

**IN THE SUPREME COURT
OF NEW SOUTH WALES
BANCO COURT**

**BELL CJ
AND JUDGES OF THE
SUPREME COURT**

THURSDAY 21 APRIL 2022

**SWEARING IN CEREMONY OF JEREMY KEVIN KIRK SC
AS A JUDGE OF THE SUPREME COURT OF NEW SOUTH WALES
AND AS A JUDGE OF APPEAL**

1 **KIRK JA:** Chief Justice, I have the honour to announce that I have been appointed a judge and a judge of appeal of this Court. I present to you my Commissions.

(Commissions read; affirmations of office taken)

2 **BELL CJ:** Justice Kirk, on behalf of the Court and of myself I congratulate you on your appointment to both offices. I wish you well. I have no doubt you will make an extraordinary contribution to this Court. Your appointment was, in the language of the classics, a complete no-brainer. We are delighted that you are joining us and we welcome you to the Court.

3 **THE HONOURABLE MARK SPEAKMAN SC MP ATTORNEY GENERAL OF NEW SOUTH WALES:** May it please the Court, your Excellency. I acknowledge the traditional custodians of the land on which we gather, the Gadigal of the Eora Nation and I pay my respects to elders past, present and emerging.

4 Your Honour Justice Kirk, on behalf of our State and the Bar, it is my great pleasure to congratulate you on your appointment as a Judge and a Judge of Appeal of this Court. We are joined today by your children, Merryn and Bede, co-parents Jackie Quang and Elizabeth McCrone, your father, Dr John Kirk, your brothers, Andrew, Stephen, Kiaran, Tim and Michael and their families.

Your Honour is the fifth of six boys born to Dr John Kirk formerly of County Clare in Ireland and Dr Julia Kirk formerly of Surrey in England. Your parents met in Cambridge while completing doctorates in biochemistry.

- 5 In 1968 your father, then teaching in Wales, was offered a position with the CSIRO and they set off for Australia. You were the first of your clan born on these shores. Your father describes you as a happy child, well behaved and always very smart. You grew up in Canberra and took weekend trips with your father and brother Tim out to the family farm called Clonakilla. There, Tim and you established the Clonakilla Lamb and Sheep Protection Society. While the membership never expanded beyond you and your brother, the Society sought to protect the newborn lambs from predatory foxes and birds using homemade slingshots. Apparently no foxes were harmed or even seen in the security perimeter and no bird hung around long enough to see what damage a homemade slingshot might do.
- 6 Your father was also planting and nurturing vineyards, paving the way for Clonakilla to become the internationally recognised winery it is today. Yours was a happy home with the occasional poddy lamb to care for when its mother had rejected it. The family also had a dog called Gough. The provenance of this name might be guessed, as might the family interest in politics.
- 7 You started your education at the local Catholic primary school, and in year five attended Daramalan College in Canberra where you completed the HSC. During high school you were intrigued by the Australian Constitution, how Parliament works and what powers it has. This interest was cemented when, on one of the many half hour drives to the farm with your father, the topic of the 1975 dismissal of the Whitlam government came up. Your interest was piqued. You started reading more on the Constitution and the Federal Senate.
- 8 Your Honour was grateful to your father for piquing your interest in the Constitution. You returned the favour when still a teenager you suggested to him that he might plant a Viognier vine. This white grape is used with the Shiraz to provide a delicate flavour. The Shiraz-Viognier, a mix of 95% Shiraz and 5%

Viognier, is now one of Clonakilla's most revered wines and recognised globally.

- 9 Your Honour was the enviable academic all-rounder at school, excelling in not only English and history but also chemistry and physics. After a gap year you majored in political science in an Arts degree at the Australian National University and won the university medal in law. You were then a Rhodes scholar, undertaking your postgraduate Bachelor of Civil Law and then a doctorate at Oxford.
- 10 At the end of your first BCL year one of your thesis supervisors wrote to your college, Magdalen, complaining that you were not studying hard enough and spending too much time partying. Your thesis supervisor was wrong. You may have been partying a little but you went on to achieve the highest mark in your year and win the Vinerian Scholarship. This scholarship has been awarded to a range of fine legal minds, including Chief Justice Bell. You have noted that Chief Justice Bell completed his doctorate in one year while you took two, but it is left to us to deduce whether his Honour went to as many parties.
- 11 True to your love of the Australian Constitution, you completed your thesis topic which was “implied rights in constitutional adjudication by the High Court of Australia since 1983”. You have adapted work from your work thesis, publishing academic texts and it has been referred to since in the High Court.
- 12 Upon returning to Australia you joined Freehills, practicing largely in commercial and litigation matters. In your third year you worked at the Shopfront Youth Legal Centre, which is both supported and financed by Freehills. You worked pro bono at Shopfront where you had more prosaic legal duties, including providing advice and representing clients in the Local Court, many of which were heard in the criminal jurisdiction. Your unusual matters included one client who wanted to change his name to “X” so that at least, he thought, the government would not be able to track him.

- 13 Your Honour was called to the Bar in 2002 where you read with the now Chief Justice. You took silk in 2011 and were nominated head of your chambers in 2015. You have appeared in courts across the country and many of your cases have established important legal principles.
- 14 In the High Court alone you have appeared in over 50 matters. They include in 2013 appearing as amicus for Australian Marriage Equality Inc in *The Commonwealth v The Australian Capital Territory*. The High Court there held that a law recognising same-sex marriage in the ACT was inconsistent with Commonwealth legislation and therefore invalid. But the High Court also stated unanimously that the Commonwealth has the power to legislate with respect to marriage equality pursuant to s 51(xxi) of the Constitution under the marriage power.
- 15 In *CEPU v Queensland Rail* you argued successfully for the union that Queensland Rail was a trading corporation within the meaning of s 51(xx) of the Constitution and therefore its employee relations were governed by Federal law and not the inconsistent Queensland law.
- 16 In *BMW Australia v Brewster* you appeared for the successful applicant on the question of whether the so-called gap filling provisions in the Federal Court of Australia Act and the Civil Procedure Act empowered the Federal Court and the Supreme Court respectively to make a common fund order. The High Court held that the gap filling provisions do not empower the courts to make common fund orders.
- 17 You have appeared frequently in this court, including the Court of Appeal, appeared frequently in the Federal Court, appeared in interstate Supreme Courts and assisted in commissions of enquiry, including as counsel assisting in the Child Abuse Royal Commission in cases 38 and 46. You have even appeared in the Southport Magistrate's Court for Amber Heard when she was prosecuted for the importation of Pistol and Boo, pets owned by Ms Heard and Johnny Depp. No conviction was recorded.

- 18 These cases are just a small sip of the vast vat of cases in which you have appeared but they illustrate the wide range of matters that you have taken. You have published 16 academic articles and chapters of texts, many of which have been referred to in judicial decisions and in other academic writing.
- 19 In *Palmer v Western Australian* the High Court adopted the approach to the intercourse limb of s 92 of the Constitution that you had recommended in your most recent academic piece. In this case Kiefel CJ and Keane J referred to one of your articles on proportionality which arose from your BCL thesis at Oxford; obviously you weren't partying too hard at all.
- 20 Your juniors and instructing solicitors describe you as highly intelligent, someone who will listen closely and respect the hard work and opinions of those that you work with on trials.
- 21 All of your juniors know the "prime directive" when you are in court: that your water glass is filled and kept filled throughout the proceedings. The prime directive is of course a catchphrase from Star Trek, and while your prime directive is known and honoured amongst your teams, none of your juniors or instructing solicitors have ever dared to call you Captain Kirk.
- 22 Your service to the legal profession extends to your chambers where you not only mentor and assist juniors but will set excellent examples to ensure work-life balance. When your children were younger you were known to leave the office by 4.30pm at the latest every day so that you could spend time with them after school, and this has translated to a great benefit for all parents in your chambers. Women in your chambers have spoken highly of your support for their parenting and careers when you have assisted them returning from maternity leave by involving them in cases and rebooting their careers.
- 23 You read widely, from science fiction to Nobel prize-winning author Kazuo Ishiguro. Your love of literature extends to service to authors. You have been thanked for reading drafts in afterwords in two novels, *Selection Day* and *Amnesty*, by the Booker prize-winning author, Aravind Adiga, whom you met at

Magdalen College. You were thanked by Phillip Gwynne, author of the crime novel, *The Build Up*, for the lawyerly advice. You love films and enjoy an eclectic range of cinematic experiences, including *Star Wars*, *the Princess Bride* and more recently, Almodovar's *Pain and Glory*.

- 24 Not surprisingly, you are very knowledgeable about wines and invariably choose the right wine when dining with friends and colleagues. You have hosted wine tastings on your floor. Rumour has it that when you applied to Eleven Wentworth you hosted a tasting party for the other members of chambers, and it is assumed that the timing of that party was merely coincidental.
- 25 You are a devoted and most loving father to your son and daughter. Amongst the list of glittering prizes of your career and achievements you nominate parenthood as the best thing you have ever done.
- 26 You serve on the Clonakilla board with your brothers and regularly meet with them on the farm. The Clonakilla Lamb and Protection Society has been disbanded. The sheep have moved to greener pastures but the vineyards thrive and your family takes great pride in its produce and service to the world's wine connoisseurs.
- 27 Friends and family have clamoured to provide testimony to your Honour's kindness, intellect, mentorship, support and continuing legal service to the people of Australia and New South Wales. And while colleagues are devastated that you will leave chambers and are now moving to the bench, it is fair to quote the *Princess Bride* to summarise their views: "Have fun storming the castle".
- 28 On the Clonakilla gate there is an emblem from the Book of Durrow, an illustrated manuscript from Ireland, that contains the four gospels where one will find in an old Irish dialect a quote from St Matthew: "Where your treasure is, your heart will be also".

- 29 There is no doubt your Honour could storm any castle you chose. Your treasure is your family and friends, all of whom wish you luck and good tidings in your appointment where you will expand your appreciation and influence with your other treasure, the law.
- 30 Congratulations on your appointment and best wishes for your career on the bench. May it please the Court.
- 31 **BELL CJ:** Thank you, Mr Attorney. Ms Cassandra Banks, Senior Vice-President of the Law Society of New South Wales.
- 32 **MS CASSANDRA BANKS SENIOR VICE-PRESIDENT LAW SOCIETY OF NEW SOUTH WALES:** May it please the Court, I too acknowledge the Gadigal people of the Eora Nation, the traditional owners on the land on which this court stands and pay my respects to their elders, past, present and their youth emerging.
- 33 I come before the Court on behalf of the solicitors of our State to offer congratulations and wish your Honour well in your appointment to the Supreme Court of New South Wales. Mindful of the important role family has played in your Honour's life, I would like to acknowledge your family and friends joining us today.
- 34 According to one silk, your Honour is unique at the New South Wales Bar for your level of seniority and for embracing a real mix of public law and private law cases. Unlike many public law barristers, he said, your Honour has done hard common law cases, including personal injury, and commercial cases such as class actions. In both, your Honour displayed formidable skills in cross-examination. Your Honour often said that to be a good barrister, you have to have a little bit of dog in you. Reflecting on your Honour's luminous academic career and success at the bar, the same silk declared your Honour an excellent mix of intellectual and dog.

- 35 Your Honour is also highly regarded by solicitors in New South Wales. According to one senior partner that briefed your Honour, solicitors prized your razor-sharp intellect and cut-through written and oral advocacy, to advance their matters in court. As we have already heard, this was particularly evident when your Honour acted as counsel for Australian Marriage Equality in *The Commonwealth v ACT*. Your fellow counsel at the time noted that getting the decision involved tactical deftness, as well as the need to make excellent submissions. Your Honour is very good at both.
- 36 Your Honour also has a great sense of humour and a reputation for being down to earth, notwithstanding your many successes. Just do not try to make small talk before entering the courtroom. One solicitor noted that about 15 minutes before court your Honour would start to gently and softly whistle, a sure-fire sign that your Honour was entering “the zone” and about to bring your laser-like focus to proceedings.
- 37 Your Honour is exacting and demanding in preparing for cases and it gets results. As we have also heard in one recent successful case, your Honour acted for BMW in the Takata airbag litigation which included a successful challenge in the High Court to common fund orders. This successful verdict was preceded by a historic joint sitting of the Federal Court and the New South Wales Court of Appeal where, according to your briefing solicitor, your Honour went down six-nil. In his telling, that this defeat was followed by success at the High Court was a testimony to your fortitude and resilience or, in your own words, ‘having a bit of the dog in you’.
- 38 While your Honour has obviously had a stellar career inside the law, your Honour has also cultivated a wonderful life outside of it. Lawyers have noted that when it came to 4.30 or 5pm, the phone calls would stop and the meetings would end. Your Honour was always diligent to carve out space for your family dinners and time with your beloved children. This does not mean your Honour was a stranger to the night shift, or that solicitors did not receive emails at 10pm requesting draft submissions for the next day. Rather, your Honour made time for the things that mattered most. Just quite how you managed to fit in so much

is still a source of mystery to your colleagues, but your suitability to today's appointment certainly is not.

39 Your Honour will bring a wealth of scholarship, legal acumen and personal integrity to the Supreme Court of New South Wales. The people of New South Wales are privileged to be served by you in this role and solicitors have every confidence that you will make an exceptional judicial officer of the Supreme Court. On behalf of the solicitors of New South Wales, congratulations your Honour.

40 **BELL CJ:** Thank you, Ms Banks. Justice Kirk.

41 **KIRK JA:** Chief Justice, fellow members of the Supreme Court, your Excellency and Mr Wilson, current and former members of this and other courts, ladies and gentlemen, all. I acknowledge the Gadigal people of the Eora Nation, the traditional custodians of the lands on which we meet and I pay my respect to elders, past, present and emerging.

42 I thank all of you here, and watching online, for honouring the Court and me by your attendance today. There have been a significant number of swearings in and out over the last couple of months, and that makes the attendance of many of you especially generous. Indeed a judicial friend of mine said he would only attend today if I promised to be funny. I am glad, Nye, that you came anyway.

43 Thank you Attorney General and Ms Banks for your kind words and for the other words as well. As was manifest in your speeches, and as I have always been very aware, I am someone who has benefited enormously from the circumstances of birth, from chances at education, from many opportunities that have been presented to me along the way, and from the mentorship, guidance and friendship of numerous people.

44 My good fortune began as you have heard with my parents and siblings. Although the six sons are different in many ways, my mother and father were always encouraging, loving and supporting of each of us in our very distinct

interests throughout childhood and our adult lives. With such a range of strong personalities, family dinners tended to be argumentative affairs. Perhaps it was there that I learned to understand that there are always two sides to an argument. I did not then have the pleasure of being able to give a ruling, although I am sure that my family will still not accept that I have any such power, relevantly, now.

45 I benefited enormously from being what my father generously called his assistant winemaker for 14-odd years of my youth. Clonakilla was a much more humble affair then than it is now. One of the benefits I had, as the Attorney referred to, from that time was spent in the half hour drives between Canberra and Murrumbateman, during which my father and I discussed many things, such as his scientific work, politics, religion and the various environmental and climatic challenges facing the Earth. As the Attorney has referred to, my interest in constitutional law, which precedes my interest in law generally, comes from that time.

46 I enjoyed my time at school and, to the ongoing bemusement of my children, became friends with some of the teachers there. I can reassure them, I did also have some friends from amongst the student body, one or two of whom are here today and indeed there are friends from all stages of my education here today.

47 Upon starting Arts/Law at the ANU, I immediately loved the study of the law. I benefited there from excellent instructors, many of whom again became friends, such as Nick Seddon, Jim Davis, Geoff Lindell, Leslie Zines and John McMillan. The latter was prepared to put his money where his mouth was, in terms of backing the quality of an ANU education, by later retaining me in his capacity as Acting New South Wales Ombudsman to represent him in this very courtroom.

48 My four years at Oxford were wonderful. Oxford has beautiful buildings and some very good academics. But the best thing about it is the student body, especially the international graduate cohort. As for any suggestion that there is

any competitiveness between myself and the Chief Justice as to the length of time it takes to produce a doctorate, there is no competition between us at all, although I do note I was better at rowing.

- 49 Upon moving to Sydney, the undoubted highlight of my three year period as a solicitor was the eight months I spent working full-time at Shopfront Youth Legal Centre in Darlinghurst, as the Attorney has referred to. I remember many of the clients there but not least my very first, who presented shortly after lunch on my first day. He told me a story which, in its essentials, I believed. He had just escaped from being held against his will over a couple of days in connection with a drug debt. In escaping, he said he had been shot at in a suburb nearby. He thought his captors were still after him and he was not sure what to do next. I searched in vain through all that I had learnt in my years of study at the ANU and Oxford as to how to advise him. In the end, I offered him some advice that had both practical and legal dimensions, then accompanied him first to hospital and then to Kings Cross Police Station. I take a little pride in having positioned myself closer to the road as we walked along.
- 50 It is to the great credit of Freehills to continue to support Shopfront, just as it is a credit to many firms, small and large, and a great many barristers who maintain the long legal tradition of doing significant pro bono work.
- 51 I was fortunate that my entire 20 years as a barrister were on Eleven Wentworth Chambers. Once one has established a practice, the most important things about chambers are having a friendly and supportive atmosphere, warm and professional staff, and colleagues one likes and respects and whom you can run tricky issues by or simply debrief after a day in court. Eleven Wentworth has all those things. My colleagues were diverse, collegial, highly professional, and enjoyable company. The staff were led first by that eminent clerk Paul Daley then by his worthy successor Zach Rymer. The other staff – Anne Deighton, Mandy Allen, Jeremy Hestelow and formerly Melinda Morris – are first rate. I had two excellent personal assistants in Simone Fuller then Caroline Gan.

- 52 As junior counsel, my most frequent leaders were those eminent silks Stephen Gageler, John Griffiths, Michael Sexton and Bret Walker. Unsurprisingly, I learnt a good deal from all of them. As senior counsel, I worked with junior counsel of the highest calibre, too many to mention. I was also briefed by a great many excellent solicitors, again too many to list. I greatly enjoyed the relationship that exists between senior and junior counsel, and between counsel and solicitors, when working together as a team in managing a dispute. A number of the practitioners with whom I have worked have become good friends. I know there are many sitting here today.
- 53 Having now completed 20 years as a barrister, I did want to offer some brief observations on being counsel. Thirteen months ago, in the context of a particular public imbroglio, Professor Rosalind Dixon of the University of New South Wales published an opinion piece in the Sydney Morning Herald, warning against the criticism of lawyers simply because of the clients whom they represent. As I told her at the time, I wholeheartedly agree. As she said, everyone should be able to obtain legal representation, no matter how unpopular they may be. For barristers, this principle is manifest in the cab rank rule which requires, subject to some limitations, that they accept a brief within their areas of expertise if they have the capacity to accept it.
- 54 I sought to give effect to that rule. For example, in my 20 years, I regularly acted for the Attorney-General or his predecessors of both political persuasions, and for other Ministers and the State. I also regularly acted against them. I acted sometimes simultaneously for and against the Commonwealth, for and against regulators such as the ACCC, for and against police prosecutors, trade unions, employers, gambling operators, Aboriginal land councils, environmental groups and coal mines.
- 55 Clients benefit not only from being represented per se, but from being advised by people who may have better insights into the likely perspective of the other party, and into all the arguments that may be presented one way or the other. To infer the personal beliefs of a legal practitioner simply from whom they have represented or the arguments they have made is a categorical error.

- 56 I have greatly enjoyed my time as a barrister. I relished the intellectual challenges and the adrenalin of standing at the bar table – examining a witness or seeking to persuade, and fielding questions from, judicial officers, whether it be a magistrate or a bench of seven in Canberra.
- 57 Practice has afforded me other interesting experiences: tours through prisons to review prison conditions, through the Snowy-Hydro scheme, and to enormous mines; the chance the Attorney alluded to of giving film direction tips to those two famous apparently happily married actors who had a little difficulty with their dogs, though regretfully I never got to meet Pistol and Boo themselves as they had been deported by then. I was a little disappointed, I confess, that the recorded apology – cruelly described in the press as a hostage video – got poor reviews, although as the Attorney referred to, the legal result back then at least was rather better.
- 58 I have appeared in nearly all the courts and tribunals operating in this State and in many other courts and tribunals around the country. By and large, and whether or not I agreed with the results of the cases in question, in every jurisdiction I have encountered judicial officers seeking to do justice according to law in good faith. I am delighted and honoured to have been given the opportunity to join them, and to join in particular this excellent Supreme Court and Court of Appeal. I relish the prospect of the new challenges that I will face.
- 59 Although I have just assumed a new one, which I will honour, I confess I have not been a great one for titles. Like my mother before me, I have sought to avoid being called “doctor”. But there is one title or name which has meant more to me than anything else and that is being called “Dad”. Generally, seeking to procreate is a fairly enjoyable business, or so I understand. For me and my co-parents Elizabeth and Jackie, it took a little more effort and organisation. The chance that they afforded me, and continue to afford me, to create and maintain a family with them is something that I value beyond any words that I could possibly express today.

- 60 Like most legal practitioners, I have at times worked long hours. However, I am proud of the fact that I made it a practice to try to leave work early each day in order to spend time with my wondrous children, Merryn and Bede – whom I love beyond measure – at least in that 12 or so year period when they found me somewhat enjoyable company.
- 61 That is not to say I could not have spent more time with them. On one Saturday, a few years ago, Merryn and Bede came into chambers with me to pick up some work. We walked out the back way through Lockhart Chambers, passing through the Bar’s Dispute Resolution Centre, where there are rooms set aside for the parties to arbitrations or mediations. As we walked past rooms labelled “party room 1”, “party room 2”, then “party rooms 3, 4, 5 and 6”, the eyes of my children got wider. One of them said, “Dad, are you sure you spend all your time here working?” Mainly, I did. And now onto my new work. Chief Justice.
- 62 **BELL CJ:** Justice Kirk. The Court will now adjourn.