SIR ANTHONY MASON LECTURE 1996: A F MASON — FROM *TRIGWELL*[1] TO *TEOH*[2]

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A JUDICIAL METAMORPHOSIS

As I hastened to give this lecture, after a busy week in the High Court in Canberra, I turned over some cuttings about Sir Anthony Mason, helpfully provided to me by the High Court Library. My eyes fell upon an essay titled 'Freedom Under Threat.'[3] Following the adjournment of the hearing of *Levy v Victoria*[4] to permit notice to be given to allow a challenge to the principles established during the Mason Court in *Theophanous v Herald and Weekly Times Ltd*[5] and *Stephens v West Australian Newspapers Ltd*,[6] the commentator lamented bitterly the passing of Sir Anthony Mason from the High Court, commenting that:

> [T]he two key members of the old majority that had given wide policy power to the central government, Australianised the Constitution and gave it a much stronger human-rights element were appointees of a conservative government: Mason and Deane.[7]

As if this were not enough, across the airwaves came commentaries upon the decision of the Court, just handed down, in *Breen v Williams*[8] dismissing the appeal from the New South Wales Court of Appeal.[9] The High Court rejected the claim of a patient without subpoena to have access to her medical records held by a medical practitioner. Gravely, the commentators suggested that this was a clear signal that the High Court was turning its back on the 'rights-based' jurispru-

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1 *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 ('*Trigwell*').

2 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 ('*Teoh*').

3 Crispin Hull, 'Freedom Under Threat', *Canberra Times* (Canberra), 15 August 1996, 11.

4 Adjourned, part heard, 6 August 1996 (High Court of Australia, Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ, 6 August 1996).

5 (1994) 182 CLR 104 ('*Theophanous*').

6 (1994) 182 CLR 211 ('*Stephens*').

7 Hull, above n 3. This is a point also made in law review commentaries. See, eg, James Miller, 'The End of Freedom, Method in *Theophanous*' (1996) 1 *Newcastle Law Review* 39.

8 (1996) 138 ALR 259. For an analysis of this case see: Samantha Hepburn, 'Case Note: *Breen v Williams*' (1996) 20 *Melbourne University Law Review* 1201.

9 *Breen v Williams* (1994) 35 NSWLR 522.

dence which had developed during Sir Anthony Mason's period as Chief Justice of Australia.[10]

It is not for me to join in these controversies. Naturally, I read with fascination the analyses of the decisions and trends in the Court to which I now have the privilege to belong. It is not only legal scholars who analyse the decisions of the Court. This is now commonly done by journalists and popular commentators. The great increase in this activity is a development which coincided with Sir Anthony Mason's last years as Chief Justice. Indeed, he encouraged the process by sometimes engaging in public dialogue himself.[11] By his later decisions in the Court, he also gave journalists something to write and speak about. Journalists and serious scholars analysed what they saw as the process of change in the decisions and techniques of reasoning of the High Court Justices during the Mason years. Professor Bryan Horrigan put his thoughts succinctly in the title of an essay: 'Is the High Court Crossing the Rubicon?'[12] He declared that the High Court's decisions on native title (a reference to *Mabo v Queensland [No 2]*)[13], free speech (a reference to *Australian Capital Television Pty Ltd v The Commonwealth*;[14] *Theophanous v Herald and Weekly Times Ltd*[15] and *Stephens v West Australian Newspapers Ltd*[16]) and Australia's treaty obligations (a reference to *Minister for Immigration and Ethnic Affairs v Teoh*[17]) raise for Australian society 'one of the oldest jurisprudential questions':

> What are the boundaries between legislative law-making and judicial law-making? In particular how should we characterise the modern High Court's law-making role?[18]

There is no doubt that Sir Anthony Mason participated in a significant period of change in Australia's federal supreme court. However, in paying tribute to him, I wish to pose a question as to how this change came about under the leadership of a man who had earlier been extremely cautious about the role of an Australian appellate judge in relation to the alteration of settled principles of the common law or of established constitutional and statutory construction? The question I pose is not an exercise in amateur psychology. It is a question which is not intended to be personal to Sir Anthony Mason. It is rather a question directed at

10 Hull, above n 3.

11 See, eg, Prue Innes and Fay Burstin, 'Judicial Evolution — Interview with Sir Anthony Mason' (1995) 69(8) *Law Institute Journal* 745; 'Interview with Chief Justice Sir Anthony Mason, by Susanna Lobez, for The Law Report, Radio National' (1994) 89 *Victorian Bar News* 44.

12 Bryan Horrigan, 'Is the High Court Crossing the Rubicon? — A Framework for Balanced Debate' (1995) 6 *Public Law Review* 284. See also Bryan Horrigan, 'Towards a Jurisprudence of High Court Overruling' (1992) 66 *Australian Law Journal* 199; Maurice Byers, 'The Law-making Role of the High Court' (1994) 11 *Australian Bar Review* 187.

13 (1992) 175 CLR 1.

14 (1992) 177 CLR 106 ('*ACTV*'). See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 ('*Nationwide*').

15 *Theophanous* (1994) 182 CLR 104.

16 *Stephens* (1994) 182 CLR 211.

17 *Teoh* (1995) 183 CLR 273.

18 Horrigan, 'Is the High Court Crossing the Rubicon?', above n 12, 284.

our judicial institutions, the people who inhabit them and the capacity of those people to develop and change during their years in office.

Lest there be any doubt that something happened between Sir Anthony Mason's early decisions in the High Court and those for which his period as Chief Justice was largely celebrated, I can illustrate this proposition with many decisions both of public and of private law. The judge who wrote the orthodox, conservative judgment in *McInnis v The Queen*[19] is a significantly different jurist from the one who, substantially overruling that decision, participated in the majority opinion in *Dietrich v The Queen*[20] thirteen years later. The judge who joined the majority in the decision in *Dugan v Mirror Newspapers Ltd*[21] had a quite different notion of the role of the law in respect of the civil rights of prisoners and accused persons from the jurist who joined the majority opinion in *McKinney v The Queen*,[22] also thirteen years later. The judge who rejected, with a jest, the suggestion of an implied constitutional guarantee of freedom of communication in *Miller v TCN Channel Nine Pty Ltd*[23] seems to have been quite a different person from the judge who found, embodied in the Constitution, an implied freedom of communication about public, political and economic matters in *ACTV*,[24] and who went on to reinforce and extend this holding in further decisions in the so-called free speech series.

Mason J's jest in *Miller* was written in that engaging style which he brought to his judicial opinions. Never far away was the lightness of touch and slightly mocking view of human foibles evident in his everyday speech. In *Miller,* he rebuffed the attempt to press upon the Court the view which Murphy J had asserted, in lonely dissent, in *Buck v Bavone*[25] and which he maintained in *Miller's case.*[26] With thinly disguised scorn, Mason J wrote briefly:

> There was an alternative argument put by the defendant, based on the judgment of Murphy J in *Buck v Bavone,* that there is to be implied in the Constitution a new set of freedoms which include a guarantee of freedom of communication. It is sufficient to say that I cannot find any basis for implying a new s 92A into the Constitution.[27]

As an object lesson on the dangers of ever allowing humour to intrude into judicial opinions, Dawson J took his colleague to task in his dissent in *ACTV.* After citing Murphy J's repeated endeavours to persuade his colleagues to the implied constitutional freedoms doctrine, Dawson J went on:

> The implication of a guarantee of freedom of communication which Murphy J asserted was rejected by other members of this Court in *Miller v TCN Nine Pty*

[19] (1979) 143 CLR 575.
[20] (1992) 177 CLR 292.
[21] (1978) 142 CLR 583.
[22] (1991) 171 CLR 468.
[23] (1986) 161 CLR 556, 581 ('*Miller*').
[24] *ACTV* (1992) 177 CLR 106.
[25] (1976) 135 CLR 110.
[26] *Miller* (1986) 161 CLR 556, 581-5.
[27] Ibid 579.

> *Ltd.* It was, they held, inconsistent with the express guarantee of freedom of intercourse given by s 92, upon the view that the express guarantee extends beyond discriminatory fiscal burdens. Gibbs CJ said (at 569): 'Section 92 leaves no room for an implication of the kind suggested'. Mason J said (at 579): 'It is sufficient to say that I cannot find any basis for implying a new s 92A into the Constitution'. Brennan J said (at 615): 'The freedom of interstate communication rests not upon an implied guarantee but upon the express terms of s 92'. And I said (at 636): 'There can, of course, be no room for [such an] implication in the face of the express provision [ie s 92].'[28]

Within but six years a constitutional implication, very like that so roundly rejected, had been found by Mason CJ, as Dawson J pointed out with astonishment.

In *State Government Insurance Commission v Trigwell*, Mason J expressed the view which he held in 1979 concerning the role of a Justice of the High Court in disturbing settled principles of the common law.[29] In doing so, he adopted a stance which was, even by its time, conservative. Not for him were the bold flights of judicial creativity evidenced in the judgments, ever popular with law students, of Lord Denning MR. Instead, there is an appeal to the political doctrine that judges apply the law, with relatively little scope to change it. Change, especially major change, must be left to Parliament.

Trigwell concerned a motor vehicle accident which occurred when a vehicle, driven along a main road, collided with two sheep. This caused the car, after striking the sheep to collide with another vehicle being driven in the opposite direction. The driver of the first car was killed. The passengers in the second car suffered serious injuries. They sued the insurer of the driver of the first car alleging negligence. The owners of the land adjoining the highway (who were the owners of the sheep) were joined as defendants. It was claimed that the presence of the sheep on the highway was the result of their negligence or that they were negligent for failing to fence the sheep, in order to prevent their straying onto the busy road. Applying the rule of the House of Lords in *Searle v Wallbank*,[30] the trial judge had held that the land owners were under no liability in negligence or nuisance for the escape of their animals onto the highway.[31] The High Court, with Murphy J dissenting, rejected the plaintiff's appeal. The Court rebuffed the suggestion that the rule, fashioned by the English courts concerning liability for animals, was either unsuitable to Australian conditions (and so not received into our law) or, if it was, that it should be overruled as inappropriate to the circumstances of Australia and its different grazing conditions and needs.

The submissions were given short shrift by Mason J:

> It is then said that there was a radical change in the relevant conditions, a change brought about by the development of roads and highways, the growth of

[28] *ACTV* (1992) 177 CLR 106, 185-6.

[29] *Trigwell* (1979) 142 CLR 617, 633. This point is discussed in John Doyle, 'Implications of Judicial Law-Making' in Cheryl Saunders (ed), *Courts of Final Jurisdiction* (1996) 84, 90, 92. The author refers also to *Gala v Preston* (1991) 172 CLR 243.

[30] [1947] AC 341.

[31] *Trigwell v Kerin and State Government Insurance Commission* (1978) 19 SASR 280.

> fast-moving motor traffic on a large scale and a substantial increase in the fencing of properties, the House of Lords should have held that the rule was no longer appropriate to modern circumstances and that the ordinary principles of negligence should apply to the occupier of land whose straying animals caused accidents on the highway. In short, it is argued that the House of Lords should have reviewed the existing law in conformity with the suggestions made by the Court of Appeal in *Hughes v Williams.*
>
> I do not doubt that there are some cases in which an ultimate court of appeal can and should vary or modify what has been thought to be a settled rule or principle of the common law on the ground that it is ill-adapted to modern circumstances. If it should emerge that a specific common law rule was based on the existence of particular conditions or circumstances, whether social or economic, and that they have undergone a radical change, then in a simple or clear case the court may be justified in moulding the rule to meet the new conditions and circumstances. But there are very powerful reasons why the court should be reluctant to engage in such an exercise. The court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found. The court's facilities, techniques and procedures are adapted to that responsibility; they are not adapted to legislative functions or to law reform activities. The court does not, and cannot, carry out investigations or enquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent. Nor can the court call for, and examine, submissions from groups or individuals who may be vitally interested in the making of changes to the law. In short, the court cannot, and does not, engage in the wide-ranging inquiries and assessments which are made by governments and law reform agencies as a desirable, if not essential, preliminary to the enactment of legislation by an elected legislature.[32]

This attitude to the development of the law of negligence, expressed in the passage in *Trigwell,* may be contrasted to the views expressed by Mason J in later cases, such as *Papatonakis v Australian Telecommunications Commission*[33] and *Bryan v Maloney.*[34] There, in the place of old doctrine was a new conceptualisation of the law of negligence. In the place of rules expressed in the English courts there was a new, heightened, sensitivity to the need to establish and express rules of negligence suitable for the rather different social conditions of Australia.

I could give many further examples of the change in judicial technique which occurred between the appointment of Sir Anthony Mason to the High Court on 7 August 1972 and his retirement on 20 April 1995. However, I have disclosed sufficient for my immediate purposes. This is to analyse the question of what occurred to occasion this judicial metamorphosis and whether the facts were personal to Sir Anthony, or deeper and institutional, such that the judicial metamorphosis is likely to survive his departure.

[32] *Trigwell* (1979) 142 CLR 617, 633.

[33] (1985) 156 CLR 7, 16-20. See also *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479, 481-8 (Wilson, Deane and Dawson JJ agreeing).

[34] (1995) 182 CLR 609, 615 with Deane and Gaudron JJ. See also *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 526, with Deane, Dawson, Toohey and Gaudron JJ.

THE REASONS FOR CHANGE

Every human being changes and develops during his or her lifetime. It is elementary psychology that we are not the same person after a decade of life's experiences. It would be remarkable if we were so impervious to personal, professional and social conditions as to be completely unaffected by them. It is a stereotype of old age — especially judicial old age — that the subject becomes more conservative and cautious as the perils of change disturb the psyche and the recollection of other legal changes, often hoped for the better, turn out to have been for the worse.

Nevertheless, I do not believe that the changes which occurred between the judge of the early and later Mason years can be explained simply by reference to psychological features wholly personal to A F Mason. Were it so, they would have had little impact on the institution of the High Court. They would have been attributed to personal factors instead of the growth and development of a jurist who became a most influential Chief Justice.

The Almighty liked (we are assured) the numbers 7 and 10. With proper humility, taking my cue from this numerical attraction, I will propose ten reasons which may help to explain the change that came over Mason J in the space of his judicial service on the High Court of Australia.

Constitutional Trinity

The early Mason years were served during the Chief Justiceship of Sir Garfield Barwick, doyen of the New South Wales Bar.[35] Barwick CJ did not retire until February 1981. Whilst he sat on the Barwick Court, Mason J's silence in court was legendary. Barwick CJ was a dominant figure in any courtroom. He was an exponent of the power of human will, strongly directed. It is said that, with the move of the High Court to its permanent seat in Canberra, Barwick CJ endeavoured to persuade the Justices to participate in more formal conferences over cases than had previously been their practice. This is, after all, the settled practice of the great federal court upon which the High Court of Australia was modelled, namely, the Supreme Court of the United States of America.[36] But Barwick CJ's attempts did not succeed.[37] Independent and (almost) equally opinionated colleagues resisted. Nevertheless, the power of Barwick CJ's influence, and his disapprobation of heterodox legal approaches, appeared to have had an impact upon Mason J in those early years. He had appeared in Barwick CJ's Court as Solicitor-General for the Commonwealth. He knew the power of the man and of the other Justices about him. All of the Justices enjoyed, before the constitutional amendment in 1977, life tenure. So indeed did Mason as a Justice. This assured the very long service of the Justices. It resulted in relatively little turnover. I am but the fortieth Justice of the High Court of Australia. Forty in almost a century is

[35] Chief Justice, High Court of Australia, 1964-81.

[36] Phillip Cooper, *Battles on the Bench — Conflict Inside the Supreme Court* (1995) 91-110.

[37] Garfield Barwick, *A Radical Tory — Garfield Barwick's Reflections and Recollections* (1995) 251.

not many. It was into this world that the new Justice, after a short period of service on the New South Wales Court of Appeal, came to the High Court at a relatively young age.

There is an irony in the power of Barwick CJ's will. Its chief consequence, so far as the High Court was concerned, lay in his persuasion of successive governments that they should establish a permanent home for the Court in Canberra and place it, where it stands, on Lake Burley Griffin. The irony is this. Whilst the High Court, and the mostly elderly gentlemen who made it up, moved around Australia in regular contact with the judiciary and the Bar in the scattered communities of the Commonwealth, their self-image was, I think, very largely that of circuit judges after the traditions of the working courts whom they supervised. But when the Court moved to its permanent home in Canberra and was placed squarely in the constitutional triangle, with its clear physical relationship to the Parliament and to the offices of the Executive Government, a new and powerful symbolism was established. The role of the Court as the constitutional court of Australia was made plain in its earliest years under the brilliant Chief Justiceship of Sir Samuel Griffith.[38] But, for the most part, they were years of strict and complete legalism when, to some extent at least, constitutional interpretation was seen as closely related to the function (and therefore needing only the techniques) of statutory interpretation generally. Once the Justices of the High Court could see, so visibly and physically, that their Court was inescapably part of the trinity of the governmental organs of the country, a new national vision of the Court was bound to follow. So indeed it did. Sir Garfield Barwick, a creative and patriotic Australian, was the product of his generation and its outlook. Perhaps he did not quite see all of the consequences of the shift of the High Court to Canberra. Ideas quite often follow symbols and are stimulated by them. I have little doubt that Mason CJ's outlook on his role as a Justice and Chief Justice would have been deepened and strengthened by the move to Canberra. It reinforced some of the other factors to which I will refer.

Colleagues

Next I would cite the impact on Mason J of the colleagues with whom he worked. Although he jested at Murphy J's[39] notion of implied constitutional rights, the very jest betrays, perhaps, a depth of feeling that needed to be voiced in a strong and dismissive way because of a lurking sentiment that ultimately revealed itself in the free speech cases.[40] Mason J would probably, to this day, reject the notion that Lionel Murphy's writing had greatly influenced him. They were two very different personalities. Their judicial styles were different. Their techniques of opinion-writing were quite distinct. But the fact is that Murphy J's ideas became a catalyst for all of the Justices. More than his individual opinions,

[38] Chief Justice, High Court of Australia, 1903-19.

[39] Justice of the High Court of Australia, 1975-86.

[40] See *Theophanous* (1994) 182 CLR 104; *Stephens* (1994) 182 CLR 211; *ACTV* (1992) 177 CLR 106; *Nationwide* (1992) 177 CLR 1.

or his manner of writing them, his legal nationalism, proneness to question received English authority and fascination with the text and implications of the Constitution came to influence the other members of the Court.[41] His influence would probably have been greater if he had been willing to reason his judgments in a more orthodox way. But then he would not have been himself. Let there be no doubt that Murphy J displayed a quickness of mind in Court that was matched by his gregariously warm personality out of Court. Garfield Barwick resisted his charm; but it had its effect on others.

Perhaps of more direct impact on Mason J's intellectual evolution was the appointment of Deane J on 25 June 1982.[42] He replaced Sir Ninian Stephen when the latter retired to become Governor-General.[43] (I replaced Deane J when he retired to become Governor-General. But there the vice-regal succession finishes.) Deane J was also a product of the Sydney Bar. His considerable intellect was deployed in some of the very areas where Mason J was an acknowledged expert — particularly in the fields of equity, trusts, intellectual property and the growing notions of unjust enrichment. It would possibly be too much to say that the advent of Deane J provided a measure of intellectual competition for Mason J, by now established for a decade as a Justice of the High Court. But Sir William Deane's creative intellect undoubtedly revived and stimulated the intellectual perceptions of Mason J. By cooperation and competition it stimulated him into patterns of judicial thought which became most evident in his writing on cases raising issues on fair dealing and good faith.[44] It spilled over into cases, in the field of public law, raising the expanding concept of procedural fairness.[45] Deane J arrived at the High Court, a year after Sir Garfield Barwick's departure. It was at about that time that the opinions of Mason J began to take on a new character, less hidebound by past doctrine. It was Deane J in *Ocean Sun Line Special Shipping Company v Fay*[46] who expressed succinctly the function of a judge of an ultimate appellate court in approaching a case before the Court. The primary duty of any judge in a rule of law society is the application of legal authority. But often legal authority is unclear. The Constitution or the statute may be ambiguous. The presented cases may not be readily stretched by the tools of analogous reasoning to afford a solution to the case in hand. Then, the judge in the tradition of the English legal system, may call in aid legal policy and legal principle. If Lionel Murphy's techniques were somewhat uncongenial to the practised Mason J, those of Sir William Deane were more appealing. They invited his concurrence. They stimulated his further development.

41 Michael Kirby, 'Lionel Murphy and the Power of Ideas' (1993) 18 *Alternative Law Journal* 253.
42 Justice of the High Court of Australia, 1982-95.
43 Justice of the High Court of Australia, 1972-82.
44 Ian Renard, 'Fair Dealing and Good Faith' in Saunders, above n 29, 63.
45 Ray Finkelstein, 'Procedural Fairness' in Saunders, above n 29, 47.
46 (1988) 165 CLR 197, 252.

Privy Council

Then I would cite the end of Privy Council appeals. It is true that appeals to the Privy Council from the High Court of Australia had concluded with the passage of the Privy Council (Limitation of Appeals) Act 1968 (Cth) and Privy Council (Appeals from the High Court) Act 1975 (Cth). All that was left was the anomalous vestige of appeals as expressly provided in s 74 on constitutional questions *inter se* the constitutional powers of the Commonwealth and of the States. The High Court has made it plain that no such certificates will again be granted. The provision is now regarded as spent.[47] By the time that Mason J was serving his early days on the High Court, there was little opportunity for appeal from his decisions. However, he had grown up in the legal and judicial world in which the superintendence of the Privy Council was an everyday possibility. There may have been relatively few cases in fact. On the whole, the contribution of the Privy Council (outside constitutional issues, for federalism is rarely understood by Englishmen) was, in my view, generally beneficial. It rescued the Australian judiciary and legal profession from the risk of provincialism. But the existence of appellate superintendence tends to produce an impetus towards caution. Those who are supervised must always keep in the back of their minds the possibility that their opinions will be reviewed, reversed and adversely remarked upon. Whilst they survived, the existence of Privy Council appeals from Australia tied the jurisprudence of the High Court of Australia to the jurisprudence of the appellate courts of England. This was not only for fear of reversal. It was also because the Privy Council, overwhelmingly an English court, was still part of the Australian judicial hierarchy. Thus the books of the English judicial decisions were on the shelves of every judge and virtually every advocate in Australia. The English Court of Appeal was '*the* Court of Appeal'. Shifts and turns in English jurisprudence were felt far away in the courthouses of Australia. Then in 1986, with the passage of the Australia Acts,[48] the last of the Privy Council appeals concluded. As it happens, the very last appeal from an Australian court was one from a decision I gave in the New South Wales Court of Appeal in *Austin v Keele*.[49] So long as an alternative avenue of appeal to the Privy Council remained, even if not by way of appeal from the High Court, that distinguished imperial tribunal retained its potential to influence Australian legal decisions. At least in theory it could criticise, distinguish and not follow decisions of the High Court of Australia. In fact, long before 1986, the Privy Council recognised, and respected, the right of the Australian High Court to take its own direction in a particular branch of the law.[50] But whilst the link to the Privy Council as part of the Australian judicial hierarchy remained, complete intellectual freedom of the Australian judiciary, including in the High Court, could not occur. With the passage of s 11(1) of the Australia Act 1986 (Cth) and its State and United

[47] *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351.

[48] Australia Act 1986 (Cth); Australia Act 1986 (UK).

[49] (1987) 10 NSWLR 283.

[50] *Geelong Harbour Trust Commissioners v Gibbs Bright and Co Ltd* (1974) 129 CLR 576. See now *Invercargill City Council v Hamlin* [1996] 2 WLR 367, 378, 384.

Kingdom counterparts, Privy Council appeals ended forever. The High Court of Australia was no longer in any way, directly or indirectly, answerable to a court of judges sitting in Whitehall. Sir Anthony Mason became the first Chief Justice of Australia who was not appointed to the Privy Council, never to have taken a seat on that tribunal before the appeals finally ended. The counterpart of this loss was the development of a judicial attitude which the constraints of Privy Council appeals tended to discourage.

Independent Nationhood

Coinciding with the foregoing developments, there occurred during Sir Anthony Mason's service on the High Court an imperceptible but distinct growth in the Australian sense of nationhood and independence. This included intellectual independence in the law. Strangely enough, I think the rather low key celebration of the Bicentennial of British sovereignty in 1988 afforded a watershed: contributing to a reflection on where Australia had come from and where it was going. The mood coincided with a growing realisation that the political rhetoric was true: Australia was independent. And that the challenge of its future (as well as its opportunities) lay in Asia, the Pacific and the Indian Ocean regions. The notion of Australia as a country of Oceania, as distinct from a nation of transplanted settlers from Northern Europe, began to affect the approach to the law of the nation's highest Court. The perception of national unity can be seen in the decision of the Court in *Street v Queensland Bar Association*.[51] But it was also to be found in the instruction which the High Court gave on the use to be made of foreign court decisions. In *Cook v Cook*[52] it was made clear, even for slow or reluctant learners, that no Australian court was to regard itself as bound by the legal holdings of any court in England, however distinguished, with the possible exception of the Privy Council during the period that it was part of the Australian judicial hierarchy. In *Nguyen v Nguyen*,[53] the High Court emphasised the obvious fact that it could not hear appeals from the Full Federal Court or from the State Courts of Appeal or Full Courts in all of the cases which were interesting or important. Those courts were given a charter, and reminded, to play their own role in the development of Australia's law. In *Australian Securities Commission v Marlborough Gold Mines Ltd*,[54] the Federal, State and Territory courts from which appeals lay to the High Court were encouraged to search, wherever possible, for harmony in their construction of federal or uniform laws. These messages were clear and confident. They emanated from a High Court with a fresh vision of the nation it served and a clearer understanding of the opportunities and limitations upon it at the apex of the Australian judicial hierarchy. They portray a Court repositioning itself in its relationship with the Australian courts system following the end of the formal link to the English judiciary. These moves

[51] (1989) 168 CLR 461.
[52] (1986) 162 CLR 376. See also *Taikato v The Queen* (1996) 139 ALR 386, 408-9 (Kirby J).
[53] (1991) 169 CLR 245.
[54] (1993) 177 CLR 485, 492.

involved Mason CJ. They reinforced his notion of his own role and that of the other Justices of the High Court, in a new national and judicial environment.

Special Leave

The introduction of the procedure for special leave to appeal to the High Court also profoundly affected the mix of business in the Court.[55] According to Mr David Jackson QC, writing in the book of essays to celebrate Mason CJ's service:

> The fact that for the first time the High Court was the only possible final court of appeal in all cases, taken with the fact that the exercise of all appellate jurisdiction had come to require the grant of special leave, meant that the Mason Court was operating under a charter significantly different from those of its predecessors.[56]

Gone was the obligation to deal with the large workload of original jurisdiction, with tax and patent cases. Gone also were the many tax appeals, testamentary cases and the range of public and private law that can be found in the early volumes of the Commonwealth Law Reports. The change was imperative if the High Court was to cope with the flow of appeals and applications coming to it. But it inevitably meant that the 'docket', as the United States judges call it, changed significantly. The Court would henceforth choose the cases it would hear. It would do so from a growing number of applications. Virtually all of the cases which are chosen involve delicately balanced issues where there are powerful arguments for both sides. Quite frequently they are expressed in the majority and minority opinions of the court under appeal. But the result of the faculty of choice has been an increase in the number of cases involving the Constitution, the interpretation of federal Acts, public law and, interestingly, criminal law. It was really during the service of Sir Harry Gibbs as Chief Justice that the growing involvement of the High Court in criminal cases expanded.[57] This may not originally have been a development congenial to Mason J, with his background in the law far from the criminal courts. But he warmed to the task. He brought to it, in his later service, a strong sense of procedural fairness which he shared with Deane J. He also brought a practical determination to ensure that compliance with the requirements of justice went beyond words and was translated into clear protective action where that was necessary. The decision in *McKinney,* and the way its principles were made known to the legal and judicial community in Australia is a good illustration of that.[58]

[55] Judiciary Act 1903 (Cth) ss 35 and 35AA; Federal Court of Australia Act 1976 (Cth) ss 24 and 33; Family Law Act 1975 (Cth) s 95; Industrial Relations Act 1988 (Cth) s 432. See also David Jackson, 'The Role of the Chief Justice: A View from the Bar' in Saunders, above n 29, 21, 22.

[56] Jackson, above n 55, 21.

[57] Chief Justice, High Court of Australia, 1981-7.

[58] See *Savvas v R* (1991) 55 A Crim R 241, 289-90.

Submissions

Another change which came upon the Court, and which flowed from the special leave system, was the introduction of strict time limits upon oral argument in special leave applications and effective time limits upon such argument in other cases, as by the requirement of written submissions. When the time for oral argument was limited, it became imperative for counsel, appearing before the High Court, to go as quickly and economically as possible to the heart of the matter. This has a tendency to encourage the identification of the issues of legal principle and legal policy which will attract the interest (and therefore the special leave) which the applicant seeks or which the respondent opposes. This is not to say that, during Mason CJ's time, considerations of judicial policy were allowed to obscure the dividing point between the role of the Court as a judicial organ of government and the role of politicians on the hustings.[59] But with new techniques came a new willingness on the part of the judges to address, in the short time available, not only the legal authority which was available to assist on the point but also the broader arguments which tended to advance, or impede, the success of the application.

Judicial Choice

Mason CJ's service also coincided with the decline and fall of the declaratory theory of the judicial function in Australia. His own professional career was as a child of that theory which every law student then learned. Lord Reid had declared it to be a fairy story.[60] But it still had proponents in Australia, long after it was rejected elsewhere as a fiction. Two features of his life rescued Mason J from a blind faith in the declaratory theory. The first was that, as a student, he had been taught by Professor Julius Stone in the Law School of the University of Sydney. Like Deane J and many other contemporaries and those appointed since, he was influenced by Stone's exposition of appellate decision-making.[61] He was affected by the explanation of the leeways for choice which present themselves to judges, especially in the highest courts. Whereas this would probably have been regarded as heresy in the High Court which Mason J joined, it became much closer to the accepted reality of the Court which he left as Chief Justice.

The other element in Sir Anthony Mason's life, apart from critical self-analysis which made him open to Stones view of the function of appellate judges, was his deep acquaintance with the jurisprudence of the Chancery Courts in England and the doctrines of equity in Australia. In a recent foreword to Patrick Parkinson's *The Principles of Equity*,[62] Sir Anthony wrote of the way that 'the

[59] Frank Brennan, 'A Tribute to Sir Anthony Mason' in Saunders, above n 29, 13.

[60] Lord Reid, 'The Judge as Law-Maker' (1992) *Journal of the Society of Public Teachers of Law* 22.

[61] Justice Michael Kirby, 'Julius Stone and the High Court of Australia', for 'Symposium to Mark the 50th Anniversary of the Publication of "Province and Function of Law" by Professor Stone' in (1997) 20(1) *University of New South Wales Law Journal* (forthcoming).

[62] Patrick Parkinson (ed), *The Principles of* Equity (1996).

broad concepts' and 'discretionary remedies' of equity were able to adjust to the different demands and conditions of modern society. He went on:

> Indeed, much of the work of the High Court of Australia in recent years exhibits the historical characteristics of equity. As the authors point out, equity judges were not subscribers to the quaint common law fiction that the rules of law had survived from time immemorial and that the judges merely find and declare the pre-existing law. We are reminded of Sir George Jessel's salutary reminder in *Re Hallett's Estate* (1879) 13 Ch D 696 that equitable doctrines and principles were 'established from time to time, altered, improved and refined from time to time'. Why the paramountcy of equity over the common law, established by the *Judicature Act,* did not prevail also in this matter of how principles of law come to be shaped, continues to astonish me.[63]

There is quite a contrast between these remarks and the judicial comments in *Trigwell.* It shows that beneath the surface was an intellectual doubt about the fiction upon which the declaratory theory rested. Once that theory's critics began to gather increasing numbers of judicial supporters,[64] both in the High Court and elsewhere, its demise followed quickly. Its passing helps to explain the open-mindedness and some, at least, of the judicial creativity which so marked Sir Anthony Mason's period as Chief Justice.

Parliamentary Disillusionment

It will be noted that in *Trigwell,* Mason J expressed the conventional view that a legal development of the kind there proposed could, and should, be left to Parliament. However, this was clearly not a view which he held with the same conviction at the end of his judicial service. What happened? In part, I think the explanation must be that, over the years, Mason J came to see this view as yet another fiction which should not be erected, unjustifiably, in the path of justice. A period observing the Australian judicial and parliamentary scene — particularly from close hand when the Court moved to Canberra — would convince even the doctrinaire that the idea that Parliament can be relied upon to make all of the necessary amendments to private law is as fictional as the notion that judges do not make law and never have. In fact, our system of justice, inherited from England, is a brilliant symbiosis between the formal mechanisms of law-making and the incremental lawmaking entrusted (amongst others) to the judges. This is a trust which has come with the Constitution and with the great system of law and justice which the Constitution affirms. If the judges never made law, how it was later asked by Sir Anthony Mason, did the forty volumes of *Halsbury's Laws of England* come about?[65]

But something else happened. It was the advance of general education and heightened expectations of justice in the community. The community is now

[63] Ibid vi.

[64] Michael McHugh, 'The Law-making Function of the Judicial Process — Part One' (1988) 62 *Australian Law Journal* 15; Michael McHugh, 'The Law-making Function of the Judicial Process — Part Two' (1988) 62 *Australian Law Journal* 116.

[65] Anthony Mason, 'A Reply' in Saunders, above n 29, 113, 115.

much less willing to accept judicial decisions, even of the High Court of Australia, abjectly with resignation and without criticism. There was always a measure of criticism. But it was nowhere as robust as has become in recent times. The same may be true of the institution of Parliament where there is even larger public disillusionment. As to the courts, on his retirement, Mason CJ said:

> I would add one comment, echoing [Canadian Supreme Court] McLachlin J's remarks, that the community today expects just and principled outcomes from court decisions. The community is uneasy with the notion that the courts are somehow concerned with law, but not with justice.[66]

Clearly arriving at this conclusion, both of community expectations and of parliamentary incapacity to deliver them, encouraged Mason CJ along the path of judicial creativity which marked his last years of judicial service.

Outreach

As Chief Justice, Sir Anthony Mason reached out to the community as no predecessor had done. His curiosity and inclination took him to countless conferences to which he contributed a vast range of papers on legal, judicial and associated themes. He became familiar to, and more comfortable with, the media than any of his predecessors. Most of them had ignored the media completely or regarded journalists as enemies of the High Court. All of this brought Mason CJ into contact with community opinion in a way that an isolated life in the citadel on Lake Burley Griffin would not ordinarily allow. He heard at close hand scholarly and community criticism of the law, of its ways and of its results. I have no doubt that this exposure to the bracing sentiment of fellow citizens, whilst not perhaps influencing particular decisions, readied the mind of a most experienced judge to accept new ideas. It probably also encouraged in him a feeling about the central importance of freedom of expression which can be seen in the free speech cases in particular but which were evident in his earlier decision in *The Commonwealth v John Fairfax and Sons Ltd.*[67] The potentiality of the later cases can be seen in many of the earlier decisions. The intellectual foundation to push forward the law of fiduciary obligations, of contract, tort and administrative fairness can be found in his earlier professional experience. Thus it was as Mr A F Mason QC, Solicitor-General, that he persuaded Federal Attorney-General Nigel Bowen to establish the Commonwealth Administrative Review Committee. This led ultimately to the creative statutory reforms found in the new federal administrative law, now celebrating its twentieth anniversary. But I think it was Sir Anthony Mason's ascendancy as Chief Justice and the increased contact he then had with the outside world that came with that office, that freed him from some of the constraints which he had earlier felt. It allowed him to express views which, if he previously held them, he had kept to himself.

66 Ibid.

67 (1980) 147 CLR 39. Cf *John Fairfax Publications Pty Ltd v Doe* (1994) 37 NSWLR 81, 100 and comment by James Miller, 'Cases and Comment' (1996) 20 *Criminal Law Journal* 288.

International Links

Beyond Australia Sir Anthony Mason, as Chief Justice, took part in Commonwealth judicial and law conferences. Although a seat on the Privy Council was denied to him by historical developments, he had always been interested in international law. During his period as Solicitor-General for the Commonwealth he had taken part, as that office-holder usually does, in many international meetings, including of the United Nations Commission on Trade Law (UNICTRAL). His familiarity with international law and his sympathy for the inevitable changes that are necessary to secure the adjustments between Australian municipal law and international law, can be seen in his decisions in *The Commonwealth of Australia v The State of Tasmania*[68] and also in *Teoh,*[69] the latter of which he wrote with Deane J. *Teoh* was the writing of judges at the end of their service as the most senior of their country's highest Court. But it was the writing of judges who, instead of looking backwards nostalgically, were looking forward to some of the challenges which will face Australian law in the century ahead. So Sir Anthony Mason did also in the decision in *Mabo v Queensland [No 2]*[70] where Brennan J (with his concurrence and that of McHugh J) gave the clearest exposition to that date of the inevitable impact which Australia's adherence to international human rights treaties would have to the development of the law of this country.[71]

The foregoing considerations may not wholly explain the change which occurred in the perception by Mason J of his judicial function as a Justice of the High Court of Australia. That there was a change seems clear by contrasting not only the results of early decisions with those which came later but also by comparing the judicial technique expressed in *Trigwell* with the exposition of so many leading decisions in later years.[72] The early decisions and expositions are entirely orthodox reflections of Sir Owen Dixon's 'strict and complete legalism'. In the later decisions and in their methodology of reasoning, Sir Anthony Mason launched out on a new path. In doing so, he instituted certain changes which, I believe, cannot and will not be reversed. He pointed in the direction of further changes which it will fall to others to continue.

THE FUTURE

Let me identify some of the changes which came about during Mason CJ's service which seem unlikely to be reversed:

68 (1983) 158 CLR 1 (*'Tasmanian Dams Case'*)
69 *Teoh* (1995) 183 CLR 273.
70 (1992) 175 CLR 1, 16 (*'Mabo [No 2]'*).
71 Ibid 42.
72 See, eg, Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4 *Australian Bar Review* 93, 106, 111.

Australian Character

The High Court of Australia is now, much more than at the time he was appointed, a distinctly Australian institution. In saying this, I am not making the mistake of embracing narrow nationalism. That barren philosophy is the opposite of my own. It is simply that the appreciation of a distinctly separate Australian jurisprudence was a natural direction for the Court at the head of the third branch of government in a wholly independent country. The appearance of the Court changed during Mason CJ's service. Gone were the wigs and robes of the English tradition. In their place a robe, variously described as business-like and austere, took their place. Quite apart from these external symbols, Mason CJ embraced the principle that the people of Australia are ultimately the legal foundation for the legitimacy of the Australian Constitution under which all laws are made.[73]

Democracy

Mason CJ rejected simplistic notions of democracy as involving no more than majority votes in Parliament intermittently elected. Modern Australian democracy is more complex. It involves a respect for the human rights of minorities, a new sensitivity to the position of the indigenous peoples of Australia (Aboriginals and Torres Strait Islanders) and an awareness of the important developments which are occurring, at an international level, in the field of human rights and fundamental freedoms. The decisions of all Justices now reveal an awareness of these developments. This advance occurred during Sir Anthony Mason's service. He contributed notably to it.

Human Rights

Many of the decisions at the closing years of Mason CJ's term reflect his empathy with human rights jurisprudence which is developing at the international, regional and national levels in all civilised countries. The decisions in *Mabo [No 2]*, *Street*, *Dietrich* and *Teoh*, all reflect an awareness of international human rights developments and a willingness to see Australia's constitutional and legal principles in relation to them. This is not to bring international treaties on human rights into Australia's municipal law where not incorporated by Parliament by 'a backdoor means'.[74] It is simply to recognise that most of the important international human rights treaties were drawn by Anglo-American lawyers. They reflect concepts which are entirely familiar to those brought up in the traditions of the common law. They may provide a setting in which approaches to Australia's problems can be aided by an awareness of the way in which other jurists, grappling with analogous problems, arrive at their solution.

[73] *ACTV* (1992) 177 CLR 106, 137-8. Cf *McGinty v Western Australia* (1996) 70 ALJR 200, 239 (*'McGinty'*) where McHugh J refers to 'considerable theoretical difficulties' in this view.

[74] *Teoh* (1995) 183 CLR 273, 288.

Policy

Whilst the dividing line between judicial principle and policy, on the one hand, and political policy on the other is not always bright, there will be no going back to the declaratory theory of the judicial function. The identification of legal principle and legal policy, and the candid discussion of it between judges and advocates, will help to achieve decisions which are better informed and more transparent: where the *real* reasons for judicial choice of one path rather than another will be disclosed, without inappropriate departure form legal authority as developed by the established techniques of analogous reasoning.

Society

The High Court must operate in an Australian society which is increasingly complex: affected by technological change and by a changing population with new and different ethnic, religious and cultural imperatives. If the Court is to continue to respond, as a branch of government, to a society undergoing such profound change, it is essential that it should continue on the path which Sir Anthony Mason identified. As in any institution, and amongst individuals, there will be periods of change and periods of consolidation. Each Justice, and each Chief Justice, brings to the High Court his or her own integrity, value system and sense of priorities. But it seems unlikely that the Court will ever return to the Court of my youth. Too many things in Australia, in the law and in the High Court itself have changed. Sir Anthony Mason was one of the change agents. He did not create all the changes. But he did develop sufficiently to respond effectively to most of them in ways that many would not have predicted from his early judicial decisions.

The areas of need which are identified by the developments which occurred during Sir Anthony Mason's service are many. But to complete this second decalogue, I would mention five.

Changing Materials

As the Court is more candid about the relevance of legal principle and legal policy, it is arguable that assistance of a slightly different kind may (in some cases at least) be required, for the just and lawful outcome of the controversy. This may affect the law on interventions before the Court.[75] It may affect the written and oral material which is placed before the Court by parties, interveners, *amici curiae* and others who are heard by the Court. In the United States of

[75] An interesting illustration of the Court's recent approach to special interest intervention may be seen in the decision ('by a statutory majority') to permit representatives of the Australian Episcopal Conference of the Catholic Church and the Australian Healthcare Association to intervene in the hearing of the appeal in *Superclinics (Australia) Pty Ltd v CES*. The intervention was justified by the applicants on the ground that the decision under appeal concerned the law of abortion. See *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47. The appeal was later settled but not before other, antagonistic, interest groups indicated their intention to seek leave to intervene.

America, significant assistance of a policy, social and economic kind is given to the Supreme Court. The absence of this assistance in Australia and even the occasional discouragement of its provision is, I think, a remnant, in the methodological field, of the declaratory doctrine about the judicial function. Once it is recognised that appellate judges have choices which should be informed outside the materials available in casebooks, the need to fill the gap should be acknowledged. The methodologies of advocacy should be adapted to its function. That function includes persuasion by the provision of relevant data. Yet the methodologies must be developed in ways which respect the constraints upon courts and avoid the suggestion that courts are merely organs of policy and social engineering.

Community Relations

The High Court has been slow to change its processes of the elaboration of its decisions. The past procedures of reasoned judgments have served it well. But the judgments are often long and inescapably technical. The communication of their ideas to the population who are served by them is often a chancy and risky business, depending, as it does, upon the ability and willingness of journalists to absorb, under the imperatives of media deadlines, the substance of the Court's decision. Sir Ninian Stephen, before his retirement, proposed that a press officer should be appointed to assist in the accessibility of the decisions of the judicial branch of government. Brennan CJ has noted that:

> The work of the Court ... comes to be evaluated by debate about the desirability of a result from standpoints other than the rule of law. The problem is difficult of solution. It is a problem for lawyers generally, for the legal profession itself is justified only by the function it plays in administering the law.[76]

But I think part of the responsibility must also fall upon the Justices who constitute the High Court. Relations with the media have a potential for harm to the institution, as recent experience in other areas of government has demonstrated. But unless there is an improvement in the techniques of providing information to the community about the decisions and reasoning of the Court, it is inevitable that the public will remain ill-informed. Result-oriented discussion and superficial analysis of judicial predilections will be all that most members of the general public learn about their highest Court and the jurists who make it up.

Legitimacy

Sir Anthony Mason and other Justices of the High Court have embraced the notion that sovereignty in the Australian Commonwealth resides, ultimately, in the people of Australia who approved the Constitution at the foundation of the Commonwealth and who alone can alter its formal text.[77] If this be so, a new explanation must be sought for the legitimacy of the judges, who are not account-

[76] Frank Brennan, 'Looking to the Future' in Saunders, above n 29, 264, 268.
[77] *ACTV* (1992) 177 CLR 106, 138. Cf *McGinty* (1996) 134 ALR 289, 343.

able to, elected by or subject to recall at the will of the people. Once the fiction of strict legalism is abandoned, it remains for the judges who are left to define the limits of their legitimacy and to understand the boundary which is set by the fact that they are not elected with a mandate to effect major change. If they do so in the interpretation and application of the Constitution, their will is extremely difficult to alter in the circumstances of the rigid provisions of s 128 of the Constitution. But even in other areas of the law, a judge reaches the point where, as *Trigwell* held, change must be left to Parliament. Views may differ as to where the line of legitimate judicial creativity ends. No judge in Australia presumes to believe that there is no line. To hold that view would be to defy not only history but the letter and structure of the Constitution itself and the very notion of the rule of law. The proper answer to the challenge to decisions such as *Dietrich, Mabo [No 2], Teoh* and the like is to attempt a fresh analysis of the circumstances where judicial creativity is permissible and those where it is not. Thus, in areas of legal procedure it may be more appropriate for the judges to keep bright the procedures that bring people to justice.[78] Bold strokes of substantive law may be in a different class. I do not suggest where the line is to be drawn today. But the bold strokes of Sir Anthony Mason's later decisions compel new attention to finding where the line is and helping to identify, for the judges who follow, how in a particular case they may find its whereabouts.[79]

Judicial Appointments

A further consequence of the greater candour about judicial policy-making may be the heightened pressure to involve politicians, or the people, in the choice of judges. It would be a great misfortune if Australia were to adopt the banal, savage and unedifying confirmation proceedings which terminated the hopes of Judge Bork in the United States and damaged the role of Clarence Thomas. Reducing judicial appointments (or for that matter recall) to television advertisements and stereotyping jingles is not the way to sustain judicial independence or to improve judicial performance. On the other hand, as the true function of the High Court and other courts as part of the judicial branch of government[80] is seen more clearly, from their works and from the physical position of the Court in Canberra, it seems likely that greater political consultation in appointments, especially of Justices of the High Court, will be demanded. Already, the Federal Parliament has enacted provisions requiring consultation with State Attorneys-General on the appointment of Justices.[81] But this procedure has obvious limitations. It does not engage all of the interests which may legitimately be involved in such an appointment. When it was believed that Justices were simply

[78] See, eg, *Halabi v Westpac Banking Corporation* (1989) 17 NSWLR 26, 33-9; *Carnie v Esanda Finance Corporation Ltd* (1990) Australian Consumer Sales and Credit Law Reporter #55-983; *Esanda Finance Corporation Ltd v Carnie* (1992) 29 NSWLR 382, 401.

[79] James Miller, 'The End of Freedom, Method in *Theophanous*' (1996) 1 *Newcastle Law Review* 39, 54-6.

[80] *Kable v Director of Public Prosecutions (NSW)* (1996) 70 ALJR 814.

[81] High Court of Australia Act 1979 (Cth) s 6.

other lawyers performing standard and semi-automatic legal tasks, it was perhaps natural that the concentration of consultation was upon other judges, Bar Associations and like interests of the legal profession. Once the public came to know (as it most vividly did in the *Tasmanian Dam Case,* in *Mabo [No 2]* and in *Teoh),* that the High Court Justices inescapably have a large policy role in the general law and a most significant function, political in the broader sense, in constitutional cases, the demand for a say in appointments may be increased. Moreover, the collection of qualities necessary to appointment may be seen as different from, and additional to, those required for other judicial officers.

Work Methods

Finally, the changing methodology adopted during Sir Anthony Mason's period as a Justice of the High Court necessarily addresses attention to the methodology of the Court in disposing of its ever-increasing caseload. A great deal of the time of the Justices is now consumed in reading application books in advance of special leave hearings. Or it is spent in absorbing statements in support of the increasing number of cases in which unrepresented litigants seek to attract the attention of the Court to their proposed appeals. Various suggestions have been made to increase the involvement of the High Court in the supervision of other Australian courts in a way which its present methodology does not permit. These have included the abolition of the special leave procedure whose constitutionality was challenged without success.[82] Other suggestions have included, from time to time, an increase in the size of the Court, the creation of panels or divisions of the Court or the establishment of a national intermediate appellate court. This last idea has so far come to nothing because of the perceived difficulties of securing the constitutional change. Yet, in the meantime, in default of constitutional alteration, new opportunities have opened up. Judges of State appellate courts have accepted commission in other jurisdictions,[83] following in this regard the deployment of judges of the Federal Court of Australia in Territory Full Courts. There may be ways, short of constitutional amendment, whereby this form of enhancement of the capacity of the Federal, State and Territory courts, under the High Court, might be ensured. It cannot be said too often that, for 98% of cases, the Courts of Appeal and Full Courts of Australia are contingently final appellate courts.[84] Without changes in current methodology, the High Court's effective supervision of their work will necessarily be limited and subject to many chance factors. The new procedures, introduced during Sir Anthony Mason's service, should be kept under constant review so that the same freshness of approach and technological inventiveness that accompanied their introduction and implementation can be exhibited in their operation and, if necessary, modification and improvement.

[82] *Carson v Slee* (1991) 173 CLR 194.

[83] For example, Priestley JA of the New South Wales Court of Appeal is an Additional Judge of the Northern Territory Court of Appeal.

[84] This is borne out by the statistics on successful applications for special leave to appeal to the High Court. See AGPS *High Court of Australia, Annual Report 1995-96* (1996), Part III, 44-53.

CONCLUSION

The last thing to be said is that Australia was most fortunate in the public service of A F Mason. That service is not concluded. It continues in other fields. But it was seen at its best in his judicial service to the nation in the High Court as a Justice and later as Chief Justice.

It is important to note that the development in his outlook and the enlargement of his sense of permissible creativity, is itself a signal of the persistence and strength of the independence of the Australian judiciary. It came about as a consequence of the personal convictions of an appointed Justice of the High Court of Australia. Those convictions ultimately took him down new and sometimes untrodden paths. Such byways in the law, as in life, can be exciting and even, on occasion, a little dangerous. The easy response to change is to stick to the well worn paths and to reject those which are new. Sir Anthony Mason saw the changing times. He boldly struck out upon new ways. He embraced new ideas in a fresh and confident manner. If this had been his approach to life and the law throughout his professional service, it would have been unremarkable that it reached new heights when he took the central seat in the nation's highest court. But the fact that nis professional life demonstrates significant change and development makes it the more fascinating and worthy of study: not only for A F Mason, the individual, but for the consequences of such change in, and development for, the institutions in which he served.

Mason CJ may have been a judge of long service of the twentieth century. But as he left office, he undoubtedly beckoned the lawyers of the Commonwealth of Australia into the twenty-first century. Because his message was especially important to law students, who are the future practitioners and guardians of the rule of law, it is right that they should celebrate him in this annual lecture. They should take encouragement from his life. They should realise that the search for the law is not, alone, enough. In the end, that search may leave the searcher profoundly uncertain or dissatisfied. It is the search for the law as it serves justice that has been the hallmark of the legal system which we have inherited from England and developed for ourselves. Sir Anthony Mason's life is an example of how great legal skills and high judicial technique can be brought together, with an increasing sense of urgency, to discover and develop the law and to ensure, so far as we can, that it is just. That is a noble aspiration for a Chief Justice of Australia. It is also a worthy encouragement for the newest student venturing for the first time into study of the law.