

Lawyers Weekly

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THIS WEEK...



OPINION:
Harmonising double jeopardy laws a worthy task
Daniel Tynan



PROFESSIONAL INDEMNITY: What will the economic downturn mean?
Angela Priestley



JUSTICE MICHAEL KIRBY: The Great Dissenter reflects Michael Romei and Zoya Sheftalovich

Incorporation is the future for nation's law firms: experts pre

BY LAURA MACINTYRE

THE NAVEL gazing prompted by incorporation has done law firms a world of good, prompting better management practices, improved transparency and greater returns, according to leading academics.

The University of Western Sydney released the findings of the first study into the incorporation of law firms to ALPMA NSW and QL members last Thursday at Macquarie Bank's Sydney offices.

Academics Dr Gillian McAllister and Professor John Gray investigated the reasons why Western Sydney law firms incorporate. At the end of 2007,

there were 122 incorporated law firms in Western Sydney.

The three firms interviewed for the case study reported overwhelmingly positive outcomes from incorporation. Dr McAllister found a key advantage for firms was the ability to think and work more creatively in relation to management of the firm; "management is no longer a universal partnership activity – only those partners who are elected to or selected from the management team make management decisions about the firm. This was seen as "liberating for those partners," she said.

Dr Peter Ellender, CEO of Carter Newell lawyers, was also on hand to offer

some insights into the firm of the future. Future become 'real corporator vide legal services right a Dr Ellender predicted, ta of economies of scale and cencies to drive the conso

Wearing his CEO he highlighted the possibil tion and greater returns fi firms, pointing to the ben raising, shareholder in restructuring of comj increased governance.

The disadvantages li sented as short-term barri

DLA Phillips Fox and PM fight homelessness

BY ZOE LYON

DLA PHILLIPS Fox CEO Tony Crawford was in good company when he took the stage at Wesley Mission's Edward Eagar Lodge last week to help launch a fundraising event for the homeless.

Crawford, along with Prime Minister Kevin Rudd, former Wallabies captain Nick Farr-Jones and Wesley Mission superintendent Reverend Keith Garner, were all on board to launch "Touch Life" – a public event to be held in the Hunter Valley over the Anzac Day long weekend which is aiming to raise \$250,000 for the homeless. Crawford and a team of DLA Phillips Fox
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Lawyers find inspiration at 2020 Summit

BY LAURA MACINTYRE

LEADING LAWYERS from Holding Redlich and Gil returned from the 2020 Summit with palpable sense of enthusiasm for the ideas presented, and speaking in Rudd-inspired lingo.

The four senior partners were among the 1,000 attendees at the 2020 Summit held in Canberra over the weekend of April.

The group of corporate lawyers were selected for their community standing, as well as their legal expertise. They contributed to a range of different work groups covering a range of issues ranging from Indigenous affairs to productivity and innovation.

The lead up to the forum has certainly reinvigorated debate about governance, and lent a new dimension to the concept of participatory democracy. Points of particular interest for the profession include recommendations of the Aus
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knowledge-based recruitment delivered in a personal and ethical way

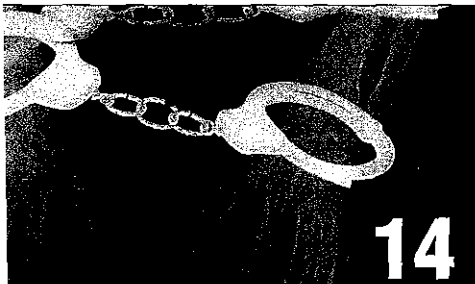
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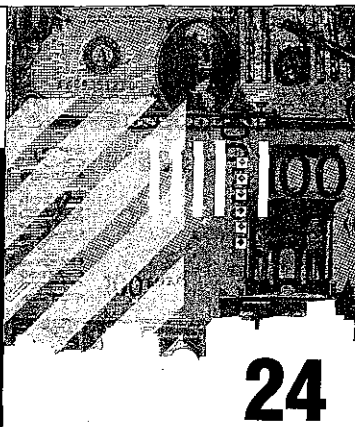
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DE OF DOUBLE JEOPARDY: Harmonising 's double jeopardy laws is a challenging but task, **Daniel Tynan** writes, but the desire to find party needs to be balanced against the rights of individuals

IGATION
ICKENZIE has aligned various practice groups ss its international offices in a US\$2.25 billion on) merger between West Siberian Resources Alliance Oil. Alliance Oil were advised by chance

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ps Fox has snapped up trade practices law and in policy expert, **Geoff Taperell**

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24 WHAT'S LEFT OF THE CRUNCHED UP PI: It's a time to be cautious as a slowing economy throws scrutiny on contracts and the spotlight on those who drafted them. But does an economic downturn really result in an increase in professional indemnity claims? **Angela Priestley** Reports

28 A REASONABLE PERSON: With less than a year until his retirement from the High Court of Australia, **Justice Michael Kirby** reflects on his experience on the bench and discusses the future of the nation's superior court. He speaks to **Michael Romei** and **Zoya Sheftalovich**

THE BUSY LAWYER
34 FISH WITH FINESSE: Fish lovers take note - it's worth stepping outside the CBD to test out this Crows Nest gem, **Zoe Lyon** discovers

Appointments p19 | Folklaw p36

and your career.

Practice

Insurance Lawyer

ity to join this firm's thriving practice. have exposure to public liability, and general commercial liability work life balance, supportive and career progression offered to the

IP Litigators

rtunity to join a top firm's growing ust have a strong contentious IP round. Innovative work, a fun team s to really take the next step in your

Various Associates

ks quality senior solicitors and great work and a long term sse a number of growing practice corporate, banking, construction

Property

ig opportunity for a junior lawyer to practice. Working across all areas you will work closely with a number s across the firm. First class training

Sydney | M&A

4 years +
This premier firm is looking for a keen corporate lawyer to join its practice. With a clear path to partnership and a strong mentor to guide you, this is an opportunity not to be missed.

Sydney | ITC

3 - 5 years
Working with an impressive list of clients you will be involved in a range of IT and communications matters. Your ability to work with software and hardware contracts will be highly regarded.

Sydney | Comm Litigation Senior Roles

There are currently a number of firms - both small and large - that are interested in commercial litigators with a client following. Whether you are a partner with a practice or a senior lawyer beginning one, these are great opportunities.

Sydney | Corp & Commercial

6 years +
Fantastic opportunity for a senior lawyer to join this niche firm. Ideally you will have experience across a range of areas, including M&A, capital raisings, finance and corporate governance and compliance. Fun and friendly firm.

Sydney | Bank & Finance

2 years +
A number of firms in Sydney are looking to build their B&F practices at the moment. Both the top and mid tier firms are alive with activity in this area and are looking to recruit. Join one of these growing firms and advance your career.

Melbourne | Comm Property

2 - 6 years
High demand for a commercial property lawyer looking to step up or across within Melbourne or from inter-state. This top tier firm will provide you with a genuine partnership track and involve you in significant property and development projects.

Melbourne | PPP

4 - 7 years
The partners of this dominant national firm are revered in Australia and globally as leaders in the PPP space. If you can also demonstrate excellent B&F exposure and technical and communication skills, this is your ideal role.

Melbourne | PE Capital Markets

3 years - Senior Associate
If you have strong corporate skills with PE and CM exposure and are at a similar top tier private practice firm or in-house, call for further information on this role. High profile work within a supportive team.

In-house

Sydney | Asset Finance

3 - 5 years
This global aviation company is seeking a bright, dedicated junior lawyer to join its team. This exciting transactional role will suit a corporate finance lawyer looking to make the move in-house.

Sydney | Construction

2 - 4 years
Outstanding opportunity to make a move in-house to a very well respected legal team in a highly commercial role. This ASX 100 Group going from strength to strength is seeking a front end construction lawyer for their busy team. You'll be a self starter ideally with broad construction contracts experience.

Sydney | Banking/FSR

3 years +
Rare opportunity in a challenging market to move in-house - join this collegiate, friendly team who will consider a more senior part-time candidate. A good working knowledge of FSR legislation / regulated products essential.

Sydney | Corporate/Funds

2 - 4 years
Awesome opportunity with international property group - a remarkable opportunity to step into a quasi commercial role offering autonomy and exposure to large-scale transactions.

A reasonable person

WITH LESS THAN A YEAR UNTIL HIS RETIREMENT FROM THE HIGH COURT OF AUSTRALIA, JUSTICE MICHAEL KIRBY REFLECTS ON HIS EXPERIENCE ON THE BENCH AND DISCUSSES THE FUTURE OF THE NATION'S SUPERIOR COURT. HE SPEAKS TO MICHAEL ROMEI AND ZOYA SHEFTALOVICH

In a career spanning over three decades, High Court Justice Michael Kirby has emerged as one of Australia's most prominent and controversial judges. Dubbed "The Great Dissenter", Justice Kirby is widely regarded as a champion of the minorities. Often citing international human rights principles and aligning judgments with wider perceptions of justice, he has injected humanity and compassion into a system renowned for its unyielding conservatism.

Now Australia's longest-serving judge, Justice Kirby is nearing the end of his tenure and questions are being raised about his legacy. Will he be remembered as a brilliant mind, or his pioneering approach to justice and service to the Australian community? Or will he be resigned as a footnote in the public consciousness as the High Court's first openly gay justice?

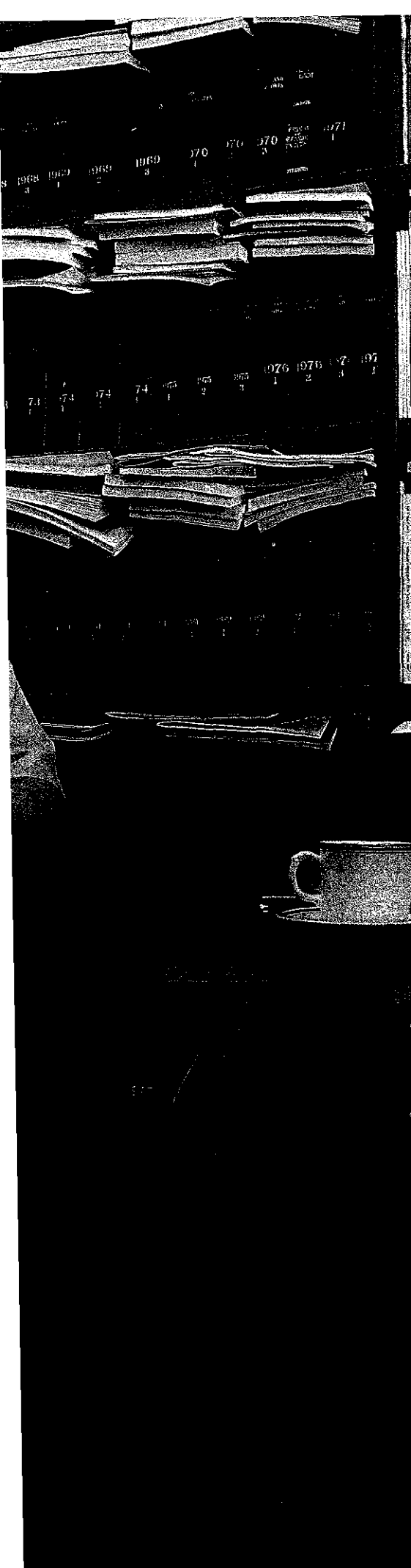
Born into a working-class family of Irish descent, Kirby grew up in Concord. He attended the local public school and was later accepted into the selective Fort Street High School, which has produced four justices of the High Court. Describing his upbringing as "rather ordinary", Justice Kirby believes that his background has heavily influenced his values and approach to decision-making.

"I went to public schools, and I think that gives you a sense of contact with the values of all Australians. That's because the children in the schools were of people of different backgrounds, different religions or no religion, different ethnicity, different parental wealth," Justice Kirby says.

"That is a good thing in a democracy for a judge to grow up with, because it means you can empathise with everybody, not just the big end of town."

Upon completing high school, Kirby went on to study law at the University of Sydney, describing this





“Mathematics wasn’t my best subject; I didn’t feel I was spiritual enough to be a minister of religion; I wasn’t patient enough to be a teacher; and the idea of cutting up frogs and rats at university put me off medicine. So I ended up with law”

Justice Michael Kirby

decision as a “process of elimination”.

“I worked it out very methodically,” he recounts. “Mathematics wasn’t my best subject; I didn’t feel I was spiritual enough to be a minister of religion; I wasn’t patient enough to be a teacher; and the idea of cutting up frogs and rats at university put me off medicine. So I ended up with law.”

Admitted to the NSW Bar in 1967, Kirby’s early career was characterised by tribunal work. In 1983 he became the youngest man appointed to the Federal Court of Australia, after which he served as president of the NSW Court of Appeal. In 1996 he was selected to become the 40th Justice of the High Court, an appointment that came as a surprise to many political commentators.

“I hope they weren’t surprised because they didn’t think I was up to it. Perhaps if people were surprised – [and] no one told me at the time – it was because there has been a bit of a tendency to appoint to the High Court people who have never said too much about their values,” Justice Kirby says.

“Because I had served as chairman of the Australian Law Reform Commission for 10 years and in other public positions, I’d been quite candid and transparent about what mattered to me,” he says.

“With most lawyers you don’t quite know what their values are and therefore how they will act as a judge, but in my case, everybody who bothered to look at the newspapers over the last 20 years would know where I was coming from and the matter that were important to me.”

During his time on the bench, Justice Kirby has often been criticised for allowing his personal beliefs to impact his decision-making. But he says it is an unavoidable consequence that is common to all judges, and those making such criticisms show a lack of understanding of the judicial system. The judge rejects suggestions that judges should and can be objective, arguing that every judge will have a different take on the law.

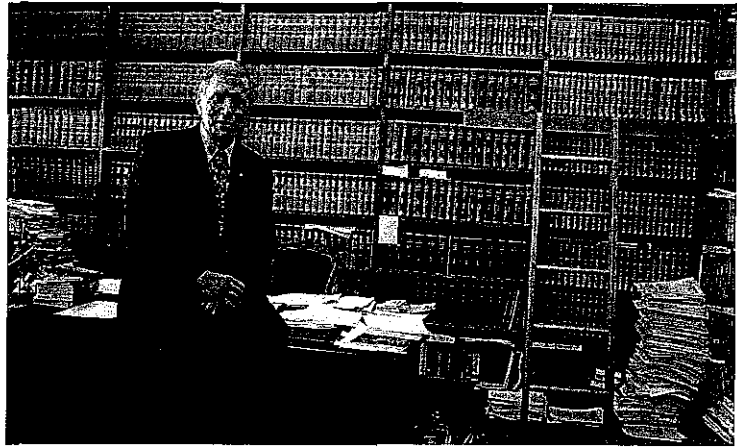
“Every judge’s personal feelings affect their judgments. Judges have to interpret the constitution, which is a very brief document. Judges have to interpret and give effect to laws made by parliament, which are expressed in language of great generality. Judges have to find and declare the common law in completely new circumstances,” he says.

“This is not ‘automatic pilot’ business. This is the matter of determining value-loaded decisions. I’m just more open about it ... It’s very important for judges to be completely candid and honest and truthful about themselves and their lives and their values.”

While acknowledging this personal element to the judicial process, Justice Kirby stops short of embracing the term “judicial activist”. He believes the label is problematic as “it tends to be used by conservative people as code language for people who make decisions improperly”. He does admit, however, that there is a degree of activism in the law, something that he argues should be embraced where necessary.

(continued on p30)

A library expanding an incredible career:
Justice Kirby relaxes in his chambers



(continued from p29)

"For hundreds of years judges in our legal tradition have been expressing and developing the law. No one calls that activism. That is simply the process of the way the common law evolves," the judge says.

"If I see injustice I don't just sit there and accept it. I see whether within the law I can cure the injustice according to law. That's in effect what I swore I would do when I became a judge. Law is about upholding the rules but also upholding justices."

It is perhaps for these reasons that Justice Kirby has dissented from his notoriously less-liberal colleagues on so many occasions, leaving him with the highest rate of dissent of any justice in the High Court's history. He is candid in admitting that his relationship with the six other justices is one of professionalism rather than love, but despite being seemingly isolated on the bench, Justice Kirby says he has never felt any external pressure to follow suit.

"It's much easier for you if you do. All you have to do then is send around a piece of paper saying 'I agree' and you don't have to write anything. You can just swim in the pool and have another gin and tonic on the weekend. So that's a sort of indirect pressure, but I don't think it's a correct pressure and it's one to which I never succumb," he says.

Justice Kirby believes that the history of the law in Australia is that dissent can influence the way future generations think about problems. "As such, I express my opinion ... and then it's over to others to consider whether in the future they will accept the approach that I have suggested, or persist with the approach that others in the majority have accepted."

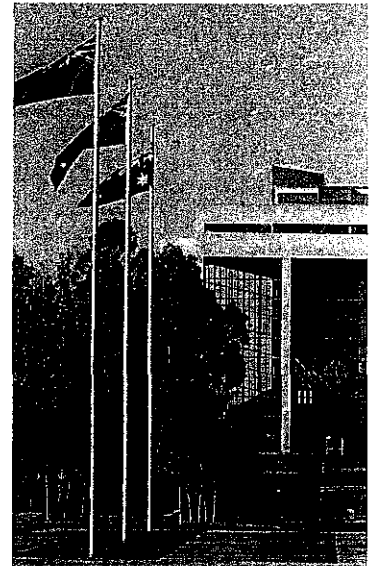
Though he often disagrees with the judgments of his learned colleagues, Justice Kirby says he has never regretted the decisions that have not gone his way. "That's the way the legal system works ... I don't lose any sleep over it because I know in the court, as in parliament, we live by the rule of democracy."

Perhaps because of his tendency to be more in line with public opinion, Justice Kirby is one of the better-known justices of the High Court, with his judgments often cited in law schools across the country. Justice Kirby attributes this to his working-class background, as well as to communication skills.

"Law students tell me that my reasons are more accessible than others. I think that's partly because of my background, but also partly because I know the value of the full stop and of the subheading and of white space on a page and of dot-points."

While in the past, outgoing High Court justices have voiced preferences for their replacements, this is something the usually outspoken Justice Kirby refrains from doing. Though he acknowledges that this is an unusual position, he deems it the correct one.

"I don't believe judges should be involved in the appointment of their successors, otherwise clone-like reproductions occur, and that's not how the world develops creatively. The societies in history



that have been most creative have been polyglot societies made up of people of different ethnicities and backgrounds and attitudes."

But while stopping short of naming a specific replacement, Justice Kirby does comment on the qualities he would like to see in future High Court appointees.

"A great court is made up of a diversity of opinion and values. I think we can do with a few 'capital-L', or 'small-l' liberals on the High Court, and I would hope that is what will happen ... Australia is changing, and it's important that the values of the highest court in the nation should approximate, or at least be aware of the differing values in the whole nation," he says.

"There's never been an Asian-Australian on the High Court, probably because when I was growing up, the composition of the community at that time was not reflective of the changing composition today. But I hope I live to see a change in the composition of the judiciary over time to reflect the increasing numbers of Asian-Australians, Arab-Australians, and more recently African-Australians. It is very boring to live in a monochrome society."

Despite a tendency to err on the side of caution,

or respect, when speaking of his fellow High Court justices, Justice Kirby does comment positively on the recent additions to the bench.

"I think it's a good thing to have women in the High Court. It's a good thing to have a diverse judiciary because our country is diverse," he says. "The appointment of justices Crennan and Keifel has meant that now we have two very firm and unwavering voices who can express the different experience of women in society and in the law."

Of his plans for the future, Justice Kirby says he looks forward to a "quiet old retirement". But having stated in the past that "my life is work", Justice Kirby is unlikely to fade into the background. Having worked on a number of boards and committees, and with a strong interest in human rights, it is expected that Justice Kirby will further pursue these interests. But when pressed to elaborate, he provides an ambiguous response.

"I'm so busy surviving from day to day that I don't worry about what will happen in the future. Something will turn up. It always has in my life." ■

Michael Romei and Zoya Shettalovich are freelance writers for *Lawyers Weekly*