

# A Hero of the NSW Bar

*Memorial Service for Sir Maurice Byers CBE QC*

*St Mary's Cathedral*

*8 February 1999*

*On 12 March the 1997 Silks presented the Bar Association with a portrait of Sir Maurice painted by Gary Shead. The photographs illustrating this memorial were taken at the presentation.*

## **Tribute by Sir Anthony Mason AC KBE**

**I**N MY MIND'S EYE the image I have of Maurice Byers goes back to the first occasion on which I encountered him. He was appearing for one of a number of tenants in a case at Central in which the landlord was seeking to recover possession of city premises. As an articled clerk I was instructing a particularly stolid and obdurate counsel for another tenant. I was fascinated by Maurice's performance. So much so that I endeavoured to persuade my master solicitor to brief him - to no avail, my advocacy being distinctly inferior to that of Maurice.

As the years passed, our paths crossed in a fortuitous fashion, as happens at the Bar. Sometimes I appeared as his junior and at other times against him. Working with him, as many here will know, was a wonderful experience. His good humour and goodwill were legendary. He always had his own ideas about the way a case should be conducted. Like all good counsel, he nourished a healthy scepticism of judges. Infallibility was a characteristic of the Pope and not one that his Holiness condescended to share with judges.

Maurice was both a distinctive personality and a distinctive advocate. His background was not that of a typical barrister. His father was both a hotel keeper and a bookmaker at a time when the punter did not enjoy a playing field as level as it is today. Much of Maurice's early life was spent living in the family accommodation in the Great Southern Hotel and the Forbes Hotel in the heart of the city. Despite the vicissitudes of fortune caused by the Great Depression, he had a very happy childhood. To his friends in later life it would come as

no surprise to learn that, as a schoolboy, he was no lean and hungry Cassius. In fact, he was tubby, giving promise of the outline with which we became so familiar. Even then his good nature shielded him from the taunts that might otherwise have come his way.

Educated at St Aloysius College, he was continuously top of his class. He graduated from the Sydney Law School with First Class Honours. Despite that, he lacked connections with the legal profession. He had to make his own way at the Bar, relying on work from less fashionable and smaller firms of solicitors whose clients needed a clever but responsible counsel to argue a legal point when very often that was all that there was to go on.

He developed a reputation for what in those days was called ingenuity but these days is called creativity. In a High Court judgment Sir Owen Dixon described one of his arguments as 'ingenious', in a context in which the comment was intended as a tribute.

On one occasion when I accused him of presenting a Jesuitical argument - an accusation for which, in this Church, I must pray forgiveness - his reply was 'People only call a man Jesuitical when they are beaten in argument.' For good measure, he told me that I was a casuist.

Later, with his reputation established, he was sought after by the larger firms, then often described as 'well respected', a term no longer in vogue, at least in its application to the modern lawyer.

More than any other counsel he appeared in odd cases. On one occasion in 1962 Rod Meagher and I appeared with him in a case involving interference by a lessor with an exiguous area 4 feet wide in front of a

dry-cleaning counter in the Wynyard Ramp. The application for an interlocutory injunction took place over 5 days, in which every possible point of law was argued and some others besides. Jacobs J delivered a lengthy judgment in which he developed a new legal concept – ‘the apparent accommodation’ – a concept of which Maurice was critical. Maurice was looking forward to arguing the case in the Privy Council. Unfortunately for counsel, the case was settled. At about that time and thereafter he appeared in a number of cases in the Privy Council.

It was his appointment as Solicitor-General that marked him out as the leading constitutional counsel of his generation. He had always been keenly interested in constitutional law. It was a field that suited his talents, as he quickly demonstrated. While he was Solicitor-General and afterwards, his successful arguments in the High Court changed the Australian constitutional landscape.

He was, without any doubt, the most successful Australian Solicitor-General of modern times and, with the possible exception of Sir Robert Garran, of all time, a fact that was implicitly recognised by an editorial in the *Sydney Morning Herald*. That ‘journal of record’, to use Tom Hughes’ standard description of the newspaper in defamation cases, noted that he won 88% of the cases in which he appeared as Solicitor-General. That a newspaper editorial should be devoted to his retirement as Solicitor-General was a remarkable recognition of his renown.

But his impact on the Australian Constitution was not confined to his work as Solicitor-General, groundbreaking though that was. The decisions are so well known that I can pass them by. After he returned to the Bar his success continued unabated, notably in the aboriginal land rights cases *Mabo* and *Wik*, *ACT TV* and *Kable*. *Kable*, in particular, was a great victory because he succeeded in the face of the very considerable physical disability that was already afflicting him.

His outstanding performances were in the High Court. There his exhibition of the conversational style of advocacy was to be seen in full flower. Unlike the author, the argument itself was lean and spare. He conveyed the impression, quite deliberately, that he was talking to the cognoscenti. A favourite tactic, in referring to authority, was to say ‘It will be very well



Lady Byers

known to your Honours’. Often I had never heard of the case and I was comforted to find that I was not alone in my ignorance. What he had to say was always directed to the critical grey area of the case, unlike some counsel who were strong on the approaches but weak once they embarked upon the grey area. He believed that the sooner one got to the critical point, the better. He never forgot that advocacy is, or should be, an exercise in persuasion.

In many ways his advocacy was a projection of his personality and inner character. Genial, tolerant and humorous, rational and articulate, he radiated sincerity and integrity. Discussion with Maurice on an argument in court could be as enjoyable as conversation with him out of court.

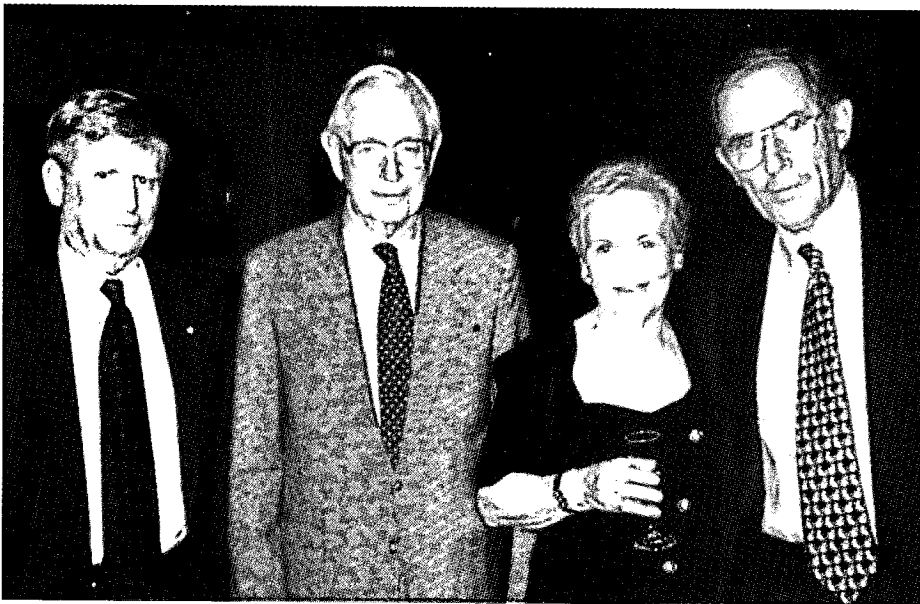
That feature of Maurice’s personality was the essence of his advocacy and of his capacity to deal with Sir Garfield Barwick when he was Chief Justice. Appearance before Sir Garfield was the ultimate test of counsel’s agility of mind and tenacity, qualities that Maurice possessed in abundance. More than that, he had wit and humour. And Sir Garfield lacked his usual sureness in the presence of someone who employed wit and humour. Maurice’s tactic of countering the Barwick broadsword with an endless series of disarming chuckles

was extremely effective.

His personality and style marked him out from other lawyers. Yet in an indefinable way, he was the personification of the very qualities we would want to associate with the leader of the Bar. By his achievements he demonstrated the very influential and, at times, decisive contribution that counsel can make, not only to the outcome of cases, but also to the shaping of the law.

In some ways it was unfortunate that he was not appointed to the High Court, a position he would have filled with great distinction. But he had the satisfaction, perhaps the greater satisfaction, of knowing that he may well have achieved more than any Australian judge of his generation. That success came about not because, as he once modestly and irreverently suggested, he simply put the ball in the scrum and let the politics of the High Court take over, but because he was from the very beginning to the very end a counsel who put his heart and soul as well as his mind into the cause of his client. He passionately believed in justice, due process, liberty and the rights of the individual. That is why he was the counsel par excellence for *Wik*.

His companionship was one of the great joys of life.



The Hon A M Gleeson AC, Chief Justice of Australia, The Hon. Sir Anthony Mason AC KBE, Lady Byers and The Hon Justice L J Priestley JA

Conversation and discussion with him, no matter on what subject, was something always eagerly to be awaited. The realisation invariably matched the expectation. For all of us here, and especially for his family, his departure is an irreplaceable loss. Many of us will recall with gratitude his warm friendship and generous assistance. In my own case, his friendship and unobtrusive but unfailing assistance was a pillar of support at all times. He was singularly fortunate. He was sustained in his lifetime, as he will be hereafter, by the warm love and affection of Lady Patricia, his children Barbara, Mark and Peter, and by his wider family.

#### **Tribute by Chief Justice Murray Gleeson**

Down through the ages the Church has prayed endlessly

for the souls of the faithful departed; asking eternal rest, perpetual light, and peace.

Most of us, when we join that company, will be judged more obviously departed than faithful. But every now and then someone dies whose life was one of conspicuous fidelity; someone who was an example of what was meant by those familiar biblical metaphors: the salt of the earth; a light; a city set on a mountain top that cannot be hidden.

Maurice Byers was such a person.

He was, of course, an immensely talented lawyer. However, talented lawyers are probably not the country's greatest need. Maurice Byers was a great deal more than that.

Mark Byers has just told us that his father's wish as to what should be said of him after he died was simply that it should be said that he loved his family. That is nothing more than the plain, unvarnished truth. It would not have escaped Maurice's notice, however, that, in the place where he was heading, it would also constitute extremely effective advocacy.

Maurice Byers' faithfulness infused his life. Like his learning, his faith was one he carried lightly. He understood, and acted upon, the essence of the principles he had learned from childhood. These principles were manifest in his love of his family, the breadth and the warmth of his friendships, his generosity of mind and spirit, the liberality of his professional practice, and the integrity and passion for justice which he brought to the public life of the nation during his years as Commonwealth Solicitor-General.

Maurice's family do not need to be reminded of what a good man he was.

However, the legal profession, and the public, should be reminded that he was not just a skilled legal practitioner; he was a man who hungered, and thirsted, after justice.

I do not mean to suggest that he despised the skills of his profession. On the contrary, he was well aware that they were necessary to achieve his purposes. But he never regarded them as sufficient.

Maurice Byers belonged to the legal profession before some people gained the insight that it would serve the public better if it were a business. In his day, advertisement and self-promotion were regarded as unethical. One result of this was that his view of the right way to behave was unclouded by any desire for applause. In his style of life, and professional conduct, he was a man of striking, and impressive, simplicity.

Maurice Byers' role in the affairs of the nation is probably not yet fully understood, even within the legal profession. However, his fidelity to principle, the unshakeable ethical foundation of his professional conduct, in both private practice and governmental affairs, was the rock upon which his life's work was built.

Pat Byers, and her children and relatives, must be very proud of the enormous contribution Maurice made to his profession and his country. They must also be greatly consoled by the conviction, that, after a long journey, he has surely merited eternal rest.

### **Tribute by Justice Gummow**

To be involved in the preparation and presentation of a case by Sir Maurice while he was Australia's second law officer was a remarkable experience.

This was so for several reasons. The first appeared when one arrived at his chambers in Canberra. In the anteroom there was his devoted and highly efficient secretary, Dawn Searle. There was no atmosphere of strain or stress. How different, one thought, from the anterooms of other great figures in the law.

Within, Sir Maurice sat, sometimes alone, sometimes with a bevy of assistants and advisers. Again, no sense of dread. Rather, there was an atmosphere of optimism that the problem in hand was to be solved by the application of calm thought. Later, when the matter was called on in the High Court, it became Sir Maurice's task to assuage judicial doubt and replace it by similar optimism which encouraged acceptance of his arguments.

Earlier, a written outline of submissions would be prepared. The production of the outline received much attention. It was never more than five or six pages. There was a number of drafts. The suggestions of all would be entertained. Succinct expression was encouraged. The smart, sharp but shallow debating point was a tradition – not a happy one – of the New South Wales Bar. Here, it was quietly but firmly put aside. Always the emphasis was on submissions which would draw the court into the heart of the matter and turn it towards the result for which the Commonwealth contended.

The reasons for Sir Maurice approaching cases at this level were both personal and pragmatic. His temperament favoured solutions that were preceded by reflection and speculation, not by the imposition of a false logical inevitability. Secondly, it was his brief not only to win the case but to advance the interests of the Commonwealth – the national interest – by a strong precedent which would stand the test of scrutiny over the decades ahead.

And so to court. Here the bench would be beguiled, never belaboured. One aims, I was once told, to please. Many here today will recall the mellifluous voice, the courtly gestures by which judges were persuaded that they could best rise to the occasion and the duties of their office, first by attaining the level upon which the Solicitor-General was presenting his arguments, and then by taking the apparently short step to accepting them.



The Honorable Sir F.G. Brennan AC KBE and Stephen Gageler S.C.



Ruth McColl S.C. and Peter McEwen S.C.

On these many memorable scenes, and in Sir Maurice's dealings with colleagues and practitioners who over time came to span many generations in Australian law, there was nothing false or mean. The professional courtesies were unfailing and unforced. Here was a senior figure admired as a formidable opponent, for the reach of his intellect and forensic skills, never feared for his tongue or displays of temperament.

It was these qualities which carried him into an active and serene old age. He was spared what I suspect he would have found the many tediums of judicial life and any anguish at being prematurely parted from them. Instead, he never really retired. A new generation of counsel came to work with and admire him and, one hopes, to see the attraction of the virtues he embodied. Then, in his 79th year, Sir Maurice, after half a century, left the lectern at the High Court, successful in the last two of his many significant cases.

To the many in this congregation who had the experience of working with him, the world now seems smaller and narrower.

It is for this life in the law that we give thanks today.