A "Living National Treasure" - Sir Maurice Byers CBE, QC

(Speeches given at the Bench and Bar Dinner on 17 June 1994 at which Sir Maurice was the guest of honour.)

Theodore Simos QC

Let me assure you that there is nothing more calculated to spoil a good dinner than to have agreed to propose a toast to the guest of honour following that dinner. And may I say at once that if the guest of honour had been anyone other than my good friend Sir Maurice Byers I would have had no hesitation in resisting the blandishments of our President, Murray Tobias, when he asked me to propose the toast.

Our guest of honour was educated at St Aloysius' College, took his law degree at the University of Sydney and was admitted to the New South Wales Bar more than 50 years ago, namely on 26 May 1944. That is a very long time ago and enormous changes have occurred over that time. For example, in 1944 Australia's population was approximately 7 million, whilst it is now over 17 million. The population of New South Wales was then approximately 2 million. It is now over 6 million. The Supreme Court was then constituted by only 12 judges, one of whom was then an acting judge. The Supreme Court has now over 40 judges and there have been corresponding increases in the numbers of judges of other courts as well as the creation of a number of new courts.

Throughout this period of great change our guest of honour has had a uniquely varied, eventful and distinguished career. Indeed, his admission to practice on 26 May 1944 was such an auspicious occasion that, as we have recently been reminded, within 11 days of that date, namely on 6 June 1944, the allied expeditionary force invaded France.

Prior to his admission to the Bar Maurice was, for two years, associate to Mr Justice Kenneth Whistler Street, later Chief Justice of the Supreme Court. After his admission, our guest of honour joined chambers on the ground floor of the old University Chambers Building at 167 Phillip Street where he joined, among others, David Benjafield (later Professor Benjafield of the Sydney University Law School), Stanley Toose and Paul Toose, Jack Richards and David Selby. He practised there until 1957 when he moved with others to the 10th floor of the then newly-built Wentworth Chambers. On that floor he joined John Kerr QC, Marcel Pile QC, Gough Whitlam, Trevor Morling, Hal Wootton, Bill Cantor, Paul Toose, Carl Shannon, David Shillington, B J F Wright, Brian White and Alan Bagot.

His practice as a junior and later as a silk was primarily in the fields of equity, taxation, company law and constitutional law and he appeared many times before the Privy Council. He also appeared in common law cases and was a severe cross-examiner when the occasion demanded, brooking no nonsense from equivocating or, dare I say it, recalcitrant, witnesses. He even appeared occasionally before civil and criminal juries.

Our guest of honour took silk in 1960 and continued his extensive practice at the private Bar until he was appointed Solicitor-General for the Commonwealth in 1973, an office which he held for 10 years.

Prior to that appointment he served for a number of years on the Bar Council, in 1966 and 1967 as its President, during which years I had the pleasure to be the Association's Honorary Secretary.

His great capacity to remain calm and unruffled and to pour oil on troubled waters, even in that office, appears from the first sentence in his Presidential Statement contained in the 1966 Annual Report of the New South Wales Bar Association. It reads:

> "The life of this Council has been much less tempestuous than that of the last, a result not entirely unintended."

In his 1967 Presidential Statement he wrote, among other things more important, of the Bar Council's concern in relation to the Bar's perennial problem of slow payment of fees. Some things never change.

I have done my best to learn of any amusing events in the career of our guest of honour whilst at the private Bar but he has led such an exemplary life that the only vice of his which I have been able to discover (a vice of which I had in any event first-hand knowledge from those many pleasurable occasions when I appeared as his junior), was his love of big expensive cigars which he used to smoke continuously during conferences while sipping endless cups of strong black coffee sweetened with artificial sweeteners. He was wont when he came towards the end of the cigar to flick it to his right against an angled open window which it would hit and then fall into the light well of Wentworth and Selborne Chambers. It used to be said that Maurice would remain at the Bar only until the light well was completely full of his burnt out cigars up to the level of his 10th floor window. That would have happened in a very short space of time but for the fact that those who wanted him to remain at the Bar saw to it that the cigar butts were regularly removed from the light well.

Sometimes, the great man's aim was not as good as it might have been and the cigar butt would fall into and commence smouldering in his wastepaper basket. It was one of the junior's many tasks during conferences with Maurice to keep an eagle eye out for such an event and to retrieve the smoking cigar butt from the wastepaper basket and consign it to its rightful place at the bottom of the light well.

On one occasion, however, this happened in the absence of junior counsel and, indeed, in the absence of anyone else in Maurice's chambers, and of course the inevitable happened. That is to say, the wastepaper in the wastepaper basket caught fire, much to the consternation of Maurice, who went rushing down the corridor to his clerk, Ken Hall, shouting out "Ken, I'm on fire, I'm on fire". With his usual efficiency Maurice's longstanding and ever loyal clerk, Ken Hall, rushed in and extinguished the fire and the crisis was averted.

On another occasion in the course of making himself yet another cup of his endless black coffee, Maurice failed to follow the instructions as to how to use the hot water urn as a

result of which it began spraying boiling water in all directions. Maurice was cowering in the corner shouting again for Ken Hall's help. Ever ready, Ken Hall came again to the rescue, this time with nothing less than an umbrella under the cover of which he escorted Maurice back to the safety of his chambers.

Maurice's 10 years as Solicitor-General for the Commonwealth were eventful and successful. It was during his term of office that the Loans Affair occurred which, as we all know, resulted ultimately in the dismissal of the Government by the Governor-General. I understand that it was not Maurice who gave the opinion in that connection that a loan for 20 years was a loan for temporary purposes.

Arising out of the Loans Affair, Sir Maurice, among others, was required to give evidence before the Senate but, even though not subject to Ministerial direction to refuse to answer, he nevertheless refused to answer on his own initiative, because he considered it would be dishonourable to reveal the secret counsels of the Crown. It took a great deal of courage to follow this course. But such courage is characteristic of our guest of honour. All who saw that happen agree that Maurice was more than a match for his inquisitors.

During his term as Solicitor-General the Tasmanian Dams Case was heard and successfully argued for the Commonwealth by Sir Maurice.

He appeared in the *Nuclear Tests Case* against France in the International Court of Justice in the Hague in 1973 as counsel and in 1974 as Solicitor-General for the Commonwealth.

"...he considered it would be dishonourable to reveal the secret counsels of the Crown."

He was the leader of the Australian Delegation to the United Nations Commission on International Trade Law in each of the years from 1974 to 1982 and was Chairman of the Australian Constitutional Commission from 1985 to 1988.

Sir Maurice was, and is, one of Australia's greatest constitutional lawyers.

The statistics bear this out. During his 10-year term as Solicitor-General he appeared in over 90 major cases including every case of constitutional importance. There were 44 constitutional cases in which Byers led for the Commonwealth in respect of which he had 37 wins, six losses and one draw. Someone has calculated this to be a success rate of 88%.

As Mr Justice McHugh said, on the occasion of a dinner to mark Sir Maurice's retirement from the office of Solicitor-General, "There are some who would say that the result of all these cases gives the appearance that Australia had an entirely new Constitution as compared with what it was when Byers first took office as Solicitor-General". Mr Justice McHugh said of Maurice's success: "In case after case he has literally hit the State Solicitors-General out of the ground. They have all retired hurt. Some of them have even taken refuge in the High Court. Others have just simply retired."

On the same occasion the then Attorney-General, Senator Gareth Evans, described him as "A gentleman, scholar, conversationalist, wit, master advocate and devoted family man", and referred to his wisdom, experience, integrity, objectivity, his mastery of constitutional principle and his deep understanding of the basic principles of the Australian political system. He said that "Sir Maurice should be declared a living national treasure (as is done in Japan), especially as he combined in the one person all the round distinction of an elder judicial statesman, the wit and charm of a saloon rogue, the face of a cherub and the body of a sumo wrestler".

Sir Maurice had a phenomenal and detailed memory of decided cases, especially constitutional cases. His approach was to analyse all his cases, even the most simple, back to first principles, especially constitutional cases, and to re-read the Constitution to see what it revealed rather than to start with preconceived notions of what the Constitution ought to say.

He was a prodigious worker but his advices were usually quite brief. Sometimes as brief as one page which might, however, have been the fruit of many hours of work and the study of many cases with which he surrounded himself in his chambers. He once told his clerk in relation to such a short advice that if the solicitors weren't happy with its brevity they could come up and have a look at all the authorities for themselves before he put them away.

The depth of the intellect and thought of Sir Maurice is revealed in a sentence contained in a paper he delivered to a continuing legal education seminar of the New South Wales Bar Association last year in which he referred to the work of the High Court "In educing from the silences of the Constitution, secrets, hitherto unsuspected". Just contemplate that for a moment. I suspect that it was Sir Maurice more than anyone else who encouraged the High Court to do that.

Sir Maurice also has a wonderful sense of humour which is revealed in two quotations taken from his speeches which I will share with you. On the occasion of the dinner to mark his retirement as Solicitor-General, Maurice made a speech which included the following "gems":

> "The greatest charm of advocacy, after all, is listening to oneself. Its greatest agony is listening to one's opponent."

On another occasion he made a speech at a function of the Victorian Bar in which he said:-

> "More recently I have listened with mounting admiration while Daryl Dawson (then Solicitor-General for the State of Victoria) has fairly constantly argued that the Commonwealth of Australia is part of the State of Victoria, rather like Geelong or Wodonga, only less important, and that its laws, when not meaningless (which was not very often) are invalid because of inconsistency with the law of the State."

On another and earlier occasion he revealed the artistic and philosophical side of his character when he said of Owen Dixon and Douglas Menzies as follows:

> "To one accustomed to the 'storm and stress' school of judgeship, appearing before Owen Dixon or Douglas Menzies was like first hearing Mozart. It is, of course, absurd to imagine that one could again encounter Dixon's radiant charm and pure intellect or Menzies' sparkling bonhomie. They were great men not only for what they wrote, but for what they were."

In the same way, our guest of honour is great not only for his legal accomplishments, but for what he is. He is not only a brilliant lawyer and a great advocate, but also a devoted husband to his wife Patricia, whom he has always lovingly called "Princess", and who has always provided him with love, support and encouragement. He is also a devoted father to his daughter Barbara, who is a solicitor, and to his sons Mark, another solicitor, and Peter, a playwright and producer. As well, he is a loyal friend of great gentleness, of great charm and even greater humility. He is an adornment to the legal profession and to the human race. ❑

Jacqueline Gleeson

It is extraordinarily hard to find a junior member of the New South Wales Bar who can speak from personal experience about the junior years of Sir Maurice Byers. From my enquiries, there are very few senior members of the Bar who recall it well. Even the number of judges who say they recall Sir Maurice as a junior is modest. You might think that this situation would give one a great degree of latitude in recounting the life and times of Sir Maurice as a junior. But it is the prerogative, and even the raison d'être, of the junior barrister to dig deeper in search of the truth or at least a good story. I thought that Ken Hall might know something - but no luck there. Even Ken did not commence clerking for Sir Maurice until 1957 and, of course, by that stage he had practically taken silk. Ken did, however, have a photograph to show me - a lovely photograph of the Supreme Court Associates of 1942 - they numbered eight and had their hands clenched over their knees like a small and not very fearsome football team. In the photo, and I'm afraid he had to be pointed out proudly to me by Ken, was the associate to Kenneth Whistler Street - M H Byers, age 25 years.

It goes without saying that when Sir Maurice was admitted, in 1944, times were very different. For the one thing, meat rationing was in force in Australia - a sad state of affairs for a hungry young junior. I imagine Sir Maurice's gaunt young face, choking down stringy rabbit casseroles as he waited for some daring solicitor to stumble across his chambers. It seems to me that his experience under the wartime régime may explain Sir Maurice's veritable obsession with the *Oyster Farms & Fisheries Act* in his early years of practice. Most of the cases in which Sir Maurice appeared, in his first years at the Bar, which were reported in the *Weekly Notes*, dealt with various breaches of that Act. One can only assume that there were others which were not reported. Surely Sir Maurice was not like the negligent criminal convicted for every crime he committed.

As Simos observed, Sir Maurice's practice as a junior was very different from his practice as QC. And not only thanks to the *Oyster Farms & Fisheries Act*. M H Byers had a broad practice with plenty of common law and tenancy work, and regular appearances in the Police Courts. His reputation was always exemplary, and it was this fact which caused him, from time to time, to be briefed by wily solicitors who well appreciated that the addition of Byers to the team would lend an air of respectability to the cause of their less than reputable client. Moreover, Sir Maurice always had an eye for an "ingenious argument". I was told of Sir Maurice's early reputation for "ingenious argument" by one of those rare fish who did remember Sir Maurice as a junior. But I was comforted when I read in the *Weekly Notes*, in a decision of Sir Kenneth Street, the words:

> "I think that, despite the ingenious arguments of Mr Byers" and later "Despite the forceful arguments put by Mr Byers and the ingenuity with which he developed his point, I still think ...".

When Sir Maurice retired from 10 years as Solicitor-General in 1983, many speeches were made in his honour. The speeches referred to Sir Maurice's great successes before the High Court appearing on behalf of the Commonwealth. It was said repeatedly that he had won 88% of his cases over the 10-year period. I have it on good authority, or at least on the authority of the Chief Justice of Australia, that Sir Maurice's success rate was not so high in his junior years.

"... a silk who listens to the views of his junior no matter how appalling or misguided."

Sir Maurice is an inspiration to all junior counsel, indeed all counsel, in terms of personal and professional style. He is courteous and humble and exemplifies all that is honest, noble *and* excellent in the tradition of the New South Wales Bar.

Better remembered than Sir Maurice's career as a junior, and indeed, still being experienced and appreciated, is Sir Maurice's reputation for his dealings with the junior Bar. Dr Flick described him as "absolutely marvellous" to work with in a tone of enthusiasm the like of which I had never before heard him express. Unkind people might say that Sir Maurice distinguished himself as a silk who listens to the views of his junior no matter how appalling or misguided. His endearing quality of politely ignoring the worst guff has won him great affection and gratitude from the junior Bar and, I suspect, from many who were once juniors.

Notwithstanding the fact that so much attention has been given recently to one particular form of discrimination in the courts and the legal profession, there is now a groundswell of community feeling against another form of discrimination - that is ageism. The temporally challenged find different ways of responding and maintaining continued vigour. Sir Maurice is a shining example of the way in which the Bar provides a rewarding habitat for its members, well after they've given up running in the City to Surf. Even though Sir Maurice has well and truly joined that demographic described as the over-55s, he has a full and blooming practice.

In a recently published novel there is a touching description of the fate of an elderly French maiden aunt who, after 50 years of service to the local parish school, is eased out of her position. It is reminiscent of the embarrassing antics of R P Meagher as he tried to secure vacant possession of a room which Sir Jack Kenny QC did not wish to vacate. The author

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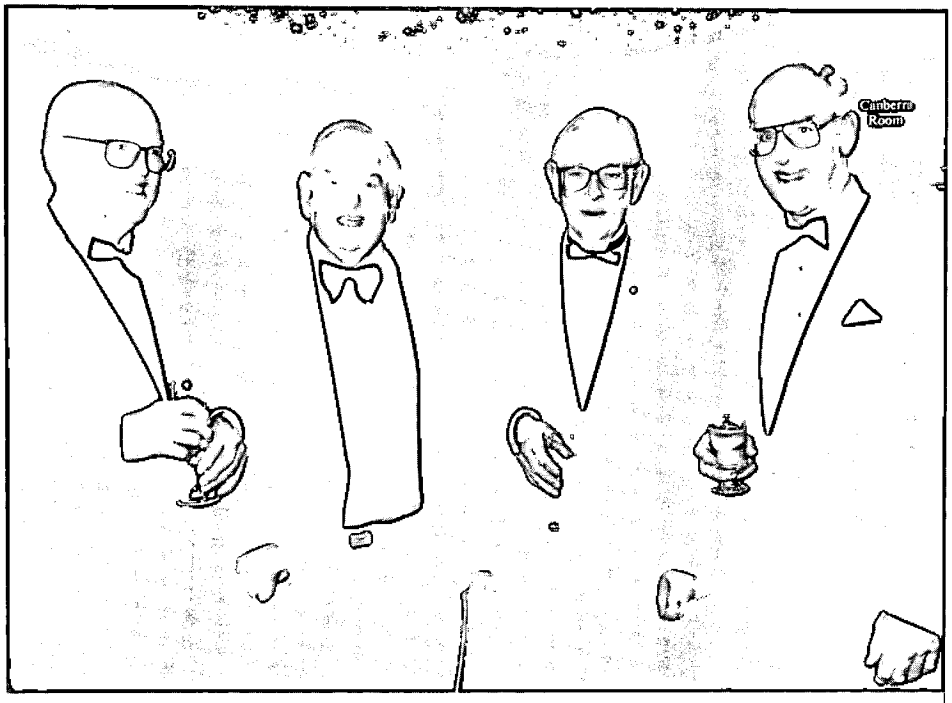
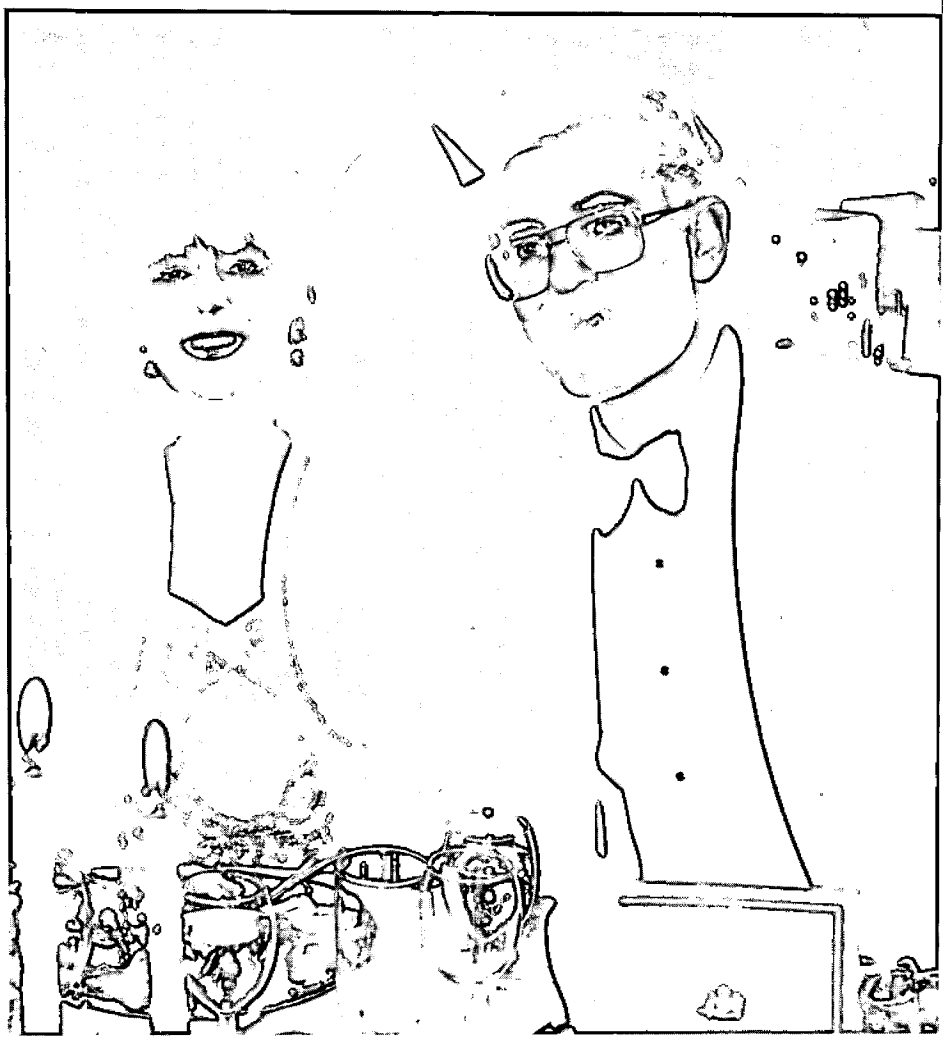
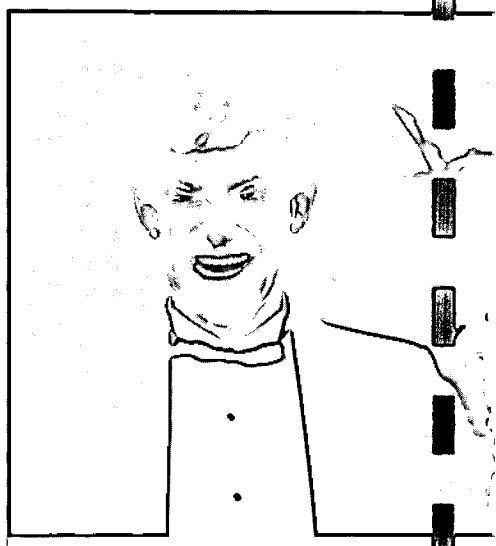


(l to r) Rt Hon Sir Harry Gibbs, G.C.M.G., A.C., K.B.E., Sir Maurice Byers C.B.E., Q.C., the Hon Sir Anthony Mason A.C., K.B.E., Theo Simos Q.C.



Alison Stenmark and Cliff Einstein Q.C.



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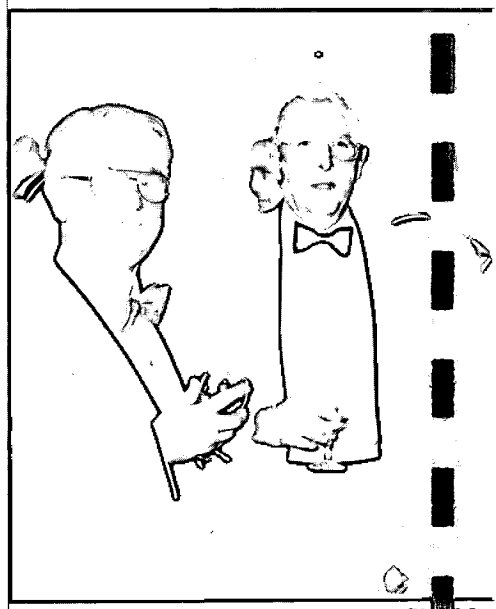

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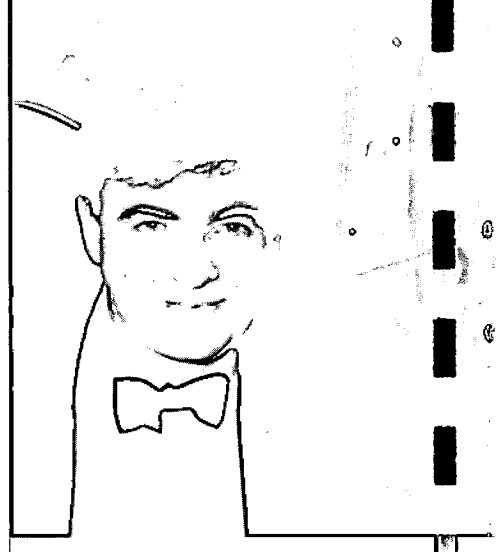

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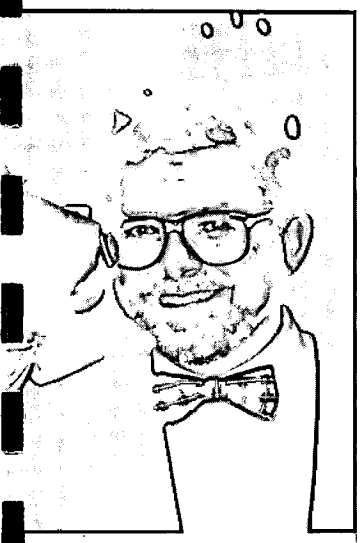

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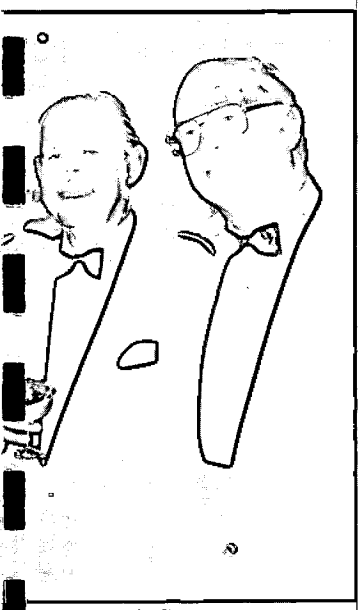

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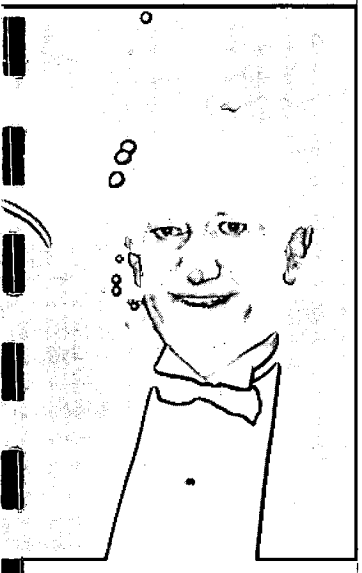

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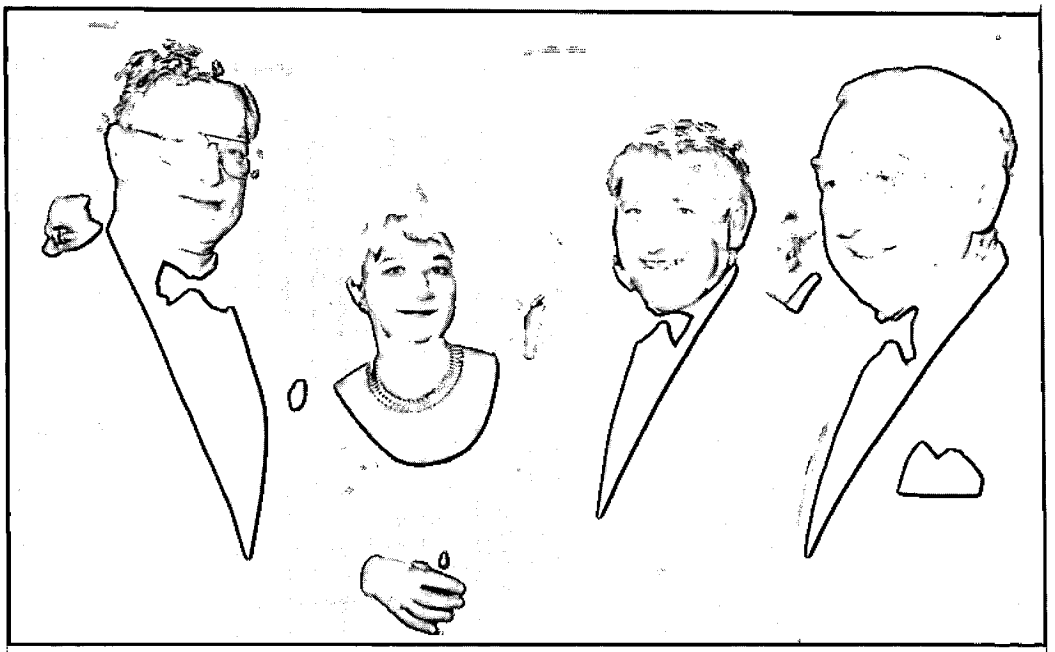
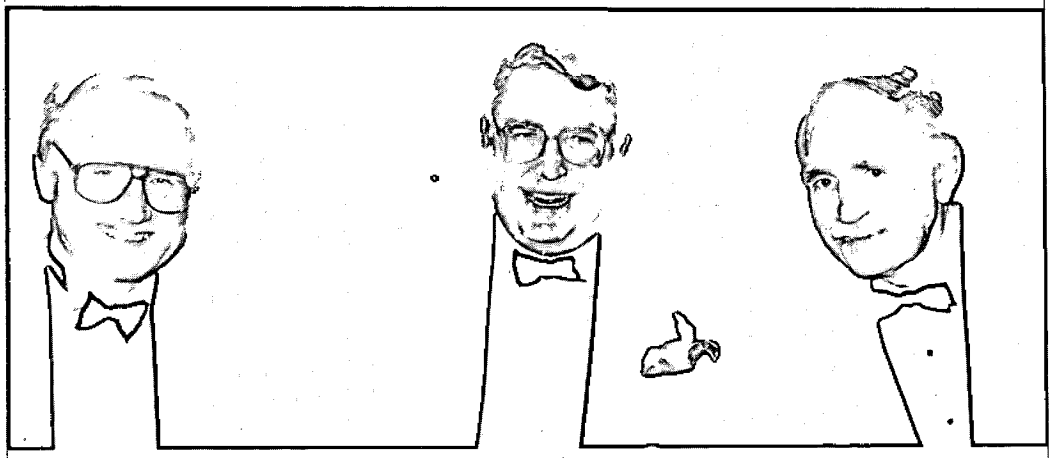
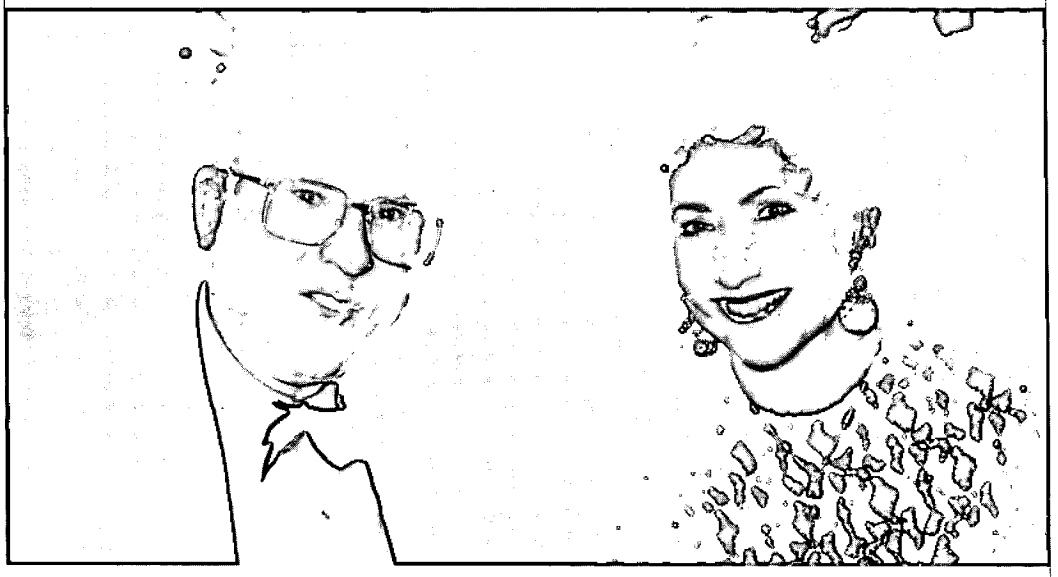


(l to r) Murray Tobias Q.C., Babette Smith, the Hon. John Hannaford, M.L.C., Chief Judge Staunton C.B.E., Q.C.



(l to r) David Fairlie, John Garnsey Q.C, Frank Riley



Commissioner the Hon. Barry O'Keefe, A.M., Q.C. and Annabelle Bennett S.C.

says of the school authorities:

"Their Jesuitical offer of a well-earned rest was accompanied by a little celebration, the purpose of which, no doubt, was to forestall any possible return by making her say goodbye in the presence of witnesses."

The purpose of this occasion is exactly the opposite. It is to forestall any possible departure on the part of the guest of honour by making him say how much he is enjoying himself in the presence of witnesses.

Therefore, I ask you to stand and to drink a toast to Sir Maurice Byers. ❑

Sir Maurice Byers CBE, QC

It's disconcerting to realise that you've been a barrister longer than many of your colleagues have been alive. Longer than Jacqui Gleeson, for example, who has said so many kind things about me. And longer, no doubt, than many others. Not longer than Theo, of course, who has also been kind to me.

Jacqueline Gleeson

But tonight we're together as barristers and as former barristers. We are all ministers of justice, sharing the one responsibility; each bound by the one duty owed to justice and having like immunities because of that. So that in what we do we are equal colleagues in the one undertaking whatever our function and whatever our age and whatever our experience.

I would like tonight to say something about the profession to which we all belong. And how it has changed during the years I've been a member of it.

In 1944 the Supreme Court of New South Wales consisted of the Chief Justice and 10 puisne judges and for part of that year of an acting judge. It then exercised jurisdiction in Admiralty, Bankruptcy, Divorce, Equity and Probate. It is comprised now of the Chief Justice, the President of the Court of Appeal, seven Judges of Appeal, a Chief Judge in Equity, another at Common Law and a third of the Commercial Division plus 30 other judges.

In 1944 the District Court was much smaller than its present Chief Judge and 57 District Court judges. There are 34 Federal Court and 52 Family Court judges. Of course, these two courts have an Australia-wide jurisdiction, but nonetheless, a considerable number of federal judges are concerned with litigation originating in this State and between New South Wales residents.

I have mentioned these numbers not to suggest that there are now too many judges or courts, but to illustrate that the legal system has become much more extensive, complicated and sophisticated than would have been expected or even considered possible 50 years ago. And I have mentioned neither the Industrial Tribunals nor the Magistracy. In 1944 the country was still at war and its growth in population and in manufacturing, industrial and rural skills was foreseen by few.

This change reflects not only the fact that the law affects more activities and transactions than previously, but that it does so by different institutions. Where the court is a specialised one, as the Family Court is, its effect upon individuals tends to be more protracted and perhaps more intrusive than is the case where a court of general jurisdiction embraces the same subject matter. When the Supreme Court, for example, had divorce jurisdiction, the undefended divorce cases tended to be pretty summary affairs whatever the ground for divorce happened to be. In those days adultery committed in the back seat of motor cars - "al fresco" to use Sir Frederick Jordan's description - was a fairly common ground for dissolution. A Supreme Court judge once confessed to me that he couldn't understand how it was done. But since my ignorance was greater than his, he remained, so far as I am aware, forever in the dark.

Given our Constitution, federal courts were inevitable. As events turned out, they were also necessary. Except for the introduction of section 40A early in the piece, the investiture provisions of the *Judiciary Act* remained in place without substantial change from 1903 until they were transformed by Attorney-General Ellicott's *Judiciary Amendment Act* of 1976. The Amendment Act repealed section 40A and thus abolished the automatic removal to the High Court of Supreme Court causes in which inter se questions arose.

The difficulty with section 40A was that few, if any, Supreme Court judges were clear as to what an inter se question was. British Law Lords, without exception, had no ideas at all upon the subject. Nor did most at the Bar. This meant that in cases of invested jurisdiction, one was never quite clear whether the judge you were addressing had ceased to have any jurisdiction to listen to you. Nor was he. Many judges were, therefore, reluctant to begin cases in which contested federal questions might arise. A result was that for 20 years few Supreme Court judges and few members of the Bar had significant constitutional experience.

When in 1975 appeals to the Privy Council from decisions of the High Court were abolished (under Attorney-General Murphy), all this changed. State courts now could be trusted with inter se questions and so section 40A went in 1976 as I have mentioned.

Thus, invested federal jurisdiction was transformed and at the same time two new federal courts began work and the practice of the law became, for the first time since Federation, a truly Australian profession. The Bar that practised before the High Court had tended to remain largely the Bar of each State or rather a small proportion to it. The presence of first instance federal jurisdiction litigation in each State before a highly regarded Court alerted the professions of each State to out-of-

State skills.

The *Trade Practices Act* helped to change the emphasis of litigation from tort to contract, from the roads and factory floors to the equally dangerous fields of commerce. The fact that two of the authors of *Meagher, Gummow and Lehane* need no longer keep their hands clean means that Equity cases are still heard even though the heyday of specific performance suits and of the interpretation of wills seems to be long past.

These changes to the law and to the legal system mean that what has really changed is the Australian community. The law and the community affect each other primarily in litigation. The citizen is there made aware of the law and has his and her effect upon its interpretation and its reach. Hard cases do affect the law and rightly so. In the interaction of the law and the citizen, the Bar and the courts are essential catalysts. Without the profession this change could not have happened.

The Attorneys-General responsible for the *Trade Practices Act*, the abolition of Privy Council appeals from the High Court, the Family Court, the Federal Court and the *Judiciary Amendment Act* both came from this Bar. Neither of their visions, nor the vision of their colleagues was a narrow one. On the contrary, we have all been responsible for, and assisted in, an unprecedented change - social and legal - a change for which the High Court Justices have in the main shown an insatiable appetite. The possession by the profession of that vision is the first thing I wanted to say.

"... the Supreme Court administered justice with an air of brutal jocularity."

The changes to the legal system are as well changes to the way the country is governed. To call the judges Her Majesty's Judges is but to speak the literal truth. It is true whether the system is unitary as in England or federal as in Australia. The curial system is the third arm of government in reality as well as in metaphor. When we appear before the courts we are engaged in the administration of justice and thus owe to the courts in this ministerial undertaking a duty which prevails over our duty to our client.

The practice of the law is thus radically and essentially different from the practice of other professions or callings. We participate and they do not in the administration of justice to the same extent as the judge, though our function differs. This difference would be known, one may think, to those entrusted with the government of the State. Yet it seems not to be, at least if some public pronouncements are to be accepted at face value. This crucial distinction between our calling and those of others is the second thing I wanted to say.

May I venture a personal view on the amendment of the Constitution to abrogate the prerogative power to appoint Queen's Counsel? The Attorney-General's right to recommend those appointments has been a long-standing means by which the Government has been able to regulate the practice of the law. It was a means which recognised the central part lawyers play in the administration of justice and the conjoint interest of the Government and of the profession in its due administration. I regret its abolition all the more because there seems to have been no good reason why Queen's Counsel should cease to exist.

It is probably true that delay and cost may be reduced by introducing simpler and more flexible rules of pleading, practice and evidence. At least that is my view, particularly if judges compelled reluctant parties to admit what was shown to have occurred even if the proof was questionable. But I cannot conceive that the *Legal Profession Act* is either likely or intended to achieve such benefits.

May I return now to the Supreme Court in 1944. It was said in those days that Chief Justice Jordan had occasion to sentence a man to death. Having done so, he rather absent-mindedly ordered that the costs of all parties should be paid out of the deceased's estate.

This anecdote, doubtless apocryphal, was taken by the profession to illustrate a remoteness from certain human feelings - a remoteness not extending to the erotic, for the Chief Justice was believed to be possessed of an unrivalled collection of literary pornography. The popular mind seems to attach this attribute, at least among the judiciary, only to Chief Justices. Sir Samuel Griffith was widely thought to be similarly disposed. Perhaps the vulgar believed Italian literature and pornography to be identical so that each Chief Justice's fondness for the former gave rise to the rumour of his addiction to the latter.

I should say that Sir Harry Gibbs, to whom the rumour did not apply, told me that in relation to Griffith the rumour was baseless.

When I came to the Bar the Supreme Court administered justice with an air of brutal jocularity. There were, of course, some judges who were brutal without being jocular and one or two who were jocular without being brutal. But, by and large, the statement is just. This attribute was shared by the Bar. Cases were, as a rule, hard fought and merciless. While discourtesy was rare, I have seen a short-tempered advocate reduced to incoherence by an adept and quick-witted counsel who was able, by his tactics, to non-suit his opponent. To some degree at least the conduct of cases at common law was determined by the presence of the jury. Jury cases are more theatrical and tense than trials before a judge sitting alone. The issues tend to be broader and forensic behaviour more black and white and, in a way, cruder. The moment is all important. Thus the contest between the advocates becomes increasingly a personal one in which putting opposing counsel at a disadvantage is seen as a way to the jury's affections or, at least, to their admiration, and thus, to ultimate victory.

In those days, too, the issues for trial were formulated in pre-*Judicature Act* pleadings. I am speaking, of course, of the common law side of the Supreme Court. The 3rd edition of *Bullen and Leake* was on every busy junior's desk.

Every declaration had to plead only those facts essential to the cause of action and no more. If more, it was embarrassing. If less, it was demurrable. Coming to the trial after battling through this jungle, having avoided the spring guns and mantraps lining the way, meant the barrister's temper was sharpened and his tolerance markedly reduced.

Often one was met by the Bench with feigned innocence,

asking "What do you think the pleader had in mind by" this phrase or that word. This was, of course, the ultimate insult. The judge had to plead no more, and thereby had become a past master of the art. No pleading, however perfect, was safe from any judge, however clumsy. Every Common Law judge was liable to ask such a question: if well disposed, with a puzzled frown; if malevolent, with an ophidian smile. So that summoning up the last reserves of one's self-control, with a false smile distorting your features, beleaguered and weary, you embarked upon the great ocean of judicial ignorance.

At this time the Victorians Latham, Starke and Dixon dominated the High Court. On the one occasion I was before him, Starke sat wigless and radiating menace. The others I encountered more often. Latham wore rimless glasses, was scholarly and dryly humorous; Dixon's angular face shone with vivacity, intelligence and a unique Mozartian charm. They were a powerful trio.

The Supreme Court was dominated by Chief Justice Jordan, around whose powerful figure his judicial colleagues orbited like so many attendant and mainly silent planets. The difference between the Courts was profound. The Supreme Court had long favoured a form of pragmatism where the likely social or legal disturbance that new ideas might give rise to became the test of their validity. That was not then and is not, I think, now the case with the High Court.

I can illustrate this difference with an anecdote.

Within a few years of my admission I argued before the Court of Criminal Appeal that a statement of intention was not a statement of fact for the law of false pretences. A decision of the Full Court of the Victorian Supreme Court had within the last 10 to 15 years restated this ancient doctrine. Sir Frederick Jordan, without consulting either of his colleagues, said the Court would not follow the Victorian decision. The High Court, after examining the earlier decisions, did apply it and, in doing so, maintained a long-standing and understandable distinction between the civil and the criminal law.

The Supreme Court chose convenience, so, I must say, did the State Parliament for after the High Court decision, the *Crimes Act* was amended to restore, as law, the State Court's legal misconception.

During the 1960s and the early 1970s there was no street in London where you might not encounter an Australian barrister or solicitor. We were all there to litigate claims for which the Judicial Committee was, we had half convinced ourselves, the only possible tribunal. Of course, it wasn't, except in the rare case where the High Court had, by previous decision irrevocably barred the prospect of success.

When in December 1973 I became Commonwealth Solicitor-General these pleasant excursions were denied to me. I must confess that, while their Lordships may have been politer than the then High Court Justices, or some of them, it was soon clear to me that they matched them neither in application nor intellect. And that has remained, and now remains, the case.

When belatedly appeals from the High Court were cut off in 1975, the day of the Privy Council as an ultimate appellate court in some Australian appeals was doomed. Even our legal system found it hard to cope with two ultimate appellate courts even though one had a more limited jurisdiction than the other. But still it was not until 1986 that this absurd and infantile system finally was given its quietus. This was made necessary by judicial decision even though the Constitution declares that decisions of the High Court shall be final and conclusive. As Humpty Dumpty said to Alice: "the question is who's to be master, that's all". And it wasn't reason, for reason denied the simultaneous existence of two ultimate courts of appeal of overlapping powers and jurisdiction, the judgment of each of which in the same matter is final and conclusive even though they may be contrary.

I hope you will forgive me if, after these digressions, I return to the pleadings. There were two immutable rules uniformly observed when pleadings were discussed. The first, the identity of the pleader was never revealed. The draftsman, perhaps one can call him author in the case of the more imaginative examples, was always referred to as the pleader. This was the case even when one was supporting one's own pleading - more necessary then than ever.

The second rule was that nothing favourable was allowed. Not the faintest hint of commendation for even the most supple or sophisticated of sentences. You may sometimes see a similar process at work when a Full Court is interpreting a statute. Or pretending to. Those wearied sighs of incomprehension! Those rhetorical queries as to the draftsman's intention - if, indeed, he was capable of forming one.

When you realise that this weaponry is just as likely to be let loose upon you as upon the Parliamentary draftsman, you realise that an essential prerequisite for a career at the Bar is a well-padded vanity.

What in other professions might be considered a blemish, even a disqualification, is in a barrister an essential attribute: lurking behind the diffident smile of the shyest junior is a conceit of Napoleonic proportions. Unless this was so, how could one survive in this most competitive, independent and gladiatorial of professions?

The Bar has been kind to most of us here. It has been superlatively kind to me. I have been lucky - something worth a thousand abilities.

I was fortunate, for example, to read with Charles McLelland - Malcolm's father. To Jerry's tuition and friendship I owe an enormous debt. I came to the Bar at the right time, at any rate, for me and was briefed in the type of case that suited my abilities.

I know the Bar faces a testing time. But we should be of good heart. An independent Bar has become an essential feature of the administration of justice in every court, State or federal. If we maintain our rights, accept our responsibilities and realise that accountability for what we do is the price of control of our destiny, all will be well.

You have done me great honour tonight. I would indeed be a monster of vanity were I not deeply moved by what you have done. To the President, to Theo Simos and Jacqueline Gleeson, to the Bar Council and to all here tonight, a not very humble barrister tenders his sincerest thanks. ❑