

Inside the Mason Court Revolution: The High Court of Australia Transformed by Jason L Pierce

By Paul Slattery QC

This book brings together a summary of over 80 interviews, conducted between 1997 and 2000, with other research on the Mason Court and its legacy. The interviewees are identified by name, and include Sir Anthony Mason and other members of the 'Mason High Court'. However, interviews are quoted anonymously throughout the book, which distracts slightly from the content, since the reader ends up wondering who made each of the statements, especially those that are particularly forthright.

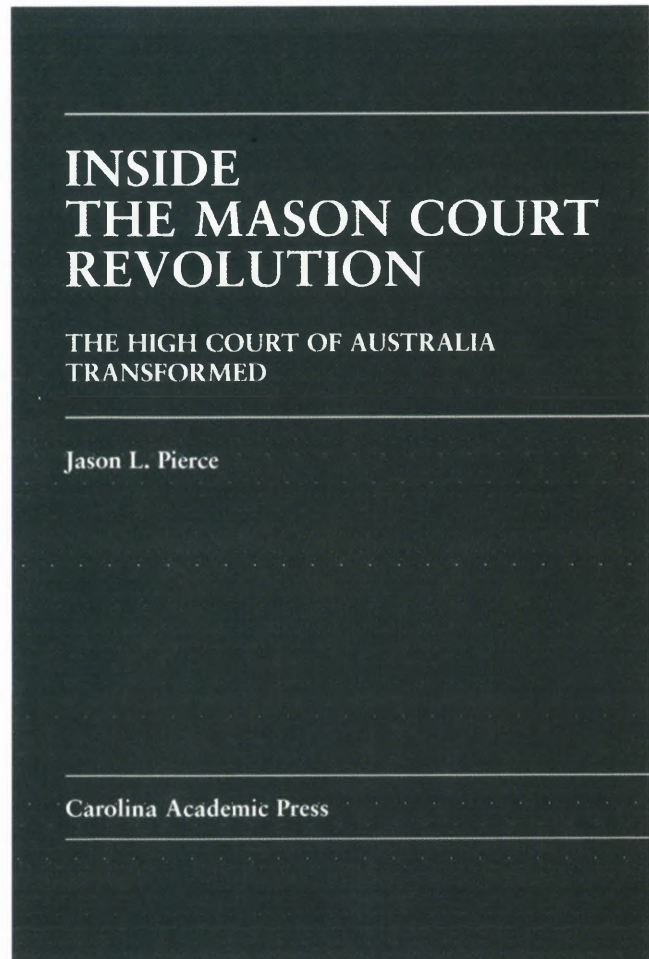
Pierce argues that, between the mid-1980s and mid-1990s, the High Court of Australia brought about a number of changes to substantive areas of private and public law, and supplanted its own orthodox judicial role with a significantly different vision. He poses two key questions: what precipitated this transformation, and why did the change occur when it did?

He starts by tracing the history of Australia's federation from disparate colonies, and of the Australian legal system – in particular, the High Court – within the Australian constitutional framework. He identifies the inheritance from a number of influences into the Australian legal culture of the notion of judicial orthodoxy, and argues that this orthodoxy 'dominated the high Court and its jurisprudence for much of the 20th century'. This tendency to formalism reflected the development of early (non-indigenous) Australian culture from its British roots.

After discussing the role of judicial orthodoxy in the Australian legal hierarchy and, in particular, the role of Sir Owen Dixon and the prevailing view of strict legalism, Pierce contends that the Mason Court supplanted that orthodoxy in four ways.

The first he describes as a shift towards expressing the priority of law as being fairness and justice; the second as moving the aim of appellate litigation from formalism and dispute resolution towards a public model, in which the 'High Court litigation is conceived as both a legal and political exercise'.

The third is the change in the way that judges interact with legal and political systems: a more politicised role enabled



judges to peak out publicly on legal and political issues.

The fourth relates to the change in the Mason Court workload, with an emphasis on constitutional cases and an increased interest in cases that related to 'protecting the individual from the state'.

Pierce analyses the various methods of legal reasoning that were applied both before and during the time of the Mason High Court. His analysis is that the Mason High Court challenged the approach of legal formalism, which had dominated the Court for much of the 20th century, and particularly the Court's commitment to the doctrine of *stare decisis*.

He suggests that these events were slow to occur in Australia compared with, for example, similar developments in other countries. He does not analyse the timing of the events from an historical perspective, taking into account >>

the difference in time and context between, for example, the establishment of the US Supreme Court and the Australian High Court. Viewed in their proper historical context, these changes were not 'slow in coming' at all, but were arguably well-advanced.

In Pierce's view, the Mason High Court injected into legal formalism something that he defines as legal realism:

'Changes came in a number of areas ... and depicts a judiciary moving from a pre-legal realist stage to a realist stage; from a judicial role that sees legal reasoning in mechanical terms to one that recognises discretion and choice.'

Pierce identifies two especially fundamental matters. First, as choice and discretion are unavoidable, judges should be forthright in acknowledging actual influences on their legal reasoning, including community values. Second, a shift occurred in relation to implied rights jurisprudence, the attitude to the doctrine of precedent and to the use of other sources to inform constitutional debate.

Pierce analyses the reasons why the transformation occurred and then what he describes as recent retreats from the role, drawing largely on his interviewees' perceptions and opinions. This approach has its limits, as the interviewees do not give consistent reasons for why the transformation occurred when it did. Pierce is left to conclude that 'their

collective account suggests an interplay of individual political and institutional factors to bring about the transformation. No single variable can explain it.'

Pierce very thoroughly examines and analyses the various appointments to the High Court bench and, from time to time, the political aspect of such appointments, particularly the 'balance' that apparently must be maintained between appointments from various states of the Commonwealth.

In Chapter 8 he assesses the future of the High Court's judicial role transformation. Pierce concludes that, although not as influential in recent years, the Mason Court's transformation of the judicial role was significant; while 'it may lay dormant in the near term ... it is now available as an intellectual fount and reference point for future lawyers and judges'.

Pierce has thoroughly researched his subject and, for that reason, this book is a worthwhile addition to any library. However, its thesis that the Mason Court radically changed the High Court's role over-simplifies an event in Australia's judicial history that was more evolution than 'revolution'.

Paul Slattery QC is based at the Anthony Mason Chambers in Adelaide. **PHONE** 08 8228 0000

EMAIL pslattery@anthonymasonchambers.com.au

Watching Brief: Reflections on Human Rights, Law and Justice **by Julian Burnside QC**

By Tilda Hum

Justice is a vague concept. While the general public often links the law with justice, those involved in the legal system often come to realise that the two are not as closely aligned as we would wish.

In *Watching Brief*, distinguished barrister and Australian Lawyers Alliance member, Julian Burnside QC, explores the notion of what is fair and just through the prism of contemporary Australian issues and personal experiences. He begins by reflecting on his school days and early years as a fledging lawyer, furiously reading the biographies of esteemed lawyers before him. Sir John Young's advice continues to resonate for him: 'In a solicitor's office, and in a barrister's

chambers, every matter is important to someone.'

The book's most passionate and disturbing section discusses Australia's treatment of asylum-seekers. After canvassing international human rights instruments, it becomes apparent to the reader that Australia is in clear breach of its obligations as an international citizen, but also lacks the compassion and empathy that a civilised democratic country with means to assist others should have. Insights are also given into the daily life and torment of refugees languishing in detention, with affidavits revealing the kinds of physical and emotional conditions that are generally considered characteristic of barbaric dictators or military