

FOREWORD

The Hon Murray Gleeson AC

The second best thing about writing a foreword to this collection of the first twelve Byers lectures is that I have had an opportunity to read (or read again) the lectures. A lawyer always has more to learn. The exercise has had an educational benefit for me, even if it is too late for that to be of any advantage to the public.

The best thing is that it gives me an opportunity to join in the tributes to Sir Maurice Byers recorded in the lectures and the additional pieces. The NSW Bar Association did well to institute a lecture series in honour of one of its most distinguished former Presidents. Much is said in praise of Sir Maurice in this collection. All of it is true. I will return to one aspect, that is, his method of advocacy. He made a major contribution to the corporate life of the Bar through his years of service on the Bar Council and his work as President. He once remarked to me that Chief Justice Barwick had ‘a generous mind’. People reveal much about themselves by what they say of others. Sir Maurice himself had a generous mind, and his admiration for that quality in another great advocate is telling. His arguments in court were direct and without irrelevancy or embellishment. His opinions were brief, but clear, and conferences never lasted long. He loved his profession. His comportment was exemplary. The NSW Bar has every reason to be proud of him.

The authors of the lectures chose their own topics, and no doubt they reflect their particular interests, or concerns. The lectures contain a wealth of scholarship. The admirable commentaries of Justices Perram and Pepper serve the useful purpose of bringing up-to-date some material that may otherwise lack topicality. This collection represents the ideas and experience of a range of eminent practitioners, judges and scholars, and covers subjects of importance and interest.

A number of the lectures refer to judicial method, and to theories on that topic. One such theory describes itself as realism. This is sometimes deployed as a rather smug

characterisation of a certain approach to the evaluation of judicial work, but the approach is often unrealistic. First, it concentrates on the work of a tiny minority of judges, who decide a small number of cases. It generates excitement about the possibility of adventure, but tends to overlook the powerful pressures for conformity that come from the doctrine of precedent, from appellate scrutiny of the output of almost all judges, and from the collegiate or corporate nature of appellate courts. Secondly, it tends to lose sight of the fact that most of the work of modern courts, including appellate courts, consists of the application (and, where necessary, interpretation) of Acts of Parliament. In this collection, the lecture of most direct relevance to the daily work of courts is that of Justice Gummow on Statutes. There are still Australian law schools that do not provide courses of instruction in interpretation. Thirdly, it tends to overlook the realities of the way cases are presented to, and argued before, courts in an adversarial system of civil justice. This is the point I wish to develop with reference to the advocacy of Sir Maurice Byers.

It is the parties to legal proceedings who select and define (subject to the relevant principles of law) the issues for decision, and who furnish, in the form of evidence, the information upon which a court acts in resolving those issues. Counsel for the parties present the arguments with which courts must deal. The capacity of courts, including courts of last resort, to make policy-oriented decisions is necessarily confined (not eliminated) by the process. The kinds of policy consideration to which courts may legitimately respond are dictated by the forensic circumstances that shape the judicial function.

Sir Maurice Byers, as an advocate, was consistently successful at the highest level. It is surely reasonable to infer that his technique of presenting argument in court reflected an accurate appreciation of the nature of the process in which he was taking part. His arguments, written or oral, in the High Court are all on record. It might be expected that a conscientious realist would study them, to see what they show about an advocate's perception of the judicial method. I suggest that they would be very revealing, not only for what is there, but also for what is absent. His arguments were succinct, technical, and legal. They were not expositions of political or economic theory. His famous comment that merely he put the ball into the scrum and let the politics of the Court take over was perhaps more ironical than is generally acknowledged. He understood and valued legal technique, and was fond of saying that, without their techniques, lawyers had little to offer that was not available from many other sources. It would be a useful practical exercise in legal realism to study the way leading

advocates present issues to judges. A good place to begin would be the arguments in the High Court of Sir Maurice Byers. They would provide a reality check of the kind that would benefit some realists.

In the matter of statutory interpretation, which has now become the dominant area of judicial activity, there is a high level of agreement within Australian courts concerning the primacy of the text. As the authors of a recent American publication (Scalia and Garner, *Reading the Law: The Interpretation of Legal Texts*, Thompson/West, 2012) point out, interpret is a transitive verb; judges interpret text. The interpreter's task is to expound the meaning of the text, not to express the will of the interpreter. In a foreword to that publication, Chief Judge Easterbrook wrote (with primary reference to the United States):

[I]n a democracy, policy-makers are supposed to be on short leashes: for the federal government two years [the House], four years (the President and his appointees), or six years (the Senate). Judges serve for 20 years or more and never face the voters. Democratic choice under the constitutional plan depends on interpretive methods that curtail judicial discretion.

Justice Heydon's taxonomy of theories of constitutional interpretation covers a number of versions of what Americans call originalism. The dominant originalist view is that the focus is the original meaning of the text, not the original subjective intent of its authors. A reference to the intention of the authors of a legal text is a conventional means of characterizing the meaning of the text. It is not an attempt to describe the state of mind of an individual, much less of a collectivity of people. What is meant by meaning may itself be a subject of some dispute, but the ultimate limit upon the capacity of the Constitution to yield new consequences is imposed by the text of the instrument, in what it says, and in what it does not say.

Justices Perram and Pepper, the NSW Bar Association, and The Federation Press have performed a valuable service to the law and the legal profession in this collection of lectures given in honour of a great leader of the Bar.

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