

# The Byers Lectures 2000-2012

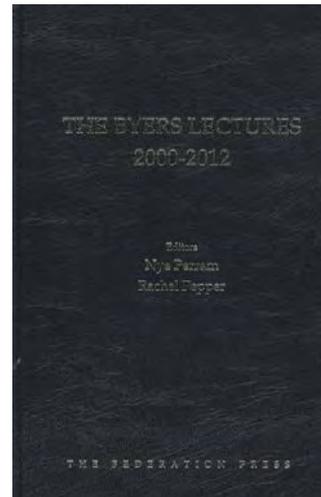
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Reviewed by The Honourable Justice Patrick Keane\*

Sir Maurice Byers was, by most measures, the most successful advocate in the High Court<sup>1</sup> in history. Sir Gerard Brennan, in his valedictory speech on the occasion of Sir Gerard's retirement as Chief Justice of the High Court, observed of Sir Maurice: 'His participation in the work of this Court was perhaps no less on his side of the Bar table than it would have been on this.'

Sir Maurice was also a well-loved leader of the New South Wales Bar. I mention this because, among the brilliant diamonds of the New South Wales Bar, for one member of that Bar to be held in affectionate regard by any other member of that Bar is a phenomenon which is sufficiently unusual to be worthy of notice. The lectures which are collected in this volume are the result of the decision of the New South Wales Bar Association to establish an annual lecture to commemorate Sir Maurice.

To recount only one of an abundance of anecdotes about his feats of advocacy in the High Court, when Sir Garfield Barwick was Chief Justice, even the most able and experienced Queen's Counsel would find it difficult even to finish a sentence, much less articulate the series of complex propositions necessary to make an argument. Sir Maurice was half-way through the opening sentence of his address in one case when Barwick CJ cut him off to point out the difficulties with the argument that he apprehended Sir Maurice would put. Sir Maurice began again, only to be halted once again by a blast from the Bench. At this point, Sir Maurice chuckled amiably and said: 'Your Honour, I apologise; but I distinctly thought I heard the Court Crier say when he opened the Court just now: "Give your attendance and you shall be heard."' He then proceeded to make his argument without further interruption. For any lesser Counsel, this would have been an act of suicidal bravado.



\* Justice of the High Court of Australia. Chief Justice of the Federal Court of Australia (2010–2012). Judge of Appeal of the Court of Appeal of the Supreme Court of Queensland (2005–2010).

1 (1998) 193 CLR v at vi.

I am able to vouch personally for the fact that Sir Maurice was a kindly gentleman as well as a great advocate. When I was, as a callow youth, waiting nervously at the Bar table to address the High Court and sitting there alone and friendless having been driven by my anxiety to arrive in the courtroom before anyone else, Sir Maurice, whom I had not yet met, came up to me and said, 'You're Pat, aren't you?' And when I managed to get out a reply in the affirmative, he said: 'You must call me "Maurice".' We then chatted amiably for a few minutes. It was obvious that he was attempting to put me at my ease before the ordeal to come. I have never forgotten his kindness to someone who was his opponent in the case at hand and very much the least of all his brethren.

In keeping with the great themes of Sir Maurice's life and work, the lectures are concerned with issues in constitutional and administrative law, and advocacy, especially as an aspect of the relationship between Bar and Bench in the co-operative enterprise of the administration of justice. And in keeping with the high regard in which Sir Maurice is still held, the lecturers are drawn from the most eminent judges, academic lawyers and barristers in Australia, New Zealand and the United Kingdom.

Many of the lectures were delivered by individuals who were serving judges at the time of delivering the lecture, and in particular, the Hon Justice MH McHugh AC, the Hon Justice Keith Mason AC, the Hon Justice WMC Gummow AC, the Hon Justice Dyson Heydon AC, the Rt Hon Dame Sian Elias, the Hon Chief Justice JJ Spigelman AC, and Lord Phillips of Worth Matravers KG. In this regard, there is an irony in that, contemporaneously with the publication of this volume of the Byers Lectures, an article has appeared in the *Sydney Law Review* which argues that 'the practice of sitting judges discussing live legal issues in legal literature raises serious problems.'<sup>2</sup>

The thesis of this article is that 'the danger stemming from published writing about a legal issue is that the judge is tied to an answer to the legal problem and holds a stake in the intellectual outcome.'<sup>3</sup> It argues that the risk of the perception of pre-judgment is sufficiently serious to warrant the exclusion of serving judges from the pages of academic journals. The authors say:

[T]here are very good reasons for thinking that extrajudicial writing on live legal issues is a bad thing and that it should be discontinued.

[I]n many instances a judge's extrajudicial comment on points of law speaks of predispositions that are neither tentative nor academic. The manner of execution, tone and content of much of this writing conveys the strong impression that the judge's mind is made up. The strength of this impression overpowers any argument that a judge can be trusted to put such predispositions to one side once in a court of law. The views are formed outside of court, without the benefit of argument make [sic] by lawyers representing real parties with genuine interests, and disclose a strong commitment by the judge to a conclusion on a point of law, thereby neutering any future arguments of counsel. Such concluded extrajudicial views constitute a very real threat to a fair trial.

... Prejudgment of matters before the court is rightly condemned in our society. The common law in both Australia and the UK has developed strong prohibitions on such conduct. But the prejudgment that is so intimately tied to committed extrajudicial writing has somehow slipped under the radar. As we have seen, judges

<sup>2</sup> Bartie S & Gava J, *Some Problems with Extrajudicial Writing* (2012) 34 *Syd LR* 637.

<sup>3</sup> Bartie & Gava, *ibid*.

and legal academics are generally supportive of such writing, at least for that which is published in learned journals or scholarly books. Perhaps this is because until recently very few judges wrote much extrajudicially on doctrinal issues and because often there were no legal academics writing in particular areas. After all, until the middle of the 20th century there were not that many legal academics in either Australia or the UK. But in a world where there is no shortage of academic commentary, there is no necessity for extrajudicial comment which in any event comes at too great a cost.<sup>4</sup>

The burden of the article's concern is that extra-judicial writing demonstrates and signals prejudgment upon an issue which the judge may be called upon to resolve in court. One aspect of the irony attending the virtually contemporaneous publication of *The Byers Lectures* and the Sydney Law Review criticism is that reference to those lectures written by serving judges demonstrates that this concern is unfounded.

The lectures by the Hon Justice McHugh (*Does Chapter II of the Constitution protect substantive as well as procedural rights?*), the Hon Justice Keith Mason (*What is wrong with top-down legal reasoning?*), the Hon Justice Gummow (*Statutes*), the Hon Justice JD Heydon (*Theories of constitutional interpretation: A taxonomy*), and the Hon Chief Justice Spigelman (*Truth and the Law*) are eloquent examples of the open-minded examination of important questions from many angles. For the most part, these discussions proceed without any suggestion of a firm attachment to a particular view, much less a view that is beyond the reach of argument.

There can be no doubt as to the utility of the lectures collected in this volume. Each lecture offers a collection of debatable points of view currently relevant to the topic: they will be of value to ensure academic and practising lawyers are kept 'au courant' with the current trends of thought in the courts and the academy. Justice Heydon's taxonomy of theories of constitutional interpretation offers a brilliant conspectus of the theories of interpretation reflected in the case law. It is essential reading as a guide for the perplexed; and in this field of discourse, the only individuals who are not perplexed are the complacent partisans of a particular school of thought.

So far as statutory interpretation is concerned, it would be a cruel irony if the benefit of Justice Gummow's 'tour de force' on statutes were denied to those in need of guidance on this topic of central importance, as a result of the insistence of members of the academy, when some law schools in Australia still do not provide courses on statutory interpretation.

And any lawyer with an interest in the art of advocacy should welcome the challenge by the Hon Murray Gleeson AC in his foreword, to take 'the reality check ... that would benefit some realists' by studying the arguments of Sir Maurice Byers to find examples of persuasive advocacy. Such a study, it is suggested by the former Chief Justice, himself one of Australia's greatest advocates, would reveal arguments which were 'succinct, technical and legal' and eschewed 'expositions of political or economic theory.' Both academic and practising lawyers would be considerably less well-informed if this kind of engagement by judges with the legal profession and the academic community were to be proscribed.

The authors of the Sydney Law Review article conclude by querying, not only the utility of extra-curial contributions by the judges, but also the motives of the judges who make these contributions:

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4 Ibid 658.

Why do judges write so much? One reason appears to be a signal to the profession and potential litigants what particular judges want litigated (as well as prefiguring the answer that will be given). Even if that is not the intention of all, or even most, judges, this signalling will be a real consequence flowing from the committed extrajudicial writing that has been the focus of this article. Such signalling represents a change from the primarily reactive role of the judges in common law litigation where the judges responded to cases that came before them. By sending out signals on what cases they would want to hear and what law they would apply the judges will become the catalyst for legal change. Such a dramatic structural change in the nature of litigation and the common law is one that should be debated and analysed rather than unthinkingly accepted.

These problems of prejudice and signalling by judges which are raised by committed extrajudicial on doctrinal issues are real [sic]. They can be solved easily if we all agree that extremely busy judges stick to judging and avoid writing about legal issues that might confront them in the courts.<sup>5</sup>

As to the question: 'Why do judges write so much?' there is a simple answer. They write because they are asked to do so by those who think that the standard of intellectual life in this country would be improved by the publication and dissemination of their analyses of current legal problems. And it might also be said that one of the reasons that judges are invited to contribute to the discussion outside the courtroom of legal developments inside the courtroom, is the perception on the part of practising lawyers that the academy is becoming less interested in 'hard law' and more interested in 'legal studies'.

Judges accept invitations to speak extra-curially out of a sense of duty to the profession.

Dr Johnson may have been largely correct when he said that: 'No man but a blockhead ever wrote except for money'; but the fact remains that most extra-curial judicial writing represents the voluntary labour of very busy people whose motivation is essentially eleemosynary. It is a labour of love that harks back hundreds of years to the Inns of Court, when judges, as senior benchers of their Inns, set and ruled upon moots argued by junior members. No one would ever have thought to suggest that the senior benchers might in some way have disqualified themselves from hearing real cases raising the same issues. It would never have been thought that they were so unsophisticated or supine as to be unable to appreciate the force of a new argument or a different way of looking at the problem.

The editors of this volume have ensured that the lectures are placed in the context of existing debate. Each lecture is introduced and helpfully summarised by the editors. These introductions provide useful guidance which makes the lecture accessible to the reader who is not a specialist in constitutional or administrative law.

Finally, it is worth noting, that as an added bonus, the volume includes some writings and speeches by Sir Maurice as well as Sir Anthony Mason's eulogy delivered at Sir Maurice's Memorial Service at St Mary's Cathedral in Sydney on 8 February 1999.

Any Australian lawyer interested in constitutional law, administrative law or advocacy should read this book: otherwise he or she may be left behind.

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5 Ibid 658.