process, but also assumes a role in the **administration** of the Court.

Frank Jones

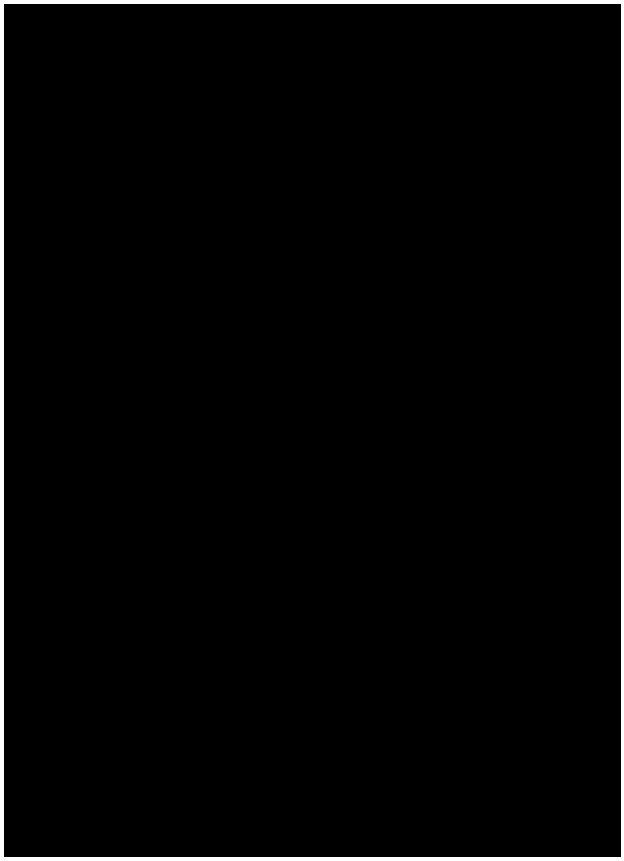
Mason, Anthony Frank (*b* 21 April 1925; Justice 1972–87; Chief Justice 1987–95) was a member of the High Court for 23 years and is regarded by many as one of Australia's greatest judges, as important and influential as **Dixon**. The ninth **Chief Justice**, he presided over a period of significant change in the Australian legal system, his eight years as Chief Justice having been described as among the most exciting and important in the Court's history.

Mason grew up in Sydney, where he attended Sydney Grammar School. His father was a surveyor who urged him to follow in his footsteps; however, Mason preferred to follow in the footsteps of his uncle, a prominent Sydney KC. After serving with the RAAF as a flying officer from 1944 to 1945, he enrolled at the University of Sydney, graduating with first-class honours in both law and arts. Mason was then articled with Clayton Utz & Co in Sydney, where he met his wife Patricia, with whom he has two sons. He also served as an associate to Justice David Roper of the Supreme Court of NSW. He moved to the Sydney Bar in 1951, where he was an unqualified success, becoming one of **Barwick's** favourite junior **counsel**.

Mason's practice was primarily in **equity** and **commercial law**, but he also took on a number of constitutional and appellate cases. After only three years at the Bar, he appeared before the High Court in *R v Davison* (1954), in which he successfully persuaded the Bench that certain sections of the *Bankruptcy Act* 1924 (Cth) invalidly purported to confer **judicial power** upon a registrar of the Bankruptcy Court. Although such appearances involved much hard work, there were occasional moments of levity. In one case, Mason erroneously referred to the English case *Ogdens v Nelson* as *Ogden v Nash*. **Dixon** pointed out the mistake, implying that Mason had (mis)spent his youth reading Ogden Nash.

Perhaps more influential on Mason's development as a lawyer, however, was his unsuccessful attempt to appear in the House of Representatives to defend newspaper owner Raymond Fitzpatrick against charges of **contempt**. The House ordered Fitzpatrick and journalist Frank Browne jailed for three months without allowing their counsel to make submissions on their behalf. The case went to the High Court (*R v Richards; Ex parte Fitzpatrick and Browne* (1955)), with Mason appearing as junior to PD Phillips QC, but the Court declined to interfere with the warrant issued by the House. These events left an indelible impression on Mason's mind: that the protection of individual rights is better left in the hands of judges than it is in the hands of politicians. This view, however, is more evident in his later judgments than in his earlier ones.

During his time at the Bar, Mason also lectured in equity at the University of Sydney Law School from 1959 to 1964; he taught both **Gaudron** and **Gummow**. Mason was appointed **Solicitor-General** for the Commonwealth in 1964, two days after he took silk. In that capacity, he appeared regularly for the Commonwealth in constitutional cases. He was also heavily involved in the development of federal **administrative law**, in particular as a member of the Administrative



Anthony Mason, Justice 1972–87, Chief Justice 1987–95 in academic dress

Review Committee (ARC). The work of the ARC led to the creation of the 'new administrative law': the *Administrative Appeals Tribunal Act* 1975 (Cth); the *Ombudsman Act* 1976 (Cth); the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) (ADJR Act); and the *Freedom of Information Act* 1982 (Cth). In addition, Mason was the leader of the Australian delegation to the UN Commission on International Trade Law from 1966 to 1969; he was its Vice-Chairman in 1968. In 1969, he was appointed to the NSW Court of Appeal—though his tenure in that Court was short-lived because of his elevation to the High Court in 1972.

During Mason's early years on the Court, he and Barwick issued quite a number of **joint judgments**. During this period, Mason was not a particularly adventurous judge. His approach to judicial decision making was relatively conservative, as is evidenced by his judgments in areas such as development of the **common law** and **constitutional interpretation**. An example is *State Government Insurance Commission v Trigwell* (1979), which concerned the development of the law of negligence. While acknowledging a **law-making role** for the courts, Mason said:

> 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.

This may be contrasted with later cases such as ***Trident General Insurance v McNiece*** (1988), ***Burnie Port Authority v General Jones*** (1994), and *Bryan v Maloney* (1995), where Mason adopted a more active judicial **role**.

Mason's earlier, restrictive approach to constitutional interpretation can be seen most clearly in *Miller v TCN Channel Nine* (1986), where he said:

> 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.

Some six years later, however, Mason joined a majority of the Court in the ***Free Speech Cases*** (1992) to find an implied freedom of **political communication** in the Constitution. His views on the value of a **Bill of Rights** have also changed over time; although initially opposed to a Bill of Rights, he has more recently acknowledged that there could be some benefits in such a development.

The development in Mason's judicial approach over the years has been noted by various **commentators.** In an interview on Radio National in 1994, Mason responded to those observations:

> I think that the extent of the change on my part has been somewhat exaggerated … It is inevitable, with the passage of time, that the views of an individual are likely to change. In my case, I have been a judge for 25 years. It would be strange indeed, if all my views remained static over that period of time. If they did, I would regard that as a worthy subject of criticism.

In 1987, Mason was appointed Chief Justice. Shortly afterwards, the Court decided two of the most important cases of Mason's career: ***Cole v Whitfield*** (1988) and ***Mabo*** (1992). In *Cole v Whitfield*, the Court, after 80 years of uncertainty, resolved in a unanimous judgment the problem of the meaning of section 92 of the Constitution (see **Interstate trade and commerce**). This illustrates well one of Mason's key roles on the Court, both as a Justice and as Chief Justice: to provide a central point around which a majority of the Justices could coalesce. Unfortunately, this success was not matched in the area of section 90, where the Court was to remain divided on the limits placed on the states' ability to levy various fees (see **Excise duties**). In *Mabo*, the Court (by a 6:1 majority) overturned nearly 200 years of apparently settled law to recognise that the prior occupation of Australia by its **Aboriginal peoples** could be a source of title to land. *Mabo* and the *Free Speech Cases* were probably the most controversial of the Court's decisions during Mason's time, attracting significant **criticism** as well as considerable praise.

As Chief Justice, Mason became associated with a move away from the strict **legalism** of Dixon's day. Rather than seeing legal reasoning as the simple application of precise rules or formulae, Mason saw **precedent** as 'an exercise in judicial **policy** which calls for an assessment of a variety of factors in which judges balance the need for continuity, consistency and predictability against the competing need for justice, flexibility and rationality'. He took a similar attitude towards constitutional interpretation, again emphasising the importance of policy. Mason was also known for the use of **foreign precedents** in his judgments.

Other notable public law cases on which Mason sat include the ***Tasmanian Dam Case*** (1983), where a majority of the Court adopted a wide approach to the **external affairs power**; ***Dietrich v The Queen*** (1992), concerning the right of an indigent accused to counsel in a criminal trial; and ***Teoh's Case*** (1995), where a majority gave an expanded role to **international law** in domestic law. In addition, in cases such as ***Kioa v West*** (1985), *Australian Broadcasting Tribunal v Bond* (1990), and *A-G (NSW) v Quin* (1990), Mason continued his role in the development of administrative law. In private law, Mason was also influential, as is evidenced by the subsequent adoption by a majority of the Court of his **dissenting judgment** in *Hospital Products v US Surgical Corporation* (1984), concerning **fiduciary obligations**, and by other equity cases such as ***Waltons Stores v Maher*** (1988) and *Baumgartner v Baumgartner* (1987).

Significant procedural changes to the Court's operations also occurred during Mason's tenure as Chief Justice (see **Procedure**). These include the abandonment of wigs and the adoption of a less formal robe (see **Court attire**); an increase in the use of written submissions (see **Argument before the Court**); and the introduction of time limits for special leave arguments (see **Leave to appeal**). Another noteworthy development was Mason's increased engagement with the **media** during his time as Chief Justice. He spoke in public quite often about the role of judges and about some of the more controversial decisions of the Court, taking the view that, if the Court was to be properly understood by the public, it was necessary for judges to play a role in cultivating **public awareness**.

Since leaving the Court, Mason has remained active both judicially and academically. He sat as a Judge of the Supreme Court of Fiji, as President of the Solomon Islands Court of Appeal, and as a long-serving member of the Permanent Court of Arbitration. He currently sits as a Non-Permanent Judge of the Hong Kong Court of Final Appeal, where he sat on the controversial right of abode cases.

In the academic arena, Mason was Chancellor of the University of NSW, a National Fellow at the ANU Research School of Social Sciences, and Chairman of the Advisory Board of the National Institute for Law, Ethics and Public Affairs at Griffith University. He is currently a member of the Advisory Board of the Centre for Comparative Constitutional Studies at the University of Melbourne. Mason's reputation and activities also extend internationally. In 1996–97, he was Arthur Goodhart Professor in Legal Science at Cambridge University, and in 1989 he was the Leon Ladner Lecturer at the Universities of British Columbia and Victoria in Canada. During his career, he has written and published an extraordinary number of **extra-judicial** articles and papers.

Mason has received several honours: a CBE in 1969, a KBE in 1972, and an AC in 1988. He received honorary degrees in law from the Australian National University and University of NSW, and from Sydney, Melbourne, Oxford, Monash,

Griffith, and Deakin Universities. He was made an Honorary Bencher of Lincoln's Inn in England and a Fellow of the Academy of Social Sciences in Australia. Outside the law, Mason's interests are in tennis and gardening, and he maintains close relationships with his children and grandchildren.

Praise for Mason has been frequent since his **retirement**. He is known for his keen intellect and acerbic wit. David Jackson QC, who made frequent appearances before the Court, described Mason's court persona as follows:

> He said relatively little, but was very good at progressing the business of argument. The combination of a commanding intelligence, vast experience, and an ability to convey by facial expression the fact that the shelf-life of an argument had expired made him very effective in that regard. At the same time he was good-humoured and encouraged even the most junior practitioners who had done their work.

Kristen Walker

Further Reading

David Jackson, 'Personalia: Sir Anthony Mason AC, KBE' (1995) 69 *ALJ* 610

Anthony Mason, 'Reflections on the High Court of Australia' (1995) 20 *MULR* 273

Mason Court (6 February 1987 to 20 April 1995). The Mason Court was described by Maurice Byers in 1996 as one of 'the most gifted and courageous High Courts in our history'. Certainly, much was achieved during **Mason's** eight years as **Chief Justice**—a period characterised by a series of landmark decisions evincing not only significant doctrinal development but also broad changes in the approach taken by the Court.

The membership of the Court during Mason's time as Chief Justice was remarkably stable, the only change being the **retirement** of **Wilson** in February 1989 and the **appointment** of **McHugh**. The other members of the Mason Court were **Brennan**, **Deane**, **Dawson**, **Toohey**, and **Gaudron**. The use of the expression 'Mason Court' should not disguise the important contributions of all members of the Bench during this period.

That the Mason Court would be both productive and adventurous was evident almost immediately. Shortly after Mason's appointment as Chief Justice, the Court delivered the unanimous decision in ***Cole v Whitfield*** (1988), bringing to

The Mason Court in 1987. Left to right: Mason, Wilson, Brennan, Dawson, Gaudron, Toohey, and Deane