A TRIBUTE TO THE HON. SIR ANTHONY MASON, AC KBE

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THE MASON COURT & BEYOND CONFERENCE

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Chief Justice of Australia

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Tradition, at least in the High Court, requires reticence in comment about the judicial work of one's colleagues. The dignity of both the individual Justices and the institution is thus ensured. The reasons for judgment must speak for themselves. If they command a concurrence from other members of the Court, the concurrence is on record. If, by reason of principle, or expression, or the desire of each Justice to work to a conclusion in his or her own words, a Justice's reasons for judgment command no concurrence, no extra curial comment is appropriate. The strength of any judgment and the reputation of its author must depend on the cogency of the concepts it expresses and the manner of their expression. As among the members of a small collegiate Court, the ultimate estimate of a judgment must be left to other minds than one's judicial colleagues. The estimate will be made, of course, by the verdict of history. For these reasons, you must hold me excused from framing my tribute to Sir Anthony Mason in terms of particular judgments he has written.

Further, I am bound to say that there is no personality cult in the High Court. The Chief Justice is regarded - in practice, not only in theory - as primus inter pares. As Sir Owen Dixon said when he was sworn into the office of Chief Justice [1] :

" The court is a co-operative institution; the position of the man who presides differs very little from that of any other judge. Perhaps he receives a little more attention from the Bar than he deserves because he announces the conclusions of the court first, but all my judicial experience tells me that a man's influence on the court does not depend on where he sits."

To describe the Court during Sir Anthony Mason's Chief Justiceship as "the Mason Court" is a useful shorthand, but it is not a term which accurately describes the dynamics of a Court constituted by Justices of robust independence of mind, willing and able to give cogent expression to their own views. That said, I am free to frame my tribute to Sir Anthony in a way which reflects my experience of him as a judicial colleague. I would speak of the themes that informed his judgments, his cast of mind and his relationship with the other members of his Court.

His public law judgments reveal a vision of Australia as an independent nation fully equipped to take its place as a member of the international community [2] . Moreover, he has a passion for free expression which is the natural concomitant of a lively and informed intellect. His judgment in Commonwealth v John Fairfax & Sons Ltd [3] contains the memorable and influential observation that "[i]t is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action". In Nationwide News [4] , he described freedom of expression as one of the "fundamental values traditionally protected by the common law".

He was concerned to diminish the possibility of abuse of power in what were once the opaque processes of government. As Solicitor-General for the Commonwealth, he suggested to Mr Nigel Bowen (the then Attorney-General) the establishment of the Commonwealth Administrative Review Committee. He became a member of that Committee which launched what became known as the

Commonwealth administrative law package: the Administrative Appeals Tribunal Act , the Ombudsman Act , the Freedom of Information Act and the Administrative Decisions (Judicial Review) Act . Later, in his judgments, Sir Anthony charted and expanded the remedies of judicial review. But he was conscious of the limitations on judicial power. In the Peko-Wallsend case 5 he reminded us of the limited role of a court reviewing the exercise of an administrative discretion. Speaking of that case in a subsequent speech, he said 6 :

"Judicial review on the merits of administrative decisions would be difficult to reconcile with the separation of powers."

Especially in his later judgments, Sir Anthony manifested a concern at the power of the modern State to overreach the individual. Fastening on the proposition that the power of government is derived from the people governed, he sought jealously to protect the governed from any attempts to exceed or to misuse legitimate power. He concluded his Wilfred Fullagar Memorial Lecture with a declaration of the courts' responsibility 7 :

"Our evolving concept of the democratic process is moving beyond an exclusive emphasis on parliamentary supremacy and majority will. It embraces a notion of responsible government which respects the fundamental rights and dignity of the individual and calls for the observance of procedural fairness in matters affecting the individual. The proper function of the courts is to protect and safeguard this vision of the democratic process."

In considering the validity of an exercise of power, Sir Anthony would not suffer words and formulae to hide the substance. In Cole v Whitfield , the s 92 criterion of operation formula was cast aside with these words 8 :

"In truth the history of the doctrine is an indication of the hazards of seeking certainty of operation of a constitutional guarantee through the medium of an artificial formula. Either the formula is consistently applied and subverts the substance of the guarantee; or an attempt is made to achieve uniformly satisfactory outcomes and the formula becomes uncertain in its application."

In the areas of private law, the Mason judgments were marked by an accurate knowledge of existing authority and a refusal to be bound by a rule of law when, consistently with the judicial method, it could be recast to be more useful or more attuned to contemporary needs. His judgments on waiver and estoppel, on fiduciary relationships, unjust enrichment, negligence and company law have illuminated these fields. It is chiefly in the fields of private law that his avidity for ideas and his search for assistance from other jurisdictions can be detected. For the first time, academic writing was encouraged on cases pending in the High Court. The research capacity of the Court library was strengthened and, more importantly, utilised. In Waltons Stores 9 , for example, within four printed pages you will find references not only to the usual sources but also to cases in Massachusetts and Malaysia, New York and New Zealand as well as a number of academic texts. He was willing to open the door more widely to criminal cases. He was anxious to achieve, is possible, clear solutions of principle to be applied by trial judges and to insist upon conditions conducive to the fairness of criminal trials 10 .

Perhaps the most significant feature of his writings is not in the solutions propounded to particular problems but, rather, in his approach to the roles of precedent and policy. Sir Owen Dixon's "strict and complete legalism", which had served the Court well in shielding it from controversy, could no longer be defended as an adequate explanation of the judicial method. In a final court of appeal, precedent has to pass through informed and critical scrutiny before its authority is fully recognized. Lecturing on "The Use and Abuse of Precedent", Sir Anthony attacked the transformation of precedent from a judicial policy to a state of mind 11 a nd he concluded that the problem of stare decisis is not a problem to be solved automatically by the application of precise rules or formulae. He saw stare decisis 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" 12 . If precedent was not automatically to be applied, policy had an overt role to play. So much was not only accepted but welcomed. He wrote 13 :

" Because policy oriented interpretation exposes underlying values for debate it would enhance the open character of the judicial decision-making process and promote legal reasoning that is more comprehensible and persuasive to society as a whole. This development would lead to a better understanding of constitutional judgments and, no doubt, to a greater capacity and willingness to criticize them. But criticism is a small price to pay if the approach is one that contributes ... to a stronger sense of constitutional awareness on the part of the community and a more accurate appreciation of the issues arising for decision."

This was a wind of change. To be sure, controversy was inevitable. Statements of judicial policy would be perceived by some as though they were statements of political policy. Judicial policy, informed by precedent and disciplined by analogy, confines the scope of discretionary judgment. But the risk of confusion between judicial policy and political policy had to be run in order to guarantee the integrity of the judicial process and to bring the influence of contemporary values to bear on modern expositions of legal principle.

His relationship with other members of the Court fostered its collegiate spirit. Suggestions for changes in a draft judgment were freely given or received with full recognition of the independence and intellectual integrity of other Justices. It is no wonder that the members of the Court remained on the most agreeable terms, though we often divided on issues of the greatest importance. The atmosphere of mutual respect that was thus engendered was drawn on to the full in the writing of the judgment of Cole v Whitfield 14 . This judgment might rightly be considered to stand as testimony to the multiple judicial qualities of Chief Justice Mason. He did not write all of it and, although I do not propose to identify the passages which he did not write, it is easy to identify the most important parts as flowing from his pen. Of 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.

There is another aspect of his time as Chief Justice which, if not controversial, was unusual. He spoke in public about judges and judging. His view has been that, if the Courts were not to be misunderstood by the public, the Judges have a part to play in cultivating public understanding. Of course, this involves a certain risk. Judges cannot easily justify themselves; nor can they conduct an ongoing controversy. The hustings are not only unfamiliar to Judges; they do not have time to mount them. Yet, overall, the innovation was successful, perhaps because he chose the occasion with discrimination while his personality was not submerged in stilted phrases. All of this was carried through with a mischievous twinkle in the eye and a mordant wit which was never designed to offend.

In a period of change, the Court was fortunate to have a Chief Justice who was rooted firmly in the history of the law but who had a vision of the future which allowed for the moulding of old principles to suit new conditions. I borrow from Harlan Stone's tribute to Cardozo in saying 15 :

"He saw in the judicial function the opportunity to practice that creative art by which law is molded to fulfill the needs of a changing social order."

Freedom is secured by the rule of law and the rule of law is secured by a competent and independent judiciary. Our nation's freedom and the rule of law are more firmly fixed by the service which he gave.

1(1952) 85 CLR xii.

2See Victoria v The Commonwealth and Hayden ("the AAP Case ") (1975) 134 CLR 338 at 497; Davis v The Commonwealth (1988) 166 CLR 79 at 94-95; Koowarta v Bjelke Petersen (1982) 153 CLR 168 at 229; Commonwealth v Tasmania. The Tasmanian Dam Case (1983) 158 CLR 1 at 124, 127.

3(1980) 147 CLR 39 at 52.

4 Nationwide News Pty Ltd v Wills (1992) 177 CLR 1 at 31.

5 Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24 at 40-41.

6Blackburn Lecture, "Administrative Review - the Experience of the First Twelve Years", (1989) 18 Federal Law Review 122 at 126.

7"Future Directions in Australian Law", (1987) 13 Monash Law Review 149 at 163.

8(1988) 165 CLR 360 at 402.

9 Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387 at 399-402.

10 Jago v District Court (NSW) (1989) 168 CLR 23; McKinney v The Queen (1991) 171 CLR 468; Dietrich v The Queen (1992) 177 CLR 292.

11(1988) 4 Australian Bar Review 93 at 106.

12(1988) 4 Australian Bar Review 93 at 111.

13"The Role of a Constitutional Court in a Federation", (1986) 16 Federal Law Review 1 at 28.

14(1988) 165 CLR 360.

15(1939) 52 Harvard Law Review 353 at 354.