

# More to the Heydon address than reported

The address by Justice Heydon (then of the NSW Court of Appeal now of the High Court) to the *Quadrant* dinner in October 2002 caused some controversy during the December/January period, particularly following the announcement of Justice Heydon's appointment to the High Court.

Whilst on that subject, the NT Bar welcomes Justice Heydon's appointment to the High Court. There can be no doubt that his Honour's obvious legal, intellectual and personal credentials will be of great benefit to Australia's highest court.

## personalities

Returning to Justice Heydon's *Quadrant* address, as is its bent, the media coverage of it dealt almost exclusively with the personalities involved rather than the central issues.

Thus, the extract published in *The Australian* newspaper focused on the comments Justice Heydon made about the views and decisions of Sir Owen Dixon, Sir Anthony Mason and the late Mr Lionel Murphy while they were members of the High Court.

As is often the case, this controversy distracted attention from the theme of the address which was: *Judicial activism and the death of the rule of law*.

## full text

The full text (14 pages) of the address has now been published in the January/February issue of *Quadrant* magazine.

It contains an interesting analysis of the differing functions of judges and politicians and of the relative capacities of the courts, the executive and the legislature to make or change the law.

In relation to the experience and capacities of politicians and judges, Justice Heydon opines that:

*Australian politicians*

*collectively have an immense experience of life and of the almost infinitely various points of view within the population. Their whole careers rest on understanding the desires and needs of individual citizens. Judges on the other hand, are lawyers with a relatively confined experience of life: it may have been intense, it may have involved exposure to many conflicts, it may have given insights into human suffering under acute stress, but it is quite narrow compared to the experience of the members of the legislature.*

This is a generalisation, so it will obviously both overstate and understate the experience of individual politicians and judges.

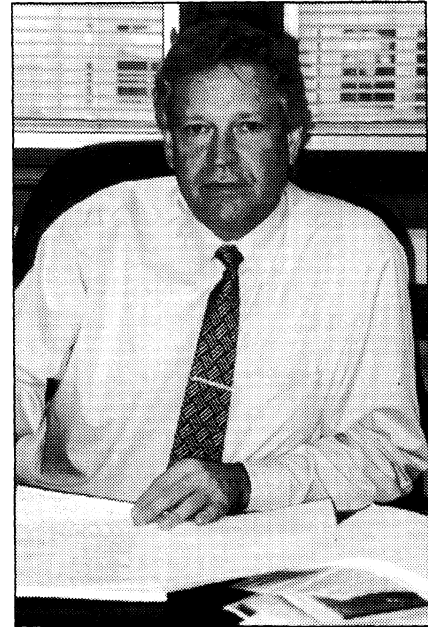
However, as a generalisation, having personally had experience as both a politician and a lawyer, I believe it is a reasonably accurate assessment.

Justice Heydon gives as examples of the High Court having made decisions that have variously had significant political, financial, economic or social consequences: *Mabo No 2*, *Wik*, *Dietrich and Brodie*.

## uncertainty

He also points to the uncertainty created in the law of negligence by the endless dicta about the concept of proximity during the late 1980s and early 1990s – a concept that has now been put aside in recent judgments.

Whilst any summary of the address will obviously not do justice to it, the



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following extract from the conclusion provides a flavour:

*The more the courts freely change the law, the more the public will come to view their function as political; the more they would rightly be open to vigorous and direct public attack on political grounds; and the greater will be the demand for public hearings into the politics of judicial candidates before appointment and greater control over judicial behaviour after appointment. So far as these demands were met, judicial independence would decline, and such attraction as judicial office presently has would be diminished.*

*None of these outcomes would be desirable. All would multiply the threats to the rule of law which judicial activism created.*

Not everyone will agree with the views expressed by Justice Heydon, but I suggest that those who are interested in the debate should read the *Quadrant* article and not be distracted by the media treatment of it. ①