

# SIR MAURICE BYERS CENTENNARY CONFERENCE<sup>1</sup>

## Closing Remarks

Ten days shy of what would have been his 100<sup>th</sup> birthday, today's conference has afforded us the opportunity to recollect and reflect upon the magnificent life of that most "benign" "Colossus of Constitutional Law",<sup>2</sup> Sir Maurice Byers.

And 'colossus' he was, as the previous speakers have testified to. No area of the law remained beyond his mastery, although it is his almost Svengali-like power over constitutional law for which he is most renown. To this day he remains Australia's most successful Solicitor-General appearing before the High Court. He has been described as the finest lawyer never to have been appointed to that arena.<sup>3</sup>

For the humble son of a hotel keeper, his achievements have left an indelible imprint on the fabric of the Australian Constitution: witness *Victoria v Commonwealth*, *Murphyores*, *Koowarta*, the *Tasmanian Dams Case*, *ACTV*, *Wik* and *Kable*, to name but a few among the very many.

Such were his talents that he was appointed as Solicitor-General in December 1973 by the Whitlam Government, and again in December 1980 by the Fraser Government, a feat he ascribed to his "own powers of endurance".<sup>4</sup> Both former Prime Ministers remained friends with Sir Maurice thereafter.

This is unsurprising because his unparalleled reputation as an advocate is rivalled only by his reputation as a gentleman. He was described as having "the gift of urbane charm; he was suave without being slippery. He was of a kindly disposition and had a gently mischievous sense of humour."<sup>5</sup>

As to that inimitable sense of humour, in a speech given at the Bench and Bar dinner on 17 June 1994, held in his honour, Sir Maurice regaled the audience with

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<sup>1</sup> Paper presented at NSW Bar Association conference, Maurice Byers Centenary Conference, Sydney, 1 November 2017.

<sup>2</sup> T Huges, "Obituary – Sir Maurice Byers Colussus of Constitutional Law", *The Australian*, 26 January 1999.

<sup>3</sup> "Pickwickian figure helped shaped the nation", *The Sydney Morning Herald*, 19 January 1999, in N Perram and R Pepper (eds), *The Byers Lectures 2000-2012*, The Federation Press, 2012, 304-306.

<sup>4</sup> Sir Maurice Byers CBE QC, *Bar Association Annual Report 1982*, address in reply on the occasion of his receiving the accolade of Knighthood, in N Perram and R Pepper (eds), *The Byers Lectures 2000-2012*, The Federation Press, 2012, 280-283.

<sup>5</sup> T Huges, "Obituary – Sir Maurice Byers Colussus of Constitutional Law", *The Australian*, 26 January 1999.

the rumour that Jordan CJ “was believed to be possessed of an unrivalled collection of literary pornography.” And moreover, that “Sir Samuel Griffith was widely thought to be similarly disposed.” He went on to add, however, that in respect of Sir Harry Gibbs “the rumour did not apply”.

The geniality, generosity and decency of Sir Maurice was a recurrent theme when Perram J and I were contacting the contributing authors during the course of editing *The Byers Lectures 2000-2012*.<sup>6</sup> Those who were fortunate enough to have met, appeared with, or even against, Sir Maurice, praised him in equal measure for his personal qualities and his professional abilities. And those who had not had the pleasure and privilege of his acquaintance lamented their loss.

After listening to the distinguished speakers this afternoon, it seems only fitting that Sir Maurice is afforded the opportunity of speaking for himself.

Given the number of judges present today, it is most apposite that Sir Maurice’s observations on the judiciary - a public duty he characterised as akin to a “bed of nails”<sup>7</sup> - are briefly touched upon.

For his was a very progressive view of the bench. Leaving aside gentle chidings about “the Judges” that “flaunt themselves in scarlet and ermine and in sweeping, shoulder length wigs” with some, at least, prone to “in their leisure hours...indulge in a luxurious sense of finery by donning a Chancellor’s robes or the resplendent uniforms of an Admiral of the Fleet or of a Vice-Marshal of the Air Force”,<sup>8</sup> his cutting reference to “the great ocean of judicial ignorance”<sup>9</sup>, or his description of judges who “were brutal without being jocular and one or two who were jocular

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<sup>6</sup> N Perram and R Pepper (eds), *The Byers Lectures 2000-2012*, The Federation Press, 2012, 304-306.

<sup>7</sup> Sir Maurice Byers, “From the Other Side of the Bar Table: an Advocate’s View of the Judiciary”, in N Perram and R Pepper (eds), *The Byers Lectures 2000-2012*, The Federation Press, 2012, 286.

<sup>8</sup> Sir Maurice Byers CBE QC, *Bar Association Annual Report 1982*, address in reply on the occasion of his receiving the accolade of Knighthood, in N Perram and R Pepper (eds), *The Byers Lectures 2000-2012*, The Federation Press, 2012, 281.

<sup>9</sup> Sir Maurice Byers, “A Living National Treasure”, speech given at the Bench and Bar dinner on 17 June 1994, in N Perram and R Pepper (eds), *The Byers Lectures 2000-2012*, The Federation Press, 2012, 295.

<sup>9</sup> Sir Maurice Byers, “From the Other Side of the Bar Table: an Advocate’s View of the Judiciary”, in N Perram and R Pepper (eds), *The Byers Lectures 2000-2012*, The Federation Press, 2012, 296.

without being brutal”,<sup>10</sup> Sir Maurice, more than most, acutely understood the essentially symbiotic relationship between barrister and bench in advancing the law.<sup>11</sup>

He described it thus:<sup>12</sup>

“The advocate and the judge...are locked together in a mutual labour: the making of the common law. Occasionally that partnership may be distasteful to both.”

Unlike many - then or now - Sir Maurice did not eschew the concept of “judge-made law”. On the contrary, he embraced its “flexibility”, and celebrated those within whom the responsibility of ensuring its organic nature endured was vested. He said:<sup>13</sup>

“The common law is contingent and temporary because it is embodied in the judges. Their judgments are not only discourses, they are also the law”, he opined.<sup>14</sup> Complaints of “unpredictability” were rejected. “Too assiduous a respect for what has been said in the past cripples the law’s development... Age does not necessarily merit respect.”

Such an approach was not to be characterised as an undemocratic usurpation of Parliamentary process, rather it was, according to him, and quoting Sir Anthony Mason to whom he referred as “a fresh and welcome voice”, part of the curial oversight and protection of “responsible government which respects the fundamental rights and dignity of the individual and calls for observance of procedural fairness in matters affecting the individual”<sup>15</sup>.

This was no more or less an early iteration of the principle of legality.

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<sup>10</sup> Sir Maurice Byers, “A Living National Treasure”, speech given at the Bench and Bar dinner on 17 June 1994, in N Perram and R Pepper (eds), *The Byers Lectures 2000-2012*, The Federation Press, 2012, 296.

<sup>11</sup> Sir Maurice Byers, “A Living National Treasure”, speech given at the Bench and Bar dinner on 17 June 1994, in N Perram and R Pepper (eds), *The Byers Lectures 2000-2012*, The Federation Press, 2012, 295.

<sup>12</sup> Sir Maurice Byers, “From the Other Side of the Bar Table: an Advocate’s View of the Judiciary”, in N Perram and R Pepper (eds), *The Byers Lectures 2000-2012*, The Federation Press, 2012, 284.

<sup>13</sup> Above, 286.

<sup>14</sup> Above, 286.

<sup>15</sup> Above, 287.

Nevertheless, he cautioned, change, even if “inevitable”, ought to be gradual. The doctrine of *stare decisis* retained an important function in the evolution of the law. Furthermore, judges were required to “appreciate what they were doing and what the consequences of their decisions may be for their society.”<sup>16</sup>

Another example of Sir Maurice’s modernity with respect to what he called the “other side of the bar table” was his exhortation to avoid politicising the courts, and in particular, the High Court, in order to maintain confidence in the judiciary and, as a corollary, in the integrity of the democratic process. “The Court should not be exposed to this hazard,” he properly, if not presciently, pronounced. A plea that, to our collective detriment, continues to be ignored.

Let me conclude with Sir Maurice’s own words. In a written piece entitled, “From the Other Side of the Bar Table: an Advocate’s View of the Judiciary”, he stated the following:<sup>17</sup>

“What I have written is rambling to a degree and severely practical. That is how advocates do regard the judiciary. But both sides of the Bar table would, I hope, share the view that the nourishment of the law requires hard thinking, courtesy and straight talking from them all and the community is entitled to no less.”

This was a guiding philosophy for Sir Maurice, who, by every account, dispensed considerably more, but never any less.

He once observed that he had “been lucky – something worth a thousand abilities.”<sup>18</sup>

There is can be no doubt that Sir Maurice possessed at least “a thousand abilities”. But it is we who are lucky to have shared so many of them.

Thank you.

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<sup>16</sup> Above, 288.

<sup>17</sup> Above, 291.

<sup>18</sup> Sir Maurice Byers, “A Living National Treasure”, speech given at the Bench and Bar dinner on 17 June 1994, contained in N Perram and R Pepper (eds), *The Byers Lectures 2000-2012*, The Federation Press, 2012, 298.