

## **FAREWELL SPEECH**

Thank you Chief Justice, Ms Katzmann and Mr Macken for your most kind remarks. Only my mother will have failed to detect the exaggerations.

I am honoured by the presence of so many friends inside and outside the law who have walked with me through the past eleven years of my career as a judge, many of you for much longer.

It is a special pleasure to acknowledge the Presidents of the Court of Appeal of Queensland, Victoria and Western Australia. I thank you for your support and friendship as we have toiled in our appointed roles as the enforcers of the High Court's changing orthodoxies. You have had the opportunity last night of meeting my most worthy successor, James Allsop.

The pressures of intermediate appellate litigation in State courts have increased markedly over the decade or so of my term of office. Statutory intricacies have complicated standard processes such as the assessment of damages. They are provoking a spate of judicial review proceedings that seek to overcome caps and restrictions. The sentencing of offenders is now much more than the so called instinctive synthesis it once was. Many appeals are disposed of only to be prolonged by sometimes complex costs disputes flowing from unaccepted settlement offers. Self-represented litigants including those whom the Americans call "frequent filers" press constantly for the reargitation of their usually doomed causes.

Last year the New South Wales Court of Appeal delivered 377 judgments as well as disposing of a large number of leave applications. The Court of Criminal Appeal delivered 373 judgments. The Judges of Appeal are assisted occasionally by judges from the trial Divisions in civil matters, and usually sit with two members of the Common Law Division in criminal matters. Nevertheless, this is remarkable productivity from a small group of very hard working Judges of Appeal, many of whom have already outlasted my judicial longevity.

My successive roles as a solicitor, a barrister at the private and then the public Bar, in law reform, and as an appellate judge in both secular and church courts have given me wonderful opportunities to observe both the constancy and change of the law.

As many of you know, I have written a good deal on the topic of judicial method. Even more than restitution, it is the closest to an intellectual passion for me. All judges have passions, including black letter judges, not that I would use that label for myself.

It is in this context of judicial method that I wish to take this last opportunity to voice some concerns about the unduly inward focus of the Australian legal system in the early twenty first century.

On the occasion of his swearing in as Chief Justice in 1987, Sir Anthony Mason 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." [Please note the plural "courts".]

He continued:

"In stating the common law for Australia, we [and here he was referring to the High Court itself] now place closer attention to the common law as is reflected in the judicial decisions and academic writings of other countries."

In 2007, when exercising its constitutional functions of correcting error and declaring the common law, the High Court signalled a departure from these principles. The topic does not matter, but the profound shift in the rules of judicial engagement does. New and now binding rules of precedent that were ushered in on this occasion declare that the earlier decision of any intermediate appellate court in Australia is now generally binding on all others. So too are the "seriously considered dicta" of a majority of the High Court in any case, regardless of its age. These rules and the High Court's response to this Court of Appeal's erroneous though genuine attempt to develop legal principle go well beyond giving effect to the principle of a unitary common law of Australia. They have been read throughout the country as the assertion of a High Court monopoly in the essential developmental aspect of the common law.

In the same appeal, the High Court resolved an issue of controversial legal principle with a haughty declaration that it did not propose to examine a recently published critique on point emanating from a current English Law Lord or to examine other legal writing which "might offer support" for the legal proposition suggested by the Court of Appeal that the High Court proceeded to reject in categorical terms.

In combination, these discouraging rules of process for inferior courts and this adopted methodology for the High Court itself will have the effect of shutting off much of the oxygen of fresh ideas that would otherwise compete for acceptance in the free market of Australian jurisprudence. In my respectful opinion, decision-making by these blinkered methods will be stunted unnecessarily, whether it proceeds in the particular to the affirmation of older rules of law or to their principled development. If lower courts are excluded from venturing contributions that may push the odd envelope, then the law will be the poorer for it.

In short, my plea to the High Court is to keep other appellate Courts in Australia in the loop.

I wish publicly to thank Chief Justice Gleeson and Chief Justice Spigleman with whom I have been most privileged to serve on this Court. I thank all of my fellow members of the Supreme Court and the judges of other State courts for their cooperation in the administration of justice in this State. To my colleagues on the Court of Appeal I shall miss the stimulation of your intellectual intercourse, your personal support, your differing senses of fun and above all your friendship that will

endure today's separation. Jim, Margaret, Roger, the two Davids, Murray, Ruth, John, Joe, Virginia and the two Peters: thank you.

A court is much more than its judges. Without the assistance of our associates, tipstaves, Registrars, registry and administrative staff and court officers we judges would be quite incapable of administering justice on any terms. I wish to record my deep appreciation for the work of my tipstaves and researchers, especially those currently in office, Danielle Gatehouse and Myra Nikolich, who have done so much to help me in the press of these final months in office. Above all I thank my secretary, associate and friend Meg Orr for her 29 years of unstinting service to me in my various legal endeavours, for her own services to the administration of justice in this State and for her personal support in wider, often painful processes to secure or administer justice within the Anglican Church.

My family is the most important thing in my life. My mother and my late father made considerable sacrifices to bring me to a new land and to provide me with a good education. My children David and Priya give me great satisfaction and joy as I watch them maturing as independent adults and struggling to cope with their difficult parents. Above all, I wish to thank my dear wife Anne, for the constant warmth and excitement she brings to my life, for enabling my career to flourish often at the expense of her own, and for her deep senses of compassion and practical concern for others.

Today I step out of public office and into what I know will be a stimulating new phase of my life. My reasons for retiring as a judge at exactly this stage of my life are complex. Like much involving causation in the law they, are incapable of exhaustive explication. But I know that the time is now right, when I feel the energy to do other things and before what would be for me a judicial sub-prime onset. I almost became a teacher rather than a lawyer, and I am relishing the idea of expounding the true impact of the **Judicature Act** to minds that are eager and open.

There is much that goes on behind the scenes in this building that I will particularly miss, including communal lunches with colleagues, a Judges' Bible study group led by a distinguished theologian, and the judges' yoga class. But for everything there is a season. I am happy to be moving on. Thank you again for the honour you have done me today.