Introduction

On 3 April 1995, three weeks before stepping down as Chief Justice of the High Court of Australia, Sir Anthony Mason was interviewed by Liz Jackson of the Australian Broadcasting Corporation for its current affairs program, *Four Corners*.

The television interview, the transcript of which is the last of the collected *Mason Papers*,[1] was a first for a sitting Chief Justice. Sir Anthony was questioned about a wide range of contemporary issues affecting the judiciary, including the law-making role of the courts generally and the High Court in particular, its interaction with Parliament, public perceptions of the courts, the impact of universal and community values, the desirability of a bill of rights, criticisms of *Mabo v Queensland (No 2)*[2] and of the cases finding implied constitutional freedoms, and State versus federal revenue-raising rights. Sir Anthony's pithy and frank answers to the journalist's questions show a man who was astutely aware of the social and political context in which the High Court operated, and who was fully able to explain and defend the legitimacy of the Court's decisions within the proper limits of its constitutional powers.

Sir Anthony was asked by Ms Jackson what would he like to see as his legacy. He replied: 'I would prefer not to express an opinion about that. It is better for others to determine whether there was a legacy worthwhile that was left.' The object of this collection is to mark the occasion of the 50th anniversary of Sir Anthony's appointment to the High Court of Australia in 1972 and to explore that legacy: his contributions to Australian law.

The *Mason Papers*, published in 2007, collected a mere 27 of Sir Anthony's extra-judicial writings and speeches – 'mere' because, as editor Professor Geoffrey Lindell pointed out, the full collection is voluminous and still growing: journal articles, chapters, speeches, reviews, lectures, presentations, newspaper articles. They are themselves an important part of Sir Anthony's legacy. They contain insights and reflections, often with subtle irony and humour, which could not be made in judgments. They remain as interesting, topical and cogent as when they were written.

This collection is primarily concerned with a different part of Sir Anthony's legacy: the law that he, with his fellow judges, declared and developed over a period of 26 years in Australia, first as a judge of the New South Wales Court of Appeal from 1969 to

1 G Lindell (ed), *Sir Anthony Mason: The Mason Papers* (Federation Press, 2007) ('*Mason Papers*').

2 (1992) 175 CLR 1.

1972, then as a puisne judge from 1972 to 1987 and as Chief Justice of the High Court of Australia from 1987 to 1995.

Sir Anthony occupies a unique place in Australia that cries out for legal and historical analysis. His life has spanned Australia's development from a British dominion whose domestic politics was dominated by the States to its emergence as a modern and independent federal nation. He served in the RAAF during World War II and, as a law student at the University of Sydney, observed Sir John Latham preside over the High Court of Australia and Sir Frederick Jordan over the Supreme Court of New South Wales (he later said that each resembled an 'ascetic schoolmaster').[3] Sir Anthony himself appeared in the High Court as early as 1951 and on the front page of *The Sydney Morning Herald* as early as 1955.[4] Before he was appointed to the High Court, Sir Anthony served as Commonwealth Solicitor-General and as a judge of the New South Wales Court of Appeal. His Chief Justiceship followed closely on the heels of Australia finally asserting its status as a sovereign independent nation with the *Australia Acts 1986*. Sir Anthony navigated the High Court through choppy economic and social waters. He modernised the Court in many subtle and lasting ways by, among other things, streamlining special leave applications and appeals and requiring oral submissions to concentrate on the key issues. He also made more obvious advances such as dispensing with wigs and embracing the media as a means for communicating the work of the High Court to a broader audience.

At his swearing in as Chief Justice of the High Court in 1987, Sir Anthony commented on the High Court becoming the final court of appeal for Australian courts with the abolition of appeals to the Privy Council from all Australian courts, this momentous and welcome change imposing on the High Court the exclusive final responsibility for declaring what is the law for Australia. He said:

> Our courts have an obligation to shape principles of law that are suited to the conditions and circumstances of Australian society and lead to decisions that are just and fair. ... For the most part in this court, we are engaged in the activity of interpreting the constitution and, more commonly, statutes. ... Even in those cases where the rules in question are common law or judge-made rules, judicial freedom of choice is restrained by our efforts to ensure that judicial development of the law, though responding dynamically to the needs of society, is principled, orderly and evolutionary in character. There is an expectation that the rules by which conduct is to be judged should be reasonably ascertainable or predictable, as well as yielding just and fair results.[5]

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3 Sir Anthony Mason, 'Supreme Court of New South Wales: Opening of Law Term Judges' Dinner' (2008) 82 *Australian Law Journal* 839, 839.

4 'Judge Refers Writ to High Court', *The Sydney Morning Herald* (16 June 1955), 1: Mr AF Mason, counsel for two men who had been convicted (in absentia) and imprisoned by the Commonwealth Parliament for contempt, was photographed outside the Supreme Court of the Australian Capital Territory, where habeas corpus applications had been filed. Sir Anthony had been refused leave to appear in the Standing Committee of Privileges and in the House of Representatives. He would later say, 'my sense of outrage over Parliament's denial of due process and natural justice remains undimmed after the lapse of 40 years': Sir Anthony Mason, 'A New Perspective on Separation of Powers' (1995) 82 (December) *Canberra Bulletin of Public Administration* 1, 5. The High Court validated Parliament's exercise of power: *R v Richardson; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157.

5 'Swearing in of Sir Anthony Mason as Chief Justice' (1987) 162 CLR x.

With the benefit of hindsight, we seek to highlight and celebrate Sir Anthony's efforts to ensure dynamic and principled development of the law. Like Professor Lindell, we, as editors of this collection, had some hard choices as to both subjects for discussion, from all of those on which Sir Anthony's judgments made their mark, and potential contributors. We decided to begin with those who had served as associates to Sir Anthony when he was on the High Court, many of whom now hold senior judicial appointments themselves; members of the University of Sydney Law School, including William Gummow, who succeeded Sir Anthony on the High Court; and leading specialists at the University of New South Wales and the Australian National University. Our task was made easier by the immediate acceptance of those invitations, but also harder because space is necessarily constrained, limiting our contributors and choice of subject matter. Not every field of law is included for analysis, but nevertheless, the table of contents illustrates the breadth of this collection.

The decision to include academic commentators, rather than limit contributors to judges and professional lawyers, many of whom would have responded enthusiastically to an invitation, is particularly fitting in Sir Anthony's case. Throughout his professional and judicial careers and subsequently, Sir Anthony has been an advocate for the value of academic writing and commentary for judges in developing the law and in legislative law reform.[6] He also does not hesitate to remind academic theorists of the need to be cognisant of the institutional and practical constraints of the judicial process.[7] He is still renowned among his former students, who included William Gummow and Mary Gaudron, when he served as lecturer in Equity at the University of Sydney Law Faculty from 1959 to 1964, while at the Bar. He has shown a deep commitment to Australian universities, serving in official capacities, such as Council member and then Pro-Chancellor of the Australian National University (1969–1975) and Chancellor of the University of New South Wales (1995–1999). He was appointed Goodhart Professor in Legal Science at the University of Cambridge in 1996–1997 and as a Visiting Fellow at other leading universities across Australia and Asia. He has served on numerous advisory boards and institutions which bridge the divide between the profession and academia, including the American Law Institute, the Australian Law Reform Commission, and university research and policy centres. His commitment to universities has extended especially to academics, both junior and professorial, with readiness to listen to, cite and encourage their work. It has extended to students. We recall an occasion only a few years ago when, well into his eighties, Sir Anthony was the popular choice to launch an edition of a student polemical magazine. He commented carefully on each contribution to the magazine and then took spontaneous questions from a packed hall of students, on random other issues including even the value of carbon trading. He answered them all with acuity and humour, to a rapt audience.

Commentators on the contribution of a High Court judge to the development of the law must always be wary of overemphasising that judge's personal effect. Even terms like the 'Dixon Court' or 'Mason Court', while convenient, can exaggerate the role of

6 See, eg, Sir Anthony Mason, 'Changing the Law in a Changing Society' (1993) 67 *Australian Law Journal* 568, 547; 'Corporate Law – The Challenge of Complexity' (1992) 2 *Australian Journal of Corporate Law* 1, 3.

7 See, eg, 'Law and Economics' (1991) 17 *Monash University Law Review* 167, 172–4, 180–1.

the Chief Justice at the expense of others. A focus on the individual judge can obscure the court as a collective institution and downplay the role of collegiality.[8] Witness *Cole v Whitfield*,[9] the pathbreaking s 92 judgment delivered a little over a year into Sir Anthony's tenure as Chief Justice. However, the unanimous judgment, recalled one of the joint authors, Sir Gerard Brennan, 'stand[s] as testimony to the multiple judicial qualities of Chief Justice Mason'.[10] Sir Anthony may have written 'the most important parts' himself, but:

> [o]f more importance, perhaps, was the judicial management of the judgment when differences of expression or even of concept among the Justices were negotiated to a united conclusion. Precise appreciation of points of difference and full discussion of implications led to complete satisfaction with the text.[11]

Above all, Sir Anthony's lasting contributions to Australian law emanate from his stewardship of the High Court during perhaps its most momentous period. During his tenure as its Chief Justice, the High Court breathed new life into the Australian Constitution by articulating some of its most important public values. The Mason Court held that the common law of Australia recognised native title. It articulated and enforced an implied freedom of political communication. It settled decades of uncertainty over the interpretation of 'absolutely free' trade, commerce and intercourse under s 92. The contribution to private law is just as significant. The High Court, when Sir Anthony was Chief Justice, attempted to consolidate promissory and proprietary estoppel into a general principle of equitable estoppel. Mason J himself wrote (in dissent) perhaps the most influential Australian judgment on fiduciary obligations. His judgments on breach and causation in negligence, implied contractual terms, and substance and procedure in choice of law are widely respected. He has been no narrow chauvinist. He readily drew on the decisions and academic writing in other common law jurisdictions and expected counsel to prepare their submissions with this in mind. The clarity of his judgments stands out, deliberately so. As he commented shortly after his appointment as Chief Justice:

> Nowadays an informed and influential section of the community is anxious to understand, evaluate and, if need be, criticise court judgments. Judges should write with this in mind rather than court the criticism that the law is an esoteric mystery administered by a priestly class.[12]

And in the same speech, Sir Anthony issued a clarion call for courts to adapt to the 'evolving concept of the democratic process' that 'respects the fundamental rights and

8 See R Dixon, 'Towering versus Collegial Judges: A Comparative Reflection' in R Abeyratne and I Porat (eds), *Towering Judges: A Comparative Study of Constitutional Judges* (Cambridge University Press, 2021), 308. Sir Anthony is one of the subjects of that volume in a chapter authored by Professors Gabrielle Appleby and Andrew Lynch: Ch 3.

9 (1988) 165 CLR 360.

10 G Brennan, 'A Tribute to the Hon Sir Anthony Mason AC KBE' (Speech, The Mason Court and Beyond Conference, 8 September 1995).

11 Ibid.

12 'Future directions in Australian law' in *Mason Papers*, above n 1, 22.

dignity of the individual'.[13] 'The proper function of the courts', said the Chief Justice of Australia, 'is to protect and safeguard this vision of the democratic process'.[14]

Following Sir Anthony's retirement, a collection of papers debating the role of courts of final jurisdiction was published in 1996 as a tribute to him, entitled *Courts of Final Jurisdiction: The Mason Court in Australia* and edited by Professor Cheryl Saunders. Now, a quarter of a century later, this collection re-examines Sir Anthony's ideas, tests their resilience a generation after his retirement from the High Court, and situates them in the broader context of modern Australian law.

Sir Anthony's judicial influence extends beyond Australia. Shortly after his retirement from the High Court, he went on to serve as what he called 'an itinerant judge in the Asia-Pacific region',[15] as judge of the Supreme Court of Fiji (1995–2000), President of the Solomon Islands Court of Appeal (1997–1999), and most notably as one of the first non-permanent judges of the Hong Kong Court of Final Appeal for 18 years from 1997 to 2015. Sir Anthony regards that service on the Hong Kong Court of Final Appeal as a highlight of his life. In his decisions on the Basic Law, he drew upon his experience in adjudicating upon constitutional divisions of power and also emphasised that judicial review extends beyond the exercise of statutory powers to those based in the prerogative and common law. At his retirement address in January 2021 as Hong Kong Chief Justice, Ma CJ extolled Sir Anthony's wisdom and ability.

We wish to thank the Francis Forbes Society for Australian Legal History for its generous support for the research and editing of this collection from the very outset. We also wish to thank Daniel Farinha for his extensive research assistance, and Rahul Arora and Janek Drevikovsky for their meticulous editing and assistance. We thank the Ross Parsons Centre of Commercial, Corporate and Taxation Law for its additional funding to cover editorial costs. We also thank Federation Press for their willingness to publish this collection and believe it will become a fitting companion to the *Mason Papers*.

We thank the contributors for their enthusiastic and thoughtful chapters in this collection. Finally, on our own behalf and those of the contributors, we thank Sir Anthony Mason for *his* contributions to Australian law. A worthwhile legacy indeed.

Barbara McDonald, Ben Chen and Jeffrey Gordon
2022

13 Ibid.
14 Ibid.
15 Sir Anthony Mason, 'Reflections of an Itinerant Judge in the Asia-Pacific Region' (2000) 28 *International Journal of Legal Information* 311.