

**THE SUPREME COURT
OF NEW SOUTH WALES
BANCO COURT**

**SPIGELMAN CJ
AND THE JUDGES OF
THE SUPREME COURT**

Friday 30 May 2008

**FAREWELL CEREMONY FOR
THE HONOURABLE JUSTICE MASON AC
UPON THE OCCASION OF HIS RETIREMENT AS A JUDGE
OF THE SUPREME COURT OF NEW SOUTH WALES**

- 1 **SPIGELMAN CJ:** Today marks the culmination of 23 years of public-spirited service to the legal system of this State that has rarely been surpassed. With a degree of personal sacrifice, about which your Honour has never been known to comment, let alone complain, you turned your back on a lucrative career at the commercial bar to become the full-time Chairman of the Law Reform Commission in the middle of 1985.
- 2 From the Law Reform Commission you were appointed in early 1987 as Solicitor-General of this State, where you served for a decade to universal acclaim and, in the light of the contemporary attitude of the High Court to State submissions on constitutional matters, with considerable fortitude. Bloodied but not bowed, your Honour was appointed President of the Court of Appeal on 4 February 1997 and it is the culmination of your service in that post that we commemorate today.
- 3 The long term significance of your term of office will be found in the intellectual leadership you have displayed for the judiciary of this State and the development of the law. Your Honour has delivered judgments of the highest quality and depth of learning over the entire jurisdiction of this Court – torts, contracts, trusts, fiduciary duties, insurance, defamation, environmental law, conflicts, restitution, estoppel, evidence, procedure, criminal law, as well as the full range of statutes which have required

exegesis of the principles of statutory interpretation. By reason of your experience as Solicitor-General you understood the interface between government and the law and the weft and weave of current issues in constitutional law.

- 4 As one who has sat with you often, I can testify to the open mindedness, diligence and courtesy with which you approached each and every hearing and the sense of joy you always brought to the investigation of legal principle, although, over the years, there seemed to be more and more statutes and authority to which the word joy would not be an appropriate description of your Honour's reaction.

- 5 The quality of your judgments, both in terms of exposition of facts and depth of understanding of the law, are widely recognised throughout the State, indeed, throughout Australia. Many of your judgments will stand the test of time though, perhaps regrettably, you will frequently suffer the obscurity of an intermediate appellate judge whose reasoning is accepted, and often enough replicated, in an unsuccessful appeal to the High Court, whose judgment will in the future stand alone as authority for the proposition first articulated with force and clarity by your Honour. This was, for example, the case with your Honour's judgment on litigation funding.ⁱ I also have in mind a case when your Honour sat at first instance, in which your Honour came to a conclusion on a particular basis, rejected by the Court of Appeal, but upheld by the High Court without express reference to your Honour's reasons.ⁱⁱ

- 6 Your Honour delivered a number of important dissenting judgments on matters about which reasonable minds could and did differ and about which your Honour's reasons stand as a full exposition of the minority view which, by reason of the quality of your judgment and the continuance of disputation on issues at the borders of the legal discourse, such as wrongful birth,ⁱⁱⁱ and the award of exemplary damages in equity,^{iv} will

guarantee your Honour a life in academic legal footnotes for many years to come, and, possibly, vindication by a future High Court.

- 7 Beyond cases which are of sufficient difficulty or significance to attract the attention of the High Court, stands a formidable body of judgments by your Honour which have clarified the law in virtually every field of legal discourse and which will guide practitioners and judges in matters of significance in the administration of justice in this State for many years to come. I can only identify a handful of the scores of such judgments encompassing: recovery for psychiatric injury;^v the finality of commercial arbitral awards;^{vi} the concept of notional estate in the *Family Provisions Act*;^{vii} the equitable doctrine of contribution;^{viii} duties owed by employers in labour hire arrangements;^{ix} the ownership of poker machine licences;^x the existence of a contractual duty of good faith;^{xi} abuse of process in criminal proceedings;^{xii} on comity between Australian intermediate appellate courts;^{xiii} the scope of statutory remedies.^{xiv} I could go on for much longer if time permitted.
- 8 Of equal significance is the body of judicial decisions which may not be of broader significance but each of which was of considerable importance to the parties. Whether in civil or criminal appeals and, on some occasions, sitting at first instance, your Honour approached every case with the same high level of dedication and commitment.
- 9 You brought all your formidable intellectual skills to bear on the frequently complex range of specific facts involved in this core of the appellate jurisdiction. These are not the cases which make it to the law reports or excite academic interest. Nevertheless, they constitute the day-in day-out service that the judiciary provides for the fair and effective operation of our economy and society. They require personal empathy, an understanding of individual motives and societal forces, a capacity to bring practicality to bear on legal learning and an ability to identify the relevant legal principles

and apply them to the circumstances of each case. All of which you consummately displayed.

- 10 Your conduct has been characterised by the seriousness with which you approached your tasks, both as a leader of the Court and as a judge. You have addressed with diligence, erudition and sensitivity, on an annual basis, the difficult task of explaining to judges of the District Court precisely how and why the Court of Appeal has exercised its appellate jurisdiction with respect to their judgments.
- 11 You set high standards for the relations between judges and each other, particularly for judges such as yourself towards the top of the judicial hierarchy who have more than the usual range of opportunities to treat others in a manner in which they would not wish to be treated themselves. We have all been chastened by your careful analysis of the importance of civility on the part of appellate courts when explaining why it is that an appeal should be allowed, so that adverse conclusions are expressed without any sense of discourtesy to the judge below and, perhaps even more importantly, without diminishing the status and respect of that court in the public eye. You were always scrupulous in this respect yourself.
- 12 You have always understood the importance of certainty in the law and the role of an intermediate appellate court in observing prior and higher authority, whilst accepting the opportunity, when it arises, to develop the law in accordance with the common law method. You brought to this task a set of ethical principles which found their origin in your religious beliefs and the strength of your faith.
- 13 I hesitate to attribute to you the appellation of that much misused term “reformer”, which has the connotation that there is something wrong. *You* are an improver. You always proceeded on the basis that things can be done better.

- 14 You would, I believe, find comfort in the pithy dictum of an American judge, the polymath Richard Posner, who said that: “only in law is ‘innovative’ a pejorative”^{xv} and in his consequential observation: “American law is too vague, too complicated, too expensive; and it is these things in part because judges are too fond of sterile verbalisms and outmoded distinctions.”^{xvi} That could never be said of your Honour.
- 15 You have always had to hand an unnervingly accurate moral compass to guide your decisions and conduct, both as a judge and in your active role over many years in the Anglican Church.
- 16 It was this moral compass that led you to engage in the movement to encourage the ordination of women in your Church. That moral compass was also, I believe, the foundation of your intellectual interest in the law of restitution, a subject on which you are the co-author of the basic Australian text. In neither case was the strength of your principles capable of being diverted with the answer that that is not the way it has been done before.
- 17 You are perfectly, indeed uniquely, placed to investigate and explain to us all how it has come to pass that Sydney has become a world centre, indeed one of the bastions, of both evangelical Anglican theology and evangelical equity scholarship. Is there a connection?
- 18 To every aspect of your professional life, whether it be the course of administration, the conduct of hearings, the writing of judgments, the interaction with your colleagues, or the topics and content of the numerous addresses you made to public and legal audiences, you manifested a remarkable combination of an intellect of the highest order, an exceptional equanimity of temperament, personal civility bordering on grace and moral strength that is exceedingly rare.
- 19 This remarkable combination of personal characteristics endeared you to everyone with whom you came into contact in your professional life,

including every member of this Court. Your performance of the administrative and pastoral functions of the leader of the Court of Appeal has always been exemplary. Your multiple kindnesses, often at personal expense, to all of the members of the Court, their staff and court employees will never be forgotten. You continued the practice of some, but not all, of your predecessors, of courtesy to practitioners and consultation with all judges of appeal. You took an interest in the activities, concerns, achievements and the comings and goings of the staff of the Judges of Appeal, which was one of many manifestations of your profound concern for other people.

- 20 From the time of my appointment as Chief Justice, the tenth anniversary of which was last Sunday, to this day I relied on your experience, advice and support. I am and will always remain personally profoundly grateful to you. Furthermore, I know I speak on behalf of every judge of this Court and every judge who had the pleasure of serving on this Court during your period as President, when I express our most heartfelt of thanks for your leadership and collegiality in all of our interactions with you as a President, as a colleague and as a friend.
- 21 Your quiet self-confidence, which often appeared self-effacing without any sense of false humility, led you to abjure any need to display your considerable ability or to seek celebration for it. No doubt this occasion, and perhaps these remarks, may be a little uncomfortable for you. However, it is our need not yours to celebrate the extraordinary breadth of your achievement. We, and I, will miss you greatly.
- 22 **MS A KATZMANN, PRESIDENT, BAR ASSOCIATION OF NEW SOUTH WALES:** When rumours of your Honour's impending retirement reached the bar and before gossiping about your replacement started disbelief was quickly followed by dismay. When your Honour told your colleagues on the bench what you were proposing to do a pervasive sense of gloom enveloped them. So it is with mixed feelings that I speak this morning on behalf of the barristers of New South Wales to pay tribute to a long and

distinguished career in the service of the law and the people of New South Wales to wish your Honour well on your retirement from the bench and to send you off in the customary way.

- 23 At your swearing-in with characteristic modesty your Honour cautioned that the air at ceremonial sittings of this Court can become “thick and sweet with flattery so that it may be best not to inhale”. Someone may therefore need to alert me when your Honour starts to turn the same colour as Justice Young. Despite a relatively humble background your Honour was always destined for great things. From your first year at university your friends marked you out for appointment to the bench at the highest level. Why, as the Prime Minister might put it? First, you were a brilliant student but what was particularly noticeable was that you were judicial in your manner. You truly had a judicial temperament and in that regard at least you have not changed. You would argue without losing your temper and you would listen to the arguments of others before reaching a balanced opinion which was quite elusive to others of the same age. You invariably managed to tread the wise middle course. Indeed, it is your Honour’s wisdom and your measured approach to things that perhaps best characterises your life and work with one exception, golf, about which I will say something later.
- 24 Your Honour flirted with the solicitors branch of the profession, working for a short time at Minter Simpson, but the bar was your calling. You spent nine years at the junior bar practising largely in equity, commercial and public law before taking silk. You read with Theo Simos, later Justice Simos, on the tenth floor of Wentworth Chambers and there you remained until 1985 when you took up the position of full time Chairman of the New South Wales Law Reform Commission. It was in February 1987 when your Honour resigned to take up your appointment as the State’s Solicitor General but you continued to serve the Commission on a part-time basis afterwards.

- 25 Your Honour was a great mentor to junior barristers. Once you provided some useful advice to a young woman whom you had generously allowed to use your chambers for six weeks while you were overseas. As your Honour departed alluding to the barrister's need to continuously robe and disrobe your Honour uttered the reassuring words, "Well, if you don't make it at the bar you will have had a lot of practice as a stripper". Fortunately, this young woman went on to enjoy a stellar career at the bar but, as we all know, nothing is assured at the junior bar.
- 26 After nearly ten years as Solicitor General, including a brief legislated absence to enable you to argue against an attempt to restrain the Bishop of Goulburn from ordaining female priests, your Honour took up your present appointment. Someone should have warned the present Attorney that your Honour suffers from the ten year itch. You noted at your swearing-in ceremony that you were looking forward to working as part of a team to tackle the onerous workload of the Court of Appeal. In this respect your Honour has been an unqualified success. The Court's annual reviews show that the Court has performed well against time standards for pending case loads. Importantly, for these attributes encourage productivity, everyone from registry staff to associates, to fellow judges, praises your Honour's leadership, accessibility and willingness to assist, even at the most inconvenient of times.
- 27 Your Honour's judgments reflect your formidable intellect, your compassion and your application. Moreover, under your Honour's leadership the collegiate life of the Court has blossomed. I did say that your Honour had been an unqualified success. There is, however, one sceptic. He shall remain nameless but what he said is worth repeating. It was this: "Some say that the judge is a good administrator but I doubt it, he is too polite".
- 28 Whilst beavering away at your day job remarkably your Honour always managed to find the time for other things, for reading, for writing, for speaking, for the church, for the family and many other things beside.

Your Honour's academic writings include your co-authorship of the text, "The Australian Law of Restitution" and for many years the Probate and Succession Practice and many papers and lectures on such topics as succession, the rule of law, legal reasoning, equity, the somewhat esoteric subject of judicial humour and what one commentator has described as the interface between the law, religion and morality.

- 29 Your Honour also has an interest in legal history. You were a foundation member of the Council of the Francis Forbes Society for Australian and Legal History and currently serve as the organisation's senior vice-president. In 2005 you accepted appointment as a non-resident member of the Fiji Supreme Court and in 2005 you were appointed a member of the appellate tribunal of the Anglican Church. It is a mark of the esteem in which your Honour is held by the bar that you were invited to speak at the bench and bar dinner in 2000 and to give the prestigious Maurice Byers Lecture in 2004. In 2003 your Honour received Australia's top civil award, the Companion of the Order of Australia, for your contribution to the law and legal scholarship to the judicial system in New South Wales, to the Anglican Church and to the community. The University of Sydney recognised your multiple achievements by awarding you an Honorary Doctorate of Laws in 2005.
- 30 Notwithstanding all of this, as I mentioned earlier your Honour finds the time to play golf, a sport which your Honour took up relatively late but with all the zeal of a convert. In 2002 you captained the bench and bar versus solicitors golf tournament to its usual inglorious defeat, although I am reliably informed that there is no causal connection between your Honour's stewardship and the outcome. Perhaps this was merely a case where the risk did not come home. However, on one memorable occasion when playing against other barristers and judges in the Ken Hall Classic, named after your Honour's esteemed former clerk, your Honour did make a material contribution to a win entitling you and your partner, Dennis Wheelahan, "the odd couple", each to six months custody of the trophy that bears both your names. Your Honour is very proud of your golfing

achievements. Six months to the day you had someone call on Wheelahan who had had the trophy first to assert your rights. When a record of another of your Honour's victories appeared in the sports section of a newspaper you made sure the article was posted in a place where it was easily seen by anyone who came into your chambers.

- 31 Last year a portrait of your Honour's predecessor, Justice Michael Kirby, painted in the style of Goya, was unveiled in the President's Court. There is a blank wall immediately across from it crying out to be filled. Your Honour is the obvious subject. However, a more modern artistic style is appropriate I think. Given your Honour's many and varied activities perhaps something in the style of the Cubists would be suitable.
- 32 Your Honour is a prodigious worker and you were not averse to mucking down with the puisne judges when the need arose. One of those instances was mentioned by the Chief Justice. It was the case where your Honour's reasons were not followed in the Court of Appeal which upheld a notice of contention but where your Honour's views were preferred in the High Court. Usually your Honour's views were shared by the other members of the Court in any particular case. Not so on one memorable occasion when your Honour stood up for flexibility, dare I say modernity, in the remedies that equity could offer. On that occasion in your Honour's powerful dissent in *Harris v Digital Pulse Pty Limited* your Honour sanctioned an award of exemplary damages in an equity suit, unprecedented in this country, describing it as "legitimate progeny sired by judicial method from the stock of the common law of Australia" which, as your Honour pointed out, included the equitable line yet to some, steeped in the old traditions, drawing on a remedy developed in tort law to redress an equitable wrong was a heresy, perhaps just as shocking as the ordination of women priests.
- 33 My favourite judgment of your Honour's, however, is not any of those that have been mentioned. It is a judgment in a common law suit. The case concerned a claim in contract and tort brought by a quantity surveyor

against four joint venturers who were engaged in the development of land situated in the western suburbs of Sydney. Justice Meagher delivered the leading judgment. His Honour described the parties in the following way: “The appellant in this case is a quantity surveyor against whom his Honour, Judge Rolfe, awarded a verdict of some \$665,025 in favour of the four respondents who together constituted a joint venture engaged in the development of certain lands said to be situated at Bossley Park, wherever that is”. Your Honour’s judgment, as usual, was eloquent. However, it lacked your Honour’s customary restraint. It began:

“I have had the benefit of reading in draft the reasons of Justice Meagher. I also have the benefit of having access to a street directory. Accordingly, I do not share his Honour’s customary doubts about the location of well known Sydney suburbs lying to the west of Darling Point which sit cheek by jowl with his Honour’s customary lack of doubts about most other matters. A useful resource for those who need to locate Bossley Park is www.travelmate.dot.com.au. By clicking on Mapmaker one can find easy ways of getting from, say, Darling Point to that suburb.”

The judgment also contains the details of the link to that map.

- 34 “Otherwise”, your Honour continued, “I agree with Justice Meagher in the dismissal of this appeal substantially for the reasons he gives”.
- 35 Your Honour has been in preparation for this day for some time. At the 2000 bench and bar dinner your Honour adverted to the Court’s internal pre-retirement classes. You told us that the topics on offer included subjects as diverse as the impact of Latin on the interpretative theories of Derrida concerning good faith, car spotting, insurance of art collections, Thomas Becket’s influence on causation theory and mesothelioma cases, why God waited until the start of the third millennium before revealing his truth exclusively to Sydney Anglicans, whether the death of all men would increase the prospects of female ordination in the Diocese of Sydney and how to get more cars on the Balmain Peninsula, wherever that is.

36 Your Honour has made an enormous contribution to the law and to the State as an advocate, an academic, a writer, a law reformer and a judge. Your Honour's special contribution, however, I venture to suggest, lies in your personal qualities, notably your unfailing courtesy and your even temper. Your Honour is universally regarded as a good man, a man of compassion and understanding, a man with regard for each individual. Only the other day I happened to look at some remarks of Sir Robert McGarry which seem apposite, especially as I understand that your Honour is keen to follow in Sir Robert's footsteps by producing your own Antipodean version of his Miscellany at Law. Sir Robert used to tell his students that the most important person in the court room is the litigant who is going to lose. Later on he explained:

"Naturally, he will usually not know this until the case is at an end but when the end comes will he go away feeling that he has had a fair run and a full hearing? One of the important duties of the courts is to send away defeated litigants who feel no justifiable sense of injustice in the judicial process. Justice in full takes time but often it is time well spent."

37 By this and many other measures your Honour has been a good judge. You have given so much of your life to others. It is about time you started to look out for yourself. On behalf of the Bar of New South Wales I wish you every happiness in this next journey and for my own part as a graduate of the University of New South Wales I am pleased that you have chosen to spend some time there.

38 **MR H MACKEN, ACTING PRESIDENT, LAW SOCIETY OF NEW SOUTH WALES:** It is indeed a great privilege and a pleasure to add my remarks to the growing valedictions that have gone before. It is a little known fact that my great aunt, Marjorie Macken, married your Honour's uncle, Harold Mason, at a time that pre-dates the great depression so I speak today not so much the unworthy servant of 22,000 solicitors but rather as a long lost brother. Brilliance is a family trait. Evidence of your Honour's intellectual brilliance has been highlighted by a former tippy who swore that your rather electrically charged hairstyle was the result of your

brain constantly emitting high voltage currents. In fact, he wondered if in the throes of deep thought your Honour would indeed electrocute yourself every time you scratched your head, a head that could charge a mobile phone, now that's useful.

39 The task of preparing for this speech today was not so much anticipating that the preceding speakers would poach the highlights of your Honour's illustrious career, which of course they did, but more about determining what aspects of your career I should focus upon given the abundance of anecdotal and published material both by your Honour and about your Honour. Born in Scotland, your Honour grew up in Concord West with your parents, Ted and Margaret, and your younger sister, Louise. Your Honour attended the local primary school and then won a scholarship to the Kings School where you subsequently became dux of that school. From all accounts that scholarship was hard won, as your Honour was called back to complete the interview for Kings because you hadn't properly met all the board members. The story goes that you were missing a sock when you hurriedly presented yourself yet again. As you have recounted on several occasions, you will always be extremely grateful to the men who waited for a little boy. This generosity of time has become a trademark of your Honour's service ever since.

40 I am in the dark as to just where or when your Honour developed a passion for the law as neither your late father, Ted, a merchant seaman, nor your mother, Margaret, would appear to have paved the way. Whether it was your Honour's intellectual drive, a calling to service or simply a desire for classy company, whatever the reason the world is a far better place for your having chosen to do law. You graduated from the University of Sydney with a Bachelor of Arts degree and a Bachelor of Laws with first class honours. You then completed a Master of Laws at the University of London. You were admitted as a solicitor in 1970. Your Honour's time as a solicitor was sadly short-lived as you were called to the bar in 1972. In the late seventies when your Honour was in private practice you invited your current associate, Meg Orr, to fill in as a secretary on a three month

trial; twenty-nine years later this remarkable woman is still reputed to be on trial and perhaps could be described as long suffering rather than long serving although time in your company could never be deemed suffering?

41 Describing your Honour as a real people person Meg has obviously relished your wonderful sense of humour, your joy in mentoring others and your demonstrable kindness and care. She remarked that never in her twenty-nine years had she witnessed a litigant upset as your Honour always listened attentively and handled them so well that they usually ended up thanking you when they lost. On one occasion a self-represented litigant who had sued a council over a development issue and lost her appeal at the Full Bench in the Land and Environment Court brought her files in milk crates to the Court of Appeal and insisted that she was going 'all the way to the High Court'. Rather than take the easy option of just asking her to leave your Honour took the time to gently explain that her arguments were unlikely to fall within the grounds of appeal required for special leave. It turns out on this occasion you were correct.

42 Further insights into your Honour's character have been provided by your first tipstaff as President of the New South Wales Court of Appeal, Lachlan Wolfers. Upon his farewell Lachlan included a note of thanks to your Honour and a list of all the cases he believed had been wrongly decided. He says:

"It was with great delight that I received over the ensuing years at somewhat regular intervals copies of High Court judgments in which a few of your judgments were overturned, each time marked with a simple 'with compliments' slip and a note saying that I might find the enclosed interesting reading. As time passes I suspect the number of cases where I recall this happened will increase, not in a dissimilar way to how your golfing prowess improves after the nineteenth tee"

A very unkind remark considering your recent form at Killara.

43 On a more serious note your Honour's influence on Lachlan's professional career has been immense. He told us, "First and foremost you taught me

to love the law. Secondly, you taught me that happiness is not drawn from material possessions and how success may be achieved through hard work, dedication to one's chosen field and most of all respect for others." This latter sentiment was the focus of your 2007 paper to the JCA conference entitled "Throwing Stones, a Cost Benefit Analysis of Judges being offensive to each other".

44 Philip Kimpton, who unfortunately didn't heed your Honour's caution and became an international lawyer, was your Honour's tipstaff in 2002. He highlighted to us your enjoyment of the quirky bits of legal trivia, the older the better, and your delight in finding antiquated words to insert in judgments such as "portmanteau" used in your decision in *Victims Compensation Fund v Brown* in 2002. I looked it up and couldn't find it anywhere but apparently it's there.

45 This particular case perhaps made it on a Lachlan Wolfer's subsequent hit list.

46 Every person in my office contacted with regard to today's ceremony spoke about you with the utmost professional respect and admiration as a friend, a mentor and as an inspiration. One of the hallmarks of your Honour's career has been your steadfast service and commitment to your staff, the profession and people. A devoted husband to Anne and father to David and Prya your family has always been your highest priority. As a consequence your Honour built a career around maintaining regular hours, forsaking life as a QC at the bar for the chairmanship of the New South Wales Law Reform Commission prior to your time on the bench. Your Honour would always make it home for the family dinner even if that meant leaving midway through a meeting regardless of the bewildered faces you left behind. It seems, however, that as a bit of a night owl your Honour never really adjusted to Anne's penchant for being an early riser, a trait that became particularly apparent when in the course of one of your Honour's many official acting duties you were obliged to attend a 4 am dawn service. Your Honour got there but I'm told it was not a good look.

47 From an early age your Honour was a believer and strongly guided by Christian morals and ideals, a calling that has underpinned your whole approach to life and your way of living. Attending Sunday school at Holy Trinity in Concord West your Honour went on to lead the parish youth fellowship and like Henry Venn, the eighteenth century founder of the influential evangelical Clapham sect within the Anglican Church, your Honour found particular comfort in bible study groups. As a member of the Sydney Synod from 1975 to 2001, as has been mentioned, your Honour was very vocal, particularly championing the entitlement of women to be ordained as priests and you would be no doubt delighted with the ordination of Archdeacon K Goldsworthy this month, the first woman in Australia to become a bishop.

48 The awarding of the Companion of the Order of Australia in 2003 is a mark of the man that you are. At the time Bishop Glenn Davies of the Sydney Diocese expressed delight with your commendation and was reported as saying your Honour was an outstanding Christian who made a great contribution to the Anglican Church, nice words from Bishop Glenn Davies. Those remarks have been echoed by your Honour's tippy of 1999, Penny Hood, who has described you as a man of integrity and courage. She says:

“We hosted lunch meetings for the movement of the ordination of women in chambers and while he received a lot of opposition within the denomination for his stance his persistence was admirable and is a testament to his strength of conviction and his beliefs.”

49 Penny's following accolades encapsulate many of the virtues we've acknowledged here today. She's described your Honour as a dedicated, diligent, funny, patient, humble, courageous, warm, intelligent family minded Christian man. Your Honour has maintained close links with the circle of friends you made during your university days including Supreme Court Judges George Palmer and Peter Hall, recently retired College of

Law principal lecturer Les Handler and the co-author of Handler and Mason Succession Law and Practice in New South Wales, and solicitor Brian Hamer, all of whom have had the highest praise and regard for your Honour both as a friend and a colleague.

50 I know that your mother, Margaret, is extremely proud of your Honour's achievements and has kept all your commissions, well, apart from those that you gave away to your tipstaff. While your children, David and Prya, have not followed your Honour's legal inclinations you should be looking forward to sumptuous feasts or at least practice banquets in retirement now that Prya has become an apprentice chef although perhaps not. I use the word 'retirement' advisedly as by all accounts your Honour will be perhaps busier in retirement than on the bench. I understand you've been appointed a visiting professor at the University of New South Wales and you'll be doing some teaching and finishing for the Australian Miscellany of Law in conjunction with former Federal Court Judge Leslie Katz. Your Honour's work as an appellant judge in this Court has been erudite, perceptive, intellectually rigorous and critical to the enhancing of the public perception of justice in New South Wales. It's also been a profound sacrifice on your part. A man who is gregarious and sociable with a desire to engage with others it may have been something of a lonely and isolated existence.

51 Your calling to the ranks of academia and the imparting of knowledge to those around you will provide a tremendous outlet for your charm, grace, intellect and your highly developed social sensitivities. It is clearly a loss for the legal profession but there is no doubt that there is a profound gain for those who are blessed enough to come in contact with you in your future pursuits. You are one of the most wonderful people who have graced these rooms, you will be sorely missed. We owe our deep-seated thanks from the solicitors of New South Wales and we wish you all the very best for your future callings. On behalf of the Law Society of New South Wales I wish to convey my best wishes to your Honour for a

fulfilling, rewarding and joyous career change fully sustained by your faith, family and friends.

- 52 **MASON P:** 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 Courts 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.
- 53 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 re-agitation of their usually doomed causes.
- 54 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.

55 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.

56 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”.

57 In 2007, when exercising its constitutional functions of correcting error and declaring the common law, the High Court signalled a departure from these principles.

58 The topic does not matter but the profound shift in the rules of judicial engagement does in my opinion. 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.

59 In the same appeal the High Court resolved an issue of controversial legal principle with the 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, in my opinion, 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 poorer for it. In short, a plea for intermediate courts of appeal to be kept in the loop.

60 I wish publicly to thank Chief Justice Gleeson and Chief Justice Spigelman 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 co-operation 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 very much.

61 A court is much more than it 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 twenty-nine 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.

- 62 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 Prynne, 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.
- 63 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.
- 64 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.

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- i *Fostif Pty Ltd v Campbells Cash and Carry Pty Ltd* [2005] NSWCA 83; (2005) 63 NSWLR 203.
 - ii *Paliflex Pty Ltd v Chief Commissioner of State Revenue (NSW)* [2003] HCA 65; (2003) 219 CLR 325.
 - iii *Harrington v Stephens* [2004] NSWCA 93; (2004) 59 NSWLR 694.
 - iv *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10; (2003) 56 NSWLR 298.
 - v *Kavanagh v Akhtar* (1998) 45 NSWLR 588; *Morgan v Tame* [2000] NSWCA 121; (2000) 49 NSWLR 21.
 - vi *Raguz v Sullivan* [2000] NSWCA 240; (2000) 50 NSWLR 236.
 - vii *Kavalee v Burbidge* (1998) 43 NSWLR 422.
 - viii *Cockburn v GIO Finance Ltd (No 2)* [2001] NSWCA 177; (2001) 51 NSWLR 624.
 - ix *TNT Australia Pty Ltd v Christie* [2003] NSWCA 47; (2003) 65 NSWLR 1.
 - x *Jabetin Pty Ltd v Liquor Administration Board* [2005] NSWCA 92; (2005) 63 NSWLR 602.
 - xi *CGU Workers Compensation (NSW) Ltd v Garcia* [2007] NSWCA 193; [2007] 14 ANZ Ins Cas 61-746.
 - xii *Adler v Director of Public Prosecutions (Cth)* [2004] NSWCCA 352; (2004) 149 A Crim R 378.
 - xiii *Tillman v Attorney General (NSW)* [2007] NSWCA 327.
 - xiv *Akron Securities v Iliffe* (1997) 41 NSWLR 353.
 - xv See *United States v McKinney* 919 F 2d 405 (7th Cir 1990) at 421 per Posner J.
 - xvi *Ibid* p423.