

not follow the conservative approach stemming from *Mabo* but should look to contemporary practices. This, Young argues, is a more reasoned approach to tradition in native title, taking into account the nature of the rights sought, and following the more liberal position of comparative jurisdictions.

Dr Yong has offered an in-depth discussion and sharp critique of Australian native title doctrine. The use of the comparative approach highlights the conservativeness of the Australian courts, and provides excellent background of the law in Canada, New Zealand and America as well as Australian case law. *The Trouble with Tradition* is strongly argued, and logically structured; the analysis and discussion is brought together in Part V, to a synthesising of the comparative approach in offering new directions in the Australian native title doctrine. This book is not for the faint-hearted. It is both comprehensive and technical. However, the clarity of writing, and direct style, makes it accessible. Dr Young has written a book that offers a comprehensive overview of Australian case law, dealing with native title, from major cases, such as *Mabo* and *Yorta Yorta* to cases such as *Yanner*,⁴ which concerned native title as a defence. Academics and students alike will find this book useful, both for its original thesis, and as an introduction to the current position of land rights law in all major jurisdictions, and native title in Australia.

*Lucy de Vreeze**

The Mason Papers: Selected articles and speeches by Sir Anthony Mason, AC KBE

Geoffrey Lindell (ed)

The Federation Press, Sydney, 2007, p 442, A\$85.00 (hardcover)

The Mason Papers: Selected articles and speeches by Sir Anthony Mason, AC KBE is a selection of the legal writings of one of Australia's eminent judicial minds. The judicial career of The Honourable Sir Anthony Mason, AC KBE, spans five decades. He was admitted to the New South Wales Bar in 1951 and was appointed as a QC and Commonwealth Solicitor-General in 1964. Sir Anthony became a Justice of the New South Wales Court of Appeal in 1969, a Justice of the High Court of Australia in 1972 and its Chief Justice in 1987, retiring in 1995. He has several honorary doctorates, has held a professorship at Oxford

⁴ *Yanner v Eaton* (1999) 201 CLR 351.

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University and was Chancellor of the University of New South Wales from 1994-1999. In addition, Sir Anthony is a Knight Commander of the Order of the British Empire and Companion of the Order of Australia.

Sir Anthony's writings have made a prodigious contribution to Australia's legal landscape, a contribution that merits close consideration by students of law, academics and politicians. The daunting task in selecting only 27 works from the body of speeches, interviews and writings of Sir Anthony was made easier through Geoffrey Lindell's consultation with his subject, providing an imprimatur over the choices. Topics covered in the book include Australian public law, international law; contract law and equity; and judicial administration, operation and procedure. The writings are at their most interesting and insightful when Sir Anthony turns his attention to the future of Australian law. His views are perhaps most influential when he examines the model for an Australian Republic (that was proposed by the Constitutional Convention of 1998) and when he considers the adoption of a Bill of Rights for Australia.

During debate on the Republic leading up to the November 1999 referendum Sir Anthony expressed misgivings over the proposed approach. He questioned the wisdom of vesting power to the Prime Minister to dismiss the President without notice, which he saw as presenting a 'Who will shoot first scenario' in any constitutional crisis, and considered that dismissal should require not just the endorsement of the House of Representatives, but also ratification by the Senate. Sir Anthony observed that although a President's reserve powers would still lie in convention, his or her powers of dismissal of the Prime Minister would lie in constitutional law and, therefore, would be exposed to judicial review. He also noted the potential for individual States to maintain their links with the Crown after the formation of the Republic, leaving open the possibility of a State monarchy under a Commonwealth Republic. Despite these misgivings, Sir Anthony supported the proposed model and felt that fine-tuning could occur once the Republic was in place. This is a surprising viewpoint. Australia's history of hesitation regarding constitutional reform highlights the potential for difficulty in correcting nascent flaws in the model for a Republic. Australia will return to the question of the Republic at some juncture and those responsible for shaping Australia's future would do well to revisit Sir Anthony's past misgivings, as well as to avoid the need for subsequent constitutional reform.

In 1988, while Chief Justice of the High Court, Sir Anthony tackled another key question - whether Australia should adopt a Bill of Rights. He saw fundamental human rights as a 'potent rallying cry across the world' that had acquired the status of a pre-requisite in modern

constitutional reform processes. Sir Anthony's address sought to balance the arguments for and against a 'constitutionally entrenched' Bill of Rights. He saw the arguments against a Bill of Rights as including: that the judicial review of legislation contrary to the Bill of Rights would be contentious and undemocratic; that judges would become lawmakers, arbiters required to determine public policy (e.g. free speech versus pornography); that judges would be required to determine political questions (e.g. civil liberties and abortion rights); and that a Bill of Rights was not needed (despite instances where the observance of fundamental human rights provided a measure of protection to the individual beyond that of the common law).

Arguments in favour of a Bill of Rights focused on: deterring the Parliament from abrogating the rule of law by creating a constitutional barrier to the misuse of parliamentary power; protection of the rights of individuals and minorities from the power of the majority in Parliament and the machinery of government; and the systemic beneficial influence on society derived from the recognition of and respect for fundamental human rights. Sir Anthony concluded by heralding the significant impact that a Bill of Rights would have on the law and judiciary. He considered that constitutional law issues associated with the Bill of Rights would grow to dominate judicial proceedings and procedures not only for the High Court, but also for other courts. Sir Anthony observed that such a change would be a reflection of the current 'gulf that divides the universe of fundamental rights from the traditional common law' indicating that new legal approaches and attitudes, techniques and rules would need to evolve to fully implement a Bill of Rights. There is popular support in Australia for the adoption of a Bill of Rights and implementation is occurring at the State level in several jurisdictions. Sir Anthony's views highlight the need for debate to look beyond the benefits of fundamental human rights to Australian society, to consider also the likely risks consequent to the adoption of a Bill of Rights.

The writings are clear, interesting and insightful and illustrate well the benefit of judicious, judicial debate on the law and the key legal questions before Australian society. The layout of this book suits the reader with a general understanding of legal issues who wishes to jump to an interesting article, interview or address. Those seeking underlying themes in Sir Anthony's work will need to work harder, read deeper and take the time to consider each work in context. To assist in further research each article is accompanied by editorial notes pointing to additional readings.

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