

# Bench and Bar Dinner - May 1995

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*Sir Anthony addresses the assembled masses.*



*(l to r) Susan Crennan QC, President of the Australian Bar Association, Chief Justice Gleeson AC, Murray Tobias QC.*

## May

May was a busy month. On 8 May the Honourable Justice G.F. Fitzgerald, AC, Chief Justice of Queensland, gave a graduation speech in which he remarked on the process of judicial selection:

“Both the judicial responsibility to produce a unique Australian jurisprudence and the values and policy choices involved in judicial decisions draw attention to the narrow social group from which judges - especially High Court and other appellate judges - are drawn. While judges represent the community as a whole, and do not, and should not, represent any section of the community, it is a legitimate criticism that the judiciary is drawn from an extremely narrow group and hence its opinions and perspectives on contemporary community values and attitudes are distorted and limited.

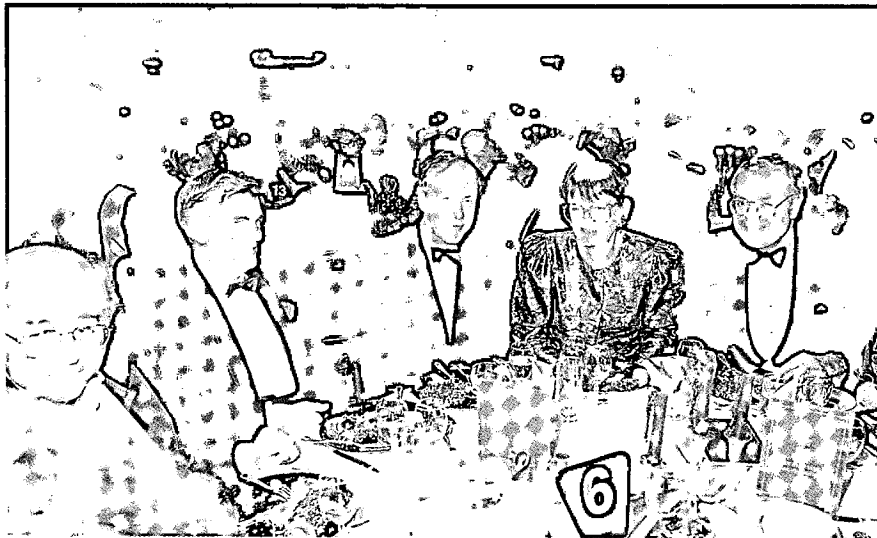
The conventional response to any discussion of judicial appointments is that merit must be the sole criterion. On the assumption that factors such as politics, religion, progressive or conservative social views, and personal or regional allegiances are immaterial, it is difficult to see what other position could be adopted. However, while capacity to perform judicial duties, integrity, etcetera, must determine who is eligible to be appointed to the bench, merit is a surprisingly slippery and subjective consideration and sometimes merely a code-word for membership of the extremely conservative legal establishment. The opposition which the late Justice Lionel Murphy attracted on his appointment to the High Court was not related to the difficulties he experienced towards the end of his life but to the establishment perception that he lacked the necessary legal ability or “merit”. In retrospect, he has been one of the most important members of the High Court in the last 25 years; some other High Court judges in that period who were acknowledged legal technicians have already been almost forgotten.

Further, the definition of merit is critically dependent on one’s perception of what makes a good judge: most lawyers would agree that it is necessary for a judge to understand the overall structure of the common law, know or be able to ascertain and comprehend the detailed rules formulated by other judges, and reason by processes of inductive and deductive logic to conclusions suitable for the decision of particular disputes, such a course exposes a judicial decision-maker to the experience and wisdom manifest in prior decisions, and many consider that that exhausts the judicial function. Others, myself included, consider that such an approach also perpetuates any errors, injustices or conflicts with modern Australian values which prior decisions involve, and that it is essential to constantly test current principles against the ideal of justice.

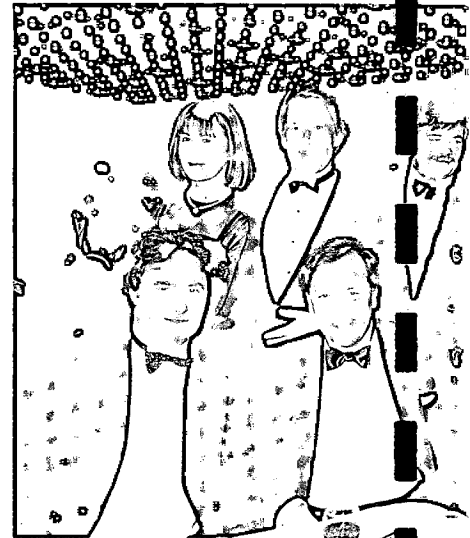
Of course, justice is not a mono-dimensional concept, concerned only with the rights and obligations of the immediate parties before the court. Other factors, such as certainty and predictability in the law and the potential effect of a decision upon other persons, must also be considered.

It is in both the community’s and the judiciary’s interests that there be greater acceptance of the reality of judicial power and of the importance of judicial appointments. Community support for the fundamental doctrine of judicial independence requires that the judiciary not exhaust its “political capital” but maintain public confidence. Judges, especially appellate judges, influence the development of the law and through it society, by either maintaining the status quo or contributing to a fairer society, and so helping to empower those who are disadvantaged. Both the community and the judiciary need to openly acknowledge that, as Professor Martha Minow put it in “Justice Engendered” (1987) *Harvard Law Review*, 10 at p 93, “The judiciary [is] a critical arena for demands of

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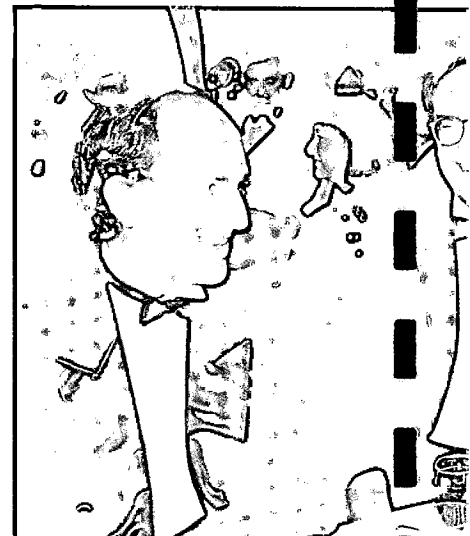
(l to r) Ian Barker QC, Justice McLelland, Prof Michael Chesterman, Justice Mathews, John McCarthy QC



(l to r) (top row) Madeleine Gilmour, Dennis Malcolm Gracie (bottom row) Thos Hodg



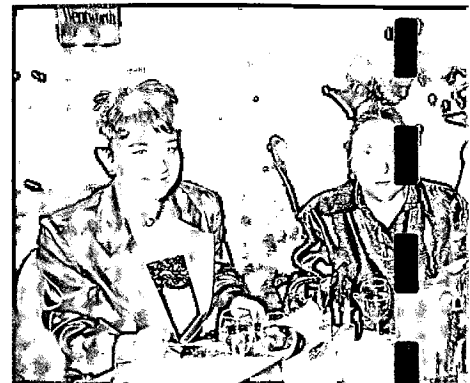
(l to r) Nick Cowdery QC, Trish Kavanagh, Acting Justice Barr, Anna Katzmann



Neil Williams, Mr Justice M



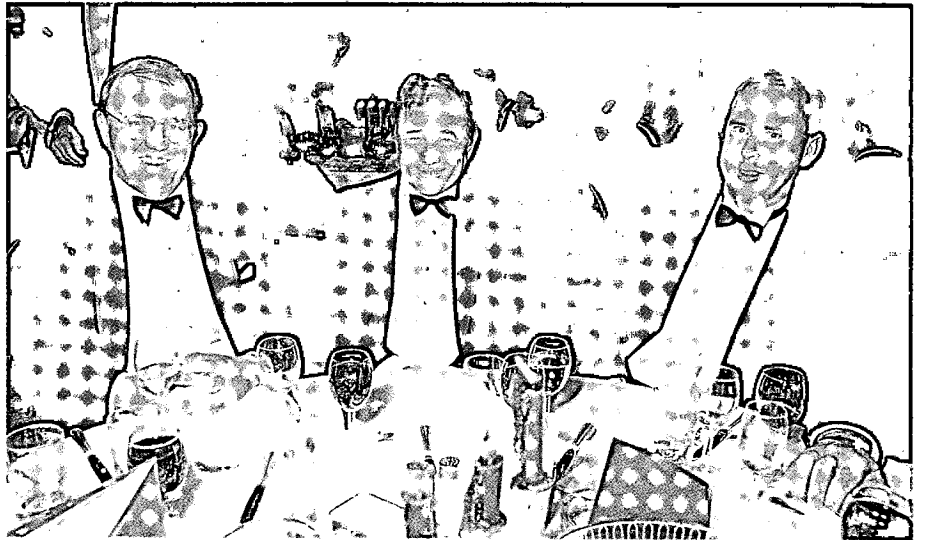
(l to r) Justice Gummow, Keith Mason QC, Justice Handley, Tony Meagher SC



(l to r) Babette Smith, Ch David Jacks QC



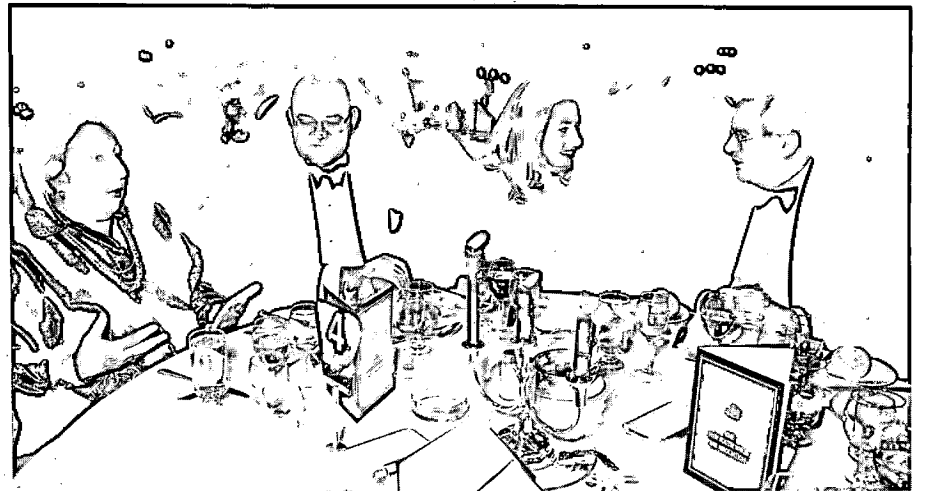
O'Dowd QC, James Dupree, Sam Gullotta  
on, Peter King, Chris Hoy, Richard Bell



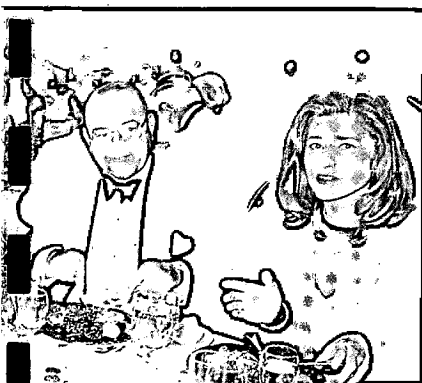
(l to r) Larry King SC, Roger Gyles QC, Brett Shields



ugh, Richard McHugh



(l to r) Chief Judge Pearlman AM, David Jackson QC, Chrissa Loukas,  
Attorney-General Jeff Shaw QC



f Judge Pearlman AM,  
Chrissa Loukas



(l to r) David O'Dowd, Fabian Gleeson, Gary Coleman, Paddy Bergin

# *Bench and Bar Dinner - May 1995*

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*(l to r) Stephen Gageler, Robert Macfarlan QC, Justice Beazley*



*(l to r) Malcolm Holmes QC, David Pritchard, Andrew Bell - the secret handshake?*



*Brian Skinner and Stephen Odgers*



*(l to r) Chester Porter QC, John Coombs QC, Rodney Parker QC*

inclusion". Those who are unrepresented or under-represented in the judiciary are entitled to insist that judges at least understand their concerns and take their perspectives into account."

The 1995 Bench and Bar Dinner took place on 26 May\*. Sir Anthony Mason AC, KBE was the guest of honour. Jackson QC was Mr. Senior. In the course of his speech, in remarking on Sir Anthony's career, he referred to two early cases in which Sir Anthony appeared as Ken Asprey QC's junior: "The second case held illegal and void a loan by a company to assist the purchase of its own shares. The Asprey-Mason team was again entirely unencumbered by merit, and was again successful.

"The latter case ... had two enduring effects. One relates purely to the law ... the second derives from the name of the case, *Dressy Frocks Pty Limited -v- Bock*. It is a consequence of the "cab rank" rule that one cannot choose one's cases - much less their names - but the name "Dressy Frocks" is really awful, simpering and Liberace-like - like living at "Beauty Point". And I have wondered whether it was the memory of that case which inspired the alacrity with which the High Court, on his taking office as Chief Justice, abandoned wigs and gowns and adopted instead the present severe garb, the distressed Christian Brothers look.

\* The video is available from the Bar Association Library.

Many of us felt some sympathy for the High Court Justices when they decided to change from the former wig and gown. Judges' salaries, even on the High Court, are not high. And it was thought that the flooding of the wig market might depress the prices they would otherwise have received for these quite expensive items. But, by a remarkable coincidence, the much more numerous Family Court, on almost the same day, decided to take up wearing wigs and gowns. The seven Justices of the High Court had no trouble disposing of their wigs, all 35 of them."

Ms. Junior, Chrissa Loukas, noted:

"Sir Anthony Mason in a judicial career spanning some 26 years, has managed not to give any offence in the gender department. Some may wonder how our guest of honour has found it so easy. I know our President, resplendent, tantalising even in his masculine wiles, is wondering."

Sir Anthony described the ephemeral nature of both the commencement of his career and its conclusion:

"My career has ended in much the same way as it began as an image in the floating world. I started at the Bar as a floater on the top floor of the old Denman Chambers. Later I moved into the subterranean basement of that building and then I floated again to the surface in the caretaker's bathroom on the top floor. By the time I arrived there the bar had been removed. Presently I float between the 18th and 19th levels of the Law Courts building, spending most of my time in a room that is described as the visiting Registrar's room on the 18th level. I had visions of a more glorious dénouement to my judicial career: a grass roots movement calling for an amendment to section 72 of the Constitution enabling me to continue on as Chief Justice after I reached the age of 70. I even contemplated commencing an action in the High Court seeking a declaration that my old commission which carried an appointment for life was not impliedly revoked by my subsequent appointment as Chief Justice, and I might say that argument has as much going for it as a number of arguments that have succeeded in the High Court over my dissent. The argument, if successful, would have entailed the invalidity of Mr. Justice Gummow's appointment and involved his ignominious relocation back to the Federal Court, but I was moved by more gentlemanly instincts."

## June

In June the Bar Council passed a resolution condemning all forms of sex harassment, discrimination on the grounds of sex or sexual preference and sexist behaviour of any kind and noted that such conduct may be held to be professional misconduct or unsatisfactory professional conduct within the meaning of the Legal Profession Act 1987 as amended.



*Chrissa Loukas*



*Sir Anthony Mason AC, KBE*

## July

In July the Bar Association published the results of a survey conducted of women barristers which disclosed that unwelcome sexual advances and comments from barristers (59%) and solicitors (39%) had been experienced, mostly while the respondents were at the Bar. The survey had been prompted by the release of a NSW Government report of

Gender Bias and the Law which identified discriminatory practices across the legal profession. Both the Bar Association and the Law Society of New South Wales are continuing to pursue strategies to improve the situation. The matter is also being considered by the Law Council of Australia.

There was then a quiet period until October.

## October

On 4 October the Hon. Justice Madgwick was sworn in as a Justice of both the Federal Court and the Industrial Relations Court of Australia.

On 9 October the Hon. Justice J.R. Lehane was sworn in as a judge of the Federal Court.

On the 16th, Peter Hidden Q.C. was sworn in as a judge of the Supreme Court. In his speech, he referred to his time as a Public Defender as being undoubtedly the most satisfying period of his professional life. "There I had access to serious trial and appellate work which would rarely have been available to me in private practice. I enjoyed the friendship and support of colleagues on the floor who, between them, possessed an unrivalled mastery of the criminal law, and I had the benefit of a high standard of instruction from the in-house solicitors of the Legal Aid Commission and a number of dedicated private solicitors who accepted Legal Aid work

on assignment from the Commission. ... I was gratified to read in the judgments of this Court in the Milat stay application, both at first instance and on appeal, a public acknowledgement of the high standard of representation in criminal matters afforded by the Public Defenders and the solicitors of the Legal Aid Commission."

## November

The Hon. Sir William Deane A.C., K.B.E. retired from the High Court on 10 November 1995 to take up his position as Governor-General of Australia when the incumbent's term of office concludes.

His successor has not been announced. All likely candidates are deflecting subtle and not-so-subtle cross-examination on their prospects in suitably po-faced manner.

## December

A new President, a new Bar Council.

1996 looms.

It all starts again... or continues? ...



*Mr Justice Hidden*



*Sir William Deane AC, KBE*