinical Perspective on Involuntary Outpatient Treatment: Efficacy and Ethics"; S Bell, "Rights Issues in Compulsory Treatment Orders" all in K Diesfeld and I Freckelton (eds), *Involuntary Detention and Therapeutic Jurisprudence: International Perspectives on Civil Commitment* (Ashgate, Aldershot, 2003).

"mental health law can sometimes be used to control the behaviour of individuals merely to relieve family, neighbours, and acquaintances from their embarrassment, rather than to assist the individuals primarily concerned to be themselves".[180] He then further noted that "it is not necessary to go to the mental health laws of Hitler's Germany or Stalin's Russia to be reminded of the potential for misuse, or excessive use, of compulsory mental health powers. The courts must be vigilant against such a misuse or excessive use."[181] Building upon an earlier decision of his own,[182] he insisted that, if Parliament is to justify enforced intrusion into the life of an individual, it must do so in very clear terms and by affording those who assert their authority with very clear powers.[183] He also emphasised the importance, especially in the post-*Rogers v Whitaker* era, of patient consent to medical treatment in most circumstances and the need for a statutory mandate for coerced treatment to be explicit.

This approach led him to disagree with the majority (Mahoney and Clarke JJA) and to construe the relevant provisions in the *Mental Health Act 1990* (NSW) in such a way as to determine that the intention of Parliament was not that the Mental Health Tribunal could extend community treatment orders in the absence of the person concerned without sufficient protections, notices and warnings. He repudiated the proposition that such a construction of the scheme of the legislation was "irrational".

CAPACITY TO MAKE HEALTH DECISIONS

Another of Michael Kirby's many bioethical interests is in decision-making capacity. Perhaps not surprisingly, his views are at the individualist end of the spectrum. He has argued that there is a need for "recognition that decisions about human capacity have profound and highly personal impacts on individuals, respect for whose dignity and basic rights is a professional, as well as a legal and moral obligation".[184] He has contended in relation to the assessment of capacity that there is a need for both scepticism and avoidance of an over-ready deference to orthodox professional wisdom: "This is a warning to be recalled in the papal treatment of Galileo. In our own time, it was illustrated in psychiatry as it was practised in the former Soviet Union. Dissidents were simply labelled mentally ill. In some places such orthodoxy still works havoc."[185]

180 *Harry v Mental Health Review Tribunal* (1994) 33 NSWLR 315 at 322.

181 (1994) 33 NSWLR 315 at 322-323.

182 *B v Medical Superintendent of Macquarie Hospital* (1987) 10 NSWLR 440, esp at 454: "Liberty is at stake."

183 See, too, *Wilson v Mental Health Review Board* [2000] VSC 404 per O'Bryan J.

184 M D Kirby, Book Review, P Darzins, D W Molloy and D Strang, *Who Can Decide, The Six Step Capacity Assessment Process* [2003] *Elder Law Review* 7: http://www.austlii.edu.au/au/journals/ElderLRev/2003/7.html (accessed 7 November 2008).

185 Kirby, n 184.

CORONERS' INQUESTS

Supreme Courts have a responsibility to supervise the activities of inferior courts and tribunals. Numbered amongst such activities is the conduct of the ancient jurisdiction of the coroner, a jurisdiction that occupies the anomalous position of being an inquisitorial oasis on the adversarial landscape of modern law.[186] Of coronership, Kirby P observed that:

> Even in the most primitive of societies, the unexplained death of a member of society (especially from unusual, violent or suspicious causes) is a matter for general concern. That is why an official [the coroner] is appointed whose duties include the investigation of such deaths and the report to society upon their relevant circumstances and causes.[187]

Kirby had occasion to be involved in two significant decisions in relation to the role of the coroner. The first was *Maksimovich v Walsh*[188] in which the issue before the New South Wales Court of Appeal was the obligation of the coroner to adhere to the rules of natural justice, a subject in due course ruled upon authoritatively by the High Court in *Annetts v McCann*[189] prior to the appointment of Kirby J.

Observing (agreeing with Samuels and McHugh JJA) that there was nothing within the relevant coronial legislation which precluded the coroner from holding concurrent inquiries into more than one fire, Kirby P held that the obligation of a coroner inclined to do so was simply to be careful to ensure that such proceedings were clear to those who might be the subject of adverse findings. He affirmed that the rules of natural justice apply to coroners' inquests so that those who might be the subject of an adverse finding are made aware of any relevant material that the coroner might take into account to their detriment.

In *Herron v Attorney-General for New South Wales*,[190] the New South Wales Court of Appeal dealt with an application to stay an inquest for reasons similar to those which led Gleeson CJ and Kirby P to stay disciplinary proceedings in the related Chelmsford deep sleep matter. The court concluded that the reopened inquest could proceed. The issue went to the nature of the coroner's jurisdiction to state the public record and the fairness of coroners' proceedings taking place many years after a death. While acknowledging a level of difficulty for the medical practitioner the subject of likely criticism, Kirby P declined to find that the inquest would be oppressive or unfair to him. He stressed that in the "interests of justice" an inadequate or insufficient finding at the initial

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186 See generally, I Freckelton and D Ranson, *Death Investigation and the Coroner's Inquest* (Oxford University Press, Melbourne, 2006).

187 *Herron v Attorney-General for New South Wales* (1987) 8 NSWLR 601 at 603.

188 (1985) 4 NSWLR 318.

189 (1990) 170 CLR 596.

190 (1987) 8 NSWLR 601.

inquest should be set aside, including in the light of new evidence that had become available. Making reference to the preventative role of the coroner, Kirby P observed that deep sleep therapy had become unlawful, but found that cognate important issues were still putting lives at risk:

> [T]he use of barbiturates and sedatives in and out of hospital is common. The community and the relatives have an interest in having the circumstances of the deceased's death fully exposed and thoroughly re-evaluated. The very controversy which has surrounded the death of the deceased and others in the care of the appellant (as well as the suggestion that the first inquest was conducted without the knowledge of that controversy or appreciation of its basis) provide ample grounds for a determination that the "interests of justice" require a new and better informed coronial inquiry.[191]

This approach of Kirby P identifies his view of the prophylactic role of coroners' inquests to facilitate the prevention of preventable deaths and the importance, in relation to the circumstances of death, that the public record is corrected when new information becomes available which enables revisiting coroners' decisions.

HEALTH, BIOETHICS AND HUMAN RIGHTS

The right to health has emerged little by little, much of it in the aftermath of the Holocaust and the Nuremberg Principles set out by the United States judges at the end of the Nazi Doctors trial in 1946/1947,[192] as well as the later Helsinki Principles. Modern health law and bioethics have been described by George Annas, as well as human rights generally, as having been nourished in the blood and ashes of World War II and the Holocaust.[193]

191 (1987) 8 NSWLR 601 at 613.

192 See G J Annas and M A Grodin, *The Nazi Doctors and the Nuremberg Code: Human Rights in Human Experimentation* (Oxford University Press, Oxford, 1992); I Freckelton, "Bioethics, Biopolitics and Medical Regulation: Learning from the Nazi Doctor Experience" (2009) 16 *Journal of Law and Medicine* 555; National Institutes of Health, *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10* (United States Government Printing Office, Washington DC, 1949) Vol 2, pp 181-182: http://ohsr.od.nih.gov/guidelines/nuremberg.html (accessed 18 December 2008).

193 G J Annas, "American Bioethics After Nuremberg: Pragmatism, Politics and Human Rights" (University Lecture, Boston University, 2005): http://www.pitt.edu/~super2/30011-31001/30701-30801.pdf (accessed 18 December 2008). See also J D Moreno, "Bioethics and the National Security State" (2004) 32 *Journal of Law, Medicine and Ethics* 1980; M D Kirby, "Holocaust – Whirligig of Emotions" (Launch of M Elliott-Kleerjoper, H Gershoni and F Kalman (eds), *Heirloom, The Second Anthology of Australian Child Survivors of the Holocaust*, Melbourne, 2 April 2006): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_2apr06.pdf (accessed 18 December 2008).

The English doyen of medical law, Professor Ian Kennedy,[194] argued in 1988 that:

> Resort to the language of rights assists in the attempt to develop law which redresses the disequilibrium of power between doctor and patient. To argue that patients have rights ensures that they will be taken seriously as partners in the enterprise of health.

By rights he meant not just individual claim rights but:

> [b]road over-arching legal as well as ethical principles against which any proposed legal measure must be tested and approved. And when I talk of human rights here, I would make it clear that I refer not only to those rights declared in international Conventions or set down in the Constitutions or Charters of particular nations, but also those inchoate rights which are the product of reasoned and moral analysis.[195]

Thus, for Kennedy, conceptualising the role of the doctor within a "human rights" framework functioned both as a mechanism to empower patients by means of the setting of standards and a way of enabling patients to seek redress through the law. In turn, this assisted in entrenching "medical law" as a distinctive area of law with contemporary standing and authority.[196] More recently, Davies,[197] too, has conceptualised "medical law" as being "[a]bout human rights, moral viewpoints, ethical concepts, economic demands and duties owed … Medical law, which leads from medical ethics, is the mechanism for 'doing the right thing' in a vast array of medical circumstances."

Analysing the content and parameters of health law slightly differently, Morgan[198] has argued that categorising medical law as a "species of human rights law" is valuable and significant if it is seen as (and is limited to) "a protection from harm and abuse".[199] Kirby is a devotee of this lens upon health law, as long ago as 1994 pointing to Art 12(1) of the *International Covenant on Economic, Social and Cultural Rights*, which prescribes that: "The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." More latterly, General Comment No 14 by the United Nations Committee on Economic, Social and Cultural Rights, in interpreting Art 12, has pronounced that "health is a fundamental human right indispensable for the exercise of other human rights. Every

194 I Kennedy, *Treat Me Right: Essays in Medical Law and Ethics* (Clarendon Press, Oxford, 1988) p vii.

195 Kennedy, n 194, pp 385-386.

196 See also the discussion in K Veitch, *The Jurisdiction of Medical Law* (Ashgate, Aldershot, 2007) pp 18-32.

197 M Davies, *Textbook on Medical Law* (2nd ed, Blackstone, London, 1998) pp 1-2.

198 D Morgan, *Issues in Medical Law and Ethics* (Cavendish, London, 2001) p 22; see also J Montgomery, *Health Care Law* (2nd ed, Oxford University Press, Oxford, 2003) p 22.

199 See, too, E Wicks, *Human Rights and Healthcare* (Hart Publishing, Oxford, 2007).

human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity."[200]

During the later part of the 20th century, in the shadow of the Human Genome Project, the call came from scientists, medical practitioners, lawmakers and many concerned people to set consistent standards in the field of bioethics which would transcend national boundaries. At its 31st session in 2001, the General Conference of UNESCO invited the Director-General to submit "the technical and legal studies undertaken regarding the possibility of elaborating universal norms on bioethics". At the request of the Director-General, the International Bioethics Committee (IBC) thereafter drafted the *Report of the IBC on the Possibility of Elaborating a Universal Instrument on Bioethics*, which was finalised on 13 June 2003. This report examined issues in bioethics that could be addressed in an international instrument and illustrated how the elaboration of such an instrument could contribute to and support international efforts being made to provide ethical guidelines in matters related to recent scientific developments. The report explored the likely form and scope of an instrument as well as its value in terms of education, information dissemination, awareness-raising and public debate.

Kirby has been a member of the IBC since 1997 when it adopted the *Universal Declaration on the Human Genome and Human Rights*. He later became the chairman of the drafting group of the IBC, which developed the *Universal Declaration of Bioethics and Human Rights*[201] which, in turn, was adopted by UNESCO's General Conference on 19 October 2005. The Declaration does not take the form of a treaty and so is not itself part of international law, but it is the first international endeavour to articulate the general principles that should apply to bioethical decisions and practices. It is therefore an important instrument.[202]

The Declaration contains many significant provisions:

- *Article 3* mandates full respect for human dignity, human rights and fundamental freedoms and stipulates that "the interests and welfare of the individual should have priority over the sole interest of science or society".
- *Article 4* reiterates principles of beneficence and non-maleficence, requiring that:

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200 See: http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.EN (accessed 7 November 2008); see further, P Hunt, "The Health and Human Rights Movement: Progress and Obstacles" (2008) 15 *Journal of Law and Medicine* 714; H Potts, "The Right to Health in Public Health: Is this a New Approach?" (2008) 15 *Journal of Law and Medicine* 725; I Freckelton, "Health and Human Rights: Challenges of Implementation and Cultural Change" (2008) 15 *Journal of Law and Medicine* 794.

201 See http://portal.unesco.org/en/ev.php-URL_ID=31058&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed 7 November 2008).

202 See further, I Freckelton, "The Universal Declaration of Bioethics and Human Rights" (2008) 16(1) *Journal of Law and Medicine* 187.

> [in] applying and advancing scientific knowledge, medical practice and associated technologies, direct and indirect benefits to patients, research participants and other affected individuals should be maximized and any possible harm to such individuals should be minimized.

- *Article 5* requires respect for the autonomy of persons to make decisions and the taking of "special measures" for those not capable of exercising autonomy.
- *Article 6* enshrines the notions of "prior, free and informed consent" in respect of the subjects of preventive, diagnostic and therapeutic medical intervention, as well as scientific research.
- *Article 7* mandates special protection to be given to those without the ability to consent.
- *Article 8* speaks to the need to protect what it terms "human vulnerability".
- *Article 9* refers to the need for respect for privacy and confidentiality and stipulates that to the greatest extent possible personal information should not be used or disclosed for purposes other than those for which it was collected.
- *Article 10* mandates respect for the "fundamental equality of all human beings".
- *Article 11* proscribes discrimination against the stigmatisation of individuals and groups.
- *Article 12* provides that "cultural diversity and pluralism should be given due regard".
- *Article 13* speaks to the need for solidarity amongst human beings and international cooperation to that end to be encouraged.
- *Article 14* provides that the promotion of health and social development for their people should be a central purpose of governments.
- *Article 15* provides that benefits resulting from any scientific research and its applications "should be shared with society as a whole and within the international community, in particular with developing countries".
- *Article 16* states that the impact of life sciences on future generations, including on their genetic constitution, should be given due regard.
- *Article 17* similarly states that due regard should be given to "the interconnection between human beings and other forms of life, to the importance of appropriate access and utilization of biological and genetic resources, to the respect for traditional knowledge and to the role of human beings in the protection of the environment, the biosphere and biodiversity".

Such non-binding articulations of principle are simply a beginning. However, as Kirby has pointed out, it is significant that 191 Member States of UNESCO agreed upon the principles. The journey toward

this level of consensus was not straightforward or uncontroversial:[203] "the Declaration's grounding of bioethics in universal human rights will bring international bioethics into a new phase of involvement with regulation and implementation".[204] With typical Kirby optimism, he has commented that "it may be expected that the new Declaration will become the starting point for international bioethics convention". It is his aspiration that bioethics committees will proliferate, promoting informed pluralistic public debate and fostering relevant bioethics education and training.

BIOTECHNOLOGY AND THE LAW

Michael Kirby has written and spoken extensively about the associated area of biotechnology and the law. One of his most misrepresented excursions into international issues occurred in the context of a talk he gave in Harare on the role of law reform in bioethics.[205] He reviewed methods used by the Australian Law Reform Commission in its report on Human Tissue Transplants as an illustration of the ways in which controversial, bioethical problems can be tackled. He incorporated some comments on the regulation of the sale of breastmilk substitutes, arising from the World Health Organisation implementing a code in 1981 on marketing such substitutes. While he was caricatured by some at the time for being prepared to go so far to talk about a subject so far away from law and law reform, in fact his focus was upon the sufficiency and advisability of the use of voluntary codes, as against coercive legislation to change behaviours.

Kirby has argued that the extraordinary challenges facing humankind as a result of developments in technology teach us a number of lessons:[206]

- regulation of such technologies must have as their focus the technologies themselves because of their global nature, which challenges and often defeats local laws;
- to do nothing is effectively to decide that nothing should be done;

203 See C C MacPherson, "Global Bioethics: Did the United Nations Declaration on Bioethics and Human Rights Miss the Boat?" (2007) 33(10) *Journal of Medical Ethics* 389; see also R Andorno, "Global Bioethics at UNESCO: In Defence of the Universal Declaration on Bioethics and Human Rights" (2007) 33 *Journal of Medical Ethics* 150.

204 M D Kirby, "The Universal Declaration on Bioethics and Human Rights – Present at the Creation" (Australian Institute for International Affairs New South Wales, Charteris Lecture, University of Sydney, 11 November 2005): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_11nov05.pdf (accessed 18 December 2008).

205 M D Kirby, "The Role of Law Reform in Bioethics: The Case of Breastmilk Substitutes" (1983) 6 *University of New South Wales Law Journal* 67.

206 M D Kirby, "Regulating Technology by Law and 'Code'" (2007) 18 *Australian Intellectual Property Journal* 230.

- normal organs of legal regulation often appear powerless in the face of new technology;
- there is a need to distinguish between technologies for the purpose of regulation;
- it is vital to be aware of different cultural assumptions that can underlie different approaches to the regulation of technology;
- regulation must remain abreast of scientific knowledge and technological change; and
- because of the rate of technological change, we must be prepared to continue to adjust our laws and supplement our lawmaking processes if we are to respond to the changes in an effective way.

In this volume Mark Henaghan has catalogued some of the ground-breaking work that Kirby has done internationally, and especially in New Zealand, in relation to the Human Genome Project. Kirby's involvement in genomic issues arose out of a conference he attended in Bilbao, Spain, at which a number of Nobel Laureates spoke of the project and stimulated an interest in Kirby.[207] A series of appointments followed, which provided him with the opportunity to persuade the International Commission of Jurists to adopt, among other future human rights concerns, the following topics of relevance to health, law and ethics:

- the human rights of drug users and drug-dependent persons;
- the human rights of homosexual and bisexual men and women;
- the human rights of people infected with HIV/AIDS; and
- the human rights of future generations, including of the human species as it will be affected by the Human Genome Project, by modern information technology and other contemporary technological developments.

Kirby has argued that to the extent that scientific research is motivated not by sheer curiosity but by profits, there is a danger that it will concentrate unduly upon profit-making objectives. This led the Ethics Committee of the Human Genome Organisation, of which Kirby was a member, to demand that a fixed proportion of net profits of pharmaceutical companies should be devoted to repaying the benefits provided by donors in developing countries in the form of their human genetic material.[208]

207 See M D Kirby, "The Human Genome Project and Society" (unpublished paper, 7th Congress, Federation of Asian and Oceanic Biochemists and Molecular Biologists, Sydney, 28 September 1995); M D Kirby, "Bioethics, the Human Genome Project and Our Future" (unpublished paper, 4th Annual Conference, Australian Bioethics Association, St John's College, Brisbane, 25 September 1995); M D Kirby, "Legal Problems: Human Genome Project" (1993) 67 *Australian Law Journal* 894; M D Kirby, "The Challenge of the Human Genome Project" (1999) 9 *Australian Biologist* 103.

208 See M D Kirby, "Biomedicine – Legal and Ethical Issues" (Speech, Commonwealth Lawyers' Association, Nairobi, Kenya, 10 September 2007): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_10sep07.pdf (accessed 10 November 2008).

The challenges posed by nanotechnology and the law have also been expounded by Kirby.[209] Bennett has identified that this is an area that:

> has tended to be below the public's radar, although the public's fascination with science suggests that nanotechnology may not have to wait long before it, too, is in the public eye. … The challenge for regulators, insurance companies and others is to translate [the risks of nanoparticles] into meaningful forms of risk management aimed at reducing the risk of harm.[210]

Kirby, too, has warned of the risks of abuse by multinational corporations, pointing out[211] the following paradoxes:

- There are no experts in these fields, because the technology is too new, complex, and unknown. There are naturally nano-optimists and nano-pessimists, yet the technology is still arriving and we are yet to grasp it fully. There is either too much or too little law. Lawmakers occasionally pre-empt developments, as with artificial insemination and human cloning. However, not to act is equally to decide the issue. As with the hybridisation of HIV and issues of xenotransplantation, we should regulate these areas. Not to act is often irresponsible and sets a particular course.
- We should look not to economic, but rather social, advantage.
- We should make sure that the populace is engaged in the debate.

LANDMINES

While fulfilling his role as Special Representative of the United Nations Secretary-General for Human Rights in Cambodia, Michael Kirby also identified the pernicious presence of landmines as a threat to the right to health. He urged the Secretary-General of the United Nations to convene an international conference to give fresh impetus to banning "this devastating means of waging war with such terrible and indiscriminating consequences for civilians".[212] A similar issue has latterly been raised in respect of cluster bombing in Iraq, Kosovo and Southern Lebanon.[213] Positively, building upon the work done by Kirby and others in relation to landmines, pressures to identify such

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209 M D Kirby, "Technology and the Law: Can the Law Keep Pace with Nanotechnology" (Speech, Queensland University of Technology, 2007): http://www.law.qut.edu.au/community/lectures/kirby/kirby2007.jsp (accessed 10 November 2008).

210 B Bennett, "Regulating Small Things: Genes, Gametes and Nanotechnology" (2007) 15 *Journal of Law and Medicine* 153.

211 Kirby, n 209.

212 M D Kirby, "Need to See Human Rights in a Global Context" (Paper, Conference on Health and Human Rights for Macfarlane Burnet Centre for Medical Research, Melbourne, 3 December 1994): http://www.lawfoundation.net.au/ljf/app/&id=17249D1FC478E4E0CA2571A90007559B (accessed 10 November 2008).

213 See I Freckelton, "Cluster Munitions: Public Health and International Humanitarian Law Perspectives" (2008) 15 *Journal of Law and Medicine* 481.

issues as public health risks are intensifying. The outcome in relation to cluster munitions thus far is that in May 2008 diplomats meeting in Dublin agreed to back an international ban on the use of such weapons. However, the major manufacturers and users of cluster munitions did not acquiesce.[214]

AIDS, HIV AND HUMAN RIGHTS

As noted above, Michael Kirby has served in a number of important international capacities on bodies endeavouring to address the pandemic of HIV/AIDS. Since the 1980s he has consistently taken a strong stand in relation to public health law reform and human rights, arguing that HIV/AIDS poses one of the greatest challenges to humanity – to mobilise constructively the international community, science, medicine and law.[215] He has identified many comparable risks in public health responses to HIV/AIDS with those earlier encountered in combating syphilis and other public health epidemics.[216] He has also repeatedly emphasised the magnitude of the problem – controversially, in 2003, branding AIDS as a much bigger problem than terrorism.[217]

Kirby's argument in relation to the role of law-making in respect of AIDS, as in other areas, is that laws must be based upon a thorough understanding of the subject – in the case of AIDS, knowledge of the virus and its modes of transmission: "AIDS laws must not be based upon ignorance, fear, political expediency and pandering to the demand of the citizenry for 'tough' measures. There must be no more branding of cheeks. Good laws, like good ethics, will be founded in good data."[218]

A great admirer of the public health law activist, Jonathan Mann, with whom he worked on the First Global Commission on AIDS, Kirby has urged the need to protect the human rights and dignity of those most at risk of infection: "this is the most likely way to win the confidence of those at risk and to secure their attention to health messages for

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214 "Cluster Bomb Ban Treaty Approved", *BBC News* (28 May 2008): http://news.bbc.co.uk/1/hi/world/europe/7423714.stm (accessed 10 November 2008); *Convention on Cluster Munitions*: http://www.clusterconvention.org/ (accessed 29 November 2008).

215 M D Kirby (Interview, "Face of Aids", April 1988): http://www.faceofaids.org/show/video/36 (accessed 10 November 2008).

216 See M D Kirby, "AIDS and Human Rights" (1991) 22(4)-23(1) *Australian Journal of Forensic Sciences* 29; M D Kirby, "AIDS and the Law" (1993) *Commonwealth Law Bulletin* 350 at 351; M D Kirby, "AIDS and Human Rights" (1992) 1 *Australian Gay and Lesbian Law Journal* 1.

217 See P Gregory, "AIDS Worse than Terror, Says Judge", *The Age* (16 April 2003): http://www.theage.com.au/articles/2003/04/15/1050172597751.html (accessed 10 November 2008), prompting the Federal Treasurer, Peter Costello to proclaim that Kirby had "dishonoured the victims of the 9/11 terror attacks"; see also M Dodd and M Schulz, *Herald Sun*, "Aids Worse than 9.11, Says Judge": http://www.news.com.au/heraldsun/story/0,21985,21262159-662,00.html (accessed 10 November 2008).

218 M D Kirby, "AIDS and the Law" (1993) *Commonwealth Law Bulletin* 350 at 352.

themselves".[219] He has argued that harm reduction, condom use, needle exchange, legislation of paid sex work, removal of laws against gays, and candid educational messages can all help turn around the AIDS epidemic, promote safer behaviour and result in a plateau of seroconversions:

> [T]he only means of reducing the spread of the epidemic is by the sharing of information and by the achievement of behaviour modification in those principally at risk. Anyone in my profession can tell you that behaviour modification, particularly in matters important to a person's identity and pleasure, is extremely difficult to achieve by law, certainly over a prolonged period. Alienated homosexual and bisexual citizens, drug users, so-called "promiscuous" people and sex workers were already outside the range of many public health messages in most countries when HIV/AIDS came along.[220]

A corollary of this position has been a view on Kirby's part that prosecution of those who spread AIDS in most circumstances is likely to prove unhelpful.[221] However, preclusion of various forms of discrimination against those who are infected is likely to constitute a constructive step in protecting their human rights.[222]

Philadelphia formed the stage for one of Kirby's most inspiring addresses which urged the thinking of revolutionary thoughts:

> We should be angry at continuing ignorant discrimination. We should be angry with the slothful indifference of political leaders to the human right to health of vulnerable people. We should be angry with the hypocrisy of those who defy scientific truth and promote hatred of women and minorities. We should be angry at a world that continues to tolerate huge and growing afflictions of human health and which denies basic medicines to millions of our species who need them. We should be angry with the drug corporations and governments that respond inadequately to the crisis calls for life-saving medications denied to the poor of the world. We should be angry with ourselves that we have not done enough to promote human rights, to reform the law and to uphold global health.[223]

Others in this volume chronicle Kirby's important contributions in the fight against public prejudice in respect of HIV-AIDS (see Ronalds,

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219 See, eg, M D Kirby, "Health, Law, Human Rights and Revolution" (2001) 14(4) *Venereology* 191 at 192.

220 M D Kirby, "The Right to Health Fifty Years On – Still Sceptical?" (Paper, Francois-Xavier Bagnoud Centre for Health and Human Rights, Harvard University, School of Public Health, 14 December 1998): http://www.lawfoundation.net.au/ljf/app/&id=1851BF23F7A2905CCA2571A700006D35 (accessed 10 November 2008).

221 M D Kirby, "HIV/AIDS Criminalisation – Deserved Retribution or Capricious Sideshow" (2007) 32(4) *Alternative Law Journal* 196. See further, McSherry, Chapter 9, "Criminal Law" in this book.

222 Kirby, n 216 (1992) at 17ff.

223 Kirby, n 219 at 195.

Chapter 11; Pitty, Chapter 18). It is worthy of note here, however, that characterising and underpinning his position is a recognition of the importance of the law as part of the infrastructure of human rights, buttressed by activist, empirically-based and humane lobbying for something even more difficult than law reform – community attitudinal change.[224]

CONCLUSIONS

Michael Kirby's work in, and commitment to, the rights of those adversely affected by health providers has been a significant theme of his career as a law reformer and as a judge. His approach has been modernist and rights-oriented but has been within orthodox parameters. While recent writing on "therapeutic jurisprudence" has provided a bridge between health and legal perspectives by proposing that health outcomes should be formally recognised as a legitimate objective of law, in terms of, for instance, statutory interpretation,[225] this is not an approach adverted to or embraced, as yet, by Kirby. While he can be criticised at times for stretching legal authorities by the medium of content-unclear terms such as "commonsense", his concern has consistently been to enhance the capacity of patients to make collaborative decisions about their own health and to have redress when adversely affected by poor health provider performance or inadequacy of information provision. He feels keenly the lot of an injured patient who otherwise is denied necessary care on the basis of rules and criteria formulated in eras before anything resembling the modern healthcare environment. He has always looked humanely on individual health providers who have erred, while also being concerned to ensure that those who have suffered as a consequence are suitably compensated. There has been legislative uptake of his views in relation to patients' entitlements to have access to their health records. Other responses have overturned his views in relation to the entitlement of parents to be compensated for the costs of rearing children who would not have been born had it not been for medical negligence.

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224 See, eg, M D Kirby, "Health, Law and Ethics" (Inaugural Kirby Lecture for the then Australian Institute of Health, Law and Ethics) (1997) 5 *Journal of Law and Medicine* 31.

225 See, eg, D B Wexler and B J Winick (eds), *Law in a Therapeutic Key* (Carolina Academic Press, Durham, 1996); B J Winick, *The Right to Refuse Mental Health Treatment* (American Psychological Association, Washington DC, 1997); B J Winick and D B Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, Durham, 2003); K Diesfeld and I Freckelton (eds), *Involuntary Detention and Therapeutic Jurisprudence: International Perspectives on Civil Commitment* (Ashgate, Aldershot, 2006); C Slobogin, *Minding Justice: Laws that Deprive People with Mental Disability of Life and Liberty* (Harvard University Press, Cambridge, Mass, 2006); D Wexler (ed), *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice* (Carolina Academic Press, Durham, 2008).

In the health law and bioethics area, it is probable that Michael Kirby's greatest contribution has been in his extrajudicial roles where his determination, incisiveness and commitment to human rights has played a vital role in influencing international initiatives to give meaning to the "right to health". It is to be hoped that he will be able to consolidate and further these contributions in his career subsequent to the High Court.

Chapter 17

THE HUMAN GENOME

Mark Henaghan*

> *[W]ho will be the "humans" to enjoy human rights if it is possible to eliminate all characteristics deemed "undesirable" and to maximise those which fit into someone's concept of the "perfect" human being?*[1]

INTRODUCTION

Most good things in life happen as a matter of serendipity rather than because of any "strategic plan". Michael Kirby "came upon the genome by accident".[2] He had been invited to participate in a conference in Bilbao, Spain, convened by the Banco Bilbao Vizcaya Foundation (Funducion BBV) to address the legal aspects of the Human Genome Project. The Project immediately appealed to Kirby's curiosity and values with its emphasis on cooperation between scientists and its potential impact on the world. Justice Kirby was involved because of his experience as the inaugural chairman of the Australian Law Reform Commission. He was asked to predict whether the global dimensions, economic significance and sheer complexity of the Project could be translated into international legal rules. The challenge pushed all the Kirby buttons and drew on his experiences not only as a law reformer and judge but also as a person who believed deeply in the common values that all humans of goodwill hold no matter what their ethnic, religious or cultural background.

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* My thanks to Jeanne Snelling, Research Fellow, University of Otago Law Faculty for her invaluable research assistance.

1 M D Kirby, "Challenges of the Genome" (1997) 20 *University of New South Wales Law Journal* 537 at 541.

2 M D Kirby, "Challenges of the Genome" (1997) 20 *University of New South Wales Law Journal* 537.

TEMPLATES FOR DEALING WITH NEW TECHNOLOGY

Michael Kirby gave five key points to the conference, which serve as a template for how to proceed when society is confronted by a new technology.[3] The first and overriding point is that not to act is to make a decision. To fail to think about the possible consequences science may create is to allow science to "rush ahead" in ways we may regret in retrospect. The second point is the basis for acting – which is to use human rights law to frame law. He has certainly lived up to his word on this last point. Between 1995 and 2005 Kirby J served on the International Bioethics Committee of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and, in 2004-2005, he chaired the drafting group that prepared the *Universal Declaration on Bioethics and Human Rights*, which was adopted by the General Conference of UNESCO in 2005. At the same time, that is between 1995 and 2005, Justice Kirby served on the Ethics Committee of the Human Genome Organisation, which monitored the project.

The third foundation point Kirby J made was that it was essential to consult the community, in particular those who were most likely to receive the benefits and suffer the problems of the Human Genome Project. This is a touchstone of Michael Kirby's work in this area – without hearing from those most affected would be to act arrogantly and inhumanely. Fourth, based on his significant work in AIDS,[4] Michael Kirby emphasises that our responses to the Human Genome Project must be based on good science, "not on ignorance, or mythology or even, with respect religion".[5] This applies to all new developments whether it be climate change or the potential uses of genetic discoveries. If we jump at shadows that are not real and could not possibly happen we divert resources and attention to a myth. Science is in a constant state of change and development. This makes the challenges of developing good policy difficult and always, to some degree, predictive rather than certain. Good science is always open to refutation[6] – it is not dogmatic or fixed.

Finally, and true to form, Kirby J made the point in his first public utterances on the Human Genome Project that, to be effective, the

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3 Kirby, n 2.

4 Michael Kirby served as a member of the Inaugural Global Commission on AIDS of the World Health Organisation 1988-1992. In 2002 he chaired an Expert Group convened by UNAIDS and the High Commissioner for Human Rights on HIV/AIDS and Human Rights. In 2001-2002 he was chairperson of the UNAIDS Expert Panel on HIV Testing of United Nations Peacekeeping Operations. Since 2004 he has been a member of the UNAIDS Global Reference Panel on HIV/AIDS and Human Rights.

5 Kirby, n 2 at 537-538.

6 K Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* (Routledge, London; 1963).

policies that are to be developed must have "global mechanisms".[7] A strong ethic that is central to all of Michael Kirby's work, whether it be judicial work or otherwise, is that we are all part of a global village; we have a common humanity, which means that we should all share in the solutions to problems we all face.

The New Zealand Law Foundation Human Genome Project

Michael Kirby's five points in his first exposure to the implications of the Human Genome Project are the template for the New Zealand Law Foundation Human Genome Project – *Law, Ethics and Policy for the Future*.[8]

The Project was the child of the visionary Chief Executive Officer of the New Zealand Law Foundation, Lynda Hagen. The New Zealand Law Foundation, which is a charitable organisation, is set up to fund research, which is important for the wellbeing of all New Zealanders. I have had the privilege of being the Principal Investigator for the Project. The Project has an Advisory Committee on which Michael Kirby serves.[9] His contribution to this New Zealand project has been immense. In the first teleconference with the Committee, and my first personal conversation with Michael Kirby, I learnt firsthand how his razor sharp mind works. I was new to the field and thought that in the first year of our research we could cover a variety of issues, ranging from so-called "designer babies" through to whether or not it should be possible to patent human genes. Kirby had thought about the implications of the Human Genome much more perceptively and deeply than I had. He had been at the cutting edge of the developments that flow from the sequencing of the Human

7 Kirby, n 2 at 538.

8 The principal investigator is Professor Mark Henaghan. Senior investigators are Professor Donald Evans (Director of the Bioethics Centre, University of Otago), Professor Stephen Robertson (Paediatrics and Child Health, Department of Women's and Children's Health, University of Otago), Dr Ian Morrison and Dr Tony Merriman (Biochemistry Department, University of Otago), Bevan Tipene-Matua (Director of Māori Research and Development, Christchurch Polytechnic Institute of Technology), Professor Nicola Peart (Law Faculty, University of Otago), Professor Grant Gillett (Bioethics Centre, University of Otago) and Dr Nicki Kerruish (Paediatrics and Child Health, Department of Women's and Children's Health and the Bioethics Centre, University of Otago). International collaborators include the Institute of Law and Ethics in Medicine at the University of Glasgow, United Kingdom (Director, Professor Sheila McLean), and Stanford Center for Biomedical Ethics at Stanford University, United States of America (Associate Director, Professor Mildred Cho).

9 Other members of the Advisory Committee are: Professor Ingrid Winship (inaugural chair of adult clinical genetics in the Department of Medicine and Royal Melbourne Hospital, University of Melbourne), Emeritus Professor Colin Mantell (formerly Tumuaki and Head of Department for Māori and Pacific Island Health, Faculty of Medicine and Health Services, University of Auckland), Justice Bruce Robertson (Justice of the New Zealand Court of Appeal and former President of the New Zealand Law Commission) and Emeritus Professor John Burrows QC (formerly of Canterbury University School of Law and currently a member of the New Zealand Law Commission).

Genome for over ten years. As far back as 1997 he had written an article, "Challenges of the Genome",[10] which raised issues of privacy, confidentiality, intellectual property and human rights. Michael left me in no doubt that each of the topics of pre-implantation diagnosis (designer babies) and patenting of human genes was large and would require more than a year each to do them any justice. I have always been grateful for this direct, straight-to-the point advice. Since then, Michael Kirby has been the patron saint of the project. We focused in the early years on pre-implantation diagnosis. Our first major report, *Choosing Genes for Future Children: Regulating Pre-implantation Genetic Diagnosis*,[11] has had an impact both in New Zealand[12] and internationally.[13]

Michael Kirby's gift is his ability to look into complex scientific issues, which have multiple implications, and precisely identify the key issues. The focus of this chapter is on Michael Kirby's writings[14] on the Human Genome Project and his effect on the New Zealand Law Foundation Human Genome Project. The themes of his writings are that the findings from the Human Genome Project have the potential to do much good – for instance, if it "became possible to identify the gene responsible for colon cancer, which kills hundreds of thousands of people every year, that discovery could facilitate early intervention to the protection of those otherwise at risk. Early diagnosis might help save lives".[15] Thus, his writings have been very influential on the research

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10 (1997) 20 *University of New South Wales Law Journal* 537.

11 See Human Genome Research Project, *Choosing Genes for Future Children: Regulating Pre-implantation Genetic Diagnosis* (Human Genome Research Project, Dunedin, 2006): http://www.otago.ac.nz/law/genome/resources/ (accessed 3 December 2008). The second year report is in two volumes: see Human Genome Research Project, *Genes, Society and the Future* (Human Genome Research Project, Dunedin, 2007) Vols I and II. The 2008 report (Vol III) is pending publication.

12 The Advisory Committee on Assisted Reproductive Technologies (ACART) set up by the *Human Assisted Reproductive Technology Act 2004* (NZ) (HART) to draw up guidelines for the use of reproductive technologies has used and followed the recommendations of the *Choosing Genes* report for public consultation and new guidelines.

13 See J Snelling, "Embryonic Tissue Typing and Made-to-Match Siblings: The New Zealand Position" (2008) 9 *Medical Law International* 13; J Snelling, "Implications for Providers and Patients: A Comment on the Regulatory Framework for Preimplantation Genetic Diagnosis in New Zealand" (2006) 8 *Medical Law International* 23; M Henaghan and D Wensley, "Preimplantation Genetic Diagnosis: A Discussion of Regulatory Mechanisms of Control from a New Zealand Perspective" (2005) 2 *Journal of International Biotechnology Law* 45. See also I Karpin, "Choosing Disability: Preimplantation Genetic Diagnosis and Negative Enhancement" (2007) 15 *Journal of Law and Medicine* 89; E Van Wagner, R Mykitiuk and J Nisker, "Constructing 'Health', Defining 'Choice': Legal and Policy Perspectives on the Post-PGD Embryo in Four Jurisdictions" (2008) 9 *Medical Law International* 45.

14 M D Kirby, "Playing God? Owning God? Patenting and the Human Genome" (2003) 26 *University of New South Wales Law Journal* 770; M D Kirby, "Genomics and Democracy – A Global Challenge" (2003) 31 *University of Western Australia Law Review* 1; M D Kirby, "The Human Genome Project – Promise and Problems" (1994) 11 *Journal of Contemporary Health Law & Policy* 1.

15 Kirby, n 2 at 540.

being carried out in New Zealand on the legal implications of the Human Genome Project.

Fruits of human genome mapping

The completion of sequencing and mapping of the human genome by Francis Collins and others has enabled Dr Parry Guilford from the University of Otago Cancer Genetics Laboratory to make a significant difference in fighting gastric cancer in an extended Māori family (or whanau) in New Zealand with unusually high rates of this disease. Dr Guilford spent ten years working with the family. Systematic research led to the identification of mutations in the E-cadherin gene among family members who were highly susceptible to developing gastric cancer. One letter in a code of three billion letters was out of sequence. The particular gene is important in cell adhesion and structure and is thought to suppress cell invasion; in people with the mutation, the gene is switched off. Dr Guilford found that about 70 per cent of people with the mutation contract the disease. A relatively simple blood test was developed by the researchers and 133 people from the extended family were tested. Forty-seven were found to carry the mutation in the E-cadherin gene. Those identified with the gene were then screened by a chrome-endoscopy technique, which uses coloured dyes to enhance the appearance of the cancers. So far, 20 people with very small tumours have been picked up through this screening program. They have all had a gastrectomy and are doing well. The other members of the family who were screened were found not to have the mutation. Now two-thirds of the family are released from any concern at all, while the others have very good care: cancers are being found at a very early stage when their chances of a complete cure are extremely high.

The research was funded by the Health Research Council of New Zealand and it shows how knowledge of the genetic make-up of a person can be very helpful in preventing the onset of disease and removing the fear of disease. Society, and particularly the health of the population, has much to gain from the proper use of genetic testing and the knowledge that has been derived from the discovery of the human genome.

Genomic research and human rights

Genomic research also has the potential to "affect the design of human beings". In Michael Kirby's words, "who will be the 'humans' to enjoy human rights if it is possible to eliminate all characteristics deemed 'undesirable' and to maximise those which fit into someone's concept of the 'perfect' human being?"[16] It is this potential for misuse which drives Justice Kirby to argue that the Human Genome Project is the ultimate test for human rights. He fears that law is "slow, cumbersome and largely

16 Kirby, n 2 at 541.

unco-ordinated ... sometimes presenting its solutions years later when the nature of the problem to be solved has changed radically".[17]

What are the problems to which Michael Kirby believes we need to respond and what are his human rights responses to these problems? In respect of the problems, the first is put in very succinct "Kirbyese" – "where does the process of medical elimination of 'defective' genes begin and end?"[18] This is the crux of decisions about the potential good and bad of genomic medicine – that is, the potential benefits and harms. In an article in the *Medical Journal of Australia*[19] entitled "The Human Genome Project in the Dock", Kirby J described "genetic alteration" as the "big one": "when it becomes possible to eliminate particular genes and transplant others what will prevent the attempted creation of super-species? Or an under-species? Or an altered human species."[20] This is the slippery slope which lies beneath many of the societal fears about genomic medicine without controls. Distinctions between medical therapy and enhancement, normality and abnormality, and health and disability are not fixed. They change over time and between societies. Compared with previous generations, we are all enhanced in many ways due to advances in knowledge and medical science. Slippery slopes can be negotiated if approached with prudence rather than speculation about the worst case scenario. There are differences in kind between using pre-implantation genetic diagnosis (PGD) to choose an embryo free from genes which lead to Huntington's Disease, and designing the perfect baby (if that were ever scientifically possible).

Pre-implantation genetic diagnosis and discrimination

After the public release of the report, *Choosing Genes for Future Children*,[21] voices from within the disabled community raised their concerns about its recommendation that pre-implantation genetic diagnosis should be available to families where there are genes that are extremely likely to produce children with conditions such as haemophilia and Huntington's disease, which will seriously impair the quality of their lives.[22] Some representatives of the disabled said that a technology which enabled choice of some embryos over others gave the message to society that

17 Kirby, n 2 at 549.

18 M D Kirby, "The Human Genome" in *Through the World's Eye* (Federation Press, Sydney, 2000) p 43.

19 (2000) 173 *Medical Journal of Australia* 599.

20 Kirby, n 18 at 662.

21 For a full reference to the report, see n 11.

22 During the course of writing the first report, the *Human Assisted Reproductive Technology Order 2005* was passed, which permitted PGD to select against monogenic disorders that may cause serious impairment in a future individual. This would include conditions such as those mentioned above. For a discussion of the Order, see Human Genome Research Project, *Choosing Genes for Future Children: Regulating Pre-implantation Genetic Diagnosis* (Human Genome Research Project, Dunedin, 2006) p 315.

some lives were less worth living than others and that potentially this could create an anti-disabled attitude in the community. Not all disability representatives spoke with one voice, however. The Rare Genetic Disorders group were supportive of the report's recommendations.[23] Public debate is an essential part of the Kirby method of dealing with complex ethical issues. The *Choosing Genes*[24] report stated that people with disabilities deserve special protection. New Zealand does not have a Disability Rights Commission (as, for example, the United Kingdom does). New Zealand has no body directly responsible for issues that fall under the category of promoting good relations between people with disabilities and their communities. Nevertheless, it is possible, we believe, to prevent suffering while at the same time ensuring those who have severe disabilities are treated with equal dignity to everyone else.

Genetic bases of behaviour

A difficult problem Kirby recognised early was the possible "discovery of a genetic basis for many disorders raising the possibility of identifying genes associated with various forms of antisocial behaviour".[25] This issue ignited public debate in New Zealand when a scientist stated that the indigenous Maori population had a "warrior gene" which gave a genetic inclination to more aggressive behaviour.[26] Tony Merriman, a researcher on the New Zealand Law Foundation Human Genome Project, and Vicki Cameron, carried out their own research[27] into the claims. They found that genes by themselves do not necessarily lead to aggressive behaviour. Environmental factors such as abuse during childhood were an important part of the equation. Dr Merriman and Dr Cameron cite longitudinal studies which showed that the crucial fact was whether or not the person had been severely mistreated as a child and that high monoamine oxidase-A (MAO-A) alleles (meaning one or two genes of a particular type) were protection against antisocial behaviour even where there had been severe maltreatment. These are factors over which children have no control and they do lead to, in the words of Michael Kirby, "assumptions about crime being the product of deliberate wrongdoing".[28] This is emerging science and new knowledge requiring us to

23 The New Zealand Organisation for Rare Disorders is a Charitable Trust to provide support and information for families affected by rare diseases: see http://www.nzord.org.nz/ (accessed 3 December 2008).

24 See n 11, p 9.

25 Kirby, n 18, p 700.

26 "Warrior Gene Prevalent in Māori: Study", *One News* (9 August 2006). http://tvnz.co.nz/view/page/425826/810285 (accessed 3 December 2008); "Maori 'Warrior' Gene Linked to Aggression" [audio clip], *The New Zealand Herald* (9 August 2006): http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&ObjectID=10395334 (accessed 3 December 2008).

27 T Merriman and V Cameron, "Risk-Taking: Beyond the Warrior Gene Story" (2007) 120 *New Zealand Medical Journal* 1250.

28 Kirby, n 18, p 700.

begin to question basic premises of our criminal law. Underlying much of Kirby J's work is the value of constantly questioning received wisdom and keeping the mind open to new understandings.

Benefit-sharing

A further difficult question identified by Michael Kirby is the issue of benefit-sharing.[29] This has two aspects to it. One is whether the donors of genetic material that yields data "useful for the development of drugs or therapies receive some share of the huge profits that may result".[30] The other is the question of where the immediate research that springs from the human genome should focus. As Justice Kirby puts it so graphically, the international community needs to ensure that "immediate research on the human genome focuses on problems like combating malaria and river blindness and not just wrinkles in the ageing rich".[31] Thus, a strong value that shines through all of Justice Kirby's work, whether it be judicial or as a member of the international community, is his strong commitment to those who are disadvantaged and marginalised.

The Universal Declaration on Bioethics and Human Rights

A great strength of Michael Kirby is that he is not only able to acutely diagnose what the issues are, he also wants to be part of the solution as part of the international community. For the United Nations Educational, Scientific and Cultural Organisation, he chaired the committee which drafted the *Universal Declaration on Bioethics and Human Rights*.[32] The primary aim of this Declaration is to provide a universal framework of principles and procedures to guide states in the formulation of their legislation, policies, or other instruments in the field of bioethics. The major contribution of this Declaration is that it prioritises interests – the interests and welfare of the individual are to have priority over the sole interest of science or society.[33] A separate Article in the Declaration is devoted to the protection of individuals and groups of special vulnerability.[34] This is Kant[35] at his best: individuals should not be used as the means to others' ends. In Kant's words: "act so that you treat

29 Kirby, n 18, p 700.

30 Kirby, n 18, p 700.

31 Kirby, n 18, p 700. See also Human Genome Research Project, *Genes, Society and the Future* (Human Genome Research Project, Dunedin, 2007) Vol 1, p 329; and D Wensley and M King, "Scientific Responsibility for the Dissemination and Interpretation of Genetic Research: Lessons from the 'Warrior Gene' Controversy" (2008) 34 *Journal of Medical Ethics* 507.

32 UNESCO, *Universal Declaration on Bioethics and Human Rights* (Paris, 19 October 2005): http://unesdoc.unesco.org/images/0014/001461/146180E.pdf (accessed 18 December 2008).

33 *Universal Declaration on Bioethics and Human Rights* (2005) Art 3.

34 *Universal Declaration on Bioethics and Human Rights* (2005) Art 8.

35 I Kant, *Foundations of the Metaphysics of Morals* (2nd ed, trans L W Beck, Prentice-Hall Inc, New Jersey, 1997) p 46.

humanity, whether in your own person or in that of another, always as an end and never as a means only". Similarly, Bentham's[36] utilitarian principles are used to emphasise that benefits to patients and research participants should be maximised by the use of new knowledge and technologies from new discoveries, such as the human genome. Possible harm should be minimised.[37]

The *Universal Declaration on Bioethics and Human Rights* (2005) is based on principles which are hallmarks of Justice Kirby's judicial career – the fundamental equality of all human beings in dignity and rights is to be respected so that they are treated justly and equitably.[38] It is easy to be cynical about such broad terms as "equality", "justice" and "equity". They are declaratory terms with aspirational force. Such law is sometimes labelled "soft" law. Nevertheless, these principles do give a sense of direction. They are a significant starting point for the development of more specific case-by-case precedents and more precise rules.[39] General principles do not prevent states from developing their own democratically accountable responses. States can decide whether they want to sign up to the values of international declarations. Then the debate and ongoing argument of what dignity and equality mean in particular circumstances can begin.

Justice Kirby and the other drafters of the *Universal Declaration on Bioethics and Human Rights* bite the difficult and contentious bullet of the weight that should be given to cultural diversity and pluralism. Article 12 makes it clear that cultural diversity and pluralism, while they are to be given due regard, cannot be invoked to infringe or limit the scope of the other general principles and human dignity, human rights, and fundamental freedoms. As Wayne Morgan said in a review of *Through the World's Eye*, "Kirby is an optimist, and an evangelist for the cause of optimism".[40] Michael Kirby believes strongly that at the core of human nature is an ethic which compels us towards justice and peace.[41] That is why he is a strong advocate for solidarity and international cooperation between all human beings.[42]

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36 J Bentham, *An Introduction to the Principles of Morals and Legislation* (ed J Burns and HLA Hart, Athlone Press, London, 1970).

37 *Universal Declaration on Bioethics and Human Rights* (2005) Art 4.

38 *Universal Declaration on Bioethics and Human Rights* (2005) Art 10.

39 See M Olivier, "The Relevance of 'Soft Law' as a Source of International Human Rights" (2002) 35 *Comparative and International Law Journal of Southern Africa* 289 at 294-301, who argues that soft law is useful in the transnational stage of developing law from more general principles of international norms.

40 (2001) 9 *Melbourne University Law Review* 25 at 27.

41 Kirby, n 18, pp 12-13, 22, 78, 81, 86, 90 and Ch 15.

42 *Universal Declaration on Bioethics and Human Rights* (2005) Art 13. See Chapter 20, "International Human Rights – The Fraternalist" by Louise Arbour and James Heenan in this book.

THE KIRBY WORLD VIEW

Underlying his view of the essential goodness in human nature are his deepest concerns for the dispossessed and disowned. Michael Kirby has an inclusive view of the human race. He is able to empathise with the outsider because of the tribulations he has had to face in his own life both as a judge who takes an outward-looking view of the law and as a homosexual man in a society where heterosexuality is seen as the "norm".

The sequencing of the human genome has revealed our common heritage of genes. It should bring humanity closer together as we see we all have the same building blocks.

Patenting genes

An outcome of the sequencing of the human genome that has particularly troubled Justice Kirby is the matter of patenting. Accordingly, he has raised the following question:

> Should those who discover the utility of particular genetic sequences who can convert that knowledge into a useful therapeutic technique or diagnostic test be entitled to patent the use of the gene involved and thereby secure, for a limited period, monopoly rights that oblige others to secure a licence if they wish to use them?[43]

Justice Kirby is on the side of those in developing countries who oppose the grant of patents over genetic sequences because they believe that the human genome and its immediate by-products are part of the common heritage of humanity. As Kirby J points out, Fleming and Florey did not seek any intellectual property protection in respect of penicillin, nor did Watson and Crick seek any patent protection in relation to their discovery and applications of DNA.[44] Justice Kirby accepts that there has been a "change of culture" in the world of science in recent times. The causes for this change are "partly related to the reduction of public funding for scientific research and the increasing involvement of the private sector".[45] Through his work as chair of the UNESCO committee which drafted the 2005 *Universal Declaration on Bioethics and Human Rights*, Kirby J has responded to the patenting of findings from the sequencing of the human genome with the principle that the benefits of scientific research should be "shared with society as a whole and within the international community, in particular with developing countries".[46] Benefits include access to

43 M D Kirby, "Law in an Age of Fantastic Technological Change" (Speech, The Commonwealth Lawyer, 2003): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_thecommonwealthlawyer.htm (accessed 3 December 2008).

44 Kirby, n 43, p 11.

45 Kirby, n 43, p 11.

46 *Universal Declaration on Bioethics and Human Rights* (2005) Art 15.

quality health care, which comes from new discoveries, and access to scientific and technological knowledge, as well as capacity-building facilities for research purposes. These principles are important levers for some controls so that the good that comes from the discovery of the human genome is available to all. In the most recent report from the New Zealand Human Genome Project,[47] which Michael Kirby oversees, we have carried out research to see if patents are having an effect on access to technologies which flow from the discovery of the human genome. We found that the company which has the patent for BRCA I (which is a diagnostic test used to pick up the genes which predispose a woman to breast cancer) has not demanded unattainable licence fees from others who seek to use it.

Yet New Zealand has experienced an aggressive attempt by one company (somewhat ironically an Australian biotechnology company) to enforce its patents on a particular type of DNA against organisations performing research and providing clinical genetic testing services in New Zealand. Genetic Technologies Ltd requested licence fees for its patents from the New Zealand Ministry of Health, District Health Boards and a number of Crown and private research institutions. The attempt resulted in the affected parties from both the health and research centres joining forces to negotiate as a group with the company. Although proceedings were filed in the High Court against Genetic Technologies Ltd for "unjustified threats" pursuant to the *Patents Act 1953* (NZ), the dispute was eventually settled out of court.

Interestingly, our research has demonstrated that this type of approach has been an isolated event. The research looked not only at the effect gene patents had on clinical genetic services but also on the biotechnology research sector in general. The results suggest that the New Zealand research sector appears to be competing at an international level in terms of patent ownership and licensing out, whilst neither the research nor the genetics services are being negatively affected by patents currently being enforced in New Zealand. The implication is that, at least at present, a balance is being achieved between encouraging innovation by the use of patents and the potential for patents to restrict research and the provision of health services. Justice Kirby will be pleased with these findings, even more so if they are replicated on an international scale.

Just as the discovery of penicillin was a major breakthrough for medicine almost 80 years ago, it has been thought that pharmacogenetics may revolutionise drug development and prescribing in the future. Pharmacogenetics, which is the study of the contribution made by genes and gene variants to an individual's response to a drug, has been another issue addressed in the most recent report of the Human Genome Project.

47 Human Genome Project, Report, *Genes, Society and the Future*, Vol III (to be published by Brookers in February 2009).

The first indicators that response to a drug may be influenced by inherited genetic characteristics appeared in the 1950s. African-American soldiers who received an anti-malarial drug subsequently developed severe anaemia. A study of the soldiers' red blood cells found that they were deficient in a particular enzyme, which resulted in the breakdown of red blood cells when exposed to the anti-malarial drug primaquine.[48] Interest in how genes may influence drug response has been greatly accelerated in recent times by advances in molecular biology and the sequencing of the human genome.

It is hoped that pharmacogenetics will improve treatment outcomes and enhance the safe prescription of medications by tailoring not only a drug, but the optimal drug dosage for an individual patient. It is generally thought that pharmacogenetics poses fewer ethical challenges than other types of genetic testing, but it, too, has implications for human rights and equality on a global scale.

There is concern that in the course of drug development, clinical trials, which recruit research participants on the basis of genetic criteria, may effectively exclude other minority groups from access to evaluated medications. Similarly, when variations in subpopulations are identified that affect drug safety and response, it is likely that investment in research and development to create better pharmaceuticals would be greatest where the target group is large and the commercial benefit is high. But if the group is small and the commercial benefits are consequently limited, there will be less incentive for research and development. This may result in what has been dubbed an "orphan" genotypic subgroup.[49] This may exacerbate existing ethnic health disparities, in particular whereby small ethnic populations may not receive the same research attention.[50] Where this occurs, government initiatives will be necessary to provide incentives for research and development.[51] Applying Justice Kirby's core principle of policy being based on good science, we have found that the hype surrounding pharmacogenetics may have outpaced the current scientific evidence that supports it. Currently pharmacogenetics has very few applications in practice. We have identified some of the potential harms that could result from an overemphasis on genetic factors associated with disease – for example attention could be drawn away from other important influences on disease such as environmental exposure, social structures and lifestyle factors.

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48 The Royal Society, *Personalised Medicines: Hopes and Realities* (Royal Society, London, 2005) p 5.

49 A Buchanan, A Califano, J Kahn, E McPherson, J Robertson and B Brody, "Pharmacogenetics: Ethical Issues and Policy Options" (2002) 12 *Kennedy Institute of Ethics Journal* 11.

50 S Gardiner and E Begg, "Genotyping for Drug-Metabolizing Enzymes – Does the Promise Meet the Reality?" (2004) 5 *Pharmacogenomics* 1033 at 1034.

51 Both the United States and Japan have enacted legislation to stimulate research and development of orphan drugs. Other countries have introduced national policies for the same ends: see M Rothstein and P Epps, "Ethical and Legal Implications of Pharmacogenomics" (2001) 2 *Nature* 228 at 230.

The Kirby vision

Working with Michael Kirby on the New Zealand Law Foundation sponsored Human Genome Project, I have seen first-hand his strengths. He finds the time to read our draft reports and give constructive, positive feedback. He encourages us to use our findings widely and not just limit them to publication in journals. From his work in law reform he realises that nature abhors a vacuum. If those who have done the research and thinking about an issue do not share their knowledge widely, the vacuum will be filled by others who may not have the same research base with which to inform the debate.

If we all look closely enough at our thinking processes we will find potential contradictions because of our human frailty and because life is not a simple linear event where ruthless logic leads to an inevitable answer. Life is far richer and more complex. Life's shape is multidimensional, horizontal and vertical and in-between. Michael Kirby insisted that our project be multi-perspective. We have scientists, ethicists, lawyers and indigenous Māori perceptions in our work. These are certainly not exhaustive and he continually encourages us to widen the base of our perspectives. This is where the potential for contradiction arises. The need to listen to different points of view is a core Kirby value as is the belief that all those different views are united by universal values such as those expressed in human rights declarations. Yet without this tension there would be no basis for advancement or change. We could listen to all the views but not be able to evaluate them. In having international standards to evaluate, we potentially prejudge views before hearing them. In an ideal society, Plato[52] assumed that there would be "some method that generates unity of opinion about the good".[53] But once we have found that method we have destroyed the very thing many of us treasure most – "that we are wholly free, not only to choose for ourselves what we ought to do, but to decide for ourselves, individually and as a species, what we ought to be".[54] We need to strive for ideals but not be dogmatic about them, and keep our minds and the lines of communication open to continually revisit and rethink our reasons for the goodness or badness of acts.

In a 2007 paper on human genome issues,[55] Kirby J incorporated a section on pre-implantation genetic diagnosis. In that section all the New Zealand researchers on the Human Genome Project were delighted to read that he described our report on *Choosing Genes for the*

52 *Republic*, VI 506 (trans A D Lindsay, London, 1992).

53 J R Flynn, *How to Defend Humane Ideals* (London, 2000) p 27.

54 A A Leff, "Unspeakable Ethics, Unnatural Law" [1979] *Duke Law Journal* 1229.

55 M D Kirby, "Biomedicine – Legal and Ethical Issues" (Speech, Commonwealth Lawyers' Association Law Society of Kenya, 15th Commonwealth Law Conference 2007, Nairobi Kenya, 10 September 2007): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_10sep07.pdf (accessed 3 December 2008).

Future as an "excellent review … which demonstrates both the potential of biomedical technology to help people and to reduce suffering".[56] Without Justice Kirby's unwavering support, the New Zealand Human Genome Project would not have happened. He is a judge who is not afraid to not only wear his genes, but also to make sure that knowledge of all our genes is used in a way that will benefit the whole of humanity. We have been the grateful benefactors of Justice Kirby's crusade to use the values of international norms to the advantage of all, particularly the most vulnerable.

56 Kirby, n 55, p 34.

Chapter 18

IN HARMONY WITH HUMAN RIGHTS

Roderic Pitty

There is no getting away from the fact that, in important decisions on human rights, the courts have frequently cut the Gordian knot where the legislature and the executive have lamentably failed to do so. It is in this sense that, by its dialogue with the people and the other branches of government, the courts can become a kind of "political conscience" of the community which they serve.[1]

INTRODUCTION: HEART AND MIND TOGETHER

Justice Michael Kirby's approach to human rights has been inspired by a search for harmony. That ideal appears at crucial points in his reasoning. In 2007, it was evident in the first control order case, *Thomas v Mowbray*.[2] This case was about whether the Australian Government has the authority to restrict the liberty of a person merely because of a suspicion that they, or someone they know, may commit a terrorist act. Justice Kirby expressed his interpretative principle about seeing the Australian *Constitution* in light of its current global context, arguing that it "should be read, so far as the text allows, in a way that is harmonious with the universal principles of the international law of human rights and not destructive of them".[3] His view of a judge's duty was stated at a conference on justice systems and human rights in Brazil in 2006. He said that, particularly at "critical moments" of "great emotion", this duty is "to declare, protect and uphold rights", using "both heart and

1 M D Kirby, "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1988) 62 *Australian Law Journal* 514 at 526-527.

2 (2007) 233 CLR 307.

3 *Thomas v Mowbray* (2007) 233 CLR 307 at 441 [382]. Kirby J expressed the ideal of "harmony" between the common law and international law two decades before in *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414 at 422.

mind" operating in harmony.[4] Justice Kirby used the same image when expressing his appreciation of the late Sir Ronald Wilson, who spoke up to defend him against homophobic slander in 2002, when "virtually all judicial voices" were "silent".[5] Justice Kirby said that Wilson J's "great contribution" to Australian society was to show "how a highly orthodox, conservative lawyer can grow up", and thus "expand his mind in harmony with his heart and with the sense of spirituality in which he was raised".[6] Justice Kirby admired Justice Wilson's achievement of such harmony.

Human rights had no global resonance when Michael Kirby was born, and Wilson was already a legal clerk. Half a century later, when Wilson became head of the Human Rights and Equal Opportunity Commission in 1990, human rights discussion and debate had altered the pretexts, if not the practice, of diplomacy. This transformation gave Kirby opportunities for professional growth that did not exist for Wilson. When Wilson was on the High Court, from 1979 until 1989, Kirby became involved with United Nations agencies as a human rights advocate, an activity he continued as a High Court judge. In 1998, upon receiving the UNESCO Prize for Human Rights Education, Kirby said a judge's role is "inescapably bound up in the promotion and application of human rights".[7] Wilson did not hold this view as a judge. Yet subsequently his view was modified somewhat by the "enormous change in social and legal norms" occurring in Australia.[8] The fact that a great technical lawyer like Wilson could alter his view impressed Kirby.[9] It reinforced a lesson that he learnt as a child, about the value of striving with "compassion, tempered with detachment", to meet the human desire to "be worthy of the highest ideals of those

4 M D Kirby, "Strengthening the Judicial Role in the Protection of Human Rights – An Action Plan" (Speech, Concluding Session, Inter-Regional Conference on Justice Systems and Human Rights, Brasilia, 20 September 2006) pp 9, 17: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_20sep06.pdf (accessed 8 December 2008).

5 Kirby, quoted in A Buti, *Sir Ronald Wilson: A Matter of Conscience* (UWA Press, Perth, 2007) p 381. For an account of the vilification of Kirby J by Senator Bill Heffernan, see L Hill, "Parliamentary Privilege and Homosexual Vilification" in K Gelber and A Stone (eds), *Hate Speech and Freedom of Speech in Australia* (Federation Press, Sydney, 2007) Ch 5.

6 Kirby, quoted in Buti, n 5, p 387.

7 M D Kirby, "Human Rights and Courage" (Speech, Ceremony for the Award of the UNESCO Prize for Human Rights Education, Paris, 7 June 1999) p 2: http://www.lawfoundation.net.au/ljf/app/&id=A1853244C93045A4CA2571A4000B462D (accessed 8 December 2008). The UNESCO prize citation is available at http://www.unesco.org/bpi/eng/unescopress/1999/99-126e.shtml (accessed 8 December 2008).

8 R Wilson, "The Domestic Impact of International Human Rights Law" (1992) 24(3 and 4) *Australian Journal of Forensic Sciences* 57 at 61, presented to the Australian Academy of Forensic Sciences 25th Anniversary meeting (29 October 1991). Kirby's interest in Wilson's view is noted by the editor (at 57). See M D Kirby, "The New World Order and Human Rights" (1991) 18(2) *Melbourne University Law Review* 209 at 214.

9 Buti, n 5, p 388, but cf p 278.

who have gone before".[10] If a conventional judge such as Wilson could start to see Australian law in a new way in a changing global context, many younger lawyers would too.

This chapter examines how Michael Kirby has sought harmony with human rights, as a global citizen and as a judge.[11] The chapter begins by explaining why Justice Kirby remains optimistic about human rights advocacy after 2001. It then reviews his involvement in United Nations agencies, assessing how this has shaped his view of human rights. This is followed by an outline of his advocacy of the Bangalore Principles of judicial reasoning.[12] His use of international human rights law as a judge is reviewed in two main areas concerning issues of liberty and public accountability, and non-discrimination. The last section of the chapter assesses why Kirby J has supported statutory Bills of Rights in Australia, and how such reform could reinforce the Bangalore method of judicial reasoning which he has championed. The aim of the chapter is to enable a sympathetic understanding of the coherence of Kirby J's judicial perspective about human rights, so that both his supporters and his critics can appreciate how different aspects of his view of human rights connect.

THE CENTRALITY OF HUMAN RIGHTS IN JUSTICE KIRBY'S WORLDVIEW

Justice Kirby recalls being inspired by reading the 1948 *Universal Declaration of Human Rights* in 1949, when it was distributed in schools in Australia.[13] In 1992, while an executive member of the International Commission of Jurists, he met the Canadian lawyer John Humphrey, who wrote the first draft of that Declaration. Justice Kirby shares Humphrey's vision, seeing human rights as potentially transforming the relations between states and their citizens.[14] The key idea is to make states accountable by creating parallel external relationships to supervise their conduct, involving the United Nations and a diverse network of

10 M D Kirby, *Through the World's Eye* (Federation Press, Sydney, 2000) p 202.

11 For analysis of Kirby J and eight other Australians from various walks of life as citizens of the world, see G Stokes, R Pitty and G Smith (eds), *Global Citizens: Australian Activists for Change* (Cambridge University Press, Melbourne, 2008).

12 M D Kirby, "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1988) 62 *Australian Law Journal* 514 at 531-532.

13 M D Kirby, "The UNESCO Bioethics Declaration – 12 Points" (Speech, UNESCO, Paris, 24 January 2005) pp 2-3: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_24jan05.html (accessed 8 December 2008).

14 M D Kirby, "Whither Human Rights?" (2001) 5 *University of Western Sydney Law Review* 25 at 25.

non-governmental advocacy groups.[15] This is a very long-term vision. Justice Kirby uses the analogy of the *Magna Carta* at the start of English constitutionalism to explain where he sees the world currently, engaged in building institutions that will one day "effectively protect human rights of all in the future".[16] The analogy is a response to sceptics who see little sign of such progress. Justice Kirby knows they are not a small minority. A poll he conducted at a conference of Commonwealth lawyers in 2003 found "at least a quarter" of the audience to be "very pessimistic about the future of human rights".[17] Despite the many setbacks globally since 2001, he has remained optimistic and idealistic about prospects for protecting human rights. To understand the reasons for his optimism, three central dimensions of his worldview need to be appreciated.

First, Kirby J's perception of the world focuses on dynamism and change. He has highlighted the role science and technology have played in transforming the contemporary world, and in bringing to more people awareness of each other.[18] He is acutely aware of global inequalities, such as in access to health care and in the meeting of basic needs. This has influenced his view, expressed at a UNESCO workshop, that "it is the obligation of each of us to rid our minds of the notion that human rights is a confined and limited topic, restricted to civil and political rights".[19] One of Kirby J's precepts is that "everything is global now", so "legal nationalism" is a diminishing force.[20] He sees change as creating challenges as well as opportunities. The right to privacy is being "steadily undermined" by new technology, so that the OECD Guidelines on Privacy, which he helped to create in the late 1970s, are already out of date.[21] Justice Kirby is keenly aware that since 2001 "even fundamental

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15 M D Kirby, "Indicators for the Implementation of Human Rights" in J Symonides (ed), *Human Rights: International Protection, Monitoring, Enforcement* (Ashgate/UNESCO, Aldershot, 2003) pp 326-328. Humphrey's view is quoted in P G Lauren, *The Evolution of International Human Rights: Visions Seen* (University of Pennsylvania Press, Philadelphia, 1998) p 230.

16 Kirby, n 14 at 29.

17 M D Kirby, "The Future of Human Rights – Does it Have One?" in G Doeker-Mach and K Ziegert (eds), *Law, Legal Culture and Politics in the Twenty First Century: Essays in Honour of Alice Erh-Soon Tay* (Franz Steiner Verlag, Stuttgart, 2004) p 169.

18 M D Kirby, *The Law and Modern Technology* (Deakin University Press, Geelong, 1982); M D Kirby, "Human Rights and Technology: A New Dilemma" (1988) 22(1) *University of British Columbia Law Review* 123.

19 M D Kirby, "Protecting Cultural Rights: Some Developments" in M Wilson and P Hunt (eds), *Culture, Rights and Cultural Rights: Perspectives from the South Pacific* (Huia, Wellington, 2000) p 147.

20 M D Kirby, "Four Parables and a Reflection on Regulating the Net" (Speech, Internet Industry Association, Sydney, 21 February 2008) pp 14-15: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_21feb08.pdf (accessed 8 December 2008).

21 J Bajkowski, "Kirby urges net privacy law overhaul", *Australian Financial Review* (4 December 2007) pp 1, 32; M D Kirby, "Privacy in Cyberspace" (1998) 21(2) *University of New South Wales Law Journal* 323.

rights may sometimes need to be reargued and again defended".[22] Yet his concerns extend beyond traditional civil liberties, which he has defended since his work for the New South Wales Council for Civil Liberties in the 1960s.[23] As President of the International Commission of Jurists, he highlighted new human rights issues, such as respecting sexual minorities, protecting all people living with HIV/AIDS, understanding drug addiction, and confronting the huge ethical challenges involved with developing biotechnology.[24] He is worried about the application of new technologies without proper legal regulation or respect for human dignity. He sees human rights education as a vital way of enhancing humanity's capacity to resolve many urgent global problems through cooperation.

Second, one of Kirby J's core values is a strong commitment to diversity, which he regards as "the glory of the human species".[25] He points out that international human rights law has an affinity with the British common law tradition, but argues that, "if we are serious about deriving a global consensus" about human rights, "we will listen to the voices of other societies" with different traditions.[26] Justice Kirby sees inter-cultural dialogue as a crucial way of creating a more universal understanding of human rights. His view is like that of the Norwegian peace researcher, Johan Galtung, who uses the metaphor of a long journey that began with the Universal Declaration, and is leading on to "more stops and new declarations, each time reflecting an ever deeper

22 Kirby, n 17, p 170. In March 2008 the UN High Commissioner for Human Rights, Louise Arbour, made a similar point, observing that the extension of the human rights agenda with more activity in areas such as economic, cultural and social rights has been substantially delayed by the urgent need to defend fundamental civil and political rights (such as the ban on torture) put at risk by the way some powerful states, especially the USA, have responded to threats posed by non-state terrorism: interview with Louise Arbour (SBS Dateline, 19 March 2008) transcript: http://news.sbs.com.au/dateline/interview_with_louise_arbour_543024 (accessed 8 December 2008).

23 M D Kirby, "A Perspective on Civil Liberties: Early Days and Days Ahead" (1996) 34(10) *Law Society Journal* 44; Kirby, n 10, Ch 8.

24 Kirby, n 17, pp 171-172; M D Kirby, "The International Commission of Jurists – Looking to the New Millennium" (Speech, Triennial Meeting of the Commission, Cape Town, 23 July 1998): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_lcjnewmi.htm (accessed 8 December 2008). Kirby J's leadership role in formulating the *International Guidelines on HIV/AIDS and Human Rights*, adopted by the UN in 1997, is discussed in this book in Chapter 20, "International Human Rights" by Louise Arbour and James Heenan.

25 M D Kirby, "Ron Castan Remembered" (Speech, Koorie Heritage Trust, Melbourne, 15 November 1999) p 3: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_castan.htm (accessed 8 December 2008).

26 M D Kirby, Foreword to D Hodgson, *Individual Duty within a Human Rights Discourse* (Ashgate, Aldershot, 2003) p xi. As President of the Court of Appeal in the Solomon Islands in 1995, Kirby J tried to involve local judges to preserve the court's legitimacy: see M D Kirby, "Civic Friendship: Building a Consensus in Governance in Malawi" (1997) LXXVIII(3) (July) *The Parliamentarian* 220.

and broader *dialogue des civilisations*".[27] Justice Kirby has participated in many such dialogues through UNESCO. He has helped to create two international agreements: the *Universal Declaration on the Human Genome and Human Rights* in 1997, and the *Universal Declaration on Bioethics and Human Rights* in 2005. He chaired the drafting group for the latter agreement, which harmonised two separate sets of ethical and legal principles, medical ethics and human rights.[28] Because his experience has included productive dialogue across cultures, he is optimistic that pressures for uniformity and dogmatism will not prevent an increasingly open exchange of ideas throughout the world.

Third, Kirby J has a passionate belief in the common interests of humanity. Like Wilson, he sees "injustice and inequality", both in Australia and the wider world, as a disease of the soul, which needs "to be cured".[29] He encourages Australians "to lift our voices and not to remain silent", so we "feel the pain of brothers and sisters everywhere".[30] While involvement in cross-cultural dialogue has strengthened his optimism about human rights, Kirby J's belief in a common humanity derives from values learnt during childhood about the importance of liberty and the dangers of conformism. One episode in particular had a lasting impact on his respect for dissent. In 1951, he first heard about the High Court because his grandmother had married a communist, a man awarded the Military Cross in the Great War whose beliefs changed during the Great Depression. Kirby saw the courage required to express a dissenting view at a time of "anticommunist hysteria in Australia".[31] He learnt "to be suspicious of public campaigns and demonisation of minorities".[32] This experience created a passion in him, not for dissent itself, but for the need for society to enable everyone without exception to use the human rights in the Universal Declaration. Justice Kirby has often celebrated the High Court's decision not to deny civil rights to

27 J Galtung, *Human Rights in Another Key* (Polity, Cambridge, 1994) p 154. A similar idea is outlined by Y Onuma, "Towards an Intercivilizational Approach to Human Rights", *Asian Yearbook of International Law*, Vol 7, pp 21-81.

28 M D Kirby, "UNESCO and Universal Principles in Bioethics: What's Next?" (Speech, UNESCO International Bioethics Committee, Tokyo, December 2005): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_18dec05.pdf (accessed 8 December 2008). See also M D Kirby, "The Universal Declaration on Bioethics and Human Rights – Present at the Creation" (Australian Institute of International Affairs New South Wales, Charteris Lecture, Sydney University, 11 November 2005) p 5: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_11nov05.pdf (accessed 8 December 2008).

29 M D Kirby, "Consensus and Dissent in Australia" (10th Annual Hawke Lecture, Adelaide, 10 October 2007) p 14: http://www.unisa.edu.au/hawkecentre/ahl/2007ahl_Kirby.pdf (accessed 8 December 2008).

30 Kirby, n 10, p 13.

31 M D Kirby, "Surface Nugget" (2002) 46(No 10) *Quadrant* 53 at 56.

32 M D Kirby, "A Cause for Celebration and Rededication" (Speech, Ceremony for the Presentation of Centenary of Federation Medals, Paddington, 23 May 2003) p 2: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_federationmedals.htm (accessed 8 December 2008).

communists, which he says was undoubtedly "right" although "out of step" with the view of the United States Supreme Court in a similar case.[33] It was right because it respected diverse opinions, and did not criminalise mere thoughts.[34] This episode profoundly shaped Kirby J's belief in liberty, and influenced his search for harmony between human rights and law.[35]

Justice Kirby's optimism about human rights has contributed to his practice of judicial dissent, although on the High Court it has more specific causes.[36] His participation in international dialogue has reinforced his perception that discrimination against minorities has diminished in many areas. He perceives a changing world, with more people using human rights to challenge discrimination and prejudice, and to "throw a girdle around the earth in the form of cyberspace".[37] His belief in this increasingly global exchange of ideas is one reason why he thinks that his judicial reasoning will gain more support in future. This belief has been strengthened by his participation since the 1970s, through United Nations agencies and other bodies, in helping to promote a distinctively cosmopolitan view of international law.

THE COSMOPOLITAN NATURE OF JUSTICE KIRBY'S INTERNATIONAL ACTIVITY

While Kirby J's international activity advocating for human rights is well known, the way in which it has influenced his judicial reasoning has been circuitous rather than direct. He did not set out as a young lawyer to break down the barrier between international and municipal law. Rather, he has been compelled to contribute to transcending that division as a result of his engagement in the international promotion and protection of human rights. The nature of that engagement has been essentially cosmopolitan, in a specific sense of that word which means being a citizen of the world in values and commitments, not just a frequent visitor to diverse places.[38] In 2003, Kirby J doubted whether he could identify as such a cosmopolitan, because of the different, popular usage of that word to mean merely what is in vogue or trendy, stylish

33 Kirby, n 29, p 15.

34 Kirby, n 32, p 3.

35 M D Kirby, "Judicial Activism: Power Without Responsibility? No, Appropriate Activism Conforming to Duty" (2006) 30(2) *Melbourne University Law Review* 576 at 581.

36 M D Kirby, "Change Through Dissent: Disagreement in the High Court and Beyond" in T Wright (ed), *Time for Change* (Hardie Grant, Melbourne, 2006) pp 21-24.

37 M D Kirby, "Human Rights – the Way Forward" (2000) 31(4) *Victoria University of Wellington Law Review* 703 at 719.

38 D Heater, *World Citizenship: Cosmopolitan Thinking and Its Opponents* (Continuum, London, 2002).

and fashionable, or a fetish for appearances not substance.[39] Yet he later accepted the term, as a synonym for a global citizen. His international activity clearly fits within the deeper meaning of a cosmopolitan, as someone morally compelled to respond to the plight of oppressed people across the world. His extensive human rights activity has included two roles: his involvement in elaborating and promoting human rights principles in new areas, and careful monitoring of human rights in Cambodia in 1993-1996 as the Representative of the United Nations Secretary-General.

Justice Kirby's overseas work began from his need, when head of the Australian Law Reform Commission, to seek relevant lessons from abroad.[40] It was extended through his involvement with the Organisation for Economic Cooperation and Development (OECD), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Health Organization (WHO), the International Labour Organization (ILO), and several other agencies.[41] His role was often to synthesise proposals for reform and to facilitate agreement among diverse people on current issues ranging from threats to privacy posed by new technology to the spread of HIV/AIDS.[42] This work extended his view of the scope of human rights, and the contexts in which they must be protected. Justice Kirby was unusual for his generation in adopting the language of human rights when young, while other activists such as Margaret Reynolds picked this up later, as a result of "trying to change the way we respond to those who are different".[43] Yet, by engaging with diversity, Kirby J further developed his appreciation of human rights through practical activity, in Australia and abroad. Combined with his experience of discrimination by those unable to accept his homosexuality, this work affirmed his belief in core principles of human rights, such as equality and non-discrimination.[44]

During his work abroad, Kirby J noticed that a major "paradigm shift" was occurring in the distribution of power in the world. Power

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39 R Pitty, Assorted Recollections of an Interview with Justice Michael Kirby (Melbourne, 15 October 2003), agreed as an accurate record in an email from Justice Kirby to the author, 2 December 2003.

40 M D Kirby, *Reform the Law: Essays on the Renewal of the Australian Legal System* (Oxford University Press, Melbourne, 1983) p 28.

41 M D Kirby, "Globalizing the Rule of Law? Global Challenges to the Traditional Ideal of the Rule of Law", in S Zifcak (ed), *Globalisation and the Rule of Law* (Routledge, Abingdon, 2005) pp 67-71.

42 See Kirby, n 10, Chs 4, 5; M D Kirby, "Why is Governance so Critical? Partnerships Across Borders Against HIV/AIDS" (Speech, 4th International Congress on AIDS in Asia and the Pacific, Manila, 28 October 1997): http://www.lawfoundation.net.au/ljf/app/1372358AA43FCAB7CA2571A70082F989.html (accessed 8 December 2008).

43 M Reynolds, *Living Politics* (University of Queensland Press, St Lucia, 2007) p 29.

44 Recalled in M D Kirby, "God and the Judge" (Speech, Pitt St Uniting Church, Sydney, 18 March 2004, broadcast on ABC Radio National Encounter program) pp 4-6 of transcript: http://www.abc.net.au/rn/relig/enc/stories/s1071895.htm (accessed 8 December 2008).

was becoming more internationalised. The traditional account of the separate rule of law within nation-states was increasingly superficial. That account ignores "the great power" of multinational corporations and the media, which is little regulated by law with regard to the impact of such actors on human rights.[45] The oppressed seem more numerous, and more at risk, given the growth of inequality. When they are wronged by powerful corporations, there is little prospect of legal redress. Yet some observers see signs of initial attempts at transnational regulation, including in areas of concern to Kirby J, such as the implications of genetic research.[46] Justice Kirby's view is that the shift toward a world comprising more international regulation of conduct within states is irreversible, and to be welcomed as part of the process of responding to contemporary global challenges. He has been not merely an observer of this shift, but a participant in it. He has tried to shape it in ways that have reduced "the perils of unaccountability".[47]

Justice Kirby has contributed to the push for more accountability by agitating for greater policing of universal human rights, as well as by participating in the creation of new norms. Upon receiving the UNESCO human rights prize, he said he was motivated by the "courage" displayed by the people in that United Nations agency, who "take up issues that others are afraid to touch".[48] He displayed courage when he was the Special Representative of the United Nations Secretary General to Cambodia, from late 1993 until early 1996. A death threat was delivered to his staff in Phnom Penh in June 1995.[49] While it was investigated, an attack on journalists the same day and other similar attacks were not, despite Kirby J's protests.[50] During Kirby J's last visits, in August 1995 and January 1996, the country's political leaders refused to meet him, after his candid criticisms of breaches of basic civil rights in a context of increasing political repression, which he termed "a reversion to autocracy" in his last report to the United Nations in April 1996.[51] His reports noted improvements outside the political realm, such as in access

45 Kirby, n 41, pp 66-67.

46 A Brysk, *Human Rights and Private Wrongs: Constructing Global Civil Society* (Routledge, New York, 2005) Ch 5.

47 Kirby, n 41, p 67.

48 "Human Rights Education Prize Awarded to Michael Kirby (Australia) in Ceremony at UNESCO" (8 June 1999) p 2: http://www.unesco.org/bpi/eng/unescopress/1999/99-126e.shtml (accessed 8 December 2008).

49 Report of the UN Secretary General's Special Representative for Human Rights in Cambodia (26 October 1995, UN document A/50/681) p 25, para 61. See Kirby, n 10, p 39.

50 *Situation of Human Rights in Cambodia* (Report of the UN Secretary General's Special Representative for Human Rights in Cambodia, Commission on Human Rights, 26 February 1996, UN document E/CN.4/1996/93) p 12, para 43.

51 M D Kirby, *Cambodia: A Parting Assessment* (Report to the UN Commission on Human Rights in Geneva, 1 April 1996) p 1: http://www.lawfoundation.net.au/ljf/print/4E7B74498AA7928BCA2571A800006D07.html (accessed 8 December 2008). See also *Situation of Human Rights in Cambodia*, n 50, pp 14, 30, paras 50, 107.

to health care and education, but stressed that girls faced intolerable discrimination in gaining a basic education, and much abuse of public authority remained.[52]

These visits to Cambodia were not fly-in, fly-out affairs with just a few meetings in the capital. Justice Kirby toured the provinces, and investigated a wide range of human rights issues, including inadequate preventive education about HIV/AIDS, forced removals of homeless people in Phnom Penh, collective punishment in prisons, the sexual exploitation and trafficking of children, the destructive impact of logging on indigenous communities, and the lack of media diversity.[53] In his final report, he devoted particular attention to the position of minorities, warning Cambodia to "avoid the mistakes made by many developed countries" and calling on it to "learn from their belated endeavours to repair those mistakes".[54] He pointed to the relevance of the Australian Law Reform Commission's 1986 report on Aboriginal customary law, and argued that the interests of traditional land owners should not be infringed, "except by the freely expressed will of such communities" ascertained through open, unprejudiced dialogue.[55]

Justice Kirby's work in Cambodia enlarged his understanding of human rights, regarding both the importance of economic and social rights and the role of the United Nations. His reporting to the United Nations in Geneva and New York reinforced his guarded optimism that, for human rights protection, "the long-term is not bleak", although authoritarian rulers will remain.[56] He marvelled at the growth of human rights advocacy groups in Cambodia, undertaking work "that would have meant death not so long ago".[57] He called for more open discussions at the United Nations, including more persistent monitoring of particular problems, and greater links with non-governmental organisations.[58] While the United Nations

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52 *Situation of Human Rights in Cambodia*, n 50, pp 16, 18, 29, 30, paras 57, 63, 103, 107; M D Kirby, *Cambodia: Steady Progress – Some Setbacks* (Report to the UN General Assembly, New York, 30 November 1995) p 2: http://www.lawfoundation.net.au/ljf/print/9701B5C413F4B209CA2571A80004430E.html (accessed 8 December 2008).

53 Report A/50/681, n 49, pp 8, 11-12, 16, 23, paras 16, 28, 29, 40, 57; *Situation of Human Rights in Cambodia*, n 50, pp 7, 14, 2, paras 26, 50, 77.

54 *Situation of Human Rights in Cambodia*, n 50, pp 22, 27, paras 82, 91.

55 *Situation of Human Rights in Cambodia*, n 50, pp 22-23, 25, paras 82, 87.

56 M Morison, "Cambodia and the United Nations: An Interview with Justice Michael Kirby, Former Special Representative of the Secretary General for Human Rights in Cambodia" (1996) (Sept) *Human Rights Defender*, Article No 28 at 3; see also Kirby, n 19, p 146.

57 M D Kirby, "Human Rights – the International Dimension" (Occasional Lecture to the Senate, 17 February 1995) p 2: http://www.lawfoundation.net.au/ljf/print/C2C399CBB541B1FDCA2571A90000797E.html (accessed 8 December 2008); see also Kirby, n 37 at 705.

58 M D Kirby "Human Rights" (Paper presented to a meeting of UN Special Rapporteurs, Special Representatives, Experts and Chairmen of Working Groups of the Commission on Human Rights Geneva, 30 September 1994) pp 3-4: http://www.lawfoundation.net.au/ljf/print/C8539B4806236772CA2571A9000D0602.html (accessed 8 December 2008).

experience in Cambodia "was atypical", arising at a time of temporarily increased United Nations capacities soon after the Cold War, he found the broader context of United Nations monitoring promising, although limited.[59] Watching dictatorships, such as Sudan, forced to "appear before the bar of the United Nations" and listen to criticism from human rights investigators, convinced him that "the process of transparent international accountability to international human rights law has begun".[60] Sceptics will note that, ten years later in 2003-2004, the United Nations tolerated crimes against humanity and genocide by agents of the Sudanese military in Darfur.[61] Yet Kirby J would say that was a failure of an old paradigm of unaccountable states, not of the United Nations as "an organisation of people".[62]

The Cambodian experience was atypical for an Australian judge. While he has dealt with governments, particularly in negotiating new human rights norms, Kirby J's involvement has not been mainly with judicial institutions answerable to the United Nations Security Council, like the International Criminal Tribunal for the Former Yugoslavia. Rather, he has been a participant in a resurgent wave of an older form of transnational legal activism. In 1869, before the recrudescence of nationalism in Europe, such activism was called a "cosmopolitan movement" by the Belgian lawyer, Gustave Rolin.[63] The Finnish lawyer Martti Koskenniemi notes that these activists were "not internationalists" but "cosmopolitans", who "had little faith in States and saw much hope in increasing contacts between peoples".[64] One of their precepts was to evaluate "the laws of one's home country from the perspective of the requirements of humanity", and they were "always ready to take account of reforms carried out elsewhere".[65] This is exactly what Kirby J has tried to do. His work with international bodies has meant that the "requirements of humanity" have gained resonance for him. This view has been reinforced by the development of his judicial reasoning.

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59 Kirby, n 37 at 706.

60 M D Kirby, "Internationalising Law – A New Frontier for Law and Justice" (2007) 25(1) *Law in Context* 11 at 18.

61 M W Daly, *Darfur's Sorrow: A History of Destruction and Genocide* (Cambridge University Press, Cambridge, 2007) pp 294-296.

62 M D Kirby, "A Challenge for the Future – The United Nations: Strengths and Weaknesses" (Speech, UN Association of Australia Conference, Canberra, 1 September 1995) p 3: http://www.lawfoundation.net.au/ljf/print/A37A4B55F0370365CA2571A8001C51FD.html (accessed 8 December 2008).

63 Rolin, quoted in M Koskenniemi, "Legal Cosmopolitanism: Tom Franck's Messianic World" (2003) 35(2) *New York University Journal of International Law and Politics* 471 at 473.

64 Koskenniemi, n 63 at 473.

65 Koskenniemi, n 63 at 473.

APPLYING THE BANGALORE PRINCIPLES OF JUDICIAL INTERPRETATION

Justice Kirby has had a key role in promoting international judicial education, as President of the International Commission of Jurists,[66] and as a proponent of the Bangalore Principles of judicial interpretation. These derive from a symposium convened in 1988 by the former Chief Justice of India, B N Bhagwati, and attended by senior judges from Commonwealth countries and the United States.[67] The Principles carefully express the key precepts of those cosmopolitan legal activists who strive to develop their municipal law in harmony with the perspective of humanity, if at all possible.[68] Before the Bangalore meeting, Kirby J accepted the orthodox view of international law as "not part of the domestic law unless specifically incorporated as such by a valid statute", doubting even the challenge to that orthodoxy from Justice Lionel Murphy.[69] At the symposium he had a "conversion", influenced by his work in international bodies concerning human rights.[70] The symposium's key Principle affirmed that it is proper for judges to use relevant international human rights norms to remove any "ambiguity or uncertainty from national constitutions, legislation or common law".[71]

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66 Before serving as President of the International Commission of Jurists in 1995-1998, Kirby J was head of its Executive Committee, and in that capacity he attended President Mandela's inauguration in 1994.

67 Judicial Colloquium in Bangalore, 24-26 February 1988, *Developing Human Rights Jurisprudence: The Domestic Application of International Human Rights Norms* (Human Rights Unit, Commonwealth Secretariat, London, 1988). These materials from the colloquium include a paper by Kirby J, pp 68-90, substantially similar to his July 1988 *Australian Law Journal* article, but lacking its broad introduction. The Commonwealth Secretariat version includes references to two NSW cases decided soon after the Bangalore meeting. A contribution by Anthony Lester QC, who helped to organise the symposium, is dated 30 April 1988, so Kirby J's contribution does not necessarily reflect his views before the meeting.

68 One commentator, sceptical about the influence of the Bangalore Principles, has noted that Kirby J and his colleagues at the Bangalore symposium were not "representatives of their courts or of their States", but rather independent judicial activists: M Allars, "International Law and Administrative Discretion" in B Opeskin and D Rothwell (eds), *International Law and Australian Federalism* (Melbourne University Press, Melbourne, 1997) p 249.

69 M D Kirby, "Murphy: Bold Spirit of the Living Law" (Inaugural Lionel Murphy Memorial Lecture, Sydney University Law School, 28 October 1987 (published in 1988) p 8. Kirby J's recollection of scepticism on arrival at Bangalore is confirmed by comparing this text (published in mid-1988) of his inaugural Murphy lecture with the first version published in early 1988: M D Kirby, "Bold Spirit of the Law" (1988) 32(3) *Quadrant* 16. The one thematic addition when the revised lecture was published by Sydney University Law School concerned Murphy the "internationalist", ie as a judge who took relevant international obligations of the Australian state into consideration: Kirby, "Murphy", pp 8-9, citing some sources from June 1988. Those passages do not appear in the *Quadrant* version, and so reflect Kirby J's views after the Bangalore symposium.

70 M D Kirby, "The Australian Use of International Human Rights Norms: From Bangalore to Balliol – A View from the Antipodes" (1993) 16 *University of New South Wales Law Journal* 363 at 364.

71 Kirby, n 12 at 532.

As Kirby J stressed, this Principle does not warrant judges disregarding clear legal provisions that are inconsistent with human rights. It just means that wherever there is a gap in the common law or ambiguity, and therefore no clear inconsistency with international norms, judges should take those norms into consideration when deciding what the domestic law really is.[72]

Following the symposium, Kirby J did two complementary things. First, he sought to outline clearly the significance of the Bangalore Principles for the future of the common law in countries such as Australia.[73] Second, he began to apply these Principles in the New South Wales Court of Appeal.[74] Initially, he felt "somewhat lonely in the prosecution of the Bangalore cause in the Australian courts".[75] This is not surprising. Compared to Murphy, Kirby gave more credence to the views of those conservative sceptics whom he was trying to persuade. He was engaged in a difficult task, attempting to expand the horizons of judges who had grown up with the orthodoxy of "dualism", the dominant legal positivist view which consigns domestic and international law to "separate planes" of reality.[76] This was the view which constrained Wilson J in the first *Mabo* case in 1988, despite his wish that he might have reached a different interpretation.[77] In promoting the Bangalore Principles, Kirby J was challenging not just the inclinations of judges seen as conservative, but a whole way of thinking which isolated Australian law from international law. He had transcended that isolation through his international work, but he knew it would be ineffective just to proselytise the Bangalore Principles based on his atypical experience.

Justice Kirby's application of the Bangalore Principles was consistent with the dynamic interpretation of the common law, which he had articulated ever since his days with the Law Reform Commission.[78] His key point was that the common law must adapt to change while retaining consistency. He emphasised this in one case, *Jago*, which concerned whether there is a common law right to a speedy trial, by claiming it is "more reliable" to find common law principles guided

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72 Kirby, n 70 at 391.

73 Kirby, n 12 at 514-531. Subsequently, Kirby J helped to formulate another set of Bangalore Principles on Judicial Integrity, adopted by the UN Office on Drugs and Crime in 2006. For the background to those principles, see M D Kirby, "Judicial Integrity – A Global Social Contract" (Speech, Third Meeting, Judicial Group on Strengthening Judicial Integrity, Colombo, 10 January 2003): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_judicialintegrity.htm (accessed 8 December 2008). Those later Bangalore Principles are available at: http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf (accessed 8 December 2008).

74 The key cases are summarised in Kirby, n 70 at 377-383.

75 Kirby, n 70 at 384.

76 B Opeskin, "Constitutional Modelling: The Domestic Effect of International Law in Commonwealth Countries" (2001) 27(2) *Commonwealth Law Bulletin* 1242 at 1248-1249.

77 Buti, n 5, p 235.

78 Kirby, n 40, pp 37-41.

by international treaties ratified by Australia, than by engaging in "disputable antiquarian research" about the decisions of medieval circuit judges living in a different world.[79] Justice Kirby's colleagues, including McHugh J, were not persuaded. Yet a new case soon arose, *Gradidge*,[80] which was about whether a person lacking speech and hearing had a right to know what was happening between the lawyers in the open court around her, through assistance from an interpreter. The trial judge had said no, but Kirby J and his fellow appeal judges said yes. They were guided by Art 14 of the *International Covenant on Civil and Political Rights*, which affirms equality before the courts, saying that all people have a right to the "free assistance of an interpreter" whenever they cannot understand the language of a court.[81] One of the other judges in *Gradidge*, Justice Gordon Samuels, had in *Jago* said that such rights "may be of assistance" if the law is unclear, but had been unconvinced.[82] His ready acceptance of the Bangalore Principles was a sign of change, showing that some sceptics might alter their attitude quite quickly.[83]

For the Bangalore method to become routine, Kirby J knew that a decision from the High Court would be crucial. In propounding the Principles, he carefully attended to the "practical" reasons why those judges "concerned about injustice" might be reluctant to adopt them, and so prefer to rely on successful law reform of the type that he had long promoted.[84] He knew such reform was hard to achieve. With the Law Reform Commission, he had seen "a general retreat from confidence in the ability and inclination of the legislatures to face up to" hard issues, so he thought judges must accept their "responsibility to develop the

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79 *Jago v District Court (NSW)* (1988) 12 NSWLR 558 at 569 (CA) per Kirby P, cited in Kirby, n 70 at 380.

80 *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414.

81 *International Covenant on Civil and Political Rights*, Arts 14.1 and 14.3(f).

82 *Jago v District Court (NSW)* (1988) 12 NSWLR 558 at 582 (CA) per Samuels JA, cited in Kirby, n 70 at 381; and *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414 at 426 per Samuels JA.

83 Allars, n 68, p 260, claims that in *Gradidge* "the ICCPR ultimately played no part in Kirby P's interpretative choice", and that Samuels JA "easily resolved the case by reference to the common law". Yet Kirby J, after summarising that case and others to audiences abroad, pointed out that "the reference to the Covenant is an intellectual starting point to the consideration by the court of the law to be applied in a particular case. It puts the judge's decision in a universal context. It puts it in a context of international principles. *On uncertain and busy litigious seas, it is often helpful to have the guiding star of international human rights norms*" (emphasis added): M D Kirby, "The Judge in the New World Order – A Role in Advancing Human Rights?" in Judicial Colloquium in Abuja, Nigeria, 9-11 December 1991, *Developing Human Rights Jurisprudence* (Commonwealth Secretariat, Interights, London, 1992) Vol 4, p 237. Note that Roslyn Higgins suggested that "international law is part of that which comprises the common law on any given subject": "The Relationship Between International and Regional Human Rights Norms and Domestic Law", in Judicial Colloquium at Balliol College, Oxford, 21-23 September 1992, *Developing Human Rights Jurisprudence* (Commonwealth Secretariat, Interights, London, 1993) Vol 5, p 21.

84 Kirby, n 12 at 522, citing Mason J.

legal system".[85] He sought to convince other judges that this "legislative and administrative log jam" was a serious problem by arguing that the "universal failure of legislators in democracies to attend to many urgent tasks of law reform" had led to much "inattention to rights" and a failure to protect individual liberties.[86]

Justice Kirby used these points to reinforce his support for "judicial activism", as opposed to judicial indifference, as a way of gaining "greater legitimacy" for court decisions.[87] He argued that a judge "may properly seek to bring domestic law into harmony" with relevant international customary law, especially where its norms are widely endorsed across the world.[88] Then, before referring particularly to the United States, he forcefully pointed out that:[89]

> There is no getting away from the fact that, in important decisions on human rights, the courts have frequently cut the Gordian knot where the legislature and the executive have lamentably failed to do so. It is in this sense that, by its dialogue with the people and the other branches of government, the courts can become a kind of "political conscience" of the community which they serve.

Pointing out that "there is often plenty of room for judicial choice", especially in difficult cases, Kirby J stressed that avoiding "judicial activism" was not a neutral posture, since it involves deliberate neglect of rights.[90] After citing the South African journalist, Donald Woods, about apartheid's obscene laws, Kirby J observed that "wrongs will sometimes be so glaring as to require redress and correction if that is possible". He said that it is in such a situation that "judges must act to defend human rights", if they are "satisfied that they have a basis in law for doing so".[91]

These arguments were tested in what Kirby J calls the "break-through" case for the Bangalore Principles, *Mabo [No 2]*.[92] He says that these Principles "played a crucial role in encouraging the High Court to reexamine the refusal of the common law to recognise the title to land of the indigenous peoples".[93] He argues that the importance of the Bangalore method "was that it provided the key that unlocked the door

85 M D Kirby, "Interview" in G Sturgess and P Chubb (eds), *Judging the World: Law and Politics in the World's Leading Courts* (Butterworths, Sydney, 1988) p 369.

86 Kirby, n 12 at 528.

87 Kirby, n 12 at 528. While in 1988 Kirby J referred routinely to "judicial activism" in a positive light, the term later became "code language" for conservative opposition to particular decisions: Kirby, n 35 at 576. For Kirby J's comparative discussion of judicial activism, see Kirby, n 10, Ch 9.

88 Kirby, n 12 at 525-526.

89 Kirby, n 12 at 526-527.

90 Kirby, n 12 at 528.

91 Kirby, n 12 at 529.

92 Kirby, n 70 at 384, 386.

93 Kirby, n 17, p 174.

to permit examination of past common law authority in Australia".[94] Sceptics who doubt such a role presume that the judges in *Mabo* were unaware of the difficult choice that Kirby J had highlighted: either develop the law to resolve a glaring injustice, or ignore human rights.[95] That is unbelievable. Two events in late 1991 reinforced Kirby J's advocacy of the Bangalore method. First, Australia ratified the First Optional Protocol to the *International Covenant on Civil and Political Rights*, so complaints about breaches of those rights can be made to the United Nations Human Rights Committee. Second, Wilson endorsed the Bangalore method, saying "recourse to international principles of human rights may be just as relevant to the moulding of the common law as it is to statutory interpretation".[96] Then, in *Mabo [No 2]* Brennan J (with Mason CJ and McHugh J) said that "international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights".[97] One week after the decision, Kirby J quoted that passage in a talk about human rights, and he continued to do so.[98] Within a few years, he had found strong support in Australia for applying the Bangalore method.

THE BANGALORE METHOD AND LIMITING UNACCOUNTABLE POWER

The timing of Kirby J's Bangalore conversion was certainly felicitous for the initial success of the Bangalore method. Subsequently, after Kirby J's promotion to the High Court, he extended the method to constitutional

94 M D Kirby, "Take Heart – International Law Comes, Ever Comes" in U Dolgopol and J Gardham (eds), *The Challenge of Conflict: International Law Responds* (Martinus Nijhoff, Leiden, 2006) p 286; M D Kirby, "International Human Rights and Constitutional Interpretation" (Chief Justice Hilario Davide Distinguished Lecture, Manila, 15 April 2005) p 4: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_15apr05.html (accessed 8 December 2008). Pitty, n 39, p 4.

95 Opeskin, n 76 at 1266 refers to Allars (n 68, pp 248-250), whose scepticism is based on artificially opposing the Bangalore Principles to a differently formulated but essentially similar idea in *Mabo [No 2]*, the "legitimate influence principle". The point is partly historical: Kirby J's advocacy of the Bangalore method made the final result in *Mabo* more likely. It is also contextual. While Allars (n 68, p 250) says that "apart from Kirby P, no Australian judge has made explicit reference to the Bangalore Principles", ideas are influential without direct citation. Allars' view is not supported by the analysis of the Hon Mr Justice David Malcolm AC, Chief Justice of Western Australia, *The Influence of Internationally Recognised Human Rights on Domestic Law* (United Nations Association of Australia (WA) Inc Evatt Memorial Lecture, Perth, 7 July 1996).

96 Wilson, n 8 at 61. Within six weeks of Wilson's speech, Kirby J was quoting it, together with an earlier speech by Mason CJ, to another meeting of Commonwealth judicial activists: Kirby, n 83, p 218.

97 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42 per Brennan J.

98 M D Kirby, "The International Impact of Human Rights Law" (1992) (Dec) *Australian Journal of Forensic Sciences* 65 at 68 (Speech, Australian Academy of Forensic Sciences, 11 June 1992).

interpretation. This was a task he mentioned in his original exploratory article, where he justified the method as producing decisions that may be more legitimate than where a judge resolves ambiguity or uncertainty in terms of values drawn from their own "experience and predilections".[99] This rationale for using the Bangalore method can be confirmed by examining when and how Kirby has used it in cases involving unaccountable power.

Refugee cases decided in 2004 show when Kirby J thinks a judge should act to uphold human rights, at least when there is no Bill of Rights. It is not enough that there is a glaring wrong, such as the detention of children of asylum seekers. Nor that Australia has been criticised for such a wrong by the United Nations Human Rights Committee for ignoring its treaty obligations. In cases where breaches of human rights like the detention of children are certainly part of government policy, and are maintained despite criticism, Kirby J says no judge should "invoke international law to override clear and valid provisions of Australian national law", however bad that law.[100] His view does not just acknowledge "the dualist mantra that international norms do not bind Australian courts unless incorporated by domestic law".[101] Kirby has said that his mind was rescued from "rigid dualism" at Bangalore.[102] He sees the Bangalore method as requiring "a shift in the understanding of the dualist principle", not a rejection of it.[103] Yet his reason for this is pragmatic, not doctrinal. It relates to his debate with his New Zealand friend, the late Robin Cooke, about a judge's role in stopping Parliaments from abolishing fundamental rights. Justice Kirby rejected Cooke's search for such a role in the common law because he thought that it "challenges the democratic character of the system of which the judiciary is a part".[104] A judge who tries to contest the supremacy of Parliament cannot win such an inherently political battle.[105] He reiterated this point in the *Durham Holdings* case, emphasising that "the judicial function rests on political facts".[106] Yet both in that case, and when speaking in New Zealand, he

99 Kirby, n 12 at 525-526.

100 *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 at 425 [171] per Kirby J; *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 74 [212] per Kirby J.

101 H Charlesworth, "The High Court on Constitutional Law: The 2004 Term" (2005) 28(1) *University of New South Wales Law Journal* 1 at 7, providing a useful analysis of this group of cases.

102 M D Kirby, "International Law – The Impact on National Constitutions" (2006) 21(3) *American University International Law Review* 327 at 332, 334, 344-346.

103 Kirby, n 41, p 74.

104 M D Kirby, "Lord Cooke and Fundamental Rights" in P Rishworth (ed), *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) p 353.

105 Kirby, n 104, pp 344-345.

106 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 427 [62] per Kirby J.

argued that the Australian *Constitution* could constrain unaccountable power.[107]

How can the *Constitution*, which lacks a Bill of Rights, be seen to limit a government's power over individuals? Justice Kirby answered this question in the *Al-Kateb* case, in which the glaring wrong was indefinite detention by default, not just mandatory detention in breach of Australia's obligations under international human rights law. Mr Al-Kateb was a stateless person who wished to leave Australia after experiencing mandatory detention. No other state would receive him, so his detention had no apparent end. The High Court majority[108] accepted such permanent detention as a tragic consequence of Mr Al-Kateb's decisions. Justice Kirby thought much more was at stake, saying that this view "potentially" posed "grave implications for the liberty of the individual" in Australia.[109] This was because it endorsed "executive assertions of self-defining and self-fulfilling powers", which, once accepted in one situation, could be readily extended to others.[110] This case raised the prospect that Parliament alone would determine who could be detained and for how long, ignoring the constitutional requirement that punishment of individuals is decided by judges, not by politicians. The majority claimed Mr Al-Kateb was not being punished, despite experiencing "indefinite detention".[111] Chief Justice Gleeson and Gummow J agreed with Kirby J's view that the *Migration Act* did not warrant such detention, but did not share all his reasons.[112] The case included a riposte from McHugh J, who called Kirby J's extended application of the Bangalore method "heretical".[113]

Justice Kirby responded to McHugh J's emphatic criticism of his reasoning by reiterating why and how international human rights law was relevant to deciding this case. He argued that "indefinite detention, at the will of the executive, and according to its opinions, actions and judgments, is alien to Australia's constitutional arrangements".[114] Since the *Migration Act* does not envisage indefinite detention, Kirby J argued that it should be interpreted in line with Australia's human rights obligations.[115] Facing not just a policy criticised by the United Nations, but an assertion of executive power that threatens individual liberty,

107 (2001) 205 CLR 399 at 431-432 [75] per Kirby J; M D Kirby, "Deep Lying Rights – A Constitutional Conversation Continues" (The Robin Cooke Lecture, Wellington, 25 November 2004) pp 11-12: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_25nov04.html (accessed 8 December 2008).

108 McHugh, Hayne, Callinan and Heydon JJ.

109 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 615-616 [148] per Kirby J.

110 (2004) 219 CLR 562 at 616 [149] per Kirby J.

111 (2004) 219 CLR 562 at 581 [33], 586 [49] per McHugh J.

112 The difference between Kirby J and Gleeson CJ was highlighted in *Coleman v Power* (2004) 220 CLR 1 at 93 [243], 96 [249]; cf Charlesworth, n 101, p 7.

113 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 589 [63] per McHugh J.

114 (2004) 219 CLR 562 at 615 [146] per Kirby J.

115 (2004) 219 CLR 562 at 630 [193] per Kirby J.

Kirby J said judges "have a duty, so far as possible, to interpret their constitutional texts in a way that is generally harmonious with the basic principles of international law, including as that law states human rights and fundamental freedoms".[116] For Kirby J, the *Constitution* must be read in view of its contemporary global context. This means that "national constitutions must adapt" to "the growing role of international law", through a "paradigm shift" that is occurring in the United States and should be accepted in Australia.[117] Justice Kirby supported his view by pointing out that other judges, including Justice McHugh, had already used contextual reasoning to find implied rights in the *Constitution*.[118]

Justice Kirby strongly disputed the claim by Justice McHugh that his contextual view of the *Constitution* ignores the procedure of constitutional change through referendum. In an earlier case, *Marquet*, which concerned an old law purporting to entrench electoral malapportionment in Western Australia without such a procedure, Kirby J rejected such spurious entrenchment.[119] He said that a law depriving citizens of rights must be "made completely clear", so that basic civil rights (to equal suffrage) "are not swept away by oversight or sleight of hand", without political accountability.[120] He said any ambiguous statute must be read in a way "that advances fundamental rights in preference to one that attempts to 'entrench' against normal legislative repeal a provision giving effect to the last malapportionment of State electorates in the Commonwealth".[121] He stressed that, while courts have a role protecting the civil rights of wealthy corporations, it is "more important" that they do no less for individual citizens.[122] The same point was made by Kirby J in a later case about self-incrimination, *Cornwell*.[123] There, he read an ambiguous statute in light of the *International Covenant on Civil and Political Rights* to find the purpose of recent law reform concerning the law of evidence in New South Wales. He said that this method was better than "poking amongst the embers" of British history in search of a dubious analogy.[124] His point was partly that the law reform had occurred in the context of the Covenant, which Australia had ratified in 1980, not in the context of British legislation "long since repealed".[125]

116 (2004) 219 CLR 562 at 624 [175] per Kirby J.

117 (2004) 219 CLR 562 at 626 [183], 627 [185], 628 [188] per Kirby J.

118 (2004) 219 CLR 562 at 625-626 [180] per Kirby J. For earlier references by other High Court judges to international law in constitutional cases, see E Willheim, "Globalisation, State Sovereignty and Domestic Law: The Australian High Court Rejects International Law as a Proper Influence on Constitutional Interpretation" (2005) 1 & 2 *Asia-Pacific Journal on Human Rights and the Law* 1 at 18-19.

119 *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 614 [206]-[208] per Kirby J.

120 (2003) 217 CLR 545 at 607 [184]-[185] per Kirby J.

121 (2003) 217 CLR 545 at 601 [168], 607-608 [186] per Kirby J.

122 (2003) 217 CLR 545 at 601 [168] per Kirby J.

123 *Cornwell v The Queen* (2007) 231 CLR 260 at 323 [180] per Kirby J.

124 (2007) 231 CLR 260 at 315 [154], 320-321 [174]-[175] per Kirby J.

125 (2007) 231 CLR 260 at 324 [184]-[185] per Kirby J.

In 2007 the first control order case, *Thomas v Mowbray*, demonstrated Kirby J's concern for protecting individual liberty.[126] Earlier, when reviewing cases concerning suspected terrorists in many countries, he had emphasised two points. The first was to see non-state terrorism as an old threat taking new forms. It should not be exaggerated in a world where many more people die each day from the denial of economic and social rights than die per year from terrorist acts designed to instil fear.[127] The second was that there is no justification for relying on emergency procedures to deal with this threat because, after 2001, "nothing fundamental has changed".[128] He pointed out that "the fundamental struggle against terrorism is strengthened, not weakened, by court decisions that insist upon adherence to the rule of law".[129] To convince the sceptics, he cited opinions of diverse authorities, including the United States Supreme Court and the Chief Justice of Israel, and the "wise decision" of the High Court in the *Communist Party Case*.[130] That decision was made without a Bill of Rights or any "developed jurisprudence on fundamental human rights", so Kirby J thought it established a minimum standard for Australian law, despite the suggestion of "unlimited powers of legislative or Executive detention" in *Al-Kateb*.[131] The "common thread" linking the comparative cases was that "the proper course of a democratic legal order is to adhere closely to the rule of law and to uphold fundamental human rights".[132]

The contrast between his preferred course and the High Court decision in *Thomas v Mowbray* is stark.[133] Only a rare dissent from Hayne J gave Kirby J support in resisting what he lamented as an "unfortunate surrender" to the "demands for more and more governmental powers", which would turn courts into "rubber stamps for the assertions of

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126 *Thomas v Mowbray* (2007) 233 CLR 307.

127 M D Kirby, "National Security: Proportionality, Restraint and Commonsense" (Speech, Australian Law Reform Commission National Security Law Conference, Sydney, 12 March 2005): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_12mar05.html (accessed 8 December 2008).

128 M D Kirby, "Judicial Review in a Time of Terrorism: Business as Usual" (2006) 22(1) *South African Journal on Human Rights* 21 at 46.

129 M D Kirby, "Terrorism and the Democratic Response 2004" (2005) 28(1) *University of New South Wales Law Journal* 221 at 240.

130 Kirby, n 129 at 223-224, 236-238, 244.

131 Kirby, n 128 at 29, 30. Compare Kirby, n 35 at 593: "The demon we should fear in our free societies is not the excessively 'activist' judge. It is the judge content with formulae who loses sight of the deep historical currents in the *Australian Constitution* and the law and misses the significance of big cases when they present."

132 Kirby, n 128 at 43.

133 The decision, accepting the validity of the control order regime, was handed down in August 2007, during the fiasco of the detention of Mohamed Haneef, when other amendments to the Commonwealth *Criminal Code* were criticised as being too broad and lacking sufficient guidance to ensure its effective operation: Andrew Lynch (interviewed on ABC Radio Law Report, 24 July 2007): http://www.abc.net.au/rn/lawreport/stories/2007/1985125.htm#transcript (accessed 8 December 2008).

officers of the Executive Government".[134] He said that it is wrong for judges to "deprive individuals of their liberty on the chance that such restrictions will prevent *others* from committing certain acts in the future".[135] The control order regime is more pernicious than the attempt to ban communists, since people can be detained not just for what they have thought, but because of a suspicion of what others might do. Justice Kirby expressed surprise that the constraints on unaccountable power used in the *Communist Party Case* were ignored. He argued that, because the courts processing control orders would lose their independence, "the damage to our constitutional arrangements could be profound".[136] He said this regime "seriously alters the balance between the state and the individual" in a way that contradicts the *Constitution*.[137] He expressed concern that it diminished liberty, and so "would deliver to terrorists successes that their own acts could never secure in Australia".[138]

For Kirby J, *Thomas v Mowbray*, like the *Al-Kateb* case, raised the spectre of a trend toward potentially authoritarian power. In justifying his use of international human rights law to confirm his reasoning by constitutional principles that the control order legislation is invalid, Kirby J returned to a principle he had stated in the *Marquet* case, which he claimed had been affirmed as a "legal value" by Gleeson CJ in *Al-Kateb*.[139] The principle is that any abrogation of fundamental rights by Parliament must be made clearly and precisely for that purpose.[140] Because the legislation asks a court to assess whether a control order is "reasonably necessary" to stop a terrorist act, without specifying in precisely what circumstances fundamental rights are to be denied, Kirby J considered that purpose had not been demonstrated.[141] Since the *Constitution* requires "independent and impartial courts", and international human rights law affirms equality of all before courts, he argued that both the *Constitution* and the law speak "with a consistent, clear voice and in identical terms", defending liberty against "legal and constitutional exceptionalism".[142] Many years before, in 1991, Kirby had warned about a resurgent "spirit of intolerance" in Australia, wondering if, with some others, he was "among the last of the true liberals".[143] The concerns he expressed in *Thomas v Mowbray* about attempts to disregard

134 *Thomas v Mowbray* (2007) 233 CLR 307 at 436 [369], 442–443 [386] per Kirby J.
135 (2007) 233 CLR 307 at 431 [355] per Kirby J.
136 (2007) 233 CLR 307 at 432 [357], 436 [368] per Kirby J.
137 (2007) 233 CLR 307 at 436 [367] per Kirby J.
138 (2007) 233 CLR 307 at 430–431 [354], 443 [388] per Kirby J.
139 (2007) 233 CLR 307 at 440–441 [380] per Kirby J, citing *Al-Kateb* (2004) 219 CLR 562 at 577 [20] per Gleeson CJ; *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 607 [184] per Kirby J.
140 *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 607 [185] per Kirby J.
141 *Thomas v Mowbray* (2007) 233 CLR 307 at 441 [381] per Kirby J.
142 *Thomas v Mowbray* (2007) 233 CLR 307 at 442 [384], 443 [388] per Kirby J.
143 M D Kirby, "The Intellectual and the Law" (1991) 50(4) *Meanjin* 523 at 531.

the *Communist Party Case* reflect such a feeling. Yet, characteristically, he emphasised a broader legal principle by insisting that, outside the field of constitutional law, the Bangalore method is now "settled doctrine" in the High Court.[144]

THE BANGALORE METHOD AND ENSURING NON-DISCRIMINATION

The principle of non-discrimination is another area where Kirby J has applied the Bangalore method. This was relevant for several native title cases after *Mabo [No 2]* and for the 1998 *Kartinyeri* case which concerned the "race power" in the *Constitution*. While it is not intended here to assess Kirby J's judicial reasoning on indigenous issues,[145] non-discrimination as a value was crucial in *Mabo [No 2]*. Justice Brennan said that "it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination".[146] Justice Kirby defended the "judicial creativity" in that case as in line with comparable countries.[147] He hoped it would clear "a log jam of injustice", by creating a "judicial stimulus to action: to establishing a more just legal system as it affects the Aboriginal people of this continent".[148] Recently, Australian jurisprudence has been criticised for extending "discriminatory aspects" of the common law after *Mabo [No 2]*.[149] For Kirby J, ending discrimination "goes to the very heart of what it should be to be an Australian".[150] He says that "those who have witnessed discrimination may sometimes be more inclined to perceive legal injustice" than others.[151] The consistency of his use of the Bangalore method can be judged in terms of his response to issues of discrimination.

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144 *Thomas v Mowbray* (2007) 233 CLR 307at 440-441 [380], 442-443 [386] per Kirby J.

145 S Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, Sydney, 2008) p 425 describes Kirby J's acceptance of the adaptability of the traditional source of native title as "a bright light in the Australian jurisprudence". See also Chapter 26 of this book, "Native Title" by Melissa Perry.

146 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 41-42 per Brennan J.

147 M D Kirby, "In Defence of Mabo" (1993) 65(4) *Australian Quarterly* 67 at 72, 77.

148 Kirby, n 147 at 73, 78.

149 L Strelein, *Compromised Jurisprudence: Native Title Cases Since Mabo* (Aboriginal Studies Press, Canberra, 2006) p 141; N Pearson, "Land is Susceptible of Ownership" in P Cane (ed), *Centenary Essays for the High Court of Australia* (Lexisnexis Butterworths, Sydney, 2004) p 116. Noting the need for indigenous land justice, McHugh J has observed that the native title process has created a log jam through a costly legal system in which "the deck is stacked against the native title holders", and little attention is given to determining what a just settlement would be: *Western Australia v Ward* (2002) 213 CLR 1 at 241-242 [561] per McHugh J.

150 M D Kirby, "The Law Reform Commission and the Essence of Australia" (2000) 77 *Reform* 58 at 61.

151 M D Kirby, "Ten years in the High Court – Continuity and Change" (2005) 27(1) *Australian Bar Review* 4 at 7.

Native title is a difficult and novel area which poses challenges for a judge such as Kirby, who is inclined toward comparative jurisprudence. He says that judges should "opt for an internationalist approach to the issues before them", but he agrees with Michael Coper that they are not "free to soar on the wings of policy".[152] His reasoning in the *Fejo* case, which concerned land near Darwin that had been granted to a settler a century before and which had become vacant in 1980, is revealing. While he had "sympathy" for the claimants' view that native title should revive once the grant had expired, he rejected the comparative arguments for this proposition, saying it was now "virtually impossible to derive applicable common themes of legal principle" covering Australia and comparable countries.[153] In the *Fejo* case, he was in a similar position to Wilson J in *Mabo (No 1)*, with his heart and mind in tension, not harmony. He supported "legal pluralism" regarding indigenous rights[154] and he once chaired a UNESCO panel of experts who had clarified that an indigenous right of self-determination does not require an independent state.[155] But pragmatic issues of policy worked against the claimants because Kirby J saw a revival of native title as creating "a serious element of uncertainty" in Australian law.[156] Critics have suggested that he returned the burden of uncertainty to indigenous peoples.[157] Yet he saw no alternative. While the *Native Title Act* was called "a special measure" for indigenous peoples, it presumed the "extinguishment" of native title in situations like *Fejo*.[158]

When Kirby J was at the Law Reform Commission he concluded that "we should expect Aboriginal laws to change and adapt".[159] He later applied that insight in two main ways. First, he accepted that, where the issue is the indigenous claimants' connection to their country (not the consistency of native title with Australian law), the best evidence comes from those claimants. Any other approach involves a discriminatory privileging of secondary, or outsider, sources. In the *Yorta Yorta* case, Kirby J argued (with Justice Gaudron) that the "continuity" of an indigenous community, through which traditions have been passed on, "is primarily a question of whether … there have been persons who have identified themselves and each other as members of the community", who hold those traditions.[160] International human rights law was not

152 Kirby, n 12 at 529, 531, quoting M Coper, *Encounters with the Australian Constitution* (CCH Australia, North Ryde, 1987) p 422.

153 *Fejo v Northern Territory* (1998) 195 CLR 96 at 150 [103], 154 [111] per Kirby J.

154 Kirby, n 40, pp 21, 122.

155 Kirby, n 60 at 14.

156 *Fejo v Northern Territory* (1998) 195 CLR 96 at 156 [112] per Kirby J.

157 Strelein, n 149, p 45.

158 *Native Title Act 1993* (Cth) Preamble, pp 2, 3.

159 Kirby, n 40, pp 125-126.

160 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at 464 [117] per Gaudron and Kirby JJ.

mentioned in that case, but earlier in the *Ward* case Kirby J cited three United Nations human rights treaties and the United Nations Draft Declaration on the Rights of Indigenous Peoples, later endorsed by the General Assembly in 2007, to make a similar point – that indigenous customs develop.[161] Justice Kirby said that "it would be a mistake to ignore the possibility of new aspects of traditional rights and interests developing as part of Aboriginal customs not envisaged, or even imagined, in the times preceding settlement".[162] He argued that native title can adapt to include a modern right to use mineral resources and a right to protect heritage.[163]

The second way in which Kirby J applied a dynamic approach to native title was to facilitate recognition in Australian law of all the rights under indigenous custom. In the *Yarmirr* case, involving indigenous sea rights, he argued that the issue of whether such rights are exclusive depends not on English precedent, but on the beneficial purpose of the *Native Title Act*, supported in cases of ambiguity by international human rights law. In this case he forcefully applied a key aspect of the Bangalore method that he had expounded since the 1988 *Jago* case – that is, that old English law has few answers for contemporary legal dilemmas, especially concerning areas like native title affected by recent statutes. Justice Kirby argued that, since the "recognition of the rights to land and to waters and fishing resources of indigenous peoples is now an international question", the influence of international human rights law "must be given special attention".[164] He saw the prohibition of racial discrimination under international law as a key factor influencing a broad recognition of native title as a dynamic set of rights, which "adapt to modern ways of life and evolve in the manner that the cultures and laws of all societies do", so they do not disappear.[165]

Without such recognition, he argued, native title holders experience "an unjust and discriminatory burden not imposed by the common law on other Australians", whose rights to exclusive possession are accepted.[166] In two cases decided in 2008, Kirby J insisted that Australian law should "live up to the promise of *Mabo*" by requiring that any legislative attack on native title must be clear and unambiguous.[167] He interpreted the

161 *Western Australia v Ward* (2002) 213 CLR 1 at 242 [567], 247-248 [581] per Kirby J. The need for states to ensure that indigenous communities can revitalise their cultural traditions has been affirmed by the UN committee monitoring the *Convention on the Elimination of All Forms of Racial Discrimination*, noted in W Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia, Antwerp, 2005) p 106.

162 *Western Australia v Ward* (2002) 213 CLR 1 at 244 [574] per Kirby J.

163 (2002) 213 CLR 1 at 245 [575]-[576] per Kirby J.

164 *Commonwealth v Yarmirr* (2001) 208 CLR 1 at 133 [297], [299] per Kirby J.

165 (2001) 208 CLR 1 at 131-132 [294], [295] per Kirby J.

166 (2001) 208 CLR 1 at 132 [296] per Kirby J, noted in Young, n 145, pp 392-393.

167 *Griffiths v Minister for Lands, Planning and Environment* (2008) 246 ALR 218 at 240 [103], 241 [107] per Kirby J.

Commonwealth Parliament's National Apology to the Stolen Generations on 13 February 2008 as now providing a crucial "element of the social context in which such laws are to be understood and applied".[168]

Justice Kirby's statement in the *Yarmirr* case that international human rights law demands special attention reflects his use of the Bangalore method in two constitutional cases, *Newcrest* in 1997,[169] and *Kartinyeri* in 1998.[170] The latter case involved the issue of whether racial discrimination has been prohibited since the 1967 referendum changed s 51(xxvi), the "race power" in the *Constitution*, by including within it Aboriginals "for whom it is deemed necessary to make special laws".[171] Debate has focused on whether the change was essentially beneficial or possibly detrimental. A useful way of putting the question is: are indigenous people only the *subjects* of that power, as people "for whom" the laws are needed, or are they also mere *objects*, as people over whom legislation may be imposed, if others desire? Justice Kirby said they are subjects, not objects. His reasoning is significant, even though there is "little likelihood" of his view prevailing in the near future.[172]

It is misleading to suggest, as Justice Heydon has done, that Kirby J is in a minority of one, with 21 Justices against his use of the Bangalore method to resolve ambiguity in the *Constitution*, apart from in a statute.[173] Former Chief Justice Mason, whom Heydon J counted against Kirby J, sees Kirby's approach as "entirely consistent" with High Court decisions in the mid-1990s, and worth careful attention.[174] In a specific case, the issue is whether ambiguity "can be resolved by recourse to history, tradition and Convention Debates", instead of by using international law.[175] What the *Kartinyeri* case highlights is that textual interpretation regardless of context is artificial. It is unlikely to create "the harmony of all the details with the whole [which] is the criterion of correct understanding".[176] That case involved the clearest instance of constitutional reform motivated by core values of human rights, equality

168 *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 248 ALR 195 at 214 [71] per Kirby J.

169 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 657-658, 661 per Kirby J.

170 *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 417-419 [166]-[167] per Kirby J.

171 *Constitution*, s 51(xxvi).

172 R French, "The Race Power: A Constitutional Chimera" in H P Lee and G Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, Melbourne, 2003) p 206.

173 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 224-225 [181] per Heydon J. See M D Kirby, "The Growing Impact of International Law on Australian Constitutional Values" (Speech, Australian Red Cross National Oration, Hobart, 8 May 2008), p 33: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_8may08.pdf (accessed 16 December 2008).

174 A Mason, "The Role of the Judiciary in Developing Human Rights in Australian Law" in D Kinley (ed), *Human Rights in Australian Law* (Federation Press, Sydney, 1998) p 43.

175 Mason, n 174, p 44.

176 H-G Gadamer, quoted in A Reilly, "Reading the Race Power: A Hermeneutic Analysis" (1999) 23(2) *Melbourne University Law Review* 476 at 495.

and non-discrimination, as opposed to the original intentions of the drafters of s 51(xxvi). If ambiguity is ignored by interpreting the text only in terms of the dominant values of 1901, the result is the neglect of rights that Kirby J had warned against.[177]

Justice Kirby interprets s 51(xxvi) by using a "contemporary approach" to the *Constitution*'s meaning, not "an originalist approach" which imposes an old meaning even against a clearly divergent referendum.[178] His approach is necessary to appreciate the meaning of the change that is made by any successful referendum. Without a contextual approach, popular sovereignty is subsumed by the dead weight of the past – by an old constitutional phrase which transcends the change, whereas it is the historical change that requires new content to transform that phrase.[179] Before the *Kartinyeri* case, Kirby J had argued that popular sovereignty is the *Constitution*'s real foundation.[180] Reviewing the referendum's history, he found it showed that both Parliament and the people intended to eliminate adverse discrimination, not entrench it.[181] Discrimination was no longer internationally acceptable after the horrors of Nazi Germany and racist South Africa.[182] Justice Kirby's analysis was "reinforced" by the international law against racial discrimination, which had inspired the referendum.[183]

The *Kartinyeri* case highlights how Kirby J's reading of the *Constitution* is cosmopolitan – that is, informed by requirements of humanity and relevant reforms elsewhere. Justice Kirby argues that the *Constitution* speaks not only to Australians, but globally "to the international community as the basic law of the Australian nation which is a member of that community".[184] This metaphor of constitutional dialogue is no mere illustrative device. Rather, it encapsulates his historical analysis of what the 1967 change involved. He sees the purpose of the constitutional change as manifested through a double form of dialogue, both between Australians and between them and the wider world. This is clear from the historical materials. Indeed, a key reason a conservative government

177 Kirby, n 12 at 528.

178 *Eastman v The Queen* (2000) 203 CLR 1 at 80 [242], 81 [245] per Kirby J; M D Kirby, "Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?" (2000) 24(1) *Melbourne University Law Review* 1.

179 Compare K Marx, *Surveys from Exile* (Penguin, Harmondsworth, 1973) p 149, regarding the dynamic of social change: "Previously the phrase transcended the content; here the content transcends the phrase."

180 M D Kirby, "Deakin: Popular Sovereignty and the True Foundation of the Australian Constitution" (1996) 3(2) *Deakin Law Review* 129 at 139; Kirby, n 10, p 149.

181 *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 404-409 [138]-[147], 413 [157] per Kirby J.

182 (1998) 195 CLR 337 at 417 [164] per Kirby J.

183 (1998) 195 CLR 337 at 417 [166], 419 [167] per Kirby J. For background to the 1967 referendum, see S Taffe, *Black and White Together* (University of Queensland Press, St Lucia, 2005) pp 101-124.

184 *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 418 [166] per Kirby J.

initiated the referendum was to "protect Australia's image abroad".[185] If the Convention Debates help to clarify the *Constitution*, the history of the 1967 referendum shows why it is important to view the *Constitution* in a global context. Without seeing that context, the purpose of that constitutional change cannot be known.

Critics of Kirby J's metaphor have said that he should have asked, not how the Australian *Constitution* speaks to the world, but "to what extent does international law 'speak to' Australian constitutional law?".[186] But both questions presuppose each other. Seeing international law as "a legitimate and important influence" on Australian law,[187] as Justice Brennan did in *Mabo [No 2]*, is to accept that a dialogue exists concerning human rights and fundamental freedoms, although Justice McHugh later disputed this. While Justice Callinan claimed Kirby J's view is "anachronistic", to assess the 1967 referendum without seeing the new global context of dialogue in which it occurred is really anachronistic.[188] Justice Kirby's belief that eventually his use of international human rights law "will be viewed as orthodox" is based on his view that a dialogue is developing.[189] This is why he was pleased when Justice McHugh finally joined the debate in *Al-Kateb.* The gap between their contrasting perspectives would become less significant if Australia follows Britain and New Zealand in adopting a Bill of Rights or in enacting Charters of Rights in the States and Territories.

THE GRADUAL PATH TOWARD A STATUTORY BILL OF RIGHTS

When Kirby J has engaged in public discussion about a Bill of Rights over many years, his main objective has been to contribute to informed debate, not advocate for a specific change. He has summarised arguments for and against, listing apparently the same number of points for each side.[190] He has supported change, but raised queries that reflect his dynamic view of human rights, particularly about addressing new human rights issues and ensuring that a Bill of Rights could protect the most vulnerable people.[191] He has advocated "the path of gradualism" – that is, attempting change "more immediately achievable" than a constitutional

185 B Attwood and A Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (2nd ed, Aboriginal Studies Press, Canberra, 2007) p 43.

186 K Walker, "International Law as a Tool of Constitutional Interpretation" (2002) 28(1) *Monash University Law Review* 85 at 97-98, 101-102, supporting the use of international customary law to resolve ambiguity.

187 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42 per Brennan J.

188 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 592-593 [69] per McHugh J; *Western Australia v Ward* (2002) 213 CLR 1 at 390-391 [961] per Callinan J.

189 *Coleman v Power* (2004) 220 CLR 1 at 96 [249] per Kirby J.

190 M D Kirby, "A Bill of Rights for Australia – But do We Need It?" (1995) 21 *Commonwealth Law Bulletin* 276 at 277-282, listing ten arguments for and against.

191 Kirby, n 190 at 278-279.

Bill of Rights.[192] His support for a statutory Bill of Rights is well known. When the Australian Capital Territory *Human Rights Act* was enacted in 2004 as Australia's first statutory Bill of Rights, Kirby J was cited by the Australian Capital Territory Chief Justice, Terence Higgins, as a supporter.[193] In 2006, when Victoria followed the Australian Capital Territory in enacting a Charter of Rights, Kirby J was encouraged. He says the fact that Australia is "out of step" internationally without a Bill of Rights demands a new debate.[194] In his 2007 Hawke Lecture calling for a "fresh consensus" to put fundamental rights "above politics", he stressed the need to ensure equality for all and to learn from overseas examples.[195] He thinks that "New Zealand judges and lawyers have much to teach Australia" about using a Bill of Rights.[196]

Justice Kirby's main arguments for a statutory Bill of Rights contain one broad, background point and three basic propositions. These link together key aspects of his perspective about human rights. The background point is that Australia is slowly "throwing off the shackles of parochialism".[197] This means the prospects for change, while modest, are likely to increase, given relevant examples from elsewhere and "a bit of stimulation".[198] The first claim is that a Bill of Rights could empower minorities in Australia, those "who are downtrodden and whose rights have been denied", and so help to "replace the acceptance of defeat" regarding equal protection of individual rights.[199] This is the most basic claim. Justice Kirby has made it often. When rejecting censorship while opening an art exhibition, he said:[200]

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192 Kirby, n 57, p 3.

193 T Higgins, "Australia's First Bill of Rights – Testing Judicial Independence and the Human Rights Imperative" (Speech, National Press Club, 3 March 2004) pp 9, 10, 12: http://www.courts.act.gov.au/supreme/content/pdfs/HigginsCJSpeech3March04.pdf (accessed 8 December 2008).

194 M D Kirby, "'Judicial Activism'? A Riposte to the Counter-Reformation" (2005) 11(1) *Otago Law Review* 1 at 12.

195 Kirby, n 29, pp 13-16.

196 M D Kirby, "Law Reform and the Trans-Tasman Log Jam" (Speech, Law Commission of New Zealand, 20th Anniversary Conference, Wellington, 25 August 2006) p 17: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_25aug06.pdf (accessed 8 December 2008). Kirby (n 190 at 282) had earlier noted the relevance of the New Zealand experience and the prospect of statutory bills of rights coming first at the Territory and State level. For New Zealand, see K Keith, "The New Zealand Bill of Rights Experience: Lessons for Australia" (2003) 9(1) *Australian Journal of Human Rights* 119.

197 M D Kirby, "Interview with Professor Ralph Simmonds from Murdoch University" (March 2000) p 6: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_global.htm (accessed 8 December 2008).

198 Kirby, n 29, p 14.

199 Kirby, n 190 at 281.

200 M D Kirby, "We are Celebrating our Freedoms by Being Here" (Speech, opening of an art exhibition on "The phallus and its functions", Ivan Dougherty Gallery, Sydney, 18 April 1992) in S Warhaft (ed), *Well May We Say … The Speeches That Made Australia* (Black Inc, Melbourne, 2004) p 478.

> Human rights for the popular majority is easy. They can generally look after themselves. Human rights matter most when minorities and their beliefs, opinions, actions and expressions are at risk.

This rationale for a Bill of Rights is linked with Kirby J's argument that a legitimate democracy is more than "a majoritarian autocracy".[201] It has been reiterated by advocates for a Bill of Rights after the *Al-Kateb* case, in which Justice McHugh implied that a constitutional Bill of Rights would be desirable, if it could gain popular support.[202] Even a statutory Bill of Rights would reduce the gap between the approaches to international law evident in that case, by reinforcing the Bangalore method's key precept about the influence of international human rights law on Australian law.

This outcome would be facilitated by wider acceptance of Kirby J's second rationale for a Bill of Rights – that it would improve consistency in judicial decision-making. Those sceptical about the effectiveness of a Bill of Rights continue to warn about "the politicisation of the judiciary", and the dangers of "activist judges" controlling many areas of social policy.[203] Justice Kirby's answer is that it is "naïve" to think judging is not political.[204] He says "greater honesty and candour about judicial reasoning" require an awareness of context and consideration of relevant policy issues.[205] His view is supported by the value-laden nature of judicial decision-making, and the scope for judicial autonomy in cases concerning human rights.[206] He is a strong proponent of judicial independence, but not of judicial escapism from democratic laws.[207] In the *Austin* case, he argued that the *Constitution* does not prevent State judicial pensions from being federally taxed, because taxes of universal application do not constrain judicial independence.[208] When he says a

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201 Kirby, n 190, at 280; see also M D Kirby, "Genomics and Democracy – A Global Challenge" (2003) 31(1) *University of Western Australia Law Review* 1 at 3 where he notes that Toohey J had expressed a similar view that democracy requires more than "rampant majorities".

202 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 595-596 [73] per McHugh J; see also G Williams, *A Charter of Rights for Australia* (UNSW Press, Sydney, 2007) Ch 1.

203 T Campbell, "Human Rights Strategies: An Australian Alternative" in T Campbell, G Goldsworthy and A Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, Aldershot, 2006) pp 330, 337; T Campbell, "Incorporation through Interpretation" in T Campbell, K Ewing and A Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press, Oxford, 2001) pp 80-111.

204 Kirby, n 190 at 280.

205 Kirby, n 194 at 8, 14.

206 E W Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press, Cambridge, 2005) pp 48, 185.

207 M D Kirby, "Independence of the Legal Profession: Global and Regional Challenges" (Speech, Law Associations in Asia Conference, Broadbeach, 20 March 2005): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_20mar05.html (accessed 8 December 2008). On the vital need for the judicial process to be impartial, see *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 242 ALR 191 at 204 [52] per Kirby J.

208 *Austin v Commonwealth* (2003) 215 CLR 185 at 293 [257]-[258], 308, [300], 314 [318] per Kirby J.

Bill of Rights would enable judges to act to "cure" some wrongs, he is again referring particularly to the urgent protection of minorities.[209]

Justice Kirby's third rationale for a Bill of Rights concerns the interaction between judges and the rest of the political system. He is critical of the supposition that sovereignty belongs to Parliament, instead of those who elect it.[210] While respecting the authority of Parliament, he suggests that a statutory Bill of Rights could increase parliamentary attention to fundamental rights. With such a Bill, courts could not invalidate legislation, but merely declare it incompatible with rights in that Bill. Justice Kirby argues that this would provide "a stimulus to the democratic process", not threaten it.[211] To the criticism, made in Britain, that such a Bill will be "less of a compromise with than a capitulation to the courts", he would respond that the Bangalore method is far from any judicial coup.[212] Before the *Al-Kateb* decisions, Kirby J said that not having a Bill of Rights in Australia tended "to diminish a creative and adaptive spirit" on the High Court.[213] If a Bill of Rights had existed, what would have been different is not just the outcome in *Al-Kateb* but, more importantly, the prospect of more debate about the risks of a trend toward unaccountable power.[214] Hypothetically, a Bill of Rights may have delayed the move from a special case of executive detention in *Al-Kateb*, concerning just stateless persons, to the new form of "control order", which potentially applies to any Australian. The need for more debate on such issues is a key reason why Kirby J supports a statutory Bill of Rights.[215]

CONCLUSION

When Justice Kirby retires as Australia's longest serving current judge, he will remain one of our country's most able and perennial advocates. Like Justice Wilson, Kirby J has never stopped being a public advocate at heart. By combining the roles of advocate and judge, he has been unorthodox. The path used by both Barwick and Murphy JJ, moving

209 Kirby, n 29, p 14; Kirby, n 190 at 280.

210 Kirby, n 107, p 11; Kirby, n 35 at 590-591.

211 Kirby, n 29, p 16.

212 Campbell, n 203, p 88.

213 M D Kirby, "The High Court of Australia and the Supreme Court of the United States – A Centenary Reflection" (2003) 31(2) *University of Western Australia Law Review* 171 at 195.

214 J Spigelman, "Blackstone, Burke, Bentham and the Human Rights Act 2004" (2005) 26(1) *Australian Bar Review* 1 at 8; A Rolls, "Avoiding Tragedy: Would the Decision of the High Court in *Al-Kateb* have been any Different if Australia had a Bill of Rights like Victoria?" (2007) 18 *Public Law Review* 119.

215 M D Kirby, "The National Debate about a Charter of Rights and Responsibilities – Answering Some of the Critics" (Speech, President's Luncheon of the Law Institute of Victoria, Melbourne, 21 August 2008) p 16: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_21aug08.pdf (accessed 16 December 2008).

from advocacy to judicial elevation via politics, never suited him.[216] He withdrew from politics after leaving Sydney University because the Australian party system does not tolerate dissent, and because of a feature of Australian politics he noted in the *Coleman* case on the scope of free speech. Justice Kirby defended freedom of speech fully in that case, as being in harmony with international law. He also noted that, while "one might wish for more rationality, less superficiality, diminished invective and increased logic and persuasion in political discourse", Australian politics is inherently rumbustious.[217] By contrast, Kirby J's advocacy of the Bangalore method of judicial interpretation has been prudent. Yet in Australia's conservative legal system this has been a bold idea, advanced in an orthodox way as a new answer to old problems.

The most serious criticism of Kirby J's judicial reasoning on human rights is that it has been advanced "always in markedly cautious terms".[218] The criticism is supported by Kirby J himself. He admits: "I don't think I was bold enough about aspects of legal doctrine where there is injustice and where things should be corrected."[219] His comment that it is better to be bold was a reflection on his mistaken advice to two Tasmanians, Rodney Croome and Nick Toonen, that the United Nations Human Rights Committee would be unlikely to uphold their complaint in the early 1990s of discrimination by Australia against homosexuals.[220] That political opinion reflected his gradualist outlook, but gradualism did not limit his human rights work in Cambodia or elsewhere. In that work Kirby J has advocated a wider view of human rights. He has found it easier to persuade kindred spirits abroad than judicial colleagues at home, hence his cautious form of presentation.

It is hard to find a major case involving human rights where Kirby J has not sought to correct injustice, if at all possible. The *Fejo* native title case and cases concerning the detention of refugee children stand out as instances where heart and mind diverged. However, correcting injustice in both situations required something going beyond the Bangalore method. What is evident from Kirby J's careful promotion of that method before the *Mabo* case, and his use of it to limit unaccountable power and discrimination, is the basic consistency of his approach. This reflects his effort to judge by seeking "an explanation at a higher

216 M D Kirby, "Foreword" in J Scutt (ed), *Lionel Murphy: A Radical Judge* (McCulloch, Carlton, 1987) p 7.

217 *Coleman v Power* (2004) 220 CLR 1 at 91 [239] per Kirby J.

218 H Charlesworth, "The High Court and Human Rights" in P Cane (ed), *Centenary Essays for the High Court of Australia* (LexisNexis Butterworths, Sydney, 2004) p 365.

219 M D Kirby, "Bold Enough" (Interview with Monica Attard, ABC Radio, *Sunday Profile*, 2 December 2007) p 9: http://www.abc.net.au/sundayprofile/stories/s2106109.htm (accessed 8 December 2008).

220 Kirby, n 219, p 9; M D Kirby, "Remembering Wolfenden" (2007) 66(3) *Meanjin* 127 at 134.

level of reasoning".[221] Thus, he has regularly queried the relevance of old English law for the resolution of current legal issues in Australia in diverse matters affecting human rights under various statutes in areas ranging from criminal law to native title.[222] While his contextual view of constitutional interpretation is novel, his approach has facilitated the use of overseas materials, such as from the European Court of Human Rights in the 2007 *Roach* case involving prisoners' voting rights.[223]

In 2005, Kirby J noted "that the inclination towards legal innovation, and particularly in matters concerned with basic human rights, has diminished in the High Court over the past decade".[224] The trend continued with the *Thomas* case, where his colleagues were out of step with Kirby J's quest for harmony between Australian law and international human rights law. His optimism about that quest is based on his view that a "global dialogue" about human rights is arising "amongst judges of final courts".[225] Sceptics will downplay this dialogue. They refuse to "tamely acquiesce in the replacement of their values with those reflecting some cosmopolitan consensus", and even rebuke Kirby J for a "primary loyalty to some sort of international judicial fraternity", rather than to his fellow citizens.[226] While Kirby J's interpretative approach is cosmopolitan, that rebuke is mistaken. His "radical" defence of racial equality in the *Kartinyeri* case does reflect a cosmopolitan "duty" to read an ambiguous provision in harmony with human rights.[227] Yet he showed, from the history of the 1967 referendum, why the duty to

221 M D Kirby, "Judging: Reflections on the Moment of Decision" (1999) 18(1) *Australian Bar Review* 4 at 10.

222 While Kirby J's reasoning in the *Wik* case involved no reference to international human rights law, it does fit his pattern of focusing on the context of Australian statutes rather than old English terminology.

223 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 178-179 [16]-[17] per Gleeson CJ, 28-29 [100] per Gummow, Kirby and Crennan JJ. For an overview of the extent to which Australian judges have relied on the jurisprudence of the European Court of Human Rights, see M D Kirby, "The Australian Debt to the European Court of Human Rights" (published in a Festschrift for Professor Luzius Wildhaber): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_apr06.pdf (accessed 8 December 2008).

224 Kirby, n 151 at 13.

225 Kirby (2005), n 94, p 9. See also M D Kirby, "Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges" (2008) 9 *Melbourne Journal of International Law* 6 at 171.

226 A M Weisburd, "Using International Law to Interpret National Constitutions – Conceptual Problems: Reflections on Justice Kirby's Advocacy of International Law in Domestic Constitutional Jurisprudence" (2006) 21(3) *American University International Law Review* 365 at 371, 374.

227 Charlesworth, n 218, p 365. Kirby J quoted the word "duty" (from recent reasons of Robin Cooke) in *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 417 [166]. Cooke had referred to the 1992 Balliol Statement that he and Kirby J and other judges endorsed at the last of a series of symposia following the Bangalore meeting. The Statement is in *Developing Human Rights Jurisprudence*, Vol 5, n 83, pp vii-viii. The relevant passage from Cooke's reasons (in the *Tavita* case) had previously been quoted by M D Kirby, "The Impact of International Human Rights Norms: 'A Law Undergoing Evolution'" (1995) 25(1) *University of Western Australia Law Review* 30 at 38.

respect human rights values of racial equality must inform Australian law – because it was unequivocally accepted by Australian voters at that referendum.[228]

While Kirby J's gift to Australian society as a public speaker is remarkable, his experience on the High Court has been that of an outsider, whose new ideas are "at first" resisted in the law.[229] As he has written of Julius Stone and H L A Hart, that role has strengthened his "capacity to stand beyond the circle", seeing Australian law "more critically and without needless deference".[230] Justice Kirby challenges others to "adapt their minds to a new way of thinking that is harmonious to the realities of the world about them".[231] His quest for harmony between Australian law and human rights has only partly been fulfilled due to the lack of a Bill of Rights. Yet the harmony he has sought is vital, because "the true test for a democracy comes when the rights of unpopular minorities and individuals are under attack".[232] By consistently advocating that Australian law should protect human rights for all, Kirby J has communicated to new generations the message that he learnt as a boy from a famous visitor to his Anglican Church in Concord, when he heard the resister to the Nazis, Pastor Martin Niemoller, speak about the need to defend the rights of others because of their humanity.

228 *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 407-408 [145], 413 [157] per Kirby J.

229 M D Kirby, "Law in Australia – Cause of Pride; Source of Dreams" (2005) 8(2) *Flinders Journal of Law Reform* 151 at 155.

230 M D Kirby, "H L A Hart, Julius Stone and the Struggle for the Soul of Law" (2005) 27(2) *Sydney Law Review* 323 at 337.

231 M D Kirby, "Domestic Implementation of International Human Rights Norms" (1999) 5(2) *Australian Journal of Human Rights* 109 at 125.

232 Kirby, n 35 at 592.

Chapter 19

INTERMEDIATE APPELLATE JUDGES

David Ipp

> *In medical science, there will always be imponderables. If Ipp JA's argument were taken to its logical conclusion, there would be no future for tort law in the field of medical negligence. The courts would opt out with a unilateral self-denying ordinance on the basis of the possibility (by no means certain) that the several legislatures of Australia, within their respective areas of responsibility, will energetically address the countless problems requiring legal solutions. Part of the genius of the tort of negligence in the common law has been its malleability and versatility, which permit it to respond to the exigencies of changing times.*[1]

Judges are not automatons and their personalities, feelings and attitudes are capable of influencing their judgment. The better the judge the more keenly will he or she attempt to suppress individual personality, but one cannot take the individual out of the judge.

Popular perception places individual judicial personalities in different categories. One such category is that of the strong-minded, reformist, adventurous judge, who is ready to change the law to meet modern conditions. These judges are not deeply influenced by precedent; their imperative is humanistic, their overriding desire is the removal of unfairness, inequality and injustice. Lord Atkin and Lord Denning were in this corner. Justice Michael Kirby is also in it.

Then there are the judges who tend towards the ancien regime. They aim for coherence in the law and, in some areas, favour historical purity. Their imperative is the rigour of rational, legal scholarship. They apply the strict judicial method as laid down by Sir Owen Dixon. They will change the law to drive out heresy. Otherwise, if altered circumstances are compelling, they will do so cautiously and incrementally. They

1 *Harriton v Stephens* (2006) 226 CLR 52 at 99 [151] per Kirby J.

are suspicious of the ultimate worth of following what they regard as changing fashions in values. Centrist judges of varying leanings occupy other categories.

It is not for me to say into which category I fall, but it may be accepted, I think, that I am not in Justice Kirby's category, and this tends to establish my disinterested credentials to write this piece.

Justice Kirby is well known as a dissenting judge. Many articles have been written, including in the popular press, discussing his marked propensity to disagree with his colleagues. For this reason, intermediate appellate courts do not cite his decisions and dicta with the frequency that they cite those of the judges who generally form the majority. The duty of intermediate appellate courts is to follow the majority, and it is rare for them to investigate the reasoning of dissenting judges. Of course, there are many judgments that Kirby J has written which form part of the majority, and many of his decisions and dicta are and will continue to be cited as the last word on several issues. But for my part, his legal opinions are not the most significant aspects of his influence on intermediate appellate judges. In any event, I have no doubt that other contributors to this book will discuss his Honour's judgments in scholarly depth and detail. I will focus on aspects of Michael Kirby's judgment writing that do not involve the legal reasoning he has deployed.

STYLE AND INDUSTRY

Early in my judicial career, while at the opposite end of the continent, I was struck by the startling creativity, energy, productivity, and imaginative decision-making that had begun to flow from Kirby P, then President of the New South Wales Court of Appeal.

Pouring out of Sydney was the work of a man of great sophistication, cultivation and humanity, who was demonstrating how a deep knowledge of western culture and thought could be brought to bear on the everyday work of a judge of appeal. The innovative aspects of his judgments were not the constant opposition to prejudice and narrow-mindedness that his writing contained. There had been judges in the past who were not without renown in this respect. It was more a matter of style and industry.

He did not use the lexicon of conventional and hackneyed words and phrases that were then so often found in legal writing. He wrote with deceptive simplicity, avoided multi-syllabic terminology and jargon, and often deployed short sentences that made the point with force and clarity. The full process of his reasoning would be revealed, the overall impression would be one of candour and rational power. In this way, he showed how judgments could be entertaining, literary works. He cut through the tangled bocage of judicial deadwood that had so long existed.

One aspect of his style has become almost universal, and that is the use of headings. I personally am a convert to the practice, but it was not without wry amusement, after submitting the first draft of this piece to the editors of this book, that I read their instruction to insert headings at appropriate places. The virus is now endemic.

The industry that Michael Kirby has always displayed in the depth and rigour of his legal reasoning is manifest for all to see and that is not the point I wish to make here. I am referring to his time on the New South Wales Court of Appeal and the remarkable number of judgments he produced while President. Rare would be the case without Kirby P independently setting out his views. From personal experience I can say that it is difficult enough keeping up with the judgments one is required to write as the judge nominated to produce the first judgment and those judgments where one dissents. To write in virtually every case, as he did, is unique. He showed what could be done.

THE SEARCH FOR UNIVERSAL LEGAL NORMS AND PRINCIPLES

From the outset of his term as President of the New South Wales Court of Appeal, even the casual reader would immediately have been struck with the breadth of Kirby P's learning as reflected in the kaleidoscopic range of his references, allusions and citations. He frequently referred (as he continued to do on the High Court) to cases in jurisdictions of other countries, to the published results and opinions of international institutions or bodies (particularly those concerning political, economic and cultural human rights but also, at times, those that dealt with scientific and technological matters), and to other material that would not previously have been found in Australian judgments.

This phenomenon did not attract universal approval, and criticisms were not always muted. In hindsight, it might be said that his Honour was (and is) involved in a search for those principles of the law that concern the commonality of humanity, from which a pattern of common laws can be extracted. By "common laws" I do not mean the "common law". I have in mind those laws that are common to all or most civilised nations. In recent times some have attempted to draw together common legal norms and principles in different fields of law.[2] This has particularly been the case in Europe where the European Union has been a fruitful field of research in this area. The notion of common laws has been described as the essential legal tradition, as old as the jus gentium of Roman law, allowing unity to be preserved amongst diversity.

Justice Kirby is essentially a universalist, and I suggest that in the international nature of his references and citations he was pursuing

2 See generally, H Patrick Glenn, *On Common Laws* (Oxford University Press, New York, 2005).

this notion. It is debatable whether Australia is ready for this idea. Nevertheless, this aspect of his writings should be seen in its appropriate jurisprudential context. Only time will tell if he is a harbinger of change in this area. Current attitudes suggest strong resistance to any substantial international influence on Australian law.

WHAT IS APPROPRIATE CRITICISM WITHIN A HIERARCHY?[3]

In England, there has long been a tradition of appellate courts according respect and, at times, praise for the judgments of lower courts which they overturn. Sometimes these courtesies verge on the elaborate. This practice has a purpose. It preserves the regard in which lower courts are held. This is particularly significant as it is in these courts that the vast proportion of the bread and butter judicial work which ordinary people experience on a daily basis is done. The practice promotes the notion that higher courts understand the pressures of jurisdictions where the working conditions and realities of life are very different. In this way these judicial courtesies help to bolster the judicial system and the conventions on which it is based. Of course, the courtesies may be overdone, and they are then self-defeating as they tend to produce scepticism on the part of the reader.

The Australian way is in a lower key – according respect is more restrained. But that does not detract from the long tradition in this country of judicial courtesy and respect within the judicial hierarchy. This restraint may simply be a product of the national personality; but it is capable of being particularly effective in cementing the conventions.

Justice Kirby has always seemed to have an innate awareness of how far a good judge may go in expressing disagreement with judges lower in the hierarchy. It is true that he does not speak in euphemisms and often expresses his disagreement in robust terms. For example, on more than one occasion he has disapproved, in direct and forthright terms, of things that I, myself, have written.[4] I think it may also fairly be said that he has reserved his strongest criticisms for his colleagues (and it is rare for him to use language that can so be described), who are in a position to defend themselves freely.

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3 On this topic, see generally, Hon Justice Keith Mason, President of the New South Wales Court of Appeal, "Throwing Stones: A Cost/Benefit Analysis of Judges being Offensive to Each Other" (Speech, JCA Conference, Sydney, 6 October 2007): http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_mason061007 (accessed 15 December 2008).

4 It is difficult in this short piece to give examples, as they need elaboration to be fully understood, but those who are interested may care to look, for instance, at *IW v City of Perth* (1997) 191 CLR 1 at 62-65, 69 per Kirby J; *Swain v Waverley Municipal Council* (2005) 220 CLR 517 at 583 [211]-[221] per Kirby J; *Harriton v Stephens* (2006) 226 CLR 52 at 87 [111]-[114], 99 [150]-[152] per Kirby J.

We have all been brought up to give and take rationally expressed criticism of our work, even criticism of a stringent kind. No-one should take offence at that kind of language. It is the way and the life of the law. Ad hominem attacks, however, are a different matter.

In writing within these self-imposed limits, with restraint, and in avoiding overly personal attacks on individuals, Kirby J has been a model for us all.

DISPASSIONATE JUDGING OF THE WHOLE

Another important contribution his Honour has made to the administration of justice in Australia is recognising the need to deal fairly with all the issues before the court. This sounds like, and is, a truism; but the way in which the system can fail in this regard is not widely understood.

Since time immemorial, there have been judges who have formulated their judgments to meet their own strategic ends. A good example is Portia in *The Merchant of Venice*, in her role as Balthasar, the apparently wise young judge who, in a brilliant but totally biased judgment, disposed of Shylock so she could bring happiness to others and marry Bassanio.[5] This phenomenon appears to be not only age-old, but also universal. As a result of error or self-delusion, or even perhaps, in rare cases, deliberate decision, some judges will select the arguments of counsel, or the lower court judges, with which they can easily deal, and omit any reference to others. Sometimes, only half an argument is recounted, and sometimes the argument is recounted in a misleading way. Sometimes the facts are not fully explained in a balanced way. Thus, the appellate judge, having chosen the battlefield, will cut through the (as presented) weakly defended ramparts and lay waste the incompetent (as presented) forces which the judge thinks need to be dismissed from the scene.

Some years ago, an English legal journal, *Legal Business*, conducted a survey that involved an attempt to rank English judges. Those who responded were practising barristers and solicitors. The identity of the judge who was said to be on top of the judicial league is not important but the reasons given for choosing the particular individual are instructive. It was said of this judge that he always set out the important arguments of counsel in full, he dealt with all those arguments fairly and in a rational way, he recounted all the relevant facts accurately, he did not finesse important issues, he squarely confronted the difficulties inherent in the case he was upholding and he never presented the case he was dismissing in a misleading way. The very fact that these matters were felt to be so important suggests that there were many who did not meet the standard.

5 See Lord Millett, "Villainy in Venice", McPherson Lecture Series (University of Queensland, 7 March 2006).

Justice Kirby has never been a serving officer of the Judiciary Hussars. It is not his way to survey the battlefield, set up non-existent defences and then proceed in triumph to smash them to pieces. His judgments are noteworthy for the meticulous detail in which he records the arguments of counsel and those of the judges of the lower courts. They are also noteworthy for the care and fairness with which he deals with those 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 a 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?

THE ROLE OF INTERMEDIATE COURTS OF APPEAL

In the course of his term as President of the New South Wales Court of Appeal, Kirby P demonstrated the residual capacity that intermediate appellate judges have to influence, and even change, the law. 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. Most intermediate appellate courts still grapple with these problems and will not hesitate to grasp the nettle of novel or controversial issues – and that, surely, is a healthy thing.

The role of intermediate appellate courts in Australia is changing. In 1993, the High Court said that, in construing Commonwealth or uniform national legislation, an intermediate appellate court should not depart from an interpretation placed on such legislation by another Australian intermediate appellate court unless convinced that that interpretation is plainly wrong.[6] In 2007 the High Court said that since there is a common

6 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492.

law of Australia rather than of each Australian jurisdiction, the same principle applies in relation to non-statutory law.[7] This reasoning has subsequently been taken a step further by the New South Wales Court of Appeal[8] which has held that an intermediate appellate court should, on the ground of comity, follow the decision of another intermediate appellate court where the relevant issue concerns the interpretation of statutory provisions that are identical or substantially similar (unless the court is convinced that the earlier decision was clearly wrong or if considerations of justice require the court not to apply it).[9]

This trend tends to homogenise all Australian intermediate appellate courts and pasteurise differences between them. Speaking in another context, Kirby J has observed that one of the values of a constitutional federation is the scope that it leaves for local innovation to stimulate the eventual emergence of national standards.[10] I, for one, regret the passing of the facility of the federal system to provide a test tube for different ideas and concepts, enabling the High Court or government eventually to select the best for national application. In addition, there is surely no doubt that from time to time the standards between intermediate appellate courts may differ; indeed, they may differ within the same court. The application of the extended *Marlborough Gold Mines* principle may lead to an undesirable influence of the first-in-time judgment, rather than the best judgment.

The intermediate courts of appeal are, in the vast preponderance of cases, the final court of appeal for the parties. Special leave is given in only a very small percentage of cases decided in Australia. For this reason, the standards of the different intermediate appellate courts have always been a matter of national interest. Now, in the light of the extended *Marlborough Gold Mines* principle, those standards have become of general importance throughout the country.

There is another change in the business of intermediate appellate courts which needs to be mentioned. The High Court has at times criticised intermediate appellate courts for not dealing with all issues in the case. This has particularly occurred when the High Court has held the intermediate court to be wrong and the matter has to be returned to that court or even to the trial court. In the New South Wales Court of Appeal the general rule is that each member of the court is in court four days out of five with a day off to write judgments. Recently, some mercy has been shown and judges have been given a week off three or four times a year for writing judgments. This regime is difficult enough as it is, but cases are getting more complex, the material is getting more

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7 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 151 [135].

8 Of which I was part.

9 *Tillman v Attorney-General (NSW)* (2007) 178 A Crim R 133 [110] per Giles and Ipp JJA; contra at 140 [47] per Mason P.

10 *Harriton v Stephens* (2006) 226 CLR 52 at 99 [151] per Kirby J.

extensive and denser, and arguments are becoming more detailed, more sophisticated and lengthier. I do not understand why this is occurring, but it is a fact of life. A symptom of this trend is the growth in the length of grounds of appeal. It is not unusual for the grounds to number more than 20, at times more than 30. This has a bearing of course on the issues before the court. The task of the judge is made more difficult by the written submissions dealing with a myriad of issues not touched on by counsel in oral argument. It is left to the judges to work out these issues, raised in writing but not orally.

Against this background, a judge of an intermediate court is compelled to select the main issues that are decisive of the case. Otherwise, he or she will be in danger of being swamped. In this respect, perhaps, it is necessary to apply a limited strategic approach in writing judgments. Much as one would want to follow the compendious example of Kirby P when President of the New South Wales Court of Appeal, I venture to suggest that in current circumstances this is now not reasonably possible. The reality of life in a busy intermediate court should be recognised.[11]

In this attempt to explain why Australia needs vigorous, independent, intermediate appellate courts, which follow and apply the traditions and conventions that have long held sway amongst those who occupy the office of intermediate appellate judge, I hope I have shown the great part that Michael Kirby has played in establishing and maintaining these traditions and conventions. There can be no doubt that he has made an enormously significant and lasting contribution.

11 See *Kuru v New South Wales* (2008) 82 ALJR 1021 at 1025 [12]; *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* [2008] NSWCA 206 at [824]–[833].

Chapter 20

INTERNATIONAL HUMAN RIGHTS: THE FRATERNALIST

Louise Arbour and James Heenan

By a paradox, one of the most effective laws we can offer to combat the spread of HIV which causes AIDS is the protection of persons living with AIDS, and those about them, from discrimination. This is a paradox because the community expects laws to protect the uninfected from the infected.[1]

INTRODUCTION

Humans have a long history of seeking to encapsulate the essence of an individual or organisation in a symbol or phrase. Heraldic arms and Latin mottos are little removed from the logos and mission statements of today. Some are even revisiting the idea of gathering the complexity of a modern nation and its values into a single pithy phrase.[2] In doing so, they understandably point to the success stories of the past, and few have been more catchy than the revolutionary cry, "liberté, égalité, fraternité!"[3] The phrase expressed in shorthand both the demands and values of the French revolutionaries of 1789 and 1848. But, like the United States' *Declaration of Independence* of some years earlier,[4] the influence of this package of values has since spread well beyond the borders of France.

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1 M D Kirby, "Law Discrimination and Human Rights – Facing up to the AIDS Paradox" (Speech, Third International Conference on AIDS in Asia and the Pacific, 10 November 1995): www.lawfoundation.net.au (accessed 18 December 2008).

2 S Lyall, "Searching for a Definition of Britishness: Fine, But 'No Motto, Please'", *International Herald Tribune* (25 January 2008).

3 "Liberty, equality, fraternity": see *Constitution of the Fifth French Republic*, Art 2 (4 October 1958). The original concluded "… ou la Mort!" ("… or death!").

4 "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness" (4 July 1776).

Today, we see in these words the embryonic individual rights which would grow into the human rights internationally recognised through the *Universal Declaration of Human Rights* (UDHR), the first article of which tells us that "all human beings are born *free* and *equal* in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of *brotherhood*".[5]

Liberty and equality are part of the heartland of the human rights agenda and individual rights, such as freedom from arbitrary detention and from discrimination, are well known parts of the human rights canon. While we have a long way to go in ensuring universal respect for these rights, their existence is largely beyond debate. Individuals such as Michael Kirby have made significant contributions not only to exploring the breadth of rights related to liberty and equality, but also in enforcing these rights in respect of real people brought before real courts.[6] Evidence of Michael Kirby's attachment to these values cuts across many of the contributions to this book. In assessing his contributions at the international level in the sphere of human rights, however, we would like to focus on his championing of that value which closely approximates "fraternité".

FRATERNITY AND HUMAN RIGHTS

As a concept, "fraternity"[7] ranges well beyond the sphere of human rights. Kinship, or some kind of solidarity lies at the base of many institutions and ideologies. In the international human rights debate and discussion, it is fair to say that the notion of fraternity has been difficult to capture. While the imperative of working together towards the aims of the *Universal Declaration of Human Rights* was relatively straightforward to grasp in political terms,[8] the implementation of "brotherhood" through legally enforceable rights was more complex.[9] One approach was to see fraternity as supporting the existence of rights of an economic

5 General Assembly (GA) Resolution 217 A (III) (10 December 1948) (UDHR) (emphasis added). For a discussion of the impact of the French and American Revolutions on the development of international human rights, see L Henkin, G Neuman, D Orentlicher and D Leebron, *Human Rights* (West, USA, 2000) p 13.

6 An oft-cited example relating to equality is *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414 concerning the rights of a deaf litigant to equal treatment in court proceedings.

7 Our use of the terms "fraternity" and "brotherhood" rather than "sorority" and "sisterhood" should not be taken as injecting a sex bias into the concept of solidarity under discussion here.

8 For one view of the role of fraternity in politics, see D Kruger, *On Fraternity: Politics Beyond Liberty and Equality* (Civitas, London, 2007). Kruger argues that the 20th century saw the political battle as ultimately between clashing concepts of liberty and equality, whereas the future will be "a contest for the principle beyond them both: fraternity".

9 For a detailed exploration of the concept of "fraternity" in constitutional law, see the papers presented to the Third Congress of the Association des Cours Constitutionnelles ayant en Partage l'Usage du Français (Ottawa, Canada, June 2003): http://www.accpuf.org/ (accessed 29 September 2008).

and social character in the Declaration. Injunctions of solidarity and cooperation could be used to justify the rights of all to a standard of living adequate for the health and wellbeing of an individual and of their family.[10] However, in casting these as rights of the individual against the State, their motivation was not so much solidarity between individuals as the desire for all to be treated equally by the State.

The concept of "fraternity" could also be seen as underpinning the promotion of the concept of peoples' or solidarity rights in the second half of the 20th century.[11] In addition to individuals' human rights, it was argued that certain rights could only be sought and enjoyed by groups of individuals based on a shared attribute. Examples include established rights, such as the right to self determination,[12] rights "declared" since the *Universal Declaration of Human Rights* (such as the right to development,[13] the right to peace,[14] and the rights of indigenous peoples[15]), and rights which, although established in some national constitutional orders, are yet to achieve consensus at the international level (such as the right to a clean environment[16]). Peoples' rights were also termed third generation rights, to distinguish them from so-called first (civil and political rights) and second (economic, social and cultural) generation rights. The tripartite typology was loosely framed around "liberté, égalité, fraternité", with third generation rights predicated on fraternité.[17]

The use of these types of categorisations of human rights has been – justifiably – the subject of some criticism, suggesting as they do a prioritisation of rights and downplaying the principle of interdependence of all human rights.[18] Moreover, others have questioned the need to resort to group rights in order to protect human rights. As the content of the relatively comprehensive set of international human rights is

10 *Universal Declaration of Human Rights*, Art 25.

11 For a detailed discussion of the history of peoples' rights, see P Alston, "People's Rights: Their Rise and Fall" in P Alston (ed), *Peoples' Rights* (Oxford University Press, Oxford, 2001) p 259.

12 Article 1 of both the *International Covenant on Civil and Political Rights* (ICCPR) GA Resolution 2200 (XXI), UN GAOR, 21st Sess, Supp No 16 p 52 (UN Doc A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976) and *International Covenant on Economic, Social and Cultural Rights* (ICESCR) GA Resolution 2200A (XXI), UN GAOR, 21st Sess, Supp No 16 p 49, UN Doc A/6316 (1966), 993 UNTS (entered into force 3 January 1976).

13 *Declaration on the Right to Development*, UN Doc A/RES/41/128 (4 December 1986).

14 *Declaration on the Right of Peoples to Peace*, UN Doc A/RES/39/11 (12 November 1984).

15 *Declaration on the Rights of Indigenous Peoples*, UN Doc A/RES/61/295 (2 October 2007).

16 See Office of the High Commissioner for Human Rights and United Nations Environment Programme, *Human Rights and the Environment: Conclusions of a Meeting of Experts* (UN, 2002) (HR/PUB/02/2).

17 See generally, L Sohn, "The New International Law: Protection of the Rights of Individuals Rather Than States" (1982) 32 *American University Law Review* 1. The notion of third generation rights is attributed to Karel Vasak.

18 For a critique of the generations of rights approach, see, eg, A Eide and A Rosas, "Economic Social and Cultural Rights: A Universal Challenge" in C Eide, C Krause and A Rosas (eds), *Economic Social and Cultural Rights* (Martinus Nijhoff, Leiden, 2001) p 4.

clarified (in particular State obligations in respect of establishing laws, policies and programmes to respect, protect and fulfil human rights), and as the means for concrete implementation of these rights expands (for example, through "justiciability", which means rights being capable of interpretation and enforcement by courts), the reliance on certain broadly defined group rights may not always provide the optimal vehicle for the protection of individuals in their daily lives.[19]

"Fraternity" (like "liberty" and "equality") cannot be limited to buttressing one category of rights. As a value it suffuses the whole human rights agenda. Non-discrimination, tolerance, universalism, inclusion, dialogue, respect: these tenets underpin all human rights, however categorised. Indeed, the concept of "fraternity" in the Universal Declaration seems to go beyond the individual's relations with the State, referring to relations between individuals[20] and with non-State actors.[21] The "spirit of brotherhood" can be seen as the foundation of nationalism, the basis of freedom of association and the solidarity in the labour movement, within or across indigenous communities, and the comity amongst nations.

Ultimately, it is the spirit of brotherhood that animates multilateralism and multiculturalism. It is this broader concept of fraternity of which Michael Kirby is both proponent and practitioner, even if he may not call it as such.[22] In this chapter we explore some evidence of this in Kirby's work on human rights at the international level.

THE MULTILATERALIST

Michael Kirby has long exhibited his strong support for multilateralism and multilateral institutions. A glance at his curriculum vitae reveals an institutional association with a wide array of international organisations, from the Organisation for Economic Cooperation and Development (OECD) to the Office of the High Commissioner for Human Rights

19 Alston, in respect of the right to development, writes: "There is no reason why the sum total of a host of rights, almost every one of which is explicitly vested in the individual, should when aggregated automatically metamorphose into a right possessed primarily not by individuals but by peoples": Alston, n 11, p 291.

20 *Universal Declaration of Human Rights*, Art 1.

21 See the preambular wording in the *Universal Declaration of Human Rights*: "every individual and every organ of society … shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance". On non-State actors, see A Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, Oxford/New York, 2006).

22 Others have ascribed to him similar values. Pitty refers to Kirby as "an important exponent of Australian cosmopolitanism": R Pitty, "Michael Kirby's Ideas of Cosmopolitan Justice" (Refereed paper presented to the Australasian Political Studies Association Conference, University of Tasmania, Hobart, 29 September–1 October 2003).

(OHCHR).[23] A list of international appointments on a curriculum vitae is a basic but significant indicator. In addition to revealing the level of interest in the subject-matter of the work, we would suggest that it also shows the level of commitment to the multilateral ideal on which the United Nations – for one – is built.

At this point we should disclose a partisanship in our views. Michael Kirby has long been a loyal and hardworking friend of the Office of the High Commissioner for Human Rights and of successive High Commissioners. Some of his specific work with us in this respect is referred to in this chapter. His support, however, continues between appointments, through his advocacy for the international human rights mechanisms (in particular, the treaty bodies and the special procedures of the Human Rights Council), for the High Commissioner and for the staff of her Office.[24]

Michael Kirby's support for international efforts in the area of human rights is not, however, limited to State-based international organisations such as the United Nations.[25] He has also lent his support to many non-governmental organisations over the same period and he continues to support public multilateral institutions in the face of significant criticisms over the past two decades of the concept of the nation-State and the Westphalian system. During that time economic globalisation, new threats to security and the rise of civil society organisations were seen as drawing power away from States and towards other actors such as business, non-governmental organisations and supra-national institutions.[26] More recently, real and perceived obstacles in a multilateral approach to global challenges have been used to justify a renewed faith in bilateral endeavours between States – and even unilateral action – particularly in areas such as trade and security.

Michael Kirby's engagement with multilateral institutions has spanned this period. He has kept the faith in a system that values inclusiveness over exclusiveness. This is not to deny the inherent difficulties in bringing together the views of 192 member States. Human rights protection is an issue which often goes to the heart of State sovereignty. As such, using a multilateral process to achieve progress will at times see sharp public disagreements and a sense that progress is coming at a glacial pace. The benefits are, however, significant. In addition to the legitimacy garnered

23 What is not so apparent from his résumé is that almost all of his work with international organisations is entirely unpaid, that Kirby has held down demanding full-time judicial appointments at the same time and that a form of discrimination against antipodeans sees much of the work involving arduous travel to "the North".

24 M D Kirby, "Internationalising Law – A New Frontier for Law and Justice" (Speech, *Globalism, Law and Justice Conference*, University of Western Australia, Perth, 27 October 2006): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_may07.pdf (accessed 29 September 2008).

25 See, eg, his role as a Commissioner and then President of the International Commission of Jurists.

26 An early analysis was offered in J Matthews, "Power Shift" (1997) 76(1) *Foreign Affairs* 50.

by universal involvement,[27] the mere process of engagement with actors with differing views can promote accommodation and change. Writing of the Human Rights Council, Kirby has said:

> Some nation states that are members of the Human Rights Council themselves have poor human rights records. The Council has not always acted with complete apparent impartiality. As in the past, decisions sometimes appear to have been made on political, rather than objective and principled, human rights grounds. Perhaps defects of this kind are inevitable, to some degree, in the real world. … Even for the most oppressive nation states, it is a salutary requirement of international institutions and practice today that autocrats and their representatives are sometimes obliged to appear before the bar of the United Nations and to answer in public to charges of infractions of international human rights law. There is progress in that very fact.[28]

None of this is to suggest that multilateral institutions involve only States. One of the earliest international organisations working on human rights, the International Labour Organization, counts non-state actors (trade unions and employer organisations) as part of its tripartite structure.[29] Civil society organisations have become key participants in the multilateral process, a development in part led by the human rights mechanisms, including the former Commission on Human Rights which allowed accredited non-governmental organisations to participate in its work on an almost equal footing with State observers.

THE UNIVERSALIST

A second manifestation of Kirby's attachment to the value of fraternity is his outspoken support for the universalism of international human rights. Along with the principles of indivisibility and interdependence, universality forms the bedrock for a coherent, comprehensive and non-selective international human rights regime. Despite countless reaffirmations in the 60 years since the adoption of the *Universal Declaration of Human Rights*,[30] the notion that all human rights protections apply to everyone, everywhere continues to be challenged in certain quarters. We hear, with troubling regularity, voices suggesting that international human rights guarantees reflect a bias towards a particular world-view. Some sceptics argue that civil and political rights – as articulated in the Declaration – belong solely to Western traditions, support Western

27 See A Boyle and C Chinkin, *The Making of International Law* (Oxford University Press, Oxford/New York, 2007) p 25.

28 Kirby, n 24, p 18.

29 Kirby was a member of the Panel of the Fact-Finding and Conciliation Commission on Freedom of Association of the ILO investigation allegations presented against the Government of South Africa in May 1988 by the Congress of South African Trade Unions.

30 These include the "2005 World Summit Outcome Document" (15 September 2005): "The universal nature of these rights and freedoms is beyond question" (A/RES/60/1 at [120]).

agendas, and are not as widely shared as their advocates believe. For their part, critics coming from liberal economic perspectives are wary of the Declaration's economic and social rights, which they regard as either hampering free market practices, or imposing obligations that are too cumbersome on states, or both. Finally, some have espoused rejectionist positions and recast them into self-serving doctrines to simply preserve privileges and power uniquely for themselves and a selected few, while denying the rights of everyone else.[31]

The universalism-relativism debate has been long running, if not always very heated.[32] Much of the commentary discounts the fact that a broad range of countries – both developed, and developing – were highly active in the drafting of the *Universal Declaration of Human Rights*,[33] and even more so in the drafting of the two covenants adopted in 1966. An indication of the broad acceptance of international human rights norms can also be gleaned from the high level of ratifications of human rights treaties across the globe. All Member States have ratified at least one of the nine core international human rights treaties, and 80 per cent have ratified four or more.[34]

As we celebrate 60 years since the adoption of the Universal Declaration, the principle of universalism – and its benefits – must be re-emphasised and reinforced, not reconsidered. Michael Kirby has been a key ally in this regard. When writing or speaking publicly about human rights, he rarely fails to stress the importance of the universal application of human rights norms, and to criticise those views that suggest some form of exceptionalism, in particular exceptions based on religious beliefs,[35] cultural norms[36] or economic imperatives.[37] Rather than catalogue these many instances of expressed rhetorical support, we will focus on some more concrete evidence of Kirby J's support for

31 See, eg, L Arbour, "Droits de l'homme, un défi", *Le Monde* (11 December 2007).

32 See A Langlois, *The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory* (Cambridge University Press, Cambridge, 2001); A An-Na'im (ed), *Human Rights in Cross Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press, Philadelphia, 1992); R Sloane, "Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights" (2001) 34 *Vanderbilt Journal of Transnational Law* 560; I Khan, "The Rights Idea: Knowledge, Human Rights, and Change" (2006) 28(2) *Harvard International Review* 70.

33 Notably China, Cuba, India, Panama and Lebanon.

34 For a database of ratifications, see: http://www2.ohchr.org/english/law/ (accessed 29 September 2008). See also the Plan of action submitted by the United Nations High Commissioner for Human Rights to the General Assembly: UN Doc A/59/2005/Add 3 at [95].

35 See M D Kirby, "Fundamental Human Rights and Religious Apostasy" (The 2007 Griffith Lecture, Griffith University, 16 November 2007): http://www.griffith.edu.au/events/griffith-lecture (accessed 29 September).

36 M D Kirby, *Through the World's Eye* (Federation Press, Sydney, 2000) p 25.

37 See M D Kirby, "DNA©: Is the Law Keeping Up?", *Lawyers Weekly* (27 September 2007): "This is the pointy end of a practical legal issue in which it is necessary for those who truly believe in the universality of human rights (and especially the right to access to the best available healthcare) to lift their voices to balance those who view such questions solely from an economic point of view and in terms of their own national and individual economic interests."

universality in his work with the Office of the High Commissioner for Human Rights (OHCHR).

The first example comes from his work with OHCHR and the Joint United Nations Programmme on HIV/AIDS (UNAIDS). The advent of HIV in the last decades of the 20th century provoked reactions of fear which were not unlike those that greeted the arrival of other incurable infectious diseases in history. What differed with the HIV epidemic was the identification of the disease with groups who were already marginalised in society: especially men who have sex with men, injection drug users, prisoners and commercial sex workers. These groups, already suffering significant discrimination, were faced with a new stigma and attendant discrimination on the grounds of actual or presumed HIV status. Many individuals suffered serious human rights violations: mandatory detention, withdrawal of medical care, dismissal from employment and places of education, arbitrary eviction and deportation, personal violence and even death at the hands of state officials. Violations continue today. In a climate of fear, the actual or assumed sero-status of an individual has been used to deny the universality of rights such as those relating to housing, health, education and freedom from arbitrary detention and extrajudicial execution.

The response to HIV highlighted the fact – as put by Kirby – that "universal human rights … are awkward. They exist in people who are not exactly like ourselves".[38] Yet it is – paradoxically for some – through respect of an individual's rights that we respond most effectively to this epidemic. Michael Kirby's famous "AIDS Paradox" succinctly displays one of the benefits of universalism:

> By a paradox, one of the most effective laws we can offer to combat the spread of HIV which causes AIDS is the protection of persons living with AIDS, and those about them, from discrimination. This is a paradox because the community expects laws to protect the uninfected from the infected.[39]

This statement also underlines the intrinsic and the instrumental value of human rights protection. An individual's rights must be protected because they are inalienable rights. However, there will also be an instrumental value in protecting rights, in this case contributing towards the goal of reducing HIV prevalence.

A quarter of a century after HIV was first identified, the importance of human rights in responding to the disease should be clearer than

38 Kirby, n 35.

39 M D Kirby, "Law Discrimination and Human Rights – Facing up to the AIDS Paradox" (Speech, Third International Conference on AIDS in Asia and the Pacific, 10 November 1995): http://www.lawfoundation.net.au (accessed 29 September 2008).

ever.[40] Vulnerability to HIV infection and to its impact feeds on violations of human rights, including discrimination against women and violations which create and sustain poverty. In turn, HIV begets human rights violations, such as further discrimination and violence. The international human rights system embraced this reality relatively rapidly. The Commission on Human Rights adopted its first resolution on HIV in 1988 and in 1989 the Commission's Sub-Commission appointed a Special Rapporteur to report on discrimination against people living with HIV.[41] Subsequently, and in fairly rapid succession, HIV status was recognised as a prohibited ground of discrimination,[42] and the right to the highest attainable standard of health was deemed to include access to antiretroviral therapy for HIV.[43]

These developments (among others) were in no small part the result of the efforts of a number of individuals working in the human rights and HIV fields, among them Michael Kirby. Starting in the late 1980s as a member of the World Health Organization's Global Commission on AIDS, Michael Kirby has been in the vanguard of insisting that protecting the human rights of all – including marginalised groups – provides the best chance of beating the scourge of HIV.

Needless to say, advocating for the universal rights of groups such as men who have sex with men and commercial sex workers has not been universally popular. For some, individuals deemed to have engaged in criminal behaviour somehow forfeit their human rights, such as the right to information on how to protect themselves from the virus as well as the right of access to health care, which includes access to antiretroviral treatment. For others, however, including some states, a reluctance to act stemmed more from the challenge of how to translate international human rights obligations (which were largely drafted before the arrival of HIV) into action in the face not only of a disease that was rapidly spreading, but also of new dilemmas emanating from the almost monthly advances in medical science, and by the maturing epidemic (for example, the rise in the number of AIDS orphans), not to mention the challenges posed by the virus itself mutating.

Responding to these needs, in 1996 OHCHR and UNAIDS organised an International Consultation on HIV/AIDS and Human

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40 For an overview of the relevance of human rights to the epidemic, see "Human Rights and HIV/AIDS: Now More Than Ever, 10 Reasons Why Human Rights Should Occupy the Center of the Global AIDS Struggle" (Open Society Institute, 2007): http://www2.ohchr.org/english/issues/hiv/document.htm (accessed 29 September 2008).

41 See UN Doc E/CN4/RES/1990/65. The final report is in UN Doc E/CN4/Sub2/1992/10.

42 UN Docs E/CN4/Sub2/1994/29 and E/CN4/RES/1995/44.

43 UN Doc E/CN4/RES/2001/33. See also General Comment 14 of the Committee on Economic, Social and Cultural Rights, "The Right to the Highest Attainable Standard of Health", UN Doc E/C12/2000/4 (11 August 2000) at [18].

Rights.[44] Michael Kirby chaired the Consultation which resulted in the *International Guidelines on HIV/AIDS and Human Rights*.[45] The International Guidelines attempt to provide guidance to States and others on how to take concrete steps to protect human rights in the context of HIV. The emphasis is – unsurprisingly – on the means for protecting, respecting and fulfilling the universal rights of all individuals, but particularly those infected with or affected by the virus. The International Guidelines explicitly refer to vulnerable individuals and populations and authoritatively recommended measures such as:

- strict adherence to the model of voluntary and specific consent to HIV testing accompanied by counselling;
- ensuring through public health legislation that information relative to the HIV status of an individual be protected from unauthorised collection, use or disclosure;
- enjoining States to take measures necessary to ensure for all persons, on a sustained and equal basis, the availability and accessibility of quality goods, services and information for HIV/AIDS prevention, treatment, care; and
- including in States' legislation, policies, programs, plans and practices positive measures aimed at addressing those factors, such as poverty, migration, rural location or discrimination of various kinds, that hinder the equal access of vulnerable individuals and populations to prevention, treatment, care and support.

In the decade of their existence, the International Guidelines have become a key guide for human rights protection efforts globally, providing a common and agreed basis for the development of country- and community-specific interventions.[46]

Michael Kirby continues to advocate passionately the message of universal protection of human rights in the face of the HIV/AIDS epidemic. He also continues to translate his words into actions, working at the multilateral level with UNAIDS and the United Nations Development Programme (UNDP), in particular working with judges.[47]

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44 Second International Consultation on HIV/AIDS and Human Rights, Geneva (23–25 September 1996). Kirby also chaired the earlier First International Consultation on AIDS and Human Rights in July 1989, which considered the possible elaboration of guidelines. A Third International Consultation on HIV/AIDS and Human Rights in 2002 revised Guideline 6 on access to treatment, a process also chaired by Kirby: see http://www2.ohchr.org/english/issues/hiv/guidelines.htm (accessed 29 September 2008). The International Guidelines were drafted under a mandate from the Commission on Human Rights in resolution 1996/43 (UN Doc E/CN4/RES/1996/43).

45 UN Doc E/CN4//1997/37.

46 States are called upon every two years to indicate to the Human Rights Council the steps they have taken to protect the rights of vulnerable groups in the context of prevention, care and access as described in the International Guidelines: see UN Doc E/CN4/RES/2005/84.

47 See the Proceedings of the Conference on Courts and Justice in the Era of HIV/AIDS (Lusaka, February 2007).

A second example of Kirby's actions to support universalism is his work as the first Special Representative of the Secretary-General for human rights in Cambodia, to which position he was appointed in November 1993.[48] The Office of the High Commissioner for Human Rights (then the Centre for Human Rights) had only one month earlier opened an office in Cambodia, two years after the Paris Agreements had brought peace to the country. Working as an expert on a part-time basis, Kirby's mandate was focused on assisting the government in the promotion and protection of human rights, as well as guiding the fledgling OHCHR presence in the country.[49]

In discharging his mandate, Kirby's belief in universalism was manifested in two ways. The first was his steadfast line that human rights were shared by all, including those in an exceedingly poor, transitional society such as Cambodia. In making a large number of recommendations aimed at promoting a rights-based future for the country, he insisted that no impermissible exception be made based on a lack of resources or cultural norms. While some rights may acceptably be realised progressively, at a minimum states have an obligation to take *some* action to respect, protect and fulfil all human rights. Examples were his insistence on the right to prompt judicial review of detention,[50] the provision of legal assistance to victims of violence against women,[51] and the need for judges to be paid salaries adequate to ensure their independence.[52] For this, he was criticised in some quarters for setting too high a bar for Cambodia. Yet years later, he drew parallels between conditions in Cambodian prisons and conditions of immigration detention in Australia, suggesting that each fell so far below internationally accepted minimum standards that he "would feel duty-bound, as a human being, to remove myself from it".[53]

A second, and perhaps more novel stance for Kirby himself, was his giving concrete meaning to the universalist slogan "*all* human rights for all". His tenure on the Cambodian mandate coincided with a renewed appreciation of the cultural, social and economic rights set out in the Universal Declaration. The reasons for this renaissance were many, but

48 The mandate was established by the Commission on Human Rights in its resolution 1993/6 (UN Doc E/CN4/RES/1993/6).

49 UN Doc E/CN4/RES/1993/6.

50 UN Doc E/CN4/1994/73 at [33].

51 UN Doc E/CN4/1996/93 at [62].

52 UN Docs E/CN4/1994/73 at [27]; E/CN4/1996/93 at [35]. Kirby J's insistence on judicial salaries also underlined the indivisibility of human rights, refuting suggestions that the protection of civil rights is somehow cost free. See also Report of the United Nations High Commissioner for Human Rights (UN Doc E/2007/82) at [23].

53 *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486. The Applicant, who had been charged with escaping from immigration detention, claimed that the conditions of detention were such that it was not a form of detention authorised by the relevant Act, and thus escape did not contravene the Act. The remark is recorded in transcript [2003] HCA Trans 456 (12 November 2003).

included the transition to democracy in many parts of the world, the 1993 Vienna World Conference on Human Rights and the long-awaited entry into operation in the late 1980s of the Committee on Economic, Social and Cultural Rights.

For Kirby, his work in Cambodia appeared to be something of an epiphany in respect of economic, social and cultural rights:

> It was in my work as United Nations Special Representative that I threw off any lingering belief that human rights were effectively, and only, about what happened in police stations, polling booths and courthouses. Obviously, these are involved. But for most Cambodians, the urgent questions that they addressed when speaking to me of human rights were issues concerned with the protection of women and girls, including in education; the access of all to drinking water; the provision of basic healthcare; and the removal of landmines. Such fundamental human rights issues cannot be addressed without the establishment and maintenance of institutions of good governance. It is simply not possible.[54]

The quest for universal application of all human rights, including economic, social and cultural rights, continues. The practical consequences of the obligation of progressive realisation are more recognised.[55] The idea that civil and political rights are somehow free, and yet economic social and cultural rights are expensive, is slowly being dispelled. Experience at the national and sub-national level is leading the way in terms of best practice in the areas of housing, education and health. Clarifying the links between poverty and human rights has shown us that categorising rights into "civil and political" and "economic, social and cultural" merely overshadows what is common to all human rights, and overemphasises irrelevant differences. Finally, building on the experience of a number of countries, work is advancing to allow for individuals to complain at the international level about violations of these rights, as has been the case for violations of civil and political rights since 1976.[56]

THE JUDGE

One can assume that Michael Kirby is best known in Australia as a judge, albeit often as a controversial judge. Outside his homeland, however, he is probably known less as a judge than as an expert on

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54 M D Kirby, "Human Rights and Good Governance – Conjoined Twins or Incompatible Strangers?" (Chancellor's Human Rights Lecture 2004, University of Melbourne, 3 November 2004): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_3nov04.html (accessed 29 September 2008).

55 For an overview, see *The Report of the High Commissioner for Human Rights to the Economic and Social Council* (UN Doc E/2007/82).

56 See the most recent report of the Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its Fourth Session (Geneva 16–27 July 2007): UN Doc A/HRC/6/8.

certain issues (privacy and law reform) and as a passionate advocate (HIV, LGBT rights[57]). However he brings his judicial bearing to all his work, including his various interactions with the international human rights world.

As a judge, Michael Kirby's fraternity is foremost with other judges. His profile and influence among judges globally is significant. He believes that judges in all regions share a role and experience that translates into a strong solidarity. As such, he can truly say "my brother judges". The burden of the trust on judicial officers features prominently in his writings.[58] The brotherhood among the judiciary implies not just mutual respect and empathy, but also opportunities to learn from each other. Particularly in the sphere of international human rights, Kirby J has assiduously worked not only to learn himself, but to convince his judicial brethren that it is appropriate (sometimes even necessary) to look for assistance beyond their particular jurisdiction.

The judiciary is, or should be, central to the protection of human rights at the national level. The state is required to ensure its human rights obligations in all its activities; however, it is through the formal justice system that the sharp edge of human rights obligations is brought to bear. The implementation of international human rights norms by national judiciaries varies from country to country, depending on the constitutional arrangements by which international treaties ratified by the executive are given force. The question posed strongly and consistently by Kirby J is: in applying a human rights norm, how much should a national judge draw assistance from international human rights norms, from the jurisprudence (or other authoritative guidance) of the international system, or from the jurisprudence of other jurisdictions? In the Australian context, he has answered this question from the Bench in a line of cases which are examined elsewhere in this book.[59] This has stirred a vigorous debate[60] both within the courtroom and outside, Kirby J's approach provoking some sharp criticism.[61] This situation is of course not confined to Australia, with other jurisdictions grappling with the same question.[62] Justice Kirby's value of solidarity pushes him to favour openness to the experience of judges in other jurisdictions on human

57 Lesbian, gay, bisexual and transgender rights.

58 M D Kirby, "To Judge is to Learn" (2007) 48 *Harvard International Law Journal Online* 36.

59 The cases include *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513; *Kartinyeri v Commonwealth* (1998) 195 CLR 337; and *Al-Kateb v Godwin* (2004) 219 CLR 562.

60 D Hovell and G Williams, "A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa" (2005) 29 *Melbourne University Law Review* 95.

61 J Allan, "'Do The Right Thing' Judging? The High Court of Australia in Al-Kateb" (2005) 24(1) *University of Queensland Law Journal* 1.

62 See, from among many examples, the discussion in *Atkins v Virginia* 536 US 304 at 347 (2002); *Lawrence v Texas* 539 US 558 (2003); *Hamdi v Rumsfeld* 542 US 507 (2004); *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 (particularly at [70]); and *Volks NO v Robinson* (2005) CCT 12/04 (Constitutional Court of South Africa).

rights problems. He has recounted many times his "road to Damascus" conversion[63] following his participation in the drafting of the *Bangalore Principles on Domestic Application of International Human Rights Norms*,[64] which welcomed the "growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law – whether constitutional, statute or common law – is uncertain or incomplete".[65]

Justice Kirby has followed this advice and sought to have regard to the texts of the international human rights treaties,[66] the views of the United Nations Human Rights treaty bodies,[67] the United Nations High Commissioner for Refugees[68] and the jurisprudence of national[69] and regional courts[70] and others.[71] In doing so, he has illustrated that the international human rights texts and mechanisms are not stratospheric instruments of little practical value in the daily life of judges and citizens. For the international system, too, there is a discernible benefit in securing a coherent and sound application of international norms across a variety of national contexts. This relies on the necessary human rights expertise being identifiable and available in a form translatable to the various national jurisdictions around the globe. One source of this expertise is the Office of the High Commissioner for Human Rights, which has gained significant expertise in the interpretation and application of international human rights law, in both conventional and customary form, in a wide variety of contexts. This expertise is made available in a number of ways. One is through the production of materials such as the *Manual on Human Rights for Judges, Prosecutors and Lawyers*,[72] which draws together international and regional norms and jurisprudence on human

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63 M D Kirby, "The Australian Use of International Human Rights Norms: From Bangalore to Balliol – A View from the Antipodes" (1993) 16 *University of New South Wales Law Review* 363.

64 Reproduced in (1988) 62 *Australian Law Journal* 531.

65 Principle No 4.

66 One of a number of examples is *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365.

67 *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365.

68 *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH* (2006) 231 CLR 1.

69 *Al-Kateb v Godwin* (2004) 219 CLR 562.

70 *Roach v Electoral Commissioner* (2007) 233 CLR 162.

71 Described once as a universal approach to the law, see Mr Bennett QC, President of the Australian Bar Association, swearing in of Justice Kirby [1996] HCA Transcript 24 (6 February 1996): "On the Bench, your Honour has educated us and caused us all to revise our approach to legal research. … [W]e look to different judicial sources. To some of us, it comes as a shock on the first occasion to be asked why one is citing foreign authority when one reads from a speech in the House of Lords. That shock develops into incredulity when your Honour gently reminds the advocate of directly relevant authority in Upper Pradesh, Cyprus or the Turks and Caicos Islands. … The universality and breadth of your Honour's approach to law will be of great benefit to this Court."

72 OHCHR and the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (UN, 2003).

rights in the criminal justice system.[73] Another is the intervention before national, regional and international courts by the High Commissioner as amicus curiae.[74]

A third and more recent vehicle for sharing expertise is the High Commissioner's Judicial Reference Group, of which Kirby J is a member along with 14 other judges from courts of final review from all regions of the world. The purpose of this group, which met for the first time in November 2007, is to provide advice and assistance to the Office of the High Commissioner for Human Rights in interacting more effectively with national judiciaries, with the aim of promoting respect for human rights norms at the national level. As state actors, judges have a duty under international human rights law towards rights-holders. Yet, like parliamentarians and the executive, judges from diverse countries will approach international human rights obligations with different experiences and needs. Some will be willing to give effect to human rights guarantees but do not have the knowledge of what the guarantees contain, or how they should be applied. Others know only too well what is required but are deprived of the means of acting, be it through a lack of resources or through political interference. Yet others have the knowledge and the means but lack the will, while for judges in countries in conflict, it is the security situation which is hampering their efforts to protect individuals' rights. For judges in each of these situations, the United Nations (and the Office of the High Commissioner for Human Rights in particular) must be able to respond with an appropriate and effective intervention.

THE BRIDGE-BUILDER

In a common sense, fraternity links individuals within groups, whether they are families, university clubs or judiciaries. How the group is defined will have a bearing on the strength of the feeling of brotherhood. Within larger and more diverse groups (such as judges across the globe) Kirby J has championed their shared attributes across boundaries, whether national or cultural. He has also been instrumental in illustrating the benefits of bringing different communities together, venturing into the heartland of other communities and disciplines where he believes much beneficial knowledge can be found.

Human rights is at its base a juridical subject, concerned as it is with norms and rights, standards and duties. It has, unsurprisingly, long

73 Kirby J contributed to this publication as a member of the IBA Review Committee and as a contributor.

74 See, eg, the recent intervention before the United States Supreme Court in *Boumediene v Bush* 476 F 3d 981 (DC Cir 2007); and *Al Odah v United States* 542 US 466 (2004): http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/06-1195_PetitionerAmCuUN-HighCommHumR.pdf (accessed 18 December 2008).

been a community of practitioners dominated by lawyers. Yet as our understanding of the nature of these most fundamental of rights and their place within local, national and global orders matures, the clearer it has become that human rights cannot remain the domain of lawyers alone. Indeed, it may well have been the relative stranglehold of lawyers that contributed to an unhurried appreciation of human rights issues beyond areas such as fair trial standards, independence of the judiciary and arbitrary detention. Already today, it would be difficult to seriously address the range of human rights challenges facing us without the expertise of professionals in the areas of economics, statistics, medicine, data technology, development, environment, biotechnology, and even transport.[75]

Justice Kirby's appreciation of this came a little earlier than it did for others. One of his first international appointments was in the late 1970s to an Organization for Economic Cooperation and Development Expert Group on Transborder Data Barriers and the Protection of Privacy,[76] which brought together governmental experts to consider an intersection between human rights and technology which today would be regarded as self-evident. From this early start, he continued to expand the ambit of his interactions and, as a judge, he has continued to speak to audiences wider than the legal profession. Justice Kirby has expressed the view many times that while lawyers may not be trained (or naturally endowed) to understand the intricacies of the world of hard science, they must make an effort to achieve some basic understanding in order not only to be able to develop and apply the law, but also to play their role in ensuring that technologies are developed in such a way as to respect and protect human rights.[77]

One community to which Kirby J has built a significant bridge from the (legal) human rights community is that of health professionals. From his work on the human genome, to bioethics and HIV, Kirby J has shown an interest in lawyers being aware of both the human rights implications of health care and the challenges posed by advances in health technologies. Health as a human right is one of the longest-recognised, yet until quite recently least-appreciated, of the internationally-recognised human rights. Protection of individuals' health was one of the earliest concerns motivating international cooperation,[78] including the establishment of the International Labour Organization and its focus on workers' rights to healthy working conditions.[79] The right to health

75 For example, in relation to trafficking in human beings and to extraordinary rendition.

76 See *Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data*, OECD Doc C(80)58/Final (23 September 1980) annex.

77 Kirby, n 36, p 42.

78 For example, a *Convention to Ban the Use of Phosphorus* in matches was adopted in 1906.

79 See ILO Constitution Preamble and ILO Convention No 13 concerning the use of white lead in painting (1921).

featured in some early national constitutions,[80] in the Constitution of the World Health Organization,[81] and is recognised in the *Universal Declaration of Human Rights* and all regional human rights systems, as well as a growing number of national constitutions.[82] At the international level it is elaborated in conventions relating to women,[83] racial discrimination,[84] children[85] and disability,[86] and a special rapporteur of the Human Rights Council on the subject has existed since 2002.[87] Justice Kirby's support for the promotion and protection of the right to the highest attainable standard of physical and mental health has been an unbroken thread through his work at the international level, from HIV[88] to the human genome and LGBT rights. Over time his support for a justiciable right to health has grown.

The impact of advances in biotechnology (in particular the elucidation of the human genome) on the enjoyment of human rights is a recurrent theme for Michael Kirby. In early 2002 he was asked by the then High Commissioner for Human Rights, Mary Robinson, to co-chair her Expert Group on Human Rights and Biotechnology. The aim of bringing together the Expert Group was to consider how the Office of the High Commissioner for Human Rights might provide follow-up to the 1997 UNESCO *Universal Declaration on the Human Genome and Human Rights*,[89] as well as to consider more generally issues deserving priority in the work of the High Commissioner and her office in the area of human rights and biotechnology. The Expert Group, which met against the background of reports of successful human cloning,[90] comprised leading scientists, bioethicists and human rights lawyers.

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80 Constitution of Mexico of 1917, Art 4.

81 *Constitution of the World Health Organization*, Preamble: Off Rec Wld Hlth Org, 2, 100 (entered into force 7 April 1948).

82 See, eg, the *Constitution* of the Republic of South Africa (1996), which includes a justiciable right to health (among others). For a discussion of the use of international human rights law in interpreting the *Constitution* (and a comparison with Australia), see Hovell and Williams, n 60.

83 *Convention on the Elimination of All Forms of Discrimination Against Women*, Art 11: GA res 34/180, 34 UN GAOR Supp (No 46) p 193, UN Doc A/34/46 (entered into force 3 September 1981).

84 *International Convention on the Elimination of All Forms of Racial Discrimination*, Art 5: 660 UNTS 195 (entered into force 4 January 1969).

85 *Convention on the Rights of the Child*, Art 24: GA res 44/25, annex, 44 UN GAOR Supp (No 49) p 167, UN Doc A/44/49 (1989) (entered into force 2 September 1990).

86 *International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, Art 25, GA res A/61/611 (2006).

87 UN Doc E/CN4/RES/2002/31.

88 For example, his membership of the UNAIDS Global Reference Group on HIV/AIDS and Human Rights, to which OHCHR is an observer.

89 *Universal Declaration on the Human Genome and Human Rights*: UN Doc A/RES/53/152.

90 In response to concerns generated by these reports, the General Assembly had established an ad hoc committee "for the purpose of considering the elaboration of an international convention against the reproductive cloning of human beings" (General Assembly resolution 56/93, 12 December 2001).

The work of the Group exemplified the benefits and challenges of promoting dialogue between various communities with disparate features and aims. Profit-seeking commercial biotechnology firms and pharmaceutical companies, statutory patent offices, indigenous groups, religious communities, insurance companies, health providers, employment agencies – all have an interest in the development of regulatory regimes in the area of biotechnology. International human rights norms, which were largely drafted long before the advent of these technologies, have a highly nuanced role to play in this process. A human rights approach will not provide all the solutions to complex dilemmas posed by biotechnological advances, but it forms a crucial component in dealing with these dilemmas, and needs to be increasingly recognised as such.[91] Proposals to restrict certain techniques must thus take into account an individual's right to enjoy the benefits of scientific research.[92] Harvesting or surveying genetic material must respect rights to privacy, including the requirement of prior informed consent to scientific experiments, surveys and the removal of genetic material. The rights to property (including intellectual property) and privacy call into question the appropriateness of applying patent laws to genetic material and the human genome. Furthermore, the results of the mapping of the human genome (which has allowed a new appreciation of the fundamental similarities and limited differences between individuals) must be used to fight discrimination, rather than encourage social pathologies such as racial discrimination.

CONCLUSION

Where, then, should we locate the value of fraternity in the development of human rights? If we follow the contribution of people like Michael Kirby, we would start by focusing on widening the conversation to include those who, according to Kirby, "are not exactly like ourselves".[93] Broadening the scope of engagement in this way is crucial for both the setting and – maybe more importantly – the implementation of human rights guarantees. This includes engaging with all those who have an impact on the enjoyment of rights, which will often extend beyond our traditional interlocutors of law enforcement officials, bureaucrats and lawyers.

It also demands engagement with the full range of rights-holders. Experience from the sphere of poverty reduction is analogous in that it has shown that those poverty-reduction strategies which fail to involve their ultimate beneficiaries in the design and execution of interven-

91 See the Report of the Group: http://www.unhchr.ch/biotech/conclusions.htm (accessed 30 September 2008).

92 *International Covenant on Economic, Social and Cultural Rights*, Art 15(1)(b).

93 Kirby, n 39.

tions, are largely less efficient than those that do. A similar conclusion is warranted in respect of human rights. This imperative of engaging as broad a group of participants as possible is primarily driven by neither our inherent autonomy nor our claim to be treated as equals. Rather it is, as we have proposed in this piece, a manifestation of the value of fraternity.

Chapter 21

THE INTERNATIONALIST

C G Weeramantry

> *A new recognition has now come about concerning the use which may be made by judges of international human rights principles and of their exposition by the international courts, tribunals and other bodies established to give them content and effect. This has happened as a reflection of the growing body of international human rights law, of the instruments both regional and international which give effect to it, and as a result of the recognition of the importance of its content for people everywhere. … [S]omething of a sea change has come over the approach of courts in England, Australia, New Zealand and other countries of the common law. … [I]t is unsurprising that the influence of the Bangalore Principles throughout the world continues to gather pace.*[1]

Michael Kirby is a voice for progress at the frontiers of the law. He is a tireless worker whose unremitting dedication to the task of making the law a more effective instrument of justice and human welfare often takes him to its very frontiers. In the result he is a significant contemporary source of legal illumination exploring, extending and clarifying the frontiers of the law.

To these efforts he brings a rare combination of vision, courage, initiative and scholarship. All these qualities he brings to the task of making the law a more sensitive and far-reaching means of serving humanity, both nationally and internationally, both conceptually and procedurally, and both through an understanding of the present and a vision for the future. This rare combination of vision and unremitting application makes him a legal trail blazer of our time.

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1 M D Kirby, "The Road from Bangalore: The First Ten Years of the Bangalore Principles on the Domestic Application of International Human Rights Norms" (Speech, Conference on 10th Anniversary of the Bangalore Principles, Bangalore, India, 28 December 1998): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_bang11.htm (accessed 5 December 2008).

This short essay will refer briefly to the work of Kirby the law reformer, Kirby the internationalist and Kirby the promoter of judicial excellence. In some of these areas I have had direct contact with him, while in others I have known of and admired his work because its influence has extended far beyond the shores of Australia.

In all of these areas Michael Kirby has shown a remarkable ability to place his legal learning in an interdisciplinary and multicultural setting. He has also shown a dedication to the development of the law to suit the needs of changing times. All too often those administering the law have tended to see it in a mono-cultural and mono-disciplinary setting. Boxed in within a compartment of its own, it tends to be insulated from the many disciplines and cultural settings which can add so much richness and understanding to a discipline on which the human future so heavily depends. Michael Kirby's life and work supply the necessary correctives to such hemmed in attitudes which need today, more than ever before, to yield to universalistic and future-oriented approaches.

Michael Kirby has brought to his work a far-ranging vision which takes all humanity for its province and regards the long-term human future as one of its real concerns. The principles behind the law rather than simply the letter of the law, the law in the field and not merely the law in the books, the international perspective in addition to the purely domestic – these have been some of the hallmarks of his approaches to the problems he has addressed.

Moreover, Kirby has been extremely sensitive to the need to carry the law to the public it must serve, rather than to adopt the ivory-tower attitude which perceives the law as an elitist body of knowledge confined to a specialist group. Whether as judge or author, lecturer or Law Reform Commissioner, or international jurist, he has followed this principle and sought to make the law known by, and accessible to, the general public. Moreover, he takes the view that the public, too, can contribute substantially to the development of the law if only they are sufficiently aware of and interested in it.

THE LAW REFORMER

One of the hallmarks of his work as President of the Australian Law Reform Commission was to engage the public in this process. He did this in various ways and few law reform commissions in the world could match this interaction between the Australian Law Reform Commission under Kirby and the general public.

Widespread consultation with the community was one of the hallmarks of his work. The general public was made aware that such a body was in session, that it was generally seeking to bring new perspectives into the law, and that it was anxious to receive public support and ideas for incorporation in its work. Numerous public

lectures delivered and seminars addressed by Kirby stressed this aspect and the whole community became involved in the exercise. Moreover, expert consultants were brought in from various disciplines and a direct approach was made to the parliamentary Opposition to contribute to this work.

The pioneering approaches of the Australian Law Reform Commission (ALRC) aimed at involving the public in its work have served as a model to law reform commissions worldwide, stimulating them to increase the catchment area from which ideas can be drawn and to stimulate the general public to a more active interest in the law. Furthermore, the ALRC also gave world leadership in its approach to certain futuristic ideas and problems, for example, its pioneering work on human tissue transplants. It was through this work that I first came in contact with Michael Kirby as I was then interested in the numerous ways in which science and technology were racing out of legal control.

As head of the ALRC, one of the future-oriented topics which Michael Kirby was called upon to consider was biotechnology. In this field the Commission was mandated to consider human tissue transplants in the context of increasing technological, medical and pharmacological developments. The Commission had to consider such problems as organ donation, the appropriateness of allowing children and prisoners to donate organs and whether relatives had the capacity to veto an individual's decision to make an organ donation. A perusal of this report is a fascinating exercise in comprehending the multiplicity of law-related areas on which such modern techniques impinge.[2]

From those early days Kirby and the ALRC were also contemplating the issues raised by information technology, which was exponentially increasing the information available, especially in the sciences. The work of Kirby and the ALRC in these fields was of a pioneering nature and has continued to be of worldwide interest. An indication of his leadership in this field was that in April 2007 he was invited to King's College, London, to speak on this topic at the launch of the Centre for Technology, Ethics and Law in Society. The onerous task of summarising the rather complex proceedings was assigned to Kirby. Among the points he made in his summary were that there were no experts in these fields because the technology was too new, complex and unknown, that there is danger in having too little law as well as too much law on these topics, that the populace should be engaged in these debates and that these issues highlight the relationship between law, morality and religion.

Indeed it was our shared concerns in the field of science, technology and the law that led to my first personal interaction with Michael Kirby. He took an interest in my work on the subject and was kind enough in 1983 to write a Foreword to *The Slumbering Sentinels: Law and Human*

2 See Australian Law Reform Commission, *Human Tissue Transplants* (ALRC 7, 1976).

Rights in the Wake of Technology, which explored the theme of technology racing out of legal control – a subject which was very close to his interests as well. Kirby's Foreword gave a clear indication of his panoramic vision of the ways in which the legal system should revamp itself and its conceptual apparatus to meet the growing dominance of science and technology. Projecting his vision far into the future he referred to the need for a new jurisprudence and a new sociology for the age of science and technology. He covered among other advances, the dangers posed by the new information technology, by biotechnology and by human tissue transplantation. The need for privacy protection was stressed and even the need for science to be alert to the dangers from new advances in shipping and aircraft technology. He wrote a telling conclusion to this foreword by referring to the need "to open the eyes of a generation, so dazzled by technological innovations, that it is often blinded to the social and human dangers that need to be seen". Here was an index to the mind of Kirby the far-seeing jurist, projecting his vision generations ahead and stressing the need for a refashioned approach adequate to take in all these unprecedented dangers that lay ahead. In this foreword I believe Michael encapsulated his philosophy on this topic.

The work of the ALRC was so important in these fields even at that time that it was referred to more than once in the text of the book. Reference was also made to Michael's initiative in bringing these issues to public attention. Special mention was made of two speeches he delivered, to the Queensland Medical Legal Society and the Australian & New Zealand Association for the Advancement of Science (ANZAAS) Congress. By any standards the ALRC under Kirby was one of the world pioneers of legal research in this field.

In the international literature on this topic there have been numerous references to the work of the ALRC which, under Kirby, was at the cutting edge of the legal advances in this field. That impact continues and its effects have spread into diverse fields as research continues apace into ways in which science can adapt and implant living tissues – even to the extent of engrafting animal organs into human bodies (xenotransplantation). The process of meddling with the building blocks of nature will go on, totally outstripping the ability of the law to keep it in control. The catalogue of areas needing legal attention which appears in No 7 of the ALRC's reports (on human tissue transplantation) is an index to the attention the law needs to devote to these technological advances.

The reports of the ALRC form a classic collection of concerned inquiries into a diversity of topics which are of interest wherever in the world lawyers consider the inadequacies of the law in meeting new challenges. Few law reform commission reports in any jurisdiction have made such an encyclopaedic survey of the legal nuances attendant on the topics entrusted to them. The law also needs to extend its reach so

as to better its services to society in those many interstitial areas which the law has tended to neglect. These reports have sought to explain and explore a wide range of principles that give life and meaning to the letter of the law.

It is a tribute to the vision Michael Kirby gave to the ALRC that, in 1999, delegations from such diverse legal backgrounds as Singapore, Malaysia, Namibia, China, New Zealand, South Africa and Swaziland visited the ALRC to talk about its research and consultation methods, and areas of expertise.

Another characteristic of the ALRC was the way in which it sought factual data on an extensive scale so that its inquiries would not be merely abstract and theoretical. Its work was solidly grounded in reality.

Perhaps a word may be said here about a greatly altered judicial attitude, which has a bearing on the reports of law reform commissions. Between the mid-1970s when the ALRC began its work, and today, it may be said that there have been substantial changes in judicial approaches towards the task of determining the law on a particular matter. In the 1970s there was still a heavy dominance of Austinian formalistic and legalistic thought inherited from a previous generation, which tended to make the judges regard themselves as restricted in their field of inquiry to judgments and purely legal texts. The letter of the law took precedence and was of prime importance. The judge's role in interpreting and applying it was restricted.[3]

Outstanding jurists like Julius Stone were at the time opening up the frontiers of jurisprudence and making the law more perceptive of, and sensitive to, other influences and other disciplines, but the sources which the judges tended to consult were still narrow and restricted. Non-traditional sources of legal information were only rarely and hesitantly consulted. Reports of law reform commissions, interesting though they were, contained indications of how the law should be developed and not of the existing state of the law. They were therefore outside the field of normal authoritative materials which the judges consulted. This was logical if the judge's function was to apply the law as it presently existed. Especially in the common law world this was a widely prevalent legal attitude.

That attitude has now changed and, almost as a matter of course, judges faced with an important issue tend to consult law reform commission reports on matters under judicial consideration. They do so especially to secure assistance on issues of legal principle and legal policy which such reports explain and open up.[4]

This important change in judicial attitudes has been the result of the steady and substantial work done by law reform commissions across

3 See, eg, *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at 284-285 [112]-[113].

4 See, eg, *Esso Australia Resources v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 65 [4]-[5], 86 [97], 89 [104].

the world. It would not be wrong to say that a leader among them was the ALRC, not merely for the comprehensiveness and thoroughness of its reports, but also for the data collected, the public consultations engaged in and the multidisciplinary inquiries conducted. Michael Kirby played an important role in giving the ALRC this position of leadership.

One of Justice Kirby's central judicial axioms, as those who know his writings would quickly perceive, is that judges need to familiarise themselves with all the sources that would assist them in understanding shortcomings in the law and the means by which those shortcomings can be overcome. Reports of law reform commissions are a prime means of doing so, especially where they are as well researched and structured as Kirby ensured they would be. It would no doubt be a source of satisfaction to him that the entire climate of judicial attitudes towards law reform reports has now changed.

Importantly, the breakthrough achieved by law reform reports has opened up the greater use of other and different extrinsic source materials, including scholarly writing. Beyond the direct impact that such sources have had upon particular judgments of the courts, the infusion of new ideas and new ways of thinking about legal problems has affected the legal culture. It has also led to more questioning about legal authority by reference to considerations of basic legal principles and legal policy.[5]

THE INTERNATIONALIST

With regard to Kirby the internationalist, there are many facets to this aspect of his work. One is his judicial role in bringing international perspectives into domestic law. Another is his internationalism as evidenced by his Presidency of the International Commission of Jurists and his membership of numerous other international bodies, including the World Health Organization (WHO), The Joint United Nations Programme on HIV/AIDS (UNAIDS), the United Nations Development Programme (UNDP), the International Labour Organization (ILO), the United Nations Office on Drugs and Crime (UNODC), the United Nations Education, Scientific and Cultural Organization (UNESCO), the Organisation for Economic Cooperation and Development (OECD) and the Commonwealth Secretariat.

His attainment of the prestigious international position of President of the International Commission of Jurists is a tribute to his recognition internationally as one of the judges/jurists of our time who is most concerned with the development of international law, especially in the field of human rights. Other aspects of his internationalism are his acceptance of external judicial and investigatory responsibilities, such as President of the Court of Appeal of the Solomon Islands, United Nations

5 See, eg, *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 421 [65]ff.

Special Representative in Cambodia and Chairman of the Constitutional Conference of Malawi.

It is not commonly realised what a pivotal role the International Commission of Jurists played in elevating the concept of human rights from the level of mere aspirations to that of recognised law. Through its bulletins, conferences and collections of human rights decisions from all the superior courts of the world, the Commission raised the level of recognition of these rights to the point where the twin Covenants on Civil and Political Rights and Economic, Social and Cultural Rights could seriously treat them as legal principles that would be binding in domestic jurisdictions. However, the concept of human rights still had a long way to go before being automatically integrated into systems of domestic law.

In the decades succeeding the two Covenants, human rights, still struggling for full legal recognition, needed to be reinforced, legitimised and incorporated into the thinking of judges and lawyers across the world. During this period, Kirby J's Presidency of the International Commission of Jurists assisted the Commission in giving human rights the continuing upward momentum they required. It was only through such a process that they reached the full stature of being formulations which all legal systems could instinctively accept as statements of law, rather than of ideals.

In 1949 and the early 1950s young lawyers who cited the *Universal Declaration of Human Rights* in a court of law were often met by the comment from the Bench that those were fine ideals, but not the law of the land. In the process of transformation from ideals to law, the influence of the International Commission of Jurists was significant. In the years of consolidation, Kirby J's work in the Commission enabled this process to move forward.

The next aspect of Kirby the internationalist to be considered is his use of the insights of international law to amplify, strengthen and improve related principles and areas of domestic law.

Michael Kirby is a strong critic of the rigid dualist view which sees international law as two separate but intersecting circles in which domestic law substantially ignores the content and rules of international law. His work gives strong support to the monist view which sees international law and domestic law as one cohesive system in which each component reinforces and complements the other. As distances shrink, as planetary resources dwindle, as our common environment is daily subjected to irreversible damage, we face the inescapable fact of the oneness of the human family which occupies a single planetary home with limited resources. Humanity needs urgently to move towards a planetary regulation of its affairs rather than to continue in the outmoded system of disparate regulation in ways which negative and weaken our

common planetary inheritance and our common trusteeship for future generations.

This philosophical reflection, translated into legal terms, means that we can no longer afford to row the one boat we all occupy in different directions, neutralising and contradicting each other's efforts through a lack of attention to our common interests. Our common cultural inheritance is united in recognising such concepts as the dignity of the individual, the conservation of the environment, the peaceful settlement of disputes, trusteeship for future generations, the advancement of justice, and the oneness of the human family.

The world has an immense inheritance of wisdom in all its cultural traditions which can be brought to the service of the global community. Unfortunately this is obscured by a narrowly circumscribed vision which excludes other perspectives and prevents us from drawing upon the wisdom they can offer. Bridges need to be built between all sections of the human family, and one of the most powerful bridges available for this purpose is the discipline of international law. This needs to be promoted and universalised rather than treated as an isolated body of rules and concepts with little relevance to domestic realities – rules and concepts to be acted on when suitable or otherwise ignored. In this respect Kirby J has built upon the approach adopted in the High Court in *Mabo v Queensland [No 2]*.[6] That approach, in turn, built upon, and applied, the central theme of the *Bangalore Principles on the Domestic Application of International Human Rights Law*, which Kirby J had participated in drafting and about which he had written.[7]

Time and again, Kirby J's judgments reveal this universalist trend which is born of the fact that his vision and perspectives reach so far afield.[8] Such vision and perspectives mark out the leaders in any discipline, and heighten their contribution to the future development of their subject.

Another great Australian judge, Sir Gerard Brennan, at a colloquium in Canada in 1996, honouring the 50th anniversary of the International Court of Justice, cited numerous decisions of the High Court of Australia which had referred to and been influenced by judgments of the International Court of Justice.

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6 (1992) 175 CLR 1 at 42.

7 See M D Kirby, "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1988) 62 *Australian Law Journal* 514.

8 See, eg, *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 657-661; *Kartinyeri v Commonwealth* (1988) 195 CLR 337 at 417-418 [166]; *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 593-607 [143]-[186]; *Al Kateb v Godwin* (2004) 219 CLR 562 at 617-624 [152]-[176]; cf 589 [63]; and *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at 27-30 [73]-[81]. See also the recent decision of the High Court in *Roach v Australian Electoral Commission* (2007) 233 CLR 162 at 178 [16]; 203-204 [100]; 220-221 [163] and 224-225 [181], where all of the judges of the High Court referred, in different ways, to international law and transnational human rights law. It is in this way that minority judgments often come, in time, to influence majority reasoning, even if unconsciously or without express acknowledgment.

The International Court of Justice cases referred to included the *Continental Shelf* cases,[9] the *Fisheries Case* (*United Kingdom v Norway*),[10] the *South West Africa* cases,[11] the *Barcelona Traction* cases,[12] *Nicaragua v the United States*[13] and several others. The Australian cases to which references were made included such landmark decisions as *Mabo v Queensland*,[14] the *Tasmanian Dams Case*[15] and *Koowarta v Bjelke Petersen*.[16] Every student of international law would know the International Court of Justice decisions cited, just as every student of Australian law would know the Australian cases cited. Even before Chief Justice Brennan, Chief Justice Mason had also drawn attention to the growing influence of international law upon domestic adjudication.[17]

Two important aspects emerge from this. The first is that International Court of Justice decisions are a rich repository of principles of international law which need to be more generally known by domestic lawyers and judges. Unfortunately, legal education is so structured today that international law is an optional subject and one can become a fully fledged lawyer, and thereafter become a judge, with no knowledge of international law. Those who become judges may have to decide cases involving new situations not covered by prior authority and they may decide these in total unawareness of the fact that international law has created the necessary principles with which to handle them. This is particularly so in fields such as environmental law where judges with no knowledge of applicable principles of international law may well decide local cases in a manner which sets the development of domestic law in a retrograde direction.[18] Justice Kirby would, I am sure, agree that this gap

9 (1969) ICJ Reports 3.
10 (1951) ICJ Reports 116.
11 (1966) ICJ Reports 3.
12 (1970) ICJ Reports 3.
13 (1986) ICJ Reports 14.
14 (1992) 175 CLR 1 at 40-41, 181-82.
15 (1983) 158 CLR 168 at 222.
16 (1982) 153 CLR 168 at 205, 219.
17 A F Mason, "The Influence of International and Transnational Law on Australian Municipal Law" (1996) 7 *Public Law Review* 20 at 23; cf J Crawford and W R Edeson, "International Law and Australian Law" in K W Ryan, *International Law in Australia* (2nd ed, Law Book Co, Sydney, 1984) pp 80-82.
18 Currently there is a grave danger that domestic judges continue to decide cases involving the application of environmental law without any knowledge of the relevant developments in international environmental law, thus setting these domestic systems on a retrograde track in this respect. In view of the long-term damage this can cause, the United Nations Environmental Programme (UNEP) has published a Bench book for the global judiciary on International Environmental Law. This book has now been made available to judiciaries in all jurisdictions, thus highlighting the importance of judicial awareness of international law: see D Shelton and A Kiss, *Judicial Handbook on Environmental Law* (Publishing Section, United Nations Office, Nairobi, 2005). Similar Bench books on other aspects of international law need to be designed.

in legal education needs urgently to be closed if the lawyers of the future are to give to the general public the service they deserve.

The second aspect that emerges from this survey is that despite the dualistic tradition that still prevails in many of the countries with common law-based legal systems, there is a clearly discernible trend to draw upon the wisdom of international law to benefit dualistic systems. This alteration in attitudes is steadily proceeding despite the official prevalence of dualism and it is to be hoped that within a decade or two dualism will become an obsolete doctrine. The pressures in that direction are intense, for the needs which guide us towards internationalism are becoming more urgent by the day.

An area of interaction between international law and domestic law which has received Kirby J's special attention is the impact of international principles on national constitutions. He made this the subject of the seventh Grotian lecture of the American Society of International Law, delivered by him in 2005. Through this lecture he brought this aspect into sharp focus for the benefit of the entire global fraternity of international lawyers.

This short survey of Kirby, the internationalist, is concluded with another personal glimpse of his mind at work. In 1992, in launching my book, *Nauru: Environmental Damage under International Trusteeship*, he combined perspectives from colonial history, international law, trusteeship law, corporate law and environmental law and showed also a deep understanding and appreciation of Pacific culture and tradition. This was a reminder also of the depth of investigation and understanding of Aboriginal culture that was shown in the reports of the ALRC on this topic. Kirby's strength was that he was able to combine all these sources into a comprehensive and integrated approach which illuminated the dark places of the law.

When I was a law student more than 60 years ago, it was generally accepted that international law could benefit greatly from the insights it could derive from domestic law. Today, the traffic is clearly in the reverse direction and it is generally accepted that nearly every department of domestic law can benefit greatly from the principles and concepts of international law. Criminal law, intellectual property law, employment law, company law, environmental law, arbitration law and family law are just a few examples of the fields where the concepts and procedures of international law can make a substantial impact on the development of domestic law.

This is indeed a revolution in the law and this trend must continue in the years ahead. Justice Kirby has been one of the world's significant judicial contributors in this field and will no doubt inspire many judges of the future to follow this course. I believe also that he is an optimist in this regard and that the informed optimism which is characteristic

of his work can help immensely towards rendering legal systems more responsive to the needs of our time.

THE PROMOTER OF JUDICIAL EXCELLENCE

Finally, we come to Kirby J the promoter of judicial excellence. Here I shall refer to an aspect of Kirby J's work which may not be generally known, but which I had the privilege of observing when we worked together as members of the Judicial Integrity Group. This was an international committee consisting of Chief Justices and superior court judges from across the world whose task was to work out an ethical code for the global judiciary which would embody the highest standards of competence, diligence and integrity. Justice Kirby described the group and its early work in an article which analysed the then current statement of the Principles of Judicial Integrity.[19]

It is to be observed in this connection that the judicial function has in all traditions and civilisations been one of the most exalted and respected forms of activity to which any citizen can be called. The responsibility to the immediate litigants, to the legal profession and to society at large is so elevated that it needs to be discharged in accordance with the highest ethical standards that can be brought to bear on it. Diligence, learning, integrity, impartiality, courtesy, patience, wisdom – all these need to be practised to the highest degree so that it is axiomatic that when one goes to law one has the benefit of all these time-honoured qualities that have been the hallmark of justice throughout the centuries. This area has been one of Kirby J's special concerns and we were seeking to encapsulate the time-honoured excellence of the judicial role in the form of a universal code of judicial ethics. For some years we worked together on this project under the auspices of the United Nations. Our task was to bridge all the historical and cultural variations in different systems. We aimed at formulating a set of agreed principles which all legal systems would accept. This group met in various cities – The Hague, Vienna, Colombo and Bangalore. Its final conclusions were reached in Bangalore and this set of principles is now known as the *Bangalore Principles of Judicial Conduct*.

As chair of this group I have much pleasure in recording our gratitude to Michael Kirby, who was the group's rapporteur. We greatly appreciated the wisdom, experience and insights he brought to bear upon our deliberations. His knowledge of a diversity of legal systems and traditions gained through years of exposure to international legal responsibilities of various sorts was invaluable to us. Furthermore, his command of detail, his drafting skills and his ability to draw out the principal issues in any discussion helped us considerably in carrying

19 M D Kirby, "United Nations Up Close (2005) 24(2) *University of Queensland Law Journal* 279.

forward this difficult project, although at certain stages the differences between legal systems seemed quite considerable.

The framing of a universal set of ethical principles for the judiciary was fraught with many problems, not the least of which was the wide gulf that existed between the common law and civil law approaches to the position of the judge in the legal hierarchy. In the systems derived from the Roman Law the relative positions of judge and jurisconsult were remarkably different from the relative positions of judge and jurist in the common law systems.

In the common law system, the judge was on a pedestal and he laid down the law with magisterial authority. In the civil law system, it was the jurisconsults who were in the vanguard of the law and the judges would look to them for guidance as to what the law was on a topic. Indeed, even the opinions of a jurisconsult could be cited to the judge, in total contravention of the common law tradition on the subject.

From this difference, fundamental divergences regarding the position of the judge emerged, which reflected on the judicial position, the judicial duties and the judicial responsibility to develop the law. Not being the elevated functionary that the common law judge was, the civil law judge, occupying a lower profile, could himself be an investigator. He could make his own inquiries into the matter in hand. He could conduct much of his investigations in the privacy of his chambers rather than in open court. He was not an umpire merely deciding between the two cases presented to him by the parties. He was not as circumscribed in his investigatory role as the common law judge, nor constricted by so many technical rules of evidence. Least of all was he a formulator of the law, able to lay down through even one judgment in a superior court, what the law was on any matter. Judgments of civil law judges were not binding on other judges and a course of judgments was required to give the law a thrust in a particular direction. The manner of appointment of judges also varied in consequence of the judge's lower profile in the entire hierarchy of the law.

From all of these, numerous differences resulted in the approach to the judicial function and this gap needed to be bridged if a code was to be evolved which would be universally accepted. In bridging this gap, the experience of Kirby J, derived from his work as Law Reform Commissioner, President of the International Commission of Jurists and as a member of numerous international bodies, was of great assistance to the Judicial Integrity Group. We worked hard as a team on this project and Kirby J approached that task with the requisite team spirit, which made it a pleasure to work with him.

The group ranged over a vast field, considering the values of independence, impartiality, integrity, propriety, equality, competence and diligence and studying the judicial codes of a wide range of countries from across the world. A number of regional instruments were also

examined. The work called for wide practical experience and cross-cultural knowledge. Apart from his strength in all these areas, the drafting skills he brought to bear as rapporteur helped us immeasurably.

During our sittings we were also made aware of judicial malpractices that had emerged in various jurisdictions. They were all vastly different and we had to devise ethical formulations that could cover them all. Here again, Kirby J would help with a wide range of suggestions and various formulations which assisted greatly in devising such all-encompassing principles.

The Bangalore Principles are now well on the way to gaining international acceptance. In April 2003 the Commission on Human Rights brought the Bangalore Principles to the attention of member states, the relevant United Nations organs and inter-governmental and non-government organisations for their consideration. They were adopted by the United Nations Economic and Social Council (ECOSOC) in 2006[20] and recommended for consideration by member states of the United Nations when reviewing or developing rules with respect to the professional and ethical conduct of members of the judiciary. The Council refers to them as being "complementary to the Basic Principles on the Independence of the Judiciary endorsed by the General Assembly in its resolutions 40/32 and 40/146".

The New Code of Judicial Conduct for the Philippine judiciary states in its Preamble that it is based upon the *Bangalore Principles of Judicial Conduct*. The judiciary of Belize has adopted the Principles as the basis of its code of judicial conduct, and more than 25 nations are using them as a guide for developing or revising their own national codes of judicial conduct. The Bangalore Principles have also been referred to from time to time by the American Bar Association, which uses them in its program seeking to improve awareness of judicial ethics in Central Europe, Europe, Asia and Africa. This is another important way in which the judicial work and experience of Kirby J has reached far beyond the shores of Australia.

It needs scarcely to be said also that Justice Kirby has been a promoter of judicial excellence in another way – by example. Young judges always look for inspiration to their outstanding predecessors and in this way he has fired the imagination of judges at all levels in Australia and elsewhere. Industry and diligence, legal learning, research, universalism, concern for the real problems faced by people who come to the law for redress, a view of the broader picture, aversion to formalism and legalism, a truly global outlook, a vision of the law as the embodiment of justice, a desire to carry forward the frontiers of the law – all these are hallmarks of the excellent judge. We need to have such judges at every level of every legal system. A burning desire for judicial excellence needs to be inculcated

20 ECOSOC 2006/23.

in the judges of the future. Justice Kirby's example goes a great way in providing an example of a combination of all these qualities.

The judicial function is almost sacrosanct in all traditions and cultures. Every judge is expected to make a contribution, however minute, towards achieving the standards which foster and preserve its elevated image. Furthermore, at this crucial phase in the ongoing stream of global jurisprudence, fresh perspectives are urgently called for, which will project the judicial vision far into the future and enrich it from the cornucopia of global wisdom. Towards all these ends Justice Kirby has made a most distinguished contribution.

Chapter 22

JUDICIAL PRACTICE

Ian Barker[*]

> *I dissent from the majority view in this case. Potentially, that view has grave implications for the liberty of the individual in this country which this Court should not endorse. … This Court should be no less defensive of personal liberty in Australia than the courts of the United States, the United Kingdom and the Privy Council for Hong Kong have been, all of which have withheld from the Executive a power of unlimited detention.*[1]

A CHANGE IN THE COURT

During the unconscionably long time I have practised law, I have occasionally heard barristers proclaim, on some public occasion or other, that they *love the law* and every professional minute they spend as legal practitioners. Such pronouncements can, I think, raise serious questions about the judgment, if not the sanity, of the barristers concerned. But I think the truth is that each is really proclaiming what a wonderful barrister he is. How could such a person not therefore be continually transfixed by every word he or she forensically utters? (I use the masculine pronoun advisedly.)

I can but aspire to the premise, and therefore have not had the good fortune to be so transfixed. Personally, I have found practice as a barrister to involve as much unpleasantness as goodwill. To say "I love the law" rather glosses over the many occasions when loving the law is as difficult as loving some of its judges. As I see it, if a barrister does not enter the profession suffering from some bipolar disorder, the chances are he or she will eventually leave it enduring at least some form of depression.

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* Many thanks to Michael McHugh, Bill Priestley, Tom Pauling, Philip Selth, Michael Kirby, Leonie Nagle and Kathy Thom for their assistance.

1 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 615-616 [148]-[149] per Kirby J.

Part of the reason for the unpleasantness may sometimes derive from the nature of one's client and, of course, from the fact that barristers deal almost continuously with people in conflict with other people, and with the law. And often, unpleasantness can be caused by those judges who seem to be possessed of an inherent hostility towards barristers, even though they may have once so practised. It is a truism, often noted, that it does not take a lot to convert a judge-hating barrister into a barrister-hating judge.

Michael Kirby became President of the New South Wales Court of Appeal in 1984. His predecessor was Justice Athol Moffitt, a distinguished lawyer and unpleasant judge. The Court of Appeal was not a happy forum for lawyers, largely because of the malign influence of Moffitt P and Justice Ray Reynolds. A good example of their forensic disposition was their treatment of a young barrister called Peter Livesey, against whom the Bar Association moved to strike his name off the roll of barristers. The case is reported.[2]

Apart from complaints about the barrister acting as a solicitor, the real contest was whether he had been complicit with Wendy Bacon in offering straw bail for a client. The allegation against Livesey was that he participated in a criminal conspiracy with Ms Bacon whereby she deposited $10,000 in cash as bail money to secure the release of one Steven Sellers, the $10,000 not being her own money but money owned by Sellers. Ms Bacon applied to the Supreme Court for a declaration that she was a fit and proper person to be admitted as a barrister. The court hearing her application included Moffitt P and Reynolds JA. Mr Livesey was neither a party nor a witness in those proceedings. The court found against Ms Bacon, in the process finding her evidence that she had borrowed the money could not be believed, and also found, in his absence, that Mr Livesey had conspired with Ms Bacon.

When the Bar Association moved to strike Mr Livesey's name from the roll, his counsel, LJ (Bill) Priestley QC, asked the President and Reynolds JA to disqualify themselves because of their prejudgment of the barrister's conduct and their adverse findings about Ms Bacon's credit. It was apparent from the start of the case against Mr Livesey that Ms Bacon would be a material witness.

But Moffitt P and Reynolds JA declined to disqualify themselves, asserting that no fair-minded observer would entertain a reasonable apprehension that the views of the two judges as expressed in the Bacon case might result in the proceedings against Livesey being affected by reason of prejudgment.

The court, constituted of Moffitt P, Reynolds and Robert Hope JJA, proceeded to hear the case and ordered that the barrister's name be struck from the roll. The responses of Moffitt P and Reynolds JA to Priestley

2 *Bar Association (NSW) v Livesey* [1982] 2 NSWLR 231.

during argument in the application that they disqualify themselves were sarcastic, contemptuous and personally abusive of counsel. As observers saw it, the conduct of the two judges, particularly Moffitt P, was a disgraceful display of judicial savagery. The High Court looked at the issue more rationally, and said there was a reasonable apprehension of bias, and the judgment was set aside.[3]

Apart from the conduct of the two judges on the application that they disqualify themselves, and in refusing to leave the case against Livesey to a court differently constituted, the case was marked by overt hostility displayed by Moffitt P and Reynolds JA towards the young barrister. Whether or not the finding of misconduct was justified, Reynolds JA (supported by the President) weighed in with an extraordinary diatribe, telling the world that:

> This young man has no concept of the "noblesse of the robe", the collegiate pride of a learned profession. … He has no chambers in the accepted sense, he owns no wig and gown, possesses a minimal library and has distanced himself from his colleagues in the profession.[4]

Whatever was meant by the "noblesse of the robe", it may just have been that Livesey did not have enough money to obtain chambers, a library or a wig and gown, and their absence from his possessions did not necessarily denote a character defect. But the case was not atypical of the approach to litigation by the then New South Wales Court of Appeal.

Things changed significantly when Kirby was appointed. And that is because of his untiring efforts to have cases before him attended by courtesy and good humour, always in the context of his enormous industry. I will return to the subject, but these features of Kirby's approach to the judicial task stayed with him in the High Court.

DENNIS MAHONEY'S VIEW

As to the change in the Court of Appeal upon Kirby's appointment, Dennis Mahoney, who succeeded him as President, said this, upon the recent unveiling of the portrait of Michael Kirby in the President's Court:

> During the Presidency of Michael Kirby things were achieved which will be, and should be, remembered. …
>
> During the Kirby Presidency there was a change in the kindness … the courtesy … shown to the Bar. In earlier times, when I was in practice at the Bar, one did not expect kindness from the Bench. That was

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3 *Livesey v NSW Bar Association* (1983) 151 CLR 288. The Bar Association pursued its application, and Livesey consented to his name being removed from the roll, upon condition that no finding of dishonesty be made against him. The Bar Association and the court agreed to his condition.

4 *Bar Association (NSW) v Livesey* [1982] 2 NSWLR 231 at 262.

> not the custom. Those who remember their appearances before Sir Alan Taylor, Sir Frank Kitto and later before Sir Garfield Barwick will understand what I mean. The Court of Appeal, understandably perhaps, adopted a similar ethos. The Moffitt Court believed that one procured most help from the Bar by the whip rather than a kind word. Perhaps that was right.
>
> Under Kirby's Presidency that changed. The Court of Appeal became a different place. There was courtesy amounting often to kindness. I do not argue whether this was a good thing. One may argue for and against discipline. But under the Kirby Presidency the ethos of the Court changed. And a patient courtesy in a Court is no small thing. For myself I found the Court to be a more pleasant place in which to be.[5]

Mahoney was a black and white lawyer and no bleeding heart, but he had no difficulty in recognising Kirby's qualities as President. He went on to discuss the phenomenon of tea and raisin toast:

> And then was the subtlety of Hot Raisin Toast. During the Kirby Presidency two things changed. Under the *Supreme Court Act* the control of the management of the Court is given initially to the President. In pre-Kirby times that power was exercised by the President according to its terms. Essentially the members of the Court were told what the President had decided should be done. …
>
> Kirby initiated a change in the control of the Court. He introduced a form of consensus. The Judges met every two or three weeks and discussed what was to happen, and discussed it, before it happened. To an extent the Judges assumed a responsibility for what happened in the Court. …
>
> As you will understand, these were matters of some delicacy. How does one lead a Judge to allow his colleagues to peer into the processes of his judgment writing? Subtlety was required, and subtlety was achieved, by the provision by the President of tea and hot raisin toast. One can boast one's judgmental achievements or confess what has happened to a judgment more easily in a context of tea and hot raisin toast.[6]

It was, Mahoney concluded, a good time.[7]

CRITICISM OF APPOINTMENT TO COURT OF APPEAL

But it was not easy for Kirby to achieve equanimity in the court and the change in judicial attitudes he strove to achieve. Anyone at the New South Wales Bar in 1984 will remember that Michael Kirby's

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5 D Mahoney (Speech, Unveiling of a Portrait of Justice Michael Kirby, Supreme Court of New South Wales, 19 November 2007): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_19nov07a.pdf (accessed 1 October 2008).

6 Mahoney, n 5.

7 Mahoney, n 5.

appointment was the subject of much criticism, some of it acerbic: he was not qualified for the position; it should have gone to Hope JA; he was appointed by a process of political patronage. His critics were not confined to the Bar; judicial disapprovals, necessarily muted, were also calculated to erode his stature.

By sheer industry and politeness and courtesy, he did, I think, persuade most of his critics to see things his way. Bill Priestley, who was on the Court on Kirby's appointment, remembers the extraordinary hours worked by the new President and, like Mahoney P, well remembers the change for good in the relationship between Bench and Bar.

JUSTICE RODERICK MEAGHER

There is an enduring notion that, when President of the Court of Appeal, Kirby P was constantly at war with Justice Meagher, who was appointed to the court in 1989. It is not hard to imagine tension between the two, having regard to their contrasting views about society and their not inconsiderable egos, but in the majority of cases which they both heard, Meagher agreed with Kirby's judgments. Nevertheless, when Meagher disagreed with some aspect of a judgment written by the President, he was not diffident about saying so.

The first such instance I have found was in Meagher JA's dissenting judgment in a spat between two insurance companies about whether an appeal lay of right, or required the leave of the Court of Appeal.[8] The majority held leave was required because that was the effect of s 103 of the *Supreme Court Act 1970* (NSW). Meagher JA disagreed, in these terms:

> In this matter I have read in draft the President's reasons for his judgment. Unfortunately, I disagree with them. In my view they constitute a powerful argument for what the Act should mean at the expense of giving effect to what the Act actually means, on the assumption that it means what it says.[9]

Calling the result "startling and inconvenient", he said "I am not deterred from this conclusion by the circumstance that in the past the Court of Appeal has stumbled into the opposite conclusion in four cases …"[10]

In 1991 a well-known Sydney identity called Neddy Smith, serving a life sentence for murder, refused to give evidence for the Crown in a murder trial. The trial judged fined him $60,000 for contempt. Smith had no assets and earned $12 per week as a gaol sweeper. Kirby, as President of the court, held the fine was excessive because the appellant had no prospect of ever paying it. Mahoney and Meagher JJA disagreed,

8 *National Employers Mutual General Insurance Association Ltd v Manufacturers Mutual Insurance Ltd* (1989) 17 NSWLR 223.

9 (1989) 17 NSWLR 223 at 242.

10 (1989) 17 NSWLR 223 at 242.

Meagher JA rather stridently saying he disagreed with the President's judgment. Strongly. He went on to say Smith's contempt:

> was contumelious as well as gross. His Honour, with some benevolence, fined him no more than $60,000.
>
> If we had the power to do so, I think we should increase the fine. But he has appealed against the amount of the fine, alleging it to be excessive – on no better ground than he has had an excess of impecuniosity. If he was rich enough to commit a calculated contempt of court, he is rich enough to bear the consequences.[11]

On another occasion Meagher JA agreed with the other two judges, including Kirby P, in the result, but expressed a rather strong view about the decision of the majority to permit the appellant to present constitutional argument. The majority sowed the wind, he said, but the whole court reaped the whirlwind. He went on to say:

> It now appears that all the constitutional arguments had the additional features of being entirely unmeritorious, a fact which did not prevent learned counsel for the respondent discussing them at meticulous length and haud sine taedio.[12]

Targets of Justice Meagher's scorn were not restricted to judges and lawyers. He was quite catholic in that regard. On one memorable occasion he referred to the evidence of actuaries in a personal injury case, saying they:

> threw themselves into the task of forecasting the events of the next sixty one years like ancient Etruscan soothsayers examining the entrails of sacrificial birds.[13]

But it must be said that the Court of Appeal continued to work well and, largely because of Kirby P's influence, it remains a civilised forum. As Michael Kirby recently said to me, in the context of his relationship with Meagher JA:

> Like many professional relationships ours did not blossom into a deep friendship. Too many differences in values and life's experiences for that. But, in its heyday, it was cordial, mutually teasing and often quite enjoyable. Judges ordinarily have little to do with the appointment of their colleagues. That is why they should not feel guilty if they do not love each other. Sometimes throwing them together in a small institution creates an explosion (like Starke, Evatt and McTiernan in the 1930s High Court). Sometimes it leads to simmering dislike and icy coldness (Barwick and Murphy). Usually there are ups and downs. Rather like a family really.

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11 *Smith v The Queen* (1991) 25 NSWLR 1 at 24.

12 *Della Patrona v Director of Public Prosecutions (Cth) (No 2)* (1995) 38 NSWLR 257 at 273.

13 *Government Insurance Office (NSW) v Rosniak* (1992) 27 NSWLR 665 at 699.

KIRBY'S INDUSTRY

Michael McHugh, recently retired from the High Court, throws further light on Kirby's extraordinary industry. Speaking about Kirby J's approach to writing judgments, he told me:

> His method for preparing judgments indicates an iron discipline. By the time the hearing of a case commences, he has purposively read the judgments in the courts below, the written submissions of counsel, often the Special Leave transcript, and often much of the evidence that is relevant to the appeal with the object of understanding the case conceptually. Shortly after the argument commences he begins to make notes of the argument, but his notation is done conceptually rather than sequentially or linearly. Almost from the commencement of the case, counsel's argument is analysed in terms of the concepts that Michael has derived from his pre-hearing reading. He uses the hearing time to prepare for the drafting of his judgment. From the moment he picks up the papers for an appeal or other hearing in the High Court, all his energies are directed to producing the best judgment of which he is capable.

This will be one of Kirby J's attributes which will be long remembered.

CONSENSUS

The "form of consensus" referred to by Dennis Mahoney can be seen in Kirby's approach, when President, to the problem of disagreement between judges of appeal on an issue in a case where they are equally divided. Section 45(2) of the *Supreme Court Act 1970* (NSW) provides that where judges of appeal are equally divided in opinion, the decision of the Court of Appeal shall be in accordance with the opinion of the Chief Justice or other judge of appeal presiding. Precisely what this means is problematic. For example, what should happen when the presiding judge differs from two others on one issue and, on another issue, the two differ from each other? At all events, Kirby P's approach to the problem was not to pull rank, but to reach consensus, saying in one case:

> Unless it is necessary it offends a sense of justice that a decision should be determined by the accidents of judicial seniority rather than an attempt to find, within the reasons and orders proposed by the judges, the highest common denominator of rational argument.[14]

In this and other cases Kirby acted as mediator; he decided what the highest common factor was and withdrew his proposed orders in favour of the orders proposed by the judge whom he detected to be in that position. I am here quoting from some comments by Justice Keith Mason, then President of the New South Wales Court of Appeal, in a

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14 *Woolworths Ltd v Kelly* (1991) 22 NSWLR 189 at 200.

recent case where the problem arose and in which he examined various possible solutions to what might be an embarrassing impasse.[15]

KIRBY AND ADDRESSES OF COUNSEL

Sometimes counsel will present a lengthy argument while the judge remains motionless and silent, without altering his facial expression throughout. It is rather like addressing an Easter Island statue, wondering whether the statue is interested in, or can even hear, the brilliant monologue to which it is subject. It is difficult to know where one is going (if anywhere) with the argument. I must say that this is not Kirby's style. If anything, he tends to be interventionist, thereby overtly displaying his leaning.

If he takes an early view of a case, as he often does, his tendency is to assist the counsel who is propounding the same view. For example, in the High Court he was kind to me when I argued a case for a respondent woman who had been awarded damages against the State for negligence in respect of an incident during her work as a police officer. Commenting upon my assent to an observation by Hayne J, he said he thought there was "a knife in that particular napkin" – in other words, I should proceed with caution. And he said it again with reference to a comment by the Chief Justice. Regrettably, in spite of his help, we lost, four to three.[16]

SPECIAL LEAVE

To get to the High Court by way of appeal, one must first pass through the gateway called special leave. There are menacing lions in the way. Unlike those in the old fable, they are not chained up, and quite prone to attack. The system was devised to give the court control of the numbers of appeal cases it has to decide. I once told a Bench and Bar dinner that obtaining special leave was no more difficult than climbing the north face of Everest in midwinter. Wearing thongs. That may be an exaggeration, but some two-thirds or more of such applications fail because they are not seen as special. In brief, s 35A of the *Judiciary Act 1903* (Cth) provides the criteria for granting special leave to be:

- any matter the Court considers relevant;
- whether the proceedings involve a question of law of public importance;
- whether the proceedings involve a question of law in respect of which there are different opinions in various courts; and
- whether the interests of the administration of justice generally or in the particular case require consideration by the High Court of the judgment to which the application relates.

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15 *Skulander v Willoughby City Council* [2007] NSWCA 116.

16 *New South Wales v Fahy* [2006] HCA Trans 615 (9 November 2006) at pp 39 and 42.

I have had the melancholy experience of appearing on unsuccessful special leave applications and hearing the dismal formulae "the decision below is not attended with sufficient doubt" or "there are insufficient prospects of success" or "this case is not a suitable vehicle to decide the point" or, implicitly, "please go away and stop wasting our time". I have occasionally obtained special leave but it is not a common event, at least in my experience. Justice Kirby exposed some of the mystical ritual surrounding the judicial approach to such applications, observing:

> Particular justices are reputed to be more amenable to granting special leave than others. My own generosity of spirit is legendary.[17]

I must say that his Honour's reference to himself does not quite accord with my experience, but he does refuse special leave quite nicely. One can leave the court at least feeling that one may still have some future at the Bar. I suppose that is what he meant when he said:

> At the end of an arduous day of special leave applications, the advocates and judges depart. Inevitably, they look back on the dispositions and their performance. Then new cases supervene to banish prolonged or excessive introspection.[18]

He recognises the special leave process for what it is, observing in the same paper:

> Special Leave decisions are particularly burdensome for all who are engaged in them. They place great stress on the parties and their advocates. They also apply pressure to the justices who must make the final decisions. All of us should endeavour to give our best on such occasions …[19]

LENGTHY JUDGMENTS – CRITICISM OF LOWER COURTS

While his fellow judges thought he often took the long way around, on the Court of Appeal Kirby P usually got it right. Bill Priestley remembers being critical of his back-to-basics approach to writing judgments, often delving into many cases for principles already well established. This may have been because Kirby was less experienced in some areas of law than other judges. He also thought (and probably still does) that the court had a duty to educate the profession. In this regard it is relevant to reiterate Priestley's observation that over the years Kirby's writings were increasingly referred to by text writers, more so than other Court of Appeal judges.

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17 M D Kirby, "Maximising Special Leave Performance in the High Court of Australia" (2007) 30(3) *University of New South Wales Law Journal* 731 at 747.

18 Kirby, n 17 at 751.

19 Kirby, n 17 at 752.

An example of his penchant for historical exegeses is his judgment in Neddy Smith's case, already referred to. In discussing the law of contempt, and the validity of excessive fines, he travelled back to the *Bill of Rights* of 1688, then came forward to the *Eighth Amendment to the Constitution of the United States*, from where he took the reader to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, the *American Convention on Human Rights*, the *African Charter of Human and Peoples' Rights* and the *International Convention on Civil and Political Rights*, and many cases in between. I have already quoted Meagher JA's view of the case; his judgment occupied about one-quarter of one page. Mahoney JA also saw no problem with the fine imposed on Smith, observing that Smith's refusal to give evidence struck at the heart of the criminal law, and that a gaol term in lieu of a fine would be derisory, having regard to the fact that Smith was already serving a life term.[20]

The same sort of observations about Michael Kirby's judgments may fairly be said about some of his High Court judgments, which will no doubt be explored at some length by other contributors to this book. But if some history is needed about a legal subject it can generally be found in Kirby's writings.

Keith Mason raised the delicate issue of how far judges on appeal should offer criticisms of judges in inferior courts, which go beyond mere criticisms of the judgments under consideration. Judges, he said, of all people ought to know the meaning of their words. He said:

> The High Court and intermediate courts of appeal occasionally adopt personally offensive language when detecting and correcting error below.[21]

Mason went on to give examples of unnecessarily strident criticism, pointing out the effect it may have personally on the judges so criticised. On his retirement from the Presidency of the Court of Appeal on 30 May 2008, Mason expanded upon his earlier remarks. He was bitterly critical of the High Court's judgment in *Farrah Constructions Pty Ltd v Say-Dee Pty Ltd*[22] saying, amongst other things:

> New and now binding rules of precedent that were ushered in on this occasion declare that the earlier decision of any intermediate appellate court in Australia is now generally binding on all others. So too are the "seriously considered dicta" of a majority of the High Court in any case, regardless of its age. These rules and the High Court's response to this Court of Appeal's erroneous though genuine attempt to develop legal principle go well beyond giving effect to the principle of a unitary

20 *Smith v The Queen* (1991) 25 NSWLR 1 at 23.

21 K Mason, "Throwing Stones: A Cost/Benefit Analysis of Judges Being Offensive to Each Other" (Paper, Judicial Conference of Australia colloquium, 6 October 2007): http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_mason061007 (accessed 30 September 2008).

22 (2007) 230 CLR 89.

> common law of Australia. They have been read throughout the country as the assertion of a High Court monopoly in the essential developmental aspect of the common law.
>
> In the same appeal, the High Court resolved an issue of controversial legal principle with a haughty declaration that it did not propose to examine a recently published critique on point emanating from a current English law lord or to examine other legal writing which "might offer support" for the legal proposition suggested by the Court of Appeal that the High Court proceeded to reject in categorical terms.
>
> In combination, these discouraging rules of process for inferior courts and this adopted methodology for the High Court itself will have the effect of shutting off much of the oxygen of fresh ideas that would otherwise compete for acceptance in the free market of Australian jurisprudence. In my respectful opinion, decision-making by these blinkered methods will be stunted unnecessarily, whether it proceeds in the particular to the affirmation of older rules of law or to their principled development. If lower courts are excluded from venturing contributions that may push the odd envelope then the law will be the poorer for it.
>
> In short, my plea to the High Court is to keep other appellate courts in Australia in the loop.

Justice Kirby did not sit on the *Farah* case. A feature of Kirby J's judgment writing is that he recognises the problems articulated by Mason, and is slow to offer unnecessary criticism of the judgments of intermediate courts, whether or not they were correct. He has from time to time rejected such criticism when made by other judges on the High Court. For example, in *Travel Compensation Fund v Tambree*,[23] Kirby J declined to join with his fellows in criticising the New South Wales Court of Appeal for taking account of a "value judgment" in a negligence action. As the Chief Justice put it, (supported by Gummow and Hayne JJ):

> To acknowledge that, in appropriate circumstances, normative considerations have a role to play in judgments about issues of causation is not to invite judges to engage in value judgments at large. The relevant norms must be derived from legal principle.[24]

Justice Kirby dealt with this in some detail, asserting that the court's observation criticising the references in the Court of Appeal to "value judgments" was unnecessary, that the Court of Appeal did no more than use language repeatedly deployed by justices of the High Court, and that the criticism of the court below by the High Court was unwarranted.[25]

23 (2005) 224 CLR 627.

24 *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 at 639 [29].

25 (2005) 224 CLR 627 at 647-648 [61].

Much the same attitude can be found in *Smits v Roach*[26] and *Roads and Traffic Authority (NSW) v Dederer.*[27]

In fact, Kirby's view about the limits of fair criticism of judges of inferior or intermediate courts was articulated much earlier, in the Court of Appeal, in a case where it was apparent a District Court judge had misconducted himself.[28] Whilst acknowledging that it was unnecessary to be too tender about the sensibilities of judges, and that where a judge's conduct fell short of expected standards it is proper that the fact be placed before the appellate court, Kirby said the appellate court for its part should exercise restraint in expressing criticism of the conduct of the primary judge. It was not a proper concern of an appellate court to offer personal criticism of, still less to denounce, the judge.

Justice Kirby went on to overturn the judgment appealed against, holding the appellants had established a reasonable apprehension of bias. Justice Meagher was rather less restrained, saying, looking at the transcript:

> [T]he most charitable conclusion one can draw is that his Honour abandoned any pretence to appear unprejudiced; a more sinister inference would be available.[29]

KIRBY IN DISSENT

The kindness that Justice Kirby has shown to judges of inferior courts stands in contrast to some of his observations about judgments of other sitting High Court judges. Some say his views about constitutional interpretation are heretical. That is not a subject for this chapter, but perhaps I can be forgiven for passing on a comment made to me by Michael McHugh:

> I am not sure whether he would agree with the view that he interprets the Constitution as if it was enacted this morning, but that is the effect of his constitutional philosophy.

The contrast in constitutional interpretation between Justice Kirby and other High Court judges is dealt with succinctly in a paper prepared in 2003 by the late Justice Selway of the Federal Court.[30] For my purposes it is interesting to consider the frequency with which Justice Kirby on the High Court has dissented, and why he is capable of such trenchant criticisms of his fellow judges when he believes they have sacrificed principle for pragmatism.

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26 (2006) 227 CLR 423.

27 (2007) 81 ALJR 1773.

28 *Goktas v Government Insurance Office (NSW)* (1993) 31 NSWLR 684.

29 (1993) 31 NSWLR 684 at 692-693.

30 B M Selway, "Methodologies of Constitutional Interpretation in the High Court of Australia" (2003) 14 *Public Law Review* 234.

Justice Kirby has the highest dissenting rate in the history of the High Court. Speaking in 2007, he observed that as the final appellate court in this country, disagreement is as irresistible as it is common; that our *Constitution* is often obscure, and statutory and constitutional language often unclear.[31] It is misleading therefore to look simply at the rates of dissent and agreement amongst the justices of the High Court. He went on to observe:

> A dissenting opinion is described as an appeal to the future. In the United States, it can now be seen that the dissents of Justices Curtis and McLean in *Scott v Samford* (on slavery); of the first Justice Harlan in *Plessey v Ferguson* (on racial segregation); of Justices Roberts, Murphy and Jackson in *Korematsu v United States* (on wartime Japanese internment); and of Justices Black and Douglas in *Dennis v United States* (on anti-communist measures) redeemed the serious errors of constitutional decision-making in the majority opinions in those cases. The dissentients offered a beacon to a later, more enlightened, time when the errors of the majority would be acknowledged and corrected.[32]

Whether history will show him to have been right or wrong, Kirby's writings reflect the passion with which he sees the errors of others on the High Court in matters of high principle. To give some examples, in *Al-Kateb v Godwin*[33] the issue for determination was whether s 196(1) of the *Migration Act 1958* (Cth) authorised the indefinite detention of an unlawful non-citizen even if his removal from Australia was not reasonably practicable in the near future. Justice Kirby (along with Gleeson CJ and Gummow J) dissented from the majority, holding that the section did not have that extreme effect. He said:

> I dissent from the majority view in this case. Potentially, that view has grave implications for the liberty of the individual in this country which this Court should not endorse. … This Court should be no less defensive of personal liberty in Australia than the courts of the United States, the United Kingdom and the Privy Council for Hong Kong have been, all of which have withheld from the Executive a power of unlimited detention.[34]

In *Re Aird; Ex parte Alpert*[35] the High Court was asked to rule upon the validity of s 9 of the *Defence Force Discipline Act 1982* (Cth) insofar as it applied to permit the trial by general court martial, sitting in Brisbane, of an Australian soldier for rape, which was committed in Thailand while he was on recreational leave. The issue was whether he should have

31 M D Kirby, "Consensus and Dissent in Australia" (10th Annual Hawke Lecture, University of South Australia, 10 October 2007): http://www.unisa.edu.au/hawkecentre/ahl/2007ahl_kirby.pdf (accessed 1 October 2008).

32 Kirby, n 31.

33 (2004) 219 CLR 562.

34 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 615-616 [148]–[149].

35 (2004) 220 CLR 308.

been tried by a civil court in Thailand, or not at all. The majority found for the Commonwealth. In his dissenting judgment (at [145]–[146]), Kirby J observed that under the *Constitution* the armed services are not divorced from civil law. Indeed, he said they exist to uphold it; and it was the duty of the High Court to maintain the strong civilian principle of the *Constitution*. He went on to say:

> It is particularly important to adhere to this time-honoured approach at a time when increased demands are being made for greater executive and legislative power.[36]

Justice Kirby propounded the view, as in *Al-Kateb*, that the court must adhere steadfastly to the protection of basic civil rights in Australia's constitutional arrangements.

Combet v Commonwealth[37] was the case in which the majority upheld the validity of the expenditure by the government on advertising its "workplace relations package". Justice Kirby was in no doubt what the result should have been, remarking, with some acidity, that:

> To dispose of these proceedings, as the joint reasons do, on an unconvincing interpretation of the Appropriation Act, alien to the *Constitution* and to Australian parliamentary practice, advanced by no party, hypothesised from the Bench and answered on the run, is an unreasonable way of concluding such an important controversy. It involves the Court in a departure from its own past unanimous authority and from its clear constitutional duty in this case.[38]

The second case about the "workplace relations package" was when the court, by majority, upheld the Commonwealth's power to enact the *Workplace Relations Amendment (Work Choices) Act 2005*.[39] It was, they said, authorised by the corporations power conferred by s 51(xx) of the *Constitution*. Again, Kirby J left no doubt about where he stood, saying:

> The view now endorsed by the majority of this Court effectively discards a century of constitutional doctrine. It ignores the express structure of the *Constitution* and the language of the two heads of constitutional power in question in this case, each of equal validity and effect. I refuse to accept that our predecessors in this Court were so blind as to the true meaning of the *Constitution* that their decisions, in such number and detail over the past hundred years, were pointless exercises in constitutional futility. Yet that is the hypothesis inherent in the decision now reached by the majority.[40]

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36 *Re Aird; Ex parte Alpert* (2004) 220 CLR 308 at 354 [146].

37 (2005) 224 CLR 494.

38 *Combet v Commonwealth* (2005) 224 CLR 494 at 616 [294].

39 *New South Wales v Commonwealth* (2006) 229 CLR 1.

40 (2006) 229 CLR 1 at 243-244 [608].

Justice Kirby was no less trenchant in his treatment of the majority in the control orders case, *Thomas v Mowbray*,[41] where he went so far as to accuse the majority of an "unfortunate surrender … to demands for more and more governmental powers, federal and State, that exceed or offend the constitutional text and its abiding values".[42] The court was, he said, passing through a "constitutional era of laissez faire". Going back to his philosophy that dissent today may well be the law tomorrow, he said that:

> Whereas, until now, Australians, including in this Court, have generally accepted the foresight prudence and wisdom of this Court and of Dixon J in particular, in the *Communist Party Case* … they will look back with regret and embarrassment at this decision when similar qualities of constitutional wisdom were demanded but not forthcoming.[43]

CONCLUSION

In this book there will be much said about other aspects of Michael Kirby as a judge. There will be technical dissections of some of his writings and perhaps other chapters will overlap mine. There will be talk by press commentators about Justice Kirby's perceived activism (whatever that really means) and some will probably see the book as an exercise in hagiography in respect of a judge whom I have seen described as "a darling of Labor's left". For my part I see him as an honest, courteous, competent and conscientious judge who drives himself to a point beyond the requirements of duty. I do not think we are entitled to expect more.

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41 (2007) 233 CLR 307.

42 *Thomas v Mowbray* (2007) 233 CLR 307 at 442-443 [386].

43 (2007) 233 CLR 307 at 443 [387].

Chapter 23

JUDICIAL VALUES

Justin Malbon

> *Some lawyers enjoy the intricate intellectual problems which can arise where there is a conflict or disparity of jurisdiction. Occasionally, a party may take advantage of them. But few ordinary citizens see their merits. Most parties discern no beauty or value in conflicts of this kind. If this amounts to an "unthinking resort to" slogans about "arid jurisdictional disputes", I must bear that label.*[1]

Judgments are the offspring of legal analysis and judicial values. Legal analysis is well enough understood; it is taught in law schools, appears in legal texts and is advanced in legal arguments before courts. It is also referred to as "standard" legal or rule of law analysis. It applies precedent, rules and principles for the interpretation of the common law, the *Constitution* and statutes. Judicial values, or "extra-legal" reasoning, on the other hand, are more enigmatic and less well understood. They reflect judicial policy norms, and can be understood as ad hoc judicial policymaking.

This chapter is interested in Kirby's judicial policy norms and values as expressed in his judgments. Ten of his decisions will be examined; seven deal with commercial law issues and three deal with non-commercial issues, such as immigration and the administration of justice. Commercial cases are selected because they illustrate the pervasiveness of judicial policy norms – a claim that judges apply policy norms in, say, constitutional cases is not as surprising as claiming that they are equally applied in commercial cases. Judicial policy norms in fact pervade most, if not all, types of cases. The three non-commercial cases examined offer a contrast to the commercial cases. Some examples of policy norms are statements that the majority ruling will encourage unscrupulous behaviour by corporations,[2] that a particular ruling has

1 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 603 [193] per Kirby J.

2 *Butcher v Lachlan Realty* (2004) 218 CLR 592 at 644 [172].

grave implications for the liberty of the individual,[3] and that cross-vesting legislation is necessary to avoid inconvenience and expense.[4]

The purpose of examining Kirby's judgments is to gain insights into the policy norms that appear to underpin the judgments examined in this chapter. His extra-legal commentary shines a torchlight on his value-sets, including the pragmatic considerations he takes into account, his intuitions about justice, and the untested or unverified assumptions he makes. In addition, this chapter offers a way of identifying and categorising these policy norms, which may aid a more comprehensive analysis of High Court judgments in the future. Given the limited scope of this study, the claims made and the insights offered will be confined to the cases examined, although speculations will be offered about the nature of Kirby's policy norms more generally.

Judicial values are the dark matter of judgments. This metaphor refers to the astrophysical theory that the universe is primarily made up of unobservable matter of unknown composition – the dark matter. The observable universe (including physical matter in the form of stars and planets) forms a relatively small proportion of the universe. Without dark matter the universe would be a very different place, and the Earth would not exist as it does today (if at all). Taking this as an analogy, the visible law – the law as written and appearing in statutes, the *Constitution*, textbooks, judgments and so on – only accounts for a relatively small proportion of the law as a whole. It does not account for the unarticulated legal values, understandings, procedures, expectations, assumptions, historical experiences, conventions and behaviours of the actors within and outside the legal system. These unwritten components together form the greater proportion of the law, yet these cannot be seen or clearly defined – although jurisprudential scholars try. Dennis Denuto, the lawyer hero in the 1997 Australian movie *The Castle*, was not wide of the mark when he desperately tried to articulate a legal principle that would save his client's house from compulsory acquisition. He explained to the judge that the law protecting his client is in the *Constitution*'s "vibe". Denuto actually got the vibe wrong, as there is no absolute immunity from compulsory acquisition, but he was correct about the existence of legal vibes. Whether describing it as the law's vibe, or its dark matter, or its extra-legal components, we are more or less describing the same thing.

Correlatively, judgments only offer a limited account of the thinking and motivations leading to judges' ultimate rulings. As we would expect, a fuller account is given of the "visible" law in judgments. The dark matter that underpins rulings is only mentioned in passing or tangentially, if at all. There are possibly three reasons for this: first,

3 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 616 [148].

4 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 603 [193].

judges are not necessarily conscious of all the influences and drivers that motivate their rulings; second, they are operating within a judicial and legal system that constrains their personal preferences; and third, critics (including politicians, lawyers and academics) lie in wait, ready to decry judicial overreach if a court appears to stray from its (legalistic) mandate. In response to criticisms of overreach, judges invariably adopt a kind of dual personality. A judge adopts the pose of the impartial arbiter of a dispute between the parties and of a disinterested diviner of "the law". Yet the appellate judge stands at the fringes of the known law and is thus compelled, when making a decision, to base it on certain (articulated and unarticulated) policy assumptions. In this way the judge to some degree or another develops the law – that is to say, creates the law. Thus, the judge cannot avoid engaging with policy-making. This engagement with policy is essentially "extra-legal".

Critics are ready for judges who openly mention the extra-legal considerations upon which they base a ruling, often accusing them of acting politically or unduly imposing personal inclinations and prejudices on the ruling. These critics, however, miss the point. The issue is not whether judges *should* use extra-legal analysis, it is *how* they use that analysis. What should be at issue are the unquestioned and unverified assumptions and presumptions that underlie extra-legal reasoning. The analysis of a number of Kirby's judgments in this chapter seeks, in part, to enliven a broader debate about the extra-legal reasoning of High Court judges.

THE EXTRA-LEGAL ATTITUDES OF JUDGES

There is a burgeoning field of study of judicial attitudes, particularly in the United States. Empirical methodologies are deployed to gain insights into judicial attitudes and behaviour. Goldman, for instance, studied the attributes of 74 United States federal appeals court judges and their judicial voting behaviour during two consecutive time periods (1961-1966 and 1966-1971, covering 2,911 cases), concluding that judges were more affected by their political stance, or the previous roles they played within the legal system, than by legal precedent.[5] Segal and Cover claimed an 80 per cent success rate in predicting judicial rulings by comparing a United States Supreme Court judge's political stance or attitude prior to appointment with the judge's positions while on the court.[6] The study showed that judicial reasoning was bound neither by precedent nor the doctrine of judicial restraint.[7] Segal and Epstein, et al, tested to find

5 S Goldman, "The Effect of Past Judicial Behaviour on Subsequent Decision-making" (1979) 19 *Jurimetrics Journal* 208.

6 J A Segal and A D Cover, "Ideological Values and the Votes of US Supreme Court Justices" (1989) 83 *American Political Science Review* 557 at 561.

7 Segal and Cover, n 6 at 562.

whether United States Supreme Court judges would follow precedent if they disagreed with it, finding that 91 per cent of the judges' rulings conformed to their previously revealed preferences despite contrary precedent. Rohde and Spaeth claimed from their study that they were able to achieve an 85 per cent success rate in predicting judicial rulings after categorising the judges' "values".[8]

These studies unsettle the assumption that United States appellate judges, at least, comply with the dictates of rule of law or "legal" analysis approaches.[9] It appears that extra-legal factors play a critical role in the reasoning and outcomes of rulings.

Can it be concluded, then, that judges simply conform to their own values and political stances? More recent United States commentary and analysis suggest the picture is more complex than this. Kritzer and Richards claim that the activities of judges must be understood within the institution that they have created, namely the court system and its jurisprudence.[10] The law, they say, "like other institutions, is created by actors (justices) with political goals (attitudes) whose subsequent decisions are then in turn influenced but not determined by the institutional structure they have created".[11] Ultimately, it is not in the interests of appellate judges or the judicial institutions in which they serve for them to simply make rulings that comply with their personal preferences, policies and politics because they seek to create jurisprudential regimes to provide guidance to other political actors and to themselves.[12] Thus:

> The goal here is consistency, both for themselves and for other political actors: As the justices decide a case, they reason about how the particular facts of the instant case fit with the principles of the relevant regime they have established in order to promote consistent treatment of similar situations. This reasoning process also enables the justices to make appeals to their colleagues that are more than just first-personal rationalizations of their own policy preferences.[13]

Appellate judges as actors within the legal system seek to communicate with other judges within the system, and with people and institutions

8 D W Rohde and H J Spaeth, *Supreme Court Decision Making* (W H Freeman, San Francisco, 1976) p 157.

9 See generally J A Segal, L Epstein, C M Cameron and H J Spaeth, "Ideological Values and the Votes of US Supreme Court Justices Revisited" (1995) 57 *Journal of Politics* 812; B E Butler, "Legal Pragmatism: Banal or Beneficial as a Jurisprudential Position?" (2002) 3 *Essays in Philosophy: A Biannual Journal*: http://www.humboldt.edu/~essays/butler.html (accessed 4 December 2008).

10 H M Kritzer and M J Richards, "The Influence of Law in the Supreme Court's Search-and-Seizure Jurisprudence" (2005) 33 *American Politics Research* 33 at 35.

11 Kritzer and Richards, n 10.

12 Kritzer and Richards, n 10.

13 Kritzer and Richards, n 10. See also S A Lindquist and D E Klein, "The Influence of Jurisprudential Considerations on Supreme Court Decisionmaking: A Study of Conflict Cases" (2006) 40 *Law and Society Review* 135.

outside the system, including the legislative and administrative arms of government. Judges are well aware that at the end of the day a court is no match for the administrative arm of government in terms of the capacity to exercise raw power. The administration has enormous resources: armies of bureaucrats who can research and develop policies and advise the legislature on the preparation of new laws; and officials, inspectors, police officers, prison officers, and more besides, to ensure the implementation and enforcement of laws and regulations. A court is almost solely reliant on non-judicial players to ensure its orders and rulings are complied with.

The way in which judges communicate with other actors within and outside the legal system must be coherent, in the sense of being consistent and credible. If judges were merely to give effect to their personal prejudices and preferences it would undermine the credibility of judicial communication. In this sense courts are not mini-legislatures designed to give effect to the policy preferences of judges. Richards and Kritzer contended on the basis of their empirical analysis that courts are quite distinct from the legislature because of the effect of the *law* in decision-making. They did not, however, reject the importance, or even the dominance, of the judges' attitudinal influences on the United States Supreme Court's decisions.[14] In their view, attitudes influence the development of law, but law can also affect the decisions of the court, and these effects are not purely attitudinal.[15]

In any event, the attitudes and values of a particular judge are not as neatly definable as might first appear. These attitudes and values are fluid, nuanced and dynamic (in the sense of changing over time and according to the circumstances before the judge) and are constrained by the very role of being a judge. A judge's value-set may itself conflict, in which case a judge may be forced to prioritise his or her competing values. For example, Kirby J places a high value on human rights, but he also places a high value on maintaining the integrity of the institutions of justice. What if these two values conflict, which appeared to be the situation in *Minister for Immigration and Multicultural and Indigenous Affairs v B*? In that case Kirby J's concerns for preserving the credibility of the institution of justice trumped concerns about human rights.[16]

The phenomenon of conflicting values was examined by United States academic Braman, who created mock briefs with identical legal arguments that raised issues regarding abortion and free speech for both the appellant and the respondent. The attitudes of 150 law students in the study were ascertained before they were each given a mock brief. Their prior attitudes were tested against the way in which they applied their legal reasoning

14 M J Richards and H M Kritzer, "Jurisprudential Regimes in Supreme Court Decision Making" (2002) 96 *American Political Science Review* 305 at 305.

15 Richards and Kritzer, n 14 at 307.

16 *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365.

to the brief.[17] Braman found that the influence of attitudes on legal reasoning was real, but not without boundaries. The decisions were not determined by wholly legal or wholly attitudinal factors but a complex interaction of the two[18] – for example, many of the students, when faced with a conflict between the principles of free speech and their views on abortion, chose free speech.[19] Braman found that the facts of a particular case and its legal context create decision environments in which legal actors are subject to different levels of constraint.[20] Her study, she suggests, should prompt judicial scholars to move beyond the false choice between legal and attitudinal determinants of behaviour toward a more sophisticated understanding of the conditions under which attitudes are likely to impact on legal decision-making.[21]

Judicially selected policy norms are therefore unlikely to be a straight-set reflection of a judge's personal politics, those values being invariably complex, dynamic, conflicting and nuanced. Although personal values play an important role, there are restraints on these values, including the institutional setting in which judges perform their tasks. Judges are often confronted with balancing their own competing policies and values. These values interact, or converse, with the visible law – which itself is dynamic and complex.

JUDICIALLY SELECTED POLICY NORMS

What, then, is meant by "judicially selected policy norms"? Schacter says that they do not appear as general rules or default principles, rather they are better understood as a kind of ad hoc, judicial policymaking, in which a judge engages in policy selection and analysis.[22]

The assumption is often made that a judge's approach to constitutional and statutory interpretation is best understood by categorising the judge as a textualist, intentionalist, purposivist or dynamic interpretationist.[23] The further assumption is made that a textualist honours legal reasoning and distains extra-legal reasoning. A judge adopting the other methods of interpretation is assumed to be more likely to adopt extra-legal reasoning than a textualist. Schacter debunked these assumptions in her study of

17 E Braman, "Reasoning on the Threshold; Testing the Separability of Preferences in Legal Decision Making" (2006) 68 *Journal of Politics* 308.

18 Braman, n 17 at 319.

19 Braman, n 17 at 319-320.

20 Braman, n 17 at 319.

21 Braman, n 17 at 311.

22 J S Schacter, "The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond" (1998) 51 *Stanford Law Review* 1 at 25.

23 Schacter, n 22 at 5. See also J Malbon, "The Race Power Under the Australian Constitution: Altered Meanings" (1999) 21 *Sydney Law Review* 80 at 81-83.

45 statutory interpretation decisions of the United States Supreme Court during the October 1996 term. Her study showed:

> Moreover, although the use of judicially-selected policy norms is in clear tension with the rhetorical claims of textualism, these norms cut across the methodological divides on the Court. The professed textualists displayed no reluctance to make arguments of this kind. Despite his attack on the use of "common law" methods in statutory interpretation, Justice Scalia, for example, wrote several opinions in which he selected a policy norm and argued against an interpretation that would undermine the norm. Similarly, Justice Thomas is often regarded as sympathetic to textualism, but he also freely used judicially-selected policy norms in several opinions. And arguments of this kind appear repeatedly in cases that cite no legislative history.[24]

Thus, taking interpretative categorisation at face value distracts us from taking proper account of the "substantial residual policymaking discretion retained by judges marching under any interpretive banner".[25] Indeed shifting the focus to judicial policy-making:

> … suggests that the use of legislative history and other interpretive resources should be assessed not for their capacity to reveal accurately a singularly correct original meaning, but instead for their ability to advance the more eclectic, policy-oriented process of assigning meaning to ambiguous legislative directives.[26]

Textualists invariably claim (both implicitly and explicitly) that they are acting in a thoroughly legal way, which is to suggest that they are largely or totally untainted by extra-legal considerations. This appeal to legalism ultimately has the potential to mislead lawyers and other observers. Legalism is by its very nature covert, thereby misleading and deluding lawyers and legal academics alike.[27] They believe their legal training equips them to think logically and provides them with the intellectual tools to deal with a complex world by stripping a problem, any problem, down to its essentials.[28] Scheingold cautions that this implicit worldview is so flawed as to be dangerous because "it is so seductive and effective in ignoring its own substantive assumptions".[29] The very covert nature of legalism diverts attention from (or pays no attention to) the underlying assumptions upon which legal analysis is built.

Why then do the textualists and others need to be so covert, and so devious? The reasons are in part due to a central paradox a judge faces. The law is a massive, lumbering, complex set of rules, doctrines, statutes, words, opinions and perspectives, some aspects of which are clearer and

24 Schacter, n 22 at 25-26.
25 Schacter, n 22 at 6.
26 Schacter, n 22 at 6.
27 S A Scheingold, *The Politics of Rights* (Yale University Press, New Haven, 1974) p 161.
28 Scheingold, n 27, p 161.
29 Scheingold, n 27, p 179.

more defined than others, and almost none of which is static. The judge is invariably confronted with the uncertain aspects of the law, which demand that he or she exercise the somewhat mystical qualities of good judgment, fairness and intellect. These qualities necessarily demand the exercise of extra-legal values and reasoning. But in performing this role, the judge can easily overreach. A judge, believing himself or herself to be exercising good judgment, could easily be perceived by the parties and observers to be indulging in personal whims and fancies about what ought to be. Such perceptions by a sufficient number of observers can begin to tease at the edges of the court's credibility as a fair and impartial forum; and the court's credibility is central to its purpose and existence. Judges are therefore faced with the delicate balancing act of applying both legal and extra-legal insights and analysis to arrive at their rulings. Observers appear to be more willing to accept the validity of legal reasoning, and less inclined to accept extra-legal reasoning – hence the judicial temptation to avoid criticism by adopting a mostly legalistic stance in judgments.

If extra-legal reasoning remains in the underworld, it will evade proper analysis and critique. Judicial assumptions that often profoundly affect the outcome of a ruling will remain untested and unverified. This cannot be good for the ultimate ends of a system of law that seeks to deliver justice to the parties and the community more generally.

To understand what law is and what it is doing, then, we need to seek to understand both its legal and its extra-legal character. Schacter recommends that we should begin to focus not on whether judges make or should make policy-oriented decisions when they interpret statutes, but instead on what policy norms, drawn from what sources, judges consult.[30] Thus, it should be asked whether the unquestioned assumptions made by a judge in a particular case are well founded or not. Take, for example, the case of *Hill v Van Erp*.[31] Here the solicitor of a testatrix had an intended beneficiary's husband witness the signing of the will, thereby precluding the intended beneficiary from gaining a half-share of a house. The intended beneficiary sued the solicitor for negligence. Justice McHugh stated extra-legally in his judgment that a ruling for the intended beneficiary would impose a duty in favour of a third party – if the professional person and the client know that the third party would benefit if the professional person had acted appropriately.[32] He said (extra-legally) that imposing such a duty would have significant economic effects because insurers would be bound to increase premiums,

30 Schacter, n 22 at 55. She observed (at 21) that, of the decisions she analysed, judicial policy-making was used in 73% of all the majority opinions and 73% of all opinions combined (majority, dissenting and concurring).

31 (1997) 188 CLR 159.

32 *Hill v Van Erp* (1997) 188 CLR 159 at 213-214.

which would lead to an increase in the cost of professional services.[33] There appeared to be no empirical basis for his assertion, yet it seemed to play significantly upon his mind when he was arriving at his ruling.

Perhaps we should be plain about this from the outset: a judge does not stray from proper judicial process by using extra-legal reasoning; rather, it needs to be admitted that this is central to a judge's task. Judges are required to bring their sense of justice and value-sets to the task of applying the technical skills of constitutional and statutory interpretation and to the explication of the common law. They are required to do more than simply decide upon a dispute between the parties before the court. An appellate court is invariably required to pay close attention to the broader (policy) implications of its rulings. The bare bones of statutory interpretation rules and conflicting precedent are only going to take the judge so far. At some point he or she must reach a decision, which requires more than mere technical legal processing. Given the court's discretionary docket, "the cases decided by the Court are precisely those that cannot be decided through the relatively mechanistic processes".[34] Thus, we as observers of courts, whether as lawyers, academics, the media or the public more generally, need to be aware of the centrality of extra-legal reasoning – and not criticise a judge for deploying such reasoning. Rather we should be prepared to critique the nature of the assumptions that underlie the reasoning.

It is interesting to observe the way in which Kirby J navigates the paradoxical legal and extra-legal worlds in the cases examined in this chapter. He is more candid than most judges about the policy process, and the assumptions and perspectives he adopts to arrive at a decision. Yet he constantly reminds the reader that he is not simply applying his subjective view on the world – he continually asserts that he is paying strict attention to established legal reasoning and processes. There is nothing wrong in that. His concerns about complying with proper legal process are a theme that constantly resurfaces in his judgments – as will be seen below. Nonetheless, it is somewhat refreshing and informative that Kirby J is brave enough to be less covert than other judges about his extra-legal reasoning.

ANALYSIS OF SELECTED CASES

In this examination of the extra-legal commentary in a number of Kirby's judgments, the standard legal analysis in the judgments will be ignored so that attention can be paid to those considerations expressed in the judgments which stand outside legal analysis, yet probably inform his ultimate rulings.

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33 (1997) 188 CLR 159 at 214.

34 Kritzer and Richards, n 10 at 34.

Seven cases are selected which relate to commercial matters, as this is a field that might not be thought of as particularly prone to extra-legal reasoning. The analysis below shows that these judgments are in fact replete with such reasoning. Three non-commercial cases are also selected in order to provide a contrast to the commercial decisions. Justice Kirby has decided a substantial number of commercial cases whilst on the High Court. No attempt is made to undertake a comprehensive analysis of all his commercial decisions; rather, a number of cases that are frequently mentioned in the standard commercial law textbooks have been selected on the assumption that the decisions were of some significance. It cannot, however, be claimed that the selection of cases was systematic, or representative of the reasoning deployed in all of Kirby J's commercial law decisions (let alone his non-commercial law decisions). As a result, no claims are made in this chapter about Kirby J's extra-legal reasoning outside the selected cases. Despite its limitations, this study does offer some tentative insights into his extra-legal reasoning.

The cases selected are: *Al-Kateb v Godwin* (*Al-Kateb*);[35] *Australian Competition and Consumer Commission v Berbatis Holdings* (*Berbatis*);[36] *Butcher v Lachlan Realty* (*Butcher*);[37] *Dow Jones v Gutnik* (*Gutnik*);[38] *Garcia v National Australia Bank* (*Garcia*);[39] *Gibbs v Mercantile Mutual Insurance* (*Gibbs*);[40] *Minister for Immigration and Multicultural and Indigenous Affairs v B* (*MIMIA v B*);[41] *NT Power Generation v Power and Water Authority* (*NT Power*);[42] *Re Wakim; Ex parte McNally* (*Wakim*);[43] and *Sons of Gwalia v Margaretic* (*Sons of Gwalia*).[44] Three of these cases deal with issues under the *Trade Practices Act 1974* (Cth) – *Berbatis, Butcher* and *NT Power*; and two deal with immigration issues – *Al-Kateb* and *MIMIA v B*. The other cases deal with the appropriate forum to sue for internet defamation – *Gutnik*; the liabilities of a loan guarantor – *Garcia*; insurance legislation applying to injuries occurring on the Swan River – *Gibbs*; the priority for recovering debts of a company's shareholders when the company becomes insolvent – *Sons of Gwalia*; and the constitutionality of cross-vesting legislation – *Wakim*.

In the selected cases, the extra-legal reasoning was distilled from the legal reasoning, which was the reasoning that referred to precedent and applied various methods of statutory (and in some cases, constitutional) interpretation. The extra-legal reasoning was that which clearly did

35 (2004) 219 CLR 562.
36 (2003) 214 CLR 51.
37 (2004) 218 CLR 592.
38 (2002) 210 CLR 575.
39 (1998) 194 CLR 395.
40 (2003) 214 CLR 604.
41 (2004) 219 CLR 365.
42 (2004) 219 CLR 90.
43 (1999) 198 CLR 511.
44 (2007) 231 CLR 160.

not conform to legal reasoning, broadly defined. Common themes in the extra-legal reasoning were then labelled according to themes and categories. A number of these themes had similarities to the themes identified by Schacter in her study of United States Supreme Court decisions. She identified categories of policy norms, including those with a fairly sharp ideological edge, such as those embracing federalism values; and system norms that deal with concerns about certainty, predictability, efficiency, administrability, and avoidance of policy anomalies.[45] This study, however, is not restricted to Schacter's categories, but instead attaches labels to each category assessed as best describing the themes revealed in the identified reasoning. The categorisation is more elaborate than Schacter's, and appears as follows:

1.0 raising concerns about the potential real world impact of the ruling;
- 1.1 the potential impact of the ruling on the community generally;
- 1.2 observing what is really going on in the community regarding the conduct the case is dealing with;
- 1.3 how the ruling should act as a warning against future wrong-doing;

2.0 making claims about the proper way the court should perform its duties;

3.0 making claims about the respective roles of the courts and the legislature regarding the development of the law;

4.0 making claims about the proper way interpretation should be undertaken;
- 4.1 interpreting the *Constitution*;
- 4.2 interpreting statutes;
- 4.3 interpretation in an international context;

5.0 outlining Kirby J's values;
- 5.1 constitutional values;
- 5.2 statutory values; and

6.0 outlining Kirby J's judicial intuition.

The potential real world impact of the ruling

The first normative category can be broadly described as one in which Kirby J suggests the court take a reality check. In a number of cases (*Butcher*, *Gutnik* and *Wakim*) he suggests either the majority is misguided because its ruling will have a detrimental effect in the real world, or (when he was in the majority) the ruling is well founded as it will not detrimentally impact the real world as feared by some. In *Berbatis*, he suggested that the majority was not paying sufficient regard to the potential impact of its decision upon the real world in its ruling in favour of a large corporate lessor of retail shops. Justice Kirby predicted

45 Schacter, n 22 at 22.

that other large lessors would read the ruling as a permission to take unfair advantage of the comparative weakness of lessees.[46] In *Butcher*, Kirby J believed the majority was failing to give effect to the purposes of the *Trade Practices Act* by not sending a signal to industry to behave in appropriate ways.

In these judgments Kirby J claims insight into how things really happen in the world outside the courtroom, and to what motivates people's behaviour. These types of claims are hardly unique to Justice Kirby; indeed, they are commonly made by most, if not all, judges in Australia. Typically, a judge claims that her or his reasoning reflects common sense. Alternatively, the judge will claim that she or he understands the commonsense solution the legislature was attempting to achieve through the legislation in contention.[47] Invariably, the judge's understanding of the world, and of common sense, bears a close relationship to her or his normative views about how the world ought to be, and how the court's rulings should alter or direct community behaviour. Schacter reminds us that despite the appeal to common sense and legislative intent, "it would be a mistake to reason from the systemic character of norms like these to a conclusion that they are value-neutral or non-substantive".[48] Usually these normative claims are made without any empirical foundation, but appear to have a critical bearing on the motivations for the judge's ultimate rulings. To some extent the failure to base the reasoning on evidence is understandable because empirical data may be unavailable or difficult to obtain. There is also the ever-present risk that any obtained data will be partial or incomplete, or will require subjective interpretation. All the same, judges and commentators should be prepared to open the extra-legal reasoning to a critical evaluation of the assumptions upon which it is based.

Claims that the court should be guided by common sense and real world experience resonate with the jurisprudence of judicial pragmatism. As a generalisation it can be said that judicial pragmatists require the law to be adapted and responsive to real-life circumstances. The essential distinction between judicial pragmatic and non-pragmatic reasoning is that the pragmatist is more interested in the practical day-to-day consequences of a ruling, whereas the non-pragmatist is more inclined to refer to broad principles and rules, that is to say ultimate eternal truths.[49] Grey puts the case for judicial pragmatism this way:

46 *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 83 [74].

47 Schacter, n 22 at 22.

48 Schacter, n 22 at 22.

49 M Sullivan and D J Solove, "Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism" (2003) 113 *Yale Law Journal* 687 at 688-689.

> Law is contextual: it is rooted in practice and custom, and takes its substance from existing patterns of human conduct and interaction. To an equal degree, law is instrumental, meant to advance the human good of those it serves, hence subject to alteration toward this end. Law so conceived is a set of practical measures for cooperative social life, using signals and sanctions to guide and channel conduct. More precise and determinate general theories of the nature and function of law should be viewed with suspicion.[50]

Posner writes that all that pragmatic jurisprudence really connotes "is a rejection of the idea that law is something grounded in permanent principles and realized in logical manipulations of those principles, and a determination to use law as an instrument for social ends".[51] Judicial pragmatism is therefore interested in the social ends of rulings; it is unabashedly interested in the consequences of decisions. John Dewey, an early advocate of judicial pragmatism, proposed that a first-rate test of the value of any philosophy is the answer to the question whether it ends in "conclusions which, when they are referred back to ordinary life-experiences and their predicaments, render them more significant, more luminous to us, and make our dealings with them more fruitful".[52]

The judicial pragmatist's interest in consequences resembles the political. Central to a politician's role and interest is the attainment of desired social ends through policy, legislation and other means. Politicians are rightly interested in consequences. It is the consequentialist nature of judicial pragmatism that exposes it to accusations of being political. Similarly, when a court shows an interest in consequences (as to some extent it must) it risks allegations that it is behaving politically. Legalism, on the other hand, allows a court to deflect such accusations by feigning disinterest in consequences, whilst at the same time being fully alive to them.

Although jurisprudential pragmatists are interested in future consequences, they do not ignore past precedent, nor do they abandon legal analysis because doing so would undermine the legal system. The system gains a large measure of its credibility by providing fairness and a reasonable degree of predictability by treating like cases alike.[53]

Justice Kirby cannot be characterised solely as a pragmatic jurist. Aspects of his extra-legal reasoning, however, do fall within this ambit, as we can see from the analysis that follows.

The potential impact on the community generally

In three of the judgments examined, *Butcher, Gutnik* and *Wakim*, Kirby J referred to the potential impact the court's ruling would have upon the

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50 T C Grey, "Freestanding Legal Pragmatism" (1996) 18 *Cardozo Law Review* 21 at 41-42.

51 R A Posner, *Overcoming Law* (Harvard University Press, Cambridge, Mass, 1995) p 405.

52 J Dewey, *Experience and Nature* (Dover Publications, New York, 1958) p 7.

53 Sullivan and Solove, n 49 at 694.

community generally. He was in the minority in *Butcher* and *Wakim* and consequently criticised the majority for, in effect, being out of touch with reality. In *Gutnik*, he sought to justify the court's ruling by claiming that fears raised by the appellant about the real world impact of an adverse ruling were either misplaced or exaggerated. What is of interest in the reasoning in each case is the consequentialist concerns he raises, and as mentioned, the reasoning harmonises with judicial pragmatists' concerns about keeping the law anchored in real world experience.

In *Butcher*, Kirby J was keen to impress upon the majority that it had wrongly decided the matter for a number of reasons, including the fact that it would lead to ordinary purchasers of land being duped by unscrupulous land agents.[54] In that case Butcher and his de facto wife, Radford, considered purchasing a valuable waterfront property north of Sydney. The land agent gave them a brochure with a photograph of the land and a diagram showing the boundaries of the land. The diagram had the appearance of being a copy of an original survey of the land. The purchasers intended to build extensions to the house and, assuming the brochure to be correct, signed a contract and paid a deposit. The brochure, however, wrongly showed the position of the high-water mark on the land, which meant planned extensions to the house would not be feasible. The purchasers claimed that the agent engaged in misleading and deceptive conduct. The agent raised a defence that the brochure carried a disclaimer that said in part that the agent could not guarantee the accuracy of the brochure's claims and interested persons should rely on their own inquiries. The majority ruled the disclaimer to be effective.

Justice Kirby criticised the majority for expecting ordinary people to notice small print disclaimers on pamphlets and notices because, whatever they should do in theory, "ordinary people cannot be converted to reading hidden messages contained in tiny print".[55] Indeed, he added, "it takes a large measure of judicial self-deception to say that the purchasers should have read the written disclaimers invoked here".[56] So ludicrous was the majority ruling in his view that the "court might just as well fold up the Act and put it away so far as dealings between real estate agents and purchasers are concerned" because agents such as those in this case "will walk straight out of the operation of the Act in many and varied circumstances".[57] In his view, the majority ruling defied "common experience and half a century of legal efforts to discourage such ploys".[58]

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54 *Butcher v Lachlan Realty* (2004) 218 CLR 592.

55 (2004) 218 CLR 592 at 656-657 [217].

56 (2004) 218 CLR 592 at 657 [217].

57 (2004) 218 CLR 592 at 644 [172].

58 (2004) 218 CLR 592 at 653 [206].

In *Gutnik*, Joseph Gutnik sued Dow Jones for defamation arising from an online article it published about him.[59] The article was uploaded in the United States and could, of course, be downloaded anywhere around the world. Dow Jones argued that Gutnik should sue them in the United States where the article was uploaded and not in Victoria where it was downloaded, otherwise anyone uploading onto the internet could be sued anywhere in the world. This could lead to some unexpected consequences, it was argued, if a jurisdiction had unusually prohibitive laws. In this instance Kirby J was in the majority, and referred to real-life experiences to allay concerns that a ruling allowing Gutnik to sue in Victoria would have a chilling effect on internet communications. For one thing, he said, the difficulty or impossibility of enforcement[60] and the cost of proceedings[61] would deter plaintiffs suing in a rogue jurisdiction. And, in any event, he added, deferring to the jurisdiction where material is uploaded would in practice amount to a disproportionate deference to the United States jurisdiction, where a vastly disproportionate number of web servers are located.[62]

Justice Kirby therefore acknowledged concerns about setting a precedent that could chill internet communications, but sought to allay these concerns by referring to real-life practicalities that would act as a barrier to litigants. Again, these extra-legal insights appeared to play a significant role in influencing the underlying policy assumptions of his decision.

References to real-world experience and the potential inconveniences the majority ruling would cause to litigants in their day-to-day access to courts and to justice were particularly strident in Kirby J's decision in *Wakim*.[63] In that case the court was required to rule on the constitutionality of cross-vesting legislation which allowed parties in matters involving both federal and State law to litigate the entire matter in either a State or federal court. The legislation had been in operation for over a decade to the considerable convenience of litigants. All State and federal governments were content with the legislation. The majority, however, ruled it unconstitutional to the extent that the Act conferred federal courts with State judicial power.

Justice Kirby excoriated the majority for their patent disregard of the potential real-world impact of their ruling. He said that only the clearest constitutional language, which he saw was lacking here, justifies rigid and impractical outcomes.[64] He observed:

59 *Dow Jones v Gutnik* (2002) 210 CLR 575.
60 (2002) 210 CLR 575 at 628 [121].
61 (2002) 210 CLR 575 at 643 [165].
62 (2002) 210 CLR 575 at 633 [133].
63 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.
64 (1999) 198 CLR 511 at 600 [187].

> Yet the agreement of all the democratically elected legislatures of Australia that a system of cross-vesting is necessary to help avoid inconvenience and expense, and to remove injustices and uncertainties occasioned by jurisdictional conflict, provides at least persuasive evidence that the legislation serves a practical national purpose. Everyday experience in the courts would probably establish that fact in any case. Some lawyers enjoy the intricate intellectual problems which can arise where there is a conflict or disparity of jurisdiction. Occasionally, a party may take advantage of them. But few ordinary citizens see their merits. Most parties discern no beauty or value in conflicts of this kind. If this amounts to an "unthinking resort to" slogans about "arid jurisdictional disputes", I must bear that label.[65]

Observing what is really going on in the community regarding the conduct the case is dealing with

In *Berbatis*, a number of shop lessees took legal action against the lessors to recover overpaid charges. Whilst the legal action was in process the lease for shop 14 was expiring. The lessees, Mr and Mrs Roberts, ran a fish and chip business at shop 14. They sought to renew the lease, but the lease offered no automatic right of renewal. During renewal negotiations they sold their business, subject to the assignment of a lease to the purchaser's satisfaction. The lessors were only prepared to renew the lease if it included a clause for abandoning the legal action for the alleged overpaid charges.[66] The question was whether the lessors were acting unconscionably in breach of s 51AA(1) of the *Trade Practices Act 1974* (Cth).

Justice Kirby made a number of references to the way people behave in the real world to justify his ultimate finding that the conduct breached the *Trade Practices Act*. He said that although the lessors were not obliged to extend the Roberts' lease to protect their goodwill and afford them a sellable business, this fact "masks the realities of the economic and litigious positions in which the Roberts and the owners respectively found themselves".[67] The owners knew, for example, that the Roberts' daughter had encephalitis, which was difficult and expensive to treat. They knew this would cause them great personal stress and emotional pain.[68] But, Kirby J observed, the owners, being a large corporation, assumed it "could take advantage of the comparative weakness of that player without any real fear that it would be rendered accountable in a court of law or equity"[69] and, ironically, because of the majority ruling, their assumption was correct.

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65 (1999) 198 CLR 511 at 603 [193].

66 *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51.

67 (2003) 214 CLR 51 at 88 [88].

68 (2003) 214 CLR 51 at 90 [93].

69 (2003) 214 CLR 51 at 83 [74].

Denuding the lease negotiations of their full context allowed the court an easy way out, in Kirby J's assessment, as the majority posed a question that could be more easily answered, but it "strips the problem of all its complexity".[70] His thinly disguised criticism of the majority is that they took an easy way out by ignoring the full factual circumstances in which the Roberts found themselves. A closer investigation of the detail of the contracting process, he says, may have given the matter a different complexion.

Consistent with the perspectives of judicial pragmatists, Kirby J highlighted the point that the law is contextual. The framing of that context has a critical bearing upon the way in which the legal question at stake is understood which, in turn, has a critical bearing on the ultimate ruling.

How the ruling should act as a warning against future wrongdoing

In two of the cases examined (*Berbatis* and *Butcher*) Kirby J explicitly stated that the rulings should act as a warning to others not to engage in wrong-doing. He was in the minority in both cases, and so his pleas to the majority had no effect. In *Berbatis* he claimed the relevant legislation, the *Trade Practices Act*, in effect enlists the courts to educate the public and industry about appropriate business practices, and seeks to deter industry from proscribed practices. In *Butcher* he saw that the majority were failing to give effect to the legislation's purpose of sending a signal to industry not to behave in certain inappropriate ways. The references he made to the legislative purpose requiring the courts to undertake an educative and deterrent role is vague, and probably falls outside the field of legal reasoning and into the field of extra-legal reasoning. That is, the alleged legislative purpose he enlists appears to give effect to his judicially devised policy.

In *Berbatis*, Kirby J believed that the court should rule against the lessors to serve as a warning against similar conduct in the future.[71] Specifically, such a ruling would constitute a warning:

> to others against the use of their economic power to obtain from a comparatively weak and vulnerable market player a concession not extractable from other participants in the market and only extracted from the Roberts because of their imperative need to secure an extension of their lease that, in other circumstances, would have been granted without relevant countervailing conditions.[72]

Indeed, *Berbatis* could offer the opportunity to deliver the message that "the Act is not to be trifled with",[73] which would give effect to Kirby J's

70 (2003) 214 CLR 51 at 91 [96].
71 (2003) 214 CLR 51 at 94 [107].
72 (2003) 214 CLR 51 at 94 [107].
73 (2003) 214 CLR 51 at 96 [110].

view that s 51AA of the *Trade Practices Act* is designed for educative, as well as deterrent, purposes.[74]

In *Butcher*, Kirby J was concerned that the majority ruling (which was in favour of the real estate agent for the vendors) would "send a signal to the industry of corporate real estate agents, and other industries, that they can avoid the requirements of the Act by the simple expedient of publishing disclaimers illegible to many eyes and easily overlooked".[75] In fact, the majority ruling, he said, "rewards illegible disclaimers and promises that, in the future, documents including them stand a real chance of avoiding the operation of the Act".[76] This was not a message he believed the court should deliver as it is contrary to the purposes of the Act.[77]

The proper way the court should perform its duties

In the ten cases considered in this chapter, Kirby J's most frequently expressed concern was that the court should perform its duties and role in the proper way. For example, he said that the court must defer to the relevant statutory criterion, and not some other criterion which a judge might consider more appropriate or more just;[78] an appellate court should affirm a lower court's rulings unless the primary judge made an error of legal principle;[79] and the court should not be persuaded by allegations by a party of extreme consequences if its submissions are not to be followed.[80] He also said that it is fundamental to stare decisis[81] that a judicial decision should derive from "(1) the reasons of the judges agreeing in the order disposing of the proceedings; (2) upon a matter in issue in the proceedings; (3) upon which a decision is necessary to arrive at that order".[82]

We might speculate on the reasons Justice Kirby is so keen to offer axiomatic pronouncements about proper judicial processes. Is he lecturing the other members of the court; is he writing a reminder note to himself; or is he insisting to the reader that he is an adherent to proper legal process? Perhaps he is reflecting his own anxiety, and doubtless the anxiety of all members of the court, that the court's credibility and the credibility of the judicial system as a whole be preserved and enhanced through disciplined obedience to proper processes. Is he, then, reminding

74 (2003) 214 CLR 51 at 96 [110].

75 *Butcher v Lachlan Realty* (2004) 218 CLR 592 at 645 [175].

76 (2004) 218 CLR 592 at 656 [215].

77 (2004) 218 CLR 592 at 656 [215].

78 *Sons of Gwalia v Margaretic* (2007) 231 CLR 160 at 210 [120].

79 *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 79-80 [66].

80 *Butcher v Lachlan Realty* (2004) 218 CLR 592 at 650-651 [197].

81 That is, the principle that rulings of a higher court are authoritative and must be followed in subsequent lower court decisions.

82 *Garcia v National Australia Bank* (1998) 194 CLR 395 at 417 [56].

all judges that they should exercise proper restraint and discipline in fulfilling their roles? Ironically enough, many would argue that he is the least restrained and disciplined of the present members of the court.

A further irony, given the propensity for Kirby J to find himself in regular dissent, arises from his reminder to the court that for the purposes of stare decisis the opinions of judges in dissent are to be disregarded.[83] Obviously that is a correct statement, but not one a dissenting judge would usually serve to emphasise, although he was in the majority in *Garcia* when he made the statement:

> Judicial remarks of a general character upon tangential questions or issues not necessary to the decision are likewise discarded, however persuasive the reasoning may appear. In this sense, the rules governing the ascertainment of binding precedent observe principles which are at once majoritarian and precise.[84]

Justice Kirby's statements about proper court process cannot always be taken to be neutral and value-free. They are often used as a rhetorical device to bolster a particular judicial value or policy. In *Garcia*, for instance, Kirby J sought to change the common law (as it was then understood) regarding the circumstances in which the enforcement of a guarantee against the wife of a borrower would be unenforceable. In this context he proposed loosening the dictates of the stare decisis rule to allow lower courts to engage in the processes of changing the common law. He said that we should not seek to impose a precedential straitjacket at a time when, because of social and other changes, refinement and development of legal principle is often more important than in the past.[85] In *Wakim*, on the other hand, he insisted on the legalistic proposition that the court must not change its rulings on matters of constitutional validity merely because of a change in the court's composition.[86] This was probably because he preferred the outcome of a recent decision of the court, which did not rule the cross-vesting legislation unconstitutional.

In *MIMIA v B*, which related to the detention of the children of suspected unlawful non-citizens, he was concerned about the Family Court exercising jurisdiction over immigration matters, and so he reiterated the legalistic proposition that Parliament's intention (to detain the children of suspected unlawful citizens), if constitutionally valid, must be given effect.[87] But in *Al-Kateb* he believed the law on the indefinite detention of suspected unlawful non-citizens to be unconstitutional.

It might be said that there is no necessary contradiction between Kirby J's positions in the cases just mentioned. Narrowly construed,

83 (1998) 194 CLR 395 at 417-418 [56].

84 (1998) 194 CLR 395 at 417 [56].

85 (1998) 194 CLR 395 at 418 [59].

86 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 596-597 [178], 598-599 [183] and [184].

87 *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 at 414 [136].

this may be true, but considered more broadly it seems that an apparently value-free legalism can be invoked to support a preferred outcome – whether that be to change the law (*Garcia* and *Gutnik*) or not change the law (*Wakim*, and in *Butcher* not change the trial judge's ruling); or whether it is invoked to rule the detention of suspected unlawful non-citizens to be constitutional (*MIMIA v B*) or unconstitutional (*Al-Kateb*).

The respective role of the courts and the legislature regarding the development of the law

Law-making is a central part of the role of the legislature and, to a lesser extent, the administration (under ultimate legislative supervision). Lawmaking is also part of the role of the courts, particularly regarding the development of the common law. Justice Kirby noted as much in *Al-Kateb* by saying that courts "are also law-makers", but in a confined and restricted way under the *Constitution* and established legal principle.[88] The question of where the borderlines lie between legitimate legislative and judicial law-making is contentious, however. In particular contention is whether constitutional interpretation is law-making in disguise. In *Al-Kateb* Kirby J confronted the allegation by fellow judge, McHugh J, that Kirby J was attempting to amend the *Constitution* under the guise of interpretation by effectively accusing the other members of the court of engaging in the same practice.[89] Needless to say, this response does not offer us any particularly useful insights into the borderlines question.

Justice Kirby outlined the respective law-making roles of the legislature and the courts with deceptive simplicity in *Gutnik*: "major legal changes in the Australian Commonwealth are the responsibility of the other branches of government, not of the courts."[90] Yet he later qualified this clear division of responsibilities by claiming that waiting for legislatures or multilateral international agreement to provide solutions to the legal problems presented by the internet would abandon those problems to agonisingly slow processes of law-making.[91] He claimed that if the court waited for the legislature it could constitute an institutional failure on the court's part to provide effective laws in harmony with contemporary civil society – national and international.[92] The basis for this assertion is not altogether clear. The implication is either that courts generally act more quickly than the legislature in changing the law, or that faced with this particular opportunity the courts were well disposed to act immediately by introducing reforms. His call for the judiciary to be

88 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 625-626 [180].

89 (2004) 219 CLR 562 at 629-630 [191].

90 *Dow Jones v Gutnik* (2002) 210 CLR 575 at 615 [76].

91 (2002) 210 CLR 575 at 627-628 [119].

92 (2002) 210 CLR 575 at 628 [119].

active in changing the law contrasts with his more deferential claim in *Gwalia* that legislation should be read as the legislature's command.[93]

The legislature and administration are increasingly using evidence-based strategies to inform their normative perspectives for developing policy and legislation. These strategies include using law reform bodies. The courts, on the other hand, are in an increasingly disadvantaged position relative to government when developing policy because of the comparative lack of capacity to commission and obtain the required research. Nevertheless, a blurred and shifting line marks out the boundary between the legislative and judicial law-making roles.

The proper way interpretation should be undertaken

Judges keenly seek the moral (that is to say, persuasive) high ground in their judgments by claiming that they have adopted the correct methodology and processes for interpreting a statute or the *Constitution*, and decry extra-legal considerations. The implied, and sometimes express, assertion is that the other judges in a case have reached a wrong determination by failing to apply the correct interpretation methodologies and proper legal processes and reasoning. Justice Kirby is no different from the rest in making these assertions, as we shall see.

Interpreting the Constitution

Justice Kirby in *Wakim* faced the legal/extra-legal analysis dichotomy squarely. Legalism, as we have seen, claims strict obedience to binding precedent and the other requirements of "legal" analysis. Even if strict obedience to precedent is not a formal requirement of High Court judges, their central aim nonetheless is to enhance the court's credibility by maintaining a level of consistency of reasoning and approach. Whilst extra-legal reasoning does not disregard precedent, it pays particular heed to the general circumstances of the decision, and its likely impact in the real world as assessed in the light of the judge's policy values. Justice Kirby neatly described the balancing of those legal and extra-legal approaches as follows:

> Yet each Justice is obliged to express his or her opinion on the meaning of the *Constitution*, guided by the past authority of the Court. Each Justice reads the unchanging text with the eyes of his or her generation and experience, sometimes perceiving new requirements or opportunities which predecessors did not see.[94]

Yet Kirby J denied that his ruling in *Wakim* was based on extra-legal grounds. He insisted instead that his view that the challenged cross-vesting legislation should be upheld was arrived at on the basis of legal

93 *Sons of Gwalia v Margaretic* (2007) 231 CLR 160 at 209-210 [117].
94 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 597-598 [180].

analysis,[95] and not on the basis of his policy preference for sensible administrative arrangements designed to remove the costs and other burdens to parties to court proceedings.[96] Again Kirby J followed other judges by decrying reliance upon extra-legal considerations whilst clearly exhibiting their use.[97]

Interpreting statutes

Invariably judges will divert attention from the fact that they are bringing their policy values to their reasoning by claiming merely to be decoding the latent meaning within the stark words of the legislation. Justice Kirby is equally prone to such claims. In *MIMIA v B* he claimed that "there is no substitute for legal analysis", even if such analysis of legislation finds it displacing or reversing prior law, or offers new insights into the old law.[98] Judges tend to emphasise that they are subordinating any personal preferences or understandings they may have in favour of non-judicial actors, such as the legislature or the public at large. Justice Kirby did in fact defer to the legislature in *MIMIA v B* by ruling that:

> In the light of the foregoing history, it is impossible to draw any inference other than that the Australian Parliament intends a system of universal mandatory detention of unlawful non-citizen arrivals to remain in force, including in respect of children. In the face of the evidence, appearing as it does in the public record supplied to this Court, readily available to all, it is impossible to construe the *Migration Act* otherwise than in accordance with its terms.[99]

This view, however, contrasts with his views in *Al-Kateb* where he found the indefinite detention of stateless unlawful non-citizens to be unconstitutional. There he said that the court should be no less defensive of personal liberty than United States and United Kingdom courts, which have denied unlimited executive power,[100] and that the indefinite incarceration of the stateless immigrants has grave implications for the liberty of the individual, which should not be endorsed by the court.[101] The apparent divergence of Kirby J's views between *MIMIA v B* and *Al-Kateb* may have arisen because he was compelled to prioritise conflicting values, a circumstance identified by Braman in her study of the attitudes of law students when compelled to deal with competing values.[102] The competing values Kirby J confronted were the protection

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95 (1999) 198 CLR 511 at 616 [225].

96 (1999) 198 CLR 511 at 613 [218].

97 See Schacter, n 22 at 25.

98 *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 at 410 [122].

99 (2004) 219 CLR 365 at 425 [170].

100 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 616 [149].

101 (2004) 219 CLR 562 at 616 [148].

102 Braman, n 17.

of human rights as against maintaining the integrity of court processes. The latter appeared to trump the former in *MIMIA v B* where his concern was to ensure the Family Court did not overreach its jurisdiction by dealing with matters that were essentially about immigration.

Schacter found in her study of United States Supreme Court decisions that there were a number of instances of judges arguing that desirable or adverse policy consequences are likely to flow from a particular interpretation of a statute, without explicitly linking the consequences to the legislative language or design.[103] Along similar lines, Kirby J claimed in *Berbatis* that Parliament had envisaged that test cases, such as that brought by the Australian Competition and Consumer Commission for the Roberts, "would help to promote the object of fair trading and translate the principles of the legislation into corporate behaviour, thereby incorporating equitable notions into practical day-to-day application".[104] His basis for assuming this to be Parliament's intention is not altogether clear.

Judges variously claim that their interpretation is correct because any other interpretation would lead to results that the legislature could not have intended. Emphasis is placed on the passive role of the judge in the interpretive process, and the implication that the court is merely deferring to the views of others. Justice Kirby probably played the feint of judicial deference most starkly in *Gwalia* when he said that statutes held the ultimate status of law because they express the "parliamentary command".[105]

An additional proposition regarding statutory interpretation invoked by Kirby J, and which resonates with judicial pragmatism, is that legislative terms should not stray too far from common understanding. In *Gibbs* the majority had interpreted the term "seas" under the *Marine Insurance Act 1909* (Cth) to include the waters of the Swan River in Perth.[106] Justice Kirby doubted that any resident of Perth or visitor for whom English was a native language would describe the waters near the Burswood Casino as the sea or any part of the sea; instead they would call it part of the river.[107] Justice Kirby cautioned that when interpreting legislation, "this Court should be careful not to stray too far from the perceptions and use of language of the ordinary person".[108]

103 Schacter, n 22 at 21.

104 *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 95 [108].

105 *Sons of Gwalia v Margaretic* (2007) 231 CLR 160 at 209-210 [117].

106 *Gibbs v Mercantile Mutual Insurance* (2003) 214 CLR 604.

107 (2003) 214 CLR 604 at 653 [144].

108 (2003) 214 CLR 604 at 653.

Interpretation in an international context

Justice Kirby's internationalist stance is well known and finds expression in numerous cases. In *Gwalia*, for instance, he said that in matters of basic principle in the law of corporate insolvency "it is increasingly important to consider the legal provisions applicable in the major countries with which Australia conducts its trade".[109] The international connection in that case would appear a little tenuous, and probably reflects his normative stance rather than the parliamentary command. In *Al-Kateb*, however, international standards took a much more central role. He made the following claim, which is clearly extra-legal:

> This Court should be no less defensive of personal liberty in Australia than the courts of the United States, the United Kingdom and the Privy Council for Hong Kong have been, all of which have withheld from the executive a power of unlimited detention.[110]

Values

Constitutional values

Justice Kirby's views about the nature of Australia's fundamental constitutional values are plain enough to see in the cases examined in this chapter. In *Al-Kateb* he said that his reason for dissent was because the majority ruling "has grave implications for the liberty of the individual in this country which this Court should not endorse".[111] In *Wakim* he emphasised the centrality of a just and efficient court system to the Australian nation with the rhetorical question:

> What can be more conducive to the national society of Australia as envisaged by the *Constitution* than the provision of legislative consent to a scheme that ensures justice, efficiency and clarity in the nation's court system? This is something at the very heart of the nation's existence and of its identity as such.[112]

Judicial values are most evident in constitutional cases, because the *Constitution* is the most open-textured of all legal documents. To be more blunt, judicial values and constitutional values are essentially the same thing because the High Court itself determines constitutional values despite judicial avowals to the contrary. These values are a hotpoint for critical analysis, and it is in constitutional cases that unverified and unsupported extra-legal claims are most prevalent.

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109 *Sons of Gwalia v Margaretic* (2007) 231 CLR 160 at 212 [128].

110 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 616 [149].

111 (2004) 219 CLR 562 at 616 [148].

112 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 616 [225].

Statutory values

In *NT Power*, Kirby J criticised the majority's approach to dealing with anti-competitive practices under the *Trade Practices Act 1974* (Cth).[113] The majority concluded that the government monopoly owner of the electricity distribution system in the Northern Territory was required under s 46 of the *Trade Practices Act* to allow the appellant electricity generator access to the government-owned electricity wires so it could deliver electricity to consumers. Justice Kirby criticised the majority for applying double standards. The majority's ruling was in effect value-laden and ideological, in his view, in that it set stringent standards for the anti-competitive behaviour of government corporations, whilst it repeatedly refused to set the same high standards "where the corporation concerned was private, successfully defending its market power against smaller private would-be competitors".[114]

Justice Kirby's attack, however, was not launched from a value-free position. He drew attention to the fact that the Northern Territory Government was concerned that NT Power was seeking to use the government's electricity distribution system to "cherry-pick" electricity consumers in Darwin and Katherine.[115] In other words, NT Power would presumably not have to face the costs of supplying more remote consumers, whereas the government-owned electricity distributor would. Justice Kirby's ruling in favour of the Northern Territory Government appeared to be motivated in part by concerns that the cherry-picking would force the government to compete by removing price cross-subsidisation in favour of more remote consumers – that is, the Northern Territory Government would be forced to lower prices in Darwin and Katherine to remain competitive, and therefore raise prices outside those cities to recover the lost revenues. If this was an underlying motivation for his rulings, it was clearly policy driven, and apparently contrary to the policy values of the author of the *Trade Practices Act*, namely the Federal Government.

It is unclear whether Kirby J was reflecting his own values or his perception of the values underlying the *Trade Practices Act* when he stated in *Berbatis* that the courts should not "usurp the economic freedom of individuals normally to decide for themselves the transactions that they would, and would not, agree to".[116]

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113 *NT Power Generation v Power and Water Authority* (2004) 219 CLR 90.

114 (2004) 219 CLR 90 at 163 [204].

115 (2004) 219 CLR 90 at 161 [197].

116 *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 87 [85].

Judicial intuition

Justice Kirby is candid about his exercise of judicial intuition to gain a sense of where the justice in a particular case may lie. The *Macquarie Dictionary* defines "intuition" as the "direct perception of truths, facts, etc, independently of any reasoning process"; and "common sense" as "sound, practical perception or understanding".[117] Both terms suggest a capacity to perceive things without the aid of logic or formal reasoning (judicial or otherwise), and to arrive at the real truth of a matter. Judicial pragmatists would approve the use of both intuition and common sense in evaluating matters and reaching decisions.

In *Berbatis*, Kirby J stated that a primary judge can be required to apply a mass of evidence of a legal standard which is expressed in broad statutory language, thus making a judicial response that is partly analytical and partly intuitive.[118] In *Gibbs* he found that the argument that the relevant section of the Swan River in Perth was part of the sea to be intuitively incorrect.[119] And his intuitive response in *MIMIA v B* that the Family Court was not the appropriate forum for dealing with the detention of immigrant children was not "shaken by demonstration of the fact that the children in question are children of a 'marriage', a relationship attracting relevant constitutional powers to the Federal Parliament upon the basis of which, in part, the [*Family Law Act*] was enacted".[120] Indeed, as the relevant marriage in question was uncontested, it seemed to him the invocation of jurisdiction was contrived.[121] He observed in that case that intuition "can be a useful check where the law appears to have taken a wrong turning".[122] He added that:

> In the courts, it is commonly based on long years of experience in the law, even if the exact reasoning is not at first consciously identified. On the other hand, intuition can sometimes be misleading or wrong. Where the rights of vulnerable persons under valid legislation are in question, it is often necessary to keep judicial intuition in check "for sometimes it will be based unconsciously on the very attitudes that the law is designed to correct and redress".[123]

In *Gwalia* Kirby J went so far as to provide a heading in his judgment which asked: "A surprising result? A counter-intuitive outcome."[124] He admitted that the conclusion drawn by the court that a shareholder can

117 *Macquarie Dictionary* (Macquarie Library, Sydney, 1982).

118 *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 86 [82].

119 *Gibbs v Mercantile Mutual Insurance* (2003) 214 CLR 604 at 650 [137].

120 *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 at 409 [117].

121 (2004) 219 CLR 365 at 409 [117].

122 (2004) 219 CLR 365 at 410 [121].

123 (2004) 219 CLR 365 at 410 [121].

124 *Sons of Gwalia v Margaretic* (2007) 231 CLR 160 at 205 [103].

sue a company of which he or she is a member for a debt valued at the price of the shareholder's shares in the company is counterintuitive.[125] As a corporation is a legal person, it is as if a person is suing himself or herself. In reality, the shareholder was suing the company for alleged misleading and deceptive conduct regarding representations about itself made before the shareholder became a member of the company by purchasing the shares.

In each of these cases Kirby J's reference to "intuition" suggests a groundedness in common sense which resonates with judicial pragmatism.

CONCLUSION

The detailed analysis in this chapter of Kirby J's extra-legal reasoning in his judgments might give the impression that he is particularly prone to favour his personal preferences and values over rigorous legal analysis. This would be a wrong impression. It is probable that, when compared with other judges, Kirby J has been more overt about his extra-legal values and motives than others, which might expose him to greater criticism. But studies of the extra-legal reasoning of United States judges – including so-called textualists who wrap the cloak of legalism tightly around their rulings – show that all judges are more or less doing the same thing. There is no reason to believe Australian judges are different in this regard. The essential difference between judges is not their greater or lesser inclination to be influenced by extra-legal considerations; it is the degree to which they act covertly in doing so.

There is nothing wrong with judges applying extra-legal values and policies to the task of judgment; indeed, it is central to that task. Judges are not appointed merely because of their technical legal proficiency. They are appointed in anticipation of this capacity together with their capacity to exercise good judgment and wisdom – these capacities are essentially extra-legal.

What this chapter invites is not a condemnation of the exercise of extra-legal analysis by judges. Rather, it seeks closer examination and analysis of it. Although it is often difficult to identify the extent to which extra-legal, as opposed to legal, factors are decisive to the outcome of a case, it is reasonable to speculate that in many cases they are crucial. Because of this significance a judge's extra-legal considerations require the close attention of analysts and scholars.

The analysis of Kirby J's decisions in this chapter provides some, albeit limited, insights into his values and policy norms. These reveal, I believe, his deep concern to maintain and enhance the credibility of the High Court as an institution, and the proper functioning of the

125 (2007) 231 CLR 160 at 205 [104].

judicial system as a whole. A strong and credible judicial system is crucial to ensuring a fair and orderly society, based on the rule of law rather than the rule of force. The concern to retain and enhance a robust judicial system is hardly unique to Justice Kirby. His extra-legal concerns were not limited to the operation of the judicial system. He sought other policy outcomes, including protecting weaker parties against the unfair and exploitative conduct of stronger parties; allowing parties relatively convenient and inexpensive access to the justice system; protecting the fundamental rights of individuals to due process of the law – whether Australian citizens or otherwise; and broadening the class of guarantors who are recognised to be at risk of unconscionable conduct because of their relationship with the borrower. Justice Kirby's application of these underlying values was in each case constrained and mediated through his role as a judge. These underlying values hold in high regard the interests of the weaker and more vulnerable members of our community. If these values ultimately underlie the Australian system of justice as a whole, this would altogether be a good thing.

Chapter 24

LAW REFORM, AUSTRALIAN-STYLE

David Weisbrot*

[A] formula for law reform in Australia. A touch of history, a pinch of philosophy, a few techniques, a lot of work, a varied programme and a great deal of luck in the Parliamentary process. The Australian Law Reform Commission seeks to give Australian law searching, critical and innovative scrutiny. We have transplanted the English law to the Antipodes. Can future generations prove themselves as adept in renewing the law and making it accurately reflect the needs and ideals of Australian society?[1]

INTRODUCTION

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)[2] – 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 …".

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* I am grateful for the assistance and ideas about relevant archival materials provided by my colleague, the then ALRC Research Manager, Ms Lani Blackman. Research assistance also was provided in 2007 by then ALRC intern, Ms Jocelyn Williams, and is gratefully acknowledged.

1 M D Kirby, "Law Reform in Australia" (Speech, Uniform Law Conference of Canada, 23-27 August 1976); see also *The Speeches of The Honourable Justice M D Kirby, CMG – Volume 1, 1975-1976* (ALRC, 1986) p 15.

2 Kirby was a Deputy President of the Australian Conciliation and Arbitration Commission when he was appointed Chairman of the ALRC from 1 January 1975, initially on a part-time basis, but full-time from 4 February 1975. He served until September 1984, when he was succeeded by Justice Murray Wilcox (on a temporary basis) and then by retired Justice Xavier Connor in May 1985. See Chapter 25 in this book containing Wilcox J's reminiscences of the Kirby years at the ALRC, "Law Reformer".

Without any disrespect at all to the individuals concerned, it is extremely unlikely that the mention of any comparable, important federal institution established around the same time – say, the Human Rights and Equal Opportunity Commission (HREOC), the Australian Consumer and Competition Commission (ACCC), the Australian Securities and Investments Commission (ASIC),[3] or the Federal Court of Australia – would elicit anything remotely like the same level of recognition, even amongst legal professionals or public servants.

This close association may be explained in part by Justice Kirby's continued high profile in Australia as a High Court judge and frequent speechmaker and public commentator, and overseas because of his high profile and advocacy in relation to human rights and bioethics. However, it is also the case that contemporary ALRC members and staff continue to identify naturally and strongly with Justice Kirby – this sustained association flowing out of the fact that the ALRC still carries Kirby J's intellectual DNA deep within its institutional core, ethos and processes.

As detailed below, the ALRC was not the first law reform commission to be established in the world – indeed, it was not even the first such body in Australia. As Kirby J has noted, given the impetus towards institutional law reform over the preceding two decades, this "was no virgin birth".[4] Nevertheless, there was no obvious or inevitable model, nationally or internationally, for designing a new federal law reform body in Australia. Justice Kirby's ultimate approach to this task was novel in many respects, and its effects have been highly influential and long-lasting.

LAW REFORM OF AN EVENING

The early history of Australian law reform[5] – at least those activities which occur outside the Parliaments and courts – includes a number of ambitious and successful projects, such as Sir Samuel Griffiths' codification of criminal law in Queensland and Robert Torrens' complete transformation of the land title system in South Australia.[6] However, prior

3 These bodies have had some changes to their names and structures over time, for example, HREOC initially was the Human Rights Commission (now Australian Human Rights Commission), and the ACCC was the Trade Practices Commission, but this does not detract from the basic point. During Michael Kirby's tenure, the ALRC simply (and inappropriately, given the existence of State bodies) was "the Law Reform Commission", with its current name conferred by the *Australian Law Reform Commission Act 1996* (Cth). Similarly, the 1973 legislation styled the head of the LRC as "Chairman", while the 1996 law changed this to "President".

4 M D Kirby, "Are We There Yet?" in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (Federation Press, Sydney, 2005) pp 433, 447.

5 See M Tilbury, "A History of Law Reform in Australia" in Opeskin and Weisbrot, n 4, pp 3-17.

6 Tilbury, n 5, p 4.

to the advent of standing bodies in the 1960s (see below), law reform in Australia generally was the province of the part-time committee.[7]

The English Law Revision Committee, established in 1934 by Lord Chancellor Sankey, was a part-time committee comprising judges, practitioners and academics, with a brief to consider "what aspects of the law required revision in light of modern circumstances", and its reports were successful in achieving statute law reform in England and highly influential across the rest of the common law world, including Australia.[8]

Similar committees were established in most Australian jurisdictions, in part to emulate the success of the English Law Revision Committee in modernising the law, and in part to maintain a close correspondence with the developing English law. This effort typically involved assembling a number of judges and legal experts (mainly practitioners, but including the odd professor) – busy people all – with a brief to revise or codify an area of black letter law, and little in the way of administrative or research support. As Tilbury has noted, such law reform committees also operated according to:

> lawyers' positivist understanding of the law … to support what amounted to an intellectual constraint on the work of the committees. Governments and the committees themselves assumed that their business was only with "lawyer's law", the false corollary being that they could consider neither matters of "policy" nor "political questions".[9]

While it would be churlish – and historically inaccurate – to suggest that little law reform work of high quality or lingering value was done during this period, it has been observed that:

> The truth is that law reform, if it is to be done properly, is a slow, complex, and time-consuming business … This sort of thing cannot be done adequately or within reasonable time limits by members serving part-time who come to the task "at the fag end of the day" or on week-ends.[10]

Another obvious disadvantage of the various ad hoc law reform arrangements is their transience. Unlike permanent law reform commissions, the other mechanisms lack: established processes; quality control mechanisms; tried and true staff; established links or databases to facilitate effective consultation; and a track record of excellence. Ad hoc efforts are also inherently unable to provide a continuing contribution to the reform process at a later date, in a field with long lead times, through the maintenance of "corporate memory", documents and websites; submissions to parliamentary or other inquiries; and so on.

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7 Tilbury, n 5, pp 8-12.

8 Tilbury, n 5, pp 8-9.

9 Tilbury, n 5, pp 10-12.

10 K Sutton, *The Pattern of Law Reform in Australia* (University of Queensland Press, St Lucia, 1969) p 15.

RATIONALISATION AND CODIFICATION OF LAW

The replacement of ad hoc and part-time committees with institutional law reform commissions began in India in 1955, followed by Hong Kong (1956); Jamaica (1964); England and Wales (in 1965, under the Chairmanship of Lord Scarman); Scotland (1965); Pakistan (1967); the Bahamas, Malta, Botswana and Ghana (all in 1968); Bermuda, Sri Lanka and Malaysia (1969); South Africa (1973) and Papua New Guinea (1975).[11]

Of course, the great rationalisation of law project has much earlier roots in Continental Europe, with its old university law faculties and Civil Code,[12] which heavily influenced the English proponents of codification, such as Jeremy Bentham, John Stuart Mill, Thomas Macaulay and James Fitzjames Stephen.

For Bentham and Mill, especially, codification of law was a noble end in itself, making the law more widely accessible to the citizenry, and assisting in delivering the utilitarian dream of "each man his own lawyer". For others, such as Macaulay and Stephen, this also reflected a pragmatic response to the exigencies of Empire, and the desire to impose and uphold the rule of law in circumstances which challenged the practical workability of common law method and its need for professional judicial officers and lawyers, with access to law libraries.[13]

The drive for rationalisation and reform was far less evident in Australia, something that attracted scathing criticism from the late 19th century. In 1891, Sir George Reid (later to become Australia's fourth Prime Minister) commented that:

> There can scarcely be any country in which law and lawyers have a worse reputation. There is no spot on the wide world surface where litigation so often spells ruin, or is more desperately avoided …
>
> Our barristers and attorneys are equal in point of honour and reliability to those of any other country. The fact is, the fault lies more with those who make the law than those who practise it. It is the system which should be abused by the public, and wholly reformed by Parliament. The legal system which disgraces us today is precisely that legal system which, seventeen years ago, was reformed out of existence in England [via the *Judicature Act 1873*] … We in this unhappy country, plagued as it is with a peculiar sort of statesmanship which revels in talk, and in

11 Australian Law Reform Commission, *Annual Report 1975* (ALRC 3, 1975) p 12.

12 The French Civil Code, eg, dates from 1804.

13 See, eg, L Farmer, "Reconstructing the English Codification Debate: The Criminal Law Commissioners" (2000) 18 *Law and History Review* 397; G A Weiss, "The Enchantment of Codification in the Common-Law World" (2000) 25 *Yale Journal of International Law* 435; M Lobban, *The Common Law and English Jurisprudence 1760–1850* (Clarendon Press, Oxford, 1991); E Stokes, *The English Utilitarians and India* (Oxford University Press, Oxford, 1959); N Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (University of Michigan Press, Ann Arbor, 2003).

> the art of busily doing nothing, have witnessed the years roll by, and our statute-book become more and more a reproach, whilst the few timid, incomplete efforts to improve our laws only shew how miserably backward we are …
>
> [W]hether law reform is a good thing for lawyers or not, it is bound to come, and the public were entitled to it long ago.[14]

Writing decades later, the esteemed Howard Zelling, then an Acting Justice of the Supreme Court of South Australia and chairman of the (now defunct) South Australian Law Reform Committee, lamented that:

> We have unfortunately in the last sixty years had the years which the locusts have eaten. There was a tremendous upsurge of law reform in the 1880s and the 1890s much of which, particularly in the social sphere, made Australia a leader in the world. And then we said "look how wonderful we are" and we sat back and other nations came up to us and in fact surpassed us.[15]

In 1971, Sir Anthony Mason (later to become Chief Justice of Australia) also expressed dismay at Australia's poor reputation for modern law reform:

> There was a time when Australia, in common with New Zealand, provided a lead to the world in formulating new and constructive legislative methods; the statutes relating to the system of Torrens title, testator's family maintenance and industrial arbitration were the expression of a legislative spirit which was anxious to grasp difficult problems and solve them with an imaginative and practical approach … It cannot be said in more recent times Australia has achieved a notable reputation for bold and imaginative law reform. Indeed, Professor K C Sutton has stated that Australia has a "sorry record in the field of law reform" and that in the common law world Australia "comes last" after England, the United States of America and New Zealand.[16]

SOCIAL CHANGE AND THE "NEW PRINCIPLE" OF LAW REFORM

The emergence of the ALRC coincided with a larger societal change in thinking about the nature and function of law and legal institutions. As noted above, work by various law reform committees at the State and Territory level largely had focused on aspects of "black letter law", which were seen to be wholly the province of judges and lawyers.

14 G H Reid, in *The Weekly Notes and Law Times of New South Wales* (14 February 1891) p 1, as quoted in Australian Law Reform Commission, *Annual Report 1975* (ALRC 3, 1975) p 1.

15 Acting Justice H E Zelling, commenting on a paper delivered by R D Conacher, "Law Reform in Action and in Prospect" at the Fifteenth Legal Convention of the Law Council of Australia (21 July 1969), recorded in (1969) 43 *Australian Law Journal* 513 at 526.

16 A F Mason, "Law Reform in Australia" (1970) 4 *Federal Law Review* 197.

However, the mood of the community had begun to shift in the 1960s, demanding more opportunities for direct community participation in the democratic process and greater accountability and transparency of public institutions.

Similarly, there was a growing call for law and legal institutions to be "relevant", reflecting contemporary conditions and community attitudes, and to be "Australian", rather than mirror reflections of the English counterparts.

Thus the establishment of the ALRC fitted snugly within the "modernist" project and sensibility of that era, which featured: strong faith in progress through specialist expertise and technocratic solutions; the view of law as a neutral technology, providing solutions as applicable to the problems of indigenous communities and the Third World as to those of advanced, industrialised societies;[17] the belief in the socially transformative power of "Big Law", through omnibus legislation and high-powered, public interest, test case litigation; and the belief that government can, and should, play a central organising role in such activities.

Thus, it is not surprising that at around the same time the ALRC was created, the Whitlam Government also established:

- HREOC – and, at the same time, ratified a range of major human rights and anti-discrimination treaties, and recognised the compulsory jurisdiction of the International Court of Justice (by signing the Optional Protocol);
- the Commonwealth Ombudsman's office;
- the Federal Court of Australia, the Family Court of Australia, the Administrative Appeals Tribunal and other federal merits review tribunals – the first system of federal courts and tribunals (below the High Court of Australia) established under Ch III of the *Constitution* since Federation; and
- the Australian Legal Aid Office, and with it the assumption of federal responsibility for legal aid, including a massive increase in funding.

At the grassroots level, this expansion of legal aid was mirrored by the advent of the Aboriginal Legal Services network and the community legal centres movement, which were:

> born of the social activism and politicisation of the late 1960s and 1970s. The legal centres … consciously developed as an alternative to the existing models of legal services delivery, embracing the political

17 As exemplified by the "Law and Development" and "Law and Modernisation" movements in the United States and the United Kingdom in the 1960s and 1970s. See D Trubek and M Galanter, "Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States" [1974] *Wisconsin Law Review* 1062; cf E Burg, "Law and Development: A Review of the Literature and a Critique of 'Scholars in Self-Estrangement'" (1977) 25 *American Journal of Comparative Law* 492.

> ideology and strategy of the welfare movement: "a commitment to grass-roots level activity, community control, empowering the recipient, de-professionalization, assertion of rights, demystification and free access to services".[18]

Writing in 1970, at the dawn of the era of "modern law reform", the noted expert on Australian government and public administration, Professor Geoffrey Sawer, observed that this development reflected:

> the qualitatively new principle … that the whole body of the law stood potentially in need of reform, and that there should be a standing body of appropriate professional experts to consider reforms continuously.[19]

For Sawer, this "new principle" of law reform should be embodied in a commission with four distinguishing characteristics: it should be permanent, full-time, independent, and authoritative.

The increasing questioning of the established institutions of that time included a lack of faith in other alternatives for bringing about legal change. This scepticism extended to:

> the judges, who were generally unwilling to reform the law by court decision and were still dominated by the literal rule of statutory interpretation, and parliaments, which were no longer willing to enact law reform by copying Imperial legislation, and the law was seen as not keeping up with technology and changes in social values; and yet there was an optimistic belief that state-sponsored activity could cure social problems.[20]

Senior members of the judiciary also expressed reservations about whether the courts were the best sites for systematic law reform. In 1979, Sir Anthony Mason noted that the responsibility of the High Court is "to decide cases by applying the law to the facts as found", and that the court's techniques and procedures were adapted to that responsibility and not to legislating or engaging in law reform activities.[21] Several years earlier, Sir Anthony had raised the possibility of law reform commissions being given delegated legislative authority, subject to the power of disallowance by either House of Parliament.[22]

Thus, institutional law reform in Australia – far more so than in the United Kingdom – owes its existence to the modernist project of the post-World War II era, embodying the optimistic view that all challenges,

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18 D Weisbrot, *Australian Lawyers* (Longman Cheshire, Melbourne, 1990) p 246, quoting J Basten, R Graycar and D Neal, "Legal Centres in Australia" (1985) 7 *Law and Policy* 113 at 115.

19 G Sawer, "The Legal Theory of Law Reform" (1970) 20 *University of Toronto Law Review* 183.

20 P Handford, "The Changing Face of Law Reform" (1999) 73 *Australian Law Journal* 503 at 506-507.

21 *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617.

22 A Mason, "Where To Now?" (1975) 49 *Australian Law Journal* 570 at 573.

including fundamental legal, social and political ones, could be addressed by the judicious application of specialist expertise and technology.

JUSTICE KIRBY AND THE ESTABLISHMENT OF THE ALRC

The ALRC was established by the Whitlam Government under legislation passed in late 1973,[23] with strong support from all of the political parties in the Parliament.[24] In introducing the Bill, Attorney-General Lionel Murphy noted that the purpose was

> to establish a Law Reform Commission, to enable the task of law reform in Australia to be tackled on a national scale. The Government is concerned to see that the system of law under which people live is responsive to the social needs of our time. The rules which govern the relationship of persons with each other and with the Government should reflect current values and philosophies. This concern is reflected in the importance the Government attaches to law reform.[25]

Under s 6(a) of the *Law Reform Commission Act 1973* (Cth), which came into effect on 1 January 1975, in order to allow for a period of planning and recruitment, the functions of the ALRC, "with a view to the systematic development and reform of the law", were specified to be: "(i) the modernisation of the law by bringing it into accord with current conditions; (ii) the elimination of defects in the law; (iii) the simplification of the law; and (iv) the adoption of new or more effective methods for the administration of the law and the dispensation of justice".

In Australia, most States and Territories had created law reform commissions under statute (albeit with varying levels of budget support) prior to the Commonwealth move – New South Wales in 1967;[26] Queensland in 1968;[27] the Australian Capital Territory in 1971;[28]

23 *Law Reform Commission Act 1973* (Cth).

24 See Commonwealth of Australia, *Parliamentary Debates*, Senate, *Hansard* (23 October 1973) pp 1345-1346 per the Attorney-General, Senator Lionel Murphy; Commonwealth of Australia, *Parliamentary Debates*, Senate, *Hansard* (6 December 1973) pp 2594-2595 per the Shadow Attorney-General, Senator Ivor Greenwood; *Parliamentary Debates,* House of Representatives (11 December 1973) pp 4713-4714 per the Government spokesman in House, Kep Enderby MP; and *Parliamentary Debates,* House of Representatives (11 December 1973) p 4713 per the Opposition spokesman in the House, James Killen MP. See also M D Kirby, *Reform the Law: Essays on the Renewal of the Australian Legal System* (Oxford University Press, Melbourne, 1983) p 3.

25 Commonwealth of Australia, *Parliamentary Debates*, Senate, *Hansard* (23 October 1973) pp 1345-1346.

26 *Law Reform Commission Act 1967* (NSW).

27 *Law Reform Commission Act 1968* (Qld).

28 *Law Reform Commission Ordinance 1971* (ACT).

Western Australia in 1972;[29] and Tasmania in 1974[30] – during what has been described as "a 'golden age' of law reform in Australia".[31]

In the spirit of the times, there was considerable goodwill for the ALRC to fulfil its mission of modernising, simplifying, consolidating, developing and reforming federal (and Territory) law. As Kirby J has written:

> Certainly, the proliferation of federal, state and territory institutions, and their growing spirit of co-operation and interaction, made it an exciting time – one full of optimism, idealism, hope and confidence.[32]

At the same time, however:

> It should not be thought that everyone, at the time, welcomed institutional law reform. Many "high-ups" were unenthusiastic about too much change in the law. They looked with suspicion on "those who are paid to be reformers".[33]

As Kirby J tells it, his appointment as Chairman owes as much to fortune as it does to his ability at the tender age of 35:

> My involvement in it was almost accidental. I was ascending in an elevator at Temple Court in Sydney. The Federal Attorney-General, who had secured the passage of the *Law Reform Commission Act 1973* (Cth), Lionel Murphy, entered and said "You are the one. I want you. Come up to my Chambers". In that way my adventure with law reform began. But for that accidental encounter I might still be a presidential member of the Industrial Relations Commission.
>
> The Law Reform Commission began life in Temple Court. We were set up in the anteroom to the Chambers of the Federal Judge in Bankruptcy, the Honourable Bernard Riley. I was 35 years of age and still in awe of judges. When Justice Riley entered and left the room, I automatically stood and bowed.[34]

As noted at the outset, there were enough similar bodies already in existence by that time to provide broad guidance on how to establish a law reform commission. However, there were also many specific decisions to make about organisational style, emphasis, priorities and procedures, and in these respects Kirby J's approach to institutional law reform was novel (or at least involved novel elements), and set a clear direction for the new institution.

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29 *Law Reform Commission Act 1972* (WA).

30 *Law Reform Commission Act 1974* (Tas).

31 Tilbury, n 5, p 15.

32 Kirby, n 4, pp 433, 444.

33 Kirby, n 4, pp 433, 444, quoting J Young, "The Influence of the Minority" (1978) 52 *Law Institute Journal* 500.

34 M D Kirby, "Tribute to Alan Rose AO, Retiring President of the ALRC" (Speech, Australian Law Reform Commission Dinner, Sydney, 20 May 1999): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_alrc20may.htm (accessed 8 December 2008).

INDEPENDENCE AND STRICT NON-PARTISANSHIP

Independence is absolutely fundamental to the success and longevity of a law reform commission. To some extent, the independence of a law reform commission is guaranteed by its enabling legislation. Whatever the form of words used in the statute, however, genuine independence becomes a matter of organisational culture. The body must be willing to assert its intellectual independence – the willingness to make findings and offer advice and recommendations to government without fear or favour, and without pandering to current fashion.

Without this essential quality, a commission would be no different from a ministerial office or government department operating under political direction, or a consultancy contracted to deliver a desired result. Even where they are mindful of the need to protect their intellectual independence, law reform commissions also must resist the temptation to become too close to government in an effort to get "runs on the board" and to be seen as "useful".

Justice Kirby has recounted this lesson in the following terms:

> When during the Attorney-Generalship of Senator Peter Durack the Commission seemed to be making little headway, I suggested to Sir Clarrie Harders, Secretary of the Attorney-General's Department, that a solution could be found. It would involve the Commission working closely with the Attorney-General and the Department upon small projects of utility and interest to both. In this way, the Commission's scoring rate would increase. We would be seen as useful to the Minister and his officers.
>
> In response to this proposal Sir Clarrie Harders gave me some candid advice. He said "If we had wanted another section of our Department, we would get it. If the Attorney-General wanted further officers in tune with his political viewpoint, he would recruit them. The value of the Commission lies in its independence. Without that independence it has no special value. It might just as well be absorbed in the Department. Guard your independence. It is your reason for existence".
>
> These were wise words. I accepted them. I banished my naive ideas. The Commission maintained its independence.[35]

Justice Kirby subsequently commented that Sir Clarrie's advice also prompted him to understand that the "ALRC had to establish its product differentiation. It did this by demonstrating a capacity to perform effectively in large and small projects alike".[36]

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35 Kirby, n 34.

36 M D Kirby, "The ALRC – A Winning Formula" (Speech, Rededication of the Michael Kirby Library, 17 February 2003) p 2: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_AusLawReform.htm (accessed 8 December 2008).

Whatever the views of individual Commissioners and staff, the Commission as a whole always must be, and must be perceived to be, scrupulously free of political partisanship or association with private or special interests.

Externally, governments must respect this culture and ensure that appointments are non-political and free from conflicts of interest, terms of reference for inquiries must not be "loaded", and informal pressure must never be brought to bear to achieve a particular desired outcome. To the extent that law reform bodies become politicised, they lose the ability to attract outstanding commissioners and members of expert advisory committees (who serve on a voluntary basis), and to play the "honest broker" role in policy development. It is fortunate in Australia that federal attorneys-general and governments of both political complexions have behaved entirely honourably in these respects, and there has been a welcome bipartisanship about the role and importance of institutional law reform.

This strictly bipartisan tone was set from the earliest days of the ALRC. As Kirby has acknowledged:

> From the outset, viewing its challenges from the perspective of other national and subnational law reform agencies, it was clear to the ALRC that the follow-up of reports was essential if the Commission was to fulfil its mandate and not simply to become another academic or research institution. This meant that it was important to gain the support of members of the Parliament regardless of political affiliation and the trust of the elected Government. Because most proposals for reform depend upon the initiatives of government it was imperative to avoid the slightest entanglement in partisan conflicts.
>
> Following my appointment in 1975 as the inaugural chairman, I sought the agreement of the Attorney-General to meet the Opposition spokesman on legal affairs, at the time Senator Ivor Greenwood QC. Agreement was readily given. The Senator had a number of very useful suggestions for the work programme and methodology of the Commission. He was a distinguished lawyer and his early death was a great loss. Also in the Opposition at the time were members of the Coalition parties who were keenly interested in law reform, including Mr R J Ellicott QC (later a federal Attorney-General) and Senator Allen Missen. On the Labor side there were strong supporters of the new institution including, from the outset, Prime Minister Gough Whitlam who had declared that the "life of a reformer is hard in Australia". He and Senator Lionel Murphy ushered the ALRC into life …
>
> I do not doubt that it was the strong commitment to service to the Parliament and engagement with members of both Houses who were interested in law reform that saved the ALRC from abolition when the Whitlam government was dismissed and the Fraser government elected … In the event, the electoral commitments of the Fraser government

> included a promise to refer to the ALRC the preparation of a report on privacy. When I heard that commitment, I knew the future of the Commission was secure.[37]

Finally, the establishment of the ALRC in Sydney, rather than in Canberra, has also contributed to the reality and the perception of institutional independence from the government and the federal bureaucracy. The Sydney location also facilitates greater interaction with the professions, commerce and industry, and grassroots community groups than otherwise might be the case if it were based in the much smaller and more government-centric national capital.

Interestingly, the initial intention was for the ALRC to be located in Canberra, and even after "appropriate premises" could not be found, the original plan was to relocate the office to Canberra within five years. As noted in the ALRC's first annual report, in 1975:

> There is no provision in the Commission's statute equivalent to s 9 of the *Law Reform Commission Act* (Canada). That section requires that the head office of the Commission shall be in the national capital region. Despite the absence of such provision, however, it seemed plain to the Commission that its headquarters should be in the national capital close to the Parliament and to the Attorney-General's Department. Unfortunately, no appropriate premises could be found to house the Commission in Canberra for the time being and for that reason the decision was taken to establish the Commission in Sydney, with a view to its translation to Canberra at an appropriate time. The time mentioned in correspondence with the inter-departmental Committee on the location of Australian Government employment has been five years.
>
> The reasons for a venue in the national capital are not difficult to see. It is vital that this Commission should be close to the Attorney-General, his Department and the Office of the Parliamentary Counsel to ensure that its proposals do not lose touch with what is politically feasible and likely to secure parliamentary time and support. The removal of the Commission from regular contact with the Attorney of the day, his departmental officers and others in Government services concerned with laws within the competence of the Australian Parliament plainly increases the difficulty of the Commission's tasks. Quite apart, however, from these considerations of a practical nature, a national law body ought to be in the national capital … Although countervailing considerations must be given weight, including the recruitment of staff and the presence of a large thriving legal profession in the larger cities of Australia, it requires no great prescience to see that this Commission should move without undue delay to the national capital. In the end, the decision to locate in Sydney has been made upon the basis only of the cold necessities imposed by the lack of suitable accommodation space in Canberra. The Commission must simply make the best of the result.[38]

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37 Kirby, n 36, p 1.

38 ALRC, n 11, pp 31-32.

However, within a short time, both strategic and pragmatic[39] considerations led to the abandonment of the relocation plans.[40] In the following year's annual report, the Commission wrote that the Sydney central business district location "has proved satisfactory"; the proximity to major libraries and the city's legal centre "resulted in considerable economies", and

> also facilitated contact with the practising profession, academics, professional bodies, departments and the business community. The Commission feels that anything that can be done to reduce the isolation of law reform and its personnel is to be encouraged.[41]

By August 1976, Kirby J was highlighting the advantages of the Sydney location, and contrasting the position with his Ottawa-based Canadian counterparts:

> Unlike the Canadian National Commission, the Australian Law Reform Commission has been established not in the Federal Capital of Canberra but in Sydney. It is hoped that our propinquity will develop responsiveness to legal ideas, especially in the practising profession and will attract the participation of the best that the Australian legal profession has to offer.[42]

SOCIO-LEGAL ORIENTATION AND METHODOLOGY

As noted above, the United Kingdom model of law reform focused almost entirely on matters of black letter law or "lawyer's law". Indeed, it is still the case that the law commissions of England and Wales, Scotland and Northern Ireland tend to limit their work to more conventional areas of the common law.

From the beginning, however, the ALRC under Kirby J took a broader (and bolder) approach than British law commissions' "vague utilitarianism",[43] endeavouring to tackle complex issues at the intersection of law and social policy. These generally involve novel issues thrown up by changing social organisation or understandings; by new scientific,

39 Such as the cost and the obvious industrial difficulties involved in seeking to transplant 31 Commissioners and staff from one city to another.

40 Although the ALRC did have ancillary offices in Canberra from 1983-1987 and 1994-1999, to help service its responsibilities for the ACT community law reform and to house Canberra resident Commissioners: see ALRC, *Annual Report 1978* (ALRC 10, 1978) pp 5-6; ALRC, *Annual Report 1983* (ALRC 23, 1983) p 9; and ALRC, *Annual Report 2000* (ALRC 90, 2000) p 16.

41 ALRC, *Annual Report 1976* (ALRC 5, 1976) p 19.

42 Kirby, n 1.

43 Kirby, n 1, p 5, quoting Professor Gower, then a member of the Law Commission of England and Wales, on the philosophy of law reform: "[W]e adopted a vague utilitarianism, asking ourselves (subconsciously rather than consciously) what would conduct to the greatest good of the greatest number. In answering that I think we placed great weight on convenience, intelligibility, avoidance of needless expense, and on what we thought would make people happy because they would regard it as just."

medical or information technologies; or by the need to adapt to changing economic realities or international circumstances.

In part, as discussed above, this was probably a sign of the times, with the Whitlam Government viewing law reform as an instrument for driving progressive social change. However, the extent and enduring nature of this institutional commitment to social policy work – which survived the dismissal of the Whitlam Government, and continued to thrive during the Howard Government – owes a great deal to the particular vision of law reform instilled by Michael Kirby, itself influenced by Professor Julius Stone's sociological jurisprudence among other key factors:

> I had not expected to be doing the work of law reform. But three elements in my life and experience gave me special enthusiasm for the new tasks.
>
> The first was the instruction I had received in my legal education from Professor Julius Stone concerning the policy choices inherent in judicial and other legal decisions. Stone had a profound influence on me and on many Australian lawyers of my generation. Secondly, my eyes had been opened to the defects of the law in operation when, as a young legal practitioner, I acted in pro bono causes for Aboriginals, conscientious objectors, anti-war demonstrators and the like. Law on the ground suddenly seemed quite different from law in the books. And thirdly, my own experience as a homosexual person taught me that law could sometimes be oppressive, unjust, cruel.[44]

Justice Kirby has also referred to his childhood experience of the treatment of a family member as delivering an important lesson on the importance of struggling to overcome injustice:

> From my youth I always knew that reform of the law was important. In 1951 my grandmother's second husband stood at risk of losing many important civil rights. He had fought at Gallipoli in 1915 and later at the Somme in France where he was gassed. He won the Military Cross, a high decoration conferred on him by King George V. But in the 1930s he became disillusioned with society and its laws. He embraced communism. To me he was a fine human being and idealist, indeed a man of deep spiritual and humanitarian values. Yet to society he was an ogre.
>
> The High Court's action in invalidating the *Communist Party Dissolution Act* was an important moment for Australian liberties. But for my family it was an important moment for a person who lived in our midst. Now I look on his views as misguided. Possibly if he were alive, so would he. But the way to fight ideas is with better ideas. The High Court, and the Australian electors at the referendum that followed the Court's decision, showed great wisdom. The episode taught me that there must sometimes

44 Kirby, n 4, pp 433, 434–435.

> be a struggle for justice and principle within the law. Justice does not always triumph; but we should never be content with injustice.[45]

All of this contributed to the Australian Government asking the ALRC to work on references with a strong social policy emphasis, leading to reports on: complaints against police; police powers (for example, arrest, detention, search and seizure, and so on); alcohol, drugs and driving; insolvency and bankruptcy; human tissue transplants; privacy; defamation; sentencing of federal offenders; insurance contracts and agents; child welfare; and the recognition and application of Aboriginal customary law.

It should also be remembered that, at that time, before the High Court significantly expanded the ambit of federal authority under the Australian *Constitution* by reference to the foreign affairs and corporations powers, most of the traditional black letter law areas that occupied the United Kingdom law commissions were regarded in Australia as matters for the States and Territories, and not for federal law. As Kirby J noted in relation to this constraint:

> [I]n national matters, we will be required to work substantially within those borders mapped out by s 51 of the Australian *Constitution*. It is difficult, at first blush, to see much common philosophy emerging from projects on "weights and measures" or "fisheries in Australian waters beyond the territorial limits" or "marriage". But we will look for it.[46]

Justice Kirby consciously looked to Canada, another federal jurisdiction, for ideas about how to formulate this broader approach to law reform:

> Quite possibly because Canadian lawyers are consistently exposed to the necessities of accommodating the civil law approach, it is the Law Reform Commission of Canada that has helped other law reform commissions in the English speaking world to come to grips with the need to seek out and articulate first principles.
>
> It will be no secret that other law reform bodies take a different approach: one that they would no doubt characterise as more "practical" and certainly one that is more comfortable to lawyers brought up in the common law mode. Take, for example, the Law Commission of England and Wales. Within six weeks of its establishment, it had formulated a programme of work, with topics as diverse as the law of contract, family law and landlord and tenant law.[47]
>
> … Perhaps we can develop a hybrid creature combining the hard headed, practical wisdom of the English Law Commission with the challenging, forward looking scholarship of Canadian reform agencies.[48]

45 Kirby, n 36, p 6.

46 Kirby, n 1, p 6.

47 Kirby, n 1, p 5.

48 Kirby, n 1, p 7.

Great assistance in the effort to forge this bolder vision of law reform was also provided in the form of a legislative afterthought. When Lionel Murphy presented the *Law Reform Commission Bill 1973* to Parliament, the Liberal Shadow Attorney-General, Senator Ivor Greenwood QC, moved an amendment to cl 7 of the Bill, seeking to impose on the ALRC the duty to ensure that its recommendations, as far as is practicable, must be consistent with the *International Covenant on Civil and Political Rights* (ICCPR) and "do not trespass unduly on personal rights and liberties".

This was accepted as a "very welcome" amendment by Murphy,[49] and became part of the enabling Act. Pre-dating the establishment of the Human Rights Commission in 1981, it was the first statutory reference to Australia's human rights obligations under the *International Covenant on Civil and Political Rights*. Justice Kirby noted at the time that this "imposes a novel, special statutory duty on the Law Reform Commission",[50] but it also opened up the opportunity for the ALRC to consider broader matters of human rights.

INNOVATIVE STAFFING AND METHODOLOGY

The ability to work across such a wide array of "socio-legal" areas required not only creativity of mind, but also a flexible – and, for an institutional law reform agency at that time, innovative – approach to appointments and a degree of comfort with the use of empirical and multidisciplinary materials and research methods.

Again, this was evident from the early days of the ALRC under Kirby J. Of the first group of Commissioners appointed in 1975, three were relatively traditional legal experts: Gerard Brennan QC, then president of the Australian and Queensland Bar Associations (and later to become Chief Justice of the High Court of Australia); Gareth Evans, then a senior lecturer in law at the University of Melbourne (and later to become Federal Attorney-General and Minister for Foreign Affairs); and John Cain, then Executive Member of the Law Council of Australia (and later to become Premier of Victoria).

However, the other two appointments were pointedly unorthodox for a law reform commission at that time. Professor Alex Castles of Adelaide University was Australia's pre-eminent legal historian, and Associate Professor Gordon Hawkins was Deputy Director of the University of Sydney's Institute of Criminology, and an internationally renowned criminologist and the co-author of the brilliant *The Honest Politician's Guide to Law and Order*, but without any legal qualifications.

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49 M D Kirby, "Human Rights: The Challenge for Law Reform" (Turner Memorial Lecture, University of Tasmania, 14 October 1976) p 18; see also *The Speeches of The Honourable Justice M D Kirby, CMG – Volume 1, 1975-1976* (ALRC, 1986).

50 Kirby, n 49, p 17.

Whatever the breadth of experience and disciplinary backgrounds found among Commissioners and staff, it was also recognised from the beginning that this would have to be supplemented by the appointment in each inquiry of a broadly-based panel of consultants with relevant expertise.[51] In 1976, Kirby J noted that:

> the Commission has been able to expand its output by the use of consultants, many of whom seek no reward other than participation in the work of national service. Not only were police, academic and civil liberties personnel used in the first reports of the Commission. In a report on motor traffic laws, the cross-section of expert opinion ranged from instrument scientists, experts on road safety, medical personnel assisting alcoholics and drug dependants, chemists and so on. A like cross-section of interdisciplinary help is to be found in every one of the Commission's current projects.[52]

Although now commonplace, the use of consultants to facilitate multidisciplinary research and policy development was then a novel practice among law reform commissions. In presenting the submission of the New South Wales Society of Labor Lawyers to the 1993-1994 parliamentary inquiry into the Role and Functions of the Australian Law Reform Commission, Tim Robertson SC commented:

> Another initiative undertaken by the ALRC which was foreign to law reform commissions before its establishment was the selection of skilled and experienced people as consultants to supplement the staff resources of the Commission. The ALRC also quickly developed close relationships with other Commissions and prominent academics and practitioners in other common law and civil law countries. This cross-fertilisation opened up the legal horizons of Commission inquiries to influences from foreign jurisdictions. I cannot recall other law reform commissions doing so, with the exception of the NSWLRC's report on the Ombudsman and appeals in administration (the Ombudsman was in fact a Swedish innovation so it could not have been considered without advertence to its foreign origin).[53]

In his own testimony before the 1993-1994 parliamentary inquiry, Kirby J also highlighted the use of consultants as one of the great successes during his time at the ALRC. Referring specifically to his experience with the project on insurance contracts,[54] Kirby J recounted:

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51 This is still part of the ALRC's standard operating procedures, although such appointees are now styled "Members of the Advisory Committee"; service continues to be on a voluntary, pro bono basis.

52 Kirby, n 1, p 9.

53 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Role and Functions of the Australian Law Reform Commission – Submissions to the Inquiry (1993-1994)* (Vol 1) p 291 per Tim Robertson, NSW Society of Labor Lawyers (16 February 1994).

54 Which culminated in ALRC, *Insurance Contracts* (ALRC 20, 1982).

> We had meetings in the Commission where we had all the consultants – they were people from every branch of the insurance industry – the life, the general, the agents, the brokers, the underwriters, the reinsurers and we had community groups and consumer groups. They joined in with tremendous enthusiasm and devotion. They gave a lot to the Commonwealth and to the Parliament. The result is a very good statute. It has removed a lot of the uncertainties. I think it has been a great success …
>
> You have to have the core of intelligent, hardworking, energetic people of repute at the centre as commissioners and staff. Then you can gather around you this group of consultants. I reckon that is one of the major achievements of the ALRC during my time. In every project we gathered this penumbra of expertise from different groups in the community relevant to the task in hand … It was always extremely exciting. The devotion of citizens to improving the law was a wonderful thing to see. It was really civic action and responsibility at work.[55]

The practice is now part of the ALRC's standard procedures. In recent times, for example, the multidisciplinary nature of the ALRC's inquiry into the protection of human genetic information, conducted in association with the Australian Health Ethics Committee of the National Health and Medical Research Council in 2001-2003, meant that it was critical to involve in the process recognised leaders in the areas of: bioethics; genetic and molecular biological research; medicine; clinical genetics; genetic counselling; community health and medicine; indigenous health; public health administration; community education; health consumer issues; genetic support groups; insurance and actuarial practice; privacy law; anti-discrimination law; forensic medicine; DNA profiling and analysis; policing and trial practice.

Similarly, the ALRC "has long been conscious of the fact that many of its references raise issues which can be illuminated by appropriate empirical research",[56] even though in some cases this "may nevertheless be difficult, expensive and time consuming".[57] The ALRC commented in its 1984 annual report that it had:

> never taken the view that law reform was a matter for lawyers alone, or that recommendations on law reform ought to be developed remote either from representatives of other disciplines, or from the general public. The growing recognition of the significance of empirical research and the role of the social sciences, however, throws these issues into yet sharper focus.[58]

The same annual report also noted that in the preceding year:

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55 House of Representatives Standing Committee on Legal and Constitutional Affairs, n 53, pp 183-184 per Justice Michael Kirby.

56 ALRC, *Annual Report 1984* (ALRC 25, 1985) p 3.

57 ALRC, n 56, p 5.

58 ALRC, n 56, p 6.

> the Commission's program has included more empirical research than ever before. This emphasis reflects in part the nature of certain references currently before the Commission [sentencing, insolvency, and Aboriginal customary laws], and in part the continued growth of awareness among lawyers and law reformers of the important contributions that disciplines outside the law have to make.[59]

For Commissioners and staff, this involved a great reliance on information available from the Australian Bureau of Statistics, as well as an increased capacity to do their own empirical research and analysis.[60]

This strong emphasis on pursuing evidence-based reform remains to this day. For example, the ALRC's *Managing Justice* report in 2000 was underpinned and greatly influenced by a major empirical study of the operations of the various federal courts and tribunals, which provided critically important data on case numbers, duration and type; the efficacy of different case management strategies, practices and procedures; the degree of legal representation and its impact on outcomes; the use of alternative dispute resolution mechanisms; the costs of litigation; as well as follow-up attitudinal surveys of litigants and lawyers.[61]

SCHOLARLY EXCELLENCE AND AUTHORITATIVENESS

While pursuing multidisciplinary and other innovative approaches to law reform, the ALRC never lost focus on the need to maintain scrupulously first class standards of scholarship. Law reform work must always proceed from a meticulous treatment of black letter law and a clear understanding of the surrounding process. Only after that is it possible to consider intelligently the options for reform and to make recommendations that are realistic and achievable. A commission report should have independent and enduring value as an authoritative text on a given topic, regardless of whether the recommendations have been acted upon by government.

From the beginning of the ALRC, this was recognised by Kirby J, and reflected by the Commission's integration of academics as Commissioners and consultants, working alongside the judges and practitioners:

> I acknowledge my debt to legal academics with whom I first worked closely in my ALRC days. They taught me to conceptualise the solution to problems. This was a new approach, different to the common law's inclination to pragmatic, minimalist solutions based on the facts of particular cases. The academics also taught me the importance of good

59 ALRC, n 56, p 3.

60 ALRC, n 56, p 3.

61 ALRC, *Managing Justice: A Review of the Federal Civil Justice System* (ALRC 89, 2000); see also ALRC, *Review of the Federal Civil Justice System* (DP 62, 1999), which set out a great deal of the empirical material.

> empirical research concerning how the law operates in society. Such research does not come cheap.[62]

Justice Kirby has noted that reports based on excellent scholarship have intrinsic value as authoritative statements and analyses of the law, such that:

> it is now quite common for ALRC reports to be cited in Australian courts, including in the High Court of Australia, in submissions addressed to elucidation of the current state of the law and clarification of questions of legal policy and legal principle.[63]
>
> It is beyond doubt that courts and academic institutions are increasingly turning to law reform reports as a significant, intensive and accurate source of legal authority, principle and policy. In this way, even if unimplemented by the Parliament, a law reform report can influence the development of the law by the courts, and also by officials and other agencies. In 20 years as an appellate judge, I have noticed a distinct change of attitude amongst the Australian judiciary concerning the citation and use of law reform reports. Whereas two decades ago this was comparatively rare and treated with suspicion or even hostility, today that attitude has virtually disappeared. Partly, this is the product of new legislative and judicial approaches to the consideration of such materials in elucidating legislative meaning. But, partly it involves a recognition of the high standards of excellence in such reports. Commonly, law reform agencies have the time and purpose to identify the issues of principle and policy that are otherwise neglected in earlier judicial writings and in the submissions that courts typically receive from the Bar table.[64]

Similarly, well-researched and well reasoned reports have an influence on the development of the law beyond any direct implementation by the receiving government, by providing information and ideas, and contributing to the changing social atmospherics or Zeitgeist:

> The confidence with which advocates now refer to ALRC, and other law reform reports, and the willingness of contemporary judges to use those reports in the performance of the judicial function, is a notable achievement. It is of the nature of a national law reform agency that it will usually have greater resources and more time to examine such legal questions than judges typically do. When there is a reasonably current report of the ALRC on a subject, it is always of great help to me and to most other Australian judges. Indeed, in a real sense, ALRC and other law reform reports can sometimes achieve their general objectives, even where Parliament has failed to act, if the power of legal analysis and the examination of the legal concepts persuades judges with the authority

62 Kirby, n 4, pp 433, 447.

63 Kirby, n 36, p 3.

64 Kirby, n 4, pp 433, 439.

> to do so that judicial reform is appropriate, taking into account the recommendations of the law reform report.[65]

Specific instances of this involve the ALRC's groundbreaking reports on *Human Tissue Transplants*[66] and *Aboriginal Customary Laws*:[67]

> In the early days of the ALRC, we prepared a report on *Human Tissue Transplants*. It was trail blazing at the time. It was especially useful because it contained a legislative definition of death. Its proposals were soon adopted throughout Australia, providing a uniform approach to a sensitive subject in a country that has long neglected uniformity of state laws. In the years after the report was tabled in the Australian Parliament, we heard many reports of how it had been translated into foreign languages and used in several countries of South America in the development of their laws on the same subject. The processes of implementation, like the ways of God, can be mysterious and unexpected.
>
> … [T]he ALRC report on *Recognition of Aboriginal Customary Laws* has not, as such, been followed up with comprehensive implementing legislation. However, it has been suggested that the report, and the widespread national discussion of the operation of Australian law upon the indigenous people of the nation, stimulated a climate of opinion that resulted in attitudinal changes in the legal profession and judiciary that found reflection in the important decision of the High Court of Australia in *Mabo v Queensland* [*No 2*].[68]

Many other reports produced during (or after, but as a result of) Michael Kirby's tenure at the ALRC, including those on admiralty,[69] evidence,[70] recognition of Aboriginal customary laws, sentencing,[71] privacy,[72] and insolvency,[73] gained recognition as definitive texts in their area – often *the* definitive text – and have proved to be of enduring value as scholarly treatises.

In a submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs, during its *Inquiry into the Role and Functions of the Australian Law Reform Commission (1993-1994)*, Professor John Wade of Bond University had particular praise for this aspect of the ALRC's work:

> The final reports (eg Matrimonial Property; Contempt; Evidence) have become cornerstone reference works, either leading to reforms,

65 Kirby, n 36, p 3.

66 ALRC, *Human Tissue Transplants* (ALRC 7, 1977).

67 ALRC, *The Recognition of Aboriginal Customary Laws* (ALRC 31, 1986).

68 Kirby, n 4, pp 433, 439-440.

69 ALRC, *Civil Admiralty Jurisdiction* (ALRC 33, 1986); ALRC, *Criminal Admiralty Jurisdiction* (ALRC 48, 1990).

70 ALRC, *Evidence (Interim)* (ALRC 26, 1985); ALRC, *Evidence* (ALRC 38, 1987).

71 ALRC, *Sentencing of Federal Offenders (Interim)* (ALRC 15, 1980); ALRC, *Sentencing* (ALRC 44, 1988).

72 ALRC, *Privacy* (ALRC 22, 1983).

73 ALRC, *Insolvency: Regular Payment of Debts* (ALRC 6, 1977).

> or discouraging the endless reinvention of the wheel by subsequent government inquiries.
>
> Such cornerstones of the options available are essential, as busy legal practitioners and business people tend to recommend reform by anecdote and horror story; vocal lobby groups can re-run tired or magical "solutions"; rarely do text books comprehensively consider the options for reform, or the details of draft reforming legislation, or have access to a team of inter-disciplinary researchers, or have access to documentation and co-operation as is available to the ALRC.
>
> In the best democratic tradition, the ALRC has encouraged *informed* discussion.[74]

THE "EXTRA STEP" OF PUBLIC CONSULTATION

Almost certainly the most important and enduring contribution of Kirby J and the ALRC to law reform was the strong emphasis on wide-spread public involvement in the policymaking process. Other bodies, such as law reform agencies, royal commissions, government departments and ad hoc inquiries, had long been in the habit of calling for submissions. However, under Michael Kirby the ALRC went well beyond this passive approach, entrenching the active engagement of the community as part and parcel of its basic approach to law reform, under the rallying cry that "law reform is too important to be left to the experts".

Justice Kirby expressed this philosophy from the outset, stating in 1976 that:

> Law Commissions ought not to be seen as a "brains trust" of lawyers, isolated from the community whom the law is to serve. Indeed, lawyers do not have unassailable authority to decide what the law ought to be. They are frequently blinkered by their training and background when new insights are needed. The participation of non-lawyers in law reform exercises is not much favoured in England and has not been much practised outside North America ... We see it as quite vital that the Commission should not become just an "overpowerful enclave of an elitist faceless few". We are established to assist the Parliament in the development of modern laws which embody the popular values of Australian society.[75]

Similarly, Kirby J has reflected in more recent times that:

> Human motivation is a complex thing. Each one of us in institutional law reform in those golden days had our own reasons for involvement. For me, it was never a purely theoretical or analytical challenge. Law affected intimately the lives of people. To reform it, and thus to make

74 J Wade, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Role and Functions of the Australian Law Reform Commission (1993-1994 – Submissions to the Inquiry* (Vol 1, Submission 2, 5 October 1993) p 3.

75 Kirby, n 1, p 7.

> it better, it was essential to consult the "usual suspects" – judges, legal practitioners, public officials and institutions. But it was also important to consult ordinary people. They might offer perspectives that would refine and strengthen our proposals. Moreover, the very process of consultation would build a momentum that would protect the ALRC against the risks of bureaucratic and political indifference when its reports were finally written and tabled in the Parliament.
>
> Probably the most original "value added" of the ALRC – and its chief contribution to the law reform technique in the years after its establishment – was its emphasis on public consultation. Apart from everything else, because of my own life's experience, I was curious to hear from other people, living and working in Australia, about aspects of the law that they perceived as seriously unjust. If I could have such experiences, surely others could do so in those areas of the law that affected them. If others with power, including legal power, were blind to the injustice of the law which they administered as it affected me, perhaps there were areas of the law of which I was ignorant, or to which I was indifferent, that could be revealed in the voices of ordinary citizens, to help me and other law reformers to remove affronts to justice that had lasted too long. In the result, this happened …
>
> The process of widespread consultation was a reminder to the expert participants in the ALRC of the need to step beyond an elitist and purely lawyerly approach to law reform. Sometimes it added perspectives that the experts had missed, or identified sensitivities that needed to be addressed. Occasionally it repaired the imbalances between the well-organised lobby groups and the interests of ordinary people. It provided a forum to test expert ideas in civil society and to question intelligent laymen about their views and experience. Above all, it was a new scene: judges, lawyers and professors asking those affected about the law and how it could be made better.
>
> The ALRC technique symbolised its commitment to a non-elitist approach to law reform. It gave the agency a high public profile that helped to protect it from abolition. It raised expectations in the community of action in the area of law concerned. It made it more difficult for the government and the Parliament to place the recommendations in the too hard basket.[76]

This commitment sprang from a combination of factors: the democratic spirit of the times, the personalities and experience of the Commissioners, and the wide-ranging nature of the initial references. As Kirby J has written:

> One of the principles which the Commission adopted to guide it, virtually from the outset, was that law reform should be conducted in a transparent way with opportunities for widespread public consultation. Consultation had always been an attribute of organised law reform, at

76 Kirby, n 4, pp 433, 435-436.

> least after the creation of the English Law Commission in 1965. But the Australian Law Reform Commission took this theme one step further. It encouraged the use of the public media, the public lecture hall, public hearings, and other means, to promote a much more general debate about the work of the Commission and the policy options which confronted it.
>
> In part, this "extra step" was the product of the personalities of the original Commissioners. All, or most, of them had some exposure to public life and some knowledge of the ways of the media. Some of them, particularly Gareth Evans, saw the public exposure of ideas as an important feature of public policy development in a modern, liberal democratic community. To some extent it was the program of references given, first by the Whitlam Government, and later by the Fraser Government which necessitated and encouraged the public consultation and community controversy that was to follow. It is much easier to confine a debate about a Statute of Limitations to lawyers in a book-lined office than it is to resolve in private the quandaries of Aboriginal customary laws, the balance to be struck in a modern law on human tissue transplantation or the design of efficient and just machinery for handling complaints against the police. Such projects required new techniques.[77]

This new approach was evident from the audiences before which Kirby J spoke in the ALRC's early years. Besides the traditional stakeholders, such as law societies and Bar associations, they included groups of Masons, Rotarians, librarians, psychologists, oncologists, surveyors, car dealers, accountants, social workers, youth refuge workers, mental health workers, arbitrators, journalists, consumers, high school principals, university staff and students, genealogists, business leaders, police, the Australian Institute of Management, the National Council for Civil Liberties, the Royal Institute of Public Administrators, the Industrial Relations Society, the Australian Computer Society, the Australian Institute of Criminology, the Royal Australian Navy, the Insurance Council of Australia, NSW Young Lawyers, the Clean Air Society of Australia and New Zealand, the Australian Academy of Science, the Country Women's Association, Young Liberals and Young National Country Party members.

This high profile was sure to draw its critics, especially among conservative elements in the judiciary and the legal profession. Justice Kirby nevertheless defended the public dimension of the ALRC's work in the following terms:

> Of course, the public controversy was not without its critics. The legal profession, and especially the judiciary, were unused to the public ventilation of ideas and conflicting viewpoints in these ways. There is a personal convention of silence and modesty which was breached by the appearances on radio, television and talk back programs, and in

77 M D Kirby, "Foreword", *The Speeches of The Honourable Justice M D Kirby, CMG – Volume 1, 1975-1976* (ALRC, 1986) pp 2-3.

> unconventional lecture halls. I was not unaware of the criticism of myself as a "grand stander" and a person devoted to personal publicity. Those who know me will be aware that I found public performances painful on occasion. But they were all part of the role of the Commission, as conceived from the outset … I remain convinced that no other methodology would have been appropriate to the nature of a new national law reform agency in Australia and the performance of its functions, in modern circumstances, with the special challenges presented by the controversial tasks assigned by successive Federal Attorneys-General.
>
> … The promotion of the *idea* of law reform in a country as resistant to its necessity as Australia was, required something of a national "softening up". That could only be achieved by the active promotion of law reform … utilising the modern media of communication.[78]
>
> In a sense, the involvement of the public is part of the rationale of changing the law through a law reform agency. It is an attribute of open government. Most people agree with it.[79]

Here again, the real and perceived independence of a law reform commission, discussed above, is a crucial factor in providing the level of confidence needed for successful community consultation. At least as important, people also must feel that the time and effort involved in their participation in the law reform process is worthwhile – that is, that they will be given a meaningful opportunity to be heard and there is some reasonable prospect for achieving positive change.

Despite the high costs involved in terms of budget resources and staff exhaustion, the ALRC has maintained that "deep commitment to undertaking extensive community consultation as an essential part of research and policy development … the sine qua non of a law reform commission".[80] For example, in the ALRC's major inquiry into the Protection of Human Genetic Information (2001-2003), it conducted 15 public forums around Australia, organised 225 meetings with stakeholders in Australia and overseas, and received about 350 written submissions.[81]

The ALRC's recent review of privacy laws and practices[82] involved the largest community consultation program it has ever undertaken. The Commission held public forums in Melbourne, Sydney and Coffs Harbour. Dedicated youth workshops (for 13-25 year olds) were held in Sydney, Perth, Brisbane and Hobart, with ALRC staff receiving special training in consultation techniques suitable for children and young people. Over 230 consultation meetings and roundtables were

78 Kirby, n 77, p 3.

79 Kirby, n 1, p 8.

80 D Weisbrot, "The Future for Institutional Law Reform" in Opeskin and Weisbrot, n 4, p 32.

81 ALRC, *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC 96, 2003).

82 ALRC, *For Your Information: Review of Australian Privacy Law* (ALRC 108, 2008).

conducted, designed to capture the views of a wide cross-section of interested stakeholders, including among others: corporations; privacy advocates; academics and lawyers with expertise in privacy; federal, State and Territory government departments; children's commissioners; privacy commissioners from all Australian jurisdictions, as well as from Canada, the United Kingdom, New Zealand, Hong Kong and Germany; business, consumer and health representatives; the National Health and Medical Research Council; HREOC; and the Australian Institute of Aboriginal and Torres Strait Islander Studies. Further, nearly 600 written submissions were received during the course of the two-year inquiry.

In a special effort to get beyond the "usual suspects" and engage the wider community, the ALRC conducted a highly publicised National Privacy Phone-in on 1-2 June 2006, receiving 1,343 responses (by telephone or the web). In early 2007, the ALRC developed a new, heavily accessed, website page called "Talking Privacy", with a graphic style (and music) designed specifically to appeal to young people. The website contained information about privacy law and the particular inquiry, and encouraged young people to send in comments to the ALRC about their experiences and views in this area. The site also contained information aimed at teachers and students who were considering law reform issues or privacy as part of a school curriculum.

It is interesting to note that the same forces that required the ALRC to revisit the area of privacy after its groundbreaking work in the early 1980s – changing science and technology, changing social attitudes and patterns of communication – also require the continuous review of the effectiveness of public consultation techniques. When the ALRC conducted its original work on privacy, not one Commissioner had a computer on his or her desk, and the internet, supercomputers, digital cameras, e-commerce and social networking simply did not exist. In just one generation, not only has the electronic landscape changed so dramatically that a new inquiry was necessary, but internet-based communications had to be integrated into the ALRC's consultation method in a substantial way (rather than as a curiosity or afterthought).

As Kirby J has noted, the ALRC's commitment to community outreach as a central technique of law reform also provides other significant advantages, including a strong, built-in system of quality assurance, insofar as these efforts help to:

> gather information and opinion; to test preliminary ideas against interest groups and their perspectives; to protect the Commission from criticism of special interests; and to strengthen political decision-makers so that they accept the reform proposals that have been tested in the community.[83]

83 Kirby, n 36, pp 2-3.

Similarly, the high level of community engagement, as well as direct efforts at community legal education – such as through the publication of the twice-yearly journal *Reform* – aimed at the general public, also has served to demystify the law:

> The willingness of the ALRC Commissioners to engage, through the media, in consultation with the general public was an important innovation in law reform technique pioneered by the ALRC. Apart from everything else, it has helped to keep the name of the Commission recognisable throughout the nation and not only in governmental and legal circles. Over a quarter of a century, the ALRC has built up credibility and a reputation by involving a broad spectrum of interests in its work. But in my view, its process of consultation has had an even more beneficial impact in helping to demystify the law and its development. In fact, I do not believe that it is too much to say that the ALRC has helped to improve community understanding of law in Australia and the ultimate obligation of citizens to take responsibility for the state of the law.[84]

COLLEGIALITY AND WORK ETHIC

Justice Kirby has commented that during his time as Chair, the ALRC manifested "a strong collegial spirit that is essential to an effective law reform institution", [85] and that he personally enjoyed the support of "a dedicated, talented and highly motivated staff. The Commission worked well as a team".[86] These are sentiments with which I and his four other successors would readily agree.

Although hard to define and quantify, another legacy of Kirby J's leadership of the ALRC is an enduring institutional culture that places a premium on collegiality, staff development, and a capacity – indeed, an enthusiasm – for hard work.

The formal, structural break with the Australian Public Service and the negotiation of dedicated ALRC-staff collective agreements came some years later, during Alan Rose's presidency in the late 1990s. However, the pattern of dedication and service above and beyond the call of duty featured from the beginning, with Kirby J as Chair setting an example with his prodigious work ethic. The current agreement acknowledges the particular nature of the ALRC's workplace, in the following terms:

> The ALRC is a professional body focused on research, consultation and applied scholarly publications. The ALRC aims to provide the highest quality legal and policy advice to the Commonwealth Attorney-General, and through the Attorney-General to the Commonwealth

84 Kirby, n 36, p 3.

85 Kirby, n 4, pp 433, 434.

86 Kirby, n 77, p 4.

> Parliament and the Australian people. The nature of the ALRC's work is such that the intensity of the workload fluctuates in keeping with the natural rhythms associated with research, writing and publication deadlines. Accordingly, employees are expected to adopt a flexible and professional approach to their work, involving longer hours during periods of peak workload, balanced by shorter working hours at other times. For its part, the ALRC is committed to providing a flexible working environment, while ensuring the quality of its work. The ALRC acknowledges that employees have to balance their working life with other commitments …[87]

In a 2003 speech, Kirby J pointed to this culture of collegiality and respect as one of the key factors underlying the ALRC's success:

> Because, from the beginning, the ALRC had numerous projects on varying subjects, it became essential to mobilise the scarce resources of the Commission in an effective way. This was done by the appointment of a commissioner in charge of each project. It was his or her task to assemble the team of commissioners, staff and consultants, to prepare the consultative documents and to lead the process of consultation throughout the country.
>
> This form of delegation led to a decentralisation of responsibilities within the Commission and the sharing of responsibility by the several Commissioners, full-time and part-time. It was equally important that the Commission as a whole be aware of the development of reports and the efficient discharge of the references given by the Attorney-General. I believe that this system has proved highly productive for a body of restricted resources. It has ensured an efficient use of personnel and an effective procedure for the timely production of reform proposals.
>
> From the start, the ALRC departed from an overly hierarchical structure common in the law in favour of a generally democratic one. The staff at every level have been regarded as part of the ALRC team … Maintaining a close team relationship with the staff and respecting and honouring their dedicated contribution to the work of the ALRC has been a feature of the institution. Their teamwork has been a notable reason for the success of the ALRC.[88]

CONCLUSION

The ALRC's 1984 annual report opens by recording that "1984 marks the end of an era", with the departure of Justice Kirby after a decade as Chair.[89] The report also noted that work completed or in progress during Kirby J's tenure "covers very many important areas of law", including:

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87 ALRC, *Collective Agreement 2007-2010* (2007) cl 6: http://www.alrc.gov.au/work/agreement/index.htm (accessed 8 December 2008).

88 Kirby, n 36, pp 4–5.

89 ALRC, *Annual Report 1984* (ALRC 25, 1985) p 1.

- police powers in the investigation of crime, and protections to citizens;
- mechanisms for the investigation of complaints against police;
- the laws of evidence;
- the whole question of punishment of offenders;
- the particular area of the breathalyser, and alcohol, drugs and driving;
- the entire area of child welfare;
- human tissue transplants, including the definition of death, and the regime which should govern the taking of body parts and blood;
- the global question of the protection of privacy, against intrusions – by government, police and law enforcement officers, and so on in relation to the collection, use and dissemination of personal information by both public and private sector record keepers;
- privacy implications of the census;
- defamation;
- the entire issue of insolvency, both corporate and personal;
- the powers of the Federal Government to resume and acquire land, including the rules which should govern compensation, and rights of appeal etc;
- the whole question of insurance, including the rules which should govern the conduct of insurance agents and brokers;
- contempt of court and tribunals;
- whether and how Australian law should accommodate and recognise Aboriginal Customary Laws;
- the respective rights of married people over property both during marriage and on its dissolution, including their rights vis a vis creditors and others;
- the law's response to the problem of domestic violence;
- Australian admiralty jurisdiction, which covers some technical aspects of resolving shipping claims;
- foreign state immunity, about the immunity which foreign governments and their agencies should have from being sued in Australian courts;
- the extent to which Australia should be a single jurisdiction for the purposes of pursuing civil claims, summoning witnesses, and extraditing alleged criminals;
- a general Australian Capital Territory reference on community law reform. Under this reference, the Commission receives suggestions for law reform on any topic in Canberra.[90]

Although Kirby J has frequently, and understandably, expressed "frustration at the doldrums into which well-considered reports fell"[91] – a feeling shared by all law reformers from time to time[92] – the implementation rate for

90 ALRC, *Annual Report 1984* (ALRC 25, 1985) p 1.

91 Kirby, n 4, pp 433, 438.

92 See, eg, B Opeskin, "Measuring Success" in Opeskin and Weisbrot, n 4, p 202; J Hannaford, "Implementation" in Opeskin and Weisbrot, n 4, p 222; D Weisbrot, "The Future for Institutional Law Reform" in Opeskin and Weisbrot, n 4, pp 18, 35-38; and L Glanfield, "Law Reform through the Executive" in Opeskin and Weisbrot, n 4, pp 288, 297-298.

ALRC reports during his time in charge actually was quite respectable, and the influence of those reports on the subsequent development of the law was even greater, domestically and internationally.

By the time Kirby J left the ALRC in 1984, the Commission had completed 14 substantive reports (that is, not counting annual reports), of which eight already had been "substantially adopted" by the government, while four others were "the subject of government commitments".[93] Most notable among the omissions was (and still remains) the excellent report on the recognition and application of Aboriginal Customary Laws.[94] However, as discussed above, that report had a significant impact on legal, judicial and political thinking, which subsequently found expression in the High Court of Australia's judgments on native title, and the legislative responses to those decisions.

As Kirby J himself later reflected:

> Disappointment that a law reform report is not immediately acted upon can also be mollified by the realisation that it is now a commonplace, in the development of new legislation on a topic that has been the subject of law reform reports, to draw heavily on law reform reports, including in other jurisdictions … [I]t can now be appreciated that a permanent, independent and authoritative law reform body can play a significant role in raising consciousness in the courts and the community about the need for law reform and the urgency of addressing it.[95]

Justice Kirby's ALRC work also had significant international influence, especially in the areas of human tissue (and bioethics more generally) and privacy. As noted above, the model Human Tissue Act developed by the ALRC in 1977[96] was adopted by all States and Territories in Australia, and then by a range of other countries around the world. Justice Kirby himself gained a major international reputation in this field. Between 1995-2005, he served on both UNESCO's International Bioethics Committee and the Ethics Committee of the Human Genome Organisation. In 2004-2005, Kirby J chaired the drafting group that prepared the *Universal Declaration on Bioethics and Human Rights*, which was adopted by the General Conference of UNESCO in 2005.

Similarly, the ALRC's 1983 report on Privacy[97] found its way into law in the *Privacy Act 1988* (Cth) and the parallel State and Territory legislation. Justice Kirby chaired two Expert Groups of the OECD in this field, on privacy principles (1978-1980) and then on data security (1991-1992), which very strongly influenced the entire development of this field of law internationally.

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93 ALRC, *Annual Report 1984* (ALRC 25, 1985) p 1.

94 ALRC, *Aboriginal Customary Laws* (ALRC 31, 1986).

95 Kirby, n 4, pp 433, 439-440.

96 ALRC, *Human Tissue Transplants* (ALRC 7, 1977).

97 ALRC, *Privacy* (ALRC 22, 1983).

As discussed above, however, Kirby J's greatest contribution to law reform will be remembered as his passionate commitment to community engagement in the process. Speaking at the ninth meeting of the Australasian Law Reform Agencies Conference in 1984, Mr J B Piggott CBE, then Chair of the Tasmanian Law Reform Commission, accurately said of Kirby J that:

> He has put Australia on the map so far as the law is concerned. But that is not his greatest contribution. The greatest contribution I think he has made is that he has put law on the map so far as the people of Australia are concerned.[98]

The final word on Kirby J's approach to law reform should be left to the man himself:

> So there it is: a formula for law reform in Australia. A touch of history, a pinch of philosophy, a few techniques, a lot of work, a varied programme and a great deal of luck in the Parliamentary process. The Australian Law Reform Commission seeks to give Australian law searching, critical and innovative scrutiny. We have transplanted the English law to the Antipodes. Can future generations prove themselves as adept in renewing the law and making it accurately reflect the needs and ideals of Australian society?[99]

98 *Record of the Australian Law Reform Agencies Conference 1984* (1984) pp 290, 297; quoted in House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Role and Functions of the Australian Law Reform Commission (1993-1994) – Submissions to the Inquiry* (Vol 1) p 75.

99 Kirby, n 1, p 15.

Chapter 25

THE LAW REFORMER

Murray Wilcox

> *[I]t is now a commonplace, in the development of new legislation on a topic that has been the subject of law reform reports, to draw heavily on law reform reports, including in other jurisdictions. … [I]t can now be appreciated that a permanent, independent and authoritative law reform body can play a significant role in raising consciousness in the courts and the community about the need for law reform and the urgency of addressing it.*[1]

Although I had known him previously, and have followed with interest his subsequent judicial career, my major contact with Michael Kirby was during the three years we worked together on the Australian Law Reform Commission (ALRC).

The legislation establishing the ALRC was enacted in 1973 on the initiative of Senator Lionel Murphy, Attorney-General in the Whitlam Labor Government. However, it was not until early 1975 that the first Commission members were appointed: a full-time Chairman, Michael Kirby, and five part-time Commissioners. The appointees immediately set to work. Astonishingly, by the end of that year, they had already published the Commission's first two reports: *Complaints against Police* and *Criminal Investigation*.

At the end of 1975, the Whitlam Government lost office. In the name of cost-cutting, the incoming Liberal-National Government reversed many of Labor's initiatives. For a time, it seemed probable the ALRC would be abolished. However, the initial Attorney-General in the new government happened to be the eminent lawyer and former Commonwealth Solicitor-General, Robert Ellicott QC. He realised the need for a national law reform body and, I suspect, was instrumental in the ALRC avoiding the axe.

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1 M Kirby, "Are We There Yet?" in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (Federation Press, Sydney, 2005) pp 433, 439-440.

Early in 1976, the ALRC produced its third report, *Alcohol, Drugs and Driving.* However, despite its early productivity, it was obviously necessary to increase the Commission's resources; the more especially because one of the initial part-time Commissioners, academic lawyer Gareth Evans, had resigned his position to contest a Senate seat, on behalf of the Labor Party, in the December 1975 election. He was unsuccessful. Despite the fact that Gareth was a major contributor to the ALRC's first three reports, the Fraser Government was not willing to reappoint him.

Bob Ellicott decided to appoint three full-time Commissioners, to supplement the Chairman and the remaining four part-time Commissioners. I was one of them, the other two being Sydney solicitor, Russell Scott, and Adelaide academic, David Kelly. I was appointed for a term of three years, on the basis that I would serve full-time for 18 months and then a further 18 months part-time, during which I would return to practice at the Bar, but finish off the references for which I had undertaken responsibility.

When I joined the Commission, on 1 July 1976, I found a small organisation that occupied one floor. Within a month or so, the other full-timers arrived. We each had a secretary and the shared services of a small, but extremely capable, team of Law Reform Officers. They assisted with research, arrangements for meetings, seminars etc and, importantly, as sounding boards for ideas. There was a small library, managed by a first-class librarian. The Commission Secretary led a small management group. And that was it, about 20 people in all.

What that early ALRC team lacked in numbers was more than made up in enthusiasm. We felt we were pioneering a new era in which, instead of the law developing in an ad hoc way, as a reaction to the latest perceived crisis, and reflecting the political interests of the incumbent government or personal prejudices of a minister, legal change would follow a systematic and open review of the particular topic, with community and expert input. Appropriate, comprehensive legislation would be recommended to the Parliament, taking the reform of the law away from the maelstrom of party politics.

Michael Kirby had much to do with developing this pioneering sense, both from his public utterances (speeches, conference papers and media interviews) and from his day-to-day leadership within the Commission. Michael worked extremely long hours. He built up a large network of contacts, including with overseas law reformers, which both enlarged our vision and facilitated our research. The coffee room table always bore a mass of interesting material, over which it was tempting to linger. However, this was not wise: a rigorous timetable applied to each reference.

Perhaps because there were so few of us, a close camaraderie united everyone at the Commission. There were frequent outings to restaurants, barbeques and the like. Michael did not organise these social activities, but he encouraged and participated in them.

The Commission took seriously its statutory obligation of public consultation. We adopted the practice of publishing short, pithy discussion papers about each reference, in which we identified the perceived inadequacies of the current law and indicated a range of possible improvements. The papers were widely distributed, not only amongst lawyers, and we strove to attract media interest to them. In those days, politicians tended to allow themselves quiet Sundays. Michael was quick to see the advantage of the ALRC embargoing major media releases until a Sunday night. We often achieved front-page exposure on the following morning.

Before I came along, the ALRC had already adopted the practice of assembling, for each reference, a panel of "consultants" who could advise the Commission about problems and possible solutions. The idea was to enlist people (legal and non-legal) with a diversity of experience and views, so there would be informed and helpful debate. Consultants' meetings were usually held at weekends, often over both days. They were demanding affairs, with concentrated work over long hours. However, with good chairmanship, usually supplied by Michael, they were turned into stimulating, enjoyable experiences.

Consultants were not paid; only reimbursed their out-of-pocket expenses. Rarely, however, did anybody decline an invitation to serve. I learned there is a widespread willingness, in our community, to serve in a voluntary capacity, if those who are invited to do so believe the project is being taken seriously and likely to achieve a positive result. In this respect, it is vital that governments be seen promptly to consider, and usually to implement, law reform reports.

During 1977, the Commission published two more reports, *Insolvency: The Regular Payment of Debts* and *Human Tissue Transplants*. However, reality was beginning to catch up with us: the report implementation rate was low. This did not appear to stem from problems about the content of our reports; it seemed to take an age for reports even to be considered by the Attorney-General. Sometimes I wondered whether this delay arose out of departmental obstruction. Some senior departmental officers clearly resented the existence of the Commission and the loss of the Department's former monopoly of advice about possible law reforms.

Further, State government antagonism towards the ALRC was becoming increasingly apparent. Some States thought the ALRC was intruding too deeply into their areas of responsibility. Perhaps, also, the Commission's consultative processes pointed up the inadequacy of the law reform processes followed by the States.

In mid-1977, Bob Ellicott resigned as Attorney-General, after a dispute with Malcolm Fraser over the handling of the Sankey prosecution of Gough Whitlam and others. Ellicott was replaced by Senator Peter Durack, an amiable Perth solicitor who lacked both the legal distinction and reforming zeal of Ellicott. Moreover, like many from the West, Peter

Durack took a restricted view of the desirable range of Commonwealth responsibilities; he was concerned the Commission should not upset the States.

For some time after Peter Durack's appointment, the future of the Commission seemed in the balance. No action was being taken in respect of any of the possible future references the Commission had suggested to the Department; no new appointments were being made.

It was in this situation that Michael Kirby, law reformer, had his finest hour. Along with all the Commissioners, Michael believed the best insurance against abolition, either overtly or by neglect, was to build up the Commission's public profile. Michael had always been willing to engage in public discussion about the Commission's work. He now went further, actively seeking opportunities for him and, to a lesser extent, us full-time Commissioners to speak about the issues raised by some of the Commission's then current references, as well as the importance of the public consultative processes that were being followed by the Commission. Michael was aided by the fact that the Commission was then heavily engaged in the sensitive Privacy reference. This included publication privacy and defamation law, topics of great interest to the media.

Over the period to mid-1979, when my term as Commissioner expired, the Commission received enormous media exposure, almost all positive. In late 1979, we published *Unfair Publication: Defamation and Privacy* to widespread approval, except from the Fairfax press. Gradually, the threat of abolition receded. New references started to trickle through. New appointments were made. The battle had been won.

When Michael Kirby was appointed President of the New South Wales Court of Appeal he resigned from the ALRC. I agreed to act, on a part-time basis, as Chairman until a long-term replacement could be recruited. I returned to a Commission that was larger than in my earlier term. Some of the early euphoria had subsided, but there was still great enthusiasm and much hard work going on. At that time, the Commission had before it two references, Evidence and Aboriginal Customary Law, which were particularly demanding, in very different ways. I found Michael Kirby had made a considerable contribution to both of them, before his departure. More importantly, he had left behind him an efficient, highly professional organisation that has continued to serve Australia well.

Chapter 26

NATIVE TITLE

Melissa Perry

The recognition of the rights to land and to waters and fishing resources of indigenous peoples is now an international question. It is one that concerns, but is not confined to, the several nations settled at one time under the British Crown. It is therefore at least as relevant … to have regard to the requirements of international law as a "legitimate and important influence on the development of the common law" as it is to consider the old cases expounding the common law of England.[1]

INTRODUCTION

On 3 June 1992, the High Court delivered its decision in *Mabo v Queensland [No 2]*, declaring the entitlement of the Meriam people as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands.[2] This was a decision of great legal and symbolic significance, marking the first time in Australia's history that the traditional rights of its indigenous people in land had been recognised by the common law.[3] Those rights, in turn, were recognised by the subsequent enactment of the *Native Title Act 1993* (Cth) (the *Native Title Act*) which sought both to afford greater protection to native title rights, and to provide certainty to the broader Australian community as to the validity of non-native title rights in land and the creation of future rights. As to the latter, the High Court had earlier held in the first *Mabo* decision (*Mabo (No 1)*)[4] that a State law which purported to extinguish

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1 *Commonwealth v Yarmirr* (2001) 208 CLR 1 at 132-133 [297] per Kirby J.

2 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 217 (save for certain excluded areas described in the declaration).

3 Prior to that time, however, there existed statutory regimes in certain of the States and Territories for the grant of rights in land to, or for the benefit of, Aboriginal peoples: see, eg, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

4 *Mabo v Queensland* (1988) 166 CLR 186.

native title inconsistently with the *Racial Discrimination Act 1975* (Cth) was invalid under s 109 of the Commonwealth *Constitution*.[5]

The decision in *Mabo [No 2]* posed a significant challenge for the development of a body of legal principle to accommodate the late recognition of these rights within Australia's legal system. While there was guidance to be found in the decision in *Mabo [No 2]*, it is in the nature of the judge-made law that it develops incrementally in response to the issues which come before the courts, including in the interpretation of statutory provisions. This chapter focuses upon the approach adopted by Justice Kirby in this process to resolving the novel and complex issues confronting the courts in working out the consequences of the decision in *Mabo [No 2]*. As will be seen, his approach builds upon the role accorded to fundamental human rights by Justice Brennan (as he then was) in holding that native title rights must now be recognised by the common law. Consequently, this chapter begins with a consideration of the reasons of Justice Brennan in that case. The chapter then examines how that and other considerations influenced Justice Kirby's approach in a real and practical sense, first, in the development of principles relating to the recognition and proof of native title and, second, in determining the circumstances in which native title was extinguished.

DEVELOPMENT OF THE LAW OF NATIVE TITLE

The role of international human rights in Mabo [No 2]

The decision in *Mabo [No 2]* addressed a fundamental inequality rooted in the very acquisition of sovereignty by Great Britain over the various parts of Australia. Under the doctrine of terra nullius, sovereignty had been acquired as if Australia were uninhabited territory "because of the supposed position on the scale of social organization of the indigenous inhabitants".[6] *Mabo [No 2]* was a turning point, with the court holding that the doctrine of terra nullius could no longer be perpetrated so as to deny recognition to the pre-existing rights of those peoples to their traditional lands. The unjust and discriminatory nature of the doctrine was held to require its re-examination. As Brennan J (with whose reasons Mason CJ and McHugh J agreed) held:

> Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to

5 That case was determined on the assumption that the native title rights claimed had not been extinguished by the acquisition of sovereignty or subsequent acts. This assumption was upheld in *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

6 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42 per Brennan J.

> individuals pursuant to Australia's accession to the *Optional Protocol to the International Covenant on Civil and Political Rights* [ICCPR] brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.[7]

Justice Kirby was not then a member of the High Court. However, the significance accorded to Australia's international obligations and, in particular, to Australia's recent accession to the Optional Protocol to the *International Covenant on Civil and Political Rights* (ICCPR) (which enabled Australians to make complaints to the Human Rights Committee)[8] reflected a deep conviction held by Kirby J as to the appropriate use of international human rights norms by domestic courts. As Chair of the Law Reform Commission between 1975 (when the Commission was first established) and 1984, he had been required to approach the task of reviewing laws within the reach of Commonwealth legislative power with a view to ensuring that such laws and proposals did not trespass unduly on personal rights and liberties, and were consistent with the ICCPR.[9] He had also participated in the judicial colloquium held in 1988 which had adopted the *Bangalore Principles on the Judicial Application of International Human Rights Law*[10] (Bangalore Principles). Those principles endorsed the use of international obligations to assist in addressing ambiguities and uncertainties in domestic law, and Justice Kirby became a strong advocate for those principles.[11]

Against this background, it is not surprising that Justice Kirby frequently cited the decision in *Mabo [No 2]* as illustrating the manner in which universal values, which can inform the development of domestic law, may be discerned from generally accepted principles of international law.[12] In particular, speaking of Australia's ratification of the ICCPR and the First Optional Protocol, he wrote that the decision "illustrates the way that the global and regional principles of human rights, even in

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7 (1992) 175 CLR 1 at 42.

8 *International Covenant on Civil and Political Rights* (ICCPR) (ATS 1980 No 23, New York, 16 December 1966); Optional Protocol to the ICCPR (ATS 1991 No 39, New York, 19 December 1966). Australia signed the ICCPR on 18 December 1972 (came into force generally and for Australia on 23 March 1976), and became a party to the Optional Protocol with effect on 25 December 1991.

9 *Law Reform Commission Act 1975* (Cth) s 7.

10 *Report of the Judicial Colloquium on the Domestic Application of International Human Rights Norms*, Bangalore, India (reprinted (1988) 14 *Commonwealth Law Bulletin* 1196).

11 M D Kirby, "Ten Years in the High Court – Continuity and Change" (2005) 27 *Australian Bar Review* 4 at 21.

12 See, eg, M D Kirby, "Internationalising Law – A New Frontier for Law and Justice" (Paper based on address at conference on Globalism, Law and Justice, University of Western Australia, Perth, 27 October 2006) pp 6 and 27.

common law countries, are coming to influence the reasoning of the courts and the content of the law".[13]

In turn, when he was required to consider novel issues in the area of native title law, Justice Kirby can be seen to have adopted a similar approach.[14] In particular, he did not accept that the impact of European settlement and the fact of dispossession of many Aboriginal people from their traditional lands meant that the late recognition of native title rights was effectively a hollow act, largely incapable of application to mainland Australia.

Recognition of native title in the face of dispossession

Early consideration of the issue

In 1986, the Law Reform Commission published its Report on Aboriginal Customary Law. That report stands as one of the most significant and comprehensive considerations of how Aboriginal customary law might interact with domestic law, potentially affecting a range of fundamental human rights, including the right of Aboriginal people to retain their racial identity and traditional lifestyle (matters which were recognised in the terms of reference themselves[15]). Even at this stage, the Commission anticipated the difficulties which Aboriginal claimants would be likely to face in establishing native title if the claim in *Mabo's* case (then unresolved) should succeed. Widespread dispossession of Aboriginal people, and the likelihood that their rights would have been abrogated in any event, led the Commission to observe that "[i]n practice common law claims (such as that in *Mabo's* case) are likely to do little to satisfy the aspirations of most Aboriginal people for land rights."[16]

13 M D Kirby, "Strengthening the Judicial Role in the Protection of Human Rights – An Action Plan" (Speech, concluding session, Inter-regional Conference on Justice Systems and Human Rights, 20 September 2006) pp 7-8.

14 Justice Kirby adopted a similar approach in other contexts apart from native title, including those where the rights of indigenous people were in issue: see, eg, *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 417-419 [166]-[167] where he referred to international human rights law in aid of the construction of the races power in s 51(xxvi) of the Commonwealth *Constitution*, which was amended in 1967 to enable the Commonwealth to make laws with respect to Aboriginal people. That approach is controversial: contrast, eg, the views of McHugh and Kirby JJ in *Al-Kateb v Godwin* (2004) 219 CLR 562 at 589-595 [62]-[73] and 617-630 [152]-[192] respectively.

15 The Terms of Reference are reproduced in Law Reform Commission, Report No 31, *The Recognition of Aboriginal Customary Laws* (AGPS 31, 1986) Vol 1, p xxxv, and expressly required the Law Reform Commission to have regard, among other matters, to: "(c) the need to ensure that every Aborigine enjoys basic human rights; (d) the right of Aborigines to retain their racial identity and traditional life style or, where they so desire, to adopt partially or wholly a European life style".

16 Law Reform Commission, n 15, Vol 2, p 136 at [902].

Justice Kirby had been Commissioner-in-Charge of the Reference on Aboriginal customary law for its first year,[17] and was Chairman of the Commission for most of the ten-year period during which the report was being researched and prepared.[18] It was perhaps due to that background that he recognised from the outset the difficulties confronted by a native title claimant in meeting the burden of establishing the existence of rights and interests sourced from the time that sovereignty was acquired.

Justice Kirby was first to consider these issues in 1994 in *Mason v Tritton*,[19] while still President of the New South Wales Court of Appeal. In that case, the Court of Appeal (Gleeson CJ, Kirby P and Priestley JA) was called upon to determine an appeal against a conviction for fisheries offences on the ground that the regulations in question did not apply to the appellant as a person exercising a native title right to fish. In dismissing the appeal, all members of the court were agreed that the appellant had failed to provide sufficient evidence that he had been exercising such a right. In that context, Kirby P observed that:

> In the nature of Aboriginal society, their many deprivations and disadvantages following European settlement of Australia and the limited record keeping of the earliest days, it is next to impossible to expect that Aboriginal Australians will ever be able to prove, by recorded details, their precise genealogy back to the time before 1788. In these circumstances, it would be unreasonable and unrealistic for the common law of Australia to demand such proof for the establishment of a claim to native title. The common law, being the creation of reason, typically rejects unrealistic and unreasonable principles.[20]

Consequently, if the case had not been determined on another ground,[21] Kirby P would have been prepared to infer use of the land by the appellant's forebears back to 1788 when sovereignty was acquired on the basis that he had proved biological descent back to the 1880s.[22]

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17 He was succeeded in that role initially by Mr B M Debelle QC for the period 1978-1981, and subsequently by Professor James Crawford under whose stewardship the project was completed in 1986.

18 Justice Kirby was Chairman of the Commission between 1975 (when the Commission was first established) and 1984. The question of whether Aboriginal customary law might be applied to Aboriginal people generally or to those living in a traditional way, and the extent to which it might be applied, particularly in the criminal context, was referred to the Commission on 9 February 1977 by the then Federal Attorney-General, Mr R J Ellicott QC.

19 (1994) 34 NSWLR 572.

20 (1994) 34 NSWLR 572 at 588.

21 The appellant had also failed to establish that he had been fishing for the traditional use claimed (to fish for food for himself and his family or exchange the same for other food); accordingly, the claim failed in any event: (1994) 34 NSWLR 572 at 589; see also at 574-575 per Gleeson CJ, and at 604 per Priestley JA.

22 (1994) 34 NSWLR 572 at 588-589.

Yorta Yorta and the effect of dispossession

Similar concerns underlay the manner in which Gaudron and Kirby JJ in their joint reasons approached the issues posed almost a decade later in the native title claim brought on behalf of the members of the Yorta Yorta Aboriginal community. That case concerned a native title claim to land and waters in northern Victoria and southern New South Wales within an area bisected by the River Murray. This was a case in which the original inhabitants of the claim area (from whom a number of the claimants were descended) had long been dispossessed of the lands which they had occupied in 1788.

The claim had been rejected at first instance and on appeal in the full Federal Court. Nor did the appeal succeed in the High Court. In essence, by majority the High Court held that the rights recognised by the *Native Title Act 1993* (Cth) and defined in s 223(1) of the Act were "traditional" in the sense that their origins lay in pre-sovereignty law and customs having normative content.[23] Thus, it was held that the rights had to be shown to be possessed under a system of laws and customs "that has had a continuous existence and vitality since sovereignty".[24] That in turn required that the "society" which acknowledged and observed those laws and customs at sovereignty had continued to exist,[25] although it was accepted that identifying such a society "will, in many cases, be very difficult".[26] That difficulty proved too great for the Yorta Yorta Aboriginal community, and the failure to satisfy that element was fatal to its claim.[27]

In their dissenting judgment, Gaudron and Kirby JJ adopted an approach which took account of the impact of European settlement and dispossession on Aboriginal people's connection to their traditional lands in the principles by which their traditional rights were recognised so as, in a practical way, to alleviate these difficulties. Thus, they held first that:

> As and when it occurred, European settlement almost certainly rendered the observance of traditional practices impractical in a number of respects … In the face of the acknowledged history of dispossession, it must be accepted that laws and customs may properly be described as "traditional" for the purposes of s 223(1) of the Act, notwithstanding that they do not correspond exactly with the laws and customs acknowledged and observed prior to European settlement.[28]

23 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2003) 214 CLR 422 at 443 [42] and 444 [45] per Gleeson CJ, Gummow and Hayne JJ.

24 (2003) 214 CLR 422 at 444-445 [47] per Gleeson CJ, Gummow and Hayne JJ.

25 (2003) 214 CLR 422 at 445-446 [49]-[54] per Gleeson CJ, Gummow and Hayne JJ.

26 (2003) 214 CLR 422 at 446 [52] per Gleeson CJ, Gummow and Hayne JJ

27 (2003) 214 CLR 422 at 458 [95]-[96] per Gleeson CJ, Gummow and Hayne JJ.

28 (2003) 214 CLR 422 at 463 [113] per Gaudron and Kirby JJ.

This approach allowed for "adaptations, alterations, modifications or extensions made in accordance with the shared values or customs and practices".[29] In other words, the word "traditional", in the statutory definition of "native title", should not be interpreted so as to exclude the inevitable process of evolution and change in the wake of European settlement.

Second, Gaudron and Kirby JJ acknowledged the relevance of the continuity of the community to the question of whether the traditional laws and customs are acknowledged and observed, but held that the community is relevantly self-defining: "[t]he question whether there is or is not continuity is primarily a question of whether, throughout the period in issue, there have been persons who have identified themselves and each other as members of the community in question."[30]

Finally, and significantly, they held that the question of whether the community had ceased to exist was not determined by the question of whether they had retained a physical presence in a particular place, holding that:

> Communities may disperse and regroup. To the extent practicable, individuals may, on the dispersal of a community, continue to acknowledge traditional laws and observe traditional customs so that, on regrouping, it may be that it can then be said that the community continues to acknowledge traditional laws and observe traditional practices.[31]

On this view, therefore, dispossession did not necessarily entail the loss of native title rights and interests in the land.

Recognition of cultural rights

The approach taken by Gaudron and Kirby JJ in *Yorta Yorta*, that a lack of physical presence on the land did not necessarily mean that the claimants' connection with the land was lost, is consistent with the view taken by Kirby J as to the significance of the spiritual nature of the relationship between Aboriginal people and the land in *Western Australia v Ward*.[32] Among the many issues in that case, the question was raised as to whether the definition of "native title" in s 223(1) of the *Native Title Act* extended to the right to maintain, protect and prevent the misuse of cultural knowledge. In particular, the question was whether that right could satisfy the requirement in s 223(1)(b) that the Aboriginal peoples, by the traditional laws acknowledged and traditional customs observed, have a connection with the land.

29 (2003) 214 CLR 422 at 463-464 [114] per Gaudron and Kirby JJ.
30 (2003) 214 CLR 422 at 464 [117] per Gaudron and Kirby JJ.
31 (2003) 214 CLR 422 at 464-465 [118] per Gaudron and Kirby JJ.
32 (2003) 213 CLR 1.

The High Court had no difficulty in accepting that a right to protect cultural knowledge would satisfy the requirement that there be a connection in s 223(1)(b) to the extent to which the right involved control of, or restrictions on, access to land. However, the majority held that the statutory definition did not extend to rights which went beyond access to land, such as rights restricting the viewing, reproduction or hearing of cultural knowledge about Dreamings relating to a particular site in the form of paintings or dance. Such rights, the majority held, "approach[ed] an incorporeal right akin to a new species of intellectual property" which failed to satisfy the requirement of "connection".[33]

Justice Kirby took a different view. He started from the accepted proposition that "the connection between Aboriginal Australians and 'country' is inherently spiritual and that the cultural knowledge belonging to Aboriginal people is, by indigenous accounts, inextricably linked with their land and waters, that is, with their 'country'".[34] From this premise, he reasoned that:

> If this cultural knowledge, as exhibited in ceremony, performance, artistic creation and narrative, is inherently related to the land according to Aboriginal beliefs, it follows logically that the right to protect such knowledge is therefore related to the land for the purposes of the [Native Title Act].[35]

He concluded that a sufficient connection between the right and the land was established. In reaching this view, Kirby J drew support from Australia's ratification of the ICCPR and the *International Covenant on Economic, Social and Cultural Rights* (IESCR),[36] holding that, in his opinion, those human rights included certain rights articulated in the Draft Declaration on the Rights of Indigenous Peoples prepared by the United Nations Working Group on Indigenous Populations.[37] In particular, he relied upon "the right of indigenous people to have 'full ownership, control and protection of their cultural and intellectual property'" and

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33 (2003) 213 CLR 1 at 84 [59]-[60] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

34 (2003) 213 CLR 1 at 247 [580]; see also at 64 [14] per Gleeson CJ, Gaudron, Gummow and Hayne JJ: "As is now well recognised, the connection which Aboriginal peoples have with 'country' is essentially spiritual." In *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, Blackburn J said that "the fundamental truth about the aboriginals' relationship to the land is that whatever else it is, it is a religious relationship … There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole'."

35 *Western Australia v Ward* (2003) 213 CLR 1 at 247 [580].

36 (2003) 213 CLR 1 at 247 [581]; *International Covenant on Economic, Social and Cultural Rights* (ICESCR) (ATS 1976 No 5, New York, 19 December 1966). Australia became a signatory to the ICESCR on 12 August 1972, and the Covenant entered into force generally on 1 March 1976.

37 *Western Australia v Ward* (2003) 213 CLR 1 at 247 [581].

the right "to practise and revitalise their cultural traditions and customs" in the Draft Declaration.[38]

At that time, the Draft Declaration was contentious and was not a document that had been prepared or adopted by states. As such, Justice Kirby's reliance upon it in this context might well be regarded as controversial, although he was careful to limit his reliance to particular articles and to do so on the basis that it was his opinion that these elucidated upon rights already protected under international treaties to which Australia was a party. Subsequently, after nearly 25 years of negotiations, the United Nations resolved to adopt the *United Nations Declaration on the Rights of Indigenous Peoples* in June 2006, which was an amended form of that Draft. While that was clearly a significant step, it is unlikely that the Declaration will be regarded as representing (at least in whole) customary international law in the foreseeable future, given, among other things, that it is a non-binding resolution expressed in aspirational terms and was adopted over the objections of a number of Member States with sizeable indigenous populations.[39]

International law and the recognition of native title offshore

The decision in *Mabo [No 2]* addressed only the question of whether native title rights and interests could be recognised on land. In *Commonwealth v Yarmirr*,[40] the court was required to consider whether equivalent rights could be recognised offshore in Australia's territorial sea. In that case, Kirby J joined with the majority (McHugh and Callinan JJ dissenting) to hold that native title rights and interests were recognised in the territorial sea. However, Kirby J departed from the majority view in holding that, subject to certain important qualifications, exclusive native title rights could be recognised in that area.[41] Those qualifications were that the native title rights were subject to the right of the ships of all nations to innocent passage through the territorial sea,[42] the public's right to navigate, which he described as "a foundational principle of the common law",[43] and the exercise of non-exclusive rights to fish under statutory fishing licences.[44]

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38 (2003) 213 CLR 1 at 247 [581].

39 The resolution was adopted by a vote of 143 in favour to 4 against (Australia, Canada, New Zealand and the United States) with 11 abstentions.

40 (2001) 208 CLR 1.

41 In *Western Australia v Ward*, Kirby J was later to express a similar view in respect of the capacity for certain exclusive elements of native title and, in particular, the right "to speak for country", to continue while being qualified by the grant of other non-exclusive interests (relevantly, a non-exclusive mining lease). However, he accepted that that proposition could not stand with the approach adopted by the majority in *Yarmirr*: (2002) 213 CLR 1 at 251-252 [591]-[598].

42 *Commonwealth v Yarmirr* (2001) 208 CLR 1 at 121-122 [272]-[275].

43 (2001) 208 CLR 1 at 124 [278].

44 (2001) 208 CLR 1 at 126 [283]-[284].

It is, perhaps, not surprising that, in the offshore equivalent to the decision in *Mabo [No 2]*, Kirby J should return to the approach adopted by Brennan J in that case as to the legitimate role of international law in influencing the development of the common law.[45] Indeed, Justice Kirby's characterisation of the question of recognition of the rights of indigenous people to land, waters and resources as "an international question"[46] led him to hold that it is "no longer sufficient, or even necessarily relevant, to refer to English sources of law; still less to be constrained by them".[47] That view was reinforced by the different circumstances in which the common law of England had developed[48] – a view which echoed the position Kirby J had previously adopted in the *Wik* case.[49]

Two aspects of international human rights were identified by Kirby J as having particular relevance to the questions before him in *Yarmirr*. First, he relied upon the prohibitions against discrimination and unequal treatment on the grounds of race, finding that these have particular relevance to Australia because it is a party to the *International Convention on the Elimination of All Forms of Racial Discrimination* and has implemented that treaty domestically by the enactment of the *Racial Discrimination Act 1975* (Cth).[50] Second, after referring to the recognition by some international bodies of the importance of protecting the traditional society and culture of indigenous peoples essential to their way of life, he explained that:

> This is why, in practical terms, the maintenance of indigenous peoples often necessitates effective protection of their land and resources extending to their traditional economic activities, such as hunting, fishing, trapping and so on. Such norms recognise that it is not enough merely to allow indigenous peoples to carry out their traditional economic activities without legal protection for their exercise of control and decision-making in relation to developments … that may otherwise diminish or destroy those activities.[51]

Based upon these matters, Kirby J held that, once it had been determined that native title rights were recognised, it would be discriminatory to deny full recognition to those rights as defined by traditional laws and customs in the absence of "a very good legal reason".[52] He refers to one such example in his reasons – that the rules of international law pursuant to which the high seas are part of the common heritage

45 (2001) 208 CLR 1 at 130-131 [293]-[296].
46 (2001) 208 CLR 1 at 133 [297].
47 (2001) 208 CLR 1 at 132-133 [297].
48 (2001) 208 CLR 1 at 133 [299].
49 See further the discussion of the *Wik* case below.
50 *Commonwealth v Yarmirr* (2001) 208 CLR 1 at 131 [294].
51 (2001) 208 CLR 1 at 131-132 [295].
52 (2001) 208 CLR 1 at 132 [296].

of mankind preclude recognition of exclusive rights in that area.[53] Furthermore, foreshadowing the approach that he would later take in *Yorta Yorta*, he held that it would be discriminatory not to recognise adaptations and modifications to those laws and customs. As he explained:

> [T]he principle of non-discrimination must include a recognition that the culture and laws of indigenous peoples adapt to modern ways of life and evolve in the manner that the cultures and laws of all societies do. They do this lest, by being frozen and completely unchangeable, they are rendered irrelevant and consequently atrophy and disappear.[54]

Extinguishment of native title: the challenge of reinterpreting the past

> [T]he present must revisit the past to produce a result, wholly unexpected at the time, which will not cause undue collision and strife in future.[55]

It is in the nature of judicial power that it involves an adjudication of existing rights and obligations and, therefore, that the law exposed by the process of judicial decision-making applies to both past and future events.[56] Consequently, the decision in *Mabo [No 2]* means that native title is treated as having been recognised by the common law since sovereignty was first acquired, notwithstanding that the decision effected a change in the common law. However, as that decision was made so late in Australia's legal history, the challenge, as Kirby J recognised, was how to "reinterpret that history with the knowledge afforded by *Mabo [No 2]*.[57] This issue arises in a direct and immediate way when an assessment has to be made of the way in which past events impacted upon native title rights and, in particular, of whether those past events extinguished native title.

The way in which Kirby J approached this challenge can be illustrated by contrasting his approach to the issues which arose in the *Wik* case[58] and, subsequently, in *Fejo v Northern Territory*.[59] The first of these cases was also the first substantive native title case in which Kirby J participated

53 (2001) 208 CLR 1 at 122-123 [276]-[277] and 134 [300].

54 (2001) 208 CLR 1 at 132 [295].

55 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 230 per Kirby J.

56 *Ha v New South Wales* (1997) 189 CLR 465 at 503-504 per Brennan CJ, McHugh, Gummow and Kirby JJ.

57 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 230.

58 (1996) 187 CLR 1.

59 (1998) 195 CLR 96.

as a member of the High Court, and was to prove to be one of its most controversial decisions.[60]

The Wik case

The *Wik* case concerned claims by the Wik and Thayorre Peoples to be the holders of native title over certain land in Queensland described as the Holroyd River Holding and the Mitchellton Pastoral leases. Pastoral leases had been granted to non-Aboriginal lessees over those areas in the early part of the 20th century. It was clear from the decision in *Mabo [No 2]* that, at the same moment that the common law recognised the pre-existing rights of indigenous peoples of Australia to their land, those native title rights became vulnerable to extinguishment by sovereign acts.[61] While the point was not ultimately decided, such acts were considered to include the grant of an estate in fee simple and the grant of a lease.[62] The principal issue in *Wik* concerned the effect of the grant of the pastoral leases on native title and, in particular, whether the grant of such leases necessarily and permanently extinguished all native title rights and interests. Addressing that issue, therefore, required the court to revisit the past to determine the impact that those interests, granted almost a century earlier, had on native title rights – being rights which were not then known to exist and which could not have been within the contemplation of the Crown when granting the pastoral leases.

An attempt had been made to argue these issues earlier in 1996 in *North Ganalanja Aboriginal Corporation v Queensland*.[63] However, notwithstanding the public importance of the question,[64] the High Court (Kirby J dissenting) declined to grant special leave to appeal to argue this

60 The decision was to provoke a response from the government which Kirby J, writing extra-judicially, regarded as inappropriate and as constituting "some evidence of a decline of civic understandings between the branches of Government in the Australian Commonwealth": Kirby, n 11 at 8. He also considered that it contributed to an incremental change in the philosophical balance of court through more conservative appointments which, over the course of time, may have led to "a diminished belief in good outcomes in the courts" by indigenous communities: n 11 at 8-9.

61 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 63 per Brennan J (Mason CJ and McHugh JJ agreeing).

62 (1992) 175 CLR 1 at 68 and 69 (point 4) per Brennan J (Mason CJ and McHugh JJ agreeing). Subsequent decisions made it clear that a grant in fee simple and a lease conferring exclusive possession did extinguish native title whole: see, in particular, *Fejo v Northern Territory* (1998) 195 CLR 96 at 126 [43] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, and at 150-152 [105]-[108] per Kirby J; *Wilson v Anderson* (2003) 213 CLR 401; *Western Australia v Ward* (2003) 213 CLR 1 at 158 [280] and 182 [369]-[370] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. This result is now statutorily prescribed by Pt 2 Div 2B of the *Native Title Act 1993* (Cth), dealing with "previous exclusive possession acts" and by equivalent State and Territory laws enacted consistently with s 23E of the Commonwealth Act.

63 (1996) 185 CLR 595.

64 (1996) 185 CLR 595 at 613 per Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ.

point on the basis that it would have involved the court in delivering an advisory opinion.[65] The "Damoclean sword", as Justice Kirby somewhat colourfully described the issue, "remain[ed] hanging over the operation of the Act and the rights of many parties".[66]

It was, however, only a short time later, on 11 June 1996, that no fewer than 35 counsel assembled to argue the point in *Wik*, each seated at his or her appointed place in the cavernous space of Courtroom No 1 of the High Court. No-one was in any doubt as to the significance of the case. As Justice Kirby was later to observe in his reasons:

> Various estimates were given of the area of land in Australia covered by pastoral leases. For the Commonwealth it was put at 42 per cent in aggregate. In various States, estimates of 70-80 per cent of the land surface were mentioned.[67]

It followed, Kirby J recognised, that if the respondents' primary argument that all native title was extinguished by the grant of pastoral leases, the court's decision in *Mabo [No 2]*:

> is revealed as having little practical significance for Australia's indigenous people over much of the land surface of the nation. … The effective operation of the *Native Title Act 1993* (Cth) and like legislation, as well as claims under the general law, recede to apply only to the balance of Australia's land surface after the grants of estates, including freehold and pastoral leaseholds (without relevant reservations) are deducted. This is all the more significant to indigenous peoples as the parts of Australia where their laws and traditions (important to sustain native title) are most likely to have survived include those where pastoral leases are likely to exist.[68]

Justice Kirby's judgment in *Wik* was, as he later said, "to prove decisive for the outcome".[69] By a narrow majority (Toohey, Gaudron, Gummow and Kirby JJ (Brennan CJ, Dawson and McHugh JJ dissenting)), the court held that pastoral leases did not necessarily extinguish all incidents of native title. They were not leases in the common law sense which conferred rights of exclusive possession, occupation and use. Rather they were creatures of statute, the nature and incidents of which were defined by statute. While the question was not unequivocally resolved in *Wik*, the High Court subsequently held, in *Western Australia v Ward*, that the extent (if any) to which native title was extinguished by the grant of a pastoral lease depended upon the extent of any inconsistency between those statutorily defined rights, on the one hand, and the content of

65 (1996) 185 CLR 595 at 612-613 per Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ.

66 (1996) 185 CLR 595 at 647-648. A similar question arose in *Fejo v Northern Territory* but was not upheld by the court in that case: (1998) 195 CLR 96 at 122-123 [27]-[32] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, and at 138-139 [77] per Kirby J.

67 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 219.

68 (1996) 187 CLR 1 at 220.

69 Kirby, n 11 at 8.

the particular native title rights and interests on the other hand.[70] This accorded with the approach adopted by Kirby J in *Wik*.[71]

A number of fundamental propositions underpinned Kirby J's approach in the *Wik* case which, to varying degrees, resonated also in the reasons of the other members of the majority. He started from the accepted proposition that native title is recognised and enforced in Australia by Australian law.[72] As he explained in his reasons:

> [N]o dual system of law, as such, is created by *Mabo [No 2]*. The source of the enforceability of native title in this or in any other Australian court is, and is only, as an applicable law of statute provides.[73]

Second, he considered that the process of accommodating native title rights within the structure of the Australian legal system could not be done without giving due regard to the historical context in which these issues arose. In the *Wik* case, this meant that Kirby J considered that it would require "very clear law" to drive him to the "unrealistic conclusion" that pastoral leases conferred exclusive possession of the land, having regard to the difficult and "unpromising" condition of the land, the very limited occupation and use of the land, and the fact that, far from being dispossessed, the Aboriginal inhabitants had continued to live on the land with little disturbance to their traditional way of life.[74] As he explained later in his reasons:

> [I]t was known that there were substantial numbers of Aboriginals using the land, comprised in the pastoral leases, according to their traditional ways. It was not government policy to drive them into the sea or to confine them strictly to reserves. In these circumstances, it is not at all difficult to infer that when the Queensland Parliament enacted legislation for pastoral leases, it had no intention thereby to authorise a lessee to expel such Aboriginals from the land.[75]

Justice Kirby found further support for this conclusion in the statutory presumption against the expropriation of rights[76] said to be rooted in the protection afforded by the sovereign to such rights in the interests of social and economic stability and peace.[77]

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70 *Western Australia v Ward* (2002) 213 CLR 1.

71 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 243 and 249 per Kirby J.

72 For example, *Fejo v Northern Territory* (1998) 195 CLR 96 at 128 [46] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2003) 214 CLR 422 at 453-454 [77] per Gleeson CJ, Gummow and Hayne JJ.

73 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 214; see also at 237-238 per Kirby J. See further, *Members of the Yorta Yorta Aboriginal Community v Victoria* (2003) 214 CLR 422 at 443-444 [43]-[44] per Gleeson CJ, Gummow and Hayne JJ.

74 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 232-233.

75 (1996) 187 CLR 1 at 246.

76 (1996) 187 CLR 1 at 247.

77 (1996) 187 CLR 1 at 234 and 248.

The historical context also informed his conclusion that pastoral leases should be characterised as statutory rights and interests in land which evolved in response to Australia's particular and unique conditions. From that starting point, it is scarcely surprising that he should find that "[i]t is a mistake to import into the peculiar Australian statutory creation, the pastoral lease, all of the features of leases in English leasehold tenures dating back to medieval times."[78] As he later stated in his reasons:

> Importing into the *Land Acts* [pursuant to which the leases were granted] notions of the common law apt for tenurial holdings under the Crown in medieval England, and attributing them to the Crown itself, piles fiction upon fiction. As it is not expressed in the legislation, I would not introduce it.[79]

The position was, however, very different with respect to estates in fee simple, as Kirby J held in *Fejo*. In that case, he found that estates in fee simple "have well settled legal features" including the right to exclusive possession in contrast to pastoral leases.[80] In common with the other members of the court, Kirby J then held that that comprehensive right could not, of its nature, co-exist with native title:

> The inconsistency lies not in the facts or in the way in which the land is actually used. It lies in a comparison between the inherently fragile native title right, susceptible to extinguishment or defeasance, and the legal rights which fee simple confers.[81]

In reaching this conclusion, Kirby J identified two policy considerations as his starting point:

> In the process of tracing the consequences which flow from *Mabo [No 2]*, two basic considerations, at least, restrain the disturbance of interests in land established by the law as previously understood. The first is that a court should not destroy or contradict an important and settled principle of the legal system. The second is that, in every society, rights in land which afford an enforceable entitlement to exclusive possession are basic to social peace and the order as well as to economic investment and prosperity. Any significant disturbance of such established rights is therefore, ordinarily, a matter for the legislature not the courts.[82]

These considerations are embodied in the need for legal certainty regarding rights in land and can be seen to have played a significant role in Justice Kirby's approach to working out the implications of *Mabo [No 2]*. For example, he rejected the submission in *Wik* that the actual conduct of the pastoralist on the land under the pastoral lease could affect

78 (1996) 187 CLR 1 at 244.

79 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 245.

80 *Fejo v Northern Territory* (1998) 195 CLR 96 at 150 [105].

81 (1998) 195 CLR 96 at 150 [105]; see also at 126 [43] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

82 (1998) 195 CLR 96 at 150 [104].

native title, holding inter alia that "[i]t would introduce a dangerous uncertainty into the entitlements to land of all people in Australia to adopt such a principle."[83] Similarly, in *Fejo*, he found support for his conclusion that, once extinguished, native title could not revive again in the practical need for certainty, holding that "[w]ere the position otherwise, a serious element of uncertainty would be introduced into a body of law which should be as clear and certain as the law can make it."[84] Nonetheless, while certainty was clearly a relevant consideration, it was not always one which could be achieved. As Kirby J also acknowledged, for example, the decision in *Wik* would leave the effect on native title of numerous other statutory interests to be worked out in future cases,[85] having regard to the particular features of those interests.

CONCLUSION

The recognition of the traditional rights of Australia's indigenous people to land in *Mabo [No 2]* was grounded in the principle of equality and the prohibition on racial discrimination. Justice Kirby consistently called upon these basic human rights as establishing the standard which the evolving body of law governing the recognition of native title must attain and, perhaps more controversially, upon the movement towards recognition of the rights of indigenous peoples in the international community. It was fundamental to Justice Kirby's approach that the decision in *Mabo [No 2]* that native title rights were recognised in Australia should not be reduced to a decision of little practical significance.

These considerations led Justice Kirby to develop principles governing the recognition of native title which endeavoured to accommodate the impact of European settlement and the dispossession of many Aboriginal people from their traditional lands, insofar as that could be done consistently with legal principle. In developing the law of native title, he also sought to give effect to the inherently spiritual relationship between Australia's indigenous people and "country", for example, in holding (in dissent) that rights to cultural knowledge were protected under the rubric of native title and in working out the legal consequences of a loss of physical connection to land.

Equally, however, Justice Kirby recognised the social and economic importance of stability and certainty in relation to rights to land. These considerations assumed particular importance in determining the consequences of *Mabo [No 2]* vis à vis non-native title rights in land, and their impact on native title. That process, as Justice Kirby recognised,

83 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 238. Rather, he concluded (in line with the other members of the majority) that the question was directed in the first instance to ascertaining the nature of the legal rights granted (at 238).

84 *Fejo v Northern Territory* (1998) 195 CLR 96 at 156 [112].

85 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 250.

involved the court in the somewhat artificial exercise of re-interpreting the past to accommodate rights not known to exist before 1992. However, in approaching that task, Justice Kirby emphasised the need to ensure that the principles relating to the impact of past events on native title took account of Australia's unique historical, legal and geographical context. In his view, the law should not be developed so as to lead to unrealistic outcomes.

From these matters, two fundamental themes emerge from the manner in which Justice Kirby sought to address the challenges posed by the decision in *Mabo [No 2]*. First, he considered that fundamental human rights have a legitimate and, indeed, a crucial role to play in the development of a body of law governing the recognition of native title rights and their interaction with other rights. Second, 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.

Chapter 27

THE POLITICAL SYSTEM

Graeme Orr and Gregory Dale

> *To designate all matters having political or partisan implications as non-justiciable would be to withdraw judicial supervision (and the rule of law) from an intolerably broad class of conduct.*[1]

THE POLITICAL SYSTEM

A discussion of Justice Michael Kirby's contribution to the law affecting the political system should begin by defining that term. The "political" is a notoriously slippery notion, even when reduced to an institutional construct like "the political system". We are certainly not concerned with its expansive sense as "that part of the total [social] organization which is concerned with the maintenance or establishment of social order … by the organized exercise of coercive authority".[2] That definition would cover the entire apparatus of government, including the legal system itself, and this chapter would be as wide as the book that you are holding.

Instead, we are concerned with the political system in the narrower sense of the sphere of democratic engagement that in a representative democracy is centred on Parliament: its processes and relationship to the executive government, and the elections, parties and freedoms to participate, particularly through political debate, which give life to those processes. By contrast, we are not concerned with the legislative powers of Parliament, which are dealt with in other chapters, nor with cases that were politically controversial, but not about the political system (such as the Waterfront dispute).

Court cases about the political system are not commonplace. In part this is due to the lack of any Australian Bill of Rights and the dominance of the tradition of parliamentary sovereignty. Also, political actors tend

1 *Egan v Willis* (1998) 195 CLR 424 at 491 [133] per Kirby J.

2 L Mair, *Primitive Government* (Penguin, Harmondsworth, 1962) p 19.

not to litigate their affairs, which invariably can be resolved within the political sphere, through negotiation or the assertion of power and numbers. Nonetheless, of all the areas of law to which he contributed, none aside from human rights appears to have so consistently stimulated Michael Kirby as a judge. Put simply, he has a deep and abiding interest in public law matters, of which those involving the political system, however rare, are an integral part.[3]

A political judge?

The question of the "politicality" of Justice Kirby is unavoidable. Throughout both his judicial and extrajudicial lives, Kirby J has been simultaneously praised and condemned for his forthrightness on issues of social justice, discrimination and human rights. This forthrightness has extended into broader "values" questions, such as the policies and purposes underlying the education and industrial relations systems.[4] The seeds of such forthrightness were sown early. One biographer writes of Kirby, in 1962, becoming the President of the Sydney University Student's Representative Council, and speaking out on issues of the day such as capital punishment and the treatment of indigenous Australians.[5] There is neither the scope, nor the need, in this chapter to canvass the substance of this praise and critique. What does need to be considered is to what degree the "politicality" of Kirby the man shaped the approach of Kirby the judge when he was confronted with cases on the political system.

This question is just one element in a larger consideration of judicial method and style. To put the issue crudely, has Kirby J been – in any sense – an analogue of Lionel Murphy, the controversial former Labor Attorney-General cum High Court Justice from 1975-1986? Murphy and Kirby undoubtedly share some progressive values, particularly on constitutionally implied rights. Both were often in dissent, and it has been speculated that the influence of Kirby J, the greatest dissenter of all, will, as for Murphy J, only be felt after his retirement.

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3 Consider *Ha v New South Wales* (1997) 189 CLR 465, where tax powers, of fundamental importance to federal-State relations, were in issue. Perhaps because the underlying issue was economic rather than socio-political, Kirby J merely sat in on the majority judgment, which undercut State powers. Compare *New South Wales v Commonwealth* (2006) 229 CLR 1 (*Work Choices Case*). There, Kirby J wrote a vast dissent but, unlike Callinan J, his motivation was not protecting State powers in the federal balance so much as his concern with preserving fair industrial relations processes.

4 Neither of which is surprising, given the scholasticism Kirby displayed at Fort Street High School and the University of Sydney and his youthful appointment to the Commonwealth Conciliation and Arbitration Commission. What is unusual, especially in Australia, is for a judge to speak publicly on such topics.

5 S Sheller, "Kirby, Michael Donald" in T Blackshield, M Coper and G Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, Melbourne, 2001) p 394.

At one level, the comparison is plainly inapt. Murphy J had no respect for orthodox legal method such as the bonds of precedent,[6] and his judgments were often short and assertive, even in the most significant of cases. Justice Kirby's judgments are a complete contrast. They are notoriously rich, lengthy and thorough.[7]

However, in a shared concern to seek out fundamental principle, and their experiences as law reformers – Murphy as a radical Attorney-General, Kirby J from 1975-1984 as the first Chair of the Australian Law Reform Commission – there is some similarity in their approach. But as a politician-turned-judge, Murphy J often saw principle in policy terms, whereas Kirby J's attachment to the principles *within* the law run deeply. Where Murphy J was impatient, Kirby J was always considered. Whereas Murphy J's style was declaratory, to the point of being peremptory, Kirby J's is redolent with discursive argumentation. His judgments display an inquiring reverence for the law.

A political metaphor may capture the distinction: Murphy J was an impatient Whitlamite on the Bench; Kirby J, however, encapsulates the mix of gradualism and vision that was fused in the Hawke/Keating years. This analogy is stretched of course, but it is no accident that Murphy J was appointed by the administration of Prime Minister Whitlam and Kirby J by the administration of Prime Minister Keating. Michael Kirby's brilliant career, however, owes something to the bold patronage of Whitlam. In 1975, at just 36 (21 years prior to his High Court elevation), Kirby won dual appointment to the Arbitration and Law Reform Commissions. Given the expansive judge he grew to be, both roles, in their fusion of legality and social concerns, must have been significant training grounds.

It will be our ultimate contention that Kirby J, whilst prone on occasions to seek the just outcome as he saw it rather than follow a purely consistent method, has not been a "political" judge. Rather, he has been something closer to "Hercules J", a creation of the leading Anglo-American jurisprude, Professor Ronald Dworkin. This figure is an exacting judicial role model who, when faced with a difficult case, avoids judicial legislation in favour of digging for deeper, and reaching for higher, principles.

KEY THEMES IN KIRBY'S TREATMENT OF THE LAW ON THE POLITICAL SYSTEM

In an assessment of Justice Kirby's contribution to the law affecting the political system, four key themes stand out:

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6 J Williams, "Murphy, Lionel Keith" in Blackshield et al, n 5, p 485.

7 G Orr, "Verbosity and Richness: Current Trends in the Craft of the High Court" (1998) 6 *Torts Law Journal* 291 at 299-301.

1. the justiciability of issues regardless of their political nature;
2. executive accountability and Parliament;
3. civil and political rights and obligations: a liberal egalitarian conception of democracy stressing concern for the rights of the vulnerable (over the powerful) and championing the freedom of political communication;
4. an expansive methodology within an evolving law.

Justiciability and "political" questions

A distinctive feature of Kirby J's contribution to public law is his much repeated refrain that courts cannot shirk "political" cases. He is instinctively averse to the idea of a judge declaring a dispute, otherwise framed in questions of legal rights and obligations, as a political matter off limits to adjudication. Admittedly, there may be realms where the prudence and comity built into the separation of powers requires courts to tread softly or delay intervention. But these are rare exceptions to the idea of the rule of law, of which the courts, and the High Court in particular, are the ultimate guardians.

Thus, on several occasions during Kirby J's tenure, the High Court was called on to interpret the prohibition on courts considering parliamentary proceedings. This rule dates to the United Kingdom *Bill of Rights* of 1688 and the struggle by Westminster Parliament to assert its powers against the Crown or executive. It retains its contemporary force from the fact that Parliaments are ultimately accountable to the people via elections.

In each of *Egan v Willis*,[8] *Attorney-General (WA) v Marquet*,[9] and *Yougarla v Western Australia*,[10] Kirby J argued forcefully for a narrow interpretation of the prohibition. This ensured that the legality of matters involving parliamentary affairs would not normally fall beyond the bounds of adjudication. According to Kirby J, this principle is most acute where a constitutional benchmark is raised because all organs of government have to be subject to the High Court's role as boundary-rider of the constitutional order that keeps a federation together.[11]

In *Egan*, the issue arose within a very heated political controversy. Egan, a New South Wales Labor Minister, was temporarily expelled from the Legislative Council for contempt. He had refused to table papers in his ministerial possession. Egan sued to challenge the legitimacy of

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8 *Egan v Willis* (1998) 195 CLR 424. For discussion, see G Carney, "Egan v Willis and Egan v Chadwick: The Triumph of Responsible Government" in G Winterton (ed), *State Constitutional Landmarks* (Federation Press, Sydney, 2006) p 289.

9 *Attorney-General (WA) v Marquet* (2003) 217 CLR 545.

10 *Yougarla v Western Australia* (2001) 207 CLR 344.

11 *Egan v Willis* (1998) 195 CLR 424 at 493 [133].

the expulsion, claiming trespass to his person. As Kirby J put the initial issue:[12]

> Will a court, even to resolve the legal rights of parties to proceedings before it, intrude itself within the walls of a Parliamentary chamber? Or will it refuse to do so out of deference to … the Bill of Rights 1688 …?

His answer was that the legality of the expulsion *was* subject to judicial review. Revealing an awareness of the political realities, Kirby J saw that the dispute was, in truth, between two political interests – government and opposition – within Parliament. It was not predominantly about the dignity or powers of one parliamentary chamber against another, or against the outside world.

In *Marquet*, the dispute, though less heated, was of no less partisan moment. It concerned whether the Western Australian Labor Government's electoral reform Bill, to undo a long-standing malapportionment favouring rural areas, had passed into law. The Bill had passed the Lower House; the ultimate question was whether it had successfully passed the Upper House, or whether it had failed "manner and form" requirements designed to entrench the malapportionment. Justice Kirby held that, although the status of the Bill was uncertain, the parliamentary deliberations over it had concluded. Hence the court could rule on the status of the Bill without interfering in a matter still purely within the political domain of the legislature.[13]

In *Yougarla*, the plaintiffs claimed that for a century Western Australia had failed to meet a constitutional obligation to put aside 1 per cent of government revenues for indigenous welfare. Similar to the situation in *Marquet*, the underlying dispute was whether a Bill undoing that obligation had properly passed into law, or whether it had failed "manner and form" requirements. Justice Kirby reiterated that it was a central duty of the courts to adjudicate such questions. He also repeated arguments from *Egan*, stressing that the traditional United Kingdom approach of judicial deference in parliamentary affairs was unsuitable for Australia, a federal polity with a written constitution.[14]

Notably, however, in *Sue v Hill*,[15] Kirby J took a somewhat different tack. That case involved a successful challenge to the Senate election of Heather Hill, a dual British and Australian citizen. A preliminary issue was whether the High Court should hear the petition by electors challenging her qualification to be a Member of Parliament, or whether the matter should be left to Parliament to resolve in accordance with centuries-old Westminster custom. In the minority – and in a conservative dissent – Kirby J thought it completely appropriate to leave the dispute

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12 (1998) 195 CLR 424 at 488 [133].

13 See also *Eastgate v Rozzoli* (1990) 20 NSWLR 188.

14 *Yougarla v Western Australia* (2001) 207 CLR 344 at 374-375 [80]-[82].

15 *Sue v Hill* (1999) 199 CLR 462.

to the Senate itself, at least in the first instance, since it "raise[d] issues which may have considerable political significance".[16] To most electoral lawyers, it is precisely because the right of someone to sit in Parliament is of such (party) political significance, that such disputes should only be handled by an independent court.[17]

In this case, however, Kirby J was not totally abdicating justiciability to the vagaries of the political sphere. The old custom provided for a special parliamentary committee to rule on a Member of Parliament's entitlement to sit. There was also a formal mechanism for Parliament to refer the dispute to the court if it did not wish to resolve it. He was not, therefore, carving out a realm of politics above and beyond the rule of law. His approach in *Sue v Hill* was, however, an example of a judge declining jurisdiction in a political matter, in contrast to his typical position.

Justice Kirby is rarely one-dimensional in his approach. On the contrary, one important nuance arising from his awareness and acceptance of the political dimension of law is his appreciation that the law can never be doctrinally pure. He illustrated this neatly in an epigram: "Constitutional law is often dragged by the chariot of political realities, at the end of a long chain."[18] Reinforcing this position, as Kirby J often pointed out, most public law disputes and even some private law disputes, if they are worthy of appellate consideration, have a "political" dimension in the sense of significant political consequences. Thus, in *Egan*, he stated:[19]

> To designate all matters having political or partisan implications as non-justiciable would be to withdraw judicial supervision (and the rule of law) from an intolerably broad class of conduct.

For some traditionalists who subscribe to a narrow legalism, clashes of values and morality are separable from the judicial task of framing a dispute as formal questions of legal precedent and interpretation. Often, such judges will look for the narrowest ground possible to resolve a dispute, not necessarily to avoid the intellectual labour of conceiving of the matter from all angles, but to avoid venturing opinions on too many issues at once. For such judges, the messy clash of values can be embarrassing. A clear example of that is in the *Work Choices Advertising Case*.[20]

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16 (1999) 199 CLR 462 at 570 [282].

17 G Orr and G Williams, "Electoral Challenges: Judicial Review of Parliamentary Elections in Australia" (2001) 23 *Sydney Law Review* 53.

18 *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 614 [208].

19 *Egan v Willis* (1998) 195 CLR 424 at 491 [133]. See, similarly, *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 444 [359].

20 *Combet v Commonwealth* (2005) 224 CLR 494 (*Work Choices Advertising Case*). See further G Orr, "Government Advertising: Parliament and Political Equality" (2006) 46 *Papers on Parliament* 1.

There, the trade union movement and a Labor frontbencher challenged the validity of the large-scale advertising employed by the federal Liberal Government. The advertisements promoted a controversial industrial relations policy even before Parliament had considered the legislation implementing the policy. This was a modern version of an ancient tussle between the monetary power of the executive and parliamentary dignity and superintendence. In powerful but separate dissents, Kirby and McHugh JJ held that the executive had no right to spend money promoting itself prior to Parliament considering the policy in question without an explicit parliamentary appropriation. In a separate judgment, Gleeson CJ held the opposite, finding that it was up to Parliament to draft budgets more stringently if it wished to limit spending on government advertising because persuading people of the merits of government policy was a natural aspect of implementing that policy.[21]

In contrast, a four-judge majority opinion adopted none of the candour of either Kirby J or Gleeson CJ. Their opaque judgment drew on arguments not mounted by either side to the dispute, invoking fine distinctions between the particular budgetary language used. In doing so, they shed no light on the great issues at stake in the case.

It is almost impossible to find such a hedgehog approach in Kirby J's judicial career. He did not simply openly acknowledge the clashes of values inherent in many cases, but he appeared to relish such clashes. (It is one reason his judgments in public law matters are often more intense than in some areas of private law, where the issues tend to be more constrained.) Typically, he acknowledges such "values" questions up front and, in doing so, makes his judgments livelier and more humane than judgments that are crafted with a narrowly legalistic approach.

For example, in *Australian Broadcasting Corporation v Lenah Game Meats*,[22] the High Court confronted an attempt by an abattoir to repress the broadcast of footage of animal cruelty taken by trespassing activists. The abattoir invoked a novel private law claim of privacy. Early in his judgment, Kirby J framed the question as one of "values in conflict". On the media's side, he identified the principles that courts should not infringe freedom of discourse prior to a full hearing and that discussion of socio-political controversies deserved constitutional protection. On the business side, he identified the idea that the media should not benefit from trespass, as well as the importance of recognising a right to privacy.[23] Other judges simply dived head-first into the doctrinal debate about whether the claim was precedented.

21 Orr, n 20 at 13.

22 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199.

23 (2001) 208 CLR 199 at 263 [152].

Executive accountability and Parliament

The theme of governmental accountability is hardly new to liberal jurisprudence. In *Lange v Australian Broadcasting Corporation*,[24] Kirby J joined a rare unanimous opinion, the theme of which was that the executive is answerable to Parliament, and Parliament to the people through elections. This is the basis of responsible government, both at Westminster and as set out in the Commonwealth *Constitution*. From this conception of power as responsibility flow many things, not least of which is the freedom of political communication (discussed in the next section).

Executive accountability is a theme readily embraced by common lawyers. What makes Kirby J's contribution interesting is not any novelty in approach, but his vehemence and consistency. The courts' role in maintaining executive accountability is a repeated refrain for him. The *Work Choices Advertising Case* is a good illustration. So, too, is *Egan v Willis*. In *Egan*, Kirby J foregrounded the ultimate issue in his first paragraph:[25]

> [T]he Court is asked to define the extent to which the Executive Government of a State is accountable to a democratically elected chamber of a Parliament and to the rule of law itself.

Given such an opening gambit, it is not hard to predict which side Kirby J favoured. Nonetheless, he carefully traces the history and functions of an elected Upper House in Australia's tradition of responsible government before rejecting the argument that it is a mere house of review with no role in keeping the executive accountable. On the contrary, "[i]t is the very reason for constituting the Council as a House of Parliament".[26]

Justice Kirby's commitment to maintaining channels of executive accountability is further illustrated in the significant freedom of information case, *McKinnon v Secretary, Department of Treasury*.[27] There, a majority of the High Court upheld a departmental denial of a journalist's request for mere background documents on taxation and welfare policies. In dissent, Kirby J paired with Gleeson CJ. Their Honours stressed the original purpose of freedom of information legislation as the public's *right* of access to official documents, subject only to the protection of necessary and essential governmental interests.[28]

Claims that Kirby J is a "radical" judge are often made. However, his wariness of untrammelled executive power does not mean he is not deferential to Parliament. First, it is always open to Parliament to cede some of its power to the executive. A court respectful of Parliament's

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24 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

25 *Egan v Willis* (1998) 195 CLR 424 at 488 [114].

26 (1998) 195 CLR 424 at 503.

27 *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423.

28 (2006) 228 CLR 423 at 428 [5].

powers must respect such a decision.[29] Second, and more significantly, he repeatedly acknowledges the common law's subservience to parliamentary supremacy. In the *BLF Case*, as President of the New South Wales Court of Appeal, Kirby P declared valid a State law empowering the Industrial Relations Minister to deregister the Builders Labourers' Federation.[30] Significantly, the legislation permanently stayed all judicial proceedings, even any commenced before the law's gazettal. President Kirby extensively reviewed the powers of Parliament and considered some of the more unjust and inhumane laws that had operated throughout history, including during World War II. Ultimately, he rejected the belief, propounded by New Zealand's Justice (now Baron) Cooke, that there are some common law rights that "lie so deep that even Parliament could not override them",[31] noting:[32]

> Such extra-constitutional notions must be viewed with reservation not only because they lack the legitimacy that attaches to the enactments ultimately sanctioned by the people. But also because, once allowed, there is no logical limit to their ambit.

President Kirby continued: "[I]f the legislation is clear, and though the judge considers it to be unjust or even oppressive, it is not for him to substitute his opinion for that of the elected representatives assembled in Parliament".[33]

Meagher JA could not resist the temptation to draw attention to the apparent conservativeness of this judgment. He later noted: "I subscribe to the (perhaps surprisingly conventional) views expressed by Kirby P in [the *BLF Case*]."[34] But the decision was not really the manifestation of a conservative alter ego. Rather, it was a signal of Kirby P's confidence in Australia's democratic institutions and traditions. He used this theme to great, if seemingly opposite effect in his strong dissent in the *Hindmarsh Bridge Case*.[35] There, he again invoked the "laws" in force during the Third Reich. Could such laws be validly enacted pursuant to the Commonwealth *Constitution*'s "races power"? No, according to

29 *Bignold v Jackson* (1991) 23 NSWLR 683 (where by merely setting a referendum to be held whenever the next election was called, the NSW Parliament ceded to the executive its constitutional power to stipulate an actual date).

30 *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (*BLF Case*) (1986) 7 NSWLR 372. See F Wheeler, "*BLF v Minister for Industrial Relations*: The Limits of State Legislative and Judicial Power" in G Winterton, *State Constitutional Landmarks* (Federation Press, Sydney, 2006) p 362.

31 *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 399 per Cooke J; cf M D Kirby, "Deep Lying Rights – A Constitutional Conversation Continues" (2005) 3 *New Zealand Journal of Public and International Law* 195.

32 *BLF Case* (1986) 7 NSWLR 372 at 405.

33 (1986) 7 NSWLR 372 at 406.

34 *Galea v New South Wales Egg Corporation* (unreported, NSW Court of Appeal, 21 November 1989).

35 *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

Kirby J. When citizens voted in the 1967 Referendum, they voted in favour of change, to address a history of discriminatory laws against indigenous Australians.[36] Whilst this limitation on pure parliamentary supremacy was to be found within the Commonwealth *Constitution*, it was not founded upon some higher judicial pronouncement, but flowed from the intention of citizens as voters and owed its force to popular sovereignty.[37]

Civil and political rights and obligations

The vulnerable and the powerful

The most expansive and consistent theme in Kirby J's work generally is his concern for human rights. In the political system, this manifests itself in his embrace of a liberal egalitarian understanding of democracy.[38] It is especially prominent in his championing of fundamental rights, including the freedom of political communication. More distinctively, it is apparent in his concern for the interests of "vulnerable" parties, a manifestation of his awareness of power imbalances. "Democracy is not about the game of elections", he wrote, meaning that democracy must preserve the rights of minorities against occasionally oppressive majorities.[39] Sometimes, the cases and legal materials before him meant that he had to take complex routes to arrive at outcomes compatible with these themes, but they are still very prominent in his judgments.

In *Attorney-General (WA) v Marquet*, Kirby J wrote a long dissent upholding the Western Australian Bill repealing electoral malapportionment. This required him to adopt a rather strained literal interpretation and hold that a "repealing" Bill was not an "amending" Bill.[40] Appealing to literalism was not just unusual for Kirby J but, we suspect, distasteful. He justified this manoeuvre by invoking a deeper purpose. His judgment in this case forms a prolonged plea for the judicial power to be used, wherever possible, to declare the law compatible with fundamental rights. In this case, the civil right at stake was "one vote, one value".

For Kirby J, the issue was not a purely legalistic or mechanical one about the proper procedures of legislative enactment. Unlike the other judges in *Marquet*, he gave credence to the underlying dispute,

36 (1998) 195 CLR 337 at 417 [164].

37 See also M D Kirby, "Upholding the Franchise – Contrasting Decisions in the Philippines, United States and Australia" (2001) 21 *Australian Bar Review* 1 at 8, where Kirby J takes pride in the Australian tradition of respecting the intention of the voters.

38 A theme he championed against thorough-going leftists: M D Kirby, "Manning Clark, 'Bourgeois Democracy' and Strange Tales from Supreme Courts" (Second Manning Clark Lecture, National Museum of Australia, 26 March 2001): http://www.manningclark.org.au/html/Paper-01.html#lecture (accessed 4 December 2008). This speech is also extracted in (2001) (Jul/Aug) *Quadrant* 10.

39 Kirby, n 37 at 9-10.

40 Entrenching provisions prevented the "amendment" of the malapportionment without a special Upper House majority.

namely the degree of rural weightage. Whilst fellow judges may have been amused to see Kirby J resting his opinion partly on a pettifogging, literal distinction between the terms "repeal" and "amend", he had a retort of his own. He reminded his colleagues of instances where the court had been happy to read the law literally to protect the interests of corporations:[41]

> To put it bluntly, it is more important for this Court to adopt an interpretation of the written law that upholds the approximately equal value of civic participation in a representative democracy … than to ensure that the privileges of a trading corporation are defended …

Public lawyers everywhere nodded in assent. Such a retort could only have come from someone who was not just a public lawyer at heart, but dedicated to shaping public law in accordance with the values of liberal egalitarianism.

The weighting of votes in favour of rural interests, as a counter-balance to urban interests, is not necessarily offensive to democracy. A critique of Kirby J's approach in *Marquet* might accuse him of imposing his own contestable conception of electoral democracy onto the political system.[42] In Kirby J's defence, he takes pains to explain he was not motivated by animosity towards any particular variation on electoral boundaries. Rather, it is to a system that would first grant greater weight to some groups, based purely on geography, and *then* attempt to entrench that weighting. The entrenchment amounted to a double disenfranchisement. As we shall see, in Kirby J's world, where principle is ultimately more important than precedent, the "dead hand" of the past is a particular fear.

Some of the themes in *Marquet* were revisited in *Mulholland v Australian Electoral Commission*.[43] An old but nearly moribund political party, the Democratic Labor Party, objected to a law requiring 500 members to register to secure its name on ballot papers. The party's case was too weak for even Kirby J to dissent, even though it offered potential to expand the implied freedoms of political communication, participation and equality. The public interest in guarding against bogus parties, or endless ballot papers full of parties with little community support, was sufficient to dismiss the claim. Nonetheless, Kirby J was part of a minority view that a ballot label was a form of political communication, and not merely an administrative privilege. Further, he warned of the need for

41 *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 601 [168].

42 This was the point of the argument, which Kirby J addresses (at 602), that electoral rights are essentially "political", not "legal", questions. In *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, Kirby J accepted that Parliament deserved deference in shaping electoral laws, given the variety of, and need for experimentation with, nuances in electoral systems.

43 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181.

"heightened vigilance" when partisan advantage or the targeting of unpopular political causes might motivate law-makers.[44]

In less directly political cases, Kirby J's concern for the protection of minority interests is particularly marked. Earlier *Yougarla's* case was noted, concerning revenue for indigenous welfare. In *Marquet*, he showed contempt for the "manner and form" entrenchment of an undemocratic electoral system; in *Yougarla*, however, he showed respect for "manner and form" entrenchment of a provision protecting indigenous interests. Contrasting the cases purely on the entrenchment issue suggests there may be hypocrisy on Kirby J's part. But if we look beyond this formal legal issue, we find consistency. In each case, he was seeking to protect the vulnerable interests and deeper rights claim – whether of voters denied one vote one value, or of a dispossessed racial minority.

Although legal historians are already tagging Justice Kirby as the Great Dissenter, in the last electoral system case on his watch, he joined a majority in partly restoring the federal voting rights of prisoners. In *Roach v Electoral Commissioner*, a female indigenous prisoner challenged a law which barred prisoners from voting in federal elections whilst in custody for an offence.[45] The judgment is rooted in historicism, suggesting the hand of Gummow J more than Kirby J. The outcome, that Parliament could not disenfranchise short-term prisoners, was a compromise.[46]

But it was a compromise infused with Kirby J's rhetoric – for example, he claimed that disenfranchisement aimed "further to stigmatise" prisoners.[47] At a broader level, the case represented a victory for his progressivism in constitutional interpretation. In *Mulholland*, he listed the universal franchise, including female and indigenous suffrage – and indeed the secret ballot – as foundation stones of electoral democracy which he would imply into the otherwise opaque constitutional guarantee that Parliament be "directly chosen by the people".[48] In *Roach*, the majority adopted this idea that constitutional law evolves to protect enlightened political developments, applying it to protect the civil rights of a vulnerable minority, namely short-term prisoners.

Concern with power is not limited to governmental power. In *Lenah Game Meats*, Kirby J sided with the majority in refusing to restrain the

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44 (2004) 220 CLR 181 at 264 [241].

45 *Roach v Electoral Commissioner* (2007) 233 CLR 162.

46 For an explanation, see G Orr, "Constitutionalising the Franchise and the Status Quo: The High Court on Prisoner Voting Rights" (Democratic Audit of Australia, Discussion Paper 19/07). In one speech, Kirby J stretched the precedential value of *Roach*, describing it as guarding the franchise except in circumstances that are the "most serious and relevant and justifiable", when all *Roach* did was protect the voting rights of "short-term" prisoners: M D Kirby, "Defining Australian Identity" (Address on the Conferral of Honorary Degree of Doctor of the Southern Cross University, Lismore, 29 September 2007): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_29sep07.pdf (accessed 4 December 2008).

47 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 200 [89].

48 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 261 [232]-[233].

ABC from broadcasting footage of animal slaughter, which had been improperly obtained by animal rights activists. However, he was keen to avoid a precedent which would narrow the powers of courts generally to issue such restraints. Buttressing this, Kirby J stressed the invasive and potentially damaging power of the modern media, taking notice of matters such as the power of "cheque book journalism", citing in support Callinan J, normally a sparring partner.[49]

Whilst favourable to the development of a tort of privacy for individuals, Kirby J thought it would be wrong to extend it to corporations. He clearly distinguished between the humiliation or invasion of privacy of an individual and disparagement of the activities of a business or corporation.[50] The same sensibility moved him to deny a local government the ability to sue to protect its reputation: its "reputation must depend upon the opinions of citizens, earned or lost in the democratic political debate".[51]

Australian Broadcasting Corporation v O'Neill[52] is in a similar vein. This was a private law dispute, not formally implicating constitutional principle. Nevertheless, the case required the balancing of free speech concerns with the reputation of a vulnerable (here a convicted) person's interests. Again, Kirby J stressed the potential for abuse of media power and resources. A corollary is the courts' duty to protect individuals from gross humiliation or gratuitous public harm since the courts are "often the only institutions in society with the authority and the will" to provide that protection.[53] This echoed an earlier case in which he upheld a restraint against *The Sydney Morning Herald* from publishing leaked phone taps about possible bribery in horse racing. Such publication was not political communication and, in any event, free speech interests are far from absolute when an accused's right to a fair trial is in jeopardy.[54]

Where purely political debate is concerned, however, Kirby J demonstrates a robust realism. For him, political debate in Australia, both past and present, is typified by "argy-bargy". Therefore, the law should not be overly sensitive when political actors or activists clash verbally. This applies particularly at election time, as in the case of *Roberts v Bass*,[55] which involved defamatory election material distributed by low-level Labor Party activists. At elections, "the purpose of [activism] is necessarily to harm [one's] opponents", and it is "unrealistic to expect … genteel conduct" because "noble ideals and temperate beliefs [give

49 *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199 at 272 [172].

50 (2001) 208 CLR 199 at 287 [219].

51 *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 at 711.

52 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57.

53 (2006) 227 CLR 57 at 96 [115].

54 *John Fairfax Publications Pty Ltd v Doe* (1995) 37 NSWLR 81.

55 *Roberts v Bass* (2002) 212 CLR 1.

way] to the reality of passionate and sometimes irrational and highly charged interchange".[56]

But this robustness also applies outside electoral speech, as *Coleman v Power* demonstrates.[57] That case involved a public order offence of using insulting words in a public place – namely crude allegations of corruption against a police officer. In his judgment, Kirby J reiterated his realistic view about the rawness of political debate.[58] (For Kirby J, this was a political realism, but not a personal preference. Although Kirby J is often passionate in his convictions, his public writings and speeches almost never stray from the tempered and well-mannered.)

Thus, political candidates and politicians do not fall into his class of "vulnerable" citizens. Nor, by extension, do relatively invulnerable litigants, such as businesses which have been subjected to verbal assaults within political speeches. In *Palmer Bruyn & Parker v Parsons*,[59] Kirby J sided with the value of political satire and ridicule to the point of being unsympathetic to a corporation that had received a ham-fisted satirical letter written by a councillor, the reporting of which caused it some financial loss.[60]

Freedom of political communication as a fundamental value

Justice Kirby's commitment to free political communication is not a gloss on his view that political disputes are inherently justiciable. Rather it is a desire to fashion a law that protects a broad freedom of political discourse, a value that he finds central to the Commonwealth *Constitution*. He followed in the footsteps of the uncovering, by the Mason court, of an implied freedom of communication about political matters, inherent in the *Constitution*'s system of representative government.

Few areas have raised such consistent difficulty for the High Court as this implied freedom. In part this is because it requires a balancing of free speech with other values. Such a balancing act better suits parliamentary debate than judicial fiat. And in part difficulty arises because of lingering doubts as to the method and limits of implying rights into an otherwise barrenly institutional document like the *Constitution*. Justice Kirby certainly would have fitted more comfortably into the creative atmosphere of the Mason court.[61] Indeed, he argued that, in that court, "Australia was blessed with a High Court of great intellectual strength".[62]

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56 (2002) 212 CLR 1 at 62-63 [171].

57 *Coleman v Power* (2004) 220 CLR 1.

58 (2004) 220 CLR 1 at 70 [166]-[167].

59 *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388.

60 (2001) 208 CLR 388 at 431-432 [132] on the role of satire and ridicule.

61 Something he hinted at: M D Kirby, "Law in Australia – Cause of Pride; Source of Dreams" (2005) 8 *Flinders Journal of Law Reform* 151 at 160.

62 M D Kirby, "Judicial Activism: Power without Responsibility? No, Appropriate Activism Conforming to Duty" (2006) 30 *Melbourne University Law Review* 576 at 586.

Justice Kirby embraced the efforts of the Mason court in opening up the methodology of constitutional implication. As a judge concerned with underlying rights and values, he sees implications as not only necessary, but necessarily evolving as social understandings of democracy and equality develop. He chided colleagues like McHugh and Callinan JJ for unduly questioning the basis of implied freedoms. He has come closest to conceiving the freedom as a positive protection against discriminatory burdens, and not merely a niggardly restraint on government action.[63] But he remained sensitive to the doctrine of parliamentary supremacy.

The high-water mark of Kirby J's attempts to develop constitutional implications was *APLA v Legal Services Commissioner (NSW)*.[64] There, in dissent, he sided with plaintiff lawyers in seeking to overturn laws restricting their ability to advertise their services to injured people. One justification relied upon was the freedom of speech not of lawyers, but of the vulnerable plaintiffs they might represent.[65] For Kirby J, the freedom of political communication must have an analogue in the sphere of lawyering and judicial power.[66] However, this dissent seems quixotic beside the majority view that the advertising of commercial services is not constitutionally protected.

Whilst not particularly successful in extending the freedom of political communication, Kirby J was successful in avoiding the freedom being "watered down".[67] The most significant case, for the consolidation of the law, was the defamation case brought by former New Zealand Prime Minister, David Lange, against the Australian Broadcasting Corporation.[68] In a rare unanimous judgment, the High Court affirmed the freedom of political communication and enhanced its role in lessening the chilling effect of Australia's restrictive defamation laws, which were largely the construct of 19th century judges. The judgment as a whole is an example of Kirby J's progressivism; had it not been, he undoubtedly would have dissented, or at least offered a rival judgment.

In entrenching the implied freedom of political communication, the joint judgment stresses the way that elements of representative government are woven into the text and fabric of the Commonwealth *Constitution*. A bridge was built to other judges, such as McHugh J, whose faith in parliamentary supremacy caused them to be sceptical of the implication of rights. The judgment also extended the law in two ways – first, by explicitly finding that communication about governmental and political affairs is an all-year-round necessity, and not something

63 H P Lee, "The 'Reasonably Appropriate and Adapted' Test and the Implied Freedom of Political Communication" in M Groves (ed), *Law and Government in Australia* (Federation Press, Sydney, 2005) pp 78-80.

64 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322.

65 (2005) 224 CLR 322 at 429-430 [314]-[315].

66 (2005) 224 CLR 322 at 438 [343].

67 A phrase he used in *Coleman v Power* (2004) 220 CLR 1 at 82 [209].

68 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

limited to election times; and second, in a distinctly internationalist and hence "Kirbyesque" turn, the court said that the freedom is not confined to Australian matters but extends to discussions of foreign affairs, the United Nations and so on.[69]

It is important to understand, however, that in political communication cases, Kirby J appears as neither a doctrinaire activist, nor a methodological conservative. In his conception of the freedom of political communication, courts must weigh the impact on communication against the social benefits of the law. To Kirby J, this is not an act of judicial usurpation of Parliament, nor a gainsaying of the wisdom of common law precedent. Rather, it is the natural role of judges as the guardians of the rule of law and the *Constitution*.

Justice Kirby's concern for the nuances of power make him wary, in individual cases, of taking a "free speech" approach, United States-style. Thus, in *Mann v O'Neill*,[70] he sought to balance the competing interests of open government and the rule of law. In that case, he held that a litigant's complaint about the mental fitness of a judicial officer was political speech, in the constitutional sense of being about a governmental matter. But he sided with the majority, finding against the litigant's argument that the complaint should have "absolute privilege" against liability in defamation, preferring instead the traditional wariness of expanding absolute privilege in order to preserve the balance between the interests of speakers and those with reputations to maintain. This is a feature of Kirby J's method in those political communication cases involving defamation law. Where there is a clash of essentially private parties, Kirby J is more favourable to the common law concern for reputation. Such cases are distinguishable from his method in disputes involving politicians or governmental institutions.

For example, in *Levy v Victoria*,[71] the High Court faced a claim by animal welfare activists who wanted to protest on duck-hunting flats. The Victorian Government prohibited non-hunters from being on the flats during hunting season. Levy objected that this unduly impaired his freedom of communication, given the desire of television for emblematic images and the need to show firsthand the cruelty inherent in hunting. The court, including Kirby J, readily accepted that the freedom was not limited to "speech" in a narrow sense, but extended to gestures and other forms of expressive communication. Revealing an understanding of the historically vital role of non-violent protest, both political and religious, Kirby J argued:[72]

69 (1997) 189 CLR 520 at 571.

70 *Mann v O'Neill* (1997) 191 CLR 204.

71 *Levy v Victoria* (1997) 189 CLR 579.

72 (1997) 189 CLR 579 at 638.

> A rudimentary knowledge of human behaviour teaches that people communicate ideas and opinions by means other than words spoken or written. Lifting a flag in battle, raising a hand against advancing tanks, wearing symbols of dissent, participating in a silent vigil, public prayer and meditation, turning away from a speaker, or even boycotting a big public event clearly constitutes political communication although not a single word is uttered.

This position was reinforced by his sensitivity to the realities of the modern media, and its central role in social and political debates.[73]

Nevertheless, exemplifying the fact that he is no radical, untethered by the rule of law, Kirby J joined the other judges in rejecting Levy's claim. Invoking his preferred concept of "proportionality", Kirby J reasoned that the ban on non-shooters, which was explicable for safety as well as public order reasons, was not disproportionate to the impact it had on Levy's freedom of expression. After all, the duck-flats were not Hyde Park and Levy retained a range of other means to promote his message.

Similarly, in *AMS v AIF*, a contest over orders in an interstate custody battle, Kirby J embraced the novel idea that the Commonwealth *Constitution* guaranteed a general freedom of mobility, which encompasses social as well as economic movement. However, he stressed that this could hardly mean that family courts could not make orders about parental obligations in ways that restricted the parents' freedom: "Completely unlimited freedom would be a form of anarchy."[74]

An expansive methodology within an evolving law

One methodological feature running through several of Kirby J's judgments is a presumptive, if not invariable, opposition to the "dead hand of the past" (a term he uses). For much of the 19th and 20th centuries, the classical view saw law as an arcane science, rooted in precedent, the more ancient the better.[75] Whilst respectful of tradition, Kirby J does not embrace this old-fashioned view of law, particularly in public law disputes. His methodology, thus, is a progressive one. He explicitly sees democratic ideals as evolving. For Kirby J, it is a key part of an appellate judge's role to embrace and perpetuate that evolution. This philosophy is illustrated in both *Attorney-General (WA) v Marquet* and *Egan v Willis*, discussed above, where he rejected resort to old British cases to resolve Australian constitutional and parliamentary conundrums.

The notion of the living law is most profound in his understanding that a constitution must embrace evolving social understandings

73 This was the corollary of his insight into the power of the modern media to do harm as well as good: *Lenah Game Meats* (2001) 208 CLR 199.

74 *AMS v AIF* (1999) 199 CLR 160 at 216 [164].

75 M D Kirby, *Judicial Activism: Authority, Principle and Policy in the Judicial Method* (Sweet & Maxwell, London, 2004).

and compromises, albeit through the haphazard iterative processes of litigation. In the *APLA Case*, he wrote:[76]

> [T]he existence of past norms cannot control the application of constitutional principles … The *Constitution* must be applied as it is understood today. This is so, irrespective of contrary past assumptions. It sometimes takes decades, and the presentation of particular cases, to reveal the implications and requirements of the *Constitution* … *The Constitution is a living document. It speaks from age to age. It responds to the challenges of new times.*

In this understanding, old legal nostrums – particularly those inherited from Britain – are not particularly potent. That some legal principles remain unarticulated for decades is no counter-argument to Kirby J's progressivism. It is in the nature of the unfolding, updating and hopefully bettering of the law that such elucidation takes time.[77]

Another aspect of this approach is a belief that the common law must give way to higher constitutional principles, which themselves evolve or unfold. In part, this expresses a judicial nationalism. Justice Kirby seeks, like progressives such as Murphy J before him, Australian solutions and the creation of a single law, rather than one subservient to inherited understandings. The notion that the common law is somehow more fundamental, or at least separable, from high principles of a constitutional kind is anathema.[78]

The past, however, for Kirby J, is not inherently suspect. We have noted how, in *Sue v Hill*, he preferred to preserve Parliament's power over the qualifications of its members. And in *Roach*, the prisoner voting case, he joined a compromise judgment which was heavy with electoral law history. Perhaps most obvious is his judgment in the *Work Choices Case*[79] where he and Callinan J argued, in vociferous dissents, to preserve traditional State industrial powers and the founding fathers' concept of arbitration.[80]

A related and vital feature of Kirby J's methodological openness is his invocation of international law, especially human rights principles, in the development of Australian law. Indeed, this is one of his life's passions. His practice of scouring international law can be traced to the landmark convention in Bangalore in 1988, which he attended. It was

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76 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 442 [354] (emphasis added).

77 *Roberts v Bass* (2002) 212 CLR 1 at 55 [146].

78 (2002) 212 CLR 1 at 48 [123]: Australia's distinctness, changing technology, and above all its peculiar *Constitution*, require a distinctive Australian public and common law; and at 59 [160]: "[I]t is only possible to have one legal rule. That is the rule of the common law adapted to the *Constitution*."

79 *New South Wales v Commonwealth* (*Work Choices Case*) (2006) 229 CLR 1.

80 Albeit that the primary concern of Kirby J was to preserve the traditional, "umpiring" role of the Industrial Relations Commission and that of Callinan J was to preserve the traditional power of the States.

there that Kirby J converted from the belief that international law had no influence on common law, without express legislative direction, to the position that in circumstances where the law appears ambiguous, judges should provide certainty by applying international human rights principles.[81]

Newly converted, Kirby J embarked upon a process of drawing international law into the judgments of hard political cases. After exhaustively examining the common law, Kirby J scoured international legal instruments in *Ballina Shire Council*[82] to determine whether international law could shed light upon whether a local government authority could sue for defamation. He found nothing in international law to support the council's action, and it was accordingly struck out.

It would be fair to observe that, particularly once he was on the High Court, Kirby J's use of international law increased, often to give weight to his dissenting decisions. As one commentator noted, "international law has not been the determining factor in Kirby J's [constitutional law] judgments – rather, it has been used as an additional legitimating argument to support a conclusion already reached".[83] Hence, international law is often the final nail in the coffin of his reasoning. For instance, in *Coleman v Power*, Kirby J uses the *International Covenant on Civil and Political Rights* to "reinforce" his statutory construction.[84] In that case, he notes that even in the absence of counsel's submissions, the court has a right to adopt an approach of constructing legislation that is consistent with international law. The reason Kirby J relies upon the *International Covenant on Civil and Political Rights*, as distinct from other multilateral treaties, is that the Covenant is a distillation of international human rights principles.[85] It does not "derive, ultimately, from intergovernmental negotiations as to national rights inter se, where different considerations apply".[86]

A second key aspect of Kirby J's methodology relates to his style. His judgments, particularly his dissents, have a scholarly density about them. Elsewhere, one of us described this as "richness and verbosity";[87] but it ill-behoves academics to criticise a judge for adopting an academic style. The richness of his judgments is illustrated in *Bennett v Commonwealth*.[88] The plaintiff sought to overturn a law of the Commonwealth Parliament which required Australian citizenship to be a prerequisite for voting

81 M D Kirby, "The Australian Use of International Human Rights Norms: From Bangalore to Balliol – A View from the Antipodes" (1993) 16 *University of New South Wales Law Journal* 363.

82 *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 at 709-710.

83 K Walker, "International Law as a Tool of Constitutional Interpretation" (2002) 28 *Monash University Law Review* 85 at 96.

84 *Coleman v Power* (2004) 220 CLR 1 at 92-93 [242].

85 (2004) 220 CLR 1 at 94 [244].

86 (2004) 220 CLR 1 at 94 [244].

87 Orr, n 7.

88 *Bennett v Commonwealth* (2007) 231 CLR 91.

rights on Norfolk Island. While one might sympathise with the desire of a distinct people to maintain the rights of New Zealanders and other islanders in their community, given the Commonwealth's plenary powers over its Territories, and the acceptance of citizenship as a prerequisite for voting in Australia, the High Court was not going to imply special rules for Norfolk Island.

However, it was not one of Kirby J's methods to steamroll a plaintiff's arguments. Whilst giving a clear victory for the Commonwealth, the prolixity of his judgment nevertheless showed (a) his reverence for considering all arguments in detail; and (b) a hint that he personally favoured the plaintiff's position but was bound by the law to find against him. In that sense, his lengthy judgments show respect not just for all facets of a legal argument, but for the parties involved. Of similar tone is the *Work Choices Advertising Case,* where he methodically addresses issues of standing, justiciability and relief, both to honour the arguments presented by the parties and, one suspects, to sow the seed of his principles for future courts to develop or reject. Indeed, the whole of that case is an excellent contrast with the niggling style – methodological and often substantive – of the Bench in the latter years of his tenure on the High Court. Dissenting for Kirby J was never a lost cause; if anything, it was an invitation to the most considered analysis.

As part of his methodological richness, Kirby J adopted a welcoming approach to interveners and amici or "friends of the court". These are groups or entities, aside from the formal parties to the litigation, who have an interest in the broader issues before the court and expertise or perspectives worth bringing to bear. Traditionally, Australian courts shied away from accepting submissions from such "busy-bodies". They feared broadening the cost and complexity of the litigation.

Justice Kirby's more open position, especially in constitutional cases, was made clear in *Levy*, the duck-hunting protest case. Whilst respecting the right of courts to govern their own processes, and the primacy of the parties who bear the core costs of the litigation, he stressed that in hard cases with a wide public interest in the law, a court should not shy away from welcoming assistance. (In particular, in *Levy*, he was critical of his fellow judges' willingness to take oral argument from media proprietors, but only a written submission from the union of journalists.[89] Again, this displays his concern that equal treatment prevail over inequalities of power.)

Ultimately, Kirby J's openness to submissions from non-parties stems from his acceptance that the High Court, particularly, needs all the assistance it can get in difficult cases:[90]

89 *Levy v Victoria* (1997) 189 CLR 579 at 650.

90 (1997) 189 CLR 579 at 651.

> The acknowledgment of the fact that courts, especially this Court, have unavoidable choices to make in finding and declaring the law, makes it appropriate, in some cases at least, to hear from a broader range of interveners and amici curiae than would have appeared proper when the declaratory theory of the judicial function was unquestionably accepted.

This statement is pure Ronald Dworkin. Justice Kirby, like other "progressive" judges, rejects the old fiction that judges are the living oracles of the law, with mysterious tools to discover the law, immanent and eternal in some black box. But he does not go so far as to embrace the view that judges in difficult cases are left on their own, to legislate freely like policy-makers. Detractors may object that interveners and amici can do little more than bring extra context and perspectives and, in that sense, a judge who encourages them is acting like a parliamentary committee. In Kirby J's defence, amici or interveners in matters of broad public interest help ensure the judge is not blinkered by the partial perspectives of the formal parties. Ideally, these submissions act not as conduits of contestable factual claims, but as sources of principled legal arguments that might otherwise be missed by the parties or the judges' research staff. Their very participation is a form of democratisation of the courts.

CONCLUSION: KIRBY J AS HERCULES J?

The ultimate question that concerns us is whether Kirby J was an incarnation of "Hercules J" – not the mythical character, but the template of the ideal liberal judge created by Ronald Dworkin.[91] Or was he a policy activist – perhaps dressed up in rich garments by virtue of being a transcendentally better and more dedicated legal writer and researcher than, say, Murphy J but, nonetheless, an activist driven by preferred outcomes rather than a consistent method or philosophy?

It is our contention that Kirby J's method and substance is not that of a "political judge", let alone one as nakedly political as Murphy J. The better analogy is with Hercules J. In Dworkin's paradigm, there is neither such a thing as mechanical or formalistic reasoning, nor is there room for Murphyesque resort to reasoning backwards from desired policy positions. Instead, the ideal common law appellate judge must strive to better the law by integrating it with fundamental principles. These principles can only be found through an assiduous process of digging deep into the purposive heart of key precedents and legislation, and reaching up into the nostrums of high constitutional and international legal understandings. The metaphor of Hercules J captures the heroic efforts Dworkin demands of judges.

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91 R Dworkin, *Law's Empire* (Fontana Press, London, 1986).

On Hercules's side, Kirby J was always reaching outwards for broader or higher principles. A good example is the *Work Choices Advertising Case* in which, rather than limiting himself to statutory interpretation of the budget papers, he examines the deeper issues of the relations between the Houses of Parliament. In the *APLA Case*, Kirby J describes his preferred approach in pure Dworkinian terms:[92]

> In constitutional doctrine above all, [the High] Court must avoid a bits and pieces approach. It should adhere to consistent principles and established methodologies.

The piecemeal, higgledy-piggledy approach of justice on a case-by-case basis, applying a narrow legalism, was never for Kirby J. In this sense, his judicial methods are Herculean. However, he is only human, and 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 synthesisation of principle. (This, of course, may as much be a criticism of the Dworkinian dream, as of any existent judge.) And there are also occasions when Kirby J, like any other busy judge, has been happy to join with the syllogistic logic of a traditional, doctrinal judgment, either because the issue did not warrant Herculean research and consideration, or because the application of precedent was particularly routine.

There is an ambivalence in Justice Kirby in respect of history. Sometimes he mines and invokes it as a strong grounding for constitutional purpose.[93] More often it is condemned as "the dead hand of the past" in favour of a progressive purposivism. As we have also noted, generally he gives old cases more respect in purely common law areas (such as defamation)[94] than in public law per se. All this is to be expected in the life of a judge, particularly in the common law. Cases and the materials on which they are based are not the playthings of a judge seeking to codify some a priori political philosophy. They present themselves ad hoc, and the parties drive the framing of the issues.

Justice Kirby's approach also echoes that lauded by the great American Legal Realist, Professor Karl Llewellyn. In championing something he called "The Grand Style" of judging in the United States tradition, Llewellyn attacked what he saw as a "false conception of precedent", where precedent blindly dictated results "save for freak cases".[95] To Llewellyn, this was not just bad judging, but not even a good description of how most judges, or sensible advocates, actually behaved. Such a mechanistic view of precedent resembles an appellate system "only in

92 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322.

93 *Sue v Hill* (1999) 199 CLR 462; *Combet v Commonwealth* (*Work Choices Advertising Case*) (2005) 224 CLR 494.

94 *Mann v O'Neill* (1997) 191 CLR 204.

95 K Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown and Company, Boston, 1960) p 62.

times of stagnation or decay".[96] For Llewellyn, the secret of wise appellate judging was to test and retest doctrines found in precedent against both principle (a patently sensible proposition of greater generality) and policy (the consequences for human lives). This was "a way of thought and work, not … a way of writing. It is a way of on-going renovation of doctrine."[97] For Llewellyn, this Grand Style provided more certainty to the law since legal rules would make more sense and be more likely to accord with conceptions of justice than a microscopic and pseudo-scientific study of the thickets of competing precedents.

In his Hamlyn Lectures, titled "Judicial Activism: Authority, Principle and Policy in the Judicial Method", Kirby J was keen to stress the choices that face appellate judges. But, in doing so, he was equally keen to stress that "it would be wrong for a judge to set out in pursuit of a personal policy agenda and hang the law".[98] Like Dworkin and Llewellyn, the quest for Justice Kirby is for an approach that justifies and grounds legal creativity in principles, rather than pure subjectivism, and in a humanistic, rather than pseudo-scientific, method. Or, as Michael Kirby himself put it in a public speech:[99]

> So long as law is something more than mere rules, so long as it speaks of deep values and human aspirations, of human dignity and fundamental rights, there will be people called judges who have the responsibility to express and apply the law and, in new circumstances, to push it forward and adapt it in a principled way.

96 Llewellyn, n 95, p 62.
97 Llewellyn, n 95, p 36.
98 Kirby, n 75, p 30.
99 Kirby, n 62 at 593.

Chapter 28

REFUGEE LAW

Michelle Foster

> *We in this court, at this time, should not be hostile to the provisions of international law … Hostility is entirely out of place. Facilitation and implementation constitute the correct legal approach.*[1]

INTRODUCTION

Australian refugee law and policy has historically been controversial. This is not surprising: as Justice Kirby has acknowledged, decisions in the refugee context (as in the immigration arena) have "significance for the composition of the Australian population".[2] One of the central issues to have emerged in recent years is the tension between Australia's international obligations under refugee and human rights law and the extent to which domestic realities and needs are consistent with those obligations. This tension has arguably never been more acute than during the past decade, an era that has witnessed some of the most heated public discussion about Australia's treatment of foreigners who seek our protection. Issues such as the legitimacy of mandatory indefinite detention, the lawfulness of executive action during the now infamous *Tampa* incident and the adoption of the "Pacific Solution" have been the subject of debate, not only within but also outside Australia, as the implications of Australia's actions both in practical and human rights terms have become widely understood.

This period has coincided with Justice Kirby's time on the High Court, during which he has made a lasting contribution to the development of refugee law jurisprudence. This chapter reflects on his contribution to Australia's implementation of its international obligations pursuant to the *Convention Relating to the Status of Refugees* (hereafter, the Refugee

1 *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52 at 59 [18] per Kirby J.

2 *Minister for Immigration and Multicultural Affairs v SGLB* (2004) 207 ALR 12 at 31 [73].

Convention),[3] with special attention to the question of who properly falls within the ambit of protection as set out in the Refugee Convention.

Part One of the chapter begins by providing both the international and domestic context for refugee status determination in Australia. Part Two then turns to consider his contribution both to our understanding of the role of international refugee law in domestic law, and to the correct resolution of many of the most difficult and controversial substantive questions involved in interpreting the definition of "refugee" in the Refugee Convention today.

PART ONE: AUSTRALIAN REFUGEE LAW – CONTEXT AND BACKGROUND

International context

One of the traditional hallmarks of state sovereignty is the ability of states to exclusively determine the composition of their community by formulating the rules for the acquisition and regulation of citizenship and by maintaining absolute control over immigration. Hence, historically international law did not delimit the power of a sovereign state, such as Australia, to freely determine its own domestic immigration rules. However, the advent of international human rights law, with its emphasis on the regulation of states' duties vis-à-vis individuals, has introduced restrictions on the discretion of states in their regulation of domestic immigration rules.

Most significantly, the Refugee Convention (and its 1967 Protocol),[4] an international treaty with 147 state parties, prohibits a state from returning a person to a place where he or she fears persecution.[5] It also imposes a range of obligations on states concerning the treatment of refugees.[6] When the Australian Government decided to sign and ratify the Refugee Convention in 1954 it voluntarily agreed to the obligations set out in the Convention.[7] Since that time Australia's sovereign ability to determine its own immigration rules has been restricted by the obligations set out in the Refugee Convention. This explains the crucial difference between general Australian immigration law, which is concerned with regulating the category of persons who are permitted

3 *Convention Relating to the Status of Refugees* (1951) 189 UNTS 2545.

4 The 1967 Protocol removed the temporal and geographical limitations on the scope of the Refugee Convention: see Protocol Relating to the Status of Refugees 606 UNTS 8791, Arts 1(2) and (3).

5 Refugee Convention, Art 33.

6 Articles 2-34. As of 1 November 2007 there are 147 state parties to either the Convention or Protocol: see http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf (accessed 19 November 2008).

7 Australia ratified the Convention on 22 January 1954 and the Protocol on 13 December 1973: see http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf (accessed 19 November 2008).

to visit or immigrate to Australia from time to time and remains largely unaffected by the rules of international law, and Australian refugee law, which operates to give domestic force to our international human rights obligations pursuant to the Refugee Convention.

One of the peculiar features of the Refugee Convention is that, unlike other international human rights treaties, it does not establish an international body vested with the power to interpret its terms.[8] This means that it is left to domestic courts to interpret the often very wide and malleable concepts such as "persecution", "membership of a particular social group" and "serious non-political crime" that are relevant to defining who is a "refugee".[9] Moreover, these courts are required to apply the rules of treaty interpretation at international law to interpret an instrument that was drafted in the late 1940s but was intended to have enduring relevance. This has not always proved to be a simple task, as the reasons for human beings requiring protection from both state and non-state actors today do not always fit squarely within the Cold War-inspired concepts embodied in the Refugee Convention. The challenge is for interpreters of this international convention to give it contemporary meaning while remaining faithful to its terms, thereby ensuring that it "is seen as a living thing, adopted by civilized countries for a humanitarian end which is constant in motive but mutable in form".[10]

Domestic context

International law does not have automatic force in Australian domestic law; rather it can be directly invoked only once the Parliament has enacted legislation to implement Australia's international obligations, including treaty obligations. In the context of the Refugee Convention, the *Migration Act 1958* (Cth) implements, at least in part,[11] Australia's obligations under the Refugee Convention by providing for a class of visa known as a "protection visa" as well as providing that a criterion for that visa is that the applicant is "a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the

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8 Compare with the UN Human Rights Committee, established by the ICCPR, which reviews periodic reports from state parties to the ICCPR and hears individual communications/complaints pursuant to the 1st Optional Protocol to the ICCPR: see Art 28 of the *International Covenant on Civil and Political Rights* (999 UNTS 172). It should be noted that Art 38 of the Refugee Convention provides that a party to the Refugee Convention may refer a dispute as to interpretation or application of the Convention to the International Court of Justice. However, this has never been used.

9 Refugee Convention, Art 1A(2).

10 *R v Immigration Appeal Tribunal and Secretary of State for the Home Department; Ex parte Syeda Khatoon Shah* [1997] Imm AR 148 at 152.

11 The Australian Parliament has not implemented the full scope of Australia's obligations under the Refugee Convention, especially those provisions concerning refugee rights.

Refugees Convention as amended by the Refugees Protocol".[12] As the High Court has explained, the legislation presents a criterion that "the applicant for the protection visa had the status of a refugee because that person answered the definition of 'refugee' spelled out in Art 1 of the Convention",[13] which therefore directs an Australian decision-maker's attention to the Refugee Convention.

It is important to note that this legislative instruction to interpret the scope of protection in Australian law by reference directly to Australia's international obligations under the Refugee Convention has been modified in recent years by amendments to the *Migration Act*, which aim to delimit the full scope of the international definition of "refugee".[14] Significantly, some of these amendments have resulted directly from a view of the executive government that:

> [i]n the absence of clear legislative guidance, the domestic interpretation of our obligations has broadened out under cumulative court decisions so that Australia now provides protection visas in cases lying well beyond the bounds originally envisaged by the Convention.[15]

Attempts have therefore been made by the executive to "restore the application of the Convention … in Australia to its proper interpretation".[16] This reveals a tension between the executive and judicial branches in the domestic refugee context which has manifested in recent years in an attempt by the government (through the legislature) to restrict the ability of the courts to interpret the "refugee" definition in a full and expansive manner.

An even more fundamental manifestation of this tension has been the attempt by successive governments to restrict the ability of the judicial branch – including the High Court – to review executive determinations of refugee status (and other immigration matters) altogether. The process of restricting access to judicial review in immigration matters began in 1992 when the Federal Court of Australia's jurisdiction under the *Administrative Decisions (Judicial Review) Act 1977* was displaced by a

12 *Migration Act 1958* (Cth) s 36(2)(a).

13 *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 174 [33] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ. The legislative drafting history of this provision reveals that it was "intended to be the mechanism by which Australia offers protection to persons who fall under [the Convention]": *NAGV* (at 175 [40]).

14 For example, s 91R of the *Migration Act* modifies the "for reasons of" clause to require the reason for the persecution to be the "essential and significant reason". It also defines persecution to require "serious harm" and "systematic and discriminatory conduct" and sets out an illustrative list of the types of harm which amount to persecution; s 91S makes some modifications to the meaning of "membership of a particular social group"; while s 91T modifies the meaning of "serious non-political crime" in Art 1F(b) of the Refugee Convention.

15 Commonwealth Parliamentary Debates, House of Representatives (28 August 2001), p 30420 (Phillip Ruddock, Minister for Immigration and Multicultural Affairs).

16 P Ruddock, *Migration Amendment Bill (No 6) 2001*, Explanatory Memorandum, p 2.

special regime which significantly limited the grounds on which judicial review was available in migration matters.[17] Since the High Court's original jurisdiction under s 75(v) of the *Constitution* was unaffected by this legislation, applicants who sought to challenge migration-related decisions on one of the restricted grounds were required to take proceedings directly in the High Court. In 1999 Gleeson CJ and McHugh J of the High Court predicted that such restriction "may have significant consequences" for the High Court "because it must inevitably force or at all events invite applicants for refugee status to invoke the constitutionally entrenched s 75(v) jurisdiction of this court",[18] thereby significantly increasing the workload of the court. By the following year, McHugh J noted that their Honours' prediction was "being experienced".[19] As a result, matters concerning migration law, particularly refugee law, have constituted a vastly disproportionate share of the High Court's workload in recent years[20] – a point noted by Kirby J in both curial and extra-curial writing.[21] In a lengthy critique in one judgment, McHugh J demonstrated the ways in which these restrictions on the Federal Court's ability to review migration matters were compromising the ability of the

17 See the *Migration Reform Act 1992* (Cth) (No 184 of 1992) s 33, which amended the *Migration Act* to exclude certain grounds of judicial review, including breach of the rules of natural justice and unreasonableness in the context of applications for protection visas. In addition, review by the Federal Court was no longer available in respect of primary decisions; rather, only decisions of the Refugee Review Tribunal or Migration Review Tribunal were subject to judicial review. In *Abebe v Commonwealth* (1999) 197 CLR 510, McHugh J noted (at 522 [21]) that, as a result of these amendments, "in important respects the jurisdiction of the Federal Court to review decisions under the Act has been severely truncated".

18 *Abebe v Commonwealth* (1999) 197 CLR 510 at 534 [50].

19 *Re the Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407 at 409 [8].

20 Crock notes that by the end of 2001 the High Court was being overwhelmed by applications for judicial review lodged by failed refugee applicants: M Crock, "Judging Refugees: The Clash of Power and Institutions in the Development of Australian Refugee Law" (2004) 26 *Sydney Law Review* 51 at 71. She explains that by 2002 there were more than 4,000 applicants involved in class actions before the High Court: Crock, fn 83. By 2003-2004 the High Court reported that migration matters accounted for 93% of all applications for constitutional writs in the High Court: see M Crock, B Saul and A Dastyari, *Future Seekers II: Refugees and Irregular Immigration in Australia* (Federation Press, Sydney, 2006) p 72. See also C Beaton-Wells, "Judicial Review of Migration Decisions: Life After S157" (2005) 33 *Federal Law Review* 141 at 160, fn 141, where she cites similar statistics.

21 Justice Kirby also adopted these concerns in *Re Minister for Immigration and Multicultural Affairs; Ex parte PT* (2001) 178 ALR 497 at 498 [1]; see also M D Kirby, "Twelve Years in the High Court – Continuity and Change" (Speech, Southern Cross University, Lismore, 30 March 2007) p 12, where he describes this phenomenon as "[t]he most distinctive phenomenon of the work of the High Court over the past decade": http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_30mar07.pdf (accessed 19 December 2008).

High Court properly to perform its role as "the keystone of the federal arch" and the "ultimate appellate court of the nation".[22]

In 2001 the legislature introduced a "privative clause" into s 474 of the *Migration Act*, which was intended to limit the High Court's original jurisdiction under s 75(v) of the *Constitution* to review immigration decisions only on very limited grounds.[23] In *Plaintiff S157 v Commonwealth*[24] the High Court rejected this attempt to curtail the "entrenched minimum provision of judicial review"[25] conferred by s 75(v) of the *Constitution*, concluding that s 474(1) did not exclude judicial review by the High Court where a decision taken under the *Migration Act* was infected with "jurisdictional error".[26] Subsequent amendments to the *Migration Act* have restored the system of judicial review in the migration context to a more sustainable model, whereby judicial review is available in the Federal Magistrates Court on the same grounds as are available in the High Court.[27]

This brief discussion of the international and domestic background serves to provide the context in which the High Court has been required to interpret Australian refugee law during the past decade. It has had to interpret the broad terms of a humanitarian-based treaty drafted more than 50 years ago in a situation where the court has at times felt overwhelmed by the case load, all against the understanding that, as Kirby J has noted in a number of decisions, "[a] wrong decision may, in some cases, have serious or even fatal consequences".[28]

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22 *Re the Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407 at 411 [15].

23 Section 474(1) provided that a "privative clause decision": "(a) is final and conclusive; and (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account." It was clear that the legislature did not intend to oust altogether the High Court's jurisdiction to review migration matters, but rather intended that, consistent with *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598, the High Court's ability to review decisions would be restricted to three grounds: lack of a bona fide attempt to exercise the power; decision not related to the subject matter of the legislation; and decision not reasonably capable of reference to the power: see *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 498-499 [53]-[56] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

24 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

25 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 513 [103].

26 Jurisdictional error includes a failure to discharge a duty; a decision made in violation of the rules of natural justice (procedural fairness); or where the tribunal falls into an error of law which causes it to "identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion": *Craig v South Australia* (1994) 184 CLR 163 at 179.

27 The amendments were introduced by the *Migration Litigation Reform Act 2005* (Cth): see generally Beaton-Wells, n 20 at 162-166.

28 *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 69 [196].

PART TWO: JUSTICE KIRBY'S CONTRIBUTION TO REFUGEE JURISPRUDENCE

In light of the international context against which refugee adjudication is set in Australian law, it is impossible to consider substantive issues involved in interpreting the "refugee" definition without first discussing interpretative approaches. Indeed, one of the striking features of Justice Kirby's judgments in this area is not only his distinctive approach to the substantive determination of many issues, but also his approach to an interpretation of the relevant sections of the *Migration Act*. For this reason, Part Two of this chapter is divided into two sections. The first discusses Justice Kirby's contribution to interpretative principles, while the second moves to his contribution to substantive aspects of the "refugee" definition.

Interpretative approach

Interpretation of the Migration Act as implementing an international treaty

As explained above, that part of the *Migration Act* which provides for the protection of refugees does so by direct reference to the Refugee Convention in requiring that the key criterion for a protection visa is that a person satisfies the definition of "refugee" set out in the Convention. This is highly significant as it is well established that in "transposing the provision of the treaty, the legislature discloses the prima facie intention that it have the same meaning in the statute as it does in the treaty".[29] Thus, in such a case, the statutory provision "is to be construed according to the method applicable to the construction of the corresponding words in the treaty".[30] That method is set out in the *Vienna Convention on the Law of Treaties* (VCLT), which provides that the primary rule of treaty interpretation is that:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[31]

According to this primary rule, priority is given neither to a purely textual or literal approach, nor to one that focuses only on context or

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29 *Applicant A v Minister for Immigration and Ethnic Affairs* (1996) 190 CLR 225 at 239 per Dawson J.

30 (1996) 190 CLR 225 at 240; see also at 252-253 per McHugh J.

31 *Vienna Convention on the Law of Treaties*, Art 31 (1155 UNTS 331). It should be noted that although the VCLT does not technically apply to the Refugee Convention, as the Refugee Convention predates the VCLT, it is widely agreed that the VCLT encapsulates customary international law and, to that extent, is authoritative and applicable: see *Minister for Immigration and Multicultural Affairs v Savvin* (2000) 98 FCR 168. For a thorough discussion of the VCLT in refugee law, see *Applicant A v Minister for Immigration and Ethnic Affairs* (1996) 190 CLR 225 at 252-256 per McHugh J.

purpose. Rather, "the determination of the ordinary meaning cannot be done in the abstract, only in the *context* of the treaty and in the light of its *object and purpose*".[32] Given that the Preamble to the Refugee Convention (a well-established indicator of context and purpose) affirms the importance of the *Universal Declaration of Human Rights 1948*, and that the Refugee Convention is concerned primarily with defining the rights to be granted to refugees by states, the leading courts in the common law world, including Australian courts, have affirmed the human rights object and purpose of the Refugee Convention.[33] It has been said that "nowhere are considerations of international instruments of human rights more important than in the area of refugees"[34] – thus, "[t]his overarching and clear human rights object and purpose is the background against which interpretation of individual provisions must take place".[35]

The importance of interpreting the "protection visa" provisions in the *Migration Act* by reference to accepted rules of treaty interpretation has long been accepted by the High Court of Australia.[36] However in recent years, while most other superior common law courts, such as the House of Lords and the Canadian Supreme Court, have continued to insist on a purposive and broad approach to interpreting the Refugee Convention, the High Court has begun to depart from its well-established position and has, in a series of more recent cases, sought to recast the interpretative focus to an inward and overwhelmingly narrow, textual one. In this context, Justice Kirby's lone reaffirmation of the broader position has been notable.

An indication that at least some members of the court were moving towards a more narrow interpretative approach emerged in obiter comments in *Minister for Immigration and Multicultural Affairs v Haji Ibrahim*, in which Gummow J stated, inter alia, that "[t]he states which did participate [in the Convention] had no commitment to basing the Convention in the international promotion of human rights".[37] In *Minister for Immigration and Multicultural Affairs v Khawar,* Gummow J's reasoning from *Ibrahim* was adopted in a joint judgment by McHugh and Gummow JJ to support the view that "the scope of the Convention

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32 A Aust, *Modern Treaty Law and Practice* (Cambridge University Press, Cambridge, 2000) p 188 (emphasis in original).

33 See generally, M Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press, Cambridge, 2007) pp 41-49.

34 *Premalal v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 41 FCR 117 at 138.

35 *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982 at 1024.

36 The most extensive discussion of this issue is in *Applicant A v Minister for Immigration and Ethnic Affairs* (1996) 190 CLR 225, especially in the judgment of McHugh J.

37 (2000) 204 CLR 1 at 47 [139]. Gummow J also set out (at 46-50 [138]-[143]) a number of other principles which were designed to establish the narrow scope of the Refugee Convention.

was deliberately confined".[38] In *NAGV v Minister for Immigration and Multicultural and Indigenous Affairs*, a joint judgment of six judges (Kirby J excluded) reiterated many of the points first raised by Gummow J which pointed, it was said, to the view that the Convention must be understood to operate at a State level, such that obligations are *not* owed to refugees.[39]

In each of these judgments Justice Kirby objected to the gradual shift in approach and continued to maintain and reiterate that the court should not "narrowly confine the operation of the Convention language";[40] and that while it must be applied according to its terms, the Convention's meaning "should be ascertained having regard to its object, bearing in mind that the Convention is one of several important international treaties designed to redress 'violations of basic human rights demonstrative of a failure of state protection'".[41] In *NAGV*, while ultimately reaching the same conclusion as the joint judgment, Justice Kirby set out at length his radically different view as to the nature of the obligations owed pursuant to the Convention. As his Honour pointed out, "one of the most significant developments of international law in the past fifty years has been the growth of the recognition of the individual as a subject of international law".[42] While, as his Honour noted, refugees are not party to the Convention, they are "certainly the subjects of the Convention provisions".[43] Thus, he concluded that to suggest that the "protection obligations" referred to in s 36(2)(a) of the *Migration Act* are not owed to refugees is "erroneous both as a matter of Australian and international law".[44]

While in the above cases the question of interpretative principles was a "side issue"[45] and thus the more restrictive statements did not prevent a progressive interpretation by a majority of the High Court, the approach to interpretation was squarely at issue in *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH*[46] and *NBGM v Minister for Immigration and Multicultural Affairs*,[47] a pair of decisions concerned with the operation of the "cessation" provisions in the Convention in

38 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 17 [48].

39 *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 169 [16]. Indeed, at 172 [27] the joint judgment criticised s 36(2)(a) of the *Migration Act* on the basis that it "assumes more than the Convention provides by assuming that obligations are owed thereunder by Contracting States to individuals".

40 *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 70 [198].

41 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 37 [111].

42 *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 182 [68].

43 (2005) 222 CLR 161 at 182 [68].

44 (2005) 222 CLR 161 at 183 [71].

45 (2005) 222 CLR 161 at 182 [69] per Kirby J.

46 (2006) 231 CLR 1.

47 (2006) 231 CLR 52.

Australian law. In *NBGM*, Callinan, Heydon and Crennan JJ (with whom Gummow ACJ agreed), criticised the first instance judge for considering that in order properly to interpret the *Migration Act 1958* (Cth) and the *Migration Regulations 1994* (Cth), it was of "central importance to appreciate the content and intended operation of the Convention".[48] Their Honours took the view that to approach the matter in this way was "to invert the steps which an Australian court should take in situations in which international instruments have been referred to in, or adopted wholly or in part by, enactments".[49] Further, their Honours stated that "the Convention does not provide any of the framework for the operation of the Act … the contrary is the case"; thus, "Australian law is determinative".[50]

In the course of directly responding to the joint judgment, Kirby J pointed out that the principle that an interpreter should, in the case of legislation implementing a treaty, favour a construction which accords with international law, is "by no means a new idea".[51] This explains why in "countless cases" in the High Court and other superior courts, reference has immediately been made to the Convention definition of "refugee" in order to interpret domestic law, as indeed is required by s 36(2)(a) of the *Migration Act*.[52] Thus, the approach of the majority is "contrary to the long-standing authority of this court".[53] In an impassioned riposte, his Honour stated:

> We in this court, at this time, should not be hostile to the provisions of international law … Hostility is entirely out of place. Facilitation and implementation constitute the correct legal approach.[54]

Use of extrinsic sources

The differences that have emerged in recent years between Justice Kirby and other members of the High Court concerning the correct approach to an interpretation of those parts of the *Migration Act* which provide for the protection of refugees has manifested in differences in judicial method and reasoning. This is not surprising: if one adopts an approach that places primary importance on the *Migration Act* as a *domestic* statute, the materials relied upon to elucidate its meaning are quite different from those that might be relevant to an interpretation which places primary

48 *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52 at 70 [57].

49 (2006) 231 CLR 52 at 71 [61].

50 (2006) 231 CLR 52 at 73 [69].

51 (2006) 231 CLR 52 at 56 [10], citing extensive authority for the proposition, including *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38; and *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

52 *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52 at 58 [14]-[15].

53 (2006) 231 CLR 52 at 59 [17].

54 (2006) 231 CLR 52 at 59 [18].

importance on the fact that the *Migration Act* implements an *international* treaty.

In particular, in recognition of the fact that the work of domestic courts in this area relates to an international treaty, recent years have recorded an active dialogue between senior courts in the common law world concerning the proper approach to the definition of "refugee".[55] This reflects the importance of an international human rights treaty being applied as uniformly and consistently as possible. As Lord Steyn of the House of Lords has said:

> In practice it is left to national courts, faced with material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true and autonomous and international meaning of the treaty. And there can only be one true meaning.[56]

This need for consistency or "international meaning" has repeatedly been emphasised in the case law, and by the United Nations High Commissioner for Refugees (UNHCR), and is manifested in the comparative approach to interpretation adopted by most common law courts and in the work of the International Association for Refugee Law Judges.[57] In addition, while as explained above there is no body vested with the authority to issue authoritative opinions on the correct interpretation of the Convention, the UNHCR is vested with the authority to "supervis[e] the application of the provisions of [the] Convention".[58] In fulfilling this responsibility, the UNHCR has produced a number of documents, including the 1979 Handbook,[59] and, since 2001, a series of "Guidelines on International Protection" which are relevant to interpreting various aspects of the "refugee" definition. In addition, the Executive Committee of the UNHCR (ExCom) – composed of 72 states – issues "Conclusions on International Protection" following its annual meeting, which also provide guidance on interpreting the terms of the Refugee Convention.

While earlier High Court decisions concerning the meaning of "refugee" routinely considered comparative jurisprudence, in recent years Justice Kirby's opinions have been distinctive in often being the only judgments in which significant regard is had to comparative

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55 See generally, L R Helfer and A Slaughter, "Toward a Theory of Effective Supranational Adjudication" (1997) 107 *Yale Law Journal* 273.

56 *R (on the application of Adan) v Secretary of State for the Home Department* [2001] 2 AC 477 at 517: that the basic human rights relevant to an interpretation of "refugee", "are not to be considered from the subjective perspective of one country … By very definition, such rights transcend subjective and parochial perspectives and extend beyond national boundaries". See also *Chan v Canada* [1995] 3 SCR 593 at 635 per La Forest J.

57 See Foster, n 33, pp 36-37.

58 Refugee Convention, Art 35.

59 UNHCR Handbook (HCR/IP/4/Eng/REV.1, reedited, Geneva, January 1992, UNHCR 1979): http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf (accessed 19 November 2008).

jurisprudence and UNHCR guidance.[60] For example, in *QAAH* the UNHCR sought for the first time in Australia to be joined as amicus curiae to the appeal.[61] Justice Kirby made it clear that he would "unhesitatingly have granted leave for UNHCR to be heard",[62] on the basis that in deciding such cases, "national courts are exercising a species of international jurisdiction", and the "more assistance courts can receive from the relevant international agencies in discharging such international functions, the better".[63] However, the UNHCR's participation was confined by the majority of the court to written submissions.[64] The judgments in *QAAH* are revealing: while the majority adopted a very technical and narrow approach to find that the "cessation" clause does not effectively operate in Australian law, Justice Kirby considered a wide range of comparative jurisprudence, UNHCR guidelines, and academic opinion (considered a "subsidiary means for the determination of rules of law" in international law),[65] in support of an interpretation of the *Migration Act* and Regulations which is clearly in accordance with international law. It is telling that it is the majority's judgment that has been criticised by leading international experts as misunderstanding international law.[66] The substance of this decision is explored further below.

Justice Kirby's willingness to consider a wide range of international materials in ascertaining the true and autonomous meaning of "refugee" in the Convention means that he has been willing to reconsider issues that have previously been decided by the High Court where the court's approach is out of step with the predominant international approach. For example, in *Khawar*, he explained that while the court had previously "had resort to dictionaries" in assigning meaning to the phrase "being persecuted",[67] consideration of the nature of the Convention as an international treaty together with jurisprudence from other state parties allowed him "to see more clearly than before the dangers in the use

60 This is particularly evidenced in *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1; *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH* (2006) 231 CLR 1; *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1.

61 The UNHCR has often intervened in refugee cases heard by the superior courts in other jurisdictions – eg, in the United States Supreme Court: see *INS v Elias-Zacarias* 502 US 478 (1992); and in the United Kingdom House of Lords: see *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629.

62 *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH* (2006) 231 CLR 1 at 29 [77].

63 (2006) 231 CLR 1 at 29 [78].

64 (2006) 231 CLR 1 at 29 [77].

65 "[T]eachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law": ICJ Statute, Art 38.

66 G Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd ed, Oxford University Press, Oxford, 2007) p 140, fn 28.

67 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 35 [106].

of dictionary definitions of the word 'persecuted' in the Convention definition".[68] His Honour's preference for a contextualised, purposive approach to interpreting "persecution" in *Khawar* was subsequently relied upon by the New Zealand Refugee Status Appeals Authority in *Refugee Appeal No 74665/03*.[69]

An even more radical reconsideration was undertaken by Kirby J in *SZATV v Minister for Immigration and Citizenship*,[70] a decision in part concerning the existence and scope of a doctrine known variously as the "relocation principle", "internal flight alternative" or "internal protection alternative" in refugee law. Although it was not ultimately necessary to ascertain the scope of the doctrine for the purposes of that case, Justice Kirby considered a wide range of comparative material concerning its textual basis and application of the principle. As to its textual basis, he noted that the most logical possible basis, the "protection limb", was not available in Australian law because of two previous decisions of the court in which the protection limb was given a very narrow meaning. Justice Kirby noted that "[o]verseas courts have not followed this [High] Court's view of the meaning of 'protection' in this context",[71] and that persuasive academic opinion also suggested that it was an incorrect approach.[72] Thus, Kirby J concluded that the High Court "should reconsider its holding in this respect".[73]

This concern always to ensure that the High Court's approach is in accord with the widely accepted views of the international community as to the correct interpretation of the Refugee Convention is vital not only to encourage "accurate decision-making",[74] but also to ensure that Australian courts are able to participate in the "judicial conversations" occurring between judges of the superior courts of states that are party to the Convention. As Kirby J warned in *QAAH*, the High Court's recent move away from an "internationalist" approach to interpreting the refugee provisions of the *Migration Act* means that the value and relevance that the High Court's decisions will have for other countries will be limited,[75] thus compromising the potential contribution of Australian courts to the development of international refugee law.

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68 (2002) 210 CLR 1 at 35 [108].

69 *Refugee Appeal No 74665/03* at [40].

70 (2007) 233 CLR 18.

71 *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 at 22 [60].

72 (2007) 233 CLR 18 at 22 [60].

73 (2007) 233 CLR 18 at 22 [60].

74 *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH* (2006) 231 CLR 1 at 30 [81].

75 (2006) 231 CLR 1 at 30 [81].

Contextualised application of domestic administrative law principles

The final aspect of Justice Kirby's approach to interpretation, which is notable in the context of refugee law, is the degree to which his understanding of the human rights object and purpose of the Convention has influenced his application of domestic administrative law principles in the refugee context. While this chapter does not explore Kirby J's contribution to the development of substantive principles of judicial review, it is worth highlighting that he has not applied the principles of judicial review in a vacuum; rather he has adopted a contextualised approach in the refugee arena. This does not mean that Justice Kirby has in every case engaged broad principles to find in favour of the applicant for refugee status. Rather, he has reiterated in some decisions that "[a] natural feeling of sympathy may not distort the application of the *Migration Act* to achieve the purpose of the parliament, however rigid and unjust that purpose may appear".[76] However, his highly contextualised approach to the application of administrative law principles to the refugee context is an important distinctive aspect of his contribution to Australian refugee law.

As alluded to above, in order for the High Court to intervene in a decision concerning refugee status in Australia (that is, a decision made under s 36(2)(a) of the *Migration Act*), it is necessary for it to be satisfied that the decision under review is infected with "jurisdictional error". One of the circumstances in which a decision may be so impugned is where the decision-maker failed to accord procedural fairness ("natural justice") to the applicant for refugee status. In a number of decisions, Justice Kirby has emphasised that, in considering the application of the rules of procedural fairness, "[t]he requirements of natural justice in a particular case may vary in accordance with considerations such as the functions and independence of the relevant decision-maker and the importance of the decisions which that person makes".[77] While that statement is not particularly novel, what is unique is his reliance on the international context of refugee decision-making as relevant to the content of the rules of procedural fairness. For example, in *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka*, Kirby J explained that an important reason for insisting upon exacting standards in the refugee context is that the tribunal is "exercising statutory powers of a special kind".[78] Specifically, these are "powers designed to fulfil Australia's obligations in international law", obligations "freely accepted" and for

76 *WACB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 210 ALR 190 at 213 [89]. See also *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 598.

77 *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128 at 150 [64].

78 (2001) 206 CLR 128 at 151 [68].

a "high humanitarian purpose".[79] For this reason, he took the view that the High Court should ensure, as far as possible, that "those obligations are carried out in accordance with the applicable norms of international law" relating to fair procedure.[80] While in that case Kirby J ultimately agreed with the joint judgment in the final orders of the court, in others his distinctive approach has resulted in different outcomes.

In *Minister for Immigration and Multicultural Affairs v SGLB*, one of the central issues before the High Court was whether the Refugee Review Tribunal (RRT) had denied procedural fairness to an applicant for refugee status on the basis that it had not properly considered whether the applicant was suffering from post-traumatic stress disorder, nor what consequences might flow from that disorder in terms of the assessment of the applicant's credibility and even his ability to participate in the hearing. While the majority of the High Court found that the alleged errors by the Refugee Review Tribunal did not constitute a denial of procedural fairness, Justice Kirby's dissenting judgment found in favour of the applicant on this ground. In setting out his general approach to the issues, he emphasised that "the decision concerning the respondent's application for a protection visa is serious and important", and has significance for (inter alia), "the compliance of the nation with its obligations, by international law, under the Refugees Convention".[81] This is why the Australian legal system "insists upon the attainment of high levels of accuracy in compliance with the Act and with the requirements of procedural fairness".[82] In ascertaining the content of those rules, he referred to the UNHCR Handbook, which recommends that where an applicant for refugee status has a "mental or emotional disturbance", the examiner should obtain an independent medical report and noted that the report relied upon by the Refugee Review Tribunal in that case did not meet these requirements.[83] Further, in assessing the steps required by the tribunal in that case, he emphasised that the applicant for refugee status had suffered prolonged detention in Australia against the background of having suffered "experiences giving rise to accepted fears" prior to coming to Australia.[84] In these circumstances, Justice Kirby concluded that the course adopted by the tribunal was objectively unfair and amounted to a denial of the rules of procedural fairness.

In another dissenting judgment, *Minister for Immigration and Multicultural Affairs v Rajamanikkam*, Justice Kirby again emphasised the special nature

79 (2001) 206 CLR 128 at 151 [68].

80 (2001) 206 CLR 128 at 153 [72]. This was primarily the ICCPR.

81 *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12 at 31 [73].

82 (2004) 207 ALR 12 at 31 [73].

83 (2004) 207 ALR 12 at 37 [81]-[82].

84 (2004) 207 ALR 12 at 37 [87].

of the refugee status determination process in informing his approach to an interpretation of statutory requirements related to the Refugee Review Tribunal's fact-finding procedure. His Honour drew on comments made by Justices Gummow and Hayne in an earlier decision of the court in which they had noted that it "is necessary always to bear in mind that an applicant for refugee status is, on one view of events, engaged in an often desperate battle for freedom, if not life itself".[85] Justice Kirby emphasised that since almost all refugee claims turn on an assessment of credibility, special care "is needed in conducting and analysing the fact-finding process in the present case".[86] Similarly, in *Minister for Immigration and Multicultural Affairs v Yusuf*, a case concerning an interpretation of statutory provisions which required the Refugee Review Tribunal to provide reasons for its decisions, Kirby J was again in dissent in finding that the tribunal had violated the requirements in that case. In setting out his reasons for adopting a "broad" construction of the relevant legislative requirements, he again emphasised the "onerous responsibilities" with which the tribunal is vested,[87] the fact that it is "entrusted with the duty to apply to disputed cases Australia's international obligations under the Refugees Convention",[88] and therefore that the "written statements" required by the Act are available "not only to the persons seeking review and to their representatives", but to "the United Nations High Commissioner for Refugees and to the many others, in Australia and beyond, who watch the way this country conforms to international law".[89]

This willingness to view the role and function of the Refugee Review Tribunal in its international context is unique but arguably entirely appropriate in light of the general concern by refugee decision-makers, particularly in the common law world, to interpret the "refugee" definition in a way that acknowledges and takes account of its status as an international treaty – a concern which extends to procedural as well as substantive issues.

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85 *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222 at 249 [91], quoting from *Abebe v The Commonwealth* (1999) 197 CLR 510 at 577-578 [191].

86 *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222 at 249 [92]; see also *Muin v Refugee Review Tribunal; Lie v Refugee Review Tribunal* (2002) 190 ALR 601 at 653 [227]-[228].

87 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 369 [143].

88 (2001) 206 CLR 323 at 369 [143].

89 (2001) 206 CLR 323 at 369 [144]. See also *SAAP v Minister for Immigration and Multicultural Affairs and Indigenous Affairs* (2005) 228 CLR 294 at 344-345 [168]-[169], where Kirby J again emphasised the relevance of these factors to interpreting other statutory procedural requirements imposed on the RRT which are designed to ensure "that the tribunal's procedures attain the highest standards of justice to the applicants before it". His Honour was in the majority in that case. For an early example of Kirby J taking into account these factors, see *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 292-293.

Contribution to substantive issues in refugee law

Having considered the distinctive manner in which Justice Kirby approaches the interpretative challenge in the refugee context, we now turn to reflect on his contribution to the resolution of the various substantive questions inherent in the determination of qualification for refugee status. The Refugee Convention extends protection to persons who have a "well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group and political opinion".[90] Although the *Migration Act* has relatively recently been amended to "clarify" the meaning of this definition, in practice the key question for refugee decision-makers in Australia continues to be whether a person meets the definition as set out in the Convention.

In the course of considering the "refugee" definition, the High Court of Australia has issued many significant judgments on important contemporary issues, many of which have been noted and even followed in overseas jurisdictions, and dissected by local and overseas refugee law scholars. Some of the most notable include the decision in *Chen Shi Hai v Minister for Immigration and Multicultural Affairs*,[91] in which the court found that a "black child" – a child born outside China's one child policy – qualified for refugee status on the basis of his fear of being deprived of basic social and economic rights such as education, housing and food as a result of his status;[92] and the decision in *Khawar*, in which a majority of the court found that a woman fleeing domestic violence in Pakistan qualified for refugee status. In these and a number of other significant cases,[93] while Kirby J has often issued a separate concurring judgment, in the main his approach to the substantive issues has not been dissimilar to the other justices in the majority. For this reason, this section focuses on those areas in which his contribution has been unique or distinctive. Perhaps unsurprisingly, these tend to be the most difficult and controversial issues in refugee determination today, both in Australia and overseas.

Voluntary but protected acts

An important issue that has emerged in refugee adjudication in recent years, both in Australia and internationally, is the correct disposition of a refugee claim that is based on the fear of consequences that will follow if an applicant chooses to engage in certain behaviour on return to his or her country of origin. The reason for the difficulty in these

90 Refugee Convention, Art 1A(2).

91 (2000) 201 CLR 293.

92 (2000) 201 CLR 293.

93 For example, *Minister for Immigration and Multicultural Affairs v S152/2003* (2004) 222 CLR 1; *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161; *Singh v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 90 ALR 397.

cases is that, unlike other types of claims such as those based on a risk of persecution by reason of race or gender, claims based on a risk which would follow from, for example, religious practice, imply an element of "voluntariness" – that is, the risk is said to accrue not from *status* but from *activity*. The issue that continues to trouble decision-makers is whether an applicant is required to desist from such conduct in order to avoid persecution. This in turn gives rise to the question whether, if it is indeed possible for an applicant to avoid persecution by remaining "discreet", the restriction on the practice *itself* constitutes persecution.

While these questions have plagued the Refugee Review Tribunal and federal courts in Australia for many years,[94] they first came before the Australian High Court in 2003 in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*,[95] a case concerning the claim for refugee status by two gay men from Bangladesh. The Refugee Review Tribunal had dismissed their claim on the basis that the applicants had in the past "clearly conducted themselves in a discreet manner and there is no reason to suppose that they would not continue to do so if they returned home now".[96] In a narrow 4:3 decision, the High Court found that the tribunal had committed a jurisdictional error by failing "to determine whether the appellants had acted discreetly only because it was not possible to live openly as a homosexual in Bangladesh".[97] Two of the majority justices, Gummow and Hayne JJ, emphasised the dangers in "creating and applying a scheme for classifying claims to protection" – in this case the dichotomy between "discreet" and "non-discreet" homosexuals in Bangladesh.[98] The problem is that processes of classification "may obscure the essentially individual and fact-specific inquiry which must be made".[99] The other majority judgment, that of McHugh and Kirby JJ, placed particular emphasis on a purposive approach to interpreting the Refugee Convention, noting that the entire objective of the Convention would be undermined if signatory countries required applicants for refugee status "to modify their beliefs or opinions or to hide their race, nationality or membership of particular social groups before those countries would give them protection under the Convention".[100] Of particular significance is that McHugh and Kirby JJ noted that in a case where a claim to refugee status is based on the fact that certain conduct is penalised in the

94 See C Dauvergne and J Millbank, "Applicants S396/2002 and S395/2002, A Gay Refugee Couple from Bangladesh" (2003) 25 *Sydney Law Review* 97.

95 *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473.

96 (2003) 216 CLR 473 at 481 [9] per Gleeson CJ, setting out the RRT reasons.

97 (2003) 216 CLR 473 at 493 [51] per McHugh and Kirby JJ.

98 (2003) 216 CLR 473 at 499 [76].

99 (2003) 216 CLR 473 at 500 [78].

100 (2003) 216 CLR 473 at 490 [41].

country of origin, determining whether the prosecution and penalty is legitimate should be done by reference to international human rights standards.[101]

This human rights approach was taken up more fully by Justice Kirby in the next case in which the "discretion" issue arose, *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*.[102] In *NABD*, it had been accepted by the Refugee Review Tribunal that the Iranian applicant had converted to Christianity and had become a member of the Uniting Church while in Indonesia.[103] The tribunal found he had attended religious gatherings in Indonesia and in a detention centre in Australia, and that he had engaged in activities in detention, including "the distribution of pamphlets, speaking to others privately about his faith and encouraging interested persons to attend church services".[104] However, the tribunal rejected the applicant's claim for refugee protection, relying on country information which established that "those converts who go about their devotions quietly are generally not disturbed" and "converts are *generally* tolerated *as long as they maintain* a *very low profile*".[105] Based on this information, the Refugee Review Tribunal drew a distinction between "converts to Christianity who go about their devotions quietly and maintain a low profile and who are generally not disturbed" on the one hand, and persons involved in the "aggressive outreach through proselytising by adherents of some more fundamental faiths" on the other.[106] The tribunal found that the Uniting Church is not one of the "fundamental faiths" that require proselytising by their adherents. Thus, it was "not inconsistent with his belief and practices" for the appellant, were he returned to Iran, to avoid proselytising the Christian religion or to avoid engaging in other active conduct that would bring him to official notice.[107]

Although acknowledging that the distinction drawn by the Refugee Review Tribunal was "far from clear cut"[108] and that "applying such a distinction may well be difficult",[109] a majority of the High Court (comprising three judges) found that the distinction was open to the tribunal, and thus the applicant had no ground for judicial review of the decision. This decision by the majority is very difficult to reconcile with the decision in *S395*; the majority in *NABD* did not present a

101 (2003) 216 CLR 473 at 491 [45].

102 *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 216 ALR 1.

103 (2005) 216 ALR 1 at 3 [4].

104 (2005) 216 ALR 1 at 3 [6].

105 (2005) 216 ALR 1 at 12 [39] (emphasis in original).

106 (2005) 216 ALR 1 at 4 [9].

107 (2005) 216 ALR 1 at 18 [67].

108 (2005) 216 ALR 1 at 4 [9].

109 (2005) 216 ALR 1 at 40 [165].

convincing case as to how the two divergent outcomes can be reconciled.[110]

In two powerful dissenting judgments, both McHugh and Kirby JJ found that the Refugee Review Tribunal had fallen into error in assessing the claim in this manner. Justice McHugh found that by drawing this simplistic distinction, the tribunal had inappropriately created a bipartite classification which it applied to the applicant without properly inquiring into the individual applicant's chance of facing persecution – the same error that had been committed by the tribunal in *S395*. In addition, McHugh J found that the tribunal came to "unsupportable conclusions about the appellant's level of activity in sharing his faith" since the weight of the evidence indicated that the appellant did engage in active proselytisation.[111]

Justice Kirby, also in dissent, found that the Refugee Review Tribunal, having accepted that a "quiet" or very low profile practice of religious beliefs was imperative for safety in Iran, effectively imposed the requirement of "quiet sharing of one's faith" on the appellant, were he to be returned to Iran. Justice Kirby concluded that "its prediction of what he would do was necessarily dependent upon its assessment of what alone it would be safe for him to do".[112]

The particularly noteworthy aspect of Kirby J's approach is that he was the *only* Justice to consider whether the effective imposition of a requirement of discretion was consistent with international law. As he noted, in line with his general approach outlined above, the Refugee Convention is "part of the international law that upholds basic human rights" and must be interpreted in that context.[113] Not only is this the approach required by the rules of treaty interpretation, but it is the only one to provide a *principled* method of resolving many of the questions inherent in a refugee claim based on "voluntary behaviour". As the United Kingdom's Court of Appeal has explained, there is a risk of "being persecuted" where "a government is doing something it is not entitled to do".[114] One may wonder how a refugee decision-maker is to ascertain such lack of entitlement other than by "establishing either a rule of international law prohibiting the action in question, or establishing that the state in question is failing to recognise a prime human right as recognised internationally".[115]

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110 *SZFDV v Minister for Immigration and Citizenship* (2007) 233 CLR 51 at 58 [27]: here, Kirby J acknowledges that *NABD* is difficult to reconcile with *S395*.

111 *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 216 ALR 1 at 15 [51].

112 (2005) 216 ALR 1 at 26 [106].

113 (2005) 216 ALR 1 at 27 [108].

114 *Sepet v Secretary of State for the Home Department* [2001] EWCA Civ 681 at [167] per Waller LJ.

115 *Sepet v Secretary of State for the Home Department* [2001] EWCA Civ 681 at [167] per Waller L.

In *NABD*, Justice Kirby referred to the *International Covenant on Civil and Political Rights* (ICCPR), noting that Art 18 expressly provides that the right to "freedom of thought, conscience and religion" includes "freedom, either individually or in community with others and in public and private, to manifest his religion or belief in worship, observance, practice and teaching".[116] In addition, the United Nations Human Rights Committee (UNHRC) – the body vested with the authority to interpret the *International Covenant on Civil and Political Rights* – has emphasised the importance of public manifestation of this right.[117] In this light, it is clear that "to reinforce in any way the oppressive denial of public religious practices (or any other feature of freedom essential to human rights) is to participate in the violation of the purposes that the Convention is intended to uphold".[118]

As Kirby J's application of the "human rights approach" in *NABD* reveals, reference to international human rights law ensures that decision-makers interpret the Convention in a manner which is consistent with its human rights objective and purpose. In addition, by drawing on the text of the widely ratified human rights treaties, as well as their authoritative interpretation by relevant treaty bodies, a point of reference that is principled, politically sanctioned and genuinely international is established.[119] This assists in avoiding divergent results in comparable cases – an important objective of a human rights treaty based on the principle of non-discrimination.

Moreover, this approach is particularly helpful and relevant where the prohibition on religious or other protected activity is less severe than in the case of *NABD* or where it is claimed to be justified. Limitations or restrictions on religious practice may range from complete prohibitions or bans on specific religions, to prohibitions on specified activities by a religion's adherents on health or public safety grounds. For example, in a decision by the Federal Court of Canada, the court held that "a law which requires a minority of citizens to breach the principles of their religion or to be lifelong outlaws is patently persecutory"; however, they qualified this view by adding "so long as those religious tenets are not unreasonable as, for example, exacting human sacrifice or the taking of prohibited drugs as a sacrament".[120] This raises the question whether the violation of *any* principle of an individual's religion is properly within the scope of a risk of being persecuted. If not, where is the line to be drawn?

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116 ICCPR, Art 18(1); the HRC is constituted by Art 28 of the ICCPR.

117 *Applicant NABD* (2005) 216 ALR 1 at [117], describing General Comment 22.

118 *Applicant NABD* (2005) 216 ALR 1 at [131].

119 R P G Haines, J Hathaway and M Foster, "Claims to Refugee Status Based on Voluntary but Protected Actions" (2003) 15 *International Journal of Refugee Law* 430 at 437.

120 *Kassatkine v Canada* (1996) 119 FTR 127.

It is in this regard that the practical utility of international human rights law can be appreciated. Article 18 of the *International Covenant on Civil and Political Rights* allows for limitations, although only in closely circumscribed circumstances. Specifically, Art 18(3) provides that "[f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others". As the United Nations Human Rights Committee has made clear, the limitations clause is to be strictly interpreted and restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.[121] In other words, bias and prejudice against a *particular* minority religion cannot constitute a sufficient basis for limiting manifestation of the disfavoured religion or belief.[122] In addition to providing this general insight, the UNHRC has the scope to consider the application of Art 18(3) to specific situations in its General Comments, Concluding Observations on state party reports and its "judgments" in respect of individual communications, all of which could provide helpful guidance for refugee decision-makers. Reliance on this analytical tool is vastly superior to a case-by-case subjective assessment of what the decision-maker regards as "legitimate" or "reasonable" in any given situation. Unfortunately, however, none of the other judges have to date been persuaded to adopt Kirby J's approach in this area.

The lack of consistency in this area is further exemplified in a pair of cases decided by the High Court in August 2007 concerning different factual scenarios but each raising the "discretion" issue. In *SZATV v Minister for Immigration and Citizenship*,[123] the court applied *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*[124] to quash the decision of the Refugee Review Tribunal on the basis that the effect of the tribunal's judgment was that "the appellant was expected to move elsewhere to Ukraine, and live 'discreetly' so as not to attract the adverse interest of the authorities in his new location, lest he be further persecuted by reason of his political opinions".[125] In a separate but concurring judgment, Justice Kirby emphasised that it cannot be a "reasonable adjustment" that "a person should have to relocate internally by sacrificing one of the fundamental attributes of human existence which the specified grounds in the Refugees Convention are intended to protect and uphold".[126]

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121 UNHRC General Comment 22 (CCPR/C/21/Rev.1/Add.4) at [8].

122 K Musalo, "Claims for Protection Based on Religion or Belief" (2004) 16 *International Journal of Refugee Law* 165 at 193.

123 (2007) 233 CLR 18.

124 (2003) 216 CLR 473.

125 *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 at 29 [32] per Gummow, Hayne and Crennan JJ (Callinan J agreeing: at 49 [106]-[107]).

126 (2007) 233 CLR 18 at 48-49 [102].

By contrast, however, in *SZFDV v Minister for Immigration and Citizenship*,[127] decided on the same day as *SZATV*, a majority of the court dismissed the appeal by deferring to the Refugee Review Tribunal's conclusion that "it would not be unreasonable" to expect the applicant for refugee status to relocate within his own country in order to avoid persecution on the basis of political opinion.[128] In dissent, Kirby J emphasised that the tribunal's finding in fact "contemplated the appellant's abandonment of his political opinions in India in the only place where it was relevant and important to hold and express those political opinions".[129] This "amounts to a negation or abdication of the relevant basic right expressed in the Refugees Convention" and therefore jurisdictional error.[130]

The consequence of the failure of a majority of the High Court to provide clear and principled guidance, based upon international human rights law, in the "voluntary actions" category is the existence of a body of inconsistent decisions in the Refugee Review Tribunal and lower federal courts, which can be difficult to reconcile with each other. While some decisions have applied *S395* so as to uphold refugee claims based on, for example, the expression of political opinion,[131] others have applied *NABD* so as to reject refugee claims. Perhaps unsurprisingly, this is particularly so in cases concerned with religious freedom.

In countless decisions (many upheld on application for review to the Federal Court) the Refugee Review Tribunal has found that the applicant does not have a well-founded fear of persecution because he or she is able to act with discretion and hide his or her religious conversion (particularly in the case of Iranian applicants) or otherwise desist from outward manifestations of religious belief. In some decisions, this is described as a factual analysis, that is, the tribunal concludes that, factually, the applicant is unlikely to act in a manner on return that would attract attention, and does not therefore have a well founded fear of future persecution. However, importantly, in a number of applications for review, the Federal Court of Australia has declined to overturn Refugee Review Tribunal decisions even where the tribunal has explicitly found that the applicant will desist from religious practice, or act in a "discreet" manner *in order to avoid persecution*.

For example, in one decision, the Federal Court upheld the tribunal's rejection of the applicant's claim for refugee status based on his fear of persecution as a follower of Falun Gong, where the tribunal had found

127 (2007) 233 CLR 51.

128 *SZFDV v Minister for Immigration and Citizenship* (2007) 233 CLR 51 at 55-56 [15] per Gummow, Hayne and Crennan JJ (Callinan J agreeing with the majority: at 64 [50]).

129 (2007) 233 CLR 51 at 62-63 [42].

130 (2007) 233 CLR 51 at 62-63 [42].

131 See, eg, *SZHBP v Minister for Immigration & Citizenship* (2007) 97 ALD 84.

that the applicant was not such a sufficiently committed practitioner that he would persevere with public practice of his religion in the face of persecution.[132] In another decision, the Federal Court similarly upheld a rejection for refugee status where the tribunal had found that the applicant would "choose loyalty to the Chinese Communist Party over the continued practice"[133] and thereby avoid persecution. In a decision in August 2005, post-dating the High Court's decision in *NABD*, a majority of the Full Federal Court upheld the Refugee Review Tribunal's decision to reject a claim for refugee status, where the tribunal had found that the applicant's decision to practise Falun Gong in private in order to reduce the risk of persecution did not itself amount to persecution.[134] The tribunal had based this finding on its view that Falun Gong "does not need to be practised in public, or with others, but can be practised privately",[135] and that public practice was not "an inherent or significant component of Falun Gong".[136] In dissent in that case, Marshall J criticised the tribunal's decision on the basis that it had accepted that the choice of the applicant to practise privately was "not a voluntary choice uninfluenced by the fear of harm".[137] In essence, refugee applicants in these cases are denied refugee status because, despite their previously demonstrated commitment to the public expression and practice of their religious beliefs, they concede that they would give up public practice rather than risk being persecuted. But this position is surely at odds with a central purpose of refugee law, namely the protection of the equal enjoyment by every person of fundamental rights and freedoms.[138] This is an area in which it is hoped that Justice Kirby's dissents will offer "a beacon to a later, more enlightened time".[139]

Membership of a particular social group

In order for a decision-maker to be satisfied that a person meets the definition of "refugee" as set out in the Convention, he or she must establish that the persecution feared is "for reasons of" one of the Convention grounds, namely race, religion, nationality, political opinion or membership of a particular social group. In other words, a fear of

132 *NAEB v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 79 at [26]-[27]. Special leave to appeal to the High Court in this matter was refused: *NAEB v MIMIA* [2005] HCATrans 101 (4 March 2005).

133 *VUAC v Minister for Immigration & Multicultural Affairs* [2005] FCA 925 at [10].

134 *Minister for Immigration & Multicultural & Indigenous Affairs v VWBA* [2005] FCAFC 175 at [12].

135 [2005] FCAFC 175 at [12].

136 [2005] FCAFC 175 at [38].

137 [2005] FCAFC 175 at [56].

138 *Applicant A v Minister for Immigration and Ethnic Affairs* (1996) 190 CLR 225 at 231-232 per Brennan CJ.

139 M D Kirby, "Judicial Dissent – Common Law and Civil Law Traditions" (2007) 123 *Law Quarterly Review* 379.

serious human rights abuse is not in and of itself sufficient to qualify for refugee status; rather that risk must be causally connected to one of the Convention grounds.

Although there are ambiguities giving rise to disagreement and debate in the jurisprudence interpreting the other Convention grounds, there is no question that the "membership of a particular social group" (MPSG) ground has been the most litigated and controversial in recent years. As the UNHCR concluded following an expert roundtable in 2001, it is "the Convention ground with the least clarity".[140] This is a combination of the paucity of explanatory material in the travaux preparatoires to the Convention, and the wide and malleable language of the MPSG category. On the other hand, given its broad language, it represents the most promising method by which groups that were overlooked in the formulation of the definition, such as women and homosexual men and women, are able to assert refugee claims today.

The high volume of case law grappling with the MPSG ground, both in Australia and overseas, means that courts and tribunals have had an opportunity to refine over time their interpretation of this ground. This is evident in a survey of the many judgments in which the Australian High Court, including Kirby J, have considered the meaning of this ground in Australian refugee law. For example, in an early decision in his term, Kirby J suggested that, "courts and agencies should turn away from attempts to formulate abstract definitions" of the MPSG ground.[141] Instead, "they should recognise 'particular social groups' on a case by case basis". This approach "accepts that an element of intuition on the part of decision-makers is inescapable, based on the assumption that they will recognise persecuted groups of particularity when they see them".[142] However, the difficulty with such an approach is that it appears to "abandon the quest for standards",[143] precisely in an area in which it is arguably the responsibility of senior courts to set out the basis upon which claims pursuant to this ground ought to be recognised. Indeed, Justice Kirby appears to have resiled from this position, if not explicitly, at least implicitly, in the principled manner in which he has dealt with the issue in more recent judgments. Certainly, the view he expressed in *Applicant A v Minister for Immigration and Ethnic Affairs*,[144] that the development and expression of such categories "[are] the province of administrators and review tribunals with experience

140 UNHCR Global Consultations, "Summary Conclusions – Membership of a Particular Social Group" (San Remo, September 2001) in E Feller, V Turk and F Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) p 312.

141 *Applicant A v Minister for Immigration and Ethnic Affairs* (1996) 190 CLR 225.

142 (1996) 190 CLR 225 at 307 per Kirby J.

143 (1996) 190 CLR 225 at 277 per Gummow J.

144 (1996) 190 CLR 225.

of refugee claims"[145] has clearly been departed from in his later unwillingness to defer to the Refugee Review Tribunal's assessment of the MPSG ground in many important cases.

While the early international jurisprudence contained a wide array of approaches to the interpretation of the MPSG ground, more recently the abovementioned process of evolution and refinement has left just two key approaches remaining. The first, adopted at least in some form in the United States, Canada, the United Kingdom and New Zealand, is the "ejusdem generis" or "protected characteristics" approach. According to this method, the MPSG ground should be construed in a manner consistent with the other grounds in the definition. Thus, the MPSG category includes groups defined by an innate or unchangeable characteristic (for example, gender); groups defined by a characteristic that is so fundamental to their human dignity that they should not be forced to forsake the characteristic (for example, homosexuality); and groups defined by a former voluntary status (for example, former child soldiers).[146] Importantly, according to this approach, there is no finite or static list of possible protected groups; rather, the category is open to evolution in line with the principles of non-discrimination law. As the English Court of Appeal has observed, "the inclusion of PSG recognised that there might be different criteria for discrimination, in pari materiae, with discrimination on other grounds, which would be equally offensive to principles of human rights".[147]

The other approach – the "social perception" test – was developed by, and remains largely confined to, the Australian courts. This test requires an applicant to demonstrate, first, that the group is identifiable by a characteristic or attribute that is common to all members of the group; second, that the relevant characteristic or attribute is not the shared fear of persecution; and third, that the possession of that characteristic or attribute distinguishes the group from society at large.[148] This test, established in *Applicant A*[149] and refined in *Applicant S v Minister for Immigration & Multicultural Affairs*,[150] requires the group to be objectively cognisable within society. Although it is not necessary to establish that "the society in question perceives there to be such a group",[151] such recognition or perception will ordinarily point to a particular social group's existence.

145 (1996) 190 CLR 225 at 380 per Kirby J.

146 See generally, J Hathaway and M Foster, "Membership of a Particular Social Group" (2003) 15(3) *International Journal of Refugee Law* 477 at 480-482.

147 *Montoya v SSHD* [2002] EWCA Civ 620.

148 *Applicant S v Minister for Immigration & Multicultural Affairs* (2004) 217 CLR 387 at 400 (*Applicant S*), reiterated by four Justices in *STCB v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 231 ALR 556 at 564 [35].

149 *Applicant A v Minister for Immigration & Ethnic Affairs* (1996) 190 CLR 225 (*Applicant A*).

150 *Applicant S v Minister for Immigration & Multicultural Affairs* (2004) 217 CLR 387.

151 (2004) 217 CLR 387 at 397 [27] per Gleeson CJ, Gummow and Kirby JJ, at 408 [61]-[63] per McHugh J.

By way of example, McHugh J in *Applicant A* illustrates how the actions of persecutors in targeting individuals who share the attribute of being left-handed would create a public perception that "left-handed men" comprise a particular social group (PSG).[152] Building on this illustration, Gleeson CJ, Gummow and Kirby JJ explained in *Applicant S*, that "over time the discriminatory treatment of this group might be absorbed into the social consciousness of the community" and that "[i]n these circumstances, it might be correct to conclude that the combination of legal and social factors … prevalent in the community indicate that left-handed men form a particular social group distinguishable from the rest of the community".[153]

While the "social perception" test could be said to have the advantages of simplicity, fluidity, greater scope for judicial discretion and potentially a wider ambit than the protected characteristics approach, it also has significant disadvantages. Unlike the protected characteristics approach, it does not provide a principled framework referable to an objective internationally sanctioned set of criteria (that is, international human rights law).[154] Moreover, an analysis of the way in which the High Court's approach is implemented by lower federal courts and tribunals suggests that it is difficult and complicated to apply in practice.

A cogent example of the problematic application of the test is the way in which it is applied to cases involving gender-based persecution. In those jurisdictions that have accepted the ejusdem generis approach, women have been described as a clear example of a PSG defined by the innate and unchangeable characteristics of their sex and gender.[155] For example, in the recent House of Lords decision in *Fornah v Secretary of State for the Home Department*,[156] Lord Bingham of Cornhill, held:

> I think it clear that women in Sierra Leone are a group of persons sharing a common characteristic which, without a fundamental change in social mores is unchangeable, namely a position of social inferiority

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152 This was endorsed by Lord Hope in *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629.

153 *Applicant S* (2004) 217 CLR 387 at 399 [31] per Gleeson CJ, Gummow and Kirby JJ.

154 See generally, Hathaway and Foster, n 146.

155 *Canada (Attorney-General) v Ward* [1993] 2 SCR 689. See also the UNHCR Gender Guidelines at [30]: "It follows that sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men." As Baroness Hale of Richmond noted in the recent decision of *Fornah v Secretary of State for the Home Department* [2007] 1 All ER 671 at 707 [86], "In other words, the world has woken up to the fact that women as a sex may be persecuted in ways which are different from the ways in which men are persecuted and that they may be persecuted because of the inferior status accorded to their gender in their home society."

156 [2007] 1 All ER 671.

> as compared with men. That is true of all women, those who accept or willingly embrace their inferior position and those who do not.[157]

However, in Australia, despite occasional straightforward acceptance by the Refugee Review Tribunal that women, or a broad subgroup of women, can comprise a PSG because they *clearly* share readily identifiable characteristics,[158] the tribunal has at other times been reluctant, if not averse, to recognising that a PSG as broadly defined as women in a country could exist.[159] This often manifests in an arbitrary finding that being a woman, even in a society where gender-discrimination persists, is not "sufficiently distinguishing".[160]

This general reluctance to accept claims on the basis simply of "women" or "gender" often results in the formulation of overly complicated and unnecessarily detailed PSGs. This is demonstrated even in the High Court's progressive decision in *Khawar*, which recognised that women fleeing domestic violence in Pakistan could qualify for refugee protection. In that case the Justices variously formulated the relevant PSG as being "women" (Gleeson CJ);[161] "married women living in a household which did not include a male blood relation to whom the woman might look for protection against violence by members of that household" (McHugh and Gummow JJ);[162] and "a particularly vulnerable group of married women in Pakistan, in dispute with their husbands and their husbands' families, unable to call on male support and subjected to, or threatened by, stove burnings at home as a means of getting rid of them yet incapable of securing effective protection from the police or agencies of the law" (Kirby J).[163]

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157 [2007] 1 All ER 671 at 690 [31]. See also Baroness Hale of Richmond (at 714 [111]): "Nor can it be seriously doubted that the persecution is visited upon its victims because they are members of a particular social group. It is only done to them because they are female members of the tribes within Sierra Leone which practise FGM. They share the immutable characteristics of being female, Sierra Leonean and members of the particular tribe to which they belong. They would share these characteristics even if FGM were not practised within their communities. Their social group exists completely independently of the initiation rites it chooses to practise."

158 See, eg, *RRT Reference: V02/13868* (6 September 2002). See also *SVTB v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 104 at [5] in which the RRT had accepted that the appellant was a member of the PSG "single women in Albania without the protection of male relatives".

159 In *SZBFQ v Minister for Immigration & Multicultural Affairs* [2005] FMCA 197 at [18], the FMC granted relief to the applicant (a young ethnic Russian woman in Azerbaijan), having found that the RRT had made a jurisdictional error by saying as a statement of principle, rather than a finding of fact, that they considered that being a woman in itself is not within the PSG ground in the Convention.

160 See, eg, *RRT Reference: N98/24000* (13 January 2000) (Colombia); see also *V00/1100329* (September 2003) (Bosnia and Herzegovina).

161 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 14 [35].

162 (2002) 210 CLR 1 at 27 [81].

163 (2002) 210 CLR 1 at 43 [129].

This tendency to formulate excessively detailed PSGs is sometimes explained on the basis that the group cannot be defined too broadly because not all women in that society are at risk. This also appears to suggest at least an implicit "floodgates" concern – namely, if the group is defined too broadly all of its members will be eligible for protection. However, these formulations of overly narrow PSGs are inconsistent with many of the otherwise settled principles of interpretation. It is well established, including by the Australian High Court, that the size of the group does not determine its eligibility for characterisation as a PSG,[164] nor does formulation of a large group such as "women" mean that every member is potentially at risk. As Lord Steyn explained in *R v Immigration Appeal Tribunal; Ex parte Shah*, the fact that some women in the relevant group are able to avoid persecution "is no answer to treating women … as a relevant social group".[165]

In practice, this has negative consequences for women seeking protection in Australia because in many cases before the Refugee Review Tribunal the attempt to define a group that is sufficiently "distinguished in society" results in the formulation of a PSG that is defined so narrowly that it becomes circular. In other words, the group is defined solely by reference to the persecution feared and the claim therefore fails on the basis that the relevant characteristic or attribute is simply the shared fear of persecution. In light of these difficulties, it is suggested that a far more satisfactory approach would be that put forward by Lord Steyn of the House of Lords – namely that "[t]he notion that women are a PSG is 'neither novel nor heterodox'"; rather it is "simply a logical application of the seminal reasoning in *Acosta* [the protected characteristic approach]".[166]

Notwithstanding my view that the above approach of the High Court, including that of Kirby J, requires reconsideration, Kirby J's more recent willingness to scrutinise the Refugee Review Tribunal's findings in this area and insist on a principled approach, consistent as far as possible with international standards, has been vital in highlighting the deficiencies in an approach that leaves an open-ended discretion in the hands of the tribunal. The most pertinent example is the recent decision in *STCB v Minister for Immigration and Multicultural and Indigenous Affairs* – a refugee claim by a citizen of Albania who feared being killed by a member of another family under customary Albanian law because his grandfather had killed a member of that family in the past. While the most logical basis of the claim – membership of a particular social

164 As Gleeson CJ noted in *Khawar*, "It is power, not number, that creates the conditions in which persecution may occur": (2002) 210 CLR 1 at 13 [33].

165 [1999] 2 AC 629 at 644.

166 [1999] 2 AC 629 at 644 per Lord Steyn.

group in the form of "family" – was precluded by domestic legislation,[167] the Refugee Review Tribunal also rejected a claim based on the PSG, "Albanian citizens subject to the customary law". The majority of the court found it "unnecessary to consider the reasoning of the tribunal and the Full Court in detail",[168] because in its own view the claim failed on the basis that the applicant was unable to satisfy the "third limb" of the "social perception" test, namely that the group to which he belonged was sufficiently distinguished from society at large. Significantly, this was so despite the acknowledgment that the material relevant to this issue before the Refugee Review Tribunal "was somewhat scarce",[169] and that arguably, therefore, they had not adequately considered it.

In dissent, Kirby J analysed the reasons of the tribunal in much more detail than did the majority, identifying a number of fundamental errors of principle in the tribunal's rejection of the particular social group claim. As Kirby J noted, the Refugee Review Tribunal relied on a number of factors to dismiss the claim that have long been deemed *irrelevant* to PSG analysis in the comparative jurisprudence and by the United Nations High Commissioner for Refugees. These included that the PSG would be extremely large ("at least a third of the population of Albania");[170] that the group was too heterogeneous[171] and that the PSG was not sufficiently "united".[172] In addition, in both Canada and the United Kingdom "the subject of blood feuds have been recognised as falling within a particular social group for Convention purposes".[173] Thus, on Kirby J's view, this was a case where "[o]nce again, this court adopts an approach to the Refugees Convention that is out of line with standards of the High Commissioner for Refugees and different from that adopted by other countries of asylum".[174] It is unclear whether a case such as this could ultimately fall within the "social perception" approach; however, as Kirby J explained, the applicant for refugee status was "entitled to have the Tribunal exercise its jurisdiction by reference to relevant criteria, derived from the Refugees Convention and not by reference to extraneous and immaterial considerations of the kind that it relied on".[175]

167 All judges (including Kirby J) accepted that s 91S of the *Migration Act 1958* (Cth) precluded this aspect of the claim.

168 *STCB v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 231 ALR 556 at 564 [36] per Gleeson CJ, Gummow, Callinan and Heydon JJ.

169 (2006) 231 ALR 556 at 565 [39].

170 (2006) 231 ALR 556 at 575 [80].

171 (2006) 231 ALR 556 at 575 [81].

172 (2006) 231 ALR 556 at 575 [83].

173 (2006) 231 ALR 556 at 576 [86].

174 (2006) 231 ALR 556 at 577 [88].

175 (2006) 231 ALR 556 at 577 [90].

Cessation

Thus far this chapter has focused on the "inclusion" clause in the Refugee Convention, that is, the positive elements that must be established in order to qualify for refugee status. However, importantly, the Refugee Convention also contains provisions pertaining to cessation and exclusion. The "exclusion" clauses exclude from protection persons who have, for example, committed war crimes or other serious non-political crimes.[176] Persons falling within those categories are prohibited from enjoying the protection of the Refugee Convention. The "cessation" clauses, on the other hand, apply to persons already found to qualify for refugee status but whose reasons for requiring protection have come to an end. Most relevantly, Art 1C(5) provides that the Convention "shall cease to apply" to a person where "the circumstances in connection with which he has been recognised as a refugee have ceased to exist".[177]

In *QAAH* and *NBGM*, mentioned above, the High Court of Australia was confronted with the question of whether and how the cessation clause applies in Australian domestic law. The issue arose because, at the time, the *Migration Regulations 1994* (Cth) provided that certain refugees, namely those applicants who entered Australia with a valid visa, were entitled to a "permanent protection visa" (PPV) – that is, essentially permanent residence.[178] However, those applicants who arrived without a visa were entitled only to a "temporary protection visa" (TPV).[179] A TPV was held for 36 months and refugees holding such a visa could apply for a PPV, which might be granted (after 30 months as a TPV holder). However, a TPV holder could not apply for a PPV if, on their way to Australia, they "resided, for a continuous period of at least 7 days, in a country in which the applicant could have sought and obtained effective protection".[180] In such a case, the refugee could apply only for another TPV, unless the Minister waived the seven-day rule if satisfied it was in the public interest to do so.[181] In addition to the reduced benefits to which recipients of a TPV were entitled as compared with PPV holders, the chief problem with the way in which this scheme was implemented was that TPV holders, having established once that they qualify for refugee status, were required to reapply and thus effectively

176 Refugee Convention, Art 1F.

177 Refugee Convention, Art 1C(5).

178 Subclass 866 (Permanent Protection) (Class XA) Visa.

179 Subclass 785 (Temporary Protection) Visa (Class XA). Section 30 of the *Migration Act* provides that a visa may be either temporary or permanent. It should be noted that on 7 August 2008 (effective 9 August 2008) the *Migration Regulations* were amended to repeal the TPV scheme so that all future arrivals in Australia who qualify for a protection visa will be granted a PPV. The amendments also provide that existing TPV holders are eligible for a permanent Resolution of Status visa without the need to re-establish their entitlement to protection: see *Migration Amendment Regulations 2008 (No 5)* (Cth), SLI 2008 No 168.

180 *Migration Regulations 1994* (Cth), reg 866.215(1).

181 *Migration Regulations 1994* (Cth), reg 866.215(2).

re-litigate their claim each time it was necessary either to renew their TPV or apply for a PPV. Thus, they lost the benefit of their previous recognition of qualification for refugee status. In *QAAH* the High Court was required to consider whether this system was consistent with s 36(2)(a) of the *Migration Act* and thus (indirectly) with international law.

In *QAAH* a majority of the Full Court of the Federal Court held that since s 36(2)(a) of the *Migration Act* "describes no more than a person who is a refugee within the meaning of Art 1 of the Convention", if a person has already been recognised as a refugee in Australia then "Australia has a protection obligation to that person … unless and until Article 1C(5) has caused cessation of that obligation".[182] Further, the court found that it is "of critical importance" whether a person has previously been recognised as a refugee in Australia because where, on application for a new TPV or PPV by a person previously so recognised, "the facts are insufficiently elucidated for a confident finding to be made, the claim of cessation will fail and the person will remain recognised as a refugee".[183] This effectively imposes the "burden of proof" on the executive or tribunal to establish cessation rather than on the applicant to re-litigate his or her claim.[184] On appeal to the High Court, the Minister argued that this understanding of s 36(2)(a) was erroneous because the definition and cessation clauses embody essentially the same test; thus the question in any determination of eligibility for a protection visa is always whether the person meets the definition of "refugee" – a matter effectively to be considered afresh on each application.[185]

The majority of the High Court (Gummow, Callinan, Heydon and Crennan JJ) allowed the appeal, holding that the Australian approach was not inconsistent with the Convention; but went further in stating that even if it was, it would be the Australian law which would prevail.

In a comprehensive, wide-ranging and powerfully argued dissent, Justice Kirby found that the correct interpretation of the Convention is that refugee status cannot "come and go" according to changed conditions, as the Minister ostensibly contended.[186] Rather, he concluded that the language and purpose of the Convention dictate that once recognised as a refugee, that status cannot be withdrawn unless "an available ground of cessation is made out".[187] Justice Kirby categorically rejected the Minister's suggestion that the inclusion and

182 *QAAH of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 223 ALR 494 at 512 [65] per Wilcox J (Madgwick J agreeing).

183 (2005) 223 ALR 494 at 513 [69].

184 Wilcox J noted that "burden of proof" was used "loosely" since, "in a technical sense, no burden of proof rests on any party in relation to review of an administrative decision": (2005) 223 ALR 494 at 513 [69].

185 *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH* (2006) 231 CLR 1 at 9 [14].

186 (2006) 231 CLR 1 at 31 [85].

187 (2006) 231 CLR 1 at 38 [107].

cessation clauses embody the same test. Rather, he found that as a matter of logic the definition (inclusion clause) and the cessation clause embody separate and distinct tests; otherwise the cessation clause would be superfluous. The language of Art 1C(5) ("has been recognised as a refugee") clearly supposes that a person has already been recognised, thus indicating that "what was intended was a two-stage approach to Arts 1A(2) and 1C(5)".[188] Justice Kirby's arguments regarding the correct approach to interpretation as a matter of international law are clearly correct: they are overwhelmingly supported, as his Honour noted in his extensive survey of international law, by comparative jurisprudence, the United Nations High Commissioner for Refugees, and academic opinion.[189]

Moreover, Kirby J's arguments concerning Australian domestic law are also compelling. As he pointed out, s 36(2)(a) of the *Migration Act* links entitlement to refugee status to whether the person is one "to whom Australia owes protection obligations". This criterion applies regardless of whether the protection visa under consideration is temporary or permanent. There is no logical method of explaining why s 36(2)(a) picks up the inclusion clause but not the cessation clause, since one must read the entirety of Art 1 to know whether a person is one "to whom Australia owes protection obligations". Thus, Kirby J concluded that each time an application for either a temporary protection visa or a permanent protection visa is made by an existing temporary protection visa holder, the starting point must be that the person is a recognised refugee who ceases to be a person to whom Australia owes protection obligations only in the circumstances provided in Art 1C of the Convention.

The practical difference between the majority judgment on the one hand, and Justice Kirby's in dissent, is highly significant. The prevailing approach, that of the majority, requires the applicant to establish his or her case on *each* application for a new protection visa. In other words, the matter is effectively considered de novo. By contrast, Kirby J's approach recognises that the textual command, as well as object and purpose, of the Convention is that once refugee status has been recognised, it can be removed only in very closely circumscribed circumstances. As the House of Lords has recently noted, the cessation clause is "calculated, if invoked, to redound to the refugee's disadvantage, not his benefit".[190] Thus, the language of Art 1C(5) is expressed "negatively and exhaustively"[191] and

188 (2006) 231 CLR 1 at 35 [99].

189 See UNHCR, "Outline of Submissions on Behalf of the Office of the United Nations High Commissioner for Refugees (as Amicus Curiae)" (2007) 19 *International Journal of Refugee Law* 360; J Fitzpatrick and R Bonoan, "Cessation of Refugee Protection" in Feller et al, n 140, pp 492, 494-499.

190 *R (Hoxha) v Special Adjudicator; R (B) v Immigration Appeal Tribunal* [2005] 4 All ER 580 at 601 [63].

191 *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH* (2006) 231 CLR 1 at 39-40 [114] per Kirby J.

should be interpreted "strictly"[192] and "restrictively".[193] In practice, this means that it will not be applied unless a decision-maker is satisfied that "any purported change in circumstances … is fundamental, stable and durable".[194] As the UNHCR Guidelines make clear, this means that any changes must be "profound and enduring".[195] Moreover, it is well accepted at the international level that the decision-maker has the "heavy burden" of establishing the requisite extent of change.[196] Accordingly, Justice Kirby concluded that although as a matter of domestic law there is no *legal* burden on the government, "as a matter of forensic practicalities, the Minister's officials will usually be obliged to furnish affirmative evidence of a propounded change".[197] Such protections, however, are not in fact available on the view of the majority of the High Court.

In failing to adopt an interpretation of the *Migration Act* and *Regulations* that conforms to Australia's international legal obligations, the majority's decision in *QAAH* has attracted international criticism[198] and also missed an important opportunity to contribute to international jurisprudence on an important aspect of refugee status determination. This is yet another area in which Justice Kirby's more principled views on the incorporation of the Refugee Convention into Australian refugee law are preferable and will hopefully eventually prevail.

CONCLUSION

This chapter has established that the outstanding feature of Justice Kirby's contribution to Australian refugee law is his consistent commitment to ensuring that the objective of the *Migration Act* – namely, to implement

192 UNHCR, "Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the 'Ceased Circumstances' Clauses)" (HCR/GIP/03/03, 10 February 2003) at [7].

193 UNHCR Submission in *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH* (2006) 231 CLR 1 at 9 [14].

194 (2006) 231 CLR 1 at 42 [122] per Kirby J.

195 UNHCR, n 192 at [10]-[14]. UNHCR Executive Committee Conclusion No 65 (1991) and No 69 (1992) – Cessation of Status, as cited in UNHCR Submission in *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH* (2006) 231 CLR 1 at 11-12 [25] per Kirby J.

196 UNHCR Submission in *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH* (2006) 231 CLR 1 at 12 [27]. See also M O'Sullivan, "Before the High Court: Minister for Immigration and Multicultural Affairs v QAAH: Cessation of Refugee Status" (2005) 28 *Sydney Law Review* 359 at 364-367.

197 *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH* (2006) 231 CLR 1 at 48 [141].

198 See Goodwin-Gill and McAdam, n 66, p 140, fn 28. In addition, the UNHCR published a press release following the decision in which it noted that the decision failed to "reflect the spirit of the legal framework for refugee protection" envisaged by the Convention: UNHCR, "UNHCR concerned about confirmation of TPV system by High Court", Press Release (20 November 2006) as cited in H Esmaeili and S Carlton, "Safe to Go Home? The Implications of the High Court Decision for Afghan and Iraqi Temporary Refugees MIMIA v QAAH of 2004" (2007) 32(2) *Alternative Law Journal* 66 at 68.

Australia's obligations under the Refugee Convention – is upheld. Although he has frequently been the lone dissenting voice, his principled and considered approach to so many of the salient issues ensures that his judgments in this area will continue to have relevance: for refugees, advocates and future judges in Australia, and for the international refugee law community.

Chapter 29

STATUTORY INTERPRETATION

Jeffrey Barnes*

> *I disagree with the somewhat narrow basis on which the joint reasons explain their conclusion … I see in this approach an unwarranted constriction of the purposive approach to the interpretation of statutes. … To confine oneself to the text of a disputed legislative provision to the exclusion of its context is to risk lapsing back into a literalistic approach to the interpretation of statutes.*[1]

INTRODUCTION

Wherever there is statute law, there is interpretation. Statutory interpretation is the branch of law governing the determination of the meaning and effect, in particular circumstances, of the provisions of statutes and subordinate legislation. The general principles are laid down in both statute and common law. Put simply, the questions which the law raises in practice are generally of three interrelated kinds. The case of *Coleman v Power*[2] can be used to illustrate. This case involved a dispute over the meaning of "insulting words" in s 7(1) of the *Vagrants, Gaming and Other*

* The author thanks Stephen Moloney of the Victorian Bar for comments on a draft of this chapter.

1 *Australian Finance Direct Ltd v Director of Consumer Affairs Victoria* (2007) 234 CLR 96 at 110 [28], [29], 111 [30] per Kirby J.

2 (2004) 220 CLR 1. The discussion based on *Coleman v Power* which follows is a simplification of the types of interpretative issues which can arise. Complications arise where the word in question is used or said to be used according to its common understanding: *Hope v Council of the City of Bathurst* (1980) 144 CLR 1 at 7-8 per Mason J. Indeed, the High Court in *Coleman* distinguished an English case turning on near-identical words ("insulting words or behaviour"): *Brutus v Cozens* [1973] AC 854. The latter case had held that the meaning of "insulting" was a question of fact and therefore (generally speaking) unassailable. In *Coleman* Gummow and Hayne JJ pointed out that in the English case it was not argued (as it was in the present case) that the content or application of "insulting" must be determined by the legal context: at 71-72 [172].

Offences Act 1931 (Qld), the appellant having been charged with using such words to the respondent police officer in a public place contrary to the provision. First, there are questions about what happened ("questions of fact"), such as what, if any, words did the appellant (defendant) use in a public place to the respondent? Second, there are questions of principle ("questions of law"). The main question of principle before the High Court in that case was – having regard to the interpretative factors – what was the legal meaning of "insulting words"? Along the way the court had to determine the relevant interpretative factors. A question of principle considered by some of the judges in that case was whether the *International Covenant on Civil and Political Rights* (1966) could be taken into account by the court in interpreting a 1931 statutory provision. Third, there are questions involving the application of the law as interpreted to the facts as found ("mixed questions of law and fact"). In the present case such a question was whether the appellant used "insulting words" to the respondent in a public place contrary to s 7(1) of the Act.

By way of introduction, Justice Kirby's contribution to statutory interpretation goes far beyond deciding disputed questions of statutory interpretation, important as they are in particular areas of the law.[3] As Chairman of the Australian Law Reform Commission he pushed for the use of law reform reports as extrinsic aids to interpretation[4] (no surprise there!), and participated in a high-level seminar which led to important changes in the law governing the use of extrinsic materials.[5] He is one of the Patrons of an international organisation devoted to improving the quality of legislative drafting and other legal writing.[6] As a High Court judge he has elegantly chronicled modern principles of interpretation[7] and has been influential in clarifying statutory interpretation doctrine.[8] He has exercised his juristic skills in scholarly forums with considerable

3 Such as native title in *The Wik Peoples v State of Queensland* (1996) 187 CLR 1 and as illustrated in many other chapters of this work.

4 The Law Reform Commission, *Alcohol, Drugs and Driving* (AGPS, 1976) App E: Draft Legislation: Motor Traffic (Alcohol and Drugs) Ordinance cl 50; The Law Reform Commission, *Insurance Contracts* (AGPS, 1982) App A: Draft Insurance Contracts Bill 1982, cl 3; M D Kirby, "Explanatory Memorandum by Mr Justice Michael Kirby" in Attorney-General's Department, *Symposium on Statutory Interpretation* (AGPS, 1983) pp 56-57.

5 Attorney-General's Department, *Symposium on Statutory Interpretation* (AGPS, 1983).

6 See Clarity, An International Association Promoting Plain Legal Language: http://www.clarity-international.net (accessed 20 October 2008).

7 For example, on the textual analysis principle, see *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52 at 83 [96]; on the purposive construction principle, see *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at 264 [35]-[36], *Foots* (at 83-84 [96]); on the contextual interpretation principle, see *Palgo* (at 264-265 [37]), *Foots* (at 83 [96]); on the access to extrinsic materials interpretation principle, see *Palgo* (at 265 [38]). The reasons for a contextual and purposive approach are well synthesised in *Australian Finance Direct Ltd v Director of Consumer Affairs Victoria* (2007) 234 CLR 96 at 112 [35].

8 See the discussion below under the heading, "The fictional nature of statutory interpretation's objective".

flair[9] and, with less orthodoxy, acted as a commentator on, and occasional trenchant critic of, the High Court of Australia on statutory interpretation.[10] Justice Kirby's contribution to statutory interpretation has not been without controversy.[11]

In appraising Kirby J's contribution to statutory interpretation it is profitable, as a first step, to reflect on the advice of the legal philosopher, Ronald Dworkin. He propounded that "the more we learn about law, the more we grow convinced that nothing important about it is wholly uncontroversial".[12] Statutory interpretation is certainly important. It owes its importance to statute law, "the cornerstone of the modern legal system",[13] and the fact that interpretation is inevitable in the regulation of complex subject matter.[14] By providing a variety of rules, principles, presumptions and canons of construction to guide the process of giving meaning to legislation, "statutory interpretation keys into the whole system of law".[15]

What controversies are there in statutory interpretation? Surprisingly, for such an old area of law,[16] there are a number of deep issues.[17] Head-lined, they include: the difficulty in reading statute law; the inherent

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9 His principal articles are M D Kirby, "Statutory Interpretation and the Rule of Law – Whose Rule, What Law?" in D St L Kelly (ed), *Essays on Legislative Drafting in Honour of J Q Ewens CMG, CBE, QC* (Adelaide Law Review Association, 1988) p 84; and M D Kirby, "Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts" (2003) 24(2) *Statute Law Review* 95. He has also touched on statutory interpretation in numerous other publications and speeches.

10 As a commentator and analyst, Kirby J has performed a valuable role, eg explaining the majority's interpretation as in *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52 at 92 [125]; and in articulating the interpretation of the majority as in *Stingel v Clark* (2006) 226 CLR 442 at 475 [96]. More critically, on a number of occasions Kirby J has sounded a warning note of the dangers of particular approaches which he perceives other members of the High Court are taking. A turning back to "literalism", in the sense of an approach which defeats the object of the Act, was a concern raised in *Federal Commissioner of Taxation v Ryan* (2000) 201 CLR 109 at 146 [82], and in *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at 284 [111]. In *Australian Finance Direct Ltd v Director of Consumer Affairs Victoria* (2007) 234 CLR 96 at 110-111 [29]-[30] he had a similar concern with "an unwarranted constriction of the purposive approach".

11 His judging is criticised in J Albrechtsen, "Judicial Hubris Makes Messy Meal of our Rights", *The Australian* (20 June 2007) p 12; J Albrechtsen, "May the Best Person Preside", *The Australian* (15 August 2007) p 14. See further below, n 169.

12 R M Dworkin, *Law's Empire* (Fontana Press, 1986) p 10.

13 M H McHugh, "The Growth of Legislation and Litigation" (1995) 69 *Australian Law Journal* 37. By comparison, "[t]he world of common law principle is in retreat. It now circles in the orbit of statute": Kirby (1988), n 9, p 97.

14 McHugh, n 13 at 37.

15 F A R Bennion, *Bennion on Statutory Interpretation: A Code* (5th ed, LexisNexis, 2008) p 8.

16 Principles began to be developed in English law from about the middle of the 14th century: Bennion, n 15, p 471.

17 For recent issue-based accounts, see S Corcoran, "Theories of Statutory Interpretation" in S Corcoran and S Bottomley (eds), *Interpreting Statutes* (Federation Press, Sydney, 2005) p 8; T Gotsis (ed), *Statutory Interpretation: Principles and Pragmatism for a New Age* (Judicial Commission of NSW, 2007).

limitations of interpretation; the lack of an overarching theory; the fictional nature of statutory interpretation's objective; the elusiveness of a statute's context; the imprecise connection between an interpretation and the statutory text; and a perception that statutory interpretation by judges is dominated by the private values of the judge.

How then has the energetic Kirby J approached the problems of statutory interpretation? The present chapter seeks answers to this question. By pursuing this inquiry I hope the reader will be able to come to a better understanding of the contribution Kirby J has made to the law of statutory interpretation and of the values he has attempted to promote in his judicial opinions and other writings.

THE DIFFICULTY IN READING STATUTE LAW

It is well known that statute law is complex.[18] The courts are implicated in this: it has often been claimed by legislative drafters that the approach taken by the courts to statutory interpretation affects the style of legislative drafting.[19] Recent history is illustrative. During the 1960s and 1970s an influence on many drafters was the literal approach that the High Court pursued, particularly in the taxation area. One drafter reflects on this era:

> [The literal approach was] largely responsible for the style of drafting that has been used in much of our statute book and which is now so heavily criticised by so many people. It was said to have invited "cumbersome, detailed and sometimes unintelligible legislation in the attempts by Parliament to spell out its purpose in such detail as to prevent the frustration of the legislative purpose by the courts".[20]

Justice Kirby's response to the ills of legislative drafting has not been to blame drafters.[21] He has promoted plain English while pointing out its limitations.[22] As early as 1983 he advocated "purposive interpretation", not as a panacea or as a single approach to interpretation, but to facilitate a simpler, less detailed mode of legislative drafting and to leave as little

18 Parliament of the Commonwealth of Australia, Senate Standing Committee on Legal and Constitutional Affairs, *The Cost of Justice: Second Report: Checks and Imbalances: The Role of Parliament and the Executive* (AGPS, 1993) Ch 2; Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Clearer Commonwealth Law: Report of the Inquiry into Legislative Drafting by the Commonwealth* (AGPS, 1993) p xiii; D Murphy, "Plain English: Principles and Practice" (Conference on Legislative Drafting, Canberra, 15 July 1992) p 4; McHugh, n 13 at 42.

19 E Moran, "The Relevance of Statutory Interpretation to Drafting" in *Drafting for the 21st Century* (Conference, Bond University, Gold Coast, 6-8 February 1991) p 104.

20 Moran, n 19, p 105. For a similar view by a legislative drafter, see I Turnbull, "Drafting Simple Legislation" (1995) 12 *Australian Tax Forum* 247 at 256.

21 M D Kirby, "Statutory Interpretation – Principles and Pragmatism for a New Age" (2007) 19 *Judicial Officers' Bulletin* 49 at 50.

22 Kirby (1988), n 9, pp 87-88. In 1983 he ventured the view that "[b]ecause many things in the law are not and never will be simple, legislation always will be complex": Kirby, n 4, p 54.

room as possible for judicial frustration of policy aims (by means of the literal approach).[23] Two decades later, he returned to this theme, but there was a twist in the tale:

> [T]he doctrine of the "plain meaning" and literal interpretation have, so far as they purported to provide a self-contained universe for interpretation, been overthrown. *Ironically perhaps*, this is a desirable development for the introduction of simpler, plainer language in documents having legal consequences. The move to plain English in legal expression could make no real headway whilst the old doctrine prevailed.[24]

What is the irony his Honour is alluding to? As Justice Kirby explained in his Hamlyn Lectures, any literate person can read an Act and, armed with a dictionary or two, give the words their literal meaning.[25] Indeed, it is the literal approach which is associated with the rule of law: if the literal meaning is clear, the ordinary citizen should be able to know in advance the legal consequences which flow from committing himself or herself to any course of action.[26] However, the purposive approach is not so simple. It has ushered in a much more "sophisticated" era of statutory construction.[27] The legislative purpose is ascertained from "the language, history, background documents and apparent policy of the law".[28] Further, legislative purpose must be ultimately derived from and accommodated within the statutory language.[29] To put it bluntly, a lay person is probably shut out of contemporary interpretation.[30] This leads to a further question: has Kirby J been backing the wrong interpretative horse? Perhaps not.

23 Kirby, n 4, p 53. Later he was often to quote and generously acknowledge McHugh J's contribution to the development of purposive interpretation made in *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404.

24 Kirby (2003), n 9 at 110-111 (emphasis added). For a case reference, see *Federal Commissioner of Taxation v Ryan* (2000) 201 CLR 109 at 145 [81] per Kirby J.

25 M D Kirby, *Judicial Activism: Authority, Principle and Policy in the Judicial Method* (Sweet & Maxwell, 2004) p 32.

26 This draws on an opinion of Lord Diplock in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG* [1975] AC 591 at 638, discussed in Bennion, n 15, pp 802-803.

27 *Sydney City Council v Reid* (1994) 34 NSWLR 506 at 511 per Kirby P, with whom Meagher JA agreed.

28 Kirby, n 25, p 33. In addition, Pearce and Geddes argue that "[i]nterpretation by reference to consequences is essentially a shorthand version of the purposive approach to interpretation": D C Pearce and R Geddes, *Statutory Interpretation in Australia* (6th ed, LexisNexis Butterworths, 2006) [2.35].

29 *Dossett v TKJ Nominees Pty Ltd* (2003) 218 CLR 1 at 17 [57] per Kirby J.

30 Of course, a lay person probably was before; only it is now more obvious. A qualification needs to be made, however. In *Sydney City Council v Reid* (1994) 34 NSWLR 506 Kirby P, as he then was, did try and accommodate the needs of the lay person where a statute (the novel *Local Government Act 1993* (NSW)) was obviously written for them: at 511. He observed: "The [Local Government] Act is an experiment in 'plain English drafting' … The LG Act was, as I have stated, drafted in a somewhat unorthodox way. It was designed to be understood more readily by people unversed in the sophisticated techniques of statutory construction. In such circumstances, it is open to argument that, had Parliament intended to exclude appeals to the Tribunal, it would have expressly so provided, as it did in the provisions excluding access to the bodies established to provide industrial relations relief."

A legislative drafter with a deep knowledge of statutory interpretation is optimistic that, with the right drafting approach, purposive interpretation can be made accessible. He suggests a way to marry the rule of law ideal and the purposive approach to interpretation:

> In view of the purposive approach to statutory construction now being taken by the courts, the chief aim of a drafter must now be to make the purpose or object underlying the Act obvious on the face of the Act. If the drafter makes the target clear, then under the purposive approach the court will see that it is hit ... In some cases, the statement of a broad principle may be sufficient ... [T]he purposive approach will be facilitated if the statute does contain a statement of principle ... The inclusion of a detailed purpose clause will assist in this regard. Drafters should also consider the use of examples as a means of getting their message across.[31]

In a welcome development, Parliaments, both federal and State, have pursued such a policy increasingly in recent years.[32]

THE INHERENT LIMITATIONS OF INTERPRETATION

In a classic article, Justice Frankfurter implored us to consider the broader context of statutory interpretation: "Though it has its own preoccupations and its own mysteries, and above all its own jargon, judicial construction ought not to be torn from its wider, non-legal context."[33] This suggests that the problems of statutory interpretation may not be entirely unique. They may be shared with other professionals and other readers who are called upon to interpret documents.

In an erudite essay on the philosophy of interpretation, a basic challenge confronting all interpreters was identified: that "there are no procedures which will always overcome the historical and personal distance between the interpreter and what is to be understood".[34] What

31 Moran, n 19, pp 107-108. Kirby J anticipated this in a 1988 article, pointing out that "it becomes important to provide guidance to the judge (and other interpreters) [for only] in this way may a measure of certainty in the construction of legislation be achieved": Kirby (1988), n 9, p 90.

32 For example, *Working with Children Act 2005* (Vic); *Mental Health Act 2000* (Qld); *Aged Care Act 1997* (Cth). For articles setting out instances, see I M L Turnbull, "Clear Legislative Drafting: New Approaches in Australia" (1990) 11(3) *Statute Law Review* 161; J Barnes, "Shining Examples", *The Loophole* (Journal of the Commonwealth Association of Legislative Counsel, June 2004) 8: http://www.opc.gov.au/calc/docs/LOOPHOLE%202004.rtf (accessed 27 October 2008).

33 F Frankfurter, "Some Reflections on the Reading of Statutes" (1947) 47 *Columbia Law Review* 527 at 528.

34 A Glass, "A Hermeneutical Standpoint" in J Goldsworthy and T Campbell (eds), *Legal Interpretation in Democratic States* (Ashgate Dartmouth, 2002) p 135. The author goes on to point out rightly that the legal interpreter's concerns are not purely historical: "jurists must interpret past law which is still in force in a way which is relevant practically for contemporary life" (p 137).

this observation raises for legal interpreters is the issue of correctness of interpretation given the historical difficulties involved in interpretation and the necessary distance created by the interpreter's perspective. How can the "gap" between the text and the interpreter's particular vantage point be bridged? The debate about the use of extrinsic materials has pointed up the difficulty in bridging this gap, as Kirby J acknowledged in 1988. He quoted Bennion who had observed: "The ideal course would be to relive the history of the text in question, covering not only the entire process of text-creation and text-validation but also historical material such as reports of official inquiries and other background sources."[35] But of course this is not possible.

What is Kirby J's response to the inability of legal interpreters to run the "ideal course"? His Honour's approach is utterly self-effacing: "puzzles often remain".[36] We are advised that "interpretation of contested legal texts ... evokes an art, not a mechanical science";[37] that the so-called rules have a "nebulous character";[38] that questions before appellate courts "rarely, if ever, have an objectively 'correct' resolution";[39] that (agreeing with McHugh J) "questions of construction are notorious for generating opposing answers".[40] And that, while correctness is properly part of the legal vocabulary, where judges disagree, what is "correct" is the result of the preferences of the majority.[41]

How can the rule of law then attempt to bridge the gulf "between the interpreter and what is to be understood"? According to Kirby J, judges are armed with interpretative "tools". "Interpretive principles are part of the common law. They inform the way judges give meaning to contested statutory language."[42] The purpose of the law in question, if it needs to be ascertained, is an objective one.[43] His Honour seems to be implying what is helpfully stated by an American writer, Professor Owen Fiss, that "[t]he idea of an objective interpretation does not require that the interpretation be wholly determined by some source external to the judge, but only that it be constrained."[44]

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35 Bennion, cited in Kirby (1988), n 9, p 96.

36 *Pfeiffer v Stevens* (2001) 209 CLR 57 at 82 [92].

37 *Stingel v Clark* (2006) 226 CLR 442 at 482 [119].

38 Kirby, n 21 at 50.

39 *Forsyth v Deputy Commissioner of Taxation* (2007) 231 CLR 531 at 550 [49].

40 *Al Kateb v Godwin* (2004) 219 CLR 562 at 630 [191], citing McHugh J in *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at 580 [42].

41 *Pfeiffer v Stevens* (2001) 209 CLR 57 at 82 [92].

42 *Coleman v Power* (2004) 220 CLR 1 at 96 [247].

43 (2004) 220 CLR 1 at 95 [245] per Kirby J.

44 O Fiss, "Objectivity and Interpretation" (1982) 34 *Stanford Law Review* 739 at 744.

THE LACK OF OVERARCHING THEORY

Every practice, it would seem, needs or has a theory, for "there is no practice without theory, however much that theory is suppressed, unformulated or perceived as 'obvious'".[45] An attempt at tracing Kirby J's "theories" in statutory interpretation has been made elsewhere.[46]

The relationship between theory and practice is, however, a complex one. Let's first of all ask: what are theoretical questions in statutory interpretation? It depends on what we call theory to some extent. We need not restrict ourselves to generalisations which purport to apply to the interpretation of all texts.[47] For David Miers, theoretical inquiry includes "middle-order" theory: clarifying "assumptions about the interpreter's standpoint and about his conception of good practice"; and constructing a "coherent account" of statutory interpretation.[48] More specifically, such accounts might contain "frames of reference that provide a coherent basis ... for statutory interpretation"[49] and "discernible and describable intellectual processes".[50] For Tom Campbell it involves wrestling with such issues as whether interpretation is necessarily about discovering authorial intentions, how interpretation relates to texts, whether interpretation can be innovative, and what objective standards are involved.[51]

Before assessing the contribution of Kirby J it is necessary to elaborate the theoretical grounding of statutory interpretation. At a Symposium on Statutory Interpretation held in Canberra in 1983 Lord Wilberforce famously told the audience that statutory interpretation was "'[a] non-subject' ... meaning that it is really about life and human nature itself – too broad and deep and variegated to be encapsulated in any theory, or, really, to be taught."[52] He based this view on observations of his fellow Law Lords, who were such a mixture of personality and career (a fact he said was bound to exist in all judicial Benches) that it was nearly impossible to produce a valid generalisation of how the process of interpretation works or ought to work. An eminent New Zealand writer on statute law, Professor Burrows, believes also that statutory interpreta-

45 Belsey, cited in D Miers, "Legal Theory and the Interpretation of Statutes" in W Twining (ed), *Legal Theory and Common Law* (Basil Blackwell, Oxford, 1986) p 119.

46 Corcoran, n 17, pp 19, 21, 23, 29. In her view, Kirby J's theories are variously "purposive", "dynamic", "best answer", and even "literal".

47 Such as hermeneutics applied to statutory interpretation: Glass, n 34, or "literary theory" similarly applied: S Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Oxford University Press, Oxford, 1989).

48 Miers, n 45, p 119.

49 Miers, n 45, p 119.

50 Miers, n 45, p 120.

51 T Campbell, "Grounding Theories of Legal Interpretation" in J Goldsworthy and T Campbell (eds), *Legal Interpretation in Democratic States* (Ashgate Dartmouth, 2002) pp 41-42.

52 Lord Wilberforce, "A Judicial Viewpoint" in Attorney-General's Department, *Symposium on Statutory Interpretation* (Canberra, 5 February 1983) p 6.

tion is "not susceptible of a coherent philosophy" (but nevertheless went on to describe it as a "pragmatic business").[53] Justice Callaway, whilst a member of the Victorian Court of Appeal, writing extrajudicially, doubted that statutory interpretation was susceptible of a great deal of intellectual rigour but, like Professor Burrows, nevertheless found that it did have some content. Like Lord Wilberforce also, Callaway J thought that the factors bearing on the construction of any given statute were so many and various that the problem could rarely be solved by applying a rule or method. However, "sound judgment" was required based upon "an instinctive synthesis of all the relevant factors" and he stressed that what was required was "not so much intellectual rigour as moral rigour, a sense of responsibility and of the limits of the judicial office".[54]

Professor Campbell makes the point that it is at least "possible to imagine a conceptual theory which states in very general terms the broad outline of what interpretive activity is about".[55] One example of this would be Bennion's model which takes statutory interpretation as an example of legal reasoning.[56] Any more detailed theory was problematic, according to Campbell, as it would need to relate the choice of conception to a set of political views, interpretation being a contested field.[57] For different reasons, Professor Miers argues that we do not have a comprehensive set of practices (let alone a description of them); and further, it is neither a desirable nor a feasible objective. It is not desirable because, given the freedom that judges enjoy under the current regime, it is difficult to see why they should want to initiate radical changes in their practices.[58] He doubts the feasibility of a comprehensive set of practices emerging because it presupposes a number of conditions. They include: agreement "as to how problems of interpretation are to be identified and formulated and as to what constitute authoritative and cogent arguments apt to resolve them"; and "the construction of a set of priority rules for resolving conflicts". It needs to be remembered that there are not

53 J Burrows, "The Changing Approach to the Interpretation of Statutes" (2002) 33 *Victoria University Wellington Law Review* 561. But what of his concession that it is pragmatic?

54 F Callaway, "Judges and Statutes" (2005) *Bar News* (Winter) 25.

55 Campbell, n 51, p 41.

56 Bennion's model of statutory interpretation is summed up as follows: "What the court does (or should do) is take an overall view, weigh *all* the interpretative factors that are relevant, and arrive at a balanced conclusion": Bennion, n 15, p 13 (emphasis in original). For a scaled-down version of the "global method" as he calls it, see F Bennion, "The Global Method: Statutory Interpretation in the Common Law World" (2000) 85 *Commonwealth Legal Education Association Newsletter* 30: http://www.francisbennion.com/htm/chrono/2000.htm (accessed 27 October 2008). Bennion acknowledges that "[t]he process of weighing or balancing legal factors in order to arrive at a disputed rule or determine a *lis* is common throughout law, and not limited to statutory interpretation": n 15, p 524.

57 Campbell, n 51, p 42.

58 For judicial support, see the article by Justice Susan Glazebrook: S Glazebrook, "Filling the Gaps" in R Bigwood (ed), *The Statute: Making and Meaning* (LexisNexis, Wellington, 2004) p 178.

one, two or three rules in statutory interpretation, but "a thousand and one interpretative criteria".[59] As Kirby J has noted,[60] many interpretative factors might present themselves in any one case.

In short, it would seem that many commentators agree that, while a general outline of interpretative practice is possible, and has been achieved, it is difficult to go further and prescribe a comprehensive set of interpretative practices for the judiciary. Is the situation any different when we look to what members of the High Court have said in their reasons for judgment? An oft-cited judicial opinion is that of Mason and Wilson JJ in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*:

> The rules, as D C Pearce says in Statutory Interpretation, p 14, are no more than rules of common sense, designed to achieve this object. They are not rules of law. If the judge applies the literal rule it is because it gives emphasis to the factor which *in the particular case* he thinks is decisive.[61]

This statement resonates with Burrows's pragmatism – much depends on what the circumstances of the particular case call for.[62] Consistent with *Cooper Brookes* is this statement by McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority* in which their Honours alluded to the major factors that may be determinative in a particular case:

> Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.[63]

A flexible approach was promoted by the High Court's recognition that "the context" of a statutory provision ought be considered in the first instance, "context" meaning "in its widest sense".[64] *Project Blue Sky* did

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59 Bennion, n 15, p 9. Bennion's UK "code" contains 464 sections. It has often been cited with approval by the High Court of Australia. The persistent myth that there are but three rules is discussed in Bennion, n 15, pp 12-13.

60 *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 594 [145].

61 (1980) 147 CLR 297 at 320 (emphasis added).

62 There is a long tradition of pragmatic statements in the literature of statutory interpretation, a tradition which influenced Kirby J through American legal realism, and the teachings of Julius Stone who introduced this school of thought to Australian law schools. For instance, Frankfurter J observed in 1947 that "[u]nhappily, there is no table of logarithms for statutory construction. No item of evidence has a fixed or even average weight. One or another may be decisive in one set of circumstances, while of little value elsewhere … In the end, language and external aids, each accorded the authority deserved in the circumstances, must be weighed in the balance of judicial judgment": Frankfurter, n 33 at 543, 544.

63 (1998) 194 CLR 355 at 384 [78].

64 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.

lend some clarification to the status of the legislative purpose when four members of the court including Kirby J held that: "The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute."[65] Finally, what of the relationship between interpretation and the statutory text in question? In freedom-enhancing terms the High Court has required that an acceptable construction be "reasonably open".[66]

These observations of the High Court, if taken at face value, are generally consistent with the juristic views summarised above. Pragmatism, flexibility, and freedom-enhancing doctrines continue to dominate the landscape of statutory interpretation. This means that there continues to be a lack of theory in statutory interpretation in the sense expounded by Miers – that is, a comprehensive set of practices. Specifying the legislative purpose as an essential factor in *Project Blue Sky* did not radically change the basic picture as the language of the text still has to be "reasonably open" to the interpretation.

How has Kirby J responded to the perceived lack of theory grounding statutory interpretation? Following Miers's analysis above, some particular "middle-order" problems in statutory interpretation, and Kirby J's contribution to their resolution, are now considered.

THE FICTIONAL NATURE OF STATUTORY INTERPRETATION'S OBJECTIVE

Defining the role of authorial intentions in statutory interpretation has been a perennial problem for the law and one in which Kirby J has made strenuous efforts to ameliorate.

A classic statement of legislative intention is that of Mason and Wilson JJ in *Cooper Brookes*, where they say that ascertaining the legislative intention is "the fundamental object of statutory construction".[67] The concept continues to be advocated in judicial[68] and juristic[69] commentary as the paramount criterion in statutory interpretation. Its defenders start from the assumption that "interpretation" requires respect for legislative

65 (1998) 194 CLR 355 at 381 [69]; cf a passage in an earlier case which Kirby J often cites, *Bropho v Western Australia* (1990) 171 CLR 1 at 20. In this case six members of the High Court referred, with a tinge of *Cooper Brookes* pragmatism and gate-left-open, to "the contemporary approach to statutory construction, with its added emphasis on legislative purpose".

66 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.

67 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1980) 147 CLR 297 at 320.

68 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 374-375 [41] per Brennan J; *Singh v Commonwealth* (2004) 222 CLR 322 at 335-336 [19] per Gleeson CJ.

69 Bennion, n 15, Part VIII.

supremacy.[70] They argue that the concept is needed to limit the judicial power to interpret non-literally[71] and in "preventing a judge from going on a frolic of his or her own".[72] It is said to be indispensable.[73] Some supporters of the concept make it clear that legislative intentions can be "individual, private and subjective", but they can also be "shared, publicly ascertainable, and, to that extent, objective".[74] Thus, they say, intention may be actually held by many legislators, or it may be found to be implicit in the words used.[75]

While conceding the concept of legislative intention is not without symbolic value,[76] In 1988 Kirby J agreed with his past teacher, Professor Julius Stone, that it was a "fiction".[77] What was needed instead was a "healthy degree of realism about the purpose to be attained in carrying out the task".[78] He thought it not very helpful to talk of a legislative will or intention when often "there is no single, plain, clear construction to be given to the legislative language".[79] Also, practically, he argued, "in most cases there is neither a clear 'will' on the part of Parliament as a whole nor even on the part of those members who command the majority of Parliament in government".[80] Statutes are typically prepared by many hands.[81] Returning to a regular theme of his in the 1980s,[82] references to the "legislative will" concealed the "creative choices" which interpreters have in applying ambiguous language of generality to particular fact situations.[83]

By 2003 Kirby J wrote of the intention of Parliament: "I never use that expression now."[84] How then has he managed without it when its defenders claim it is indispensable? A number of steps have been taken.

70 J Goldsworthy, "Parliamentary Sovereignty and Statutory Interpretation" in Bigwood, n 58, p 188.

71 Goldsworthy, n 70, p 193.

72 Callaway, n 54 at 26.

73 Goldsworthy, n 70, p 196.

74 Goldsworthy, n 70, p 195.

75 Bennion, n 15, p 481.

76 Kirby (1988), n 9, p 88.

77 Kirby (1988), n 9, pp 89-90.

78 Kirby (1988), n 9, p 89.

79 Kirby (1988), n 9, p 89.

80 Kirby (1988), n 9, p 89.

81 Kirby (1988), n 9, p 89.

82 M D Kirby, *The Judges: The 1983 Boyer Lectures* (ABC Books, Sydney, 1983) Ch 5.

83 Kirby (1988), n 9, p 89. On the meaning of "creative choices", see the discussion below at n 175.

84 Kirby (2003), n 9 at 98. This statement has not proved to be correct in every sense. References to "the intention of Parliament" or "the will of Parliament" have not completely disappeared from Kirby J's opinions, eg, *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52 at 82 [94]; *Australian Finance Direct Ltd v Director of Consumer Affairs Victoria* (2007) 234 CLR 96 at 123 [68]; and *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at 266 [41]. Sceptics such as Goldsworthy might see the above as further instances of judges being unable to avoid resorting to the concept: Goldsworthy, n 70, p 196.

First, parliamentary intention was to be understood, he said, as referring merely to the *subjective* intentions of the legislators.[85] But such intentions could not be the object of statutory interpretation since "[a] court seeks to ascertain the purpose of the law, ultimately derived objectively from the language in which the law is expressed."[86] Hence, it was argued, "the fiction of parliamentary 'intention' should not be used in relation to statutes".[87] It would appear Kirby J's arguments have been influential to some degree.[88]

The second step Kirby J took was to assist in restating the paramount object of statutory interpretation. This occurred in *Project Blue Sky*, when, drawing on Bennion's work on interpretation, Kirby J joined McHugh, Gummow and Hayne JJ to hold:

> The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute ...
>
> [T]he duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision ... [89]

These passages from *Project Blue Sky* are open to a number of interpretations themselves. Arguably, one interpretation is that the High Court no longer recognises the notion of "the intention of Parliament", with its misleading overtones of subjective intentions, as the paramount or fundamental object of statutory interpretation. In its place is the common law concept of "legal meaning". The content of *this* concept is, however, driven by a judicial test of "the meaning that the legislature is taken to have intended [the words] to have". Thus, according to this case, it would appear that the "intention of Parliament" lives on but in an indirect, attributive sense, shorn of the subjective overtones.

The third step Kirby J took was to state how, doctrinally, judges would continue to show respect for the Parliament in carrying out their

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85 A process Frankfurter J once likened to delving into the minds of legislators: Frankfurter, n 33 at 539.

86 *Commonwealth v Yarmirr* (2001) 208 CLR 1 at 117-118 [262] per Kirby J.

87 *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 186 ALR 289 at 316 [102] (n 95) (HC) per Kirby J.

88 Other members of the High Court have clarified their position without necessarily agreeing with the language of Kirby J. Gleeson CJ defended an objective sense of legislative intention in *Singh v Commonwealth* (2004) 222 CLR 322 at 335-336 [19]. And, in *Forsyth v Deputy Commissioner of Taxation* (2007) 231 CLR 531, six members of the court implied "the intention of the legislature" was a convenient label for an exercise in statutory interpretation which has regard to the context, scope, and purpose of a specific provision: at 548 [39]. Extrajudicially, Glazebrook J of the New Zealand Court of Appeal has also embraced the concept of subjective intentions: Glazebrook, n 58, p 157.

89 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69], 384 [78].

interpretative duties. Repeating the valuable words of Lord Diplock, he stated that "Parliament is sovereign only in respect of what it expresses by the words used in the legislation it has passed".[90] In this way, Kirby J affirmed the fundamental value of "the respect which is due of a democratically elected legislature".[91]

Despite the attempt by Kirby J to demote the intentions of Parliament as a legal concept, the historical intentions of Parliament remain influential.[92] This was apparent in *Coleman v Power*,[93] the facts of which were mentioned above. Among the issues canvassed by two members of the High Court (Gleeson CJ and Kirby J) was the relevance for interpretation in that case of the *International Covenant on Civil and Political Rights* done in 1966. That instrument recognises the "right to freedom of expression" subject to certain restrictions, including restrictions necessary for the protection of public order (Art 19). The matter had not been argued by the parties, but both Gleeson CJ and Kirby J gave extended consideration to the question of the weight (if any) to be afforded a treaty which is entered into *after* the enactment of the law in question. Their considerations were influenced by differing conceptions of the object of interpretation.

Gleeson CJ pointed out that there is considerable authority for the view that, in the case of legislation enacted *after* or in contemplation of entry into or ratification of a relevant international instrument, the courts should favour that construction which accords with Australia's obligations under the instrument. But there was no clear authority in the case of legislation enacted *before* such instruments were made.[94] The theory underlying the current law governing the use of international instruments was, he said, that Parliament could be said, prima facie, to have intended to give effect to Australia's obligations under international law. The Chief Justice made pointed references to the fact that the present case concerned the interpretation of a provision which had been enacted in 1931. In his view it followed that the Queensland Parliament could not have intended to give effect to obligations which did not exist at the time of enactment.

Justice Kirby saw Gleeson CJ as contending that the meaning of a 1931 Act was forever governed by the "intention" of the legislators who sat in the Queensland Parliament in that year. He argued that laws once enacted operate as from time to time applicable and that the words of a statute should normally be interpreted "in accordance with their

90 *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (*BLF Case*) (1986) 7 NSWLR 372 at 405 per Kirby P.

91 Kirby (1988), n 9, p 89.

92 See the references to Kirby J's opinions at n 84.

93 (2004) 220 CLR 1.

94 (2004) 220 CLR 1 at 27-28 [19].

ordinary and *current* meaning".[95] He rejected the notion that Acts of Parliament are read in accordance with the subjective intentions of the legislators who voted for them.[96] He nevertheless recognised the precedential force of the law propounded by the Chief Justice.[97]

To date, Kirby J's arguments on extending the use of international instruments in the way he suggested in *Coleman v Power* have not gained acceptance in any majority opinion of the High Court. It remains to be seen whether his confidence in the law changing[98] will be borne out, or whether the concept of the intention of Parliament will continue to have a hold in this area of statutory interpretation.

THE ELUSIVENESS OF A STATUTE'S CONTEXT

It has been helpfully stated by Gleeson CJ that "[m]eaning is always influenced, and sometimes controlled, by context."[99] The question is, though – what is the context? The problem was more precisely drawn by Frankfurter J: "I should say the troublesome phase of construction is the determination of the extent to which extraneous documentation and external circumstances may be allowed to infiltrate the text on the theory that they were part of it, written in ink discernible to the judicial eye."[100]

A statute's context is, in short, "elusive".[101] The context is hard to define for a number of reasons. A statute "is only ever part of an overall legal framework".[102] Unlike a historian, a legal interpreter is concerned not only with the historical framework, but also with the present, for:

> [j]urists must interpret past law which is still in force in a way which is relevant practically for contemporary life and in this, to put it broadly, they will be concerned with maintaining the coherence of the present legal system and with the effect of the new ruling upon the litigants and the present community.[103]

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95 Emphasis in original of Kirby J.

96 (2004) 220 CLR 1 at 93-96 [243]-[249] per Kirby J.

97 (2004) 220 CLR 1 at 94 [244], 96 [249].

98 (2004) 220 CLR 1 at 94 [244].

99 *Singh v Commonwealth* (2004) 222 CLR 322 at 332 [12] per Gleeson CJ.

100 Frankfurter, n 33 at 529.

101 G Tanner, "Law Reform and Accessibility" (Australasian Law Reform Agencies Conference, Wellington, 13-16 April 2004) [147]: http://www.lawcom.govt.nz/SpeechPaper.aspx (accessed 27 October 2008). Extra-curially, drawing on *Bennion on Statutory Interpretation*, Gleeson CJ has opined that the context includes "any … matter that could rationally assist understanding of meaning": M Gleeson, "The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights" (Victoria Law Foundation Oration, Melbourne, 31 July 2008): http://www.hcourt.gov.au/speeches/cj/cj_31jul08.pdf (accessed 31 October 2008).

102 Tanner, n 101 at [147].

103 Glass, n 34, p 137.

The context potentially embraces many interpretative *factors* drawn from the interpretative *criteria*: the general guides to legislative intention.[104]

However, if we look more closely at recent history, we see that judges and Parliaments have taken a number of steps to define, and redefine, *the context* for the purposes of statutory interpretation. The literal construction rule purported to rule out taking account of a result thought to be "inconvenient or impolitic or improbable".[105] Academic criticism of the literal rule focused on the thinness and frequent absurdity of literal meanings that are detached from contextual evidence of the legislature's intentions.[106] The strong version of the literal rule was criticised by Mason and Wilson JJ in the 1981 case of *Cooper Brookes*[107] in a judicial opinion later to be regarded as a pillar of the "modern approach to statutory interpretation".[108] Mason and Wilson JJ had opined that inconvenience of result or improbability of result could assist "the court in concluding that an alternative construction which is reasonably open is to be preferred to the literal meaning because the alternative interpretation more closely conforms to the legislative intent discernible from other provisions in the statute".[109]

Subsequently, s 15AA of the *Acts Interpretation Act 1901* (Cth), inserted in 1981, acted as a tie breaker or rule of priority in the event of a conflict between a construction which promoted the purpose and a construction which did not.[110] Implicitly, it was argued, the section also required the purpose to be sought out in the first place.[111] This addition was followed by a 1984 amendment to the *Acts Interpretation Act* inserting s 15AB into that Act. This provision set out new limits to the use of extrinsic materials.[112] There had previously been a common law rule that courts could not refer to reports of parliamentary debates for any purpose to aid the construction of a statute,[113] and doubt as to the circumstances when extrinsic material, including parliamentary debates, could be looked at

104 Bennion, n 15, p 520.

105 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 161-162 per Higgins J.

106 Goldsworthy, n 70, pp 191-192.

107 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1980) 147 CLR 297 at 319-320.

108 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.

109 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1980) 147 CLR 297 at 320.

110 See J W Barnes, "Statutory Interpretation, Law Reform and Sampford's Theory of the Disorder of Law – Part Two" (1995) 23 *Federal Law Review* 77 at 114-116. State equivalents followed: see Pearce and Geddes, n 28 at [2.7].

111 Barnes, n 110 at 105-108.

112 State and Territory equivalents followed: see Pearce and Geddes, n 28 at [3.13].

113 Pearce and Geddes, n 28 at [3.4].

for the purpose of discovering the mischief.[114] However, s 15AB did not allow carte blanche and was a carefully crafted compromise.[115]

In the 1990s the High Court clarified the common law on recourse to extrinsic materials and to some extent took the common law further than the reach of the statutory sections 15AA and 15AB. In *Project Blue Sky* it made clear that consideration of the legislative purpose was mandatory: "The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute."[116] This mandated only what had been implicit in s 15AA. As regards extrinsic materials, in *CIC Insurance*, it approved a 1957 observation in a House of Lords case that "context" was to be considered as "in its widest sense".[117] While this statement was question-begging, the specific ruling in that case clarified when the mischief could be sought. Even if the conditions set out in s 15AB were not satisfied, the common law independently permitted the courts to refer both to reports of law reform bodies and to explanatory memoranda to ascertain the mischief to be remedied by a statute.[118] Although the leading cases were concerned with ascertaining only the mischief, the High Court has subsequently referred to the mischief and the purpose interchangeably.[119]

Much has changed therefore since the early 1980s. There is no longer any strong version of the literal rule. There is no doubt that the purpose of a disputed provision must be sought whether or not there is any ambiguity on the face of the provision. Under the common law, at least the mischief and probably the purpose can be sought from extrinsic materials free of statutory conditions on their use. Now that so many of the previous limits on context have been abandoned one could be forgiven for asking – where are the problems today with observing the limits to context? Justice Kirby has himself ventured an opinion on where some problems still lie in the approach of the High Court. In 1999 he thought his judicial opinions reflected a "more whole-hearted acceptance of the

114 J Allsop, "Statutes: Context, Meaning and Pre-enactment History" (2005) *Bar News* (Winter) 19; Pearce and Geddes, n 28 at [3.4].

115 Pearce and Geddes, n 28 at [3.14], referring to *Re Australian Federation of Construction Contractors; Ex parte Billing* (1986) 68 ALR 416 at 420 (HC).

116 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ. This had followed upon the High Court's hint in *Bropho v Western Australia* (1990) 171 CLR 1 at 20.

117 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

118 Pearce and Geddes, n 28 at [3.7], referring to *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384; and *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85. Textual ambiguity is not a precondition for reference to these extrinsic materials: Pearce and Geddes, n 28 at [3.7].

119 *Forsyth v Deputy Commissioner of Taxation* (2007) 231 CLR 531 at 548 [42] per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ; see also Pearce and Geddes, n 28 at [3.8] for a similar comment referring to earlier cases.

so-called purposive approach to statutory construction".[120] Does this tell the whole story, and what is the nature of Kirby J's contribution to the problem of defining the context objectively? Recent High Court cases on which he sat as a member of the court suggest a number of problems remain in the quest to consider the context "in its widest sense".

Difficulty in fixing upon or sourcing any relevant statement of purpose

The legislative purpose is an objective standard,[121] "not drawn, like nitrogen, out of the air".[122] Interpreters can have difficulty in fixing upon or sourcing any relevant statement of purpose. *Palgo Holdings Pty Ltd v Gowans*[123] is nicely illustrative. In this case the appellant made short-term loans, typically for a term of seven days. The loans were secured. Each borrower signed a document, the first part of which bore the heading "Secured Loan Agreement", and the second part the heading "Bill of Sale/Goods Mortgage". The second part was made as a deed between the borrower as mortgagor and the lender as mortgagee. Under the document the borrower transferred title in the mortgaged property to the lender as security for the repayment of the balance of the loan, and the borrower was to keep the mortgaged property in the borrower's possession and custody. The lender was charged and convicted in the Local Court of New South Wales with an offence against s 6 of the *Pawnbrokers and Second-hand Dealers Act 1996* (NSW) which provided: "A person must not carry on a business of lending money on the security of pawned goods except in accordance with a licence held by the person." The case found its way to the High Court. The appellant not having a licence, the issue before the court was whether the lender's business was the business of lending money on the security of pawned goods. As the Act contained no definition of "pawned" or "pawned goods", the case involved determining the meaning of "pawned goods" in the 1996 Act. All the judges accepted that, outside the Act, pawn or pledge had a long-established legal meaning.[124] It signified one class of bailment of goods which depends upon delivery of possession. Further, a pawn was distinct from a chattel mortgage. With the latter, but not the former, the whole legal title passes conditionally to the mortgagee, and possession is not essential to create or support the title.[125]

120 M D Kirby, "Judging: Reflections on the Moment of Decision" (1999) 4 *The Judicial Review* 189 at 197.

121 *Coleman v Power* (2004) 220 CLR 1 at 95 [245] per Kirby J; see also Glazebrook, n 58, p 157.

122 Frankfurter, n 33 at 539.

123 (2005) 221 CLR 249.

124 (2005) 221 CLR 249 at 257-258 [16]-[19].

125 (2005) 221 CLR 249 at 257-258 [16]-[19] per McHugh, Gummow, Hayne and Heydon JJ, at 275-277 [78]-[82] per Kirby J.

The majority held that "pawn" in the 1996 Act had its normal legal meaning: a bailment of personal property as security for a debt, a transaction distinct from a chattel mortgage.[126] Justice Kirby dissented. He held that the Act caught "a person, such as the appellant, carrying on the business of lending money on deposited goods".[127] He rejected the strict legal meaning of pawned goods as excluding goods over which there also exists a chattel mortgage.[128] He favoured the ordinary meaning of "to deposit as security; as for money borrowed: to pawn a watch".[129]

A remarkable thing about this case is how judges can disagree about whether particular extrinsic material is helpful at all in fixing the mischief and the purpose. This is how the majority saw the Minister's speech given in support of the Bill that became the 1996 Act:

> The Second Reading Speech ... described the purpose of the Bill as being "to establish a new regulatory scheme for pawnbrokers and second-hand dealers". Apart from referring to what was said to be "streamlined licensing of pawnbrokers and second-hand dealers who deal in high-risk-of-theft goods" the speech was silent about why a new regulatory scheme was thought necessary and about why any particular changes were thought necessary.[130]

Compare Kirby J's opinion:

> The Minister's speech: Any doubt about the interpretation of the 1996 Act is set at rest by a consideration of the Second Reading Speech given in support of the Bill that became the 1996 Act. …
>
> Against the background of the Minister's explanation of the purposes and objects of the 1996 Act, any suggestion that it was intended, somehow, to narrow the definition of a "pawnbroker", and thus of "pawned goods", must be rejected.[131]

How can it be that great minds would differ? At the risk of distorting the picture, here, drawn from the opinion of Kirby J, appear to be the most relevant extracts of the Second Reading Speech:

> [90] Three purposes for the 1996 Act were disclosed in the Minister's speech. These were, first, to consolidate licensing provisions formerly appearing in the 1902 Act and in the *Second-hand Dealers and Collectors Act 1906* (NSW) and the *Hawkers Act 1974* (NSW), replacing them "with a single statute targeted to prevent and remedy problems in the current marketplace". Secondly, the 1996 Act was intended to "streamline" licensing of pawnbrokers and second-hand dealers who deal in "high-risk-of-theft goods". …

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126 (2005) 221 CLR 249 at 261 [25].
127 (2005) 221 CLR 249 at 280 [93].
128 (2005) 221 CLR 249 at 281 [99].
129 (2005) 221 CLR 249 at 280 [95].
130 (2005) 221 CLR 249 at 259 [21].
131 (2005) 221 CLR 249 at 278 [88], 283 [106].

> [92] The Minister also explained that a "secondary purpose" of the Act was: "regulation of pawnbrokers in the consumer interest".[132]

On close analysis, the Second Reading Speech does not specifically and explicitly refer to the purpose of catching "a person, such as the appellant, carrying on the business of lending money on deposited goods".[133] The difference in the majority and minority opinions would appear to be that the majority were seeking a "standout" (clear and specific) statement of the purpose, whereas Kirby J was prepared to infer the purpose from general purposes: the reference to consumer interest and problems in the marketplace as well as the extension of the Act in s 5. From his vantage point, he could see "the large social purposes of the Act [which] would be defeated" by the strict legal meaning.[134] Justice Kirby accordingly read the statute with such generalised purposes in mind. Although his view did not prevail on the court, Parliament had the last word.[135]

Different views of the import of extrinsic materials

Due to the complexity of the extrinsic materials, different views of the import of such materials are possible. These challenges were apparent in *Australian Finance Direct Ltd v Director of Consumer Affairs Victoria*.[136] The issue in this case was whether a form of credit contract used by the appellant credit provider contravened the disclosure requirements in s 15(B) of the *Consumer Credit (Victoria) Code* (Vic), applying by force of s 5 of the *Consumer Credit (Victoria) Act 1995* (Vic). Section 14 of the Code provided that a credit provider must not enter into a credit contract unless the credit provider has given the debtor a precontractual statement setting out the matters required by s 15 to be included in the contract document. In particular, s 15(B)(a) required that, if the amount of credit is ascertainable, the contract document contain the relevant amount and "the persons, bodies or agents (including the credit provider) to whom it is to be paid and the amounts payable to each of them". The appellant extended credit for the purposes of a person wishing to attend a seminar provided by the National Investment Institute Pty Ltd (NII). A precontractual agreement stated:

> Who we will pay our loan to:
>
> Name of Supplier … [NII]
>
> Amount payable to Supplier: $15,340

132 (2005) 221 CLR 249 at 279 [90], 280 [92].

133 (2005) 221 CLR 249 at 280 [93].

134 (2005) 221 CLR 249 at 283 [108].

135 Soon after the case was decided the Act was amended to define "pawnbroker" in the way Kirby J had read the Act: *Pawnbrokers and Second-hand Dealers Amendment Act 2005* (NSW), s 3.

136 (2007) 234 CLR 96. The facts are taken from the reasons for judgment of Gleeson CJ, Gummow, Hayne, and Crennan JJ.

The respondent contended that this statement did not disclose a "holdback" – an amount which, under an arrangement between the appellant and the supplier of services (NII), the appellant was entitled to retain. In other words, a person who wished to attend the seminars would be unaware of the holdback, as the credit contract itself did not disclose that the credit provider (the appellant) was retaining a proportion of the loan funds. The issue became whether the statutory reference to "amounts payable" in s 15B(a) could be read as confining attention to the obligations of the credit provider and borrower under the credit contract to the exclusion of contractual arrangements between the credit provider and the supplier of services which governed legal entitlements to receive the amount of credit provided. The Victorian Court of Appeal split on the issue.

On further appeal to the High Court, all members of the court, including Kirby J, agreed that the appeal ought to be dismissed. They held that the credit contracts offered by the appellant did not comply with the requirements of s 15B(a) because, by not disclosing the holdbacks, they did not identify the persons (including the credit provider) to whom the amount of credit was to be paid or the amounts payable to each of them.[137] But their reasons differed sharply.

The joint opinion of Gleeson CJ, Gummow, Hayne and Crennan JJ based their interpretation on the text of the Code together with the specific legislative purpose to be discerned from the provision in question and the statutory context. Importantly, it would appear that their Honours *did* have regard to the context beyond the Code, for they briefly observed, somewhat elliptically, "[w]ider considerations of 'truth in lending' are not to be disregarded, but they tend to divert the argument into unproductive speculation about the importance, or possible importance, to the debtors of knowledge of the holdback."[138]

Justice Kirby took issue with the approach in the joint opinion, saying:

> I disagree with the somewhat narrow basis on which the joint reasons explain their conclusion ... I see in this approach an unwarranted constriction of the purposive approach to the interpretation of statutes. … To confine oneself to the text of a disputed legislative provision to the exclusion of its context is to risk lapsing back into a literalistic approach to the interpretation of statutes.[139]

Justice Kirby held that a court is normally obliged to examine the statutory context in which the contested "terms" of the legislation appear and give "some consideration of the objectives that stimulated the making of the contested law". The value of the purpose was that it "helps judges to read

137 (2007) 234 CLR 96 at 109 [22].
138 (2007) 234 CLR 96 at 108 [19].
139 (2007) 234 CLR 96 at 110 [28], [29], 111 [30].

the statutory language in the correct way and to appreciate fully what the legislature was intending to say on the particular question in hand".[140] He added that, "[w]here the legislature has not spelt out this purpose in unmistakable terms, it is the responsibility of the decision-maker to use all available resources to discover it."[141] With some understatement, Kirby J advised that what is needed is a "thorough investigation of the purpose of the provision or provisions concerned".[142]

Justice Kirby proceeded to examine an array of material, including the United States *Truth in Lending Act 1968*, previous State legislation, case law on previous legislation, the Minister's Second Reading Speech to the Victorian Bill, and the Minister's Second Reading Speech to the Queensland Parliament introducing the template for the Code from which the Victorian Act was to draw. The case law he examined contained references to the insurance contracts report of the Australian Law Reform Commission, work in which he had personally been involved. He also drew heavily on other provisions of the Credit Code, pointing out that an understanding of the history and purpose of the Code made it easier to draw implications from the statutory text.

Ultimately, he held that truth in lending required "transparency in the dealings between credit providers and borrowers".[143] He therefore resolved the dispute by applying the purpose as he had found it from the Act and external materials. This had the result of upholding the contentions of the respondent, as the respondent's construction (no implication to be made that the provision is solely concerned with the lending transaction itself) conformed to the central objects of the Code whereas the implication sought by the appellant would have frustrated the attainment of the objects.

In Kirby J's view, by confining themselves to the text of the disputed legislative provision to the exclusion of its context, the joint reasons had taken a different approach to what the High Court had previously accepted. However, as I read it, there is no fundamental difference in the approach of the joint reasons and Kirby J. If, following a split decision below and a contest over the meaning of a statutory provision, the joint reasons *had* confined themselves to the text of a disputed legislative provision and completely forsaken examination of extrinsic materials when they were so abundant, I would agree in that criticism. But on my reading the difference of view arose over interpretation of the content of "the philosophy of truth in lending" which lay behind the reforms. Justice Kirby viewed it as calling for transparency, or full disclosure. This went beyond knowing the cost to the debtor. However, the joint reasons seemed to have taken a different view of the concept of "truth in

140 (2007) 234 CLR 96 at 123 [68].
141 (2007) 234 CLR 96 at 113 [37].
142 (2007) 234 CLR 96 at 110 [29].
143 (2007) 234 CLR 96 at 122 [65].

lending" for they thought that it raised questions about the importance or possible importance to the debtors of knowledge of the holdback.[144] In other words, the joint reasons did not assume the philosophy necessarily entailed transparency or full disclosure.

The difference of view about the import of the philosophy of truth in lending stemmed in part from the complicated path reform had taken in this area. This was not the same scale of problem with external materials which the High Court had faced in *Palgo*. In that case a Second Reading Speech was at the centre of the dispute. In the present case the legislation was the culmination of more than 30 years of attempts to reform and modernise consumer credit laws.[145] It is not surprising that out of that history different views may arise about the guiding philosophy.

Conflicting contextual material

The context can supply clear, but conflicting, evidence even on the same criterion. Such was the case in abundance in *Stingel v Clark*.[146] Section 5(1A) of the *Limitations of Actions Act 1958* (Vic) provided for a relaxation of the time for bringing "an action for damages for negligence nuisance or breach of duty". The appellant, having brought an action for trespass to the person (assault and rape) which was otherwise well out of time, the question was whether it was an action for "breach of duty". The majority of the High Court, constituted by Gleeson CJ, Callinan, Heydon and Crennan JJ together with Hayne J, allowed the appeal, holding the action fell within the subsection. Justices Gummow and Kirby dissented. As Hayne J observed, the case was finely balanced.[147] Among other things, the court split on interpreting the legislative history. The Victorian provision had been copied from a United Kingdom Act (and subsequently re-enacted). Justices Gummow and Kirby each pointed out (correctly) that this background, which included a report to the United Kingdom Parliament specifically ruling out trespass to the person, favoured the defendant.[148] Emphasising the value of legislative history in this case, Kirby J forcefully argued that "[i]t would be completely ahistorical to attempt now to impose on the chosen words a different meaning when language, context and history combine to show that the intention was that the chosen words ('breach of duty') would apply only to some causes of action."[149] However, the majority pointed out (again

144 (2007) 234 CLR 96 at 108 [19].

145 (2007) 234 CLR 96 at 117 [49] per Kirby J, drawing on Neave JA's reasons in the Court of Appeal of the Supreme Court of Victoria.

146 (2006) 226 CLR 442. The facts are taken from the reasons for judgment of Gleeson CJ, Callinan, Heydon and Crennan JJ.

147 (2006) 226 CLR 442 at 484 [130].

148 (2006) 226 CLR 442 at 468-470 [66]-[72] per Gummow J, at 477-480 [106]-[113] per Kirby J.

149 (2006) 226 CLR 442 at 480 [113].

correctly) that the Victorian background to the provision in question included two single judge decisions on the earlier version holding that an action for trespass to the person was included in the troublesome phrase, decisions which were also followed in English courts at the time.[150]

THE IMPRECISE CONNECTION BETWEEN AN INTERPRETATION AND THE STATUTORY TEXT

As mentioned above, in a number of cases the High Court has required that, if an "interpretation" is to be acceptable, the language of the relevant enactment must be "reasonably open" to such an interpretation.[151] Such a vaguely worded formula has brought forth criticism: not stating clearly what in truth is the relationship between interpretation and text.[152]

Justice Kirby has responded to this problem at a number of levels. First, in *Project Blue Sky* he joined three other members of the court and clarified to some extent the relationship in principle between an acceptable interpretation and the text. "The primary object of statutory construction is to construe the relevant provision so that it is *consistent with* the language and purpose of all the provisions of the statute."[153] He later instanced that "[extrinsic] materials may not contradict the statutory text".[154]

Second, Kirby J endeavoured to show that the interpretation he favours is available in, or is at least consistent with, the language of the text. For instance, in dissenting opinions he has held:

- "a longer period" in s 860(2) of the *Local Government Act 1993* (Qld) meant a single longer period only;[155]
- "pawned goods" for the purposes of the *Pawnbrokers and Second-hand Dealers Act 1996* (NSW) had its common meaning of goods deposited as security;[156]
- "assessment" in s 170(3) of the *Income Tax Assessment Act 1936* (Cth) included a nil assessment;[157]
- "liabilities" in s 82(1) of the *Bankruptcy Act 1966* (Cth) included "obligations which (although they may be contingent or may not necessarily be immediately enforceable) are judged inevitable or highly probable at the time of the bankruptcy, such that they are

150 (2006) 226 CLR 442 at 450–451 [10]–[12].

151 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320 per Mason and Wilson JJ.

152 Bennion, n 15, p 457.

153 (1998) 194 CLR 355 at 381 [69] (emphasis added). See also Kirby (1988), n 9, p 97: the duty "in the end" is to the words enacted by Parliament.

154 *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at 265 [38].

155 *Pfeiffer v Stevens* (2001) 209 CLR 57 at 92 [127].

156 *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at 280 [95].

157 *Federal Commissioner of Taxation v Ryan* (2000) 201 CLR 109 at 142 [73].

capable of identification by the trustee or a court as envisaged by the *Bankruptcy Act*";[158]

- "breach of duty", in the phrase "negligence nuisance or breach of duty" in s 5(1A) of the *Limitations of Actions Act 1958* (Vic), should be given its ordinary legal meaning: referring to actions where a duty is an element of the alleged tort;[159]
- "a reference", in the phrase "a reference to some other Act or instrument" in s 68(1) of the *Interpretation Act 1987* (NSW), included an implied reference.[160]

Third, as these opinions demonstrate, Kirby J is careful to enunciate clearly the interpretation he propounds. Bennion calls this necessary technique "interstitial articulation". "Fully to enunciate the legal meaning of an enactment", says that author, "requires *articulation* of the detailed propositions which, while not stated in the express words of the enactment, are either taken to be implied or are held to be there by the exercise of legislative power delegated to the court".[161] Interstitial articulation is of considerable help in clarifying the law. In the above dissenting opinions of Kirby J, the technique also assists in demonstrating the legitimacy of the interpretation from a textual viewpoint.

A PERCEPTION THAT STATUTORY INTERPRETATION BY JUDGES IS DOMINATED BY THE PRIVATE VALUES OF THE JUDGE

There is a perception amongst *some* academic commentators and journalists that statutory interpretation by judges is dominated by the private values of the judge. The attainment of the rule of law is brought into question. Here are some instances of that viewpoint:

- A linguistics scholar, Ross Charnock, has written: "Where there is no authority on the question, the judge is obliged in the end to rely on his personal, linguistic intuition, occasionally reinforced by references to dictionary definitions."[162] In this way, he thought, the judge decides rather than discovers the meaning.[163] The author concludes that, in view of disagreements between English and American judges

158 *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52 at 90 [117].

159 *Stingel v Clark* (2006) 226 CLR 442 at 476 [100]-[101].

160 *Forsyth v Deputy Commissioner of Taxation* (2007) 231 CLR 531 at 561 [92].

161 Bennion, n 15, p 504 (emphasis in original). In his recent article, F Bennion, "Improving Law Quality by Interstitial Articulation" (2008) 172 *Justice of the Peace* 619, Bennion is critical of some judges for paying insufficient attention to the need to enunciate the legal meaning.

162 R Charnock, "Clear Ambiguity" in A Wagner and S Cacciaguidi-Fahy (eds), *Legal Language and the Search for Clarity: Practice and Tools* (Peter Lang, Bern, 2006) p 91.

163 Charnock, n 162, p 89.

in particular cases, "semantic indeterminacy appears as a pervasive problem".[164]

- In articles by members of the Critical Legal Studies movement and, more recently, by postmodernists, it has been argued that the creative and political characteristics of statutory interpretation "can be disguised or obscured".[165]
- In a recent study of the House of Lords a political sociologist came to the personal view that there was little evidence that judicial methodology constrained judges;[166] "law really is just what the judges say it is".[167] In Robertson's view, "In many cases … [the Law Lords] work 'bottom-up', from a basic instinct that the plaintiff or the defendant ought to win to an argument that makes him the winner."[168]
- Justice Kirby has been personally criticised in this regard by a political commentator for *The Australian*, Janet Albrechtsen. She has alleged that "[u]sually [Kirby J is] busily crafting the law to suit his own preference, often disguising his views under the cloak of community standards."[169]

The charge that interpretation by judges is dominated by the private values of the judge is clearly not an isolated view, but this is not to suggest it is a prevailing view held by judges and jurists, or even by other commentators. The Chief Justice of Australia has said that "[t]he responsibility of discovering, expounding and applying the meaning of legislation is discharged according to legal principles."[170] Yet modern judges frequently

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164 Charnock, n 162, p 89.

165 A Hutchinson, "The Rise and Ruse of Administrative Law and Scholarship" (1985) 48 *Modern Law Review* 293 at 304: see at 295 for discussion of the link with Critical Legal Studies scholarship. For a postmodern critique, see R Benson, *The Interpretation Game: How Judges and Lawyers Make the Law* (Carolina Academic Press, 2008) p xv: "The interpreters of a law are not really constrained by legal language, precedents, rules, doctrines or principles … In creating meanings, interpreters – including judges – have extraordinary license, and are inescapably influenced by their own psychological character, values and personal contexts". Benson rejects the notion that we live under "the rule of law" as "mistaken", adding: "We live under the rule of people" (p xvi).

166 D Robertson, *Judicial Discretion in the House of Lords* (Oxford University Press, Oxford, 1998) p 75.

167 Robertson, n 166, p xii.

168 Robertson, n 166, p 17.

169 Albrechtsen (June 2007), n 11. See also Albrechtsen (August 2007), n 11 p 14: "[Keifel J] looks at the words of a statute for guidance on the law rather than imposing her personal, political views of justice. In other words, she is no Michael Kirby."

170 Gleeson, n 101. Bennion (2000), n 56 points out that, contrary to what is often said, the judge does not "select" the guides to legislative intention but identifies relevant factors from a large number of possible criteria. For judicial rejections of the idea that private values dominate judging in general, see G Brennan, "A Critique of Criticism: An Occasional Address" (1993) 19 *Monash University Law Review* 213 at 214; A Mason, "Rights, Values and Legal Institutions: Reshaping Australian Institutions" in G Lindell (ed), *The Mason Papers: Selected Articles and Speeches by Sir Anthony Mason AC, KBE* (Federation Press, Sydney, 2007) p 82.

acknowledge that judging, and therefore statutory interpretation, is influenced *to some extent* by a judge's "judicial philosophy". For example, Sir Anthony Mason (post High Court), having articulated the notion of a "judicial philosophy" in judicial decision-making,[171] emphasised that "there are powerful constraints that serve to constrain a judge in giving effect to the philosophy or set of values to which he or she consciously or unconsciously subscribes".[172] Similarly, the leading jurist on statutory interpretation in the United Kingdom, Francis Bennion, gives space in his treatise to discussing the value preferences which inform judicial reasoning, though, like Mason, he is of the view that the weight of interpretative factors is not "a purely subjective matter, entirely dependent on the idiosyncrasies of particular judges".[173]

Nor are academics, who examine the application of legal rules in an interdisciplinary manner, necessarily cynical of judicial reasoning. Professor Braithwaite has pointed out that, if judges do work "bottom-up", the intuitions are "grounded in professional training more than personal values", and with judges "those professional intuitions are legal ones".[174]

The judicial and extrajudicial writings of Kirby J contain interesting responses, which demonstrate his sensitivity to these issues. First, he acknowledges that he is often faced with choices in decision-making.[175] He acknowledges also how resolving competing arguments has been

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171 "Every judge brings to his or her office or, as I think is more often the case, develops while in office, a judicial philosophy. That philosophy may extend over a very wide range of matters related to the law, its place in society, the role of the courts and their relationship with other arms of government": Mason, n 170, p 82.

172 Mason, n 170, p 82.

173 Bennion, n 15, pp 130-133: s 20(4) of his Code.

174 J Braithwaite, "Rules and Principles: A Theory of Legal Certainty" (2002) 27 *Australian Journal of Legal Philosophy* 47 at 64. See also Fish, n 47.

175 It is true that, as mentioned above (text to n 83), his extra-curial papers make reference to a judge having "creative choices" and a "creative role" even in statutory interpretation: for example, Kirby (1988), n 9, p 89; Kirby, n 25, p 33. At the time these statements were made they were ahead of their time, but it is now widely recognised amongst judges and jurists that judges exercise a *degree* of creativity in statutory interpretation – see, for instance: Glazebrook, n 58, p 159; Goldsworthy, n 70, pp 189-190; R Sullivan, *Statutory Interpretation* (2nd ed, Irwin Law, 2007) pp 29, 39. We ought to read Kirby J's declarations in the light of the "necessary limits" he sees as operating on judicial decision-making (n 25, p 33) and the mode of law-making he undertakes from time to time. In the area of statutory interpretation his reasons for judgment manifest legal reasoning: he bases his decision-making on the interpretative criteria of the law and requires interpretative factors, such as the legislative purpose, to be objectively based: *Coleman v Power* (2004) 220 CLR 1 at 95 [245]. Further, there is nothing wrong (and much to be said for) the open account he attempts to give of the creative role of intuitive reflection. The case of *Foots* is a graphic illustration. In that case, he informed us, the unlikely outcome raised by initial intuitive reflection "sends the judicial mind searching for whether it is truly the result intended and provided for by the Act": *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52 at 86 [100].

personally difficult.[176] There is nothing contentious or new in these revelations.[177]

Second, Kirby J discusses frankly the role of intuitive judgments both in his judicial opinions[178] and extrajudicial[179] writings. In this way also, he merely reflects, albeit in a more open style, orthodox legal practice: standard legal texts[180] and other judges[181] accept the role that judgment plays in statutory interpretation. Similarly, in his Hamlyn Lectures he acknowledged the importance of "subjective perceptions" such as the different perceptions that judges hold of the legislative purpose. The Chief Justice of the High Court has also observed that there are legitimate differences between individual judges in approaches to interpretation.[182]

Third, Kirby J is open about the desire of judges, including himself, to attain, if possible, just outcomes in particular cases.[183] He has had regard to consequences in many cases.[184] Again, this is conventional judicial practice.[185] The law permits judges to take account of the operation of a statute on a literal reading free of earlier restrictions.[186]

Fourth, Kirby J acts on the belief that the scope for undisclosed intuitive judgment is reduced, and the judiciary is rendered more accountable, by judges being as open and explicit as possible in their reasons.[187] A good example of this is the way Kirby J alludes to any "fireside equities" present in a case. These are the feelings a judge may have about the parties or the lawyers arising from the facts of the case. For instance, in *Forsyth* the Deputy Commissioner of Taxation had instituted an action against the appellant for the recovery of a penalty (an amount said to be payable) under the *Income Tax Assessment Act 1936* (Cth). The action was brought

176 *R v Lavender* (2005) 222 CLR 67 at 95 [86].

177 J Stone, *Legal System and Lawyers' Reasonings* (Maitland Publications, Sydney, 1968) pp 288-292; A Mason, "Legislative and Judicial Law-making: Can We Locate an Identifiable Boundary?" in Lindell, n 170, p 59.

178 *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52 at 85-87 [97]-[102]; *Forsyth v Deputy Commissioner of Taxation* (2007) 231 CLR 531 at 550 [48]; *Stingel v Clark* (2006) 226 CLR 442 at 482 [119].

179 Kirby, n 120.

180 Bennion, n 15, pp 124-126.

181 Callaway, n 54 at 25; Frankfurter, n 33 at 531, discussing a passage of Holmes J in *United States v Johnson* 221 US 488 at 496 (1911).

182 M Gleeson, *The Rule of Law and the Constitution* (ABC Books, Sydney, 2000) p 130.

183 Kirby (2003), n 9 at 110.

184 For example, *Federal Commissioner of Taxation v Ryan* (2000) 201 CLR 109 at 138-139 [65] ("avoidance of bizarre results"); *R v Lavender* (2005) 222 CLR 67 at 106 [124] ("practical difficulties"); *Forsyth v Deputy Commissioner of Taxation* (2007) 231 CLR 531 at 562 [95].

185 See A Mason, "Chief Justice Comments on Fundamental Issues Facing the Judiciary" in Lindell, n 170, p 401.

186 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1980) 147 CLR 297 at 320-321 per Mason and Wilson JJ, approved in *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408. See also Pearce and Geddes, n 28 at [2.34]-[2.35].

187 Kirby, n 120 at 195.

in the District Court of New South Wales. On appeal, the taxpayer challenged the jurisdiction of the District Court. Yet, if the appellant succeeded in his technical argument, that outcome would be no impediment to a fresh action being brought by the Deputy Commissioner in a court of competent jurisdiction.[188] Justice Kirby observed that the appellant's objection to jurisdiction was entirely technical. Further, as a result of the power of the Deputy Commissioner to commence fresh proceedings, he noted that "[a] measure of irritation about the appellant's jurisdictional argument is therefore understandable".[189]

Ultimately, we should look to Justice Kirby's judicial opinions for his response to this vexed issue. If we read his reasons for judgment carefully we readily encounter instances where he acknowledges that unfair consequences would befall the plaintiffs if they lost the case, yet he nevertheless feels bound to decide against them (and did so). In recent times this occurred in *Chang*[190] and in *Stingel*.[191] Similarly, where the sympathies were reversed – where for instance the plaintiff taxpayer appeared to be raising "irritating" technical arguments (*Forsyth*)[192] – Kirby J nevertheless felt bound in the end to decide in favour of that party. In other words, his response to the apparent dilemma raised by some commentators is to demonstrate, in the only way he can, that the law does bind a judge; that the rule of law and parliamentary supremacy are not just topics for conversation.

THE CONTRIBUTION OF MICHAEL KIRBY, JUDGE AND JURIST

In both judicial and extrajudicial forums Michael Kirby has vigorously tackled many deep-seated problems of statutory interpretation, including the difficulty in reading statute law; the inherent limitations of interpretation; the lack of an overarching theory; the fictional nature of statutory interpretation's objective; the elusiveness of a statute's context; the imprecise connection between an interpretation and the statutory text in question; and a perception that statutory interpretation by judges is dominated by the private values of the judge. Individually or with other members of the High Court, he has had a measure of success in affecting legal drafting and stimulating the taking into account of legislative purpose, in reformulating the objective of statutory interpretation, in

188 *Forsyth v Deputy Commissioner of Taxation* (2007) 231 CLR 531 at 542 [19] per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ, at 551 [52] per Kirby J.

189 *Forsyth v Deputy Commissioner of Taxation* (2007) 231 CLR 531 at 551 [52].

190 *Chang v Laidley Shire Council* (2007) 234 CLR 1 at 27 [85].

191 *Stingel v Clark* (2006) 226 CLR 442 at 480 [113].

192 *Forsyth v Deputy Commissioner of Taxation* (2007) 231 CLR 531 at 551 [52]. See also *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52 at 87 [104] where the bankrupt appellant (in favour of whom Kirby J eventually decided in dissent) was presumed by Kirby J to have knowingly embarked on litigation knowing the risks and potential liabilities.

clarifying how an interpretation relates to the statutory text, and in making the public more aware of a judge's reasoning and decision-making process in the field of statutory interpretation. These are formidable achievements. However, to date he has not been successful in certain areas, notably in moving the law to take greater account of international instruments, in persuading his fellow judges to use extrinsic material more inferentially, and in laying down a universal method for all cases of judicial interpretation.

In seeking answers to the problems of statutory interpretation Kirby J's responses have been shaped by a judicial philosophy. From the law he has drawn a number of values: that the law ought to be more readable; that the judicial function is to see that Parliament's target is hit if possible; that the interpretation of a legislative provision is often a multifaceted endeavour, requiring identification and assessment of many contextual factors; that the interpreter must respect the words enacted by a democratically elected legislature; that judges have an obligation to be scrupulously independent; and, in writing their opinions, judges have a responsibility to be as accountable as possible. At a more individual level he has sought: to carry out research into the background of the law with utmost effort to seek to appreciate fully what the legislature was intending to say on the particular question in hand; to have the law stated in realistic and not misleading ways; and, through reasons for judgment and extrajudicial commentary, to communicate openly with the parties, the legal profession and the general public about the law.

Statutory interpretation sorely needed, as Kirby J himself once said, the injection of "a healthy degree of realism".[193] The revival of interest in and thought about statutory interpretation[194] is due in no small part to the exceptional contribution over many years of Michael Kirby, judge and jurist.

193 Kirby (1988), n 9, p 89. For discussion of the myth that the law of statutory interpretation is virtually contained in three rules, see n 59 above.

194 See Bennion, n 15, p 7; Pearce and Geddes, n 28 [2.1]; Corcoran, n 17, pp 8–10; J W Barnes, "Statutory Interpretation, Law Reform and Sampford's Theory of the Disorder of Law – Part One" (1994) 22 *Federal Law Review* 116, fn 9.

Chapter 30

SENTENCING

George Zdenkowski*

However, in Australia, judges in federal courts may not normally deprive individuals of liberty on the sole basis of a prediction of what might occur in the future. Without an applicable anterior conviction, they may not do so on the basis of acts that people may fear but which have not yet occurred. Much less may judges deprive individuals of their liberty on the chance that such restrictions will prevent others from committing certain acts in the future. Such provisions partake of features of the treatment of hostages which was such a shameful characteristic of the conduct of the oppressors in the Second World War and elsewhere. It is not a feature hitherto regarded as proper to the powers vested in the Australian judiciary. In Australia, we do not deprive individuals of their freedoms because doing so conduces to the desired control of others.[1]

INTRODUCTION

Justice Kirby was not a sentencer. Indeed in his long and distinguished career on the Bench he has not, as far as I am aware, ever sentenced anyone at first instance.[2] Rather, he was a reviewer of sentences and a reviewer of sentencing. In his capacity as President of the New South Wales Court of Appeal and later as a Justice of the High Court of Australia he presided over many appeals against the excessive severity (or leniency) of sentencing decisions of the lower courts, as well as appeals concerning sentencing error. He had many opportunities to "review" sentencing decisions. On the other hand, Kirby J also tackled the broader issue

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* The author gratefully acknowledges comments on an earlier draft by Professor Kate Warner. Any errors or omissions remain the author's responsibility.

1 *Thomas v Mowbray* (2007) 233 CLR 307 at 431 [355] per Kirby J.

2 Personal communication (7 February 2008).

of examining the sentencing task[3] – a "review" of sentencing – at the Australian Law Reform Commission (ALRC).

The challenges in each sphere are quite different. "Reviewing" sentencing decisions of lower courts involves not a substitution of the view that the appellate court thinks appropriate but, in general terms, an examination of the margin of tolerance that should be accorded to judicial officers who actually impose sentences on offenders. Clearly, it also involves identification of error in the application of sentencing principles. Sentencing reform, by contrast, must necessarily address the architecture of sentencing law, probe the underlying justifications for existing principles, investigate the operational reality of the system and make recommendations for reform which will hopefully improve the law.

At the heart of Kirby J's appellate sentencing decisions and his advocacy of sentencing reform is a concern for fairness – fairness to the community, fairness to the offender (proportionate punishment, natural justice, adherence to statutory and constitutional constraints), fairness to other similar offenders who have committed similar offences and fairness to victims.

These and other themes and the contributions to his sentencing jurisprudence generally will be the subject of this chapter. Necessarily, because of space limitations, the focus will be restricted to two areas: law reform and the High Court cases, reflecting the earlier and later periods of Kirby J's judicial career. The substantial contribution by him as President of the New South Wales Court of Appeal, which spanned the intervening period, will not be reviewed. The account will inevitably be selective and incomplete (in terms of a comprehensive review of all areas of sentencing), skewed as it is by the issues which have been presented for consideration by High Court Benches in which Kirby J participated.

LAW REFORM

In 1978, the ALRC was asked to inquire into the reform of federal sentencing law. This was the first major comprehensive review of sentencing law in Australia.[4] It provides the first detailed description of federal involvement in the criminal justice system. One of the pioneering changes made at the time was a shift towards the incorporation of empirical data in the sentencing reform process:

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3 Kirby J was fond of describing this as "painful" and "unrewarding", adopting Lord Kilbrandon's epithet: see Lord Kilbrandon, "Children in Trouble" (1966) 6 *British Journal of Criminology* 112 at 122.

4 The first stage resulted in an interim report: ALRC, *Sentencing of Federal Offenders (Interim)* (ALRC 15, 1980). This inquiry lapsed for some years and was renewed in 1984: see ALRC, *Sentencing* (ALRC 44, 1988). Some 18 years later, the ALRC again reviewed federal sentencing law: ALRC, *Same Crime, Same Time* (ALRC 103, 2006).

> [T]he proposals of the Commission draw very heavily upon the information and opinions supplied by the critical actors in the criminal justice system drama. The future of sentencing reform in Australia will almost certainly be influenced by this insight into the thinking and conduct of the chief dramatis personae. The time for considering sentencing reform as a matter to be studied in isolation from empirical data has passed.[5]

Justice Kirby (and his ALRC colleagues) ventured boldly where sentencing law reformers had not trespassed – into the heartland of the judiciary whom he undoubtedly had in mind (although his nominated target was "the legal profession") when he said, somewhat provocatively:

> There are some who are dubious about the value of opinion surveys and detailed analysis of sentencing practice and statistics. Though the human element in criminal punishment must never be overlooked, there is room for more science than exists at present. Inconsistency and disuniformity in the name of individual judicial discretion may be no more than lazy self-indulgence on the part of a legal profession resistant to change. The defence of the right of a judge or magistrate to have his [sic] personal idiosyncratic views, at the cost of the citizen coming before him [sic] for judicial punishment, is no longer acceptable.[6]

Justice Kirby (and his ALRC colleagues) had to confront another controversial issue: the fact that federal offenders were largely treated like their State or Territorial counterparts. But Kirby J and the ALRC pointed to the need for uniform treatment of federal offenders: "One attribute of justice, normally accepted, is roughly like treatment for like offenders committing like offences … The Law Reform Commission had to confront this basal question."[7]

Basically, economic and pragmatic arguments favoured the status quo but considerations of justice demanded an overhaul of institutional arrangements and procedures to assure roughly equal treatment of federal offenders wherever they might be tried, convicted and sentenced in Australia. Measures advocated by Kirby J and his ALRC colleagues[8] in the Interim Report[9] were potentially far-reaching. They included the establishment of a national Sentencing Council; sentencing guidelines for federal prosecutors; a revision of penalties in Commonwealth legislation; the abolition of federal parole; the provision of a new appeal channel for federal criminal cases to the Federal Court; the standardisation of

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5 M D Kirby, *Reform the Law: Essays on the Renewal of the Australian Legal System* (Oxford University Press, Melbourne, 1983) pp 131-132.

6 Kirby, n 5, pp 133-134.

7 M D Kirby, "Federal Prisoners in State Prisons: Economy versus Justice" (Speech, Seminar on the Problems of Punishment, Lincoln Institute, Melbourne, 10 November 1983).

8 The sentencing reference was at that stage led by Professor Duncan Chappell as Commissioner-in-Charge.

9 ALRC, *Sentencing of Federal Offenders (Interim)* (ALRC 15, 1980).

remissions for federal prisoners; the improvement of prison conditions to conform with international and nationally recognised minimum standards; the provision of an accessible and confidential grievance mechanism for federal prisoners; and national sentencing legislation. It also made detailed recommendations as to the compensation of victims of federal crime.

This ambitious program met with a lukewarm response from government, although in 1982 amendments to the *Crimes Act 1914* (Cth) were introduced implementing limited recommendations.[10]

The Sentencing Council proposal, a cornerstone of the Interim Report, fell by the wayside notwithstanding Senator Durack's support of this body, albeit in a modified form.[11] When the reference came to be further considered by a fresh team, which reviewed existing proposals, carried out further research into a range of other measures and undertook extensive consultations, the broad ambit of the Interim Report was endorsed in the final report.[12] However, the abolition of federal parole was abandoned and the proposal for federal criminal appeals to the Federal Court was not pursued. The government embrace of the final report proposals was less than enthusiastic. The *Crimes Act 1914* (Cth) was amended to incorporate (in Pt 1B) some recommendations as to sentencing factors to be considered by a court[13] and various modifications were made to the relevant provisions governing parole and remissions for federal prisoners.

The status quo as to the incarceration of federal prisoners in State or Territorial prisons (pursuant to s 120 of the *Constitution*) remained undisturbed. Indeed, none of the sentencing reports recommended otherwise given the relatively small cohort of such prisoners (and their wide dispersal) and notwithstanding some growth in their numbers. However, the aspirations of Kirby J and his colleagues for enforceable benchmark minimum standards for federal prisoners, reflecting international human rights, have not been realised. The proposal for

10 Incorporating s 17A (imprisonment as a measure of last resort) and s 20AB (providing a wider range of State/Territorial non-custodial options for federal prisoners).

11 Senator Durack, the then federal Attorney-General, wrote to the State and Territory Attorneys-General proposing that a Sentencing Council should be established administratively with functions to provide guidelines for judicial officers engaged in sentencing: M D Kirby, "The Best Prisoners' Aid: Keeping Them Out of Prison" (Speech, Annual General Meeting of the Prisoners' Aid Association of NSW, Sydney, 29 October 1981) p 7. Subsequently, Senator Gareth Evans, Attorney-General in the Hawke Labor Government also embraced the idea, but apparently to no avail: M D Kirby, "The Future of Sentencing" (Speech, Conference of NSW Stipendiary Magistrates, State Office Block, Sydney, 1 June 1983) pp 2, 10.

12 Australian Law Reform Commission, *Sentencing* (ALRC 44, 1988).

13 The recommendations were only partially adopted and Pt 1B was the subject of judicial criticism – for being opaque and unnecessarily complex – in *DPP v El Karhani* (1990) 21 NSWLR 427, amongst other cases. For a detailed review of the criticisms, see ALRC, *Same Crime, Same Time* (ALRC 103, 2006) pp 107-109.

uniform treatment of federal offenders in the earlier reports has been abandoned in favour of intra-State or intra-Territorial parity between federal and State/Territorial prisoners. The ALRC recommendation in 1988 to establish an Australian Capital Territory correctional system has, however, been implemented and progress has been made in relation to standardising minimum national guidelines for Australian prisons. Prosecution guidelines have been introduced.

Justice Kirby was a realist about the practical difficulties of law reform when the reference was "controversial, sensitive and [involved] matters upon which the keenest differences of view can be held in the legal profession, in the expert community and in society generally".[14] Sentencing reform is notoriously controversial.[15] As Kirby J has said: "Talks about sentencing reform are generally depressing efforts that end with a solemn identification of problems and a despairing cri de coeur that nothing ever seems to be done."[16]

However, Kirby J basically remained an optimist about the long-term view needed for the sentencing reform process. Law reform reports have a long shelf life. Reports are often taken up by practitioners, academics, governments in other jurisdictions in Australia or overseas. In Australia, the sentencing reports have been influential with State and Territory governments. Victoria and New South Wales have introduced Sentencing Councils with an advisory role.[17] All States and Territories now have comprehensive sentencing legislation. Ironically, the only missing link is in the federal sphere. Victim compensation schemes exist in various States and Territories but not at a federal level. Prosecution guidelines are now commonplace. The powerful arguments against mandatory sentencing in the various ALRC sentencing reports[18] have been echoed in other sentencing law reform reports[19] and have played a role in stemming the tide against the introduction of such measures or, on occasion, in reversing such policy.[20]

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14 M D Kirby, "Criminal Investigation Reform: At Last" (Speech, Australian Institute of Criminology, the Commonwealth Attorney-General's Department and the Law Council of Australia, Seminar on the Criminal Investigation Bill, Melbourne, 6 February 1982).

15 G Zdenkowski, "Punishment Policy and Politics" in M Laffin and M Painter (eds), *Reform and Reversal: Lessons from the Coalition Government in New South Wales 1988-1995* (Macmillan, Sydney, 1995) p 220. See also D Brown, "Challenges to Criminal Justice Reform" in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (Federation Press, Sydney, 2005).

16 Kirby, n 11 (1981), p 7.

17 For a detailed analysis, see A Freiberg and K Gelb (eds), *Penal Populism, Sentencing Councils and Sentencing Policy* (Hawkins Press, 2008).

18 See, eg, ALRC, *Same Crime, Same Time* (ALRC 103, 2006) [21.54]-[21.65].

19 NSW Law Reform Commission, *Sentencing Report 79* (NSWLRC, 1996).

20 D Johnson and G Zdenkowski, *Mandatory Injustice: Compulsory Imprisonment in the Northern Territory* (Australian Centre for Independent Journalism, UTS, 2000).

The federal sentencing reports have been a touchstone for consideration of sentencing reform in Australian States and Territories.[21] The review of the case law and the literature has been a valuable resource for courts and governments in their examination of the ongoing issue of structuring sentencing discretion, and the introduction of sentencing guidelines.[22]

In 2006 the ALRC once more reported on federal sentencing in a comprehensive report.[23] Again, there was very wide-ranging input and extensive consultation and deliberation. Generally speaking, many of the themes of the Interim Report by Kirby J and his ALRC colleagues were echoed, leaving aside the abolition of federal parole, the uniform treatment of federal offenders and the Sentencing Council.[24] The proposal for a federal criminal appeal process was canvassed in the Discussion Paper[25] but was ultimately abandoned. There was a resounding endorsement of the need for national sentencing legislation, now that the federal sphere was the only jurisdiction without such a statute. The proposal in 1980 for a compensation scheme for the victims of federal crime was refreshed.

THE HIGH COURT CASES

Over 50 years ago Professor Norval Morris lamented the relative lack of attention to the sentencing process in Australian courts compared with the focus on the contested trial.[26] This refrain was taken up by Kirby J in *Ryan*[27] in the context of argument about sentencing of persons (like the appellant) convicted of serial sexual offences against minors. Kirby J observed:

> Experience suggests that the particular aspects of sentencing offenders like the appellant are rarely, if ever, supported by appropriate evidence or extended argument. This fact bears out a frequent complaint about the criminal justice system that it concentrates its energies on the trial and tends to lose steam when it turns to the task, at least as important, of sentencing those who are convicted.[28]

To some legal practitioners (or indeed judicial officers) this may seem a counsel of perfection, particularly when one considers the pressures of

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21 For example, NSW Law Reform Commission, *Sentencing Report 79* (NSWLRC, 1996).

22 G Zdenkowski, "Sentencing Trends: Past, Present and Prospective" in D Chappell and P Wilson (eds), *Crime and the Criminal Justice System in Australia: 2000 and Beyond* (Butterworths, Sydney, 2000) p 161.

23 ALRC, *Same Crime, Same Time* (ALRC 103, 2006).

24 The reasoning was somewhat curious when one considers the actual roles of the NSW and Victorian bodies: see, eg, the Victorian Sentencing Advisory Council and the discussion by Freiberg and Gelb, n 17.

25 ALRC, *Sentencing of Federal Offenders* (ALRC DP 70, 2005).

26 N Morris, "Sentencing Convicted Criminals" (1953) 27 *Australian Law Journal* 186 at 187, 196-197.

27 *Ryan v The Queen* (2001) 206 CLR 267 at 301 [114].

28 (2001) 206 CLR 267 at 301 [114].

the workload in the lower courts and the inadequate legal aid resources. It may also be the case that advocates are less comfortable trawling through vast bodies of scientific literature (often in conflict) than with the adversarial process associated with contested trials. Nevertheless, Kirby J's basic point is sound. It is a disservice to the criminal justice system to neglect an appropriate evidentiary foundation for sentence.

Judicial sentencing discretion

If asked, Kirby J would probably have approved of the snappy title of the ALRC's latest foray into sentencing reform – *Same Crime, Same Time*. He was a pioneer in the use of language and techniques in the marketplace of law reform which were accessible to the media and the public. However, he would have been equally aware of the limitations of that title[29] for it is bristling with potential problems. The title completely ignores the circumstances of the offender and also underplays the variation in circumstances which inevitably occur in the "same" crime. Ironically, the title is only strictly applicable to mandatory sentencing, which the ALRC firmly rejects in its report (as does Kirby J).

Justice Kirby would be likely also to regard an exegesis of the title as somewhat precious. After all, it is the touchstone for a debate about the substantive issues, the recommendations in the report. But the difficulties of encapsulating, with accuracy, the exquisite dilemmas faced by sentencing courts are highlighted by this prosaic illustration: in particular, the central and abiding notion of judicial discretion in sentencing.

The role of a sentencer is to apply existing principles to the circumstances of the offence and the offender. This is cited as a mantra in the authorities but remains a challenging and elusive task. It is uncontroversial among judicial officers in this country that mandatory sentencing formulae are inappropriate and unfair. Likewise there is a consensus that a capricious power to punish, unfettered by any yardstick whatsoever, is an anathema.

But there remains between these two theoretical extremes a vast array of possibilities. The extent to which judicial discretion is (or should be) structured, regulated, guided or otherwise influenced (or in extreme cases dispensed with) is a matter of ongoing reflection in Australia (and in kindred jurisdictions) in the courts, Parliament, law reform agencies, the academy, the media and in public debate.

The common law has always favoured a relatively broad discretion. However, attempts to regulate discretion via the courts and the Parliament (through techniques such as appellate review, guideline judgments, sentencing legislation and, occasionally, mandatory penalties)

29 As, no doubt, were those at the ALRC who coined it.

have proliferated over recent years.[30] Justice Kirby sets out his position succinctly in *Postiglione*.[31] While the sentencing function remains in the hands of judicial officers there must be a considerable latitude accorded to sentencers and there will, inevitably, be legitimate variation in outcomes. The discretion will be subject to certain constraints: statutory maxima; availability of sentencing data (as background information); sentencing guidelines; and appellate review. But none of these qualifying constraints has the effect of reducing the outcome to mathematical certainty.[32] No two cases are ever exactly the same.

Justice Kirby acknowledges the orthodox position[33] that:

> it is well established that when performing their function sentencing judges must be accorded a wide measure of latitude which will be respected by the appellate courts. So long as the sentencing judge has taken into account the relevant considerations of law and fact, the appellate court will not ordinarily intervene … [T]he proper approach is one of vigilance within a context of appellate restraint.[34]

It is well known that such appellate restraint in respect of sentencing decisions is manifested to an even greater degree when the High Court is considering such matters.[35] Justice Kirby embraced the conventional wisdom in this respect.[36]

A cardinal sentencing principle is that relating to sentencing parity. This requires that there should not be a marked disparity between sentences imposed on co-offenders, which gives rise to a justifiable sense of grievance. In the leading case of *Postiglione*[37] Kirby J joined his colleagues in the High Court in affirming this principle and noted that consistent punishment is "a reflection of the notion of equal justice" and is an attribute of "any rational and fair system of criminal justice" whereas inconsistency in punishment is a "badge of unfairness" which undermines public confidence in the administration of justice.[38] He recognised that the search for perfect consistency is an aspirational, and unattainable, goal having regard to the inevitable differences between the circumstances of offences and offenders and, further, the discretionary character of the sentencing function performed by judicial officers. Appellate courts, especially the High Court, must act with restraint. Mere disparity is not enough. There must be an objectively demonstrable grievance.

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30 For a review of these developments, see Zdenkowski, n 22, pp 161-202.

31 *Postiglione v The Queen* (1997) 189 CLR 295 at 336-339.

32 A notion he develops in *Markarian v The Queen* (2005) 228 CLR 357.

33 *Lowe v The Queen* (1984) 154 CLR 606 at 610.

34 *Postiglione v The Queen* (1997) 189 CLR 295 at 336-337 per Kirby J, aff'd in *Ryan v The Queen* (2001) 206 CLR 267 at 294 [89]-[90].

35 See *Judiciary Act 1903* (Cth) s 35A; *Lowe v The Queen* (1984) 154 CLR 606; *Liberato v The Queen* (1985) 159 CLR 507.

36 *Postiglione v The Queen* (1997) 189 CLR 295 at 337.

37 (1997) 189 CLR 295.

38 *Lowe v The Queen* (1984) 154 CLR 606 at 610-611.

Postiglione also raised the principle of totality and how this principle interacted with the parity principle. The totality principle requires a sentencer who passes a series of sentences, which are each legitimate according to the offence in question and each legitimately made consecutive according to the relevant principle, to review the aggregate sentence and to consider that it is "just and appropriate" and not a crushing penalty having regard to the record and prospects of the offender.[39] Justice Kirby acknowledged that the parity and the totality principles operate as checks required of sentencing courts. In the circumstances of this case, the parity principle prevailed insofar as it clashed with the totality principle.

It is not contestable that there is no such thing as a single perfect sentence. Nor that judicial officers exercise their sentencing discretion in arriving at an outcome subject to statutory constraints and guidelines and appellate review. One matter which has excited some judicial controversy is the process by which the sentencing discretion is exercised. The opposing views have been characterised as intuitive or instinctive synthesis on the one hand,[40] and two-stage or two-tiered sentencing[41] on the other.

Crudely put, instinctive synthesis can be described as a value judgment by the sentencing court as to the appropriate sentencing outcome after the court has distilled all relevant factors relating to the offence and the offender. Equally crudely, two-stage sentencing involves a structured approach in which an initial value judgment is made as to the appropriate sentence and subsequent adjustments are made having regard to particular identified considerations. It will be seen from the discussion later in this section that, in each case, there are variants on each of these formulations.

Instinctive synthesis survives as a central plank of Australian sentencing law. It has been the subject of considerable academic criticism.[42] Justice Kirby's initial encounter with attempts to modify, regulate or otherwise constrain the very broad judicial discretion inherent in this notion came with the first stage of the ALRC's sentencing inquiry in 1979. At that time there was a flurry of activity, in the United States in particular, to

39 Kirby J cites D A Thomas, *Principles of Sentencing* (2nd ed, Ashgate, London, 1979) p 56; Lamer CJ in *R v M* (CA) (1996) 105 CCC (3d) 327 at 349; and C Ruby, *Sentencing* (4th ed, Butterworths, Toronto, 1994).

40 See, eg, the decisions of *R v Williscroft* [1975] VR 292; *R v Young* [1990] VR 95 and *R v Geddes* (1936) 36 SR(NSW) 554.

41 See *R v Shannon* (1979) 21 SASR 442; *R v Gallagher* (1991) 23 NSWLR 220; *R v Osenkowski* (1982) 30 SASR 212; and *R v Raggett* (1990) 101 FLR 323.

42 M Tonry, *Sentencing Matters* (Oxford University Press, New York, 1996) p 178; I Leader Elliott, "Instinctive Synthesizers in the High Court" (2002) 26 *Criminal Law Journal* 5; M Bagaric, "Sentencing: The Road to Nowhere" (1999) 21 *Sydney Law Review* 597; M Bagaric and R Edney, "What's Instinct Got to Do with It? A Blueprint for a Coherent Approach to Punishing Criminals" (2003) 27 *Criminal Law Journal* 119.

devise various means of dealing with unjustified disparity in sentencing and to promote consistency. Many of these proposals included limiting judicial discretion by the invocation of various preordained grids or matrices, which combined data about the offender's criminal record and the criminal offence in question. There were many variants.[43] The logical extreme of these attempts to fetter judicial discretion is mandatory sentencing. The ALRC rejected these approaches as inappropriate to Australian conditions but embraced the notion that it was desirable to improve consistency by other means.[44]

One of the memorable responses to the ALRC's proposals to regulate discretion came from the Victorian Supreme Court during the consultation process. The then members of that court declined to participate in a survey by the ALRC in the course of its sentencing inquiry. It was thought that this failure to cooperate was prompted, at least in part, by the collective apprehension about the ALRC's intentions in relation to the regulation of sentencing discretion and the perceived threat to the independence of the judiciary. Leaving aside the details of that debate, there is a certain irony in that Kirby J has an impeccable track record as a staunch defender of judicial independence. Nevertheless, it would have provided an opportunity to reflect on the significance of sentencing discretion and on the natural home of the "instinctive synthesis". In the event, the concerns of the Victorian Supreme Court proved to be ill-founded.

Many years later, Kirby J revisited the notion of instinctive synthesis in some detail in the case of *Markarian*.[45] Markarian pleaded guilty to a charge of knowingly taking part in the supply of a prohibited drug. He was convicted and sentenced to a term of imprisonment and the Crown successfully appealed to the New South Wales Court of Criminal Appeal on the basis that the penalty was manifestly inadequate. The High Court unanimously upheld his appeal on the basis that the Court of Criminal Appeal had erred in adopting the wrong starting point for consideration of the appellant's sentence.

However, the court divided over whether the Court of Criminal Appeal erred in adopting a two-tiered approach. The joint reasons for judgment of Gleeson CJ and Gummow, Hayne and Callinan JJ, as well as the judgment of McHugh J, endorsed the instinctive synthesis approach while Kirby J dissented on this issue, criticised the instinctive synthesis and embraced the so-called two-stage approach.

Despite the apparent jousting, there was considerable common ground. This was partly, at least, because of the differing definitions of instinctive synthesis and the two-stage process. No judge (even McHugh J) was willing to espouse without qualification the high-water mark of *Williscroft*, which

43 For a review of these developments, see Zdenkowski, n 22, pp 161-202.

44 ALRC, *Sentencing of Federal Offenders (Interim)* (ALRC 15, 1980).

45 *Markarian v The Queen* (2005) 228 CLR 357.

arguably allows a court to produce a final sentence by doing no more than listing factors, without discussing reasons. All judges were concerned that there be full transparency and articulation of relevant considerations. Further, there was unanimity as to the need for articulation of accessible reasons in the interest of the parties, appeal courts and the public. Likewise, there was a consensus that sentencing was an imprecise process involving a value judgment.

Justice McHugh was alone in advocating that a judge should only provide one value for the sentence, subject to adjustment only for utilitarian factors unrelated to sentence such as a guilty plea or assisting the authorities. His occasionally acerbic attacks on the two-stage process appeared at times to involve the demolition of a straw person erected by him – namely that a two-stage approach inherently involved the embrace of a single figure based on the objective features of the offence and then a process of item by item mathematical increments and decrements.[46] The approach actually favoured by Kirby J was cryptically prefigured by him a decade earlier in *Postiglione* when he said: "It is a mistake to endeavour to reduce judicial sentencing to mathematical accuracy or analytical certainty."[47]

In many ways it could be said that all the High Court judges other than Kirby J were clinging to the wreckage of unfortunate and otiose terminology. Unfortunate in the sense that "instinctive" and "intuitive" invoke for the public (as Kirby J points out) mysterious and arcane judicial activities which all those other judges disavow. Otiose, because everyone agrees (at least implicitly) that the terminology adds nothing.

Justice Kirby produced a pungent summary:

> All that seems left from the original imperatives, traced to the decisions of *Williscroft* and *Young*, is a prohibition on mathematical adjustments in deriving the ultimate sentence imposed on an offender. Yet even this is not now absolute[48] … So analysed, the residue of this judicial debate over twenty years – in this Court over the last five years – is revealed for what it is. Australian judges must now express their obeisance to an "instinctive synthesis" as the explanation of their sentencing outcomes. It might be prudent for them to avoid mention of "two stages" or of mathematics. Yet in many instances (and increasingly by statutory prescription) if judges do so no error of sentencing principle will have occurred. Such mention may, in fact, sometimes even be required.

46 For a fascinating analysis of *Markarian* from a neurobiological perspective, including the role played by emotion in legal decision-making, see H Bennett and G A Broe, "Judicial Neurobiology, Markarian Synthesis and Emotion: How Can the Human Brain Make Sentencing Decisions?" (2007) 31 *Criminal Law Journal* 75.

47 *Postiglione v The Queen* (1997) 189 CLR 295 at 339. See also his remarks in *Johnson v The Queen* (2004) 205 ALR 346 at 358-360 [40]-[44].

48 Kirby J recites exceptions allowed for specification of reductions in quantum for guilty pleas or assistance to the authorities permissible in legislation and also exceptions identified in the joint reasons in, eg, "simple" cases.

> The lofty and absolute prescriptions of *Williscroft* and *Young* remain in place like the two vast and trunkless legs of stone of Ozymandias.[49] But, with all respect, they are now beginning to look just as lifeless. One day I expect that travellers to the antique land of this part of the law of sentencing will walk this way without knowing that the two prescriptions once were there.[50]

It is small wonder, then, that Justice Mildren, delivering a paper to a national sentencing conference, speculated that the debate was "much ado about nothing".[51]

Guideline judgments are usually judgments given by an appellate court which transcend the appeal point in issue and are intended to assist sentencing courts to achieve greater consistency by providing guidance as to appropriate sentencing scales for identified offence categories,[52] or in the application of particular principles such as the sentencing discount for a guilty plea.[53] Though initially somewhat controversial, there appears to be an acceptance by the courts of these developments and some Parliaments now have powers to refer matters to the courts for guideline judgments.[54]

The matter has arisen for consideration in the High Court on one occasion in *Wong v The Queen*.[55] This decision cast some doubt on the constitutional validity of guideline judgments for federal offenders in certain circumstances.[56] The New South Wales Court of Appeal had issued guidelines concerning sentencing appropriate for couriers and others with a minor level of involvement in the importation of heroin. The guidelines related to the quantity of drug involved and a range of penalties was suggested for each of the five levels specified. The guidelines were successfully challenged. Justices Gaudron, Gummow and Hayne ruled that the guidelines were inconsistent with the statutory obligation

49 P Shelley, "Ozymandias", reproduced in Abrams (ed), *The Norton Anthology of English Literature* (6th ed, WW Norton, New York, 1993) Vol 2, p 672.

50 *Markarian v The Queen* (2005) 228 CLR 357 at 407 [138]-[139] per Kirby J.

51 D Mildren, "Intuitive Synthesis or the Structured Approach?" (Paper, *Sentencing: Principles, Perspectives and Possibilities*, Conference, National Judicial College of Australia, Canberra, February 2006) p 6.

52 See, eg, *R v Jurisic* (1998) 45 NSWLR 209; *R v Henry* (1999) 46 NSWLR 346.

53 *R v Thomson* (2000) 49 NSWLR 383.

54 See generally, Zdenkowski, n 22, pp 175-177; N Morgan and B Murray, "What's in a Name? Guideline Judgments in Australia" (1999) 23 *Criminal Law Journal* 90 at 93-94; R Johns, *Sentencing Law: A Review of Developments in 1998-2001* (NSW Parliament, 2002) pp 25-26; P Byrne, "Guideline Sentencing: A Defence Perspective" (1999) 11(11) *Judicial Officers' Bulletin* 81; K Warner, "The Role of Guideline Judgments in the Law and Order Debate in Australia" (2003) 27 *Criminal Law Journal* 8; J Anderson, "Leading Steps Aright: Judicial Guideline Judgments in NSW" (2004) 16(2) *Current Issues in Criminal Justice* 140; A Ashworth, "English Sentencing Guidelines in their Public and Political Context" in A Freiberg and K Gelb (eds), *Penal Populism, Sentencing Councils and Sentencing Policy* (Hawkins Press, Annandale, 2008).

55 (2002) 207 CLR 584.

56 See Johns, n 54, p 38.

that the sentencing court must follow in sentencing federal offenders in accordance with s 16A of the *Crimes Act 1914* (Cth). The joint judgment also observed that if such guidelines were intended to be binding in future cases (for example, if an appellate court would consider the issue of failure to comply), they would begin "to pass from the judicial to the legislative".[57] In their joint judgment they distinguished:

> between a court articulating the principles which do, or should, underpin the determination of a particular sentence and the publication of expected or intended results of future cases. Articulation of applicable principles is central to the reasoned exercise of jurisdiction in particular matters before the court. By contrast, intended results in future cases is not within the jurisdiction or the powers of the court.[58]

While agreeing in the outcome of the appeal (because the guidelines were incompatible with the terms of the applicable federal legislation), Kirby J reserved for future consideration the issue of whether it is possible to formulate guidelines consistently with the *Constitution*, noting that much will depend on the manner in which they are used. For example:

> If they were merely a "sounding board" or "check" against the exercise of a sentencing discretion, so as to bring greater consistency to that exercise, they would not be incompatible with the performance of judicial functions. Similarly, just because of the language used (promulgation), the treatment of considerations irrelevant to the particular case or suggested illogicality of reasoning, a court would not necessarily go beyond its judicial functions.[59]

Professor Warner has argued that the decision is confined to numerical guidelines and that the joint judgment expresses "no difficulty with guideline judgments that lack a quantitative element and merely indicate relevant sentencing considerations without establishing a starting point or developing a range".[60] Justice Kirby also made observations about the problem (which he did not regard as compelling in the instant case) of a single State Court of Criminal Appeal issuing guidelines which would purportedly be applicable to federal offenders in other States and Territories.[61]

Mandatory sentencing is a technique sometimes promoted as a mode of enhancing consistency in sentencing. It seems that there is no constitutional impediment to legislation introducing such measures.[62] Yet, like most of his judicial colleagues, Kirby J had serious concerns

57 *Wong v The Queen* (2002) 207 CLR 584 at 614 [80].

58 (2002) 207 CLR 584 at 615 [83].

59 (2002) 207 CLR 584 at 635-636 [144].

60 Warner, n 54 at 13.

61 *Wong v The Queen* (2002) 207 CLR 584 at 627-629 [118]-[124].

62 *Palling v Corfield* (1970) 123 CLR 52; see also discussion in G Zdenkowski, "Mandatory Imprisonment of Property Offenders in the Northern Territory" (1999) 22 *University of New South Wales Law Journal* 302 at 308-309.

about mandatory sentencing – the removal of judicial discretion in respect of the whole or part[63] of the sentencing outcome – and, together with his ALRC colleagues, was critical of it in the Interim Report in 1980. The ALRC reiterated that concern in its final report in 1988,[64] and again in 2006. This report provides a succinct summary of Kirby J's views:[65]

> Prescribing mandatory terms of imprisonment for a federal offence is generally incompatible with sound practice and principle in this area. Mandatory sentencing has the potential to offend against the principles of proportionality, parsimony and individualised justice. In particular, the ALRC considers that the judiciary should retain its traditional sentencing discretion to enable justice to be done in individual cases … The maintenance of individualised justice and broad judicial discretion are essential attributes of our criminal justice system, outweighing the potential deterrent effect that mandatory sentencing may have. The ALRC thus recommends that the Australian Government take steps to ensure that federal criminal justice offence provisions do not prescribe mandatory minimum terms of imprisonment.

Fact-finding for sentencers

In the leading case of *R v Olbrich*[66] the High Court reviewed the principles applied to fact-finding by sentencing courts. The respondent Olbrich had pleaded guilty to a charge of importing a quantity of heroin not less than the trafficable amount. At the sentencing hearing he tendered affidavit evidence to support a contention that he had acted only as a courier in a drug importation operation. That evidence was rejected by the trial judge, who sought to apply "normal sentencing principles". The prosecution was content for Olbrich to be sentenced on the basis of the objective facts, noting that the description of courier should not apply.

By majority,[67] the High Court held that the trial judge had not erred. It approved the principles outlined in *R v Storey*[68] and held that where there are disputed facts a sentencing judge may not take account of facts in a way that is adverse to the interests of the accused unless these facts have been established beyond reasonable doubt, but if there are circumstances which the judge proposes to take into account in

63 Sometimes legislation specifies a mandatory minimum sentence.

64 ALRC, *Sentencing* (ALRC 44,1988) p 29.

65 ALRC, *Same Crime, Same Time* (ALRC 103, 2006) pp 538-542. For a more detailed critique, see Johnson and Zdenkowski, n 20; N Morgan, "Why We Should Not Have Mandatory Penalties: Theoretical Structures and Realities" (2002) 23 *Adelaide Law Review* 141; G Santow, "Mandatory Sentencing: A Matter for the High Court?" (2000) 74 *Australian Law Journal* 298.

66 (1999) 199 CLR 270. For an incisive analysis of the decision, see K Warner, "Sentencing Review" (2000) 24(6) *Criminal Law Journal* 355 at 364-365.

67 Gleeson CJ, Gaudron, Hayne and Callinan JJ.

68 (1998) 1 VR 359 at 369.

favour of an accused, it is enough that they be proved on the balance of probabilities. Justice Kirby dissented. He, too, relied on *Storey* but took the view that the application of those principles to the facts of the case generated a different outcome – namely that the primary judge had erred. In his view the failure of the respondent to prove that he was a courier did not warrant the conclusion by the primary judge that he was a principal. The classification of a drug importer has a definite connotation as a matter of aggravation in sentencing drug importers. Matters of aggravation must be proved beyond reasonable doubt by the prosecution.[69]

By contrast, the majority stated:

> We reject the contention that a judge who is not satisfied of some matter that is urged in a plea on behalf of an offender must, nevertheless, sentence the offender on the basis that accepts the accuracy of that contention unless the prosecution proves the contrary.[70]

In *Weininger v The Queen*,[71] the High Court again confronted the issue of fact-finding in the sentencing process. More specifically, it had to consider the significance of remarks on sentencing made by the primary judge, who imposed a heavy sentence on the appellant (who had no prior convictions in Australia or Israel) when he pleaded guilty to two federal offences and one State offence relating to drug importation and money laundering. The remarks by the primary judge, which were, in essence, the subject of the challenge, were:

> The prisoner's prior good character in the sense that he comes before the court without any prior convictions is a matter which must receive some recognition. However, in the face of strong evidence establishing the prisoner's participation in cocaine importation by the same syndicate for some period of time before the commission of the instant offences, he cannot be treated as a first offender with the attendant leniency that that status usually attracts.[72]

By majority, an appeal to the Court of Criminal Appeal was dismissed, with Simpson J in dissent.

The alleged flaws in the primary judge's remarks were that she had sentenced the appellant for offences with which he had not been charged and of which he had not been convicted. Further, if prior discredited conduct was to be taken into account it was for the prosecution to assert it and prove it beyond reasonable doubt. The majority of the High

69 *R v Olbrich* (1999) 199 CLR 270 at 292-293 [56]. The Court of Criminal Appeal embraced a similar approach.

70 (1999) 199 CLR 270 at 280-281 [24].

71 (2003) 212 CLR 629.

72 Cited in the joint judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ: (2003) 212 CLR 629 at 634 [14].

Court[73] dismissed the appeal. The reasoning (following *Olbrich*) was that the sentencing court was not obliged to choose between being satisfied on the balance of probabilities that the accused had not previously engaged in drug importation or money laundering or being satisfied beyond reasonable doubt that he had. The sentencing judge may not be persuaded of either conclusion. The relevant sentencing fact was what was known of the appellant's character and his antecedents. The High Court majority acknowledged that the trial judge's terminology "cannot be treated as a first offender" was unfortunate (if seen in isolation) but should be placed in context.

Justice Kirby dissented strongly and adopted (in part) the reasoning of Simpson J, who dissented in the court below. As a threshold matter he argued that taking account of evidence of prior involvement in federal crime bypassed the constitutional entitlement to a jury trial.[74] Justice Kirby reasoned:

> If the prosecution wished to have the appellant punished in any way, directly or indirectly, for participation in earlier acts of cocaine importation, besides those of which it charged him, it was obliged to add additional counts to the indictment charging him in respect of such acts. With regard to such counts, the appellant would have had to consider, and if he so decided, to insist on the observance of the constitutional prescription. Indirect circumvention of the constitutional norm should not occur.[75]

The real dispute is one of characterisation of the sentencing process. The majority of the High Court (and, indeed, all members of the Court of Criminal Appeal, including Simpson J who dissented) deny that the appellant was sentenced for uncharged offences. They claim that the primary judge legitimately reduced the credit which might otherwise be available having regard to what was known of the appellant's antecedents.

Sentencing factors

The matters that a court may take into account in reaching its sentencing decision are many and varied. These days they are largely set out in legislation.[76] Yet there is still some scope for disagreement as to the

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73 A joint judgment by Gleeson CJ, McHugh, Gummow and Hayne JJ, and a separate concurring judgment by Callinan J.

74 Compare the majority, who said that following a plea of guilty there was no reason to empanel a jury because there was, with respect to sentencing, no function for a jury to perform: see *Cheng v The Queen* (2000) 203 CLR 248.

75 *Weininger v The Queen* (2003) 212 CLR 629 at 646 [54].

76 For example, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A; *Sentencing Act 1991* (Vic) s 5(2); *Penalties and Sentences Act 1992* (Qld) s 9(2); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1); *Crimes (Sentencing) Act 2005* (ACT) s 33; *Sentencing Act 1995* (NT) s 5(2). Compare Tasmania, where the legislation does not set out general factors. It does, however, specify three non-exhaustive factors relevant to the recording of a conviction: see *Sentencing Act 1997* (Tas) s 9.

operation of the various factors. Considered below are some of the relevant High Court cases in which Kirby J participated.

Justice Kirby has referred to the "social stigma" that is an inevitable consequence of a conviction (quite apart from a prison term) as an appropriate matter to consider in deciding to suspend a prison sentence.[77] Moreover, in certain circumstances the court could, in his view, take account of "the additional opprobrium, adverse publicity, public humiliation and personal, social and family stress which he suffered".[78] *Ryan* concerned an application for special leave to appeal against a sentence imposed in respect of 14 counts of sexual offences against young boys. The appellant (who pleaded guilty) was a priest who admitted that he was a paedophile. The two grounds of appeal related to a failure by the sentencing judge to extend appropriate leniency for (a) the accused's disclosure of unknown offences; and (b) the accused's good character.

The appeal was allowed on the basis that the denial of any leniency at all for good character was a sentencing error. During the course of his judgment, Kirby J made the remarks quoted above by way of obiter dicta. Justice Callinan agreed with those comments.[79] But McHugh J was less convinced that "public opprobrium and a permanent and public stigma entitle a convicted person to a lesser sentence than would otherwise be the case".[80]

In *Cameron v The Queen*,[81] Kirby J formed part of the majority[82] which upheld the appeal. (Justice McHugh dissented.) This is the leading case on the principles to be applied when a court is considering the sentencing discount upon a guilty plea.[83] The decision distinguished the sentencing leniency to be afforded to someone who expressed genuine remorse and contrition from that which a court may consider in respect of so-called utilitarian benefits. Justice Kirby (focusing on consequence rather than motive of the offender) expressed the latter in terms of the public interest in saving the community from the cost and inconvenience of a trial and the various collateral cost benefits as well as encouraging the clear-up rate of crime, vindicating public confidence in legal processes and the law and assisting victims to put their experiences behind them and sparing them (especially in traumatic cases) from the ordeal of giving evidence. Justices Gaudron, Gummow and

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77 *Dinsdale v The Queen* (1999) 202 CLR 321.

78 *Ryan v The Queen* (2001) 206 CLR 267 at 303 [123].

79 (2001) 206 CLR 267 at 318-319 [176]-[178].

80 (2001) 206 CLR 267 at 284 [52]-[53].

81 (2002) 209 CLR 339.

82 The remaining Justices being Gaudron, Gummow and Callinan JJ.

83 The reasoning is not necessarily applicable in some State or Territorial jurisdictions because of specific statutory provisions or sentencing guidelines.

Callinan preferred to characterise the utilitarian value of a guilty plea as facilitating the course of justice.[84]

A further significant case concerning guilty pleas in which Kirby J participated was *GAS v The Queen; SJK v The Queen*.[85] In this matter a joint judgment[86] dismissed an appeal by the two juvenile appellants who had been convicted and sentenced for manslaughter following a guilty plea. Originally each was charged with murder in relation to the strangulation of an elderly woman. Eventually, the Crown who conceded that they could not establish which of the two actually killed the victim, accepted pleas to manslaughter. The sentencing court imposed prison terms of six years (with a four-year non-parole period) in each case. The Director of Public Prosecutions successfully appealed these sentences on the grounds of manifest inadequacy. The High Court found no error in the Court of Appeal ruling. During the course of their decision, the High Court laid down principles affecting plea agreements.[87]

A failure by the primary judge to consider a relevant matter on sentencing may found error warranting interference by the High Court, notwithstanding that neither the offender nor his legal representative specifically raised the matter either at trial or upon appeal.[88] In *AB v The Queen* the appellant (a former teacher) pleaded guilty to 67 offences of a sexual character against former students. Following complaints to the police he fled to the United States, but was eventually extradited on 28 offences. He confessed fully and volunteered information about 39 offences, which might not otherwise have been discovered. He waived his entitlement to object (under extradition law) to being tried and sentenced for those additional offences. By majority (Gummow, Kirby and Callinan JJ) the High Court held that the sentencing judge's discretion miscarried.[89] Justice Kirby said:

> In my opinion, this is the kind of exceptional case when it can be said that the factual foundation for a point of legal significance was adequately laid before the courts of trial and appeal, so that the failure to perceive the significance of the consideration resulting from the operation of the law is not something that should be laid exclusively at the door of the appellant …
>
> Due and explicit regard ought to have been given to the significance of the appellant's waiver of extradition rights ie his non-insistence on the rule of speciality. It was a consideration different from, and additional

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84 They took this view because a focus on cost-saving may conflict with the principle that a person should not be penalised for pleading not guilty: *Siganto v The Queen* (1998) 194 CLR 656.

85 (2004) 217 CLR 198.

86 Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ.

87 *GAS v The Queen; SJK v The Queen* (2004) 217 CLR 198 at 210-211 [28]-[30].

88 *AB v The Queen* (1999) 198 CLR 111.

89 McHugh and Hayne JJ dissented.

> to, contrition, the clearing-up of crime difficult to detect and the saving of public costs. Because no consideration was given at first instance or on appeal, and on the contrary because of the way additional confessions were used to the appellant's disadvantage, the sentencing discretion miscarried.[90]

Parole schemes vary widely in the States and Territories. Often, parole schemes make separate provisions for life sentence prisoners. In South Australia, prisoners convicted of murder are subjected to a mandatory life sentence. The sentencing judge has a power to determine a non-parole period, if this is considered appropriate. In *Inge v The Queen*,[91] the High Court considered the relevance of the age of the youthful offender convicted of murder in determining the non-parole period and, in particular, whether his youthfulness counted against him. The unanimous decision of the court[92] ruled that it was an erroneous approach to impose a longer non-parole period because of the relative youth of the offender and that the matter should be remitted for further consideration by the Court of Criminal Appeal. Justice Kirby observed:

> [I]n the scheme of the South Australian legislation, life imprisonment does not necessarily mean (and in most cases will not involve) imprisonment for the term of the prisoner's natural life. Accordingly, a foundation for the calculation of the non-parole period by reference to that consideration is knocked away … To calculate the non-parole period by reference to the supposed life expectancy of the prisoner is therefore to calculate it by reference to a factor that is irrelevant or misleading.[93]

On a number of occasions the High Court has considered the factors to be considered in sentencing federal offenders. The governing provisions (a non-exhaustive list) are set out in s 16A(2) of the *Crimes Act 1914* (Cth). In *Wong v The Queen*[94] all members of the court (including Kirby J) overturned the New South Wales Court of Criminal Appeal guideline judgment because of its incompatibility with these provisions. There is a conflict of opinion as to the meaning of s 16A(2)(c) considered in *Weininger*.[95] Justice Kirby stated that this provision did not permit "uncharged criminal acts" to be taken into account and found rather that this related to the totality principle.[96] On the other hand, Callinan J said that because s 16A(2)(b) allowed "other offences" to be taken into account and s 16A(2)(c) referred to a "course of conduct", there was a basis for distinguishing the provisions and "for taking into account

90 *AB v The Queen* (1999) 198 CLR 111 at 147 [96], 149 [100].

91 *Inge v The Queen* (1999) 199 CLR 295.

92 Gleeson CJ, Gaudron, Kirby, Hayne, and Callinan JJ.

93 *Inge v The Queen* (1999) 199 CLR 295 at 318 [63].

94 *Wong v The Queen* (2001) 207 CLR 584.

95 (2003) 212 CLR 629.

96 *Weininger v The Queen* (2003) 212 CLR 629 at 647 [56]–[57].

under the latter, relevant conduct, albeit that it might involve criminal acts which in turn might not have resulted in charged and established (by verdict or plea) facts constituting other offences".[97]

Section 16G of the *Crimes Act 1914* (Cth) provided:[98]

> If a federal sentence is to be served in a prison of a State or Territory where State or Territory sentences are not subject to remission or reduction, the court imposing the sentence must take that fact into account in determining the length of sentence and must adjust the sentence accordingly.

In *Lee Vanit v The Queen; Tansakun v The Queen* and *Wangsaimas v The Queen*[99] each of the appellants pleaded guilty to importing a commercial quantity of heroin into Australia. Each was sentenced to life imprisonment and a non-parole period was not specified. The High Court unanimously dismissed the appeal, holding that s 16G did not apply to a life sentence. Justice Kirby, after making certain observations about the difficulties of construing Pt 1B of the *Crimes Act 1914* (Cth), held that s 16G could not apply to a life sentence which, inherently, was an indeterminate sentence.[100]

Sentencing for multiple offences

The conventional approach to sentencing an offender for multiple offences is to fix an appropriate sentence for each offence and then to have regard to principles of cumulation or concurrence, as well as to the principles of totality.

In *Pearce v The Queen*[101] the appellant relied on a double jeopardy argument in respect of convictions for two overlapping charges. All members of the High Court (including Kirby J) were of the view that there was no strict double jeopardy. They also agreed that the total effective sentence imposed by the primary judge was appropriate. However, they divided over whether to intervene. Justice Kirby thought the error in applying principles of concurrent sentences did not warrant disturbing the sentence. The majority[102] observed:

> To an offender, the only relevant question may be "how long", and that may suggest that a sentencing judge or appellate court should have regard only to the total effective sentence that is to be imposed on an offender.

97 (2003) 212 CLR 629 at 665 [112], cited in ALRC, *Same Crime, Same Time* (ALRC 103, 2006) p 174.

98 Now repealed.

99 (1997) 190 CLR 378.

100 McHugh and Gummow JJ agreed. Brennan CJ and Gaudron J ruled that a life sentence is not ordinarily understood to be capable of adjustment by remission or reduction. It would be inappropriate to interpret s 16G as requiring a court deciding whether to impose a life sentence to take the possibility of such adjustment into account.

101 (1998) 194 CLR 610.

102 McHugh, Hayne and Callinan JJ in a joint judgment (Gummow J agreeing).

> Such an approach is likely to mask error. A judge sentencing an offender for more than one offence must fix an appropriate sentence for each offence and then consider questions of cumulation or concurrence, as well, of course, as questions of totality.[103]

This approach was reaffirmed in *Johnson v The Queen*[104] by all members of the court, including Kirby J. In *Pearce* the court also made observations about "double punishment" (falling short of strict double jeopardy). Justice Kirby said:

> It is tempting to regard the imposition of common concurrent sentences as a practical way of avoiding the risk of double punishment … In the imposition of a sentence in such circumstances, great care must be taken to avoid double punishment for the same conduct. That care should be manifest in the reasons of the sentencing judge.[105]

A similar view was taken in the joint judgment: "To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of elements that are common."[106]

Suspended prison sentences

Suspended sentences of imprisonment have been regarded as controversial, on the basis of "conceptual incongruity" and also because of the popular perception that the punishment imposed is illusory.[107] Nevertheless, despite waxing and waning popularity over the years with various legislatures, suspended imprisonment is a much used sentencing option and is available in Australia under federal law and in every State and Territory. The leading authority is *Dinsdale v The Queen*[108] in which the principal judgment was delivered by Kirby J. In his reasons, it was made clear that the appropriate method for sentencing courts to adopt was a two-stage process. First, the court should determine whether, having regard to all the normal sentencing considerations, a sentence of imprisonment is called for. Then and only then, should the court turn its mind to the decision as to whether it is appropriate to suspend. Justice Kirby made certain observations indicating that the previous

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103 *Pearce v The Queen* (1998) 194 CLR 610 at 623-624 [45].

104 (2004) 205 ALR 346 at 350-352, 356 [12], [26].

105 *Pearce v The Queen* (1998) 194 CLR 610 at 650 [121].

106 (1998) 194 CLR 610 at 623 [40].

107 M Bagaric, "Suspended Sentences and Preventive Sentences: Illusory Evils and Disproportionate Punishments" (1999) 22 *University of New South Wales Law Journal* 535. See also Victorian Sentencing Advisory Council, *Suspended Sentences*, Final Report – Pt 1 (Sentencing Advisory Council, Melbourne, 2006) and Victorian Sentencing Advisory Council, *Suspended Sentences and Intermediate Sentencing Orders*, Final Report – Pt 2 (Sentencing Advisory Council, Melbourne, 2008). For a comprehensive review of suspended sentences in the Australian context, see L Bartels, "Sword or Feather? The Use and Utility of Suspended Sentences in Tasmania" (PhD Thesis, University of Tasmania, 2008).

108 (1999) 202 CLR 321.

approach by courts of focusing on rehabilitation prospects in respect of the stage-two issue was too narrow. Rehabilitation was but one of the many factors to be taken into account. Justice Kirby was mindful of the tension which existed between the status of suspended imprisonment as the penultimate penalty known to law on the one hand, and its perception (at times at least) by the public, victims and even offenders as something considerably less than that.[109] To some extent the tension might be reduced by better education as to the nature and operation of this sentencing option, stringent conditions attached to such orders and effective and well-understood enforcement measures upon breach.[110] In the meantime, *Dinsdale* provides the touchstone for courts grappling with the decision to suspend.

Sentencing of federal offenders[111]

Despite the ALRC reports,[112] the autochthonous expedient still prevails. That is, State and Territorial courts apply Pt 1B of the *Crimes Act 1914* (Cth) (which is not comprehensive, nor reflective of ALRC recommendations, except in very limited respects) to the sentencing of federal offenders. Federal prisoners are detained in State or Territorial prisons (see *Constitution*, s 120) while non-custodial sentencing options are dealt with pursuant to State and Territorial law,[113] as are evidentiary and procedural matters.[114]

The upshot is that Courts of Criminal Appeal (or their equivalents) in the respective States and Territories are the arbiters of sentencing for the cohort of federal offenders which come before them and the touchstone of consistency is more likely to be the sentences imposed on the State or Territorial offenders dealt with by those courts. In other words, "intra-State" or "intra-Territorial" uniformity prevails rather than national uniformity. It is against this background that some recent High Court decisions involving sentencing of federal offenders (in which Kirby J participated) will be considered.[115]

109 *Dinsdale v The Queen* (1999) 202 CLR 321 at 346-347.

110 L Bartels, "The Use of Suspended Sentences in Australia; Unsheathing the Sword of Damocles" (2007) 31 *Criminal Law Journal* 113.

111 Cases involving sentencing factors and federal offenders are dealt with earlier: see "Sentencing factors".

112 See ALRC, *Sentencing of Federal Offenders (Interim)* (ALRC 15, 1980); ALRC, *Sentencing* (ALRC 44, 1988); ALRC, *Same Crime, Same Time* (ALRC 103, 2006).

113 As modified by the *Crimes Act 1914* (Cth).

114 *Judiciary Act 1903* (Cth) s 68.

115 The High Court appears to have dealt with 12 sentencing appeals involving federal offenders since 1990. Only the cases involving Kirby J are considered in this chapter: *Johnson* (2004); *Putland* (2004); *Weininger* (2003); *Wong* (2001); *Olbrich* (1999); *Postiglione* (1997); *Vanit* (1997). Other High Court cases involving sentencing appeals by federal offenders (after 1990 but not involving Kirby J) are not reviewed: *Savvas v The Queen* (1995) 183 CLR 1; *Kesavarajah v The Queen* (1994) 181 CLR 230; *Hookham v The Queen* (1994) 181 CLR 450; *Leeth v Commonwealth* (1991) 174 CLR 455; *R v Shrestha* (1991) 173 CLR 48.

The majority of the High Court certainly endorsed the "autochthonous expedient" in *Putland v The Queen*,[116] which involved a challenge by the appellant to the power of the sentencing court in the Northern Territory to impose a single aggregate sentence for several indictable federal offences. The majority[117] held that such sentencing was permissible because the general terms of s 68 of the *Judiciary Act 1903* (Cth) picked up the relevant Northern Territory legislation (which authorised such aggregate sentences for Territorial offenders) and dismissed the appeal. There was some discussion by the majority of the relevance or otherwise of ALRC 44 (1988) to the introduction of the 1989 amendments contained in Pt 1B of the *Crimes Act 1914* (Cth). Despite the enactment of s 4K, which only provided expressly for an aggregate sentence for federal summary offenders, the majority held that this did not pose an obstacle to the operation of the general terms of the *Judiciary Act*.

In a powerful dissent, Kirby J asserted:

> Subject to law, federal offenders, convicted of indictable offences should ordinarily be treated uniformly and without discrimination, wherever their conviction occurs in the Commonwealth. In sentencing they should be so treated unless a valid law authorises or contemplates a relevant difference.[118]

After a careful examination of the facts, legislation and legislative history, Kirby J concluded that, in essence, the proviso in s 68(1) of the *Judiciary Act* governed the situation. That is, federal laws "otherwise provide". The relevant federal law, s 4K of the *Crimes Act 1914* (Cth), expressly provided for an aggregate sentence for summary offenders – a category quite different from serious, indictable offences. As Kirby J pointed out, it would have been quite a simple matter for the legislation to include indictable offences. An explicit federal law should not be undone by the general provisions of the *Judiciary Act*. This was enough to reach a conclusion favourable to the appellant. But Kirby J made some further observations. In his view, Pt 1B introduced a new federal sentencing regime, however imperfect or incomplete. The court should not undermine it. Indeed, the joint reasons of Gaudron, Gummow and Hayne JJ in *Wong*[119] emphasised the duty of Australian courts to obey the "legislative command of Pt 1B of the Commonwealth Crimes Act" in sentencing convicted federal offenders.

Justice Kirby also elaborated on considerations of legal principle and policy which, in his view, supported the legislative construction advocated by the appellant:

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116 (2004) 218 CLR 174.

117 Gleeson CJ, Gummow, Callinan and Heydon JJ.

118 *Putland v The Queen* (2004) 218 CLR 174 at 177-178 [67].

119 (2001) 207 CLR 584 at 610 [72].

> Only if specific sentences are identified for federal indictable offences, such as those of which the appellant was convicted, will the transparency of the process be fully upheld. Taking into account considerations of totality and of sentences for connected offences in relation to each other is clearly desirable and permissible. However, the submergence of sentences for major crimes in a single undifferentiated aggregate sentence carries a risk of injustice to the offender … In some cases, it will "mask error" in the judicial approach to sentencing. As Professor Warner stated:
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> > "A general sentence has the advantage of simplicity and convenience but may sacrifice considerations of uniformity and predictability at a time when such issues are considered particularly desirable."[120]

Indefinite imprisonment

A highly controversial issue in the community – and indeed the courts – is whether a person can be detained in prison for the protection of the community from future harm, as distinct from the notion of a penalty imposed by the court for a past offence. A related matter, discussed in Chapter 28, "Refugee Law", is the power of the executive to detain unlawful non-citizens indefinitely in immigration detention centres.

The former issue received a good deal of publicity when the *Community Protection Act 1994* (NSW) (the Act) was challenged in the High Court by the only subject of the legislation, Gregory Wayne Kable, not long before Kirby J's appointment to the High Court. Indeed Kirby J was critical of the provisions of the *Community Protection Bill 1994* (as it then was) when he addressed a human rights forum at the University of New South Wales.[121]

The High Court, by majority,[122] ruled that the Act was unconstitutional. Although different reasons were given, in simple terms, its invalidity flowed from a decision to grant to a State court (a repository of federal jurisdiction) powers which were inconsistent with, or repugnant to, Ch III of the *Constitution*.[123] Briefly considered below are High Court cases involving indefinite imprisonment or preventive detention in which Kirby J has been involved. They can be loosely grouped as follows: a series of cases in which the court reviewed the relevant legislation and the extent to which the procedures laid down had been properly followed (*Thompson, Lowndes*, *McGarry* and *Strong*); and cases involving

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120 *Putland v The Queen* (2004) 218 CLR 174 at 213-214 [116].

121 M D Kirby, "Intellectual Disability and Community Protection: Community Protection Bill 1994 (NSW)" (1994) 1 *Australian Journal of Human Rights* 398.

122 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 per Toohey, Gaudron, McHugh and Gummow JJ (Brennan CJ and Dawson J dissenting).

123 For a review of *Kable*, see G Zdenkowski, "Community Protection through Imprisonment without Conviction: Pragmatism versus Justice" (1997) 3(2) *Australian Journal of Human Rights* 8.

challenges to the Queensland dangerous prisoners legislation, which authorises preventive detention (*Fardon* and *Buckley*).

Thompson v The Queen[124] concerned an application for special leave to appeal against, among other things, an order that a period of indefinite imprisonment be served pursuant to s 98 of the *Sentencing Act 1995* (WA). It was common ground that certain psychological and other reports prepared to inform the primary judge were prepared in haste and were not comprehensive. In these circumstances special leave to appeal was granted and the appeal allowed,[125] with Kirby J (who delivered the principal judgment) observing:

> Where there was any possibility that an order of indefinite imprisonment might be made, it was essential that the procedures observed should be regular and scrupulously thorough and that the materials, including the pre-sentence reports, should be as adequate and complete as fairness to the prisoner required … [I]t is fundamental that the power to order indefinite imprisonment should be sparingly exercised and then only in clear cases.[126]

In *Lowndes v The Queen*,[127] the primary judge, after an invitation to make an order for indefinite imprisonment pursuant to s 98 of the *Sentencing Act* (WA), declined to do so, ordering instead a non-parole period. This decision was overturned by the Court of Criminal Appeal. The High Court (sitting as a Bench of seven judges including Kirby J) delivered a joint judgment allowing the appeal, in the course of which it affirmed the reasoning in *Chester v The Queen*[128] and *R v Moffatt*[129] to the effect that a court's power to impose an order of preventive detention should be confined to exceptional cases where such orders are demonstrably necessary.

A third case relating to s 98 of the *Sentencing Act 1995* (WA) involving Kirby J was *McGarry v The Queen*.[130] A majority of the High Court[131] held that if an appellate court decided that the discretion of the sentencing judge miscarried as to the nominal sentence, the whole sentence (including any orders for indefinite imprisonment) must be set aside and the appellate court would be obliged to re-sentence the offender. Further, that in deciding an offender was a danger to society it was not enough to consider a mere risk, even a serious risk of reoffending. Rather, a sentencing court must consider whether the offender would engage in conduct the consequences of which would properly be called

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124 (1999) 165 ALR 219.
125 Gaudron, Kirby and Hayne JJ.
126 *Thompson v The Queen* (1999) 165 ALR 219 at 224 [18]–[19].
127 (1999) 163 ALR 483.
128 (1988) 165 CLR 611.
129 (1998) 2 VR 229.
130 (2001) 207 CLR 121.
131 Gleeson CJ, Gaudron, McHugh, Gummow, Kirby and Hayne JJ (Callinan J dissenting).

grave or serious for the whole, or part, of society. The majority also emphasised the need to base any such decision on sufficient material. To the extent that reliance is placed on the past conduct of an offender, full details of such conduct (including relevant evidence) should be provided to the sentencing judge and the offender should have an opportunity to be heard. Justice Kirby stressed that indefinite imprisonment is an exceptional and discretionary punishment that should not be ordered except after the observance of fair procedures and upon the basis of appropriate materials.[132] He also made some general observations as to why indefinite imprisonment amounted to what he described as a "serious and extraordinary step".[133]

In *Strong v The Queen*,[134] the High Court considered, amongst other things, orders made against an appellant under the *Habitual Criminals Act 1957* (NSW) (the Act), including pronouncement as an habitual criminal and a sentence of imprisonment additional to sentences for certain offences of which he was convicted (to be served concurrently), by way of preventive detention. The Court of Criminal Appeal modified the terms of the sentences but left intact the pronouncement of the appellant as an habitual criminal but reduced the term of the concurrent preventive sentence. A majority of the High Court[135] dismissed the appeal against the orders made in the Court of Criminal Appeal. Justices McHugh and Kirby dissented. During the course of his judgment Kirby J observed that scrupulous procedures were required in dealing with statutes authorising preventive punishment for offenders;[136] that the law relating to habitual criminals had fallen into disuse and that there had been a proposal to repeal it;[137] that the powers conferred by law should (by analogy with the indefinite imprisonment cases) be used sparingly;[138] that the materials before the court were unsatisfactory and inadequate;[139] that preventive detention laws fall more heavily on minority and indigenous populations;[140] and that formal arguments should not succeed when the liberty of the subject is concerned.[141]

A constitutional challenge to the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) was launched in *Fardon v Attorney-General for the State of Queensland*.[142] The appellant sought to argue that the legislation, which authorised the Supreme Court of Queensland to make continuing

132 *McGarry v The Queen* (2001) 207 CLR 121 at 142 [62].
133 (2001) 207 CLR 121 at 142-143 [60]-[61].
134 (2005) 224 CLR 1.
135 Gleeson CJ, Callinan and Heydon JJ.
136 *Strong v The Queen* (2005) 224 CLR 1 at 16 [35].
137 (2005) 224 CLR 1 at 25-26 [61]-[62].
138 (2005) 224 CLR 1 at 30 [79].
139 (2005) 224 CLR 1 at 31 [83].
140 (2005) 224 CLR 1 32-33 [87].
141 (2005) 224 CLR 1 at 35 [95].
142 (2004) 223 CLR 575.

detention orders in respect of prisoners convicted of serious sexual offences, was invalid. The basis for the claim was that the legislation sought to confer powers on the Supreme Court which were incompatible with that court's position under the *Constitution* as a potential repository of federal jurisdiction. Relying on *Kable v Director of Public Prosecutions (NSW)*,[143] the appellant said that the powers conferred on the court by the legislation were repugnant to the court's constitutional integrity. By majority,[144] the High Court held that the terms of the legislation (directed as they were to achieve what Callinan and Heydon JJ described as "a legitimate, preventative, non-punitive purpose in the public interest, and to achieve it with due regard to a full and conventional judicial process, including unfettered appellate review")[145] did not violate the principle in *Kable*. Justice Kirby, in his dissenting judgment, pointed to the notorious unreliability of the prediction of dangerousness.[146] He concluded that the principle in *Kable* applied to the legislation because it was repugnant to Ch III of the *Constitution* in several respects and that the cumulative effect of these features rendered the entire legislation invalid because the offending provisions could not be severed. In his reasons, Kirby J issued a cautionary note about the assumption that so-called civilised countries could not fall into the error of embracing a phenomenological approach to punishment by addressing "the estimated character of the criminal instead of the proved facts of a crime". This approach, coupled with an abuse of the powers of preventive detention, emerged as a serious problem in 1930s Germany.[147]

Another similar Queensland law (*Penalties and Sentences Act 1992* (Qld) s 163) was considered by the High Court in *Buckley v The Queen*[148] a short time later. This statute authorised the imposition of an indefinite prison term on violent offenders, provided the court had followed detailed procedures. The appellant, who was the subject of such an order, did not challenge the constitutional validity of the provisions but rather the manner in which the discretionary judgment was exercised. The High Court, in a joint judgment, which included Kirby J,[149] decided that the primary judge failed to have regard to the exceptional nature of an indefinite sentence and the Court of Appeal should have reconsidered the exercise of sentencing discretion. Giving its reasons, the High Court stressed: the exceptional nature of an indefinite sentence (because, among other things, it departs from the principle of proportionality); the need for the primary judge to observe closely the statutory preconditions to the making of

143 (1996) 189 CLR 51.

144 Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ (Kirby J dissenting).

145 *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 at 658 [234].

146 (2004) 223 CLR 575 at 622-623 [123]-[125].

147 (2004) 223 CLR 575 at 645 [188].

148 (2006) 80 ALJR 605.

149 Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ.

such an order; and the requirement to give detailed reasons for such an order.

Baker v The Queen[150] was not specifically a case about a power to impose an indefinite prison term but dealt with a kindred notion. The appellant challenged the validity of s 13A of the *Sentencing Act 1989* (NSW), which provided that a person serving a life sentence who was the subject of a non-release recommendation was ineligible for determination of a minimum term and an additional term (as other life sentence prisoners at the material time were) unless special reasons existed. He claimed the provision was unconstitutional because it offended the principle in *Kable*. A majority of the High Court[151] dismissed the appeal ruling that the provision did not violate the principle and was accordingly valid. Justice Kirby issued a robust dissenting judgment. He referred to the parliamentary debates leading up to the introduction of the impugned provision in which the avowed parliamentary purpose was to keep a small defined class – ten identified life sentence prisoners – regularly referred to as "animals", locked up forever. Justice Kirby was careful to note that it was not the court's role to intrude on the rhetoric or language embraced by Members of Parliament but said that the context, the parliamentary debate, was germane to the issue he had to consider.[152] He then referred to further contextual material – namely, the uncontested objective evidence accepted by the primary judge – that the appellant had demonstrated in his 30 years of confinement that he was remorseful, a model prisoner with powerful prospects of rehabilitation.[153] Justice Kirby noted that, unlike the legislation invalidated in *Kable*, these provisions did not target a single individual – a fact of which the legislators were clearly conscious. Considering the circumstances as a whole, Kirby J was satisfied that the law was incompatible with, or repugnant to, Ch III of the *Constitution* in the terms articulated in *Kable*. The appellant was identified as one of a class of ten nominated persons. In effect, the law was ad hominem in nature.[154] According to Kirby J, the provisions were in substance (if not in form) retroactive in nature,[155] offended international human rights principles[156] and embraced arbitrary and discriminatory criteria.[157]

Effectively, the majority view was that the constitutional validity of the law survived because it did not entirely deprive the New South Wales Supreme Court of its power to make a discretionary decision once the precondition that special reasons exist was satisfied. Justice Kirby agreed

150 (2004) 223 CLR 513.

151 Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.

152 *Baker v The Queen* (2004) 223 CLR 513 at 536-539 [59]-[66].

153 (2004) 223 CLR 513 at 540-541 [69]-[71].

154 (2004) 223 CLR 513 at 547 [94]-[96].

155 (2004) 223 CLR 513 at 548 [99]-[100]. Interestingly, Senior Counsel for the appellant expressly disclaimed a retroactivity argument (as pointed out by Gleeson CJ at 520 [7]).

156 (2004) 223 CLR 513 at 551 [109]; see also at 558-559 [133]-[135].

157 (2004) 223 CLR 513 at 553 [116].

that, in form, that was the case. In substance, in his view, the collective effect of the law and the circumstances in which it was made foreclosed that process. It was similar to the division of opinion that occurred in *Fardon*. In each case, Kirby J chose to pierce the veil.

Prisoners' rights

Almost 30 years ago, after reviewing the extent to which Australian courts had intervened to enhance prisoners' rights, I concluded that the "hands-off" or non-interventionist posture of the courts had been replaced by an occasional willingness (albeit modest) to adopt a more positive approach.[158] There has not been a landslide since. But this is not entirely due to court reluctance. The opportunities for courts to consider such issues are few and far between, not least because of the obvious difficulties prisoners have in initiating such litigation. In the rarefied atmosphere of the High Court the cases are fewer still. Nevertheless, in the last few years there have been a number of cases in which prisoner litigants have appeared in the High Court in which Kirby J has expressed strong views about their rights and conditions.

The most recent (and most successful as far as prisoners' rights are concerned) was *Roach v Electoral Commissioner*.[159] In that case, by majority,[160] the amendments introduced in 2006 to the *Commonwealth Electoral Act 1918* (Cth), which denied the franchise to all voters serving a term of imprisonment, were declared invalid. Previously, the disentitlement (as to federal elections) had been limited to prisoners serving three years or more. Vickie Lee Roach was enrolled as a voter in a federal electorate. In 2004 she was convicted of certain crimes and sentenced to an effective term of six years' imprisonment. While her challenge to the blanket prohibition succeeded, it was a pyrrhic victory as far as she was concerned. The court upheld the validity of the previous provisions, which excluded her as a voter.

There is a long history relating to the loss of civil rights by prisoners, including voting rights. The loss of such rights is closely associated with the notion of civil death.[161] In 1988 the ALRC recommended the removal of all restrictions on the right to vote based on conviction or imprisonment:

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158 G Zdenkowski, "Judicial Intervention in Prisons" (1979-80) 6 *Monash Law Review* 294; see also G Zdenkowski, "Review of Disciplinary Proceedings in Australian Prisons" (1983) 7 *Criminal Law Journal* 3.

159 (2007) 233 CLR 162.

160 Gleeson CJ, Gummow, Kirby and Crennan JJ.

161 For a detailed review of voting rights of convicted persons in all Australian jurisdictions, see J Fitzgerald and G Zdenkowski, "Voting Rights of Convicted Persons" (1987) 11 *Criminal Law Journal* 11. Note that there have been a number of legislative changes since this review.

> The denial of the right to vote is an unnecessary restriction upon the civil rights of convicted persons. It is not a just punishment, especially if imposed in addition to other punishments. The bases for its existence are outmoded or anachronistic.[162]

By contrast, the rationale advocated by Gummow, Kirby and Crennan JJ in their joint reasons is rather modest. They acknowledge that a blanket denial of the franchise to all prisoners is too broad, discriminatory and capricious because it has no regard to any measure of culpability. But they accept that it is legitimate to deny the franchise to appropriately identified classes of prisoners, in respect of whom[163] it could be said that their offences evinced an incompatible culpability which rendered those electors unfit to participate in the electoral process. While one might claim that this is a victory for prisoners' rights, it is a very limited and cautious outcome. Justices Gummow, Kirby and Crennan were content to accept that a three-year prison term was an appropriate criterion to deny the franchise. This is a rather crude yardstick which could apply to a whole range of circumstances. Moreover, the link between a loss of voting rights and an appropriate degree of culpability was asserted rather than explained. Nor was there any attempt to investigate or articulate the underlying notion of civil death or the status of prisoners as citizens deserving equality before the law.[164] In a nutshell, the upshot of *Roach* might be to entrench the notion that at least some prisoners should lose the franchise and set back the prospect of legislative reform to remove all, or most, restrictions.[165]

Justice Kirby took a bolder stance for prisoners in the case of *Behrooz*.[166] In that matter, Mahran Behrooz was held as an unlawful non-citizen at a detention centre at Woomera in South Australia. After leaving the centre without permission he was charged with escape. He sought and obtained the issue of witness summonses directed to the relevant department (the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA)) and to the operators of the detention centre, requiring production of documentary material as to conditions at the detention centre. An application to set aside the summonses as an abuse of process was rejected by the Chief Magistrate but was successful in the Supreme Court of South Australia, the Full Court and

162 ALRC, *Sentencing* (ALRC 44, 1988) [243]; see also ALRC, *Sentencing: Prisons* (ALRC DP 31, 1987) [123]-[132].

163 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 200-201 [89]-[90].

164 In this respect contrast the strong statement by Kirby J three years earlier about prisoners as citizens, electors, subjects of the Queen and deserving equality before the law in *Muir v The Queen* (2004) 206 ALR 189 at 194 [24]-[25].

165 As to the constitutional powers to effect such reforms, see Fitzgerald and Zdenkowski, n 162 at 38-39.

166 *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486. However, on this occasion Kirby J was a lone dissentient.

the High Court. The majority of the High Court[167] held that conditions of detention were not relevant to the legality of detention. An unlawful non-citizen might have civil, equitable or administrative law remedies in relation to conditions of detention, or criminal sanctions might be imposed if the custodians of a detainee violated the criminal law, but an unlawful non-citizen held in a detention centre established under the *Migration Act* was held in "immigration detention" irrespective of the conditions of detention. It is important to recall that the point was not whether the conditions were intolerable. By definition, the evidence had not yet been received.

Justice Kirby dissented vigorously. In his view, if conditions of detention were inhuman or intolerable the detention would cease to be immigration detention. Accordingly, the evidence sought to be adduced to test the claim should be allowed. Justice Kirby observed:

> Putting it quite simply, whereas, as this Court has held, the constitutional head of power supports the administrative confinement of a person such as the appellant in "immigration detention", implicitly under reasonable and humane conditions, it would not support his prolonged confinement in inhuman and intolerable conditions. If that form of confinement were attempted in Australia it would be unlawful. It would be contrary to the *Constitution*.[168]

Justice Kirby also noted that the appellant might also rely on the constitutional necessity of a judicial order of punishment. Moreover, the *International Covenant on Civil and Political Rights* (which is binding on Australia in international law) prohibited arbitrary detention and was relevant to a construction of Australian legislation. Finally, Kirby J castigated the majority view that Behrooz should seek redress via alternative remedies, describing such a proposition as absurd. Given the circumstances of the case:

> [t]he overwhelming majority of asylum seekers who come to this Court are self-represented, and they are so because they lack the resources to retain counsel. People confined in immigration detention are likely to be impecunious, powerless, with limited command of the English language and, in a place as remote as Woomera, with extremely restricted access to legal assistance.[169]

Justice Kirby argued that to deprive the appellant of a forum to test the lawfulness would:

> also involve a failure of the Australian judicature to address a serious complaint of official unlawfulness in a context where that issue is relevant to the disposition of an actual legal controversy … We should

167 Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ.

168 *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 at 526 [116] per Kirby J.

169 (2004) 219 CLR 486 at 533 [136].

> not give a legal answer that future generations will condemn and that we ourselves will be ashamed of.[170]

The issue of prison conditions arose in a different context in *Cabal v United Mexican States [No 2]*.[171] In that case, an applicant for special leave to the High Court in respect of an extradition matter sought bail from Kirby J pending the hearing of that application. Justice Kirby ruled that in the circumstances bail could not be granted unless exceptional circumstances were demonstrated. Uncontradicted affidavit evidence was accepted by the court that for a period of 30 months the applicant had been subjected to unacceptable conditions of imprisonment and also degrading treatment.

Justice Kirby held that this treatment over a period of two-and-a-half years amounted to exceptional circumstances which (taken together with other matters not relevant here) warranted the grant of conditional bail, and he therefore exercised the power to grant bail, which he said arose by implication from the *Constitution*.

In *Cameron v The Queen*,[172] the appellant prisoner was unrepresented at his special leave application because legal aid was not available. However, the Western Australian authorities brought him to court so that he could argue his application in person. In the event he was granted special leave and ultimately (represented by counsel) succeeded on appeal. Justice Kirby, delivering his reasons for judgment, made some observations regarding legal representation of prisoners. In this case, it was fortuitous that the prisoner was brought to court and that he was able to persuade the High Court that there was an error in the court below. Justice Kirby noted that improved arrangements may be necessary for the presentation of special leave applications in person by indigent prisoners.[173]

These remarks were the subject of a critique, and were not followed by McHugh J in *Milat v The Queen*[174] where the applicant prisoner, an inmate of Goulburn Correctional Centre in New South Wales, sought orders (in the alternative) that he either be brought before the court to present his application or that he be enabled to do so via videolink. Both alternatives were rejected. In giving his reasons, McHugh J doubted that the court had the power to order that a prisoner be brought before the court but that, in any case, its exercise would only arise if the failure to make such an order would thwart the exercise of the court's jurisdiction. According to McHugh J, written submissions (the practice adopted in most comparable appellate jurisdictions) were satisfactory and would not be enhanced, in this case, by oral argument. Although critical of Kirby J's

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170 (2004) 219 CLR 486 at 533-534 [138]-[139].

171 (2001) 181 ALR 169.

172 (2002) 209 CLR 339.

173 *Cameron v The Queen* (2002) 209 CLR 339 at 370 [97].

174 (2004) 205 ALR 338.

remarks in *Cameron*, McHugh J correctly notes that they were largely concerned with legal representation for indigent prisoners. But he does not directly challenge Kirby J's suggestion that the court had the power to grant bail to an indigent prisoner pending grant of legal aid other than to comment that there could be a practical problem if the Crown declined to grant such aid. Justice McHugh also rejected the idea of a videolink because he said it was not the court's practice and, in effect, that such an order in favour of prisoners would open the floodgates.[175] An application to adjourn the motion was also dismissed on the basis that this would be futile.

The issue arose a couple of months later in *Muir v The Queen*[176] before a High Court Bench consisting of McHugh, Kirby and Hayne JJ. The majority, Justices McHugh and Hayne, dismissed a notice of motion seeking an order that the applicant, an unrepresented inmate of Goulburn Correctional Centre in New South Wales, be brought to court to enable presentation by him of oral argument. In essence they did so on the basis that neither s 78 of the *Judiciary Act 1903* (Cth) nor the *High Court Rules 2004* conferred such a right on the applicant.[177] Moreover, they did not perceive there to be a constitutional power to make the order sought. Even if such a power existed, they were satisfied that this was not an occasion for its exercise in favour of the applicant.

Justice Kirby, in a dissenting judgment, expressed concern about what amounted, in effect, to unequal treatment of some prisoners:[178]

> Sooner or later – preferably sooner – this court will have to decide whether it has the power to order that a person, having the custody of a prisoner, bring that person to court, or secure place, where the prisoner can be heard in support of an application for special leave or in an appeal, if leave is granted, when the prisoner is not represented by a lawyer. In my view it is arguable that this court has the relevant power, as incidental to its constitutional function to hear and determine appeals from all judgments of Supreme Courts.

The unequal contest at the Bar table was noted by Kirby J – experienced counsel versus an empty seat. In the view of Kirby J, the court should grant the order sought. However, if the court has sufficient doubts, it should at least grant an adjournment of the motion and of the special leave hearing and request the Attorney-General of the Commonwealth, the Human Rights and Equal Opportunity Commission, the relevant Bar Association or some other appropriate person or body to appear by counsel before the court, as well as the respondent, to assist the court to

175 *Milat v The Queen* (2004) 205 ALR 338 at 344-345 [34].

176 (2004) 206 ALR 189.

177 Following *Collins v The Queen* (1975) 133 CLR 120 in which it was held that a special leave application is no more than an application for leave to commence a proceeding, and therefore s 78 does not apply.

178 *Muir v The Queen* (2004) 206 ALR 189 at 191 [12]-[13].

resolve the issue of power. Justice Kirby emphasised the utility of oral submissions by prisoners and noted the practice of the New South Wales Court of Criminal Appeal (in which he regularly participated for more than a decade prior to his High Court appointment) invariably to allow unrepresented prisoners to appear in person (or via videolink) to present argument on their appeal. He rejected the suggestion that this was a fruitless exercise and noted that he had benefited from oral argument by such prisoners both in the Court of Criminal Appeal and in the High Court.

Moreover, to deny such rights to some prisoners is discriminatory while the High Court embraces the practice of short oral argument for all others on special leave applications. Further, it is patently unfair and unequal when one observes that prisoners from Queensland, Western Australia and South Australia are regularly brought to court or to a videolink in Canberra. However, prisoners in New South Wales, and Australian Capital Territory prisoners committed to New South Wales prisons, are not afforded this opportunity because of the capricious circumstance that New South Wales correctional authorities chose not to cooperate:

> This is an inequality in the treatment of prisoners and in the exercise of their rights within the Commonwealth in which I do not acquiesce. Whether there is power to correct it should be addressed without delay … [P]risoners are human beings. In most cases, they are also citizens of this country, "subjects of the Queen" and "electors" under the *Constitution*. They should, so far as the law can allow, ordinarily have the same rights as all other persons before this Court. They have lost their liberty whilst they are in prison. However, so far as I am concerned, they have not lost their right to equality before the law.[179]

Justice Kirby pointed out that the injustice of the majority view was highlighted by the fact that the court had, on the same day, disposed of seven applications by videolink, one from Brisbane and six from Perth.

Constitutional protections and sentencing

One searches the *Constitution* in vain for express terminology granting protections to the sentencing process per se. However, Kirby J has sought to invoke the *Constitution* in a number of ways in this regard. Mention has already been made of the manner in which he believes Ch III of the *Constitution* and the principle in *Kable* ought to protect prisoners against indefinite detention orders, in certain circumstances,[180] and his contemplation of the possibility that persons in immigration detention

179 (2004) 206 ALR 189 at 194 [24]–[25].

180 See *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575; *Baker v The Queen* (2004) 223 CLR 51.

may also have such protection.[181] Justice Kirby has also raised the issue (without a need to resolve it) of the potential impediment of Ch III to sentencing guideline judgments for federal offenders.[182] In this section, some other "constitutional" cases will be considered.

There is a long and distinguished controversy as to the meaning of s 80 of the *Constitution*. In essence, the debate is between the "proceduralists" and the "substantivists". The conventional wisdom is that s 80 is no more than a procedural guarantee of a jury trial at the whim of the Federal Parliament, who can choose to designate federal offences as indictable (and thereby attract a guaranteed jury trial) or not (in which case there is no guarantee) irrespective of the seriousness or otherwise of the offence.[183] The other (minority) view is that the guarantee is actual and substantive and that any serious federal offence should be tried by jury.[184] Justice Kirby is in the latter camp.

As far as sentencing is concerned, Kirby J has been conducting a lonely campaign arguing for a s 80 guarantee of a jury trial in respect of separate offences which, in his view, were created by virtue of s 235(2)(c) and (d) of the *Customs Act 1901* (Cth) (now repealed).[185] Section 235(2)(c) provided for a maximum penalty of life imprisonment if the court was satisfied that a commercial quantity of narcotic goods was involved or that a trafficable quantity was involved (and that the accused had previously been convicted of another narcotics offence involving a trafficable amount). Section 235(2)(d) provided for alternative penalties depending on the amount of, or nature of, the narcotic substance.

In *Cheng v The Queen*,[186] five men were charged with being knowingly concerned in the importation of narcotic goods contrary to s 233B(1)(d) of the *Customs Act*. Three of the accused (the present appellants) ultimately pleaded guilty and were sentenced to terms of imprisonment. There was no dispute as to the quantity of the narcotic substance involved. They each sought leave to reopen the decision in *Kingswell v The Queen*[187] (where the proceduralists prevailed despite strong dissents from Brennan and Deane JJ) on appeal.

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181 *Al-Kateb v Godwin* (2004) 219 CLR 562; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khajafi* (2004) 219 CLR 664, although it was not necessary to decide the point given the view taken by Kirby J of the construction of the relevant legislation.

182 *Wong v The Queen* (2002) 207 CLR 584 at 635-638 [141]-[147].

183 *R v Bernasconi* (1915) 19 CLR 629; *Spratt v Hermes* (1965) 114 CLR 226; and, more recently, the majority judgment in *Kingswell v The Queen* (1985) 159 CLR 264.

184 See the strong dissent by Dixon and Evatt JJ in *R v Federal Court of Bankruptcy: Ex Parte Lowenstein* (1938) 59 CLR 556 at 581-582. Further support for this view is found, eg, in dissenting judgments in *Beckwith v The Queen* (1976) 135 CLR 569 and *Kingswell v The Queen* (1985) 159 CLR 264.

185 *Cheng v The Queen* (2000) 203 CLR 248. The *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005* repealed ss 233B and 235 of the *Customs Act 1901* (Cth) on 5 December 2005.

186 (2000) 203 CLR 248.

187 (1985) 159 CLR 264.

The majority[188] thought it was neither necessary nor appropriate to reopen *Kingswell* and dismissed the appeal. Justice Kirby, in dissent, argued that the characterisation of "any offence" in s 80 of the *Constitution* adopted by Brennan J (in dissent) should be accepted. According to Kirby J:

> Where a legislature has provided in a statute that an accused's liability to punishment varies, depending on whether the prosecution is successful in establishing the existence of a particular factual ingredient, that legislature is thereby ordinarily taken to have created distinct offences. It is not ordinarily taken to have created different species of a single offence.
>
> The principle so stated is really a basic rule of procedural fairness applicable to criminal trials. Where differentiated consequences for punishment follow proof of particular and additional conduct on the part of the accused, differentiated offences are thereby provided. Such offences must be charged, particularised and proved separately. Where a jury is summoned, the accused who disputes a relevant circumstance of aggravation is normally entitled to be charged separately in the indictment in respect of each offence. That person is then entitled to have the verdict of the jury upon each charge as so specified.[189]

This was not a case about whether s 80 was a mere procedural guarantee. There was no doubt that the offence in issue was a federal indictable offence. The debatable question was: what was the offence in issue? The majority held that there was a single offence under s 233B(1)(d) and that the facts raised, on sentencing, for the consideration of the court's satisfaction under s 235(2)(c), (d) and (e) are objective facts. Justice Kirby's characterisation was different. In his view, offences which attract maximum penalties prescribed by s 235(2)(c) and (d) are distinct from s 233B offences and each element of the distinct offences is the subject of the guarantee of s 80 of the *Constitution*. Because the Parliament has purported to deny the accused a right to jury trial in respect of these elements, the provisions of ss 233B(1)(d) and 235(2)(c) insofar as they create a separate offence are incompatible with the *Constitution*.

In *Cheung v The Queen*[190] (which involved a person convicted of the offence of importing heroin following a trial) Kirby J adhered to the reasoning embraced by him in *Cheng*. However, he distinguished *Cheng* and said that the appellant's attempt to extend the constitutional argument as to s 80 had failed. Basically, the appellant sought to argue that the trial judge's acceptance of the evidence of an accomplice (contested during the trial) should have been the subject of a jury finding. Justice Kirby was of the view that the s 80 guarantee could not be stretched this far.

188 Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.
189 *Cheng v The Queen* (2000) 203 CLR 248 at 325-326 [229]-[230].
190 (2001) 209 CLR 1.

This was a case (unlike *Cheng*) of a single indivisible offence in respect of which there had been a jury trial in accordance with s 80. It was not required that there be a special verdict in respect of the jury's assessment of facts which might have the consequence of exposing the accused to enhanced punishment.

A constitutional argument of a different character arose in *White v Director of Military Prosecutions*.[191] In the original jurisdiction of the High Court, the appellant, who was a member of the Australian Defence Force, had been charged with a series of offences under the *Defence Force Discipline Act 1982* (Cth) (the Act). She was due to be tried by court martial or a Defence Force Magistrate. She challenged the validity of the Act and, accordingly, the power of a tribunal constituted under it to hear the case and to impose punishment. Her challenge was based on Ch III of the *Constitution*. By majority,[192] the court held that the appeal should be dismissed because military tribunals could validly try and punish offences enacted under the defence power outside the framework of Ch III of the *Constitution*. Moreover, they were not confined to offences of an exclusively disciplinary character. Justice Kirby dissented. In his view, military tribunals should be confined to disciplinary offences:

> Defence personnel are citizens. They are entitled, as much as any others, to one of the most precious guarantees that the *Constitution* offers – the resolution of disputed charges of serious criminal conduct before independent courts operating wholly within the judicature and outside the executive.[193]

Justice Kirby reiterated his view that the minority opinion of Deane J in relation to s 80 of the *Constitution* in *Kingswell* should be embraced. This was a further basis on which the appellant was entitled to succeed.

In *Re the Governor, Goulburn Correctional Centre: Ex parte Eastman*[194] the applicant, David Eastman, who was serving a sentence at Goulburn Correctional Centre (having been convicted of murder), sought a writ of habeas corpus. The basis of his claim was that the trial judge in the Australian Capital Territory Supreme Court had not been appointed in accordance with s 72 of the *Constitution*, and that accordingly the proceedings leading to his conviction, sentence and detention were invalid. The majority of the court[195] dismissed the application holding that s 72 of the *Constitution* had no application to the Supreme Court of the Australian Capital Territory because that was not a court "created by Parliament" within s 72. Justice Kirby dissented and would have ordered the immediate release of the applicant. In his view the Australian Capital

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191 (2007) 231 CLR 570.

192 Gleeson CJ, Gummow, Callinan and Heydon JJ.

193 (2007) 231 CLR 570 at 603 [80].

194 (1999) 200 CLR 322.

195 Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

Territory Supreme Court was a federal court and was governed by Ch III of the *Constitution*. Appointments not made in accordance with s 72, as in this case, were invalid.

Although it is not strictly a sentencing case, *Thomas v Mowbray*[196] warrants mention here because, as Kirby J put it (citing Gummow J in *Fardon*):

> the concern is with the *deprivation of liberty* without adjudication of guilt rather than with the further (and different) question whether the deprivation is for a punitive purpose.[197]

At issue in *Thomas v Mowbray* was the constitutional validity of an interim control order made against Mr Thomas by Mowbray FM in purported exercise of powers conferred by Div 104 of the *Criminal Code* (Cth) (the Act) which had been enacted to deal with the threat of terrorist acts. The High Court, sitting in its original jurisdiction, was invited to determine the question of validity on the basis of asserted facts. The issues for decision were characterised by Kirby J as: (i) whether federal legislative power existed to support the Act (either pursuant to the reference, defence, nationhood or external affairs powers); (ii) whether the Act purports to confer power on a federal court that cannot be characterised as part of "the judicial power of the Commonwealth"; and (iii) whether the Act is invalid because it provides for the exercise of power in a manner incompatible with Ch III of the *Constitution*.[198]

The majority of the High Court[199] upheld the validity of the legislation. Justices Kirby and Hayne dissented. After a detailed analysis of the legislative history and authorities and, in particular, the *Communist Party Case*,[200] Kirby J ruled that there was no constitutional head of power which supported the Act in its current terms. From his perspective, this was enough to decide the case. However, he gave reasons as to why, in his view, the plaintiff was also entitled to succeed in relation to the other two challenges to the Act.

As to the question of the conferral of non-judicial power, Kirby J noted, among other things, that what is ultimately involved is the loss of liberty of an individual by judicial order,[201] observing:

> This Court has accepted that, in "strictly limited circumstances", the judiciary permits "executive interference with the liberty of an individual" where "the purpose of the imprisonment is to achieve some legitimate non-punitive object."[202] However, in Australia, judges in federal courts may not normally deprive individuals of liberty on the

196 (2007) 233 CLR 307.

197 (2007) 233 CLR 307 at 430 [353] (emphasis added).

198 (2007) 233 CLR 307 at 374 [183].

199 Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ.

200 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

201 *Thomas v Mowbray* (2007) 233 CLR 307 at 429-430 [352].

202 *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575.

> sole basis of a prediction of what might occur in the future. Without an applicable anterior conviction, they may not do so on the basis of acts that people may fear but which have not yet occurred. Much less may judges deprive individuals of their liberty on the chance that such restrictions will prevent others from committing certain acts in the future.[203] Such provisions partake of features of the treatment of hostages which was such a shameful characteristic of the conduct of the oppressors in the Second World War and elsewhere. It is not a feature hitherto regarded as proper to the powers vested in the Australian judiciary. In Australia, we do not deprive individuals of their freedoms because doing so conduces to the desired control of others.[204]

In reviewing the third challenge by the plaintiff, namely the potential incompatibility of the Act with Ch III of the *Constitution*, Kirby J pointed to what he described as the offending features of the Act: ex parte determinations; uniform minimisation of the rights of an individual in respect of whom a control order is sought; and the withholding of evidence from that individual. He concluded that the Act involved an exercise of power inconsistent with Ch III:

> [T]he Code is at odds in important respects with the features of "independence, impartiality and integrity" that are implied or assumed characteristics of the federal courts for which Ch III of the *Constitution* provides. Requiring such courts, as of ordinary course, to issue orders ex parte, that deprive an individual of basic civil rights, on the application of officers of the executive branch of government and upon proof to the civil standard alone that the measures are reasonably necessary to protect the public from a future terrorist act, departs from the manner in which, for more than a century, the judicial power of the Commonwealth has been exercised under the *Constitution*.[205]

Natural justice

A commitment to natural justice in its various manifestations is a leitmotif which transcends Kirby J's sentencing jurisprudence: it recurs throughout his judicial and extrajudicial pronouncements. It certainly is a central concern in his consideration of sentencing decisions. This is illustrated by his advocacy of the right of prisoners to appear in person in the High Court and his concern that procedures which might have the effect of depriving a person of his or her liberty be scrupulously scrutinised (themes which are dealt with elsewhere in this chapter). Considered here are Kirby J's insistence on giving reasons for sentence; the importance of the transparency and accountability that come from open justice; the strict construction required of statutes granting the

203 See *Thomas v Mowbray* (2007) 233 CLR 307 at 474-476 [503]-[506] per Hayne J.
204 (2007) 233 CLR 307 at 431 [355].
205 (2007) 233 CLR 307 at 436 [366].

Crown powers to appeal against sentence; and the constraints associated with appellate re-sentencing.

Although there is not a universal requirement for a court to articulate detailed reasons for sentence, there is an increasing acceptance that this should be the case.[206] The orthodox rationale is in terms of fairness to the parties, the profession and the public and the appellate courts. Justice Kirby takes this a step further:

> The scope of the duty to provide reasons is defined for me, at the margin, by considerations which go far beyond the proper explanation to the parties, their representatives, the legal profession, judicial peers and the whole community of the decision in the particular case. For me, what is at stake is a basal notion of the requirement imposed on the donee of public power. Unaccountable power is tyranny. If the exercise of power is accounted for, and is thought unlawful or unjust, it may be remedied. If it is hidden in silence, the chances of a brooding sense of injustice exists, which will contribute to undermining the integrity and legitimacy of the polity that permits it.[207]

Another area of accountability and transparency in the judicial process which has attracted the attention of Kirby J is the prospect of televised court proceedings. In 1983 in delivering the ABC's Boyer Lectures he made a prediction, which was seen in some quarters as bold, if not dangerously radical. He said:

> Another technology with clear implications for the judiciary is the media of communications. In most states of the United States, though not yet in the Federal Courts, television brings the courts to a wider audience. In Australia royal occasions, church services and now even parliaments themselves are televised. But cameras still normally remain outside the courtroom. People will grow impatient at this adherence to the old technology of information. They will see no logic in the insistence on sketches of little artistic merit of judges and witnesses. Under proper conditions, I have no doubt that television and radio will ultimately enter the courtrooms of Australia. The technology has moved on. If the Judges are to remain the great educators of the community they will have, in time, to adapt to it, uncomfortable as that adaptation will

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206 ALRC, *Same Crime, Same Time* (ALRC 103, 2006).

207 M D Kirby, "Reasons for Judgment: 'Always Permissible, Usually Desirable and Often Obligatory' " (1999) 12 *Australian Bar Review* 121 at 132. Other commentators have argued that a requirement to give reasons might result in increased cost and delay and that the absence of reasons does not amount to a denial of natural justice: M O'Loghlan, "Whether Courts Must Give Reasons for Decision" (1999) 73 *Australian Law Journal* 630. See also: M D Kirby, "Appellate Reasons" (Speech, Supreme Court of Western Australia Judges' Seminar, Perth, 23 October 2007): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_23oct07.pdf (accessed 8 December 2008); M D Kirby, "Ex Tempore Reasons" (1992) 9 *Australian Bar Review* 91; M D Kirby, "Ex Tempore Judgments" in A Blackshield, M Coper and G Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, Melbourne, 2001).

> be at first. In the 21st century, the camera will be as common in the courtrooms as the law reporter's notebook is today.[208]

The principle of open justice – that courts should, subject to certain notable exceptions, be open to public scrutiny, has long been accepted. However, the mode of access has been controversial. Since the 1983 prediction there have been a limited number of telecasts of court proceedings, including of sentencing remarks. In 1995 Justice Bernard Teague of the Victorian Supreme Court allowed a television camera to record the sentencing of a convicted murderer. It was a particularly gruesome case that was regarded as newsworthy because of its sensational nature. Since then there have been other instances of televised court proceedings, such as the sentencing of Martin Bryant in relation to the Port Arthur homicides. There is no doubt, as Kirby J has pointed out,[209] the lively debate continues.[210] But it is likely that, as a leading commentator on the media and the law noted in 1995, this debate will shift from a focus on the desirability of allowing a television camera into Australian courts to a concern with the appropriate means of regulating this process.[211]

In *Byrnes v The Queen; Hopwood v The Queen*[212] the High Court unanimously held that there was no statutory power for the Commonwealth Director of Public Prosecutions to appeal against sentences for offences against certain South Australian corporate laws. In a triumph of understatement, the joint judgment of Gaudron, McHugh, Gummow and Callinan JJ referred to "the wilds of legislative complexity" in issue.[213] Justice Kirby, while agreeing with the outcome, was less restrained:

> These appeals present a further illustration of the grotesque complications that exist in the regulation of corporations under Australian law. Such complications derive from a heady mixture of legal history, the separate corporations legislation of the Commonwealth, the States and the Territories, a narrow constitutional decision, and the successive and unduly complex legislative schemes that have responded to the foregoing.[214]

Justice Kirby proceeded to emphasise that it is essential that appeal rights granted to prosecutors be conferred in unambiguous statutory language:

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208 M D Kirby, *The Judges: The 1983 Boyer Lectures* (ABC Books, Sydney, 1983) p 78.

209 M D Kirby, "Televising Court Proceedings", Forum (1999) 18(2) *University of New South Wales Law Journal* 483 at 486.

210 G Zdenkowski, "Magistrates' Courts and Public Confidence" (2007) 8(3) *The Judicial Review* 385 at 389.

211 D Stepniak, "Why Shouldn't Australian Court Proceedings be Televised?" (1994) 17 *University of New South Wales Law Journal* 345.

212 (1999) 199 CLR 1.

213 (1999) 199 CLR 1 at 13 [12].

214 (1999) 199 CLR 1 at 33 [77]-[80].

> In the specific matter of appeals against a criminal sentence, it is well established that clear language is necessary to afford to a prosecutor a right of appeal (and thus to a court the jurisdiction to hear such an appeal). In part, the principle derives from the statutory character of appeals. But mostly it can be traced to the bias of our law in favour of the liberty of the individual and against exposure of the individual to repeated jeopardy in criminal proceedings … The Commonwealth DPP knocked on the Court's door. But as he had no lawful authority to do so, the Court could not bid him enter. It could only open the door a fraction to say so and send him on his way.[215]

A short time later, the High Court ruled (in a joint judgment of Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ) that legislation in Western Australia authorising prosecution appeals against State laws did not authorise the Commonwealth Director of Public Prosectuions to institute appeals against sentences imposed for offences against the laws of the State. The federal legislation conferring powers on Commonwealth prosecutors covered the field and the State law was inconsistent with it (and thereby invalidated to the relevant extent) pursuant to s 109 of the *Constitution*.[216]

The power of an appellate court to substitute a sentence on counts on which the appellant had been properly convicted arose in *R H McL v The Queen*.[217] The appellant was convicted of 16 counts out of the 24 sexual offences charged. The trial judge imposed a total effective sentence of 12 years with a 10-year non-parole period. The Court of Appeal quashed four convictions on appeal and ordered a retrial on those matters. In respect of the remaining convictions, the court exercised its powers to re-sentence and increased the sentences on the remaining counts so that the total effective sentence was the same as that imposed by the trial judge. The majority of the High Court[218] held that where there had been proper joinder of the counts in an indictment (as here), the relevant statutory provisions enabled the Court of Appeal to convict and to increase sentences for convictions that were not quashed by the court but which were the subject of an appeal to it.

Justice Kirby agreed that the Court of Appeal did have a power, in the circumstances, to substitute a sentence. In relation to the submission by the appellant that the increase in sentence constituted a departure from the requirements of procedural fairness, Kirby J observed:

> [T]he good practice which has long been followed in sentencing appeals in most courts of Australia, of alerting an appellant once the appellate court has formed a tentative view, that the appeal might result in increased punishment, has now been endorsed as a proper standard

215 (1999) 199 CLR 1 at 35, 38 [85], [91].

216 *Bond v The Queen* (2000) 201 CLR 213.

217 (2000) 203 CLR 452.

218 Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

> by appellate decisions in several Australian jurisdictions … It can be taken as an accepted obligation imposed by the requirements of fairness that due notice will be given to an appellant that an appellate court is contemplating an increase in the punishment imposed upon him or her.[219]

However, Kirby J decided that, in the circumstances of the case, the Court of Appeal had not departed from procedural fairness. But he ultimately dissented on the basis that the actual re-sentencing of the appellant miscarried.

Sentencing and human rights

It will be apparent from the earlier discussion that a concern for human rights – as an aid to construction of statutory material or to understanding the implications of the *Constitution* – is a regular feature of Kirby J's deliberations[220] including in cases concerning sentencing issues. (In this chapter see, for example, *Muir*, *White*, *Fardon*, *Baker*, *Strong*, *Roach* and *Behrooz*.) This section will briefly consider further aspects of this theme.

The death penalty has been abolished in all jurisdictions in Australia since 1985.[221] Despite calls for its reintroduction, particularly for vicious and violent crime, no Australian Parliament has responded to such a call. Justice Kirby and his ALRC colleagues were forthright about the need to maintain the abolitionist position as far as federal and Australian Capital Territory offenders were concerned.[222] But Australian governments have been inconsistent about their policy on the international level. The recent inconsistencies can be traced to 2003 when death sentences were handed down by an Indonesian court to two of the so-called "Bali Bombers" who killed 88 Australians in a terrorist attack. The then Prime Minister, Mr John Howard, and the then Opposition Leader, Mr Simon Crean, embraced a bipartisan position of non-interference. Not so Kirby J. Addressing a group of lawyers gathered to mark the Centenary of the High Court, Kirby J insisted that capital punishment should not be tolerated, even when it is imposed on those who have committed manifest atrocities such as the Bali bombings:

> That is when our adherence to human rights is tested … It is not tested in dealing with people like ourselves with whom we can identify. It

219 *R H McL v The Queen* (2000) 203 CLR 452 at 493 [127].

220 H Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (Cambridge University Press, Oakleigh, Vic, 2000) p 63; M D Kirby, "The Role of International Standards in Australian Courts" in P Alston and M Chiam (eds), *Treaty-Making and Australia* (Federation Press, Sydney, 1995) pp 74-92.

221 ALRC, *Sentencing: Penalties* (ALRC DP 30, 1987) p 3.

222 ALRC, *Sentencing of Federal Offenders (Interim)* (ALRC 15, 1980) pp 32-33. This position was affirmed in subsequent ALRC sentencing reports: ALRC, *Sentencing* (ALRC 44, 1988) p 16; ALRC, *Same Crime, Same Time* (ALRC 103, 2006) p 258.

> is tested when we deal with strangers who are feared and hated. If you ask, "What is the essence of human rights?" I think it's love: that you can love another person, even a person who's done very wrong things, because you realise you share with them the phenomenon of the common existence of our species.[223]

Justice Kirby was well aware of the very high level of intellectually disabled people amongst the prison population in Australia. He expressed concern about the potential impact of sentencing legislation on their human rights, including legislation which authorised indefinite detention of dangerous offenders.[224]

The constitutional arguments in *Thomas v Mowbray* were discussed earlier. However, Kirby J noted that his conclusions were fortified by the international law of human rights insofar as it bore on the construction of the legislation and the *Constitution*, and the resolution of ambiguities which had the potential to abrogate fundamental rights.[225]

CONCLUDING REMARKS

An attempt has been made to distil the essence of Kirby J's sentencing jurisprudence. But his was not a philosophy of punishment or, indeed, sentencing. He did not seek to grapple with theories of punishment and joust with academics and judicial colleagues about them, even in his law reform days. This is, of course, unsurprising for a judicial officer whose task it is to apply the law within the permissible constitutional constraints. Wearing his hat as a law reformer, he was keenly aware of the art of the possible, and the need for patience. Both as a judge and as a law reformer, Kirby J chose to operate within an orthodox paradigm (which may be a matter of surprise to his critics) but to insist on scrupulous fairness and to test the limits of the legal rules (including the *Constitution*) by reference to the touchstones of justice and universal human rights principles (where applicable), often pushing the boundaries in that cause.

It will be apparent from this review that Kirby J brought to both his advocacy of sentencing reform and to his deliberations on sentencing matters in the High Court the same rigour and vigour. With remarkable

223 Cited in D Hoare, "Australian Exceptionalism", *The Monthly* (July 2007) p 23. See also M D Kirby, "The High Court and the Death Penalty: Looking Back, Looking Forward" (2003) 77 *Australian Law Journal* 811.

224 M D Kirby, "Intellectual Disability and Community Protection: Community Protection Bill 1994 (NSW)" (1994) 1 *Australian Journal of Human Rights* 398.The review of the indefinite detention cases contains further detail on related human rights issues.

225 *Thomas v Mowbray* (2007) 233 CLR 307 at 440-441 [379]-[382]. See also M D Kirby, "International Law – The Impact on National Constitutions" (2006) 21 *American University International Law Review* 327; M D Kirby, "Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges" (2008) 9 *Melbourne Journal of International Law* 171 at 184-187.

zeal he interrogated all the available legal resources from home and abroad, which could practically be brought to bear on the issue he had to resolve – and urged counsel and colleagues to do likewise. He was a resolute defender of the rule of law and the liberty of the subject. When penal powers were invoked he constantly counselled that, within the constraints permitted by the law (and the *Constitution* in particular), regard must be had to the strict rules of construction, natural justice, due process and, where applicable, international human rights norms. He reminded us that all of these matters regularly fell to be considered in cases which were unpalatable and, on occasion, causes of fear, anxiety, hatred or revulsion in parts of the community. At such times, sentencing law is truly tested.

Justice Kirby's sentencing jurisprudence reflects a unique blend of compassion and rationality, logic and sensitivity, courageous innovation and constitutional respect. He did not hesitate to dissent if he felt it was necessary. Indeed, he regarded the right to dissent as a hallmark of judicial and personal integrity.[226] He always provided detailed reasons for his dissents so that they could be judged on their merits and, at times, provide a guidepost to the future development of the law.

With his profound sense of justice bound to a recognition of the constraints under which a judicial officer must act, one could not ask for a great deal more from a High Court judge with the crucial role, among many others, of appellate review of sentencing decisions. Justice Michael Kirby has left a formidable and distinguished legacy both in the areas of sentencing reform and in his contribution to the sentencing decisions of the High Court.

226 M D Kirby, *Through the World's Eye* (Federation Press, Sydney, 2000) p 128. He noted that he much admired the High Court's previous most frequent dissenter, Justice Lionel Murphy, who had a strike rate of nearly 22%. In his first three years, Kirby J notes that he dissented in 32% of cases. It is of some interest that in the 37 High Court sentencing decisions considered in this chapter he dissented in 20 of them, a rate of approximately 54%.

Chapter 31

TAX

Miranda Stewart

Revenue law is not a mystery separate and apart. It is an integrated part of the body of statute law.[1]

The modern states that have succeeded in the twentieth century are those that enacted, enforced and respected their taxation laws.[2]

INTRODUCTION

Justice Kirby's decisions on taxation law during his quarter-century on Australian courts reveal his view of taxation as an essential element of the modern state of Australia. An analysis of his approach to tax law, which is statute law par excellence, also illustrates Kirby J's approach to statutory interpretation and demonstrates his commitment to applying the tax statute as a manifestation of public policy – reflecting the "social and political realities" and, above all, the democratic context of taxation.[3]

Justice Kirby is clear that the role of courts in tax cases is to apply general principles of statutory interpretation so as to discern the purpose of the Parliament in a particular tax provision, in light of the overall scheme of taxing legislation and of the extrinsic materials. His judgments on taxation, as on other topics, are rich in comparative law, as he refers to decisions of Canada, the United States, the United Kingdom, New Zealand and other Commonwealth countries in seeking to determine the sense and purpose of Australian taxation statutes.

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1 *Commissioner of Stamp Duties (NSW) v Permanent Trustee Co Ltd* (1987) 87 ATC 4670 at 4673 per Kirby P.

2 M D Kirby, "Justice Graham Hill and Australian Tax Law" (Justice Graham Hill Memorial Speech, Taxation Institute of Australia, Hobart, 15 March 2007) pp 23-24; published at (2007) 42 *Taxation in Australia* 202 at 205; see also http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_15mar07.pdf (accessed 8 December 2008).

3 Kirby, n 2 at 205.

After first summarising Kirby J's participation in judicial decisions on tax law, this chapter examines some selected topics that reveal his policy and interpretative approach. First, the chapter considers Kirby J's decisions on the constitutionality of tax regimes and on the "rule of law" in taxation. This is followed by an examination of how his tax judgments take account of changing social and political realities, illustrated particularly by his view on charities, which have a privileged status of exemption from taxation. The chapter goes on to examine several aspects of Kirby J's approach to the income tax – Australia's biggest tax both in terms of revenue raised and of the size and complexity of the statute. Justice Kirby was not afraid to dissent on the income tax and some of the more important of these dissents are discussed. Finally, the chapter considers his recently stated view concerning his opposition to a specialist tax court in Australia, which is consistent with his view that tax law is not a "mystery" but a proper matter for consideration by generalist judges.

JUDICIAL DECISIONS ON TAXATION

Relatively few tax cases are heard by the highest courts in Australia at either State or federal level. During his time on both the High Court of Australia and as President of the New South Wales Court of Appeal, Kirby J heard only a handful of tax cases each year.[4] As President of the New South Wales Court of Appeal, Kirby P sat on fewer than 20 cases relating to tax law, the majority concerning New South Wales stamp duty, land tax and death duty (now abolished) and some on the collection and machinery provisions (such as pay-as-you-earn remittance) for federal taxes. On the High Court, Kirby J sat on almost all the tax cases decided during his term (about 50 cases), approximately three-quarters of which concerned income tax. The Full Court of the Federal Court is the final arbiter for most income tax matters.[5] Appeals lie by special leave to the High Court but leave is granted for only a few income tax cases every year and even fewer appeals are aired in respect of other federal taxes, such as the Goods and Services Tax or excises, or in respect of State taxes such as stamp duty, land tax or payroll tax. Consequently, Kirby J

4 During his short time on the Federal Court in the period from May 1983 to September 1984, he did not sit on any tax cases.

5 *Sonenco (No 87) Pty Ltd v Commissioner of Taxation* (1993) 93 ATC 4828 at 4828 per Brennan J; Mason CJ, refusing special leave to appeal to the High Court in *Federal Commissioner of Taxation v Westfield* (1991) 22 ATR 400 at 402; see also G Hill, "What do we Expect from Judges in Tax Cases?" (1995) 69 *Australian Law Journal* 992 at 999.

considered it very important that lower and intermediate courts should "strive to reach the right conclusion" in a revenue case.[6]

While it cannot be said of Justice Kirby that he was either a "Commissioner's judge" or a "taxpayer's judge", his judgments indicate that raising revenue through taxes and protection of that revenue were important considerations for him.[7] His record in the New South Wales Court of Appeal was even in respect of decisions in favour of the taxpayer or of the revenue. In the High Court, including dissents, overall Kirby J found in more decisions for the revenue than for the taxpayer, most strikingly in income tax cases, where he found in about one-third of cases in favour of the taxpayer and two-thirds in favour of the Commissioner. This ratio of decisions is consistent with the High Court's record on income tax in recent years.[8]

TAX AND THE CONSTITUTION

Justice Kirby has been required in a number of High Court cases to consider the constitutionality of a tax regime. His decisions in *Airservices Australia v Canadian Airlines International Ltd*[9] (with Gleeson CJ) and in *Luton v Lessels*[10] indicate his view as to characterisation of a levy as a "tax" under the *Constitution*.[11] This characterisation is important in the constitutional scheme which grants to the House of Representatives the ultimate legislative power to make laws with respect to taxation; establishes the Consolidated Revenue Fund into which all taxes must be paid and from which Budgets are appropriated; and ensures that the government cannot "tack" a non-tax law onto a tax law so as to prevent

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6 *Chief Commissioner of Stamp Duties v Buckle* (1995) 38 NSWLR 574 at 575 per Kirby P: in that case, the difference in opinion between Sheller JA and Powell JA could not be resolved and the case did proceed to the High Court, which essentially affirmed the decision of Kirby P and Sheller JA: *Chief Commissioner of Stamp Duties v Buckle* (1998) 192 CLR 226.

7 See, eg, *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 228 CLR 168 at 198 [86]; *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605 at 632 [77].

8 The Inspector-General of Taxation, *Report on Review of Tax Office Management of Part IVC Litigation* (28 April 2006) p 35 sets out statistics on tax decisions of the Federal Court, Full Federal Court and High Court in the 2003-2004 year. The High Court ratio was 3:1 in favour of the Commissioner, while in all other courts, the ratio was at least 2:1 in favour of the Commissioner and sometimes higher. It is important to note that the vast majority of tax matters are settled through administrative processes, the majority in the taxpayer's favour and a significant proportion of appeals are settled before trial: p 35.

9 (1999) 202 CLR 133.

10 (2002) 210 CLR 333.

11 Other decisions on constitutional issues include *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51; *Paliflex Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2003) 219 CLR 325; *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388; *Chief Executive Officer of Customs v el Hajje* (2005) 224 CLR 159.

the former's rejection by the Senate.[12] As Kirby J has noted, these provisions "may be traced to the constitutional struggles in England and in the American colonies by which, ultimately, the authority of the people, in the respective Houses of Parliament directly elected by the people, was successfully asserted to determine conclusively the revenue that could be raised by way of taxation".[13]

The starting point for characterisation of a law as "imposing taxation" is a much-quoted statement by Latham CJ that a "tax" is a compulsory levy for public purposes, to be paid into consolidated revenue and with the goal of raising revenue for the government.[14] Justice Kirby gets to the heart of the matter in his view that the most significant feature that distinguishes a "law imposing taxation" from one that does not is that a tax law, "with very few exceptions, has the purpose and effect of raising general revenue for the government".[15] In consequence, in *Luton v Lessels* he found that the child support scheme, under which the Australian Taxation Office (ATO) is required to withhold amounts from non-custodial parents and to pay them on to the custodial parent for maintenance of children, does not impose a tax. In *Airservices Australia*, Kirby J concluded, with the court, that levies charged by the Civil Aviation Authority were not a "tax" as they were essentially fees for services, even though they were imposed by a statutory body and contained an element of subsidy or calculation on the basis of ability to pay as between the airlines which were users of the services.[16]

Yet taxes are a tool of governance and are frequently imposed not only to raise revenue but also to intervene in the economy and to regulate the behaviour of taxpayers. All taxes create incentives or disincentives for taxpayers to carry out particular activities. Obvious examples of the use of a tax for regulatory purposes are the (now repealed) Training Guarantee Levy and the Superannuation Guarantee Levy, both of which are intended to act as "sticks" to employers so as to enforce their training and superannuation obligations, rather than to raise revenue. On the other hand, Australia's extremely generous exemption of superannuation benefits from income tax is intended to encourage people to put savings into superannuation. Justice Kirby's conceptual framework does not easily explain how such taxes fit into the constitutional scheme, except as an exception to the general principle that taxes raise revenue. The High Court has, however, usually accepted that this kind of levy will

12 *Constitution*, ss 51(ii), 53, 55, 57, 81, 83. See also M Stewart and K Walker, "Restricting the Legislative Power to Tax – Australia" (2007) 15(2) *Michigan State Journal of International Law* 193.

13 *Luton v Lessels* (2002) 210 CLR 333 at 366 [98] per Kirby J.

14 *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 269 at 276 per Latham CJ.

15 *Luton v Lessels* (2002) 210 CLR 333 at 371 [117] per Kirby J.

16 *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 178 [90] per Kirby J; see also *Harper v Victoria* (1966) 114 CLR 361.

be a tax for constitutional purposes, thereby rendering it immune from challenge by the Senate.[17]

TAX AND THE RULE OF LAW

In seeking to balance the rights of the taxpayer against the need for effective tax administration, Kirby J has made some important contributions in cases concerning due process in the tax system. In *Esso Australia Resources v Federal Commissioner of Taxation*,[18] he sought to confine legal professional privilege to documents produced for the "sole" purpose of legal advice, rather than the "dominant" purpose (as was decided by the majority of the High Court).[19] His reasons included the "practical significance" of allowing a large number of documents to remain privileged in a tax case involving a "very large corporation" and the likely advantage to be obtained by corporations, rather than individuals, as against the tax administration as a result of extension of the privilege.[20] His concerns were cited in the recent Australian Law Reform Commission review of the privilege, which nonetheless recommended retention of the dominant purpose test and the extension of the privilege to all tax advisers, including accountants and registered tax agents.[21]

On the other hand, Kirby J has frequently been concerned to restrict the Commissioner's power to act in an arbitrary way and to subject the tax administration to full judicial review. His sole dissent on whether a "nil tax" notice from the Commissioner of Taxation constituted an "assessment" in *Federal Commissioner of Taxation v Ryan*[22] reveals his desire to read down the tax statute so as to protect taxpayers from potentially capricious behaviour by the Commissioner. The question was important because it determined the applicability of time limits on the Commissioner's power to amend the assessment. As Kirby J pointed out:

> It would be absurd if … the taxpayer acquired the protection of s 170(3) [concerning time limits] in a case where he or she was assessed to tax due and payable in the sum of five dollars but no protection at all when the assessment was nil … [I]t would remain open (in the event of a nil

17 *Fairfax v Commissioner of Taxation (Cth)* (1965) 114 CLR 1. In *Leask v Commonwealth* (1996) 187 CLR 79, Kirby J concluded (as did Toohey and Gaudron JJ) that the *Financial Transactions Reporting Act 1988* (Cth) was a law respecting "taxation" and hence supported by s 51(ii) of the *Constitution* (although not necessarily itself imposing a "tax").

18 (1999) 201 CLR 49.

19 *Esso Australia Resources v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 81 [86] per Kirby J; see also at 73 [61] per McHugh J.

20 (1999) 201 CLR 49 at 90 [106], [109] per Kirby J.

21 ALRC, *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (ALRC 107, 2008) p 244.

22 (2000) 201 CLR 109.

assessment) to subject a taxpayer to a fresh assessment of tax five, ten or 30 years later.[23]

In *Ryan*, Justice Kirby found against the Commissioner and would have upheld the decision of the Full Federal Court.[24] The majority of the High Court upheld the Commissioner's narrow interpretation of "assessment" in the statute.[25] This decision was one trigger of a recent Treasury review, which has now resulted in reform to ensure that all taxpayers are equally protected by time limits on amendment of assessments.[26]

In the important case of *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 68 ATR 41, Kirby J agreed with Gummow, Hayne, Heydon and Crennan JJ that the Commissioner may be subject to judicial review in making tax assessments. The court held that in the case at hand, the Commissioner had not acted in bad faith as alleged by the taxpayer. Justice Kirby emphasised the fundamental importance under our *Constitution* of the rule of law so as to ensure full judicial review of action by the Commissioner. He noted that "there is a risk that specialists in taxation law will overlook, or ignore, the considerable … advances in administrative law, in particular within judicial review" and referred to a number of grounds of review that could be available to protect taxpayers from arbitrary assessment, including arguments that the Commissioner has taken account of irrelevant considerations; has misunderstood the limits of power; or acted outside power, in bad faith or in breach of natural justice.[27]

THE "SOCIAL AND POLITICAL REALITIES" OF TAX

Justice McHugh once said, "most tax cases turn on their facts".[28] This means that many tax cases are unsuited to review by an appellate court but sometimes the facts indicate a change in the social, commercial, political or technological context, which may call for a new interpretation of the tax law. Justice Kirby's willingness to consider the broader context is evident in several tax cases, including one of the first matters he heard on the New South Wales Court of Appeal. *John Fairfax & Sons Ltd v*

23 *Federal Commissioner of Taxation v Ryan* (2000) 201 CLR 109 at 140 [68] per Kirby J.

24 *Commissioner of Taxation v Ryan* (1998) 82 FCR 345.

25 *Federal Commissioner of Taxation v Ryan* (2000) 201 CLR 109 per Gleeson CJ, Gummow, Hayne and Callinan JJ.

26 Australian Treasury, *Report on Aspects of Income Tax Self Assessment* (August 2004); s 166 of the *Income Tax Assessment Act 1936* (Cth) (as amended following the Treasury review).

27 (2008) 68 ATR 41 at 74, citing Aronson, "Jurisdictional Error Without the Tears" in Groves and Lee (eds), *Australian Administrative Law – Fundamentals, Principles and Doctrines* (Cambridge University Press, Melbourne, 2007) pp 335-336.

28 In refusing special leave to appeal in *Federal Commissioner of Taxation v Eastern Nitrogen B28/2001* (unreported, High Court of Australia, Gaudron and McHugh JJ, 15 February 2002): http://www.austlii.edu.au/au/other/hca/transcripts/2001/B28/1.html (accessed 19 December 2008).

Deputy Commissioner of Taxation[29] concerned the application of federal sales tax to colourful glossy advertising flyers in newspapers (sales tax has since been repealed and replaced with the Goods and Services Tax).[30] The issue was whether these flyers qualified as "part of a newspaper" and so were exempt from sales tax. Justice Kirby discussed the history of the newspaper exemption, noting that historians have suggested that the imposition of tax on newspapers in the American colonies by Britain was a contributing cause of the American Revolution and was one reason for the decision to exempt newspapers from tax in the Australian colonies.[31] He also took notice of the commercial reality that newspapers, while containing news – being "a narrative of recent events and occurrences" – comprise primarily advertising which makes up as much as 90 per cent of a newspaper. In the result, the flyers were found by Kirby J, with his fellow judges, to be part of the newspaper and hence exempt from tax: weekend papers became much heavier as a result.

A more important area where social and political realities have changed dramatically – but the tax law has failed to keep up – is in the definition of "charity" for tax purposes. Unlike most people and businesses that are obliged to pay tax, charities have the very significant privilege of being exempt from taxation. In Australia, we still adopt an ancient English definition of "charity" from the *Statute of Elizabeth* of 1601, as interpreted in a House of Lords decision, *Pemsel*, more than 100 years ago.[32] In two recent cases, Justice Kirby expressed his concern that the law has not kept up with life and reform is needed.

In *Central Bayside General Practice Association Ltd v Commissioner of State Revenue*,[33] the High Court considered whether a non-profit doctors' association was a "charitable body" so that the wages it paid to its employees would be exempt under s 10(1)(bb) of the *Pay-roll Tax Act 1971* (Vic). The association had the purpose of improving patient care and was almost exclusively funded by a Federal Government grant. The main ground for its exemption was that it was established for a purpose "beneficial to the community", and hence was "charitable" within the meaning of the *Statute of Elizabeth*.[34] The High Court confirmed that the rule in *Pemsel* continues to apply and that the association qualified for the exemption. Justice Kirby disagreed with the statement of Gleeson CJ, Heydon and Crennan JJ in *Central Bayside* that it was "difficult to question" the application of

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29 (1988) 16 NSWLR 620.

30 But see *Wilson v Commissioner of Stamp Duties (NSW)* (1988) 88 ATC 4307, in which Kirby J declined to apply a stamp duty exemption for the use of "motion picture films" to the hire of videos by video stores: he concluded that there are limits to the court's ability to extend a partly obsolescent phrase to a new and different commercial and technical process.

31 *John Fairfax & Sons Ltd v Deputy Commissioner of Taxation* (1988) 16 NSWLR 620 at 623.

32 *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 at 581.

33 (2006) 228 CLR 168.

34 *Charitable Uses Act 1601* (UK) 43 Eliz I c 4, as interpreted by Lord Macnaghten in *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 at 581.

the rule in *Pemsel*.[35] He commented that the Victorian payroll tax exemption for charities was included in "particular and urgent State fiscal legislation" which had the goal of "the restoration of the State's finances".[36] He surveyed the Australian authorities and those of Canada, the United Kingdom and New Zealand as to the definition of "charity". He ultimately agreed with the majority in adhering to the ancient rule because of its very longevity and because changing the rule would upset the affairs, potentially, of many existing charities; reform must be left, ultimately, to the legislature.[37]

The definition of "charity" in the *Statute of Elizabeth* includes religious activities, so churches and other religious institutions do not pay tax. In *Commissioner of Taxation (Cth) v Word Investments Ltd* [2008] HCA 55, the High Court has given a surprisingly expansive reading to the meaning of "charity" in a religious context, holding that a company engaged solely in activities for profit (an investment business and a funeral business), was eligible for charitable status because its founding constitution required it to conduct its business in furtherance of listed religious objects. Word Investments did not itself do any religious activity but distributed its profits to a missionary organisation known as Wycliffe Bible Translators Australia, in accordance with its objects.

Justice Kirby wrote a powerful dissent in *Word Investments*, holding that when one looked at what the company actually did (and not simply at the listed objects), it was clearly in business. As such, it should pay tax and not obtain an unfair commercial advantage compared to other businesses. He also highlighted the "secular character of the Commonwealth and its laws and the separation of the governmental and religious domains":

> Charitable and religious institutions contribute to society in various ways. However, such institutions sometimes perform functions that are offensive to the beliefs, value and consciences of other taxpayers. … [A]s a generally applicable principle it is important to spare general taxpayers from the obligation to pay income tax effectively to support or underwrite the activities of religious (and also political) organisations with which they disagree.[38]

PURPOSE AND SUBSTANCE IN APPLYING INCOME TAX LAW

The income tax law is known for its length and complexity. As a result of an incomplete rewrite process, the provisions are spread across two Acts, the *Income Tax Assessment Act 1997* (Cth) (the 1997 Act) and the *Income*

35 *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 228 CLR 168 at 231, fn 28 per Gleeson CJ, Heydon and Crennan JJ.

36 (2006) 228 CLR 168 at 198-199 [87] per Kirby J.

37 (2006) 228 CLR 168 at 205-206 [110]-[115].

38 [2008] HCA 55 at [110] and [112] per Kirby J.

Tax Assessment Act 1936 (Cth) (the 1936 Act). Yet in spite of the size of the statute, many income tax cases which come before the High Court concern the interpretation of just two statutory provisions: first, whether an amount is included in a taxpayer's assessable income under s 6-5 of the 1997 Act as "income according to ordinary concepts", and second, whether an expense is deductible by a taxpayer under the general rule in s 8-1 of the 1997 Act.

Consistent with his claim to be a generalist, Justice Kirby has always disclaimed any particular expertise in taxation. He has suggested that he sometimes feels "beyond the pale in this discipline", lacking "the deep knowledge" of other judges and lawyers.[39] He has, nonetheless, participated fully in deciding many significant income tax cases both with his fellow judges and writing alone. These include *Federal Commissioner of Taxation v Montgomery*,[40] in which Kirby J joined Gaudron, Gummow and Hayne JJ in concluding that a lease incentive was assessable to partners in a law firm, applying a broad interpretation of s 6-5 of the 1997 Act; *Federal Commissioner of Taxation v Citylink Melbourne Ltd*,[41] in which he wrote a lengthy judgment in sole dissent, concluding that fees under a concession arrangement between the taxpayer and the Victorian Government were not deductible under s 8-1 of the 1997 Act; and *Commissioner of Taxation (Cth) v Spotless Services Ltd*[42] in which he participated in a unanimous joint judgment which applied the general anti-avoidance rule in Pt IVA of the 1936 Act to a transaction that had both commercial and tax purposes.

Australia inherited from early British jurisprudence a literalist approach to tax interpretation and a presumption that tax laws are to be interpreted strictly against the revenue (see, for example, *Inland Revenue Commissioners v Duke of Westminster*[43]). Justice Kirby has been at pains to emphasise that this strict approach and presumption no longer applies in Australia.[44] He discusses this shift as a necessary consequence of development of the modern democratic state, suggesting that the "strict approach" was first expounded in Britain at a time when the legislature was "an unrepresentative collection of vested interests, rotten boroughs and landed gentry".[45] After establishment of the universal franchise which "accompanied and stimulated the larger role of the modern regulatory state and the growth of social welfare and other governmental initiatives to be funded from the revenue", this interpretative approach was no longer appropriate:

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39 Contrasting himself to the late Justice Graham Hill of the Federal Court, a renowned taxation specialist: Kirby, n 2 at 203.

40 (1999) 198 CLR 639.

41 (2006) 228 CLR 1.

42 (1996) 186 CLR 404.

43 [1936] AC 1.

44 Kirby, n 2 at 205.

45 Kirby, n 2 at 205.

> [T]his new legislative environment … both explained and necessitated a much less hostile attitude to the interpretation of taxation statutes on the part of the judiciary. No longer were such laws … imposed by unrepresentative Parliaments. Now they could be taken to be the expressed and necessary will of the representatives of the population as a whole.[46]

The strict interpretative approach was most famously applied in Australia by Sir Garfield Barwick during his tenure on the High Court in the 1960s and 1970s. This was a time (in spite of Justice Kirby's historical analysis) of universal suffrage and, on some views, near universal engagement by taxpayers in tax avoidance. Chief Justice Barwick established an explicitly political framework for the strict approach, holding that "it is for the Parliament to specify, and to do so, in my opinion, as far as language will permit, with unambiguous clarity, the circumstances which will attract an obligation on the part of the citizen to pay tax".[47] Taxpayers had "every right to mould the transaction" into a form that satisfies the words of the statute while minimising tax payable.[48] At that time, Murphy J seemed a lone voice arguing against "the prevailing trend in Australia", which appeared "so absolutely literalistic that it … is an open invitation to artificial and contrived tax avoidance".[49] Yet the High Court soon after confirmed a more purposive approach so that "legislative intention" is to be ascertained by reference to the statute as a whole and by the use of extrinsic materials; further, "the fact that the Act is a taxing statute does not make it immune to the general principles governing the interpretation of statutes".[50] This view is now well established.[51] Justice Kirby combines this purposive approach with detailed attention to the words of the statute and with his unique and broad understanding of the public policy of raising revenue for the regulatory state.

As so many tax cases turn on their facts, the judicial interpretation of those facts becomes crucial. In addition to a purposive interpretation of the statute, the question becomes how is the court to interpret the transactions and arrangements entered into by the taxpayer? Respect for the legal form of transactions has dominated in tax cases. However, in rare cases, a court has found that a transaction established in legal form is a "sham", only

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46 Kirby, n 2 at 205.

47 *Federal Commissioner of Taxation v Westraders Pty Ltd* (1980) 144 CLR 55 at 60 per Barwick CJ.

48 (1980) 144 CLR 55 at 60 per Barwick CJ.

49 (1980) 144 CLR 55 at 80 per Murphy J.

50 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320 per Mason and Wilson JJ (in the majority).

51 *CIC Insurance v Bankstown Football Club* (1997) 187 CLR 384; *HP Mercantile Pty Ltd v Commissioner of Taxation* (2005) 143 FCR 553. Even so, influential judges in the taxation field, while supporting the purposive approach, have expressed a view that courts should resolve ambiguity in tax laws in favour of the taxpayer as a "last resort" to prevent "sloppy drafting": G Hill, "A Judicial Perspective on Tax Reform" (1998) 72 *Australian Law Journal* 685 at 689.

"intended to be mistaken for something else … a spurious imitation, a counterfeit, a disguise or a false front".[52] If a "sham" is found, the judge will disregard the transaction, identify the "real" transaction intended by the taxpayer and apply the income tax law to the real transaction. The doctrine of "sham" has been controversial in Australia and generally has been given very limited effect.

In the *Raftland* case,[53] the High Court, including Justice Kirby, had the opportunity for the first time to apply a judicial doctrine of "sham" to a transaction so as to strike down a taxpayer's arrangement of their legal affairs to minimise tax. The case concerned whether a present entitlement to trust income was validly established in the hands of a beneficiary of a trust, so as to ensure that the beneficiary would be treated as deriving the income. The beneficiary, previously a stranger to the trust, did not pay tax because it had tax losses that could be offset against the trust income. It was clear that all the participants in the arrangement understood and intended that the trustee would never pay out the income to the beneficiary and, apart from a one-off payment (to "purchase" the tax losses), the beneficiary did not and never would seek payment of the balance of the purported distribution.

Justice Kirby agreed with his fellow judges (Gleeson CJ, Gummow and Crennan JJ; and Heydon J) in upholding the decision of Kiefel J at first instance in the Federal Court, that the trust distribution was a sham and so the beneficiary should not be treated as deriving the trust income. Chief Justice Gleeson, Gummow and Crennan JJ, examining the whole of the relevant circumstances, found that the trustee's resolution was a "mere piece of machinery" in establishing a tax result. Justice Kirby, suggesting that "it is essential for this Court to grapple with the issue of sham",[54] did a broad-ranging analysis of approaches in the United Kingdom, Canada, New Zealand and the United States, in which courts have applied a "substance over form" approach to interpreting transactions. He concluded that while a very broad approach, as advocated by Murphy J in *Westraders*,[55] may not be acceptable in Australia, the doctrine of sham has "primary value" in identifying the mutual, substantive intentions of the parties as to their respective rights and obligations, taking into account all the documentary, oral and extrinsic evidence. The doctrine of sham asserts, by this, the "essential realism of the judicial process" and is proof "that judicial decision-making is not to be trifled with".[56]

52 *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 18 FCR 449 at 454 per Lockhart J.

53 *Raftland Pty Ltd as Trustee of the Raftland Trust v Federal Commissioner of Taxation* (2008) 82 ALJR 934.

54 *Raftland Pty Ltd v Federal Commissioner of Taxation* (2008) 82 ALJR 934 at 955 [101] per Kirby J.

55 *Federal Commissioner of Taxation v Westraders Pty Ltd* (1980) 144 CLR 55.

56 *Raftland Pty Ltd v Federal Commissioner of Taxation* (2008) 82 ALJR 934 at 964 [152].

Stone's case: sporting income

Justice Kirby has always sought to find the purpose of the statute by applying the words of the tax law as they stand, unclouded by a "judicial gloss".[57] He frequently exhorts counsel to return to the text of the statute and he has criticised tax experts for hubris in considering tax law to be "special and distinct".[58] While no doubt there is truth in the criticism, Kirby J's view of the insularity of tax experts does somewhat of an injustice to a century of accumulated knowledge. His approach and the importance of this body of "tax lore" is illustrated by the case of *Federal Commissioner of Taxation v Stone*.[59]

Ms Stone was an elite athlete who specialised in the javelin, a member of Australia's Olympic and Commonwealth Games athletic teams and a full-time police officer. The case concerned whether, under s 6-5 of the 1997 Act, Ms Stone was required to be assessed as "income according to ordinary concepts" on various amounts she received in association with her athletic activities. These included: grants from the Sydney Olympic Committee and the Queensland Academy of Sport; prize money from winning competitions; payment of part of her costs in training under the Olympic Team Membership Agreement; sponsorship by commercial sports companies; and appearance fees. The Commissioner argued (in a formulation that was not novel) that Ms Stone was in a "business" of being a professional athlete so that all these receipts relating to her athletic activities would be taxed as income of the business. In contrast, occasional prize winnings that are the result of success in recreational sport are generally not taxable as income.

The rather odd phrase, "income according to ordinary concepts", was included in s 6-5 of the 1997 Act during the rewrite of a provision that simply assessed "income" (former s 25 of the 1936 Act). It originated in a 1935 judgment on the meaning of "income":[60]

> The word "income" is not a term of art, and what forms of receipts are comprehended within it, and what principles are to be applied to ascertain how much of those receipts ought to be treated as income, must be determined in accordance with the ordinary concepts and usages of mankind …

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57 *Federal Commissioner of Taxation v Stone* (2005) 222 CLR 289 at 314 [86]-[87] per Kirby J.

58 *Federal Commissioner of Taxation v Ryan* (2000) 201 CLR 109 at 146 [84] per Kirby J.

59 (2005) 222 CLR 289.

60 *Scott v Commissioner of Taxation* (1935) 35 SR (NSW) 215 at 219 per Sir Frederick Jordan CJ.

As Kirby J observed in *Stone*, the use of the phrase "income according to ordinary concepts" in s 6-5 is a "legislative endorsement" of this judicial statement.[61]

In *Stone,* the majority decided that Ms Stone was in a business and all her various receipts would be assessed, as "'business' income is one species of income".[62] Justice Kirby expressed concern about this approach, as follows:

> [T]he first step of the Court, in a case such as the present, is not to superimpose an intermediate question as to whether the taxpayer can be treated as "carrying on a business" and then to ask whether various receipts, derived by the taxpayer during the year of income, can be aggregated in some way so as to be regarded *together* as the "income" of that business. Instead, it is to look individually at "the ordinary income you derived directly or indirectly from all sources …" and to test the liability of such receipts to income tax by the criterion of whether *each item* of alleged "income" could be so described "according to ordinary concepts".[63]

Justice Kirby considered that the interpolation of the concept of a "business" may "gloss" the statute "in a way disadvantageous to the taxpayer and unduly favourable to the Commissioner".[64] However, he ultimately (and in this author's view, rightly) accepted the "gloss" applied by the court in joint reasons. He did so because, as he acknowledged, the meaning of "ordinary income" as judicially developed and applied *does* refer to income from a business as a "sub-category" of ordinary income.[65] The layered edifice of judicial and legislative history indicates that the legislature did intend to include receipts of a "business" as a kind of "ordinary income".

The joint reasons in *Stone* explicitly referred to the 20th century development of the athlete who participates in "professional sport" and thereby turns their athletic prowess to account.[66] Justice Kirby acknowledged that this "made sense" in the world of sport today. As he

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61 *Federal Commissioner of Taxation v Stone* (2005) 222 CLR 289 at 310 [73] per Kirby J. In the rewrite, the government sought *not* to jettison the large body of judicial decisions concerning the old definition of "income", as evident also in s 1-3 of the 1997 Act, which states that the legislature intends to apply the "same meaning" to rewritten provisions where that appears to be intended in the relevant context. See also the majority: (2005) 222 CLR 289 at 294 [8] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

62 (2005) 222 CLR 289 at 297 [17] per Gleeson CJ, Gummow, Hayne and Heydon JJ. They also referred to the statutory definition of "income from personal exertion", which includes income from a "business" in s 995-1 of the 1997 Act.

63 (2005) 222 CLR 289 at 314 [86] per Kirby J (emphasis in original).

64 (2005) 222 CLR 289 at 314 [87].

65 (2005) 222 CLR 289 at 316 [93]-[94]; see also, eg, Fullagar J in *Federal Commissioner of Taxation v Hayes* (1956) 96 CLR 47 at 54; *W Nevill & Co Ltd v Federal Commissioner of Taxation* (1937) 56 CLR 290; *Commissioner of Taxation (Cth) v Myer Emporium Ltd* (1987) 163 CLR 199.

66 (2005) 222 CLR 289 at 295 [12] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

said, it is likely to operate in favour of the Commissioner on the income side of the equation, by permitting a "global approach to disparate sources of a taxpayer's receipts where they can be grouped together and attributed to a 'business' which the taxpayer is found to have carried on".[67] However, *Stone's* case is also likely to assist sportsmen and women, in allowing a wider range of expenses to be deducted in their professional business.[68]

DISSENTS IN TAX CASES: TAX LAW AND "TAX LORE"

Like Murphy J (though with a very different style and approach), Justice Kirby has not been afraid to dissent in tax cases.[69] On the High Court, he was a sole dissenter in approximately one-third of the income tax cases that he heard; he also joined with fellow judges in dissent in some cases.[70] His first sole dissent appears two years after he joined the Bench, in *Federal Commissioner of Taxation v Murry*.[71] In that case, Kirby J agreed with the Full Court of the Federal Court in finding for the taxpayer that a taxi licence comprised small business goodwill, which was eligible for an exemption from capital gains tax on sale. Two other dissenting judgments are discussed below, both of which concern the deductibility of expenses under s 8-1 of the 1997 Act. Expenses are deductible under s 8-1 where they are incurred in gaining or producing assessable income, or necessarily incurred in carrying on a business (the two "positive" limbs of s 8-1). Expenses are not deductible if they are capital or private, or generate exempt income (the "negative" limbs of s 8-1).

Steele: of interest and profit

The case of *Steele v Deputy Commissioner of Taxation*[72] concerned the deductibility of interest expense incurred by Ms Steele on a commercial loan that she took out in 1980 to fund the acquisition of a rural property near Perth airport. Ms Steele sought to develop the property for profit, including as a motel that she would own and operate, and in various other ways. She never succeeded in these plans and did not generate any income from developing the property. After seven years, she sold a half-

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67 (2005) 222 CLR 289 at 318 [98] per Kirby J.

68 See *Spriggs v Federal Commissioner of Taxation* [2007] ATC 5280; overruled in *Federal Commissioner of Taxation v Spriggs* [2008] FCFCA 150 (22 August 2008), special leave granted to the taxpayer to appeal to the High Court.

69 See J Scutt (ed), *Lionel Murphy: A Radical Judge* (McCulloch Publishing, South Melbourne, 2002) for a discussion of Murphy J's tax decisions.

70 During his time as President of the NSW Court of Appeal, Kirby J was in the majority in all tax cases that he decided.

71 (1998) 193 CLR 605.

72 (1999) 197 CLR 459.

interest to a person she hoped would be able to be a joint venturer; two years later, she sold her remaining half-interest in the property.

There was no dispute in *Steele* that the acquired land was a capital asset of Ms Steele. However, two questions arose. Was the interest expense on Ms Steele's loan incurred in gaining or producing assessable income? If so, was a deduction for the interest denied because it was a capital expenditure?

The majority of the High Court overturned the Full Federal Court decision that the interest was not deductible and remitted it to the Administrative Appeals Tribunal for further findings of fact as to the profit-making intention of the taxpayer. The court held that there is no requirement in s 8-1 for actual assessable income to be derived by the taxpayer from an intended venture. Rather, it is the intention of the taxpayer when taking out the loan that is relevant – in other words, one must look to what the expenditure "would be expected to produce".[73] The court also found that the interest expense was not capital in nature,[74] rejecting a Privy Council decision in a Hong Kong case, *Wharf Properties Ltd v Commissioner of Inland Revenue (HK)*[75] on somewhat similar facts, as not representing the law in Australia. The court stated:

> [I]nterest is ordinarily a recurrent or periodic payment which secures, not an enduring advantage, but, rather, the use of borrowed money during the term of the loan … [I]t is therefore ordinarily a revenue item … its character is not altered by reason of the fact that the borrowed funds are used to purchase a capital asset.[76]

The Commissioner of Taxation, in binding public Tax Ruling 2004/4, accepts, following *Steele*, that where there was a purpose of profit-making in respect of the venture at the time of the initial borrowing, and the funds are used for the purpose, then the interest will be deductible even if no profit is ultimately generated.

Justice Kirby, in dissent, found the interest to be capital and non-deductible. He observed that "it is sometimes hazardous to specify the purpose of provisions" of the income tax law given the complexity of the statute, but he attempted to do so for s 8-1:

> It represents, in a sense, an accommodation between the taxpayer's legitimate claim to allowable deductions where and to the extent to which, the losses or outgoings in question were incurred in gaining or producing the assessable income upon which tax may be levied … In part, this idea rests upon a notion that the income of the taxpayer

73 *Steele v Deputy Commissioner of Taxation* (1999) 197 CLR 459 at 467 [22] per Gleeson CJ, Gaudron and Gummow JJ, citing *Fletcher v Federal Commissioner of Taxation* (1991) 173 CLR 1 at 16-17; see also the long list of cases at fn 7 of the majority judgment.

74 (1999) 197 CLR 459 at 470 [29] per Gleeson CJ, Gaudron and Gummow JJ (Callinan J agreeing).

75 [1997] AC 505.

76 (1999) 197 CLR 459 at 470 [29] per Gleeson CJ, Gaudron and Gummow JJ.

> may then, or in the foreseeable future, be diminished by the losses or outgoings concerned. In part, it represents a quid pro quo afforded by the Parliament to the taxpayer.[77]

This interpretation emphasises that deductions under s 8-1 of the 1997 Act are a concession "afforded" by the Parliament to the taxpayer – they do not arise as of right. This is important for Kirby J, in particular in finding room for the "capital" prohibition in s 8-1 to operate. He based his decision on this prohibition, stating that the exception for capital expenditure "must be given effect" and he rejected the view of the majority that the payment of interest is in most cases "revenue" in nature.[78] While he expressly declined to decide whether the interest was incurred "in" gaining assessable income under the first positive limb of s 8-1, Kirby J also clearly considered that Ms Steele did not have a substantial commercial purpose but merely an "idea" of developing the property and that she made "desultory", "apparently unenthusiastic and ultimately fruitless endeavours to convert the 'idea' into an income producing asset".[79]

One basis for Justice Kirby's dissent was his identification of a potential inconsistency between the majority view in *Steele* and the earlier, unanimous decision of the High Court in *C of T v Energy Resources of Australia Ltd*,[80] in which he also sat. The *Energy Resources* case concerned deductibility of a loss on a discounted bill. The Commissioner accepted that the loss was a revenue item; the question before the court concerned calculation of the amount of the loss. The court remarked in dicta (comments that are not necessary to resolve the dispute before the court) that the discount might be capital because the funding was obtained to strengthen "the business entity, structure or organisation" of the taxpayer.[81] This logic, it seemed to Kirby J, could apply equally to interest on a loan to buy a capital asset, as in *Steele's* case.

In commercial terms, discount on a bill and interest on a loan are essentially the same. Differential treatment of discount and interest arises in the tax law because of the different legal form of the transactions. Discount on a bill is treated as generating a loss or gain on realisation of an asset (being the bill) rather than as an accruing cost of funds. This loss or gain is likely to be capital because the bill *itself* is on capital account, unless the taxpayer trades in bills and securities.[82] In contrast, interest is

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77 *Steele v Deputy Commissioner of Taxation* (1999) 197 CLR 459 at 481 [67] per Kirby J.

78 (1999) 197 CLR 459 at 483 [71] per Kirby J.

79 (1999) 197 CLR 459 at 479 [57].

80 (1996) 185 CLR 66.

81 *Federal Commissisoner of Taxation v Energy Resources of Australia Ltd* (1996) 185 CLR 66 at 73-74, quoting the classic case of *Sun Newspapers Ltd and Associated Newspapers Ltd v Federal Commissioner of Taxation* (1938) 61 CLR 337 at 339.

82 *Lomax v Peter Dixon* [1943] 2 All ER 255; if the discount substitutes completely for interest, it may be treated as such but a question of how to account for the deduction or income over the period of the bill remains.

accepted in law as a recurrent cost of funds arising "day to day" in respect of a loan and, hence, usually deductible.[83] Justice Kirby is right to point to the inconsistency but the solution may be the reverse of his approach in *Steele*. That is, there is a good policy argument that the tax law should treat a discount on a bill *like interest* as a deductible expense on revenue account. The question then becomes how to account appropriately for the cost of funds over the period of the borrowing, regardless of the legal form of the transaction. The High Court grappled with this issue in *Coles Myer Finance v Federal Commissioner of Taxation*.[84] The substantial Treasury reform project on *Taxation of Financial Arrangements* also deals with this problem.[85] In sum, this author suggests that Kirby J was wrong on this issue and the decision of the majority in *Steele* is correct.

Citylink: the road to riches

A harder case is that of *Federal Commissioner of Taxation v Citylink Melbourne Ltd*,[86] which is of particular interest to Melburnians. *Citylink* concerned the legal arrangements between the Victorian State Government and Citylink Melbourne Ltd for a "Concession" for the construction and operation of the toll road which now circles the city. The Concession comprised a number of complex and interlocking contracts granting to the company and related entities the right to construct, own and operate the toll road, in exchange for "Concession Fees". *Citylink* was distinguished by its dollar value – each "Concession Fee" owed by the company to the Victorian Government was $95.6 million and accrued every six months over a period that could be as long as 38 years, totalling many billions of dollars. The issue was the deductibility by the company of the Concession Fees under s 8-1 of the 1997 Act. Under the contracts, the government's entitlement to receive payment of the Fees was subordinated to other obligations, so that the Fees were not actually *payable* for decades. Nonetheless, a deduction was sought for the accrued obligation every six months during the life of the project. The court by majority held that the Concession Fees were incurred by Citylink Melbourne Ltd at each six-month interval and were on revenue account (not capital), so that they were deductible under s 8-1 of the 1997 Act.[87]

83 *Riches v Westminster Bank* [1947] AC 390; *Federal Commissioner of Taxation v Australian Guarantee Corporation Ltd* (1984) 15 ATR 982.

84 (1993) 176 CLR 640.

85 *Tax Laws Amendment (Taxation of Financial Arrangements) Bill 2008* (Cth), introduced 4 December 2008.

86 (2006) 228 CLR 1

87 (2006) 228 CLR 1 at 44 [155] per Crennan J (Gleeson CJ, Gummow, Callinan and Heydon JJ agreeing).

Justice Kirby dissented, finding that the Fees were of a capital nature and hence not deductible. He agreed with Merkel J at first instance on this point. He argued that the Fees obtained advantages that were:[88]

> of a permanent and enduring character … compris[ing] the grant of the Concession for a period of approximately thirty-eight years. Clearly, that was a capital asset because it was the indispensable part of the profit-yielding structure of [the company].

The fact that the Fees, under the contract, accrued every six months and hence qualified as "recurrent" (albeit not *paid* at that time) did not prevent them being on capital account. Justice Kirby also considered that the Fees were not "incurred" in the years in question, as a result of the overall effect of the complex contractual arrangements which subordinated the obligations until various thresholds were met.

There are some similarities between *Citylink* and *Steele's* case, in that both considered the deductibility of a recurrent expenditure in respect of an underlying capital asset. But *Citylink* presents a more difficult and complex question. In spite of the apparent ease with which the majority of the High Court found for the taxpayer, Kirby J is right that this very large public-private infrastructure Concession arrangement needs to be considered as an entirety. His judgment, while against the weight of judicial authority on business deductions, evidences a laudable attempt to apply s 8-1 to the overall factual and policy matrix before him. The commercial effect of allowing a deduction each time a Concession Fee arose was to reduce by 30 per cent, being the company tax rate, the cost of the project to Citylink. At the same time, Citylink did not actually need to pay the Fee until the various thresholds were met, many years later. Kirby J cited Merkel J's observations that the technical application of the tax law in this case led to a level of "artificiality and unreality", which amounted to "a taxpayers' heaven".[89] The income tax deduction also reduced the cost of the project to the Victorian Government, effectively transferring 30 per cent of its cost to the Federal Government and thus generating a subsidy for this Victorian State infrastructure project that is indirectly borne by taxpayers throughout Australia. While this cost-sharing may be an appropriate policy outcome, the subsidy was not explicitly delivered by a budget decision of the Federal Government (indeed, the ATO clearly opposed it).

NO SEPARATE TAX COURT

This chapter concludes, appropriately, with Justice Kirby's thoughts on the process of judicial decision-making in tax matters. In a recent speech

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88 (2006) 228 CLR 1 at 15 [29] per Kirby J.

89 (2006) 228 CLR 1 at 9 [7] per Kirby J, quoting Merkel J in *Transurban Citylink Ltd v Commissioner of Taxation* (2004) 135 FCR 356 at 381.

and article, he has commented on a debate that takes place from time to time as to whether Australia needs a specialist federal tax court.[90] As indicated above, the Full Court of the Federal Court is the final arbiter in most tax cases. The Federal Court rotates judicial participation in its Taxation List, as in other specialist areas for which it has responsibility. Of course, the High Court is a generalist court.

Justice Kirby has argued strongly against establishment of a specialist tax court in Australia. He has defended the record and quality of the Federal Court on tax and other matters since its creation in 1976 and pointed to the significant presence of lawyers with experience in federal taxation law on the Federal Court Bench during that time so that very frequently, a judge with specific experience in taxation is a participant and leading writer in tax appeals.[91] He has highlighted the important role of generalists in sparking new insights and questioning assumptions, and has suggested that a balance of generalists and specialists helps to ensure institutional separation of the Bench from the parties to avoid "an appearance of too close a proximity between the decision-makers and the regular clients of the court".[92] As he observed, the Commissioner of Taxation would be the principal, repeat client of a specialist tax court, which could tend to diminish its appearance of impartiality over time. Other reasons against establishing a specialist court include: the need for judges to have knowledge of other areas of law such as corporate or property law and to be aware of broad approaches to interpretation of federal legislation, so as to do the job of interpreting tax laws properly; the additional costs of a new court; and the benefits for judges of variety and stimulation in judicial work.

These arguments against a specialist tax court are persuasive. Justice Kirby's judgments in tax cases reveal his willingness to interpret tax law as a "generalist" with "fresh eyes", always aiming to apply the words of the statute as an expression of the purpose of the Parliament. Sometimes his judgments give too little weight to tax expert knowledge. But there is no doubt that he has fulfilled one of the most important roles as a "generalist" judge in the realm of tax law: to unsettle assumptions, disturb myths and to require the tax profession "to have to justify settled ways of thinking".[93] His legacy in this regard is likely to become increasingly important in the future.

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90 M D Kirby, "Hubris Contained: Why a Separate Australian Tax Court Should be Rejected" (Speech, Challis Taxation Discussion Group, 3 August 2007); published at (2007) 42(3) *Taxation in Australia* 161; see also http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_3aug07.pdf (accessed 8 December 2008).

91 Citing Hill, n 5 at 997-998.

92 Kirby, n 90 at 164.

93 Kirby, n 90 at 163.

Chapter 32

TORTS

Danuta Mendelson

> *[I]t is as much the direct* emotional *involvement of a plaintiff in an accident or perilous situation, as his or her physical presence at the scene or directly at its aftermath that is pertinent to the level and nature of the injury suffered, and the consequent psychological damage.*[1]

When a person suffers an injury, be that physical or mental harm, it is usual to ask: "What caused that injury? Why did it happen?" Sometimes the answer is obvious: for example, another car driver failed to pay proper attention. Sometimes, however, the answer is far from obvious as there may be a succession and mix of "causative factors". Judges have been grappling with how to define "legal causation" for a long time. There are conflicting views on how to define and resolve the problem.[2]

Once the person or entity that "caused" the injury has been identified, there are other legal questions to resolve. One of these is whether the responsible actor should have foreseen that it or their activity could result in the injury. Another required question is whether the law identifies a relationship between the responsible actor and the "victim" such that the responsible actor owed a duty to the victim to avoid the action that caused the victim's injury. These issues of foreseeability, duty of care, and standard of care (content of the duty of care) are at the heart of the modern tort of negligence. And, as with "causation", during Michael Kirby's judicial career there has been vigorous debate among appellate judges, academics, law reformers and legislators about the limits that should be applied.

Justice Kirby has contributed to that debate, both while on the New South Wales Court of Appeal and on the High Court. This chapter examines aspects of that debate by focusing upon his contribution to developments in the law applied to "mental harm" and the fundamental

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1 *Coates v Government Insurance Office (NSW)* (1995) 36 NSWLR 1 at 11 per Kirby J.

2 See I Freckelton and D Mendelson, *Causation in Law and Medicine* (Ashgate, Aldershot, 2002).

principles underpinning the law of negligence. Particularly in the area relating to "mental harm", some of his dissents have become the accepted approach.

EVOLVING PRINCIPLES: FROM DISSENT TO MAJORITY

In the Ralph Heimans' life-size portrait of Justice Kirby,[3] he is standing amongst justices of the New South Wales Court of Appeal in a grey-green passageway. Covered in hooded crimson robes trimmed with white fur, all justices, except Kirby P, are wearing silvery wigs, which resemble stiff medieval helmets (his wig is folded neatly under his arm). They are divided into two groups. Four figures, with their backs to us, are moving towards a doorway and thence to a dark space. Justice Kirby is depicted in the foreground, standing sideways in the company of two justices engaged in a discussion. Though part of the group, his head is turned away from the others, towards the world outside. His eyes look at us – the viewers – as we approach the painting, return our gaze while we scrutinise the picture, and then follow us into the distance. The portrait is palpably symbolic of many aspects of Kirby J's legal persona, including that of a judicial dissentient.

It is probably unusual to focus on dissent. Yet dissent is a fundamental component of ceaseless judicial conversations that form the multi-patterned intellectual fabric of the common law. An ardent supporter of the independence of the judicial office, which he has interpreted as including "independence from extraneous pressures and influences but also independence from the judge's judicial colleagues where that is necessary to the proper discharge of the judicial functions",[4] Kirby J has explained the virtues of dissent as follows:

> Through dissenting opinions, whether we agree or disagree with them, we frequently come to understand how others, without the slightest incompetence, dishonesty or legal heresy, can reach opposite conclusions. Often these conclusions are influenced by expressed or unexpressed divergences over the legal authority, principles or policy applicable to the case.[5]

3 Ralph Heimans, "Radical Restraint: Justice Michael Kirby" (1998 Collection of the National Portrait Gallery, Canberra): http://www.portrait.gov.au/static/coll_1196Radical+Restraint++5CnJustice+Michael+Kirby.php (accessed 12 November 2008). The title refers to a phrase in the valedictory speech Justice Kirby delivered upon leaving the Presidency of the New South Wales Court of Appeal. See photo number 12.

4 M D Kirby, "Appellate Reasons" (Speech, Judges' Seminar, Supreme Court of Western Australia, Perth, 23 October 2007): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_23oct07.pdf (accessed 19 December 2008). His Honour referred to *Rees v Crane* [1994] 2 AC 173 at 187-188 (PC); cf *Fingleton v The Queen* (2005) 227 CLR 166 at 229-230 [187]-[191].

5 M D Kirby, "Reformation" in *Judicial Activism: Authority, Principle and Policy in the Judicial Method*, The Hamlyn Lectures (Thomson/Sweet & Maxwell, London, 2004) p 19.

Dissenting opinions help to shape the law by stimulating discussion between the adjudicators that may lead to reconsideration and re-evaluation of legal doctrines, precedents and policies. Justice Kirby's contribution to the jurisprudence relating to the duty of care in tort provides an excellent illustration of the role of dissent.

Speaking extrajudicially, his Honour also noted that "today's dissent occasionally becomes tomorrow's orthodoxy".[6] This indeed has happened in the field of liability for negligently occasioned pure mental harm.[7] This chapter considers those judgments which reflect Kirby J's approach to the substantive legal values as expressed in his opinions about the nature and function of legal principles and policy in respect of modern tort law. They exemplify his Honour's passionate conviction that those innocently harmed through another's wrongful conduct should be compensated, on the one hand, and his belief that the function of the tort of negligence is to set standards for responsible conduct amongst legal neighbours (with a focus on accident prevention), on the other.[8]

A convenient starting point of reference is the High Court of Australia's decision in *Jaensch v Coffey*,[9] which transformed the then ruling theory of the duty of care in cases of "pure nervous shock"[10] by introducing the theory of relational proximity when determining liability for negligent conduct in "developing" areas of the law (the law of "pure" mental harm; "pure" economic loss; harm occasioned by "pure" omissions; and negligent advice),[11] and novel categories of case. First, Kirby J's contribution to the debate about methods and tests for determining the existence of duty of care in these special categories

6 Kirby, n 5 (2004) p 18.

7 The term "nervous shock" – the traditional common law appellation of the head of damage for psychiatric injury – has been abandoned in favour of "mental harm": see *Civil Liability Act 2002* (NSW) Pt 3; *Wrongs Act 1958* (Vic) ss 73–75; *Civil Liability Act 2002* (WA) Pt 1B; *Civil Liability Act 1936* (SA) s 53; *Civil Liability Act 2002* (Tas) Pt 8; *Civil Law (Wrongs) Act 2002* (ACT) Pt 3.2. These terms will be used in their historical context. For further discussion on the history of compensation for "pure" psychiatric injury, see D Mendelson, *The New Law of Torts* (Oxford University Press, Melbourne, 2007) pp 415-443; and D Mendelson, *Interfaces of Medicine and Law: The History of the Liability for Negligently Caused Psychiatric Injury (Nervous Shock)* (Ashgate/Dartmouth; Burlington, 1998).

8 *Neindorf v Junkovic* (2005) 80 ALJR 341 at 347 [21], 357 [73] and 360 [86] per Kirby J; see also *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 491-492 [105]; *New South Wales v Fahy* (2007) 232 CLR 486 at 527-528 [132]. I am very grateful to Professor Harold Luntz for bringing this point to my attention (private communication, 3 February, 2008).

9 (1984) 155 CLR 549.

10 In *Jaensch v Coffey*, the High Court adopted the dissenting opinion of Evatt J in *Chester v The Council of the Municipality of Waverley* (1939) 62 CLR 1, and reversed the majority holding in this long-standing precedent.

11 The adjective "pure" indicates that the mental harm or economic loss suffered by the claimant is not "consequential upon physical injury to the plaintiff's person or property". This phrase was used by Stephen J in *Caltex Oil (Australia) Pty Ltd v The Dredge Willemstad* (1978) 136 CLR 529 at 562.

of case will be reviewed, followed by a discussion of his part in the evolution of the law of mental harm.

Relational proximity in determining the existence of the duty of care

Michael Kirby was appointed the President of the New South Wales Court of Appeal in September 1984. Just one month prior to his appointment, the High Court of Australia handed down its decision in *Jaensch v Coffey*. Strictly speaking, today the importance of this case is historical insofar as the leading judgments in *Jaensch v Coffey*, which had provided a foundation for the evolution of both the general concept of the duty of care and the law of pure mental harm, have since been modified or superseded by subsequent cases and legislation. However, at the time, its jurisprudential and social impact was very significant.

In *Jaensch v Coffey*, Mrs Coffey recovered damages for pure nervous shock[12] on the basis that, though not present at the scene of the accident, she – as a person in a "close and intimate" relationship with the victim[13] – experienced its "immediate aftermath" by coming to the hospital during the period of the immediate post-accident treatment of her injured husband.[14] According to Deane J,[15] Mrs Coffey's psychiatric illness, which she sustained as a result of seeing her physically injured husband in hospital, established a sufficient relationship of *causal proximity* between her and the defendant driver to impose upon him a duty not to cause her psychiatric injury.

Jaensch marked an extension of the scope of defendants' liability for pure nervous shock by allowing judges to focus on temporal and emotional, rather than only spatial, proximity between the parties.[16] It also attempted – through the notion of legal proximity – to provide a control mechanism over the broad test of reasonable foreseeability of a risk of harm in developing novel categories of liability. Justice Deane's new approach intended to define more specifically the notion of "legal

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12 While at home, Mrs Coffey was informed that her husband was in hospital with grave injuries, which he suffered when a negligently driven car collided with his motorcycle. She developed serious psychiatric illness in the wake of the accident, and sued the driver in negligence.

13 *Jaensch v Coffey* (1984) 155 CLR 549 per Gibbs CJ at 555.

14 The High Court of Australia followed the House of Lords' decision in *McLoughlin v O'Brian* [1983] 1 AC 410 where the plaintiff developed psychiatric illness when she came to the hospital following the accident in which a negligently driven lorry severely injured her husband and killed one of her children. She was not present at the scene of the accident.

15 Gibbs CJ was in broad agreement: *Jaensch v Coffey* (1984) 155 CLR 549 at 551.

16 Previously, in *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, the High Court of Australia determined that psychiatric illness consequent upon witnessing a shocking event was foreseeable and could give rise to a duty of care in cases of rescuers where employers had a legal duty to provide safe working conditions for employees.

neighbourhood" as articulated by Lord Atkin in *Donoghue v Stevenson*[17] by distinguishing, among other things: physical proximity between the parties (in the sense of space and time); circumstantial proximity (overriding employer-employee, professional-client relationship, etc); and causal proximity ("the closeness or directness of the relationship between the particular act or cause of action and the injury sustained"); as well as policy considerations. The policy element controlled the finding or otherwise of the legal proximity, and thus determined the denial[18] or extension of the duty of care.[19]

Justice Deane's notion of the "relationship of proximity" as the "conceptual determinant" of duty in special categories of case was subsequently adopted by other members of the High Court of Australia[20] with the notable exception of Brennan J, who favoured an incremental approach to the expansion of liability in negligence.[21]

Approaches to determining the existence of duty of care

By the time Kirby P was elevated to the High Court of Australia in February 1996, Deane J's theory of proximity, though still "in use", was undergoing critical reappraisal,[22] which eventually led to its abandonment in *Sullivan v Moody*.[23] This case concerned two fathers who sued doctors, social workers, hospitals, and departmental officers, claiming that they suffered pure nervous shock and consequential personal and financial loss as a result of being informed that they were accused of sexually

17 According to *Donoghue v Stevenson* [1932] AC 562, the existence of the duty of care is predicated on whether the defendant should have reasonably foreseen that, unless he or she took reasonable care, a foreseeable individual (or a group) may be at risk of a foreseeable injury as a result of the careless conduct. The scope of the duty of care defines the "legal neighbourhood".

18 For example, *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; and *Gala v Preston* (1991) 172 CLR 243.

19 For example, *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; *Bryan v Maloney* (1995) 182 CLR 609; and *Pyrenees Shire Council v Day* (1998) 192 CLR 330.

20 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 543 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ in a joint judgment.

21 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 481 per Brennan J: "It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable considerations that ought to negative, or to reduce or limit the scope of the duty of the class of the person to whom it is owed."

22 In England, Lord Oliver in *Caparo Plc v Dickman* [1990] 2 AC 605 at 633 commented: "'Proximity' is, no doubt, a convenient expression so long as it is realised that it is no more than a label which embraces not a definable concept but merely a description of circumstances from which, pragmatically, the courts conclude that a duty of care exists." In Australia, see *Hill v Van Erp* (1997) 188 CLR 159 at 189–190; *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 198 [27], at 210 [76], at 300 [330]; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 61 [165]; and *Sullivan v Moody; Thompson v Connon* (2001) 207 CLR 562 at 578 [48].

23 (2001) 207 CLR 562. Deane J's notion of proximity was perceived as too open ended at a time when "policy" was to restrict rather than enlarge the range of "duty of care".

abusing their children. The High Court (Gleeson CJ, Gaudron, McHugh, Hayne, and Callinan JJ), in a joint and unanimous decision, found that the defendants involved in investigating and reporting upon allegations of child sexual abuse did not owe the plaintiffs a duty of care.[24] The court in *Sullivan* did not develop an alternative single theory for determining the existence of the duty of care in all categories of case.[25] Instead, the judgment identified a number of factors that should be "the focus of attention in a judicial evaluation" when arriving at a conclusion regarding the existence of duty "as a matter of principle". The factors to be evaluated in this manner include, to use Kirby J's well-crafted summation: (1) that finding a duty of care would not cut across or undermine other legal rules; (2) that the duty asserted would not be incompatible with another duty; and (3) that to recognise a duty would not expose the defendant to indeterminate liability.[26] Another significant consideration emphasised by the majority was the "need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships".[27]

Though he accepted the validity of the *Sullivan* considerations,[28] Kirby J has often expressed disappointment with and dissatisfaction at the lack of a "settled methodology or universal test for determining the existence of a duty of care" in Australia.[29] Nor was he prepared to entirely forsake the concept of relational proximity. While acknowledging that the notion of proximity failed as the "universal indicium of the duty of care at common law", in *Modbury Triangle v Anzil*[30] Kirby J observed that "as a measure of factors relevant to the degree of physical, circumstantial and causal closeness, proximity is the best notion yet devised by the law to delineate the relationship of 'neighbour'". In the late 1990s, he

24 See also *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633.

25 See *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 210 [76] per McHugh J]; *Sullivan v Moody* (2001) 207 CLR 562 at 579 [50].

26 *Harriton v Stephens* (2006) 226 CLR 52 at 74 [64] (citations omitted).

27 *Sullivan v Moody* (2001) 207 CLR 562 at 579 [49], 581 [55]; *Hill v Van Erp* (1997) 188 CLR 159 at 231 per Gummow J.

28 As well as what Kirby J termed "salient features", including the internal dynamics of a particular legal relationship in terms of vulnerability, power and control; and social considerations, including "generality or particularity of the class, the resources of, and demands upon the authority, may each be, in a given case, a relevant circumstance": see *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 624 [236] per Kirby J, at 664 [321] per Callinan J.

29 *Harriton v Stephens* (2006) 226 CLR 52 at 73 [62]; see also *Neindorf v Junkovic* (2005) 80 ALJR 341 at 346-347 [20]-[22]; *Travel Compensation Fund v Robert Tambree t/as R Tambree and Co* (2005) 224 CLR 627 at 648-650 [63]-[67]; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 616 [211].

30 (2001) 205 CLR 254 at 275 [61].

adopted the three-stage test of duty of care[31] articulated by Lord Bridge of Harwich in *Caparo Industries Plc v Dickman*.[32] The *Caparo* test incorporates Brennan J's incremental approach in its analysis of the relationship between the plaintiff and the defendant from the perspective of proximity, fairness and justice, as well as policy considerations.[33] According to Kirby J, under the *Caparo* test, the court has to ask and respond to three questions (emphasis added): "(1) whether it was *reasonably foreseeable* to the alleged tortfeasor that the particular conduct or omission would be likely to cause harm to a person such as the claimant; (2) whether between that tortfeasor and the claimant *a relationship existed* that could be characterised as one of "proximity" or "neighbourhood"; and (3) if so, whether it was *fair, just and reasonable* that the law should impose a duty of a given scope upon that tortfeasor for the benefit of that person".[34]

It was the final question that the court in *Sullivan* found particularly objectionable. In its reasons for rejecting the *Caparo* test, the court noted[35] the danger that:

> [T]he matter of foreseeability (which is often incontestable) having been determined, the succeeding questions will be reduced to a discretionary judgment based upon a sense of what is fair, and just and reasonable as an outcome in the particular case … The question as to what is fair, and just and reasonable is capable of being misunderstood as an invitation to formulate policy rather than to search for principle. The concept of policy, in this context, is often ill-defined. There are policies at work in the law which can be identified and applied to novel problems, but the law of tort develops by reference to principles, which must be capable of general application, not discretionary decision-making in individual cases.[36]

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31 *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 420-427 [246]-[253]; *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at 476-477 [117]-[121], 484-485 [138]-[140]; *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 286-291 [289]-[302]; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 80-86 [223]-[235]; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 604-605 [241].

32 [1990] AC 605 at 617-618. Lord Bridge of Harwich stated: "[I]n addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other."

33 See Lord Hoffmann in *Stovin v Wise* [1996] AC 923 at 949: "starting with situations in which a duty has been held to exist and then asking whether there are considerations of analogy, policy, fairness and justice for extending it to cover a new situation". The *Caparo* test is the governing theory for imposition of duty of care in novel categories of case in the United Kingdom and Canada.

34 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 623 [232].

35 *Sullivan v Moody* (2001) 207 CLR 562 at 579 [49].

36 Their Honours added (at [53]) that novel cases should not "be decided by reference only to some intuitive sense of what is 'fair' or 'unfair'".

Speaking extrajudicially, Kirby retorted that legal principles are in essence "the distilled product of earlier considerations of authority and policy".[37] According to Kirby, in determining novel cases, when a legal principle, which "is itself captive of past experience" cannot assist them, judges effectively do consider – either explicitly or obliquely – not only authoritative precedents, but also questions of legal policy."[38] In *Neindorf v Junkovic*,[39] he wryly observed that the shift in judicial outcomes in negligence cases towards restriction and denial of liability[40] "plainly derives from a shift in legal policy, albeit one that is not usually spelt out by judges as *Caparo* would require".

Yet it is difficult to deny that, as the *Sullivan* court points out, the notions of fairness and justice are sometimes used by judges merely to cover decisional choices made according to personal beliefs and emotional responses to the cases at hand, rather than well researched and reasoned arguments. At the same time, these two concepts also embody fundamental legal values, which in Western jurisprudence go back to the recorded debates between Roman jurists, and which have been reformulated over centuries into legal principles or tests that reflect socio-political and cultural values of the society in which they operate. For example, Reginald Dias in his seminal treatise on *Jurisprudence*[41] delineated nine categories of legal values, including sanctity of the person; sanctity of property; social welfare; equality; consistency and fidelity to principle, doctrine and tradition; morality; and convenience.[42] Justice Kirby has not specifically referred to Dias's categories; nevertheless his reasoning appears to be in close harmony with most of them.

In *Graham Barclay Oysters Pty Ltd v Ryan*,[43] though labelling the rejection of the *Caparo* test in *Sullivan v Moody* a "serious error",[44] Kirby J

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37 See Kirby, n 5, p 84, where his Honour defines "legal principle" as a rule "derived from a close analysis of the emerging common themes of multiple decisions in connected areas of the law".

38 Kirby, n 5, pp 84-85.

39 (2005) 80 ALJR 341 at 346-347 [20].

40 In *Neindorf v Junkovic* (2005) 80 ALJR 341 at 347 [22], his Honour characterised this trend as "erosion of negligence liability and the substitution of indifference to those who are, in law, our neighbours".

41 R W M Dias, *Jurisprudence* (4th ed, Butterworths, London, 1976) p 258. For a further discussion, see C Horowitz, "Legal Justice, Values and Appellate Decision-Making" (1982-1983) 18 *Gonzaga Law Review* 633 at 639-641.

42 The other values listed by Dias were: national and social safety; and international comity.

43 (2002) 211 CLR 540.

44 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 626 [238], Kirby J quoting from and specifically agreeing with C Witting, "The Three-stage Test Abandoned in Australia – or Not?" (2002) 118 *Law Quarterly Review* 214 at 215.

reluctantly relinquished his overt adherence to this approach[45] in favour of a broad formula based on the "touchstone" of reasonableness, namely, that "a duty of care will be imposed when it is reasonable in all the circumstances to do so"[46] (presumably guided by the *Sullivan* criteria). It was this interpretation of the *Donoghue v Stevenson* test which he and Gummow J adopted in *Tame v New South Wales*[47] when determining the existence of the duty of care.[48] Their Honours noted that other members of the court in *Tame* also effectively used the same test.[49] Thus, the imposition of the duty in novel cases seems to be determined by the judicial response to the conflated duty and its breach question, namely, whether a "reasonable person in the defendant's position could have avoided damage by exercising reasonable care and was in such a relationship to the plaintiff that he or she ought to have acted to do so".[50] In a way, this approach is a paraphrase of the two first questions in *Caparo*.

DUTY OF CARE AND CAUSATION

Even where it is established that one party, the actor, owes a duty of care to a second party, and that the second party has suffered injury, there is still the question of whether it was a breach of duty by that actor which caused the injury. Causation has been, and remains, a complex issue.

Although there is a tendency to treat each element of the tort of negligence as a discrete entity with its own set of assumptions, tests and rules, the theory of responsibility and fault underpinning the tort of negligence is integral. Professor Tony Honoré observed that "causation in law depends on concepts that apply outside the law … and reflects normative considerations, legal or moral".[51] Hence, jurisprudential considerations that determine the existence, the scope and the content of the defendant's duty will usually also determine the defendant's causal responsibility.

The most difficult aspect of legal causation is determining legal responsibility for wrongfully occasioned harm in those cases where there are a number of causally relevant (necessary) conditions sufficient for the occurrence of the result. In Australia, the test to determine which one

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45 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 626 [238]; see also: *Travel Compensation Fund v Tambree (t/as R Tambree and Associates)* (2005) 224 CLR 627 at 648 [64] per Kirby J: "I have acknowledged that, *for the time being*, it has been rejected in Australia by a majority of this Court in *Sullivan v Moody* and that it is my duty to conform" (emphasis added).

46 (2002) 211 CLR 540 at 628 [244].

47 (2002) 211 CLR 317.

48 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 628 [244].

49 (2002) 211 CLR 540 at 628 [244].

50 (2002) 211 CLR 540 at 627 [240].

51 T Honoré, "Necessary and Sufficient Conditions in Torts Law" in *Responsibility and Fault* (Hart Publishing, Oxford/Portland, 1999) pp 98-99.

in a set of such sufficient conditions should be held the legally necessary cause of the particular harm was articulated by the majority of the High Court of Australia in *March v E & MH Stramare Pty Ltd*.[52] Emphasising that the question of causation in negligence is essentially a question of fact, the majority stated that it should be answered by reference to common sense and experience, in which considerations of policy and value judgments, including "the infusion of policy considerations", play a part.[53] This test of causation, however, does not fit well with the *Sullivan* doctrine, which eschews judicial decision-making based on policy reasons.

Moreover, in the 1990s, under the influence of theoretical writings by Professors Tony Honoré and Jane Stapleton, the general question of causation began to be perceived as comprising two elements – examination of causally relevant conditions (factual causation) and the extent (if any) to which a defendant can be held liable for the harmful outcome. The approaches in the United Kingdom and Australia have been rather different. Thus, in the United Kingdom, Lord Nicholls of Birkenhead, in *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)*,[54] explicitly adopted Professor Jane Stapleton's twofold model for determining causal liability,[55] namely an inquiry into factual causation and an inquiry into the "scope of the defendant's liability". His Lordship then devised the test for the latter, which includes "a value judgment" based on the third question in the *Caparo* test of duty as the determinant of causal liability. (It will be recalled that Kirby J stands alone in the High Court in his support for this third question.) According to his Lordship:

> The second inquiry, although this is not always openly acknowledged by the courts, involves a value judgment ("*ought* to be held liable"). Written large, the second inquiry concerns the extent of the loss for which the defendant ought fairly or reasonably or justly to be held liable (the epithets are interchangeable).

However, the test of justice, fairness and reasonableness for determining the scope of causal responsibility has been criticised by Lord Steyn in *Aneco Reinsurance Underwriting Ltd (In Liquidation) v Johnson & Higgins Ltd*[56] as amounting to "a deus ex machine", which "will tend to lead to formulaic reasoning". More recently, Baroness Hale of Richmond in *Transfield Shipping Inc v Mercator Shipping Inc*[57] specifically agreed with Lord Steyn's critique.

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52 (1991) 171 CLR 506.

53 *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 515, 516 per Mason CJ, at 522 per Deane J, at 524 per Toohey J (Gordon J agreeing, McHugh J dissenting).

54 *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 at 1090-1092 [69]-[75].

55 Lord Nicholls of Birkenhead referred to J Stapleton, "Unpacking 'Causation'" in P Cane and J Gardner (eds), *Relating to Responsibility*, *Essays for Tony Honoré* (Hart Publishing, Oxford/Portland, 2001) p 168. See also T Honoré, n 51, pp 94-121.

56 [2001] UKHL 51; [2002] 1 Lloyd's Rep 157 at [40].

57 [2008] 2 Lloyd's Rep 275 at [93].

Since the twofold ("factual causation" and "scope of liability") model of causation has been codified in all Australian jurisdictions,[58] the debate about the applicable test for deciding whether "it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (scope of liability)"[59] has been even more lively in Australia than in England.

In *Ruddock v Taylor*,[60] Ipp JA of the New South Wales Court of Appeal adopted the analysis of causation formulated by Professor Jane Stapleton,[61] observing that "there are two fundamental questions involved in the determination of causation in tort",[62] one factual and the other involving an "appropriate" "scope of liability for the consequences of tortious conduct", with "the ultimate question to be answered when addressing the second aspect [being] a normative one, namely, whether the defendant ought to be held liable to pay damages for that harm".[63] Ipp JA considered that, for "normative reasons", the defendant "ought to be held liable to pay damages for the harm suffered" by the claimant, adding that "[i]t would be unjust to hold otherwise."[64]

This "value judgment" approach to causation by Ipp JA was in turn adopted by Sheller JA (with whom Mason P and Ipp JA agreed) in *Tambree v Travel Compensation Fund*.[65] On appeal, the High Court of Australia, though unanimous in allowing the appeal by the Travel Compensation Fund,[66] was sharply divided on the appropriate theory of causation. Gleeson CJ found that the "value judgment" test was inapposite when

58 *Civil Liability Act 2002* (NSW) s 5D(1)(b); *Civil Liability Act 2003* (Qld) s 11(1)(b); *Civil Liability Act 2002* (Tas) s 13(1)(b); *Civil Law (Wrongs) Amendment Act 2003* (ACT), s 40(1)(b); *Civil Liability Act 2003* (WA) s 5C(1)(b); *Civil Liability Act 1936* (SA) s 34(1)(b); *Wrongs Act 1958* (Vic) s 51(1)(b).

59 *Wrongs Act 1958* (Vic) s 51(1)(b).

60 (2003) 58 NSWLR 269.

61 J Stapleton, "Cause-in-Fact and the Scope of Liability for Consequences" (2003) 119 *Law Quarterly Review* 388.

62 *Ruddock v Taylor* (2003) 58 NSWLR 269 at 286 [84]-[87].

63 Ipp JA stated (at [89]) that: "The approach to causation that I have set out forms the basis of s 5D of the *Civil Liability Amendment (Personal Responsibility) Act 2002.* This Act does not govern the present action but, in my view, the principles it embodies in regard to causation are in accord with the common law." His Honour's application of a test specifically devised for determining causation in negligence to the intentional tort of false imprisonment (which was the matter in issue in *Ruddock*), is problematic.

64 *Ruddock v Taylor* (2003) 58 NSWLR 269 at 287 [95]. The decision of the New South Wales Court of Appeal was overturned by the High Court of Australia in *Ruddock v Taylor* (2005) 222 CLR 612 per Gleeson CJ, Gummow, Hayne, Heydon JJ in joint judgment (Callinan J concurring, McHugh and Kirby JJ in dissent).

65 [2004] NSWCA 24. *Tambree* involved a question of causation in relation to damage suffered by the claimant who was negligently supplied by the defendants (an accountant and an auditor) with false and misleading statements about the financial position of a travel agency business.

66 *Travel Compensation Fund v Tambree (t/as R Tambree and Associates)* (2005) 224 CLR 627.

determining the question of causation in the particular case.[67] Gummow and Hayne JJ (in a joint judgment) rejected the approach adopted by the New South Wales Court of Appeal and, by extension, the Lord Nicholls' test set out in *Kuwait Airways* (with which Kirby J would be comfortable). According to their Honours, although:

> [t]here are indications in the United Kingdom that, in determining for the law of tort questions of sufficient or determinative causal linkage, a similar approach to that in *Caparo* should be adopted by asking whether as "a value judgment" the defendant ought to be held liable,[68] the considerations referred to in *Sullivan v Moody* when affirming the rejection in Australia of *Caparo* apply likewise to the approach taken by the Court of Appeal in this case by reference to *Ruddock v Taylor*.[69]

In separate judgments, Kirby and Callinan JJ[70] dissented on the issue of "value judgments", and argued that no changes should be made to the *March v Stramare* value judgment and commonsense test when answering the question "whether a defendant is in law responsible for damage which his or her negligence has played some part in producing".[71] Justice Kirby, having analysed several authorities supportive of "value judgments" in determining causal responsibility, characterised the legal causation question as "a policy question where value judgments have to be resolved", and stated that "the contrary proposition is inconsistent with both earlier and later authority of this Court".[72] His Honour considered the criticism by Gleeson CJ, Gummow and Hayne JJ of both Sheller JA in *Tambree* and of Ipp JA in *Ruddock v Taylor* as "unnecessary" and "unwarranted".[73]

In relation to *Sullivan v Moody*, Kirby J conceded that "the reasoning in *Sullivan* presents a difficulty for earlier judicial elaborations of causation in fact and law", and that the previous references in the High Court to "the making of value judgments and the infusion of policy considerations",[74] when determining contested questions of causation,

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67 (2005) 224 CLR 627 at 641 [35] per Gleeson CJ: "The answer to the problem of causation in the present case is to be found, not in a value judgment, but in an accurate identification of the nature of the risk against which the appellant sought protection and of the loss it suffered, considered in the light of the kind of wrongful conduct in which the first and second respondents engaged."

68 *Travel Compensation Fund v Tambree (t/as R Tambree and Associates)* (2005) 224 CLR 627 at 643 [48]. Gummow and Hayne JJ referred to *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 at 1090–1091 [69]–[71] per Lord Nicholls of Birkenhead.

69 (2005) 224 CLR 627 at 643 [48].

70 (2005) 224 CLR 627 at 645 [55], at 653 [80] per Callinan J.

71 *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 515.

72 *Travel Compensation Fund v Tambree (t/as R Tambree and Associates)* (2005) 224 CLR 627 at 646 [57].

73 (2005) 224 CLR 627 at 647 [61].

74 (2005) 224 CLR 627 at 649 [65]; Kirby J referred to *Chappel v Hart* (1998) 195 CLR 232 at 255.

may be "incompatible with the rejection, in *Sullivan*, of such 'judgments' and 'considerations' in the ascertainment of a duty of care".[75]

His Honour, however, criticised as illusory "the supposed distinction between the 'formulation of *policy*' and a 'search for *principle*', referred to in *Sullivan*",[76] noting that "[c]ommonly (although some deny it) legal *principle* is no more than the distilled product of earlier considerations of legal *authority* and legal *policy*."[77] Given that the *Sullivan* doctrine is now an "earlier" authority representing the ruling legal policy, Kirby J's criticism does not resolve the jurisprudential inconsistency of adhering to the *March v Stramare* approach.

Justice Kirby expanded further his views on causation in *Roads and Traffic Authority v Royal*.[78] The case involved a question whether the breach of duty by the Roads and Traffic Authority (RTA) in not alleviating risks created by a highway "black spot", rather than the negligent conduct of the two drivers (speeding and failing to keep a proper lookout) caused or materially contributed to the car crash. In a joint judgment, Gummow, Hayne and Heydon JJ held that even if the RTA's breach of duty could be said to have "materially contributed to the occurrence of an accident, by creating a heightened risk of such an accident (due to the obscuring effect of one vehicle on another in an adjoining lane), it made no contribution to the occurrence of this accident".[79] In other words, to use Professor Harold Luntz's formulation,[80] a breach of the duty of care by a public authority to a general class of people (motorists in this case), should *not* be construed as providing an "umbrella" of legal/causal responsibility for the failure to take reasonable care by individual motorists (in this instance, the two motorists).

The joint judgment in *Royal* did not refer to the "commonsense" and "value judgment" tests of causation. However, in *Travel Compensation Fund v Tambree (t/as R Tambree and Associates)*,[81] Gummow and Hayne JJ (in a joint judgment) doubted "whether there is any 'common sense' notion of causation which can provide a useful, still less universal, legal norm".[82] In contrast, Keiffel J applied the *March v Stramare* "common

75 (2005) 224 CLR 627 at 649 [65].

76 (2005) 224 CLR 627 at 649 [65]; Kirby J referred to J Stapleton, "The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable" (2003) 24 *Australian Bar Review* 135 at 135-140.

77 His Honour referred to R Dworkin, *Taking Rights Seriously* (Harvard University Press, Cambridge, 1977), discussed in Kirby, n 5, p 84.

78 (2008) 82 ALJR 870.

79 *Roads and Traffic Authority v Royal* (2008) 82 ALJR 870 at 876-877 [25].

80 Private communication (15 May 2008).

81 (2005) 224 CLR 627 at 642 [45].

82 Gummow and Hayne JJ reaffirmed the statements of Gummow, Hayne and Heydon JJ in *Allianz Australia Insurance Ltd v GSF Australia Pty L* (2005) 221 CLR 568 at 596-597 [96]-[97], which approved the dissenting judgment of McHugh J in *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 532, who doubted "whether there is any consistent commonsense notion of what constitutes a 'cause'".

sense" test, but found, with the majority, that the possibility of risk created by the RTA's failure to remedy the black spot did not cause or materially contribute to the actual collision between the two motorists.[83]

In his dissenting judgment, Kirby J reiterated that the majority test in *March v Stramare* is still the ruling authority, and that it directs the decision-maker inquiring into causation-in-fact "to reach a conclusion by the application to the entirety of the evidence of common sense and the lessons of common experience",[84] which means that the determination of causation-in-fact cannot be made "without recourse to broader considerations".[85] At the same time, Kirby J agreed with Gleeson CJ in *Travel Compensation Fund* that "[i]t would be a mistake to turn the legitimate use of 'policy' considerations, based on identified legal principles, into the use of 'value judgments at large'."[86]

It seems that there are two major and interrelated reasons for Kirby J's support for the retention of the majority's test in *March v Stramare*. One is his conviction that, in factual disputes, legal responsibility for wrongfully occasioned damage should be determined according to clearly articulated normative standards. The second reason is that these standards should factor in the economic values of efficiency and wealth maximisation as well as the social values of fairness and compassion.

Policy considerations and the content of the duty of care

Justice Kirby's conviction that the legal decision-making process should be transparent and cognisant of contemporary socio-economic realities has also influenced his approach to determining standards for the duty of care. Indeed, the question whether and, if so, which, social, economic or cultural factors should be considered as relevant when the court defines the normative standard of care is pivotal to the law of negligence.

Principles governing the standard of care in negligence were developed by the English courts in the mid-19th century[87] before accident insurance (including third party insurance) and medical (expenses and disability) insurance became widely available. This meant that tortfeasors' liability for damages was truly personal, and ruinous if enforced. At the same time, since there were no statutory social security benefit schemes, unless fully compensated, injured victims of negligent conduct had to pay all medical and care costs arising from their injury out of their own pockets, and to bear the burden of loss of capacity to earn. This socio-economic reality changed in Australia when, at the beginning of the 20th century, third party accident and professional indemnity insurance became

83 *Roads and Traffic Authority v Royal* (2008) 82 ALJR 870 at 898 [144].

84 (2008) 82 ALJR 870 at 886 [81].

85 (2008) 82 ALJR 870 at 887 [84].

86 *Travel Compensation Fund v Tambree (t/as R Tambree & Associates)* (2005) 224 CLR 627 at 639 [29].

87 *Blyth v Birmingham Waterworks* (1856) 11 Exch 781.

widely available. In the 1970s third party insurance became compulsory for all motor vehicle owners and, in 1974, the national health insurance scheme was established in Australia.[88] Although these socio-economic developments have profoundly changed economic consequences for those found liable for negligently causing injury to others, and for those who suffer such injuries, the courts still tend to approach the question of liability and assessment of damages as if nothing had changed since the middle of the 19th century. Consequently, the common law of negligence is underpinned by a legal fiction that, for example, negligent drivers are personally responsible (in the sense of not being indemnified by an insurance company) for paying compensation to persons they harm.[89]

It may be that by now, upholding such legal fictions has become essential to the very survival of the common law of personal injury. However, Kirby J has argued that, at least in the case of vehicular accidents, it is necessary to recognise the relevance of compulsory third party insurance (common throughout Australia) when determining the liability of drivers and owners of motor vehicles to those whom they injure. He provided the most extensive disquisition on the relevance of insurance to the law of negligence in *Imbree v McNeilly*,[90] which overruled the longstanding precedent of *Cook v Cook*.[91] Both cases concerned the factors and principles that should be considered relevant in formulating the standard of care.

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88 See *Health Insurance Act 1973* (Cth) and the *Health Insurance Commission Act 1973* (Cth). See also D Mendelson, "Devaluation of a Constitutional Guarantee: The History of Section 51(xxiiiA) of the Commonwealth Constitution" (1999) 23 *Melbourne University Law Review* 308. National social security measures (including disability support pensions) were implemented by the Commonwealth Government in the early 20th century: see *Invalid and Old-Age Pensions Act 1908* (Cth) and, in the 1940s, *Pharmaceutical Benefits Act 1944* (Cth); *Social Services Consolidation Act 1947* (Cth). See also T Kewley, *Social Security in Australia: The Development of Social Security and Health Benefits from 1900 to the Present* (Sydney University Press, Sydney, 1965).

89 The corresponding legal fiction assumes that in Australia a negligently injured person has no access to social security benefits, medical, nursing and rehabilitation care, whether nationally or State/Territory funded.

90 (2008) 82 ALJR 1374. Imbree supervised the 16-year-old defendant, McNeilly, driving his station wagon. Imbree was aware (as were other passengers in the vehicle) that McNeilly was an unskilled and inexperienced driver, who did not hold a learner's permit. McNeilly lost control of the vehicle while trying to avoid tyre debris on the road. It overturned, and Imbree, who was sitting in the front seat, suffered spinal injuries, which rendered him tetraplegic.

91 (1986) 162 CLR 376. Gleeson CJ, Gummow, Hayne and Kiefel JJ (plurality judgment) and Kirby J (in a separate judgment) determined that "*Cook v Cook* should no longer be treated as expressing any distinct principle in the law of negligence": *Imbree v McNeilly* (2008) 82 ALJR 1374 at 1387 [51]. Crennan J agreed with the reasons of Gleeson CJ and also with the reasons of the majority; Heydon J considered that the appeal could be upheld without overruling *Cook v Cook* (1986) 162 CLR 376. All justices, except Kirby J, refer in *Imbree v McNeilly* to joint judgments as "plurality" judgments.

In *Cook v Cook*, Mason, Wilson, Deane and Dawson JJ, in a plurality judgment,[92] relied on the dissenting judgment of Dixon J in *The Insurance Commissioner v Joyce*,[93] where he wrote[94] that "[f]or those who believe that negligence is not a general tort but depends on a duty arising from relations, juxtapositions, situations or conduct or activities, the duty of care thus arises. For those who take the contrary view, the standard of care is thus determined." In *Cook v Cook*, Dixon J's approach was interpreted in terms of the legal "relationship of proximity" (discussed above), which factored in skill – or the absence thereof – when determining the standard of the duty of care owed by "a driver who is known to be quite unskilled and inexperienced" to "a passenger who has voluntarily undertaken to supervise his or her driving efforts".[95] The majority held that in the "special and exceptional circumstances" of such a case, the objective standard of care owed by the particular driver to the supervising passenger (but not necessarily to other passengers) had to be "either expanded or confined by reference to the objective standard of skill or care which is reasonably to be expected of a driver to a passenger in the category of a case where that special or different relationship exists" so as to take account of his or her known lack of skill and experience.[96]

This approach required "the application of a different standard of care to the one defendant in respect of the one incident yielding the same kind of damage to two different persons, according to whether the plaintiff was supervising the defendant's driving or not".[97] This meant that the standard of care applicable to learner-drivers was not to be objective and uniform, but varied in accordance with such factors as the injured passenger's knowledge and awareness of the driver's inexperience. In *Imbree* the High Court unanimously reversed the *Cook v Cook* doctrine, and determined that "[n]o different standard of care is to be applied in deciding whether a passenger supervising a learner driver has suffered damage a cause of which was the failure of the learner driver to act with reasonable care."[98]

Justice Kirby agreed, but with the following proviso:

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92 In *Cook v Cook* Brennan J determined (at 394) that, in view of the passengers' knowledge that the driver was inexperienced, the appropriate standard was that of "an inexperienced driver of ordinary prudence".

93 (1948) 77 CLR 39.

94 (1948) 77 CLR 39 at 57.

95 *Cook v Cook* (1986) 162 CLR 376 at 388. In this case, the plaintiff persuaded her sister-in-law, the defendant, to drive a car, even though she knew that the latter was both inexperienced and did not hold even a driver's permit. While driving, the defendant attempted to avoid a collision with a stationary car. She put her foot on the accelerator, swerved and hit an electricity pole. The plaintiff sustained serious injuries as a result of the collision.

96 (1986) 162 CLR 376 at 384, 387.

97 *Imbree v McNeilly* (2008) 82 ALJR 1374 at 1390 [70].

98 (2008) 82 ALJR 1374 at 1387 [51].

> Whatever may be the relevance of liability insurance for other areas of substantive law, in the field of liability of drivers and owners of motor vehicles to those whom they injure, the time has come to adjust the fiction of individual personal liability. This Court should acknowledge the relevance of compulsory insurance to the content of the liability for motor vehicle accident liability … After 60 years, it is time that fiction acknowledged reality.[99]

Chief Justice Gleeson was the only other member of the Bench to broach the issue of insurance.[100] He observed[101] that although "insurance is a major factor in the practical operation of the law of negligence as it applies to motor vehicle accidents", it is merely one aspect of "a heavy overlay, varying in its detail, of statutory prescription and modification" under which the common law operates. In other words, the existence of a scheme of compulsory third party insurance does not – on its own – provide a principled explanation for a determination that, at common law, "the standard of care owed by an inexperienced driver to a supervising passenger [is] the same objective standard as that owed to third parties generally".[102]

Thus, Kirby J was unsuccessful in persuading the High Court that the common law liability of drivers should be determined "in the context of statutory prescriptions, enacted in substantially common form throughout Australia, providing for a compulsory scheme of third party insurance for the liability of all drivers (and owners) of motor vehicles operating on public roads throughout the nation".[103] In view of several other compulsory insurance schemes (for example, all medical practitioners and lawyers must carry professional insurance as a prerequisite to registration), his Honour's focus on insured drivers would have created an exception in its own right. Nevertheless, it is inevitable that in the future the High Court will have to reconsider the concept of personal responsibility in the context of insurance and expressly define what role insurance, and other social realities, should play in judicial determinations of the duty of care and its content, attribution of legal responsibility and assessment of damages.

THE LAW OF MENTAL HARM

Having considered aspects of duty of care, causation and standard of care, the remainder of this chapter examines Kirby J's approach to "mental harm" cases since *Jaensch v Coffey*.[104]

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99 (2008) 82 ALJR 1374 at 1396-1397 [112].

100 *Imbree v McNeilly* was Gleeson CJ's final judgment on the High Court of Australia.

101 (2008) 82 ALJR 1374 at 1381-1382 [22]-[23].

102 (2008) 82 ALJR 1374 at 1382 [23].

103 (2008) 82 ALJR 1374 at 1395 [106].

104 (1984) 155 CLR 549.

The fact that Kirby J was unsuccessful in persuading the majority of the High Court of Australia of the merits of the *Caparo* test does not detract from the depth and insight of his contribution to the jurisprudence of the duty of care. A variation of the *Caparo* test may yet find favour with the High Court judges of the future. In the meantime, his Honour's contribution to the evolution of the law of pure mental harm has been both far-reaching and sagacious, as demonstrated in the following cases.

Justice Kirby initially formulated his approach to the law of pure mental harm while the President of the New South Wales Court of Appeal. As noted above, following the *Jaensch* decision, damages became recoverable for a recognised psychiatric illness resulting from shock occasioned by the death of, or an injury to, another person (within a restricted category of victims),[105] as long as the eligible claimants directly perceived (through sight or hearing)[106] the "immediate aftermath" (that is, the claimant's perception, which triggered the psychiatric illness was "unaffected by other intervening causes or events")[107] of the shocking event. Other preconditions to recovery included the requirements (a) that the requisite shocking phenomenon be one which "affronts or insults the plaintiff's mind and causes a recognizable psychiatric illness"; (b) that it be single rather than cumulative;[108] and (c) that the claimants are shown to have been of "normal fortitude" at the time of the injury. Excluded from recovery were bystanders in the sense of officious intermeddlers, curious onlookers and involuntary onlookers who did not suffer physical injury, as well as claimants who sustained psychiatric injury as a result of concern for the defendant who died, or was injured or imperilled by his or her wrongful conduct.[109] Though recognised as a groundbreaking case, these limitations on and exceptions to the scope of the duty of care under the *Jaensch v Coffey* theory were criticised by academic writers[110] and appellate judges.[111] In the two cases directly on the issue of liability for pure nervous shock, Kirby J analysed the general requirement of a

105 That is, generally, persons in a "close and intimate" relationship, as well as in some circumstances, co-workers: in *Mount Isa Mines Ltd v Pusey* (1971) 125 CLR, the High Court allowed recovery for pure nervous shock to a rescuer who provided succour but did not witness the accident that rendered his co-workers severely burnt.

106 *McLoughlin v O'Brian* [1983] 1 AC 410 at 423 per Lord Wilberforce – an approach generally adopted in *Jaensch v Coffey*, which however left the question of this requirement open: at 567 per Brennan J, at 612 per Dawson J, at 608 per Deane J.

107 See *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317 at 409 [270] per Hayne J.

108 *Jaensch v Coffey* (1984) 155 CLR 549 at 567 per Brennan J.

109 (1984) 155 CLR 549 at 604 per Deane J. This exception was first formulated by Lord Robertson in *Bourhill v Young* [1943] 1 AC 92.

110 N J Mullany and P R Handford, *Tort Liability for Psychiatric Damage* (Law Book Company, Sydney, 1993).

111 See, eg, *Pham v Lawson* (1997) 68 SASR 124 per Lander J; *Shipard v Motor Accident Commission* (1997) 70 SASR 240.

sudden, single shock in cases of non-physical impact psychiatric injury and the prerequisite of a direct perception, including the notion of "an immediate aftermath".[112]

Campbelltown City Council v Mackay

In *Campbelltown City Council v Mackay*,[113] the claimants, Mr and Mrs Mackay, claimed damages for negligently occasioned psychiatric illness. However, each claimant developed a psychiatric condition not in July 1984, when they experienced the shock of their negligently constructed house moving suddenly (the first of many such movements that would eventually make the house uninhabitable), but in August 1985, following the stillbirth of their son.[114] In concurring judgments, Kirby P, Samuels and McHugh JJA held, in Kirby P's words,[115] that, bound by the decision of the High Court of Australia in *Jaensch v Coffey*,[116] the Court of Appeal was not in a position to "to review the boundaries of the liability of the appellants for nervous shock".[117] Nevertheless, he noted that the historically determined requirement of a single shock was conceptually unconvincing and medically anachronistic, because "[a]s the facts of the damage suffered by the respondents illustrate, psychiatric injury, more than most, is very unlikely to result from the single impact upon the psyche of the claimant of an isolated event."[118]

Justice Kirby[119] pointed out that the requirement of a single shock and other "artificialities" governing the tort "bring the law into disrepute" by forcing "claimants to try to squeeze their claims into outmoded formulae". Fear-driven limitations on recovery for pure nervous shock[120] were contrary to the principle that individuals should be compensated

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112 Significantly, at the time when judges and commentators almost universally considered "pure nervous shock" as merely a "special duty situation", Kirby J referred to this kind of liability as "tort" – a discrete cause of action, with its own set of elements and jurisprudential rationale: see, eg, *Campbelltown City Council v Mackay* (1989) 15 NSWLR 501.

113 (1989) 15 NSWLR 501.

114 The trial judge awarded compensation for the damage to their home and consequential loss, as well as nervous shock. The defendants were theoretically successful in their challenge of the award for nervous shock. However, the Court of Appeal held that the sum awarded at first instance for nervous shock should be awarded for consequential loss (vexation, worry, distress and inconvenience) in respect of damage to the home.

115 (1989) 15 NSWLR 501 at 503.

116 (1984) 155 CLR 549.

117 According to McHugh J, "[c]ounsel for the plaintiffs expressly rejected an invitation from the Court to examine the question whether liability in an action for 'nervous shock' might ensue if the psychiatric conditions from which they admittedly suffered in 1985 and 1986 were wholly or partly the result of the accumulated distress and worry caused by the damage to their home."

118 *Campbelltown City Council v Mackay* (1989) 15 NSWLR 501 at 503.

119 (1989) 15 NSWLR 501 at 503-504.

120 Fears of opening the floodgates of litigation through "fraudulent and unsubstantiated claims" were articulated by the Privy Council in *Victorian Railway Commissioners v James Coultas and Mary Coultas* (1888) 13 AC 222.

for harm occasioned through the unreasonable conduct of others. Moreover, the exclusionary rules were also detrimental to the public interest in the proper administration of justice, insofar as they subjected "expert witnesses to the pressure to distort opinions on what they may feel to be legitimate claims, out of deference to outmoded formulations of the legal basis of entitlement to recovery".[121]

Coates v Government Insurance Office (NSW)

In *Coates v Government Insurance Office (NSW)*,[122] the plaintiffs claimed to have sustained psychiatric illness as a result of being told that their father was killed in a road crash occasioned by the defendant's negligence. By majority (Gleeson CJ and Clarke JA, Kirby P dissenting), the New South Wales Court of Appeal held that the claimants failed to establish that they suffered from a recognised psychiatric injury (as distinct from ordinary grief), and thus could not recover damages for nervous shock.

In his dissenting judgment, Kirby P, as in many other cases, differed in his interpretation of the relevant statute (here, the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 4), and in his assessment of expert testimony.[123] However, according to Professor Luntz, the real reason for the dissent in *Coates* was Kirby P's recognition that the law had failed to keep up with scientific understanding of the causes of psychiatric illness and that the questions which the law put to the witnesses were not questions they could answer.[124]

In the *Coates* judgment, Kirby P critically reviewed all major prerequisites (also called "control mechanisms") to recovery for pure nervous shock, which the claimants had to establish, in addition to showing that the risk of their psychiatric illness was reasonably foreseeable and that they were in a proximate legal relationship with the other party. With respect to the requirement of direct perception, his Honour observed that such a rule is "hopelessly out of contact" with the reality of the world where the mobile phone is ubiquitous, and "in which the law of nervous shock must now operate". It was time for the law to leave behind the "outdated" appellation of "nervous shock", and recognise that:

> it is as much the direct *emotional* involvement of a plaintiff in an accident or perilous situation, as her or his *physical* presence at the scene or directly at its aftermath that is pertinent to the level and nature of the injury suffered, and the consequent psychological damage.[125]

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121 *Campbelltown City Council v Mackay* (1989) 15 NSWLR 501 at 503-504.

122 (1995) 36 NSWLR 1.

123 Kirby P relied on the opinion of Dr Jolly, whereas the other members of the Court of Appeal found the evidence of other medical experts more persuasive.

124 H Luntz (private communication, 3 February 2008).

125 *Coates v Government Insurance Office (NSW)* (1995) 36 NSWLR 1 at 11.

In what may be best described as the manifesto for reforming the common law of pure nervous shock, Kirby P explained that:

> it is neither rational nor manageable to draw the lines of recovery according to:
>
> (a) The presence of the "victim" or absence from the event "or its immediate aftermath" whatever that may mean. … [T]here will always be conflict as to what the "immediate aftermath" was and how far it extended in time and medium;
> (b) The direct perception of the shocking news by sight and sound and the indirect perception, for example, by telecommunications, television, video or oral message; or
> (c) The precise legal relationship of the claimant to the victim of the tort. Human relationships are so infinitely varied that to confine coverage to a parent, lawful spouse or child (who may, in fact, be indifferent) would be to exclude many other persons in close and intimate relationships, where grief and shock are profound and, having regard to the relationship, readily foreseeable.[126]

In his *Coates* judgment, having conceded "the difficulty of drawing lines on policy grounds to restrict the exposure of tortfeasors to liability for nervous shock caused by a message of injury or death consequential upon the tort",[127] Kirby P declared that, "provided the requisite factors of foreseeability and proximity are demonstrated, the logic which traditionally prohibits recovery where a plaintiff has been told of the incident and its effects, as opposed to directly perceiving the incident, is unsustainable".[128] In *Tame v New South Wales; Annetts v Australian Stations Pty Ltd*,[129] though focusing on foreseeability rather than proximity and policy, the High Court of Australia agreed.

Tame v New South Wales; Annetts v Australian Stations Pty Ltd

Most of Kirby P's dissenting ideas became, in fact, the "orthodoxy" as the new Australian common law principles in the area of pure mental harm were declared by the High Court in *Tame v New South Wales*; *Annetts v Australian Stations Pty Ltd*[130] (*Tame/Annetts*). The two cases were heard together.[131] In *Tame v New South Wales*, Mrs Tame sustained physical injuries in a motor vehicle collision for which she was compensated. However, in the course of investigation into that accident, a police officer mistakenly recorded a blood-alcohol level of 0.14 for

126 (1995) 36 NSWLR 1 at 11.
127 (1995) 36 NSWLR 1 at 9.
128 (1995) 36 NSWLR 1 at 9-10.
129 (2002) 211 CLR 317.
130 (2002) 211 CLR 317.
131 Appeal from *Morgan v Tame* (2000) 49 NSWLR 21 (affirmed); appeal from *Annetts v Australian Stations Pty Ltd* (2000) 23 WAR 35 (reversed). See also *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269.

both drivers (Mrs Tame's alcohol reading was actually nil). Although the mistake was subsequently corrected, and no-one had acted on the erroneous information, Mrs Tame sued the police (the State of New South Wales) for pure nervous shock. She claimed that she developed a psychotic depressive illness – not as a result of shock from the collision, but from shock sustained when her solicitor told her of the incorrect entry. The High Court determined that the police officer, and hence New South Wales, did not owe Mrs Tame a duty to take reasonable care to avoid causing her injury of the kind she suffered.

In *Annetts v Australian Stations Pty Ltd*, parents of the sixteen-year-old, James Annetts, claimed damages for negligently occasioned mental harm. Prior to James' employment at the Australian Stations Pty Ltd as a jackaroo, they telephoned his employer who assured them that their son would be safe, and work under constant supervision. James, however, was sent to work alone as a caretaker at a remote location 100 km away from the station. After seven weeks, a police officer notified his parents that James and another teenager, Simon (employed by the defendants on another remote station), were missing. Mr Annetts collapsed on hearing the news. Subsequently, the Coroner found that James died of dehydration after their four-wheel-drive became bogged in the Gibson Desert (Simon died of a rifle wound).[132]

By 2002 it was accepted that when determining the duty of care in claims for pure mental harm,[133] the generic test of reasonable foresight has to be subject to considerations and constraints articulated in the *Sullivan* judgment. But the major question in *Tame & Annetts* was the applicability of the *Jaensch v Coffey* requirements as additional exclusionary preconditions in claims for pure mental harm.

The liability in *Tame* turned on the question whether it was reasonably foreseeable that a person of "normal fortitude" would develop a psychiatric illness in response to being told about a clerical mistake that of itself had no adverse consequences and which, once discovered, was promptly rectified. Therefore, only those parts of the judicial opinions relating to foreseeability and the nature and function of the normal fortitude requirement fell within *Tame*'s ratio decidendi. In *Annetts*, given the pre-existing relationship between the parties, the issue of liability was even narrower – namely, the relationship between verbal communications and shock, or a series of shocks, which give rise to psychiatric illness. Nevertheless, the High Court took the opportunity to enunciate rules applicable to compensation for pure psychiatric injury in general.

Each of the six judgments reconsidered, to a greater or lesser extent, three questions of law pertaining to pure mental harm, which Gaudron J

132 See *Annetts v McCann* (1990) 170 CLR 596 and, more generally, I Freckelton and D Ranson, *Death Investigation and the Coroner's Inquest* (Oxford University Press, Melbourne, 2006).

133 As well as cases of "pure economic loss", "pure" omissions and other developing or novel categories of case.

described as the "sudden shock rule"; the "direct perception rule"; and the "normal fortitude rule".[134] Sweeping away the past caveats and qualifications imposed on the duty of care in relation to pure psychiatric injury, the High Court of Australia determined, by a majority, that ordinary principles of negligence should govern compensation for this kind of harm. Hence those three prerequisites to which Kirby J so strongly objected in *Coates v Government Insurance Office (NSW)* were relegated from exclusionary rules pertaining to the existence of the duty of care, to merely factors that are relevant when the court examines the issue of the causal responsibility of the defendant's wrongful conduct for the claimant's psychiatric injury.[135]

Justices Gummow and Kirby, in their joint concurring judgment, stated[136] that the scope of duty in such cases should be defined with "reference to values which the law protects". Their Honours did not actually spell out the apposite values; however, presumably among them would be the value of the sanctity of the person where it stands for safeguarding the interest in mental as well as physical integrity against foreseeable negligent injury.[137] Another value highlighted by the decision in *Tame/Annetts* was equality, one aspect of which, as conceptualised by Dias in terms of justice, is treating like cases in like fashion. Thus, jurisprudentially, tests for establishing the defendants' liability for personal injury in negligence should be conceptually the same, irrespective of whether the harm in question happens to be physical or psychiatric. To quote from the Gummow and Kirby JJ judgment:[138] "The legal theory of recovery for 'pure' psychiatric injury should be unhindered by artificial constrictions based on the circumstance that the illness for which redress was sought was purely psychiatric."

With the decision in *Campbelltown City Council v Mackay* in the background, Gummow and Kirby JJ noted that the doctrine of "sudden shock" should no longer be "accepted as a pre-condition for recovery in cases of negligently inflicted psychiatric illness".[139] According to their Honours, although "cases of protracted suffering, as opposed to 'sudden shock', may raise difficult issues of causation and remoteness of damage", such difficulties "are more appropriately analysed with reference to the principles of causation and remoteness, not through an absolute denial

134 *Tame v New South Wales*; *Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317 at 339 [45].

135 Gleeson CJ, Gaudron, Gummow and Kirby JJ, McHugh, Hayne JJ; Callinan J contra: the sudden shock rule and the direct perception rule should not be considered definitive tests of liability. Gleeson CJ, Gaudron, Gummow and Kirby JJ; McHugh, Hayne and Callinan JJ contra: the normal fortitude rule should not be considered a definitive test of liability.

136 (2002) 211 CLR 317 at 383 [196].

137 (2002) 211 CLR 317 at 411 [275] per Hayne J.

138 (2002) 211 CLR 317 at 397 [236].

139 (2002) 211 CLR 317 at 389 [210]-[213].

of duty".[140] Likewise, the requirement of "direct perception", when it is only applicable to claims for pure psychiatric illness, offends against the value of equality. According to Gummow and Kirby JJ,[141] "[a]ssuming that otherwise liability could be established, this exclusion of recovery is obviously arbitrary. It lacks apparent logic or legal merit."

Their Honours commented[142] that "the more significant causal factor in cases of psychiatric illness is not the 'direct perception' of the event, or the precise manner in which the horror of the event is conveyed, but the relationship between the plaintiff and the accident victim".[143]

Finally, Gummow and Kirby JJ[144] decided that the controversial requirement,[145] which made the recovery of damages conditional on proof that a person of "normal fortitude" would have suffered pure psychiatric injury as a result of the defendant's negligent conduct, was not a "free-standing criterion of liability", but a consideration to be factored into the court's assessment "at the stage of breach, of the reasonable foreseeability of the risk of psychiatric harm".[146]

As it happened, soon after the decision in *Tame/Annetts*, a review of the law of negligence was undertaken by a special panel chaired by the Honourable Justice David Andrew Ipp.[147] Victoria, New South Wales, Tasmania, the Australian Capital Territory, South Australia and Western Australia adopted – in different ways and to different degrees – recommendations of the Ipp Panel's *Review of the Law of Negligence Report*[148] relating to compensation for "consequential mental harm" following physical injury (for instance where depression is suffered as a result of an injury to the body) and "pure mental harm".[149] This left

140 (2002) 211 CLR 317 at 388 [208] per Gummow and Kirby JJ: "Assuming that the other elements of the cause of action have been made out, liability in negligence, for which damage is the gist of the action, should turn on proof of a recognisable psychiatric disorder, not on the aetiology of that disorder."

141 (2002) 211 CLR 317 at 393 [222].

142 (2002) 211 CLR 317 at 393 [222].

143 (2002) 211 CLR 317 at 393 [222], citing H Teff, "Liability for Psychiatric Illness after Hillsborough" (1992) 12 *Journal of Legal Studies* 440 at 442; B Markesinis and S Deakin, *Markesinis and Deakin's Tort Law* (4th ed, Oxford University Press, Oxford, 1999) p 130.

144 (2002) 211 CLR 317 at 380 [189].

145 See, eg, *Mount Isa Mines Ltd v Pusey* (1971) 125 CLR 383 at 405 per Windeyer J.

146 (2002) 211 CLR 317 at 380 [189]. But see at 357 [110] where McHugh J, who dissented on this point, observed that foreseeability of risk in pure psychiatric illness cases should not "be anchored by reference to the most vulnerable person in the community" as this "would place an undue burden on social action and communication", and "would seriously interfere with the individual's freedom of action and communication". See also Hayne J (at 411 [275]).

147 D Ipp, P Cane, D Sheldon and I Macintosh, *Review of the Law of Negligence Report*. The Second Report was released on 2 October 2002: http://nla.gov.au/nla.arc-31508 (accessed 19 November 2008).

148 Ipp et al, n 147.

149 *Civil Law (Wrongs) Act 2002* (ACT) s 32; *Civil Liability Act 2002* (NSW) s 27; *Civil Liability Act 2002* (Tas) s 29; *Civil Liability Act 2002* (WA) s 5Q; *Civil Liability Act 1936* (SA) s 3. For a discussion, see Mendelson (2007), n 7, pp 465-471.

Queensland and the Northern Territory as the only jurisdictions fully governed by the common law as expressed in *Tame/Annetts*.[150] Although the codified mental harm provisions are yet to undergo judicial scrutiny, it is to be hoped that they will be interpreted in the light of the principles and approaches formulated in *Tame/Annetts*.[151]

CONCLUSIONS

In a democratic society, when legislative enactments are considered by the common law courts, transparency in judicial reasoning is of particular importance. Insofar as the third stage of the *Caparo* test provides a formal framework for an explanation and discussion of legal values, extra-legal considerations and insights that underpin judicial choices, it can serve the object of transparency. Perhaps the justices of the future will consider a fusion of the *Sullivan* guidelines, with their emphasis on the logic and coherence of the law, with Kirby J's approach to legal analysis.

"The times they are a-changin'",[152] and so it is for the law of torts. In the past three decades of Kirby J's judicial activity, many aspects of torts law have mutated beyond recognition – for example, in the late 1970s few lawyers would have predicted either the "imperial expansion" of the tort of negligence,[153] or the legislative intervention, which codified the major substantive principles of this cause of action. Throughout that time, Kirby J, in carefully reasoned opinions and writings that have ranged from playfully beguiling to despondent cris de coeur, has kept the jurisprudential conversation focused on what Ulpian, referring to "Celsus' elegant definition", called "the art of goodness and fairness".[154]

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150 Queensland is also governed by general negligence provisions contained in the *Civil Liability Act 2003* (Qld).

151 For example, the legislation provides that a duty of care is to be imposed in the circumstances of the case where the defendant ought to have foreseen "that a person of normal fortitude *might* … suffer a recognised psychiatric illness". The modal verb "might", in contrast to "may" or "would" (which was the common law test), suggests a much lower threshold for liability by requiring a mere possibility or contingency, rather than probability, of a "person of normal fortitude" suffering a "recognised psychiatric illness". For a further discussion, see Mendelson, n 149, pp 415-443.

152 Bob Dylan, "The times they are a-changin'".

153 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 570 per Brennan J.

154 "Ut eleganter Celsus definit, ius est ars boni et aequi" (Ulp D 1,1,1). Ulpian interpreted "aequum" as a legal value which "requires the interests of each person to be taken into account and given equal weight": T Honoré, *Ulpian* (2nd ed, Oxford University Press, 2002) p 93.

Chapter 33

TRADE PRACTICES LAW

Warren Pengilley*

> *The language of the TPA applicable to this case is obscure. It is in need of re-drafting by reference to concepts and purposes. It requires the negotiation of too many cross-references, qualifications and statutory interrelationships. This imposes an unreasonable burden on the corporations and their officers subject to the TPA, the ACCC enforcing the Act and the courts with the responsibility of assigning meaning to, and applying, its provisions.*[1]

THE JUDICIAL FUNCTION

Michael Kirby was never backward in declaring what he thought good judges should do. As long ago as his 1983 Boyer Lectures[2] he acknowledged that, amongst judges, "strong differences are inevitable and healthy and should neither be suppressed nor too closely disguised". He has lived by this philosophy. His views can never be seen as "too closely disguised". There are many, of course, not only in the judiciary, who will profoundly agree with the philosophy he expresses but disagree with a number of his decisions. I have, on many occasions, found myself in this group. Trade practices law is a classic field in which minds reasonably differ and everyone's views have aspects of subliminal subjectivity.

Justice Kirby also stated in his Boyer Lectures, and has restated many times since, that judges should not only make the law but should also seek to reform it. He saw as a strength of the great common law judges of the past that they, with determination and assurance, "developed the common law from precedent to precedent". He saw this reform process as having been carried out by judges such as Britain's Lord Denning,

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* This contribution was written during October 2008.

1 *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1 at 24 [69] per Kirby J.

2 M D Kirby, *The Judges* (Boyer Lectures, ABC, 1983).

Justice Cardozo of the United States and, in Australia, by Justice Murphy (whom he described as Australia's "exemplar" in this regard[3]).

While Kirby J, I think, saw his judicial reasoning as following the foundations laid by Denning and Cardozo, only history will tell whether he is judged as having their eminence, and I have no doubt others will comment upon this more learnedly than I. The importance of his philosophy for trade practices purposes lies in his admiration for Justice Lionel Murphy. It was, of course, the then Senator Murphy, as Attorney-General, who was responsible for the enactment of the *Trade Practices* Act *1974* (Cth). In relation to this Act, it was he who paved the way for a new method of drafting which was not usual in the 1970s. Murphy believed that general legal expressions could often not be expressed with black letter law precision and that black letter law drafting gave rise to more problems than it solved. Thus he favoured broad conceptual drafting, leaving it to the judiciary to interpret the statute in a purposive manner. It is my view that this is a proper approach to the drafting of trade practices legislation. What it does necessitate, however, is for discipline to be exercised in the interpretation of the statute, for all issues, including long-term ramifications, to be considered and for experience elsewhere to be researched and carefully evaluated. It is not sufficient to have fixed views and simply to re-articulate these from time to time. While it is Justice Kirby's torch that there can be differences which are healthy and should neither be suppressed nor too closely disguised, he has had something of a fixed view on competition law (that self-interest is wrong and that many arrangements which could be explained in rational marketing terms should be shot down as being nothing more than what he described as "loopholes for escape") and his judgments, for this reason, fail to reflect the precision of reasoning and balancing of interests which are so admired in many of his constitutional and human rights decisions.

ACTIVIST AND DISSENTER

Justice Kirby was an activist and a frequent dissenter. As of 2007, in the High Court, his dissent rate was 48.28 per cent, well above the next Justice (Heydon J at 15.52 per cent).[4] Justice Kirby himself thought that this rate of dissent was because of the nature of the matters before the High Court – that is, matters surviving the special leave to appeal process and often involving constitutional and humanitarian issues. He noted that when he served as President of the New South Wales Court of

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3 Kirby, n 2, p 59.

4 See Summary of Statistics compiled by Gilbert and Tobin Centre of Public Law and set out in *The Australian Financial Review* (16 February 2007) p 59. The dissent rates there recorded are Gleeson CJ 7.27%; Gummow J 1.82%; Kirby J 48.28%; Hayne J 3.77%; Callinan J 10.53%; Heydon J 15.52% and Crennan J 0.00%.

Appeal he was in the majority in 84.6 per cent of the cases and in a very high proportion of cases gave the opinion of the entire court or secured the concurrent opinion of at least one other judge. He was also of the belief that, had he served as a High Court judge on the "Mason court", he would not have dissented very often from the then majority.[5]

The record in trade practices cases is, however, quite different. A summary of the competition law cases in which Kirby J participated is set out in an Appendix to this commentary. One may well conclude that he dissented in every one of the seven competition cases which came before the court and in which he was involved by October 2008. Even in the two cases in which he gave a judgment concurring with the majority in result, either in whole or in part, his judgments were based on such different reasoning from that of the majority that they may well be considered as dissents.

What are the reasons for this? They may perhaps be found in the inherent Kirby belief in the virtues (and they are assuredly virtues) of assertively expressing one's views when unable to agree with one's colleagues. They may be found in the inherent nature of the subject matter. Competition law is novel in Australia, not having been experienced here prior to 1975. Thus, as with new constitutional issues, there are uncharted grounds. It may be in the "purposive" interpretation which Kirby J sought to bring to competition law. It may just be that he saw things differently from the colleagues in his midst and, had he been in the "Mason court", he would not have done so. All of this involves conjecture.

Justice Kirby did not, I think, hold out hope that a substantial number of his trade practices dissents would become the law of the future. But he did believe that some of his dissents would at least influence the law and that some may well, in the fullness of time, be adopted as the law. He said in this regard in his 2003 Hamlyn lectures: "Everyone knows that, in today's judiciary, today's dissent occasionally becomes tomorrow's orthodoxy."[6] No doubt he held out this hope for at least some of his own dissents.

It is appropriate to see whether, and if so, where, his dissents may become tomorrow's orthodoxy. The following analysis of law under the *Trade Practices Act 1974* (Cth) refers primarily to competition law (Pt IV of the *Trade Practices Act*). This is the area of the *Trade Practices Act* upon which, in my view, the members of the judiciary can probably place their

5 M D Kirby, "Ten Years in the High Court – Continuity and Change" (Speech, NSW Bar Association, Sydney, 17 October 2005): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_1005.pdf (accessed 4 December 2008). See also M D Kirby, "Twelve Years in the High Court: Continuity and Change" (Speech, Southern Cross University, Lismore, 30 November 2007): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_30mar07.pdf (accessed 4 December 2008).

6 M D Kirby, "Judicial Activism: Authority, Principle and Policy in the Judicial Method" (First Hamlyn Lecture, 55th Series, University of Exeter, 19 November 2003) p 2: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_19nov.html (accessed 4 December 2008).

greatest imprint. It is law completely without precedent in Australia prior to 1975. The other major areas of the Act (consumer protection (Pt V) and unconscionable conduct (Pt IVA)) also merit evaluation, albeit much more briefly. These areas are important. But they are developments from the common law of deceit and misrepresentation (in the case of Pt V) and common law unconscionability decisions (in the case of Pt IVA).[7] There is thus scope for differing approaches in these areas but there is not the same scope for the exercise of original thinking as there is in the competition law field.

COMPETITION LAW

The Kirby views as to competition law principles

In order to understand his judgments, it is necessary to set out Kirby J's views on the interpretation of competition law. He stated these views in *Melway*,[8] the very first competition law case in the High Court on which he sat, and only the second to reach that court.[9] In *Melway* he stated that the competition provisions of the *Trade Practices Act* should be interpreted in accordance with the following principles:

- it is a fundamental piece of remedial legislation;
- it departs from prior Australian drafting principles and follows the *Sherman Act* of the United States in mode of drafting and policy objectives;
- it must be construed so as to uphold its purpose and the court should ensure that there were no "loopholes for escape";
- it should not be approached as a piece of "metaphysical analysis";
- it is aimed at promoting competition, efficiency and consumer welfare and has economic objectives;
- it is the Australian equivalent of the anti-trust laws of the United States and the European Union; and
- under various anti-trust statutes, the purpose of promoting competition and protecting consumers is the same. There are good reasons for Australia to adhere to substantially common approaches to common problems, even given different language in the various statutes involved.

7 In particular, *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447. Though this decision was given after the enactment of the *Trade Practices Act*, it was a common law decision given before the enactment of Pt IVA of the Act and Pt IVA was built on the *Amadio* decision.

8 *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) CLR 1.

9 The first was *Queensland Wire*, some 12 years earlier than *Melway*: *Queensland Wire Industries v Broken Hill Pty Co Ltd* (1989) 167 CLR 177.

Difficulty of application of the Kirby competition law principles

No-one can disagree with Kirby J's generally stated principles. It is indeed commendable that they should be stated clearly and unambiguously. It is in the application of these principles that Kirby J has been hard to predict and his conclusions have been difficult to reconcile with the principles he articulated in *Melway*. No doubt reform is one thing but some degree of certainty is necessary if business is to act in compliance with the law. Some cases have held certainty, for this reason, to be vital to the interpretation of competition law.[10] Also, of course, marketing and economic analysis is an important factor in competition law assessments. However, perhaps this is missing somewhat in Kirby J's analyses. This is strange because he holds one of those things singularly missing in the qualifications of High Court judges – a degree in economics. Further, one would have thought that he would have taken great notice of United States experience in light of his evaluative criteria. Yet in most respects, these criteria also have not been analysed.

In *Melway*,[11] a misuse of market power case, he would have held an exclusive distribution arrangement to be illegal notwithstanding evidence as to its efficiency and business justification and the fact that Melway would have done, and in fact did do, exactly the same thing when it was not in a position of market power. Rather than regarding this, as did the majority, as indicating Melway's distribution system was not "taking advantage" of market power (because it did the same thing when it had no market power), he dismissed the Melway distribution system as being based on "self-interest". Assuredly it was, but we have it from *Queensland Wire*, a decision Kirby J much admired,[12] and from

10 See, eg, the two following Privy Council decisions on appeal from the Supreme Court of New Zealand: *Telecom Corp of New Zealand v Clear Communications* [1995] NZLR 385 at 405: "[t]he trader is entitled, before he enters upon a line of conduct which is designed to affect his competitors to know with some certainty whether or not what he proposes is lawful"; and *Carter Holt Harvey Building Products Group v Commerce Commission* [2004] UKPC 37: "breach of the Act [exposes] a trader to quasi criminal penalty. The law would be failing in its duty if it did not make clear what he can and cannot do if he is in a predicament)." The High Court has utilised a number of differing concepts in its interpretation of the *Trade Practices Act*. They are most capably discussed in an article by Katherine McMahon, "Competition Law, Adjudication and the High Court" (2006) 30 *Melbourne University Law Review* 782. That article demonstrates that competition law interpretation in Australia is often a matter of subjectivity masquerading as noble and objective principles. The major problem with Kirby J's "purposeful" approach is that it necessarily involves uncertainty of outcome. This problem could have been ameliorated had he analysed and followed United States cases more closely – a point discussed later in this commentary.

11 *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) CLR 1.

12 *Queensland Wire Industries v Broken Hill Pty Co Ltd* (1989) 167 CLR 177. One of Kirby J's major reasons for dissent in *Melway* was that he thought that the majority negated the *Queensland Wire* decision. The majority, however, applied the *Queensland Wire* decision in order to reach their conclusion in *Melway*.

general market observation, that self-interest is what drives initiative and individual decision-making. Conduct cannot, therefore, be condemned for the reason of "self-interest" alone. Further, he condemned the conduct in *Melway* notwithstanding United States authority, utilised by the majority in a joint judgment to reach the opposite conclusion, that exclusive dealing arrangements of the type involved in the case could have advantages for competition as a whole.

Freedom to select distributors is an important aspect of "freedom to deal" and the competitive process itself, even if this necessarily involves denying supply to an individual. Justice Kirby appears to have seen Melway's denial of supply as equating to a denial of "civil rights", rather than recognising the fact that competition necessarily involves selection of distribution channels. This selection itself is a "freedom" – albeit one necessarily involving non-supply to a denied party. It is a question of balance. The Kirby judgment in *Melway* lacked this necessary balance although, in the interests of full disclosure, I must here state that I was involved in the case as an adviser to Melway and may perhaps have an elliptical view of Kirby J's judgment for this reason.

The Kirby views as to the court's obligations in relation to remedies

In *Melway* Kirby J was, however, certainly correct in one respect. He foresaw the fact that "at the risk of offending purists", it could not be the case that the difficulty of framing orders in orthodox terms could frustrate the purpose of the Act. He believed that it was the duty of the High Court to craft statutory injunctions to achieve the Act's purpose "even when it requires a little legal imagination uncongenial to procedural and remedial traditionalists". The drafting of appropriate compliance orders would not, in my view, have posed an insuperable problem in *Melway* itself if Melway had been found in breach. But the difficulties of framing such orders have perhaps been underrated by Justice Kirby. We have not yet had a subsequent case which has significantly tested the ingenuity of the courts in drafting complex compliance orders. The real future problem will no doubt arise in mandatory supply orders when the court may be required to establish terms such as price, time periods, product quality, quantity of supply, credit terms and a barrage of other conditions encompassed in the somewhat disarmingly simple word "supply".

Kirby and the application of United States law

The major objective factor of certainty in Kirby J's interpretation of competition law would, one would have thought, have been the experience of the United States. He openly admits his respect for United States judgments and experience as a basis for his "purposive" interpretation of the *Trade Practices Act*.

The problem with his "purposive" approach is that it is a poor predictor of outcomes. One thing which could give greater certainty of outcome in his judgments would be to follow United States cases unless, for valid reasons, discussed and evaluated in detail, there was no sound basis for doing so. There can be little doubt that following United States law, in addition to providing greater certainty of outcome, would also have contributed to a "purposive" approach. No country has brought greater economic and marketing logic to the interpretation of competition law than the United States.

On many occasions, the High Court has dismissed United States reasoning as so-called "foreign concepts" or as "judicial gloss". This is not studied reasoning. It is counter-productive in the extreme and contrary to economic concepts which are akin in most free enterprise countries. Justice Kirby, in interpreting his "*Melway* principles", could have done much to negate this somewhat unconvincing and shallow logic had he applied in his reasoning the view that there were good reasons to adhere to substantially common approaches to common problems, even given different wording in the various statutes involved – one of his basic "*Melway* principles".

Sadly, however, he does not in his actual judgments seem to have considered United States law to nearly the same degree as has the majority. In *Melway*, he did not apply such law, and the majority did. In *Boral*,[13] he did not embrace the United States concept of "predatory pricing", articulated in particular by Justice McHugh, to distinguish what is legal and what is illegal pricing below cost. For Justice Kirby it was enough that Boral had expressed an intention to force a competitor from the market, something the majority believed indicated only competitive aggression, which was a good thing for consumers. In *South Sydney*,[14] he did not apply United States law to determine whether or not the South Sydney Rabbitohs had been legally or illegally excluded from the Sydney Rugby League Football competition. In this case, the competition rules provided for 14 competition teams and South Sydney was number 15 on the evaluation mandated by the criteria. The criteria themselves were not attacked. The majority believed that no particular club was targeted by the criteria and that the number limitation was defensible in the interests of the competition as a whole. United States law is that if selection criteria are objective and impartially applied, competition law is not breached.[15] In the *South Sydney* case, it was conceded that these criteria were fulfilled. Justice Kirby did not apply the United States test, however, and reached the opposite conclusion. He concluded that

13 *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374.

14 *News Ltd v South Sydney District Rugby League Football Club* (2003) 215 CLR 563.

15 *Deesen v Professional Golfers Association of America* 358 F 2d 165 (9th CCA (1966)); *Bridge Corporation of America v Contract Bridge League* 428 F 2d 1365 (9th CCA (1970)).

the sole purpose of the arrangement, the team limitation and the criteria themselves was the exclusion from the competition of a previously playing club. In *Visy*,[16] there was a problem of interpretation of the Act and a question of statutory construction as to whether an arrangement was an exclusive dealing arrangement and illegal only if anticompetitive (which the Australian Competition and Consumer Commission conceded it was not) or whether the arrangement was an exclusionary provision (in colloquial terms, a collective boycott entered into between competitors) and thus, per se, banned. The majority treated the matter as one of statutory construction and did not really canvass the policy of the Act. They concluded that the arrangement could be, as a matter of statutory construction, an exclusionary provision and thus illegal. Justice Kirby, quite rightly regarded the matter as one of statutory imprecision and thus one to be interpreted in accordance with the policy of the Act. This policy was, he said, that arrangements between competitors were to be looked at with particular disfavour. Therefore, agreeing with the majority conclusion, but on quite different reasoning, he opined that the policy of the Act should be that per se bans should not be removed from the Act's coverage simply because an arrangement might also be considered to be subject to a competition test. This view, he thought, helped to "shine the light essential to finding one's way through the statutory maze". Had he, however, looked at United States cases for illumination, he would have seen that the experience there was contrary to his conclusion. Per se illegality in the United States is found only in the clearest of cases where even a person with rudimentary economic training can see that the arrangement is blatantly anti-competitive, clearly not the position in the *Visy* case. In cases of doubt, a competition test, rather than a per se ban, should be applied.[17] If there is doubt whether an arrangement should be regarded as a "vertical" or a "horizontal" one, the former test should be applied.[18] Numerous cases have given cogent economic reasoning for this conclusion.

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16 *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1.

17 In order to be per se banned, an arrangement must have "a pernicious effect on competition and lack any redeeming virtue": *Northern Pacific Railway Co v US* 356 US 1 (1958). A per se ban is appropriate only if, after a "quick look", "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets": *California Dental Association v FTC* 526 US 756 (1999) (US Sup Ct). In the *Visy* case these tests were clearly not satisfied as the ACCC concluded that, if the arrangements were subject to a competition test, they would be legal.

18 See, eg, *Red Diamond Supply Inc v Liquid Cerbolic Corporation* 637 F 2d 1001 (5th Cir (1981)); *Abadir & Co v First Mississippi Corporation* 651 F 2d 422 (5th Cir (1981)): the courts when uncertain of a particular type of restraint should decline to apply the per se label. In *Visy* (2003) 216 CLR 1, Gleeson CJ, McHugh, Gummow and Hayne JJ opined that the vertical/horizontal classification was to adopt terms from the "wholly different context of United States antitrust law" where they are "jargon with no agreed or fixed meaning". The terms, in fact, are well understood and useful and hence, despite the above judicial observations, I use them here.

Justice Kirby's non-acceptance of the United States experience, which he states he admires so much, is also apparent in *SST Consulting*.[19] This case involved a question of the meaning of s 4L of the *Trade Practices Act*, which deals with the severability of provisions of a contract breaching the Act and the extent to which, after such severance, the balance of an agreement can be enforced. The majority in a joint judgment held that, if the agreement, after severance, is enforceable, then it will be enforced. Thus a mortgage obligation could have an illegal provision severed and still be enforced as to the balance of its provisions.

Once again, Kirby J dissented. He regarded the majority's view as being "metaphysical analysis". The fundamental purpose of the Act was to discourage breach and impose penalties and the majority, he believed, were providing "loopholes for escape". Again, however, had he looked at the United States experience, he would have found the contrary view expressed. In *Kelly v Kosuga*,[20] the United States Supreme Court held that pleading competition defences to contractual claims was a "very dishonest defence" and that the overwhelming general legal policy should be that of "preventing people from getting other people's property for nothing when they purport to be buying it". The conclusion of the United States Supreme Court on the issue before the High Court in *SST Consulting* would, therefore, have been that, as a matter of public policy, courts should not be quick to create a policy of non-enforcement of contracts beyond that which is clearly the requirement of anti-trust law. This is the position at which the High Court majority arrived, albeit by the quite different route of statutory construction.

Having criticised his colleagues for their conservatism in interpreting the competition law, one would have thought that Kirby J would have enthusiastically joined them in finding the Northern Territory Power and Water Authority in breach of the Act's misuse of market power provisions when it denied access to a competitive power generator (NT Power) to its distribution network. Without such access NT Power was unable to deliver power to Darwin and Katherine, these being markets in which NT Power could compete with the Power and Water Authority, if they were able to deliver power over the Authority's power distribution network.[21] In the United States this is colloquially known as an "essential facilities" case and, although not referred to in the High Court judgment, the High Court's majority judgment that the Power and Water Authority had misused its market power is consistent with that of the United States Supreme Court in *Otter Tail*.[22] However, Justice Kirby

19 *SST Consulting Services Pty Ltd v Reison* (2006) 225 CLR 516.

20 *Kelly v Kosuga* 358 US 516 (1959).

21 *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90.

22 *Otter Tail Power Co v US* 410 US 366 (1973). Note, however, the recent opinion of the US Supreme Court in *Verizon Communications v Law Office of Curtis v Trinko LLP* 540 US 398 (2004) that it neither recognised nor repudiated the "essential facilities doctrine".

again dissented. He believed that the Northern Territory Government could refuse transmission access for "governmental reasons". The issue to him was not a purely commercial one attracting the operation of the *Trade Practices Act*. His reasoning is hard to fathom. The major extension of the Act in 1995 to State and Territory entities carrying on business was aimed at removing any "shield of the crown" and at placing government and private business enterprises on the same footing.[23] In any event, as the majority pointed out, there is mechanism in the *Trade Practices Act* itself, which, if utilised, can give exemption from the Act's coverage.[24] Utilising the "purposive" principles of interpretation of the *Trade Practices Act* as stated by Kirby J, it is difficult to see how he reached the conclusion he did in *NT Power*.[25]

Rural Press: vindicating the Kirby "purposive" approach to competition law

Of the seven High Court competition cases in which his Honour participated, only one has not, to date, been discussed in this chapter. This is *Rural Press*[26] and has been left until last because I believe that he has not accurately applied his own criteria in all the other competition cases on which he has sat. *Rural Press*, however, shows that a purposive interpretation can bring about a sensible result, albeit that Kirby J was still in the minority. The facts in *Rural Press* were that Rural Press, a well-resourced national rural newspaper publisher, issued a warning to Waikerie Printing, a small provincial publisher, not to extend its distribution into an area traditionally the domain of Rural Press. If this warning was not heeded, Rural Press threatened to publish in the Waikerie Press area in which it had never previously been involved. The threat was, of course, backed up by the fear that Rural Press's entry into the Waikerie Press area would have a severe effect on the latter's business. Waikerie Press determined not to extend its distribution into the traditional Rural Press area and advised Rural Press of its decision. The Australian Competition and Consumer Commission alleged a breach of s 46 and other sections of the *Trade Practices Act*.[27]

The majority held that Rural Press did not have "market power" but had something quite different, namely power created by the possession of material and organisational assets. The majority also held that it was the threat of Rural Press to enter the Waikerie market which had to be

23 See Australian Government, Senate, *Competition Policy Reform Bill 1995*, Second Reading Speech (*Hansard*, 29 March 1995) p 2437.

24 See *Trade Practices Act 1974* (Cth) s 51.

25 *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90.

26 *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53.

27 The main issue in the case is that of misuse of market power and only this issue is considered in this commentary.

evaluated. In the Waikerie market, Rural Press was not a player and had to be regarded as having no market power.

Justice Kirby commenced his decision by observing the "unreality" of the majority view. He regarded the Rural Press threat to Waikerie as an attempt to "'persuade' (or bully) the latter out of the notion of competition – an idea which fondly for a short time Waikerie had embraced". He regarded the issue as being one of commercial reality. Would Rural Press, in a competitive market have made the threat it did? Clearly it "could" do so as it had the relevant physical capacity (indeed anyone probably had this), but it "would" not do so because, in a competitive market, the threat would be an empty one. Thus, he concluded, the fact that Rural Press had made the threat constituted conduct which would not occur in a competitive market and Rural Press, by making the threat, was taking advantage of its market power by acting in a manner contrary to how it would act in such a market. He regarded the majority's exculpation of Rural Press, being based on a "could" test of physical capacity to act, as commercially unrealistic. Justice Kirby also concluded that the threats involved were made only because Rural Press had the relevant market power, and this included power enjoyed because of financial resources. The actuality was, he said, that any hope of competition was extinguished by the Rural Press threat as it mandated the non-entry into the Rural Press market by Waikerie, Rural Press's only potential competitor. The true analysis, he said, was not one of Rural Press's entry into the Waikerie market in which it had no market power, but the threatened entry of Waikerie Press into the Rural Press market. It was the Rural Press threat in relation to its own market which caused Waikerie to "back off and abandon its dream of competition". Justice Kirby regarded the analysis of the majority as "bordering on the ethereal". He is right in this conclusion.

The *Rural Press* case is a classic example of Kirby J applying a "purposeful" interpretation of competition law. The majority judgment permits what Kirby J believed to be "loopholes for escape" and "metaphysical analysis". Justice Kirby's dissent is much the better judgment. This is so obviously so that it is surprising that the majority trod the path it did.

Kirby as a competition law judge: overall observations

All in all, Justice Kirby is right in his approach to competition law interpretational principles. Sadly, however, his judgments have been characterised by an intensely personal application of these principles. This has led to lack of certainty of interpretation – an important factor in business compliance with competition law.[28] Further, Kirby J has not followed the United States law which he openly admires and which is part of his interpretational philosophy. If he had done so, he would

28 See cases cited at n 10.

not have held as he did. Greater certainty of decision would also have resulted. In fact, it is the majority, not Kirby J, which has followed United States interpretation.

When, however, a hole is opened up by an artificial approach to the Act's interpretation, it is a hole that is gaping. The Kirby J dissent in *Rural Press* is, in my view, unassailable and, hopefully, his commonsense approach to the actuality of the facts will be the future trend.

The "Kirby admonitions": are they deserved?

Justice Kirby was never backward in coming forward. In his judgments, he made a number of "Kirby admonitions" to his fellow judges. Thus, he noted in *Rural Press* that the majority were "unduly protective of the depredation of the corporations concerned" and that "the victims are Australian consumers and the competitors who seek to engage in competitive conduct in the naïve faith in the protection of the Act".[29] He did not confine his frustration to his *Rural Press* dissent but explicitly applied his views to *Melway* and *Boral* (referring to similar comments made in his dissent in each of those cases), commenting that "[j]udicial lightning strikes thrice". With respect, *Melway* and *Boral* were quite different cases to *Rural Press* and there is little justification in lumping them into a trilogy, their only major common factor, in my view, being that Kirby J dissented in each of them. Melway both could and would have done the same thing if in a competitive market. Boral, though a significant market player, had no choice but to react competitively to the low price of Pioneer, a strong entity and a leading low pricer in the market. It is not unreasonable to conclude that neither Melway nor Boral could be regarded as taking advantage of a substantial degree of power in a market, given these findings. On this basis, alone, *Rural Press* was distinguishable from *Melway* and *Boral* notwithstanding the Kirby J equation of all three. Rural Press clearly had the relevant market power but the majority evaluated the wrong market. For the reasons stated above, Kirby J was correct in the frustrations he expressed at the majority views in *Rural Press*. However, *Rural Press* was, in my view, the first and not the third judicial lightning strike of which he could complain.

His "admonition" in *NT Power* is unjustified. In that case, he complained of a contrast in the majority view between the:

> energetic deployment of trade practices law in [the] case, affecting a government corporation having governmental obligations to public welfare with the repeated refusal of the court … to do the same thing where the corporation concerned was private, successfully defending its market power against smaller would-be competitors.[30]

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29 *Rural Press* (2003) 216 CLR 53 at 105 [139].

30 *NT Power* (2004) 219 CLR 90 at 163 [204].

This admonition is not fairly made. In the *NT Power* case, clearly it may be his view that government should in some way be treated differently under competition law. However, the legislature had clearly expressed the policy view that this was not to be the case.[31]

CONSUMER PROTECTION

Butcher v Lachlan Elder Realty

Undoubtedly the major consumer protection provision in Pt V of the *Trade Practices Act* is s 52, which prohibits conduct that is misleading or deceptive, or is likely to mislead or deceive. One case in the High Court adequately illustrates Kirby J's approach. This case is *Butcher v Lachlan Elder Realty Pty Ltd*.[32]

Section 52 is of wide import. There is general agreement as to the principles applicable to it, a major one of which is that it is "impressions which count". Not surprisingly, there have been attempts to limit the impact of s 52 by disclaimers and exclusion clauses in various documents. *Butcher* was such a case.

Butcher involved an agent's brochure in relation to the sale of real estate in Newport, a suburb of Sydney. A surveyor's plan in the agent's brochure described a waterfront boundary. It was erroneous. The consequence was that significantly less land was purchased than was represented in the agent's brochure. Included in the brochure was a disclaimer in small type to the effect that the agent believed in the accuracy of the surveyor's representation but could not guarantee this and that the agent was only "passing on" information provided by a surveyor. The law, clearly enough, was that this disclaimer, if adequately made known to the purchasers, would have been a defence by the agent to a misleading or deceptive conduct claim. The question was whether it had been adequately made known.

The majority held that the disclaimer had been adequately advised. Two major factors in the decision of the majority were, first, that the relevant purchasers were considered to be "quite wealthy" and "intelligent, shrewd and self reliant" and, second, that the transaction related to an expensive property. It must, therefore, be assumed, in the view of the majority, that the purchasers would take more than usual care in relation to the transaction. In the circumstances, the agent had done all that was necessary to bring the disclaimer to the purchasers' notice.

Justice Kirby, with Justice McHugh, vigorously dissented. He held that the disclaimers were "printed in tiny typeface" which "a youth with 20/20 vision" could read but which "any ordinary adult" would

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31 See nn 21 and 23 above.

32 *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592.

not be able to read without some form of magnification. He likened the disclaimer to insignificant information published in obscure places in official reports, such as the identity of the government printer. To suggest that this communication of information was meaningful was, he said "to defy common experience and half a century of legal efforts to discourage such ploys by denying them legal effectiveness". In particular, the written disclosure had to be considered in light of the agent's conduct in giving out the brochure, stating that it contained a survey and "that is everything you need to know". He did not believe that the personal qualities of the purchasers excused the agent's action in any way.

It may be argued that his Honour was here showing nothing more than an attitude to the facts. Some may say he was making no definitive contribution to the law by expressing such views. I disagree.

Clearly, he rightly opined that if disclaimers of this kind were acceptable "the Court might just as well fold up the Act and put it away" in transactions of this kind. He gave clear articulation of the principles of disclaimers. He noted that, as a matter of commercial reality, self-interest often inclines parties to limit proper warnings and seduce consumers with attractive communications unembarrassed by messages of restraint. Disclaimers, he said, must be "clear, detailed and prominent". The more harsh the exception, the stricter the approach of the court to the party seeking to rely on it.

Justice Kirby's interpretation, drawing as it does on his "purposive" interpretation of the law, is likely to become the future standard, whether or not those following him openly give credit to his judgment in *Butcher* for its adoption. This, surely, is the standard intended by the Act.

UNCONSCIONABLE CONDUCT

Australian Competition and Consumer Commission v Berbatis

A similar appreciation to *Butcher's* case can be seen in his approach in *Berbatis*[33] to the question of unconscionable conduct as set out in Pt IVA of the *Trade Practices Act*. It is not necessary to state the facts in *Berbatis* in detail here. Suffice it to say that a landlord agreed to the renewal of a lease of business premises only if the tenants would agree to release the landlord from a pre-existing claim of rent overpayment allegedly amounting to $50,000. The tenants had sold the business conditionally upon renewal of the lease. The lease was about to expire. The tenants desperately needed the proceeds of the business sale to finance medical expenses in relation to the serious illness of their daughter. They were legally advised not to sign the lease but felt they had no option but to do so. The Australian Competition and Consumer Commission

33 *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51.

brought action against the lessor alleging unconscionable conduct. The case was determined under s 51AA of the *Trade Practices Act* and necessitated an evaluation of the unwritten State and Territory law of unconscionability.

The importance of *Berbatis* is not the factual finding as to whether there was or was not unconscionable conduct involved, but the basis on which this finding was made. The majority held that there was no unconscionable conduct. In essence, the majority held that the sole issue relevant to unconscionability was whether or not the tenants knew what they were doing. The test was whether their minds were so overborne that they did not act voluntarily. The majority found that this was not the case. The tenants knew exactly what they were doing.

If the sole question of unconscionability is whether or not the mind of a party is "overborne", the court is precluded from considering any other circumstances. Justice Kirby would have none of this, repeating the cry that the court yet again had the choice between a broad and beneficial application of the Act as distinct from a narrow and restrictive one. He believed that the term "unconscionable" had no technical meaning and that a party could be subject to unconscionable conduct in circumstances where his or her will was not overborne and the conduct involved could not be so categorised. He was careful, however, to point out that whether a party was "disadvantaged" had to be looked at in context and would not normally be relevant in landlord and tenant cases. Further, the court had to be careful not unduly to usurp the economic freedom of individuals normally to decide for themselves what they will and will not do. Unconscionability, he said, was easier to describe than define but it should not be limited in the way the majority had done. In the circumstances, he saw no reason to disturb the factual findings of the trial judge and that the finding of unconscionability reached at trial should have been affirmed.

Justice Kirby's judgment is a measured one. Given appropriate circumstances, courts will in future look more widely than the majority have opined in *Berbatis*. It is thus likely that, given a suitable future case, the courts will incline to the wider view of unconscionability propounded by Kirby J. The impact of the *Berbatis* decision is, however, likely to be limited. Section 51AA, the subject of litigation in *Berbatis*, deals only with unconscionability under the unwritten law of the States and Territories. Sections 51AB and 51AC of the *Trade Practices Act* specifically deal with unconscionable conduct in relation to the supply of goods and services, and unconscionability in business transactions respectively. Each prescribes a series of specific factors to be taken into account in determining whether the "unconscionability" test has been met. These sections may be regarded as a legislative acceptance of Kirby J's view that factors other than "overbearing the mind" should be considered in unconscionable conduct evaluations.

JUSTICE KIRBY'S TRADE PRACTICES CONTRIBUTION: AN EVALUATION

Competition law generally

Justice Kirby's sincerity of principle in relation to the *Trade Practices Act* cannot be doubted.

In the competition area, the problem of the "purposive" approach he has so enthusiastically adopted is that it has been significantly personal and somewhat unpredictable. Nowhere is this more apparent than in *NT Power* where he adopted a totally personal view of governmental conduct under the *Trade Practices Act* which is simply unsupported by, and indeed denied by, legislative policy itself. In substantive areas of breach, he has seen sin where others have not. Indeed, in all the competition cases in which he has been involved, except *Rural Press*, it can be argued that he has not canvassed the wider picture and has not applied the principles he has articulated. This could perhaps be put down to his "civil rights" beliefs in which field his work must be greatly respected. He has, I think, seen denials of supply, for example, as infringements of economic civil rights. However, he has failed to recognise that freedom to deal is also a fundamental economic civil right and that hard choices as to those with which one deals are a crucial aspect of the competition process. A balance is required. In those areas where we might have expected a balancing of views, with some degree of certainty – namely in the application of United States decisions – this evaluation has not been done. Thus, with the exception of his judgment on *Rural Press*, Kirby J's contribution to competition law is likely to be attitudinal rather than substantive. It is difficult to argue against the principle of purposeful interpretation which he espouses. Many may well believe that this view is correct and most articulately expressed. That he puts such a view is his contribution to competition law. But in most areas, his particular judgments are unlikely, in my view, to be embraced as future substantive law.

Views on substantive competition law issues

Two views of substantive competition law expressed by Kirby J may, however, be adopted. These stem from his judgment in *Rural Press*.

First, it seems likely that the "could" test will be replaced by the "would" test as the test of taking advantage of market power – that is, whether a company *would* act in a certain way in a competitive market (not whether they *could* so act) may well be the question for future evaluation. This is simply because this test makes more sense and is in accordance with actuality. The Act is concerned with actuality.

Second, it is likely that power in relation to resources, financial and otherwise, will be seen in future as a factor for evaluation under s 46 in

relation to the market power of an entity. To exclude financial and resource issues from market power evaluations is to fly in the face of reality.

If the above two interpretations, foreshadowed by Kirby J, are not adopted judicially, it is likely that they will be implemented legislatively simply because they make common sense.

Views as to the duty of the courts in relation to remedies

Justice Kirby is clearly correct in concluding in *Melway* that the courts will have to adapt procedural remedies to cover competition law breaches and not be constrained by traditional approaches to the drafting of injunctive relief. How this will develop over time remains to be seen. However, he has undoubtedly foreshadowed the philosophical principles which will have to be followed in the future if meaningful remedies are to be delivered for competition law breaches.

Consumer protection

In the field of consumer protection, the views of Kirby J are likely to command greater respect. Here, in relation to "civil rights" issues, he is far more at home. In *Butcher* and *Berbatis*, he expresses the true purpose of the Act and the approach which will be judicially applied in future. All would be wise to heed his views as to the proper approach to be taken to the interpretation of the consumer protection provisions of the Act. In particular, his contempt for legal stratagems and his dislike of artificiality working against actuality deserve significant consideration in future in cases involving such tactics. Future judgments are likely to endorse his approach.

KIRBY AS A COMMUNICATOR

Michael Kirby has always championed the cause of clear language. The turgid tones of both statutory enactments and the judgments interpreting them are things which all practising lawyers dread. In the trade practices context, he noted in *Visy*,[34] for example, that:

> The language of the TPA applicable to this case is obscure. It is in need of re-drafting by reference to concepts and purposes. It requires the negotiation of too many cross-references, qualifications and statutory interrelationships. This imposes an unreasonable burden on the corporations and their officers subject to the TPA, the ACCC enforcing the Act and the courts with the responsibility of assigning meaning to, and applying, its provisions.[35]

The issue of communication is wider than strictly trade practices issues. But it must be mentioned in this context because it has arisen in the

34 *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1.

35 (2003) 216 CLR 1 at 24 [69] per Kirby J.

interpretation of the *Trade Practices Act* on many occasions. It is specifically to be noted in relation to trade practices that the problem of drafting complexity was seen as an important issue as long ago as 1975; yet still nothing has been done in relation to it.[36]

Justice Kirby is firmly of the belief that there are some simple rules that lawyers can adopt to help them write and speak more clearly in English. Short sentences, more direct expression, avoidance of clichés, writing more closely to the way people speak all assist lawyers to make legal expression clearer and simpler.[37]

He has also noted that High Court judgments frequently contain in separate judgments unnecessary repetition of statements of evidence, legislation or other materials adequately covered in the reasons of colleagues, stating "I have little time for this form of repetition".[38] He notes that this is:

> a continuing practice that the High Court should tackle. Sometimes such repetition arises from the hope or expectation of the writer that a proffered draft will become the opinion of the Court which should therefore be full and self-contained. Where this aspiration is dashed, pride of authorship should give way to the blue pencil.[39]

All of these principles of expression apply as much to competition legislation as to any other – and perhaps more so. Therefore, in relation to his record as a competition law judge, his general philosophical observations on expression should be included. To omit them would be to omit the important issue of the communication of decisions reached in the competition law arena.

Communication is not a matter that is merely technical and which can, for this reason, be downgraded or perhaps overlooked completely. It is crucial to our understanding of the law and the time we can devote to its study. By the time cases reach the High Court, there would be much to be said for the basic facts being agreed and needing to be stated only

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36 It is to be noted that the former Prime Minister, the Hon John Howard, as Minister for Business and Consumer Affairs, gave a reference in 1975 to the Swanson Committee, amongst other things, to recommend how the Act might be drafted: "to pay particular attention to ensure that it is sufficiently certain in its language to enable persons affected by it to understand its operation and effect as to be reasonably able to comply with its obligations in the ordinary course of business". Despite this reference, the Swanson Committee said nothing on the issue and hence the reference is still unanswered. In 2003 in *Visy* (2003) 216 CLR 1, the various courts were unable to ascertain the reasons for the drafting adopted. Despite widespread amendments to the *Trade Practices Act* in 2005, the government did nothing to clarify the drafting involved in *Visy* to make the position clear.

37 See "Judicial Attitudes to Plain Language and the Law" (Interview of Justice Michael Kirby, High Court of Australia, by Kathryn O'Brien, Law student, University of Sydney, 1 November 2006): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_1nov06.pdf (accessed 4 December 2008).

38 Kirby, n 5.

39 Kirby, n 5.

once in the leading judgment, or perhaps as a clearly delineated section applicable to all judgments. Justice Kirby supports this view. Why this simple managerial step (with its consequent saving of hundreds, perhaps thousands of lawyer work hours around the nation) cannot be taken is a mystery. Justice Kirby clearly is a leading advocate of plain English drafting and expression. Every practitioner will, no doubt, make a plea for plain English drafting and expression and the elimination of needless repetition in relation to her or his area of practice. Such a plea cannot be omitted in relation to competition law practice, a field in which the problems seem to be of particular significance.

OVERALL EVALUATION

As a trade practices judge

Overall, Justice Kirby will undoubtedly leave a mark on trade practices law. However, this mark is likely to be more in his attitude towards trade practices interpretation than in relation to the substantive law itself. Whatever views one holds of his judgments, one must respect the fact that he has, as a judge, lived by his philosophy that "strong differences (of opinion) are inevitable and healthy and should neither be suppressed nor too closely disguised".[40]

For his application of this philosophy, Justice Kirby cannot be ignored in the trade practices field. However, his lasting and outstanding contribution to the law will be in the areas of civil rights and individual liberty. It is in these arenas, not in the trade practices arena, that his Honour will be remembered as an eminent judge who has made a unique contribution to the law.

As a communicator

For his admonitions in relation to clear expression, Justice Kirby is to be applauded. In particular in the trade practices field, this was a real concern as early as 1976. It is unforgivable that nothing has been done to address the issue despite a Committee of Inquiry having been given a specific reference to report on the problem.[41]

It is also to be hoped that Justice Kirby's suggested changes to High Court attitudes and procedures in relation to judgment writing receive sympathy from the court. He has written thoughtfully on this subject and his October 2007 paper given to the Judges' Seminar in Perth is worthy of detailed consideration on the issue.[42] Of course, it is not an

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40 Kirby, n 2.

41 See n 36.

42 M D Kirby, "Appellate Reasons" (Speech, Judges' Seminar, Supreme Court of Western Australia, Perth, 23 October 2007): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_23oct07.pdf (accessed 19 December 2008). See also text relating to nn 37, 38 and 39.

issue only for the High Court judiciary but it is here that he speaks with greatest authority.

Justice Kirby's suggestions as to drafting and procedures are sensible, deserve implementation and, if implemented, would be an impressive contribution not only to trade practices law but to the law overall.

APPENDIX

TABLE OF RESTRICTIVE TRADE PRACTICES (COMPETITION) DECISIONS IN HIGH COURT IN WHICH JUSTICE KIRBY WAS INVOLVED[43]

Case Citation	Issues Involved	Decision of Court and Judgments of Justices other than Kirby J	Decision of Kirby J
Melway Publishing Pty Ltd v Robert Hicks Pty Ltd (2001) 205 CLR 1.	• Misuse of market power by denying supply to a party not an authorised distributor (TPA, s 46).	• No misuse of market power. Joint judgment (Gleeson CJ; Gummow, Hayne and Callinan JJ).	• Section 46 breached. Dissenting judgment.
Boral Besser Masonry Ltd v ACCC (2003) 215 CLR 374.	• Misuse of market power (TPA, s 46).	• No misuse of market power – Joint judgment (Gleeson CJ; Callinan J) – Joint judgment (Gaudron, Gummow and Hayne JJ) – Separate judgment (McHugh J).	• Section 46 breached. Dissenting judgment.
News Ltd v South Sydney District Rugby League Football Club (2003) 215 CLR 563.	• Legality of exclusionary provision (TPA, ss 45, 4D).	• No illegality. Separate judgments (Gleeson CJ; McHugh J; Gummow J and Callinan J).	• Sections 45 and 4D breached. Dissenting judgment.

43 This table cites cases determined prior to October 2008. Cases cited do not include *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1. This case was based on trade practices issues, but the only issue determined by the court related to Crown immunity. In essence, therefore, the case was a constitutional law case dealing with Crown immunity and was not a trade practices case.

TABLE OF RESTRICTIVE TRADE PRACTICES (COMPETITION) DECISIONS IN HIGH COURT IN WHICH JUSTICE KIRBY WAS INVOLVED – *continued*

Case Citation	Issues Involved	Decision of Court and Judgments of Justices other than Kirby J	Decision of Kirby J
Visy Paper Pty Ltd v ACCC (2003) 216 CLR 1.	• Construction of arrangement as to whether it was an exclusive dealing arrangement subject to a competition test or a per se illegal exclusionary provision (TPA, ss 45, 4D, 47).	• Issue was one of statutory construction. The arrangement had a dual character and was exclusive dealing subject to a competition test in part, and a per se banned exclusionary provision in part (joint judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ; Callinan J dissenting).	• Concurring judgment agreeing with joint majority judgment. Separate comments added as to the purpose of the Act and principles of its construction.
Rural Press Ltd v ACCC (2003) 216 CLR 53.	• Whether there was a misuse of market power by threatening action (TPA, s 46). • Whether there was an anti-competitive arrangement between competitions (TPA, s 45). • Whether there was a per se illegal exclusionary provision (TPA, ss 45, 4D).	• There was no misuse of market power (joint judgment of Gummow, Hayne and Heydon JJ (the majority joint reasons) with whom Gleeson CJ and Callinan J in a joint judgment agreed). • There was an anti-competitive agreement between competitors (judgments as above). • There was a per se illegal exclusionary provision (judgments as above).	Separate judgment (agreeing in part and dissenting in part). The major issue in this case was the s 46 (misuse of market power) issue on which his Honour dissented. Held also: • There was an anti-competitive agreement (agreeing with the majority joint reasons). • There was an illegal exclusionary provision (agreeing with the majority joint reasons but adding views as to the nature of "purpose").

TABLE OF RESTRICTIVE TRADE PRACTICES (COMPETITION) DECISIONS IN HIGH COURT IN WHICH JUSTICE KIRBY WAS INVOLVED – *continued*

Case Citation	Issues Involved	Decision of Court and Judgments of Justices other than Kirby J	Decision of Kirby J
NT Power Generation Pty Ltd v Power and Water Authority (2004) 219 CLR 90.	• Whether denial of access to power distribution network constituted misuse of market power (TPA, s 46). • Whether PAWA was exempt from TPA as a Crown instrumentality (TPA, s 2B). • Did the access provisions in Pt IIIA justify construing s 2B in a manner which would prevent access arising under s 46? (TPA, s 2B; Pt IIIA; s 46.)	Joint judgment of McHugh ACJ; Gummow, Callinan and Heydon JJ held: • The denial of access constituted a misuse of market power. • PAWA carried on business and was not exempt from the TPA by virtue of Crown immunity. • Access was available under s 46 notwithstanding the Pt IIIA access regime.	• Dissenting judgment holding s 46 not breached. • PAWA was not carrying on business under s 2B. PAWA's decision to deny access was not purely commercial and had a governmental character. As such, wider considerations such as increasing prices in Darwin to supply remote areas had to be considered and PAWA had to make access decisions in light of this.
SST Consulting Services Pty Ltd v Rieson (2006) 225 CLR 516.	Question as to the extent and meaning of severability test in relation to TPA enforceability. (Contract involved an illegal exclusionary provision but its enforcement did not involve enforcing this provision.) (TPA, s 47(6), (7); s 42.)	Held (joint judgment of Gleeson CJ; Gummow, Hayne, Heydon and Crennan JJ) that s 4L requires severance of an offending provision. If a contract, after severance, is still enforceable, then it will be enforced other than in respect of the offending severed provision. The contract was enforceable as its enforcement did not involve a TPA infringement once severance had occurred.	Dissenting judgment holding that there was no case for interpreting the severance provisions of s 4L in a manner which would affirm the balance of the contract "with its inherent affront to the TPA".

Chapter 34

WOMEN

Patricia Easteal*

There should be a greater sense of urgency for change to redress the gender problem of the Australian legal profession. Hope and prayer have their part to play in getting change. The commitment to excellence must remain undiminished. But effective measures to redress imbalance may also be needed. ... We have a problem. We know it. We must turn our considerable talents, as a profession, to finding and implementing the solutions.[1]

INTRODUCTION: THE JUDGE AS AN AGENT OF CHANGE

Judges have the capacity to effect change for women in explicit and implicit ways: through their decision-making and in their public speaking and (non-judicial) writing. In researching topics related to women and the law and in preparing lectures for various subjects pertaining to gender, discrimination and family law, the judge whose "work" appears most frequently is Michael Kirby. For me, and for my students, his opinions and ideas are consistently enlightening and illustrative of an understanding of what it is to be a minority in Australian society.

If his statements, thoughts or reasoning are contained in a judgment, they are often expressed in dissent – profound and insightful minority opinions that are frequently cited by those who are attempting to understand how the law can best result in just outcomes for all Australians.

Aside from his decisions, Michael Kirby has had an impact upon women's rights through his prolific writing in Australian and overseas law reviews, journals and the popular press "in support of a disparate

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* My most heartfelt gratitude goes to Bruce Arnold, PhD student at University of Canberra, for his invaluable research assistance.

1 M D Kirby, "Women Lawyers – Making a Difference" (Speech, Womens Lawyers' Association of New South Wales, 18 June 1997): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_womenlaw.htm (accessed 19 December 2008).

range of human rights and liberal causes as well as issues more directly related to the administration of justice".[2] An empirical study in 2002 showed that he had published 300 papers, articles and speeches, which was more than three times the number by the second most prolific High Court judge:

> At the crudest level of casual empiricism there seems to be some support for the view that higher than average dissenters publish more articles with Kirby J publishing many more articles than any other High Court or Federal Court judge and, at the same time, being a frequent dissenter.[3]

Further, some judicial officers, more than others influence change by playing an advocate role in public speaking engagements. As a High Court Judge, Kirby has given at least three speeches solely focused on the topic of discrimination and women legal practitioners. These were not mere catalogues of statistics but passionate and personal reflections during which, through sharing his own observations and experiences, he made concrete suggestions to assist women. Indeed, Kirby's conceptualisation of "lived" law reform means that he has been prepared to proffer advice or even, at times, admonishment:

> Never accept the injustice of sexism. Never accept it in your Court. Don't accept it from witnesses. Don't accept it from advocates. And don't accept it from your colleagues.[4]

Citations in Australia and overseas indicate that through his judgments, papers and speeches Kirby has had an impact upon women's rights to justice. The following pages examine, first, the effects of his awareness of gender stereotyping and its potential rippling harm; second, a number of decisions which illustrate his desire to ensure that women, along with other "minority" victims, plaintiffs and defendants, are treated equitably by the criminal justice system; and, finally, his advocacy for women as "actors" on the legal stage – that is, their right to equal representation and upward mobility in legal practitioner occupations.

Like Kirby's own thoughtful judgments, this chapter is an interpretation that reflects the author's particular philosophical outlook. Unlike High Court judges, however, we as authors in this context are subject to word limits and so do not have the luxury of drawing out finer points in our treatment of a subject. This account is, therefore, necessarily skeletal and neither encompasses all precedents nor does justice to the rich and colourful fabric of Kirby's rulings on specific cases, initially criticised, but

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2 R Smyth, "Judges and Academic Scholarship: An Empirical Study of the Academic Publication Patterns of Federal Court and High Court Judges" [2002] 12 *Queensland University of Technology Law and Justice Journal*: http://www.austlii.edu.au/au/journals/QUTLJJ/2002/12.html (accessed 9 October 2008).

3 Smyth, n 2.

4 Kirby, n 1, quoting Justice Louise Arbour, a Judge of the Ontario Court of Appeal: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_womenlaw.htm (accessed 19 December 2008).

increasingly assimilated by the legal profession and community as articulating justice and reflecting the nature of life in contemporary society.

THE RIGHT NOT TO BE STEREOTYPED BY GENDER

It is often difficult for minorities to overcome outdated beliefs about them and this can, in fact, contribute to their continued unfair treatment and inequality of opportunity. Many of Justice Kirby's decisions demonstrate his concern in respect of the possibility of destructive consequences from such pigeonholing of individuals. Certainly, closed systems of stereotypes, through which experiences are filtered, may translate into disadvantage and are obstacles to equality and justice.

Justice Kirby's judgments show an awareness that women are not a monolithic category, but have differences evoked by class, ethnicity, age, sexuality, physical and mental ability and more. He recognises that, if perceived as a homogeneous grouping, differences among individuals are not recognised and their rights may thus be denied.

Our legal system, like other scenes in the cultural landscape, often fails to recognise this diversity of women's lives. But Justice Kirby does – through a commitment to human rights, recognition of empirical data and possibly, at least in part, because of his own identification as a member of a minority group.

Stereotyping battered women

Some battered women who have killed their violent partner plead self-defence. Battered woman syndrome[5] evidence can be raised to explain why women had no other recourse, why to them the threat feels immediate, although perhaps not immediate in the clock sense of time and why they "believed upon reasonable grounds that it was necessary in self-defence" to do what they did.[6] Justice Kirby's concern with the use of battered woman syndrome in the courts was demonstrated in *Osland v the Queen*.[7] Heather Osland and her son, David Albion, first sedated and then bludgeoned her increasingly violent husband to death. Albion was acquitted at his second trial but Heather received a minimum sentence of nine-and-a-half years, which was upheld on appeal. She was granted special leave to appeal to the High Court. The case was heard before a

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5 See P Easteal, *Less Than Equal* (Butterworths, Sydney, 2001) for a discussion of battered woman syndrome. Kirby cites work by Australian academics in his critique of the syndrome: E Sheahy, J Stubbs and J Tolmie, "Defending Battered Woman on Trial: The Battered Woman Syndrome and its Limitations" (1992) 16 *Criminal Law Journal* 369; J Stubbs and J Tolmie, "Race, Gender and the Battered Woman Syndrome: An Australian Case Study" (1995) 8 *Canadian Journal of Women and the Law* 122; I Freckelton and H Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (4th ed, Lawbook Co., Sydney, 2009).

6 The test applied by the High Court in *Zecevic v Director of Public Prosectuions (Vic)* (1987) 162 CLR 645.

7 (1998) 197 CLR 316.

five-member High Court Bench and the appeal was denied 3:2, with Justice Kirby in the majority.

In his decision, Kirby J was critical of battered woman syndrome as potentially excluding males and some women victims:

> Care needs to be taken in the use of language and in conceptualising the problem presented by evidence tendered to exculpate an accused of a serious crime on the ground of a pre-existing battering or abusive relationship. As evidence of the neutrality of the law it should avoid, as far as possible, categories expressed in sex specific or otherwise discriminatory terms. Such categories tend to reinforce stereotypes.[8]

Justice Kirby reviewed the literature that regards the syndrome as "based largely on the experiences of caucasian women of a particular social background" and as psychologising women's behaviour, which could impact on "the perception of women as fully independent and responsible individuals". He also discussed the medical legitimacy of the syndrome and warned courts to be cautious in accepting battered woman syndrome testimony:

> No civilised society removes its protection to human life simply because of the existence of a history of long-term physical or psychological abuse. … To the extent that evidence about BWS is tendered in a trial to sustain that conclusion, judges must firmly bring the jury back to the limited use to which such evidence may be put. This is, and is only, as it bears upon the legal issues in the trial such as self-defence and provocation.[9]

Justice Kirby's emphasis and objective in his reasoning are always aimed at promoting equality before the law. In this case, and in his dissent in *Green*,[10] he expressed the view that "this Court should be extremely careful to avoid any signal condoning serious violence by people who take the law into their own hands"[11] and stressed the need to use objective criteria both in tests of self-defence and in provocation.

> By insisting upon reference to an objective standard of the ordinary person, the courts have also applied a principle defensive [that is] of equality before the law. Without such a criterion, measured by reference to the ordinary person's response, provocation would be available, and murder might be reduced to manslaughter, simply because the accused failed to exhibit the measure of self-control which might reasonably be expected of an ordinary person in his or her circumstances.[12]

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8 (1998) 197 CLR 316 at 370 [158].

9 (1998) 197 CLR 316 at 375 [165].

10 *Green v The Queen* (1997) 191 CLR 334 at 387 in which Kirby J (in minority with Gummow J) upheld strict objective criteria for provocation.

11 *Osland v The Queen* (1998) 197 CLR 316 at 380 [170].

12 *Green v The Queen* (1997) 191 CLR 334 at 401.

There are academics, such as myself,[13] who have noted that such "objective" criteria can be problematic. If the constructs of "ordinary person" and "reasonably believing upon reasonable grounds that it was necessary in self-defence"[14] are interpreted as constituting both what is "ordinary" and what are reasonable beliefs and behaviour for a white middle class male,[15] then some battered women's experiences of "ordinary" and "reasonable" may be misunderstood and ignored. To an extent, Kirby J does seem to appreciate that this may indeed be the case and that evidence about domestic violence may be necessary for juries to understand the nature and dynamics of such violence, why the woman may have stayed in the violent relationship, "the accused's ability, in such a relationship, to perceive danger from the abuser" and "whether, in the evidence, the particular accused believed on reasonable grounds that there was no other way to preserve herself or himself from death or grievous bodily harm than by resorting to the conduct giving rise to the charge".[16]

However, Kirby J does not believe that such evidence should be "syndromised" and given a gender label, or that it adequately explained to the jury how Osland's premeditated action could have been either self-defence or manslaughter.[17]

Stereotyping wives

In *Garcia v National Australia Bank Ltd*,[18] Mrs Garcia had repeatedly provided guarantees for her husband's company. After separating from him, she sought to have the guarantees removed on the basis that she had not actually known what she had agreed to since the bank had not explained the responsibilities she was assuming by signing the documents. In taking this action, Mrs Garcia was invoking the *Yerkey* rule[19] or the special equity of wives. This 1939 principle states that a wife who has provided security to cover her husband's debt could avoid

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13 For example, P Papathanasiou and P Easteal, "The Ordinary Person in Provocation Law: Is the Objective Standard Objective?" (1999) 10(3) *Current Issues in Criminal Justice* 53.

14 This is the test articulated and applied by the High Court in *Zecevic v Director of Public Prosectuions (Vic)* (1987) 162 CLR 645.

15 See S Bronitt and K Amirthalingam, "Cultural Blindness: Criminal Law in Multicultural Australia" (1996) 21(2) *Alternative Law Journal* 58 for an excellent discussion about the persistence of the Anglo-Saxon/Anglo-Celtic "ordinary" man in constructing what is provocation. This is *despite* the so-called two-tiered test in *R v Stingel* (1990) 171 CLR 312 at 326 that the "content and extent of the provocative conduct must be assessed from the viewpoint of the particular accused".

16 *Osland v the Queen* (1998) 197 CLR 316 at 378 [169].

17 For a discussion of how such an act can be seen as self defence, see P Easteal, "Violence Against Women in the Home: Kaleidoscopes on a Collision Course?" [2003] 3(2) *Queensland University of Technology Law and Justice Journal*: http://www.law.qut.edu.au/about/ljj/editions/v3n2/index.jsp (accessed 9 October 2008).

18 (1998) 194 CLR 395.

19 *Yerkey v Jones* (1939) 63 CLR 649.

that contract if she could show that she did not thoroughly understand the transaction and that she had not received sufficient information from the lending organisation.

Justice Kirby identified problems with the rule – first, it stereotypes all wives. Taking the same anti-*Yerkey* perspective as he had in the New South Wales Court of Criminal Appeal,[20] his view in *Garcia* was that the "special equity" doctrine, by operating only in favour of married women, promoted "discriminatory stereotypes":

> A principle which accords to *all* married women a "special equity" based on their supposed need for protection rests upon a stereotype of wives to which this Court should give no endorsement.[21]

Specifically, in *Garcia* Kirby J regarded the special equity rule as in fact "offensive to the status of women today" since it implied "that all married women, as such, are needful of special protection supported by a legal presumption in their favour".[22] He saw it as ignoring the heterogeneity of females' experiences and the fact that there are wives who are well able to understand contractual issues and to protect their own interests.

At the same time, however, Justice Kirby expressed concern that the rule excludes those who are not wives – that is, de facto partners, same sex partners and others "who now live in relationships of potential dependence and vulnerability outside marriage":[23]

> The stereotype underlying *Yerkey* may hold true for some, perhaps even a significant number of, wives. But this Court should, where possible, refuse to "classify unnecessarily and overbroadly by gender when more accurate and impartial" principles can be stated. The Court should not be misunderstood as endorsing or upholding such discrimination where so much legislative and judicial effort in Australia has been directed at removing it.[24]

Justice Kirby also examined the discriminatory impact of gender stereotyping in an appeal in a wrongful death of spouse case.[25] In calculating the compensation for a surviving spouse under the *Fatal Accidents Act 1959* (WA), the primary judge awarded a discount of five per cent for the possibility of remarriage. The majority in the Full Court raised this to 20 per cent plus a further five per cent discount for general contingencies. The High Court Bench was of mixed opinions with Kirby J strongly articulating the view that the construct of a remarriage discount was reflective of an outdated masculine perspective and that "this Court,

20 See R Grossi, "The Wife as Legal Subject in Equity and Commercial Law" (2002) 27(4) *Alternative Law Journal* 171 for discussion of the special equity.

21 (1998) 194 CLR 395 at 424 [66].

22 (1998) 194 CLR 395 at 424 [66].

23 (1998) 194 CLR 395 at 424 [66].

24 (1998) 194 CLR 395 at 427 [66].

25 *De Sales v Ingrilli* (2002) 212 CLR 338.

must alter their approach in order to escape the justifiable criticism that they are perpetuating expressions of the law that are anachronistic or impermissibly discriminatory".[26] He concluded that:

> The issue having been squarely presented for decision and argued in this appeal and the present approach having been shown to be unjust, unpredictable, anomalous and discriminatory, the time has come for re-expression of the law on the discount for domestic re-partnering. I therefore agree with the joint reasons that, in a wrongful death case, ordinarily, no deduction should be made on account that a surviving spouse or domestic partner will remarry or form a new domestic relationship of economic significance.[27]

The decision of Kirby J in *Garcia* is consistent with his comments in *Brown v Brown*[28] where he noted Murphy J's argument in *Calverley v Green*[29] that gender-based presumptions of advancement should be abandoned. Justice Kirby's decision stated that the presumption of advancement must be applied equally to gifts by "mothers and wives as by fathers and husbands":[30]

> Law should not be expressed in terms which differentiate between people on the ground of their gender unless the differentiation is firmly based upon rational grounds supported by fact, not mere prejudice, stereotype or history received from earlier times when attitudes to women were different.[31]

This provides a compelling reason for "releasing the presumption of advancement from its earlier gender-based discrimination",[32] contrary to suggestions that traditional distinctions should be maintained on the basis that they are favourable to women:

> It is true that the principle of gender neutral application of the law will normally involve the removal of legal rules which have disadvantaged women ... However, it would be an impermissible principle to accept the removal of stereotypes only where this resulted in advantages to women.[33]

THE RIGHTS OF WOMEN AS HOUSE SPOUSES AND PRIMARY CHILD CARERS

Justice Kirby has reflected upon the treatment of women as domestic partners and as carers.

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26 (2002) 212 CLR 338 at 393 [155].

27 (2002) 212 CLR 338 at 395 [161], citing the joint judgment of Gaudron, Gummow and Hayne JJ.

28 (1993) 31 NSWLR 582.

29 (1984) 155 CLR 242 at 264.

30 *Brown v Brown* (1993) 31 NSWLR 582 at 598 [G].

31 (1993) 31 NSWLR 582 at 599 [A].

32 (1993) 31 NSWLR 582 at 598 [C].

33 (1993) 31 NSWLR 582 at 600 [B]. For a critique of his judgment in *Brown*, see L Sarmas, "A Step in the Wrong Direction: The Emergence of Gender 'Neutrality' in the Equitable Presumption of 'Advancement'" (1994) 19 *Melbourne University Law Review* 762.

Pregnancy and employment

Sometimes the facts of a particular case involve a minority group other than women. However, Kirby J's interpretation and/or reasoning will no doubt serve women well into the future. For example, his championing of a broad interpretation of discrimination legislation in *Purvis*[34] with the comment that, so far as the language of the Act permits, courts should construe the Act "in a manner that furthers the goal of truly equal treatment",[35] is a reminder that:

> [P]rotective and remedial legislation should not be construed narrowly lest courts become the undoers and destroyers of the benefits and remedies provided by such legislation.[36]

Although Kirby J's strong dissenting view on the issue of the comparator in that matter did concern the *Disability Discrimination Act 1991* (Cth), his argument could prove invaluable for women claiming discrimination on the ground of pregnancy under s 7 of the *Sex Discrimination Act 1984* (Cth). Just like the *Disability Discrimination Act*, the *Sex Discrimination Act* uses a comparator – that is, a person whose treatment is compared to that of the individual who is claiming to have experienced discrimination.

In *Purvis*, Daniel Hoggan, a high school student with an intellectual disability, had been expelled because of anti-social conduct. In minority, Kirby and McHugh JJ articulated the view that the comparator in this case should have been a student both without the disability and without the disruptive behaviour. The comparator for the majority was a non-disabled student who behaved in a similarly troublesome way. The question thus posed was whether such a student, without a disability but with similar behaviour, would have been expelled. Some commentators feel that framing the question in this way narrows the capacity of discrimination law to protect people like Daniel Hoggan[37] or women, such as Cynthia Thomson, who return to work following maternity leave.[38]

The *Sex Discrimination Act* states that a woman is discriminated against because of her pregnancy or because of a characteristic that "appertains generally to women who are pregnant or potentially pregnant; or (c) a characteristic that is generally imputed to women who are pregnant or potentially pregnant".[39] In adjudicating Thomson's claim of direct pregnancy discrimination, Allsop J used a comparator similar to the majority in *Purvis* – that is, a non-pregnant employee who had taken

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34 *Purvis v New South Wales* (2003) 217 CLR 92 at 103 [16]ff.

35 (2003) 217 CLR 92 at 111 [46].

36 *IW v City of Perth* (1997) 191 CLR 1 at 58.

37 For an analysis of *Purvis*, see S Edwards, "Purvis in the High Court: Behaviour, Disability and the Meaning of Direct Discrimination" (2004) 26(4) *Sydney Law Review* 639.

38 *Thomson v Orica Australia Pty Ltd* (2002) 116 IR 186, discussed by B Smith and J Riley, "Family Friendly Work Practices and the Law" (2004) 26(3) *Sydney Law Review* 395.

39 *Sex Discrimination Act 1984* (Cth) s 7(1)(a), (b), (c).

leave for a year.[40] As Kirby J pointed out in *Purvis*, such a comparator could contribute to problems in establishing causation between the protected attribute and the discriminatory behaviour:

> Discrimination jurisprudence establishes that the circumstances of the person alleged to have suffered discriminatory treatment *and which are related to the prohibited ground* are to be excluded from the circumstances of the comparator … "It would fatally frustrate the purposes of the Act if the matters which it expressly identifies as constituting unacceptable bases for differential treatment ... could be seized upon as rendering the overall circumstances materially different …"[41]

Fortunately Ms Thomson, despite the choice of comparators, was successful in her complaint. However, there is little doubt that this will be an arguable issue in the future and complainants' counsel would be well advised to pay heed to Kirby J's dissent in *Purvis*.

Value of unpaid work

Most unpaid domestic work continues to be done by women even when both male and female partners are employed outside the home.[42] However, some judicial decisions, such as that by Master McLaughlin in *Green v Robinson*,[43] reflect a view that the opposite is true – that there is, in fact, an equal division of labour between men and women in the "domestic" sphere. Further, there has been some reluctance by courts to consider domestic, non-financial contributions as important.

Justice Kirby, unlike some of his (primarily) brethren judges, recognises that women continue to bear the brunt of childcare and other domestic tasks and that these activities should be considered as valuable contributions to the relationship. Thus, he dissented in the appeal in *Green v Robinson*, stating that:

> [M]y reading of the evidence leaves me with the strong impression that Ms Green's contributions were more intensive and diverse than Mr Robinson's. The unchallenged evidence was that she carried out multiple domestic chores, including washing, cooking, cleaning and ironing, both for Mr Robinson and for herself. She even polished his service boots.[44]

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40 *Thomson v Orica Australia Pty Ltd* (2002) 116 IR 186.

41 *Purvis v New South Wales* (2003) 217 CLR 92 at 131 [119], citing Sir Ronald Wilson in *Sullivan v Department of Defence* [1992] EOC 92-421 at 79,005.

42 For statistics, see Human Rights and Equal Opportunity Commission, *Striking the Balance: Women, Men, Work and Family* (HREOC Discussion Paper, 2005): http://www.hreoc.gov.au/sex_discrimination/publication/strikingbalance/index.html (accessed 10 October 2008); and *It's About Time: Women, Work and Family* (HREOC Final Paper, 2007): http://www.hreoc.gov.au/sex_discrimination/its_about_time/chapter4.html - 410 (accessed 10 October 2008).

43 (1995) 36 NSWLR 96; see discussion of this case in NSW Law Reform Commission, Discussion Paper No 44 (2002), *Review of the Property (Relationships) Act 1984 (NSW)*: http://www.lawlink.nsw.gov.au/lrc.nsf/pages/dp44toc (accessed 10 October 2008).

44 (1995) 36 NSWLR 96 at 104 [F].

In that matter he asserted, too, that both financial and non-financial contributions should be considered when deciding entitlement to superannuation funds. Thus, he disagreed with the majority who held that the appellant needed to prove that she had made some contribution to the respondent's superannuation.[45]

This general point of view was reiterated by Kirby J in *Bryson v Bryant*,[46] in which the majority rejected the argument that the non-financial contributions made by a female partner during the relationship should give rise to a constructive trust since they were made purely for reasons of "love and affection".[47] In his dissent, Kirby J stated that contributions of this sort are not inferior[48] to financial ones and that:

> love and affection are all very well. But in the past, such emotions have often been used as a cloak to hide the proper claims of women on the assets of men.[49]

He suggested that a constructive trust of the type identified in *Baumgartner*[50] should be available to "parties to a de facto marriage or same sex relationship" with homemaker contributions equated with financial contributions.[51]

Reproductive autonomy

In the case of *Cattanach v Melchior*,[52] Dr Cattanach performed a tubal ligation on Mrs Melchior. The operation failed and a (healthy) child was born contrary to her wishes. Consequently, she sued the doctor for the costs of raising an unwanted child and for pain and suffering, including her loss of earnings during pregnancy. The High Court questioned whether the costs of child rearing could be included in the damages that had been awarded by the Queensland Court and upheld by the appellate court.[53]

In his judgment, Kirby J stressed the need to apply the common law holistically, taking into account the differential impact of children

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45 (1995) 36 NSWLR 96 at 103 [F].

46 (1992) 29 NSWLR 188.

47 The majority in *Bryson v Bryant* (1992) 29 NSWLR 188 at 229 described domestic contributions done out of love and affection as tasks undertaken as one party's share of the relationship without regard to whether or not those efforts would entitle one to any equitable share in the property.

48 (1992) 29 NSWLR 188 at 203 [A]. Kirby J (at 201 [D]) quoted with approval ("I respectfully agree") Deane J's comment in *Muschinski v Dodds* (1985) 160 CLR 583 in respect of "a need to take account of a practical equation between direct contributions in money or labour and indirect contributions in other forms such as support, home-making and family care".

49 (1992) 29 NSWLR 188 at 204 [F].

50 *Baumgartner v Baumgartner* (1987) 164 CLR 137.

51 *Bryson v Bryant* (1992) 29 NSWLR 188 at 202 [G].

52 (2003) 215 CLR 1.

53 This decision is also analysed in this book by Ian Freckelton (Chapter 16), albeit from a different perspective.

on women's lives. In his view, the "ordinary principles of tort liability would entitle the victims of the appellants' wrong to recover from the appellants all aspects of their harm that are reasonably foreseeable and not too remote":[54]

> The propounded distinction between immediate and long-term costs of medical error is not drawn in other cases of medical negligence. It is arbitrary and unjust in this context. Such a distinction could even be said to be discriminatory, given that it involves a denial of the application of ordinary compensatory principles in the particular circumstances of child-birth and child-rearing, circumstances that biologically and socially pertain to the female experience and traditionally fall within the domain of women.[55]

This was a view that he had also advocated in *CES v Superclinics (Australia) Pty Ltd*[56] as President of the New South Wales Court of Appeal when he rejected:

> the argument that, as a matter of policy, the "sanctity of human life" prevented the law from allowing damages for the "economic consequences" of the unplanned and unwanted pregnancy consequential upon medical negligence.[57]

In *Cattanach v Melchior*, Justice Kirby also scrutinised other "outmoded" reasoning, stating his view that in contemporary Australian life, there are many people who choose not to have children and that "the family values being promulgated privileged a particular notion of the family – the procreating heterosexual family".[58] According to Kirby J, this construct was "formed in the far-off days of judicial youth, 30 or more years earlier, when social facts were significantly different".[59]

The matter of *McBain*[60] was also about reproductive rights. Dr McBain was a medical practitioner who had successfully challenged the validity of Victorian State legislation restricting IVF treatment to married women. His argument was that s 22 of the *Sex Discrimination Act 1984* (Cth) bans discrimination based on marital status and overrides s 8

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54 (2003) 215 CLR 1 at 68 [180], where Kirby J stated that the public policy consideration of the financial burden on insurance companies and medical practitioners was not to be considered by the court but should be dealt with by Parliament ("denial is the business, if of anyone, of Parliament not the courts").

55 *Cattanach v Melchior* (2003) 215 CLR 1 at 62 [162].

56 (1995) 38 NSWLR 47.

57 See *Cattanach v Melchior* (2003) 215 CLR 1 at 45 [112], citing *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 at 74–77.

58 D Hamer, "Principle, Policy and Judicial Activism" [2004] 11 *University of New England Law Journal*: http://www.austlii.edu.au/au/journals/UNELJ/2004/11.html#fn54 (accessed 10 October 2008).

59 *Cattanach v Melchior* (2003) 215 CLR 1 at 64 [164].

60 *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372.

of the *Infertility Treatment Act 1995* (Vic).[61] The appeal to the High Court by Australia's Catholic Bishops, who attempted to have that decision quashed, was concerned with questions of constitutional law and so was not perhaps directly relevant to issues of women's rights. However, since the High Court's unanimous dismissal upheld the provision of in-vitro fertilisation services, and therefore indirectly had a bearing on issues of reproductive autonomy and the status of women who are not married, it bears mention here. Although Kirby J, in the minority, agreed that there was a relevant matter to be heard, he concurred with the other members of the court in respect of dismissal on discretionary grounds. His arguments took a pragmatic perspective: since there had been no appeal to the Victorian Court of Appeal, if the Bishops were successful, those doctors who had provided in-vitro fertilisation to single women following the Federal Court decision, might be exposed "to possible investigation for breach of a law" or of their "professional obligations in Victoria".[62]

Mobility

The current Chief Justice of the Family Court, Bryant CJ recently wrote that relocation cases "are the hardest cases that the court does, unquestionably … [they are] cases which pose a dilemma rather than a problem".[63] The "dilemma" is the need for the court to choose between a parent's (usually a mother's) right to freedom of movement and the best interests of children and their right to know and be cared for by both parents.

In both relocation cases that have been heard by the High Court, *AMS v AIF*[64] and *U v U*,[65] Kirby J's judgments have supported the woman's right to move.[66] Although the paramount consideration is the best interests of the child, in Kirby J's view it is not the only consideration:

> In my reasons in *AMS* I also acknowledged that legislative changes in Australia, sometimes reflecting international law, laid increased emphasis on the rights of the child who is separated from one or both parents to maintain personal relations and direct contact with each of them on a regular basis. However, I insisted that this rule too was not

61 Section 109 of the Commonwealth *Constitution* mandates that where a State Act is inconsistent with a Commonwealth Act, the State Act is invalid to the extent of the inconsistency.

62 *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 456 [230].

63 Hon D Bryant, submission to House of Representatives Standing Committee on Legal and Constitutional Affairs, *Relocation Report* (Family Law Council, May 2006): http://www.ag.gov.au/www/agd/agd.nsf/Page/FamilyLawCouncil_Publications_ReportstotheAttorney-General_RelocationReport (accessed 13 October 2008).

64 (1999) 199 CLR 160.

65 (2002) 211 CLR 238.

66 This is a subject also addressed by Richard Chisholm (Chapter 15) in this volume.

> "an absolute one". I suggested that "courts recognise the implications of the application of that right to the custodial (or residence) parent, and particularly because most of them are women".[67]

In *AMS*, which involved relocation from Perth to Darwin, Kirby J asserted that examining the state of mind of the relocating parent may not be appropriate "to any significant degree". He also suggested that there should be more leniency in domestic moves in contrast to overseas relocation,[68] but recognised, nevertheless, that "even where the proposal is made to remove the child to another country, courts will not necessarily restrain such moves".[69]

Three years after the decision in *AMS*, the High Court was called on to decide an international relocation case, *U v U*. The mother proposed to move back to her homeland, India. During the trial, she was implicitly tested when asked whether she would stay in Australia, rather than proceeding with her preferred relocation to India, in order to maintain contact with her daughter. She agreed that she would. It was Kirby J's view that the trial judge had erred in treating her response to the question as a proposal by the mother and that her "true proposal" was not adequately considered:

> The burden of such injustices will ordinarily fall, as here, on the wife. It will be she, not the husband, who will usually be confined, in effect, in her personal movements, emotional environment, employment opportunities and chances of remarriage, repartnering and reparenting.[70]

True to his usual form, Justice Kirby thus put what he identifies as gender issues in relocation cases into a human rights context. He pointed out that if the child's best interests are the sole concern, then the parent with whom the child spends the most time (usually the mother) "would virtually always be obliged to reside in close proximity to the other parent (usually the father) so as to facilitate contact between the latter and the child".[71] And importantly, as far as effectuating attitudinal change, he presented these arguments to the public in an Australian newspaper article:

> There are other considerations. These include the "human rights of custodial parents, who are mostly women". "To take the contrary view," I said, "is to entrench gendered social and economic consequences of

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67 M D Kirby, "Family Law and Human Rights" (2003) 17 *Australian Journal of Family Law* 1 at 6.

68 As discussed in J Behrens, "U V U: The High Court on Relocation" [2003] 20 *Melbourne University Law Review*: http://www.austlii.edu.au/au/journals/MULR/2003/20.html (accessed 10 October 2008).

69 (1999) 199 CLR 160 at 210 [147].

70 *U v U* (2002) 211 CLR 238 at 278 [142].

71 *AMS v AIF* (1999) 199 CLR 160 at 208 [144].

care-giving upon women in a way that is contrary to (local and international law)."[72]

THE RIGHTS OF WOMEN WHO ARE VULNERABLE TO VIOLENCE

Mrs Taikato was carrying a pressurised canister of formaldehyde with her for self-defence, when her handbag was searched by police. Convicted of an offence under s 545E(1) of the *Crimes Act 1900* (NSW), part of her appeal was that, in fact, she had a reasonable excuse for carrying the canister. She had been attacked a few years earlier by someone attempting to burgle her Sydney home. However, the majority in the High Court[73] held that within the meaning of s 545E(2) there was no reasonable excuse. Justice Kirby, however, dissenting from the majority decision, looked at why it might be reasonable for a woman to carry such a canister for protection:

> Relevant Australian conditions today [to be taken into account in deciding whether Ms Taikato should have been found guilty of the crime] include the danger which is faced by women in certain circumstances and at certain times in Australian cities. They also include the dangers faced by other vulnerable groups, such as the old, the young, ethnic minorities, homosexuals, etc. Section 545E was enacted to operate in this environment. It should have received a construction appropriate to that context.[74]

In this way, by particularising "certain circumstances and at certain times", Kirby J has not generalised about all women but has recognised that what is a reasonable excuse could vary depending on an individual's experience and perception of vulnerability.

Refugees and illegal migrants

Pakistani authorities had failed to respond to Naima Khawar's complaints of domestic violence – acts that included being drenched in petrol and threatened with incineration. She was then denied a protection visa by the Australian Government.

The case of *Minister for Immigration & Multicultural Affairs v Khawar*[75] represented an advance on past refugee law in terms of protection for women as a class and in the interpretation of Australia's obligations

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72 M D Kirby, "Judging the Best Policy for Children", *The Age* (28 October 2002): http://www.theage.com.au/articles/2002/10/27/1035683303193.html (accessed 10 October 2008).

73 See *Taikato v The Queen* (1996) 186 CLR 454. For a discussion on this case, see J Scutt, "Character, Credit, Context: Women's Lives, Judicial 'Reality'" in P Easteal (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture* (Federation Press, Sydney, 1998) pp 159–173.

74 *Taikato v The Queen* (1996) 186 CLR 454 at 485.

75 (2002) 210 CLR 1. For a discussion of this case, see U Jayasinghe, "Women as Members of a Particular Social Group" (2006) 31(2) *Alternative Law Journal* 79.

vis-à-vis international agreements. It established that to be considered a refugee, the agent of persecution does not have to have been the State.

Justice Kirby held that the law did not protect Naima Khawar as a victim of violence, as it would have for a man. Further, he maintained that what the Refugee Review Tribunal constructed as a family dispute should actually have been examined in "the light of the material about the serious legal, social and practical disadvantages suffered by the respondent and women in her position":[76]

> a particularly vulnerable group of married women in Pakistan, in dispute with their husbands and their husbands' families, unable to call on male support and subjected to, or threatened by, stove burnings at home as a means of getting rid of them yet incapable of securing effective protection from the police or agencies of the law.[77]

Using the formula, "Persecution = Serious Harm + The Failure of State Protection",[78] to show the necessary nexus between her experiences and the Refugees Convention grounds, Justice Kirby stated the view that the Convention is intended to protect individuals whom the State is not protecting. He also reasoned that as Australia is a signatory to both the *International Covenant on Civil and Political Rights* and the *Convention on the Elimination of All Forms of Discrimination against Women*, it needs to reflect the intention of these two instruments to uphold "the concept of women's equality before the law and the unacceptability of the state and its agencies discriminating unjustly against women solely by reason of their sex".[79]

Chen Shi Hai v Minister for Immigration and Multicultural Affairs[80] was another case relevant to women and their rights to refugee status, although the facts did not concern women, but rather an illegitimate child of Chinese refugees who sought protection on the basis that he would be persecuted if the family was forced to return to China. In their judgment in this case, Gleeson CJ, and Gaudron, Gummow and Hayne JJ stated:

> To say that, ordinarily, a law of general application is not discriminatory is not to deny that general laws, which are apparently non discriminatory, may impact differently on different people and, thus, operate discriminatorily. Nor is it to overlook the possibility that selective enforcement of a law of general application may result in discrimination.[81]

76 *Minister for Immigration & Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 33 [100].

77 (2002) 210 CLR 1 at 43 [129].

78 (2002) 210 CLR 1 at 40 [118] fn 127: Lord Hoffmann in *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 at 653 attributed the source of the formula to the *Gender Guidelines for the Determination of Asylum Cases in the UK* (Refugee Women's Legal Group, July 1998) p 5.

79 (2002) 210 CLR 1 at 37 [111].

80 (2000) 201 CLR 293.

81 *Chen Shi Hai v Minister for Immigration & Multicultural Affairs* (2000) 201 CLR 293 at 301 [21].

In his comments, Kirby J mentioned the importance of this sort of thinking for certain groups – including victims of sexual assault:

> Discrimination may in particular circumstances fall most heavily on racial minorities, on women subjected to sexual abuse,[82] on religious minorities accused of apostacy or on homosexuals. It may be reinforced by laws or practices of apparently general application. The mere fact that the law is a criminal law or one of general application in a particular society does not withdraw from those who have a well-founded fear of being persecuted, the protection of the Convention definition.[83]

Kirby's judgments embody a principled refusal to objectify women as above or below the law. That is evident in the recent case of *R v Tang*,[84] in which the majority upheld the conviction of a brothel owner for slavery offences. In dissent, Kirby J commented that:

> [T]here is an inescapable dilemma in the operation of fundamental principles of human rights, reflected in the Code and in Australian law more generally. Protection of persons alleged to have been trafficked as "sexual slaves" is achieved in this country in a trial system that also provides fundamental legal protections for those who are accused of having been involved in such offences. As is often observed, the protection of the law becomes specially important when it is claimed by the unpopular and the despised accused of grave wrong-doing.[85]

For Justice Kirby, disregarding the protection of the law for alleged offenders in "abhorrent" offences[86] against women or other people would be unjust and implicitly a reversion to patriarchal notions of law that deny women full agency.

Sexual assault

Aside from looking at rape in the context of refugee law, Kirby J has made a number of germane comments in criminal law matters, both

82 Kirby refers here to the UK case, *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 at 635–637, 648.

83 *Chen Shi Hai v Minister for Immigration & Multicultural Affairs* (2000) 201 CLR 293 at 317 [72].

84 (2008) 82 ALJR 1334.

85 *R v Tang* (2008) 82 ALJR 1334 at 1351 [69]. It was Kirby's minority view that this trial for slavery offences miscarried due to the trial judge's directions, which failed to adequately inform the jury that the fault element of intention needed to be applied to all elements of the offences.

86 His concern for "the protection of the law" does not reflect a disregard for victims of sexual slavery: "Women and children are particularly vulnerable to human trafficking and they are often subjected to sexual and other physical and emotional exploitation. This abhorrent activity commonly involves conditions of infancy, serious vulnerability, shocking living and working conditions and repeated violence, oppression and humiliation": *R v Tang* (2008) 82 ALJR 1334 at 1351 [116].

whilst President of the New South Wales Court of Appeal and as a judge in the High Court. For example, as the former, he addressed what is consistently the most problematic and contentious area of sexual assault legislation – the issue of consent:

> To criminalise conscious advertence to the possibility of non-consent, but to excuse the reckless failure of the accused to give a moment's thought to that possibility, is self-evidently unacceptable. In the hierarchy of wrongdoing, such total indifference to the consent of a person to have sexual intercourse is plainly reckless, at least in our society today.[87]

The same year, in *R v Leary*[88] Kirby P criticised the reasoning in *R v Heros Hakopian*[89] in which a Victorian judge questioned the degree of trauma that a prostitute could experience from sexual assault. He endorsed the rejection of *Hakopian* by Court J, the trial judge in *Leary*, indicating that:

> [P]rostitutes, male or female, were entitled to the same protection of the law as any other citizen. They have their human dignity and their privacy and ought not unconsensually to have that invaded by fellow citizens, and that is what occurred in this case.[90]

Then five years later, in *Palmer v The Queen*,[91] one of the issues examined by the High Court was whether, in a rape trial, questions could be asked or suggestions made about the inability of the accused to explain why the complainant would have lied and fabricated the sexual assault allegations. Justice Kirby agreed with the majority that the appeal should be allowed and the verdict quashed. After looking at the arguments on both sides, he wrote that there should be a general prohibition on initiating questions of an accused as to the possible motivation of the complainant to make false accusations. In his reasoning, though, he did infer that false allegations would be unusual since he described them as "truly wicked conduct".[92]

Justice Kirby did not agree with the other grounds for appeal – that the verdict was unsafe or unsound – and therefore did not agree with the majority's entering a verdict of acquittal. Instead, in minority he ordered a retrial. The appellant's arguments included questioning the victim's credibility and the truth of her allegations since she had not told her mother about all of the incidents. Justice Kirby's comments showed a comprehensive understanding of what sexual assault can mean for its victims. For instance, he explained why the complainant might not have disclosed to her mother:

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87 *R v Kitchener* (1993) 29 NSWLR 696 at 697 [B].

88 (Unreported, NSW Sup Ct CCA, 060254, 1993) at p 11.

89 (Unreported, Vic Sup Ct CCA, BC9100584, December 1991).

90 *R v Leary* (Unreported, NSW Sup Ct CCA, 060254, 1993) at p 11.

91 (1998) 193 CLR 1.

92 *Palmer v the Queen* (1998) 193 CLR 1 at 39 [99].

> [T]he complainant might have been grossly embarrassed, confused and too inexperienced or ashamed to tell her mother about the unwanted attentions which were then happening to her. Many victims of unwanted sexual activity, particularly young ones, experience shame and blame themselves. Thus, the complainant said in evidence that she considered herself a "slut". Complainants may also fear (sometimes with justification) that they will not be believed if they complain.[93]

Violence against women has an international dimension too. In that respect it is worth noting Michael Kirby's involvement in Cambodia as the United Nations Special Representative of the Secretary-General for Human Rights. His final report (at paras 56-72) paid particular attention to articulating principles and practicalities for the implementation of measures to ensure that Cambodian women enjoy the same rights and protections as Cambodian men.[94]

RIGHTS OF WOMEN AS "ACTORS" IN THE LAW

Since his appointment to the High Court, Justice Kirby has made a number of speeches that either partly or exclusively focus on women legal practitioners. All of these talks reflect on the slow rate of women to progress through the ranks. It is Kirby J's strongly articulated view that more partners in law firms, barristers and judges need to be female since he believes that women lawyers are not "simply male lawyers in skirts" but, through their experiences and values, can "see issues, including issues of legal theory and practice" differently.[95] Accordingly, he has also advocated for more women on the High Court, recognising that there, as in other courts, judges have discretion and that their choices are guided by and reflect their values. Therefore, women can add "richness and variety of the elements available to argument and decision-making":

> Women bring additional perspectives to the law, as to other things in life. Their experience of law, and of life, is different from that of men. It is important that their perspective, shared by half the population, should be seen and heard in a nation's final court.[96]

In his speeches, Justice Kirby provides a slew of reported statistics showing that despite the gradual increase of women studying law to be almost 50 per cent by 1990 and 50 per cent by the mid-1990s, there has not been a correlate increase in the percentages of women as partners

93 (1998) 193 CLR 1 at 33 [85].

94 M D Kirby, *Report of the Special Representative of the Secretary-General for Human Rights in Cambodia* (Commission on Human Rights, E/CN.4/1996/93 of 24 February 1996): http://cambodia.ohchr.org/webdocuments/reports/SRSG_HR_rpt/84_SRSG_HR_26-Feb-96_eng.pdf (accessed 14 October 2008).

95 Kirby, n 1.

96 M D Kirby, "Women in Law – Doldrums or Progress?" (Speech, Women Lawyers of Western Australia, Perth, 22 October 2003): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_22oct.html (accessed 14 October 2008).

in law firms, as senior counsel or in the judiciary. He shares, too, his own High Court experience, reporting that in his first 18 months on that Bench, of at least 200 barristers with speaking roles, only six were women. Four years later, there was no great improvement with the same number – six – appearing with speaking roles[97] and again, in 2003, he reports that the number was declining.[98]

Justice Kirby ponders why this is the case and proposes numerous reasons, such as the attrition of the best female advocates through their appointment to judicial office. Other explanations or contributing variables include: instructing solicitors who are senior males who give out briefs accordingly; client attitudes based on gender stereotyping; family "burdens" and career interruptions; and, of course, the masculine culture of the Bar and the private law firms[99] – "There is a glass ceiling and women find it harder than men to break through."[100]

Aside from identifying the problems, Kirby J also offers concrete suggestions that could lead to increased gender equity. One example – that judges should practise gender equality as he does himself by hiring one male and one female associate. Other Kirby recommendations for equity include the need for an acceptance of part-time employment in legal professions, an increased number of women taking leadership roles in the professional organisations and as more active lobbyists.[101] In addition, he recommends that:

> In the contracting out of Crown legal work to the private profession, principles of equal opportunity should be written into the contract. Work should be withheld from those who clearly practise discrimination in their assignment of briefs or advocacy work. In the palaces of marble and glass in which so many members of the legal profession now carry on their work, it should be possible to provide childcare facilities.[102]

CONCLUSION: "... THEIR FULL AND RIGHTFUL PLACE IN THE LAW"

It is not surprising that Michael Kirby is cited so frequently in my students' assignments and in my research and teaching preparation resource material. What is evident to anyone who reads his judgments, papers and speeches is his passion for human rights, and there is no doubt that women as a "minority group" benefit from this commitment. Thus, in this chapter we have seen examples of his legal reasoning and

97 M D Kirby, "Women in the Law – What Next?" (Speech, Lesbia Harford Oration 2001, Victorian Women Lawyers' Association, 20 August 2001): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_vicwomen.htm (accessed 14 October 2008).

98 Kirby, n 96.

99 Kirby, n 96.

100 Kirby, n 97.

101 Kirby, n 96.

102 Kirby, n 95.

commentary in a number of decisions – such as arguing for a broad interpretation of discrimination law in *Purvis* – which are illustrative of his desire to ensure that women, along with other "minorities", have access to justice.

Kirby believes that this access can be imperilled by the use of legal constructs that are based on stereotypes. Consequently, he takes a strong position on battered woman syndrome and the "special wives equity". His viewpoints have not therefore been popular amongst those who advocate for women such as Heather Osland to be acquitted, and for the economic dependency and disempowerment of some wives to be recognised. However, Kirby is concerned that battered woman syndrome and the *Yerkey* rule are both too inclusive and too exclusive, pigeonholing people into a finite category, but concurrently excluding some who may be eligible from arguing for them.

Although he regards stereotyping as anathema to human rights, Kirby does recognise that there are some differences, which do equate to some degree with gender. He has argued that these differences can effect what is regarded as "reasonable" behaviour for *some* women and for *some* victims of violence. He acknowledges, too, the power and effect of gender roles and the potential for discrimination against women in such diverse areas as unpaid work or domestic contributions, IVF, relocation, and as actors in the legal realm. He also sees that women may have their own unique bases for refugee status because of gender-based experiences and treatment in their country of origin.

It is in all of these ways that Michael Kirby has shown his concern that differences between the sexes need not only to be understood in the application of the law, but also celebrated in its practice:

> I have a dream that women will play their full and rightful place in the law … If the judiciary is sometimes a patriarchy, the laws that judges make and interpret may reflect male values and overlook the values and dreams of women.[103]

103 M D Kirby, "Law in Australia – Cause of Pride; Source of Dreams" (2005) 8(2) *Flinders Journal of Law Reform* 161.

Chapter 35

FINAL THOUGHTS

Julian Burnside

Like all of us, Manning Clark was a bundle of contradictions. But his life made a difference to Australia. He held a mirror up to Australian society and its past. After we peered into it, things would never seem quite the same again. Beside him, his carping critics appear as pygmies.[1]

Many years ago, Michael Kirby telephoned me at home at about 8.00 on a Sunday morning. I was awake, but my day had not started. His opening words surprised me: "I rang you in chambers, but you were not there." His tone of gentle reproach suggested that I needed to improve my work habits.

At the time, I was an ambitious young junior, but the idea of being in chambers early on a Sunday morning had not yet occurred to me. I had only met him once or twice. It was the very early days of the law's encounter with computer technology. I had shared the platform with Kirby a couple of times at seminars to do with computers and their likely impact on law and legal practice. I thought I knew a thing or two about the subject. His knowledge and insight made a great impression.

If Kirby's purpose in calling me on a Sunday morning early was to impress me with his industry, it worked. If I had been tempted to think that he was showing off, the balance of his history would prove me wrong: Kirby's industry is legendary; his output is phenomenal.

Not long afterwards, he spoke at the inaugural meeting of the New South Wales Society for Computers and Law. In December 2007 he spoke at the Society's 25th anniversary dinner. The occasion marked not only his long involvement with computer technology (something which dawned on the rest of the legal profession about a decade later); it also

1 M D Kirby, "Manning Clark, 'Bourgeois Democracy' and Strange Tales From Supreme Courts" (Second Annual Manning Clark Lecture, 26 March 2001): http://manningclark.org.au/html/Paper-Kirby_Michael-Manning_Clark_Bourgeois_Democracy_Strange_Tales_from_Supreme_Courts.html (accessed 1 December 2008).

incidentally illustrated his remarkable energy. He finished his speech[2] by saying:

> It is appropriate that this anniversary celebration should take place in the Strangers' dining room of Parliament House, Sydney. It is always a privilege to be in the precincts of a democratic legislature. The Parliament of New South Wales is one of the oldest continuously operating representative legislatures in the world. We are therefore greatly fortunate to assemble for this celebration in such a place.
>
> Across the Sydney Domain, illuminated in the distance, is the Art Gallery of New South Wales. I must shortly leave this occasion for another that is being held in that equally beautiful public space. It is a celebration of gay, lesbian, bisexual and other Australians, joining together to acknowledge twenty-five of their fellow citizens whom that community have elected to recognise as leaders in the struggle for equality of all people, regardless of their sexual orientation. I have been chosen as one of the twenty-five. So I will put in an appearance.

With this small, polite social bomb he left. But not before the obligatory group photograph of Kirby and various members of the organising committee. (Kirby always has photographs taken when he makes a speech. It is an endearing habit which seemed like vanity at first but has ossified into a sort of eccentricity. His photograph album must be a pictorial history to rival the Hulton archive.)

It is a matter easily seen from the essays in this collection that his approach to judgment writing is marked by a level of thoroughness rarely equalled in our legal history. When in dissent, Kirby J always draws together the authorities which seem to him to justify the position he takes, and the principles which compel him to take it. Even when in agreement with the majority, he rarely forgoes the opportunity to review the relevant area of law and, where possible, to refresh its exposition.

It is a lamentable fact that his judgments have not commanded universal acclaim. Some are frightened by their content; some by their length. Others have more idiosyncratic objections. In 1992, Meagher JA spoke at a forum on "The Writing of Judgments". He began his speech as follows:[3]

> I do not see why writing a judgment is any different, or should be judged any differently, from writing anything else – like an essay on economics or philosophy. The normal rules of English prose composition apply just the same. Clarity is the principal virtue; and brevity, so far as the subject

2 M D Kirby, "Computers and Law: The First Quarter Century" (Speech, New South Wales Society for Computers and the Law, Sydney, 9 October 2007): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_9oct07.pdf (accessed 28 August 2008).

3 (1992) 9 *Australian Bar Review* 135.

> permits, is the next one. There are two ways, it seems to me, that judges in fact go about writing their judgments. One is the way sometimes favoured by our President, Mr Justice Kirby, and others, which is to throw your mind into neutral, close your eyes, open your mouth, and let it all come out.

Although entertaining, in a manner only Meagher JA could get away with, this assessment is plainly wrong. While Kirby J's judgments are not brief, they are no longer than his task requires, and his task is no small one; and if he manages it with his mind in neutral, it must be truly formidable to see him in top gear.

Orr and Dale are right to suggest that Kirby is Hercules J. But even that allusion is not quite adequate to capture the full force of it. Hercules had no choice but to engage in his labours. Kirby's burden is largely self-imposed, yet is discharged with equanimity. He set to the law's Augean stables with a willing heart. When a collection of his judgments is compiled (as surely it must be) it will comprise, in effect, a restatement of the most important aspects of Australian law. It will be wrong in some of its conclusions, for the time being at least, but it will collect together in an organised way all the learning which bears on every significant legal subject.

Kirby's prodigious judicial output is matched by an astonishing number of speeches, papers and book reviews. Over the past few years, he has written about subjects as diverse as "An Article in Honour of Martha Nussbaum for the Library of Living Philosophers"; "Reflections on Running in the Queen's Baton Relay"; "The Dreyfus Case a Century On"; "Sexuality, Discrimination and Seven Home Truths"; "National Security – Proportionality, Commonsense and Restraint"; "Power without Responsibility – Appropriate Activism"; "Legal Issues and The New Genetics"; and "Australian Corporations Law and Global Forces". The list of speeches and papers is vast. Even allowing for the fact that some speeches plough the same furrow, the reach and scale of his intellectual output is astounding.

Perhaps more than his judgments, which are necessarily confined, more or less, to the questions presented for decision, Kirby's speeches give some insight into the breadth of his intellectual reach, and the full extent of his industry.

Given Michael Kirby's long involvement in law reform, it is no surprise that one of his heroes was Lord Scarman. Scarman had helped create the Law Commission in Britain, on which many other law reform bodies have since been modelled. Although Scarman was cautious and conservative as a judge (even in the House of Lords), he was dedicated to the idea that institutional law reform was essential if law was to continue properly to serve society. From as early as 1974, Scarman had proposed the adoption of a European-style charter of human rights. There were

strong parallels between the two men. In a speech titled "Law Reform, Human Rights and Modern Governance – Australia's Debt to Lord Scarman",[4] Kirby said of him:

> [Scarman's] singular contributions to Australian law lay in the part he played in introducing institutional law reform as a regular fact of legal life and in his early endorsement of the concept of human rights law in a culture traditionally hostile to that idea. There was a unity in his legal philosophy. It continues to have an impact, including in Australia.

Twenty years earlier, Scarman had written the Foreword to Kirby's collection of essays "Reform the Law". He wrote:

> Michael Kirby has established himself as one of the liveliest minds active in the field of law reform … Nothing is too great – or too small – for him to tackle in his challenging and creative way, if he thinks it presents a law reform problem. He has the all-embracing, universal approach … I needed no convincing that the Kirby approach is absolutely right: that law reform serves no true purpose unless it is "to take the whole body of the law", as Bacon put it, under review and to sustain the review indefinitely …[5]

Viewed after the fact, it looks like a long distance mutual admiration society; but neither of them exaggerated, and in the comparison neither loses to the other.

It is natural for people to admire most in others the qualities they perceive in themselves. It is not surprising then to read what Kirby said of Manning Clark:

> Like all of us, Manning Clark was a bundle of contradictions. But his life made a difference to Australia. He held a mirror up to Australian society and its past. After we peered into it, things would never seem quite the same again. Beside him, his carping critics appear as pygmies.[6]

Michael Kirby has always had an unshakeable attachment to the idea that every individual human being is entitled to the respect which comes from their equal humanity. This idea, doubtless admirable, can be difficult to maintain and must be exceptionally difficult to maintain for judges who, necessarily, are exposed to all the foibles and vices of mankind. But it is a theme which informs almost everything Kirby has written:

> Ordinary people may be prosaic. Their aspirations and ideals may seem modest, even mediocre. But they are individuals. They have human rights and dignity.[7]

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4 M D Kirby, "Law Reform, Human Rights and Modern Governance – Australia's Debt to Lord Scarman" (2006) 80 *Australian Law Journal* 299: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_apr06a.pdf (accessed 13 October 2008).

5 M D Kirby, *Reform the Law: Essays on the Renewal of the Australian Legal System* (Oxford University Press, Melbourne, 1983).

6 Kirby, n 1.

7 Kirby, n 6.

Coupled with this, perhaps an aspect of it, is a dignified humility about his own position at the summit of the Australian legal profession. After a speech at Melbourne University on what it is like to be a High Court judge[8] he answered a number of questions:

> I came from an ordinary suburban middle to lower middle class Australian family, I don't feel myself more important than anybody else. I feel myself somewhat in touch with the values and aspirations of ordinary Australians. I think that those values involve something of integrity and wisdom that we the judges should never forget.

One question was directed to the notorious fact that Kirby has been the subject of many personal attacks. Kirby answered:

> If you think I keep a little black book in which I write down everybody who said a nasty thing about me, I do not. I have to tell you that in my life, not just as a judge, but in my whole life, I've had a lot of nasty things said about me. The black book would be very full. But it would really be pointless to keep such a book. You should never carry bitterness. Sometimes the personal comments of one's critics can be hurtful. Hurtful not only to you as an individual but to the institution you honour.

In other circumstances, this might seem like an easy response which would never be put to the test. But the occasion was a speech in 1997, five years before the disgraceful and misconceived attack on Kirby by Senator Heffernan under cover of parliamentary privilege, an attack to which the then Prime Minister John Howard added his own inflammatory contribution while pretending to keep his distance. Kirby handled the attack with conspicuous dignity, and accepted the apology which Heffernan was later obliged to offer. Kirby's grace and restraint during the Heffernan affair impressed even his critics.

In July 2007 he was interviewed by *Justinian*.[9] The article began with the observation:

> Justice Michael Kirby is savaged like no other High Court judge. Yet on he glides, pouring out his well-written, well-reasoned judgments at about twice the output of his colleagues on High. He's the only member of that otherwise stitched-up ultimate appellate tribunal who dares share with us his fantasies, foibles and fears.

Beyond what the speech at Melbourne University tells of Kirby's character, it also explains in part the origins of his view of the central importance of protecting human rights, even in a healthy democracy. He said on that occasion, to a roomful of eager young law students:

> You can't just keep quiet where basic rights are involved. If you think that something is unjust and you feel strongly about it, and if it affects the human dignity of another person, you should lift your voice. That's

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8 Kirby, n 6.

9 Richard Ackland, modest proprietor of the eponymous online journal.

> your civic obligation and privilege … Think freshly. Don't just think with the blinkers of the past on your mind. Alas, the law tends to produce people who are all too readily locked, unquestioningly, into the past.[10]

He enlarged on the theme in his Manning Clark Lecture in 2001:[11]

> The ballot box is not always a good protector of minorities. The ballot box can sometimes be an instrument to legitimise oppression by law. The law in the first century of our federation was not always "unrivalled in its spaciousness and freedom" for Aboriginals and other indigenous peoples. Nor for women. Nor for the old. Nor for the disabled. Nor for Asian Australians. Nor for other people of colour. Nor for gays and lesbians.
>
> Until Australia has a Bill of Rights, it will lack the occasional constitutional corrective that stimulates and cajoles the politicians, answerable to the ballot box, into reflecting modern notions of pluralism and true equality.
>
> I know these things at first hand. I do so because, for most of my life, as a homosexual Australian, I have been oppressed by unjust laws. I do not doubt that had there been a constitutional Bill of Rights in this country the reforms, slowly and sometimes reluctantly (and even apologetically) enacted for homosexual equality would have come more quickly from the courts. The courts would have upheld fundamental human rights to privacy, to equality and to full human dignity more speedily.[12]

The force of these comments became painfully clear in 2004 when the High Court decided *Al-Kateb v Godwin*.[13] The majority in that case may have found an available path to a humane result if Australia had had a Bill of Rights. The ballot box offered no solace to refugees in 2001 after the *Tampa* episode, nor in 2004 after the decision in *Al-Kateb*. In a tribute to Lord Scarman in 2006, Kirby said:

> Opponents talk repeatedly of the perils of "judicial activism" and the threat to democracy. To this talk it is necessary to reply, as Lord Bingham did:
>
> > "Constitutional dangers exist no less in too little judicial activism as in too much. There are limits to the legitimacy of executive or legislative decision-making, just as there are to decision-making by the courts."
>
> Lord Bingham's statement appeared in an important decision of the House of Lords upholding the rights of persons of foreign nationality, detained without trial and unconvicted but accused under counterterrorism

10 M D Kirby, "What is it Really Like to be a Justice of the High Court of Australia? – A Conversation of Law Students with Justice Kirby" (Speech, Sydney University, 23 May 1997).

11 Kirby, n 6.

12 Kirby, n 6.

13 (2004) 219 CLR 562.

> legislation. It would not have been possible for the decision of the House of Lords in that case, or many others, to have been reached, or the statement made, without the *Human Rights Act*.[14]

Despite Kirby's vast output on serious subjects, his speeches also reveal a style of wit which might be described as mock self-deprecation, or humility manqué. In October 2006, he was chosen to judge the "World's Most Boring Lecture Competition" for Oxfam Australia.[15] In his own speech, before awarding the prizes, he spoke of the ten deadly sins which can make a lecture boring. The first of these was "A boring topic":

> My best known effort in this respect – reproduced in countless corners of the Internet – was my well known talk, delivered to an astonished audience in Harare, Zimbabwe on "Breast Milk Substitutes and the Law". It caused my then colleague, Gordon Samuels, to ask on my return: "Kirby, is there nothing you will not speak about?" After that jest he was naturally elevated to Vice Regal rank whose function specialises in this first sin.[16]

The sixth deadly sin he identified as "Boring self-absorption":

> Everyone has his or her little obsession. In Australia, it usually takes the form of a football or cricket team. But with a little luck it might involve the late symphonies of Gustav Mahler. The urgent needs of law reform. Or religious attitudes to homosexuality. With a little persistence, a public speaker with such obsessions is well on the way to a first class honours degree in boredom. To consider that many find Mahler's music too noisy for too long; that some think the law bad enough without law reform; and that numerous people find sexuality a yawn, can come as a terrible shock to an accomplished bore.[17]

He acknowledged, naturally, that boring people also have rights:

> In all probability, as the Human Genome Project unfolds, it will be found that boredom is genetic. People simply cannot help it …
>
> Some of those who yawn and fall asleep are not even reacting to one's cultivated witticisms and entrancing thoughts … Pity them. They are victims.
>
> As for bores themselves, I can describe quite precisely the identikit of the typical exemplar of this art. He is male. Average height. About 60. He wears a dark suit. A white shirt. A navy blue tie and glasses. He is tired. And bored. In fact, all in all, he looks rather like me.[18]

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14 Kirby, n 4 at 313-314.

15 M D Kirby, "Boring Speeches – The Ten Deadly Sins" (Speech, The World's Most Boring Lecture Competition, Australian National University, 6 October 2000): http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_anu.htm (accessed 13 October 2008).

16 Kirby, n 15.

17 Kirby, n 15.

18 Kirby, n 15.

What the written word does not reveal is the style of Kirby's speeches. They are a mixture of studied gravity and measured levity. Ever conscious of the importance of maintaining the aura of judicial office, he nevertheless speaks with disarming candour and real human warmth. This is a rare combination in lawyers, and almost non-existent in judges.

In the introduction to the interview with *Justinian*, the author noted that Kirby was "the only member of that otherwise stitched-up ultimate appellate tribunal who dares share with us his fantasies, foibles and fears". And share them he did. He answered a number of questions with unnerving candour and conciseness:

> Describe yourself in three words. *Focused – energetic – kind.*
>
> Who or what do you fantasise about? *A dinner party with Janet Albrechtsen.*
>
> What regrets do you have? *Not enough fun when I was young.*
>
> What's your most glamorous feature? *Still to be discovered.*
>
> How would you like to die? *Never think of it. Too much still to do.*
>
> What would your epitaph say? *"A loving man."*

He was also asked: "What is your greatest fear?" He replied: "Retirement".

Michael Kirby's retirement marks the end of an important era. It will be a long time before the High Court, or any court, can boast a judge with such an extraordinary combination of industry, scholarship and humanity. In writing this, I admit the self-evident, that I am among that largish group of lawyers (and larger group of lay people) who count themselves among his fans. In a lifetime of public service, Kirby has dedicated himself to restating and reforming the law so that it will better serve the society of which it is an integral part. He wrote of Lord Scarman:

> It is not given to many judges, indeed many officials, to leave a lasting, and probably permanent, mark on a nation's basic legal institutions. To contribute two such marks requires an extraordinary spirit. It suggests a person with special gifts of intellect, persuasiveness and human empathy. These are the qualities that Leslie Scarman deployed throughout his life. They have affected the development of law in the United Kingdom. They continue to influence, if only by example, the development of the law in other countries of the common law, including Australia.[19]

The same could be said with equal truth of Michael Kirby.

Gavan Griffith and Graeme Hill see Kirby as writing for posterity. That is the lot of the dissenter. In much of his writing, on and off the Bench, he stands above the crowd and sees further. If he is looking to the future, it is because he sees clearly how the future can be. While

19 Kirby, n 4 at 315.

contemporary commentators have not been uniform in their appreciation of Kirby's views, I think posterity will be more generous.

Kirby's view of the proper role of law is not shared by everyone: for some whose human rights are not in doubt, law serves better if it gets on with other tasks. 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 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.

1. The young Michael Kirby, aged 3 in wartime Sydney, 1942.

2. The Kirby family goes to the Sydney Royal Easter Show in 1951. From left to right: Michael, Donald, David and Diana with parents, Don and Jean Kirby looking on.

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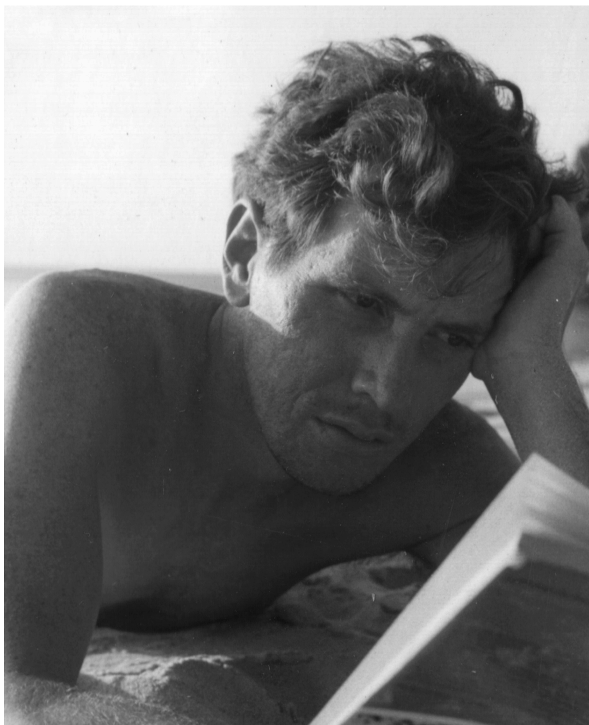
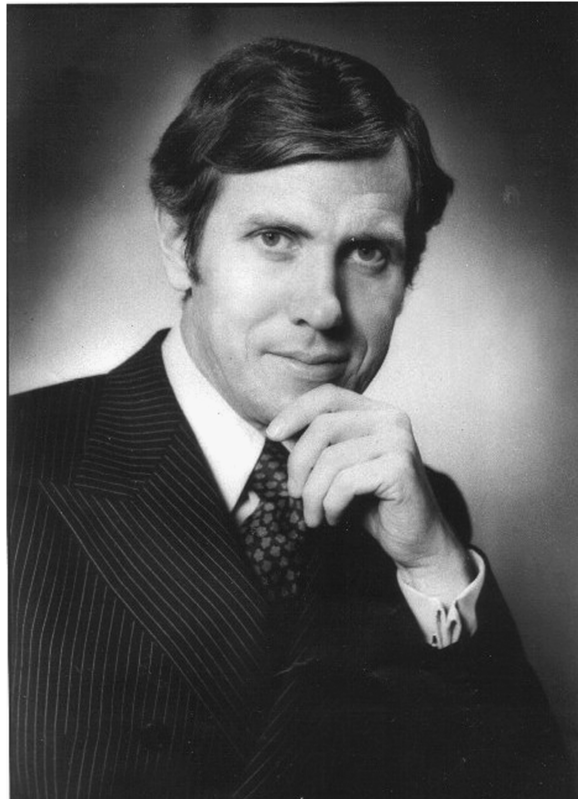


3. Michael Kirby on a beach at Goa, India, 1970.

4. With Johan van Vloten at the door to the Banco Court, Supreme Court of New South Wales, Sydney 1973.

5. The second Kombi van in the foothills of the Himalayas, 1974.



6. Justice Michael Kirby, inaugural Chairman of the Australian Law Reform Commission, 1975 and Deputy President of the Australian Conciliation and Arbitration Commission.

7. Michael Kirby and brother Donald in the cold of England, 1975.

8. Michael Kirby as barrister with Harold Glass QC, later a Judge of Appeal (NSW) and Roy F Turner, solicitor, 1975.

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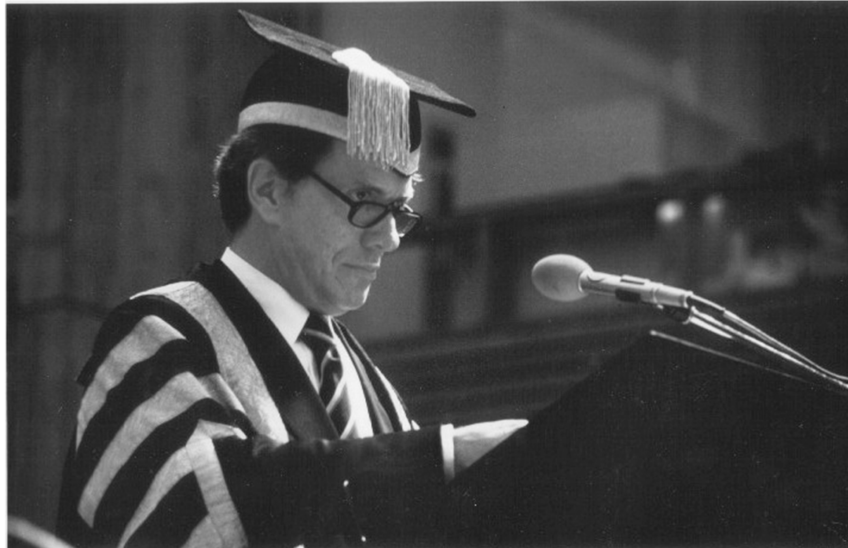
9. The original Australian Law Reform Commission 1975.
Seated: Gareth Evans, Justice Michael Kirby and Professor Gordon Hawkins.
Standing: F G Brennan QC, Professor Alex Castles and Mr John Cain.



10. Justice Michael Kirby as Chancellor of Macquarie University, Sydney, 1986.

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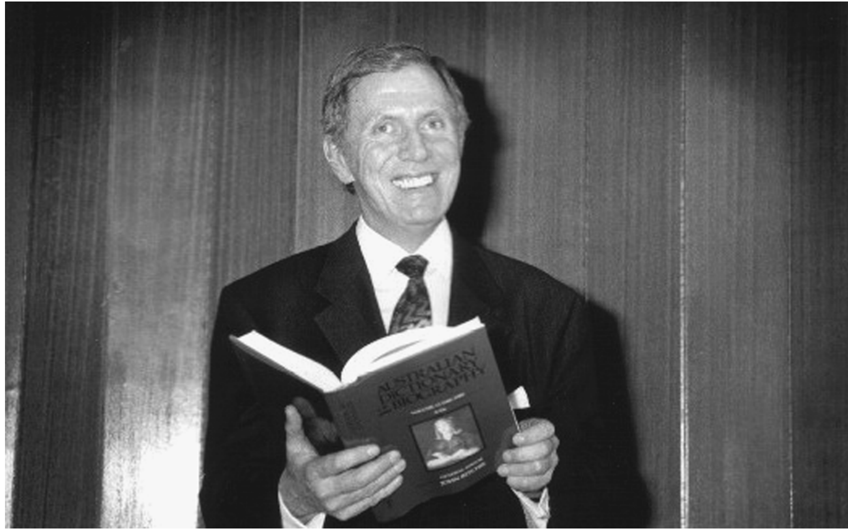
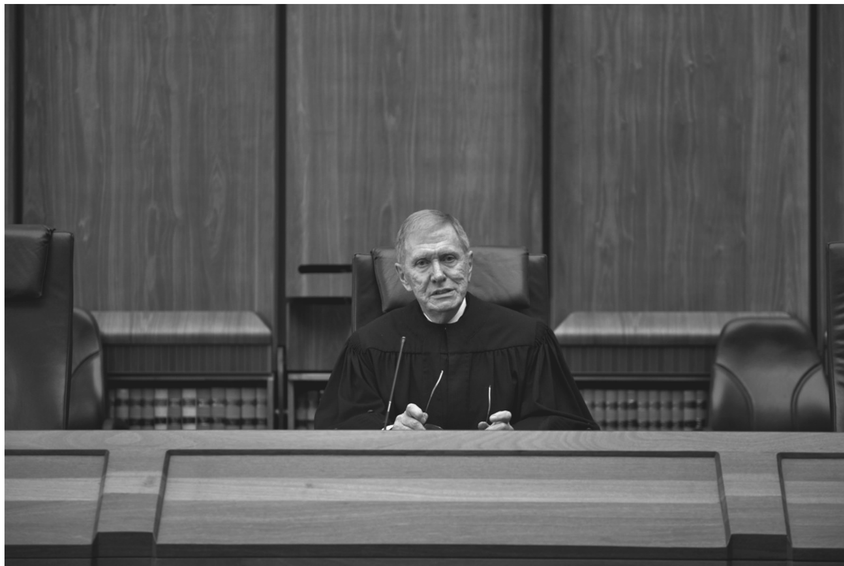


13. Justice Michael Kirby as book launcher, 1980s.

14. Michael Kirby and Johan van Vloten in Canberra Chambers for the Silks Dinner, February 1999.

15. The Justices of the High Court of Australia on the appointment of French CJ. From left to right: Justices Gummow, Crennan, Heydon, Hayne and Kiefel, Chief Justice French and Justice Kirby, September 2008.



16. Michael Kirby in his seat, High Court of Australia, Canberra, December 2008.

11. Justice Michael Kirby sworn as President of the New South Wales Court of Appeal by Chief Justice Sir Laurence Street, September 1974.

12. Portrait by Ralph Heimans, "Radical Restraint" (National Portrait Gallery, Canberra), 1996. (Original in colour.)

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