

Legal change – the role of advocates

Chief Justice Robert French AC delivered the Sir Maurice Byers Lecture in the Bar Association Common Room on 22 June 2016.

Introduction

I learned from Maurice Byers a great advocate's perspective on the High Court — 'they're just chaps Bob, just chaps' — or so he told me, as we prepared for the hearing in *Koowarta v Bjelke-Peterson*¹ in 1982. As a description of the gender of the court it was accurate. I learned from him in *Fencott v Muller*² in 1983 that one line of dismissive humour could do more for a wide view of the corporations power than an hour of earnest argument. In 1986 on my appointment to the Federal Court he sent me a note expressing confidence that I would eventually be appointed to the High Court. Perhaps he was encouraging me to stay on for the long haul and was relying upon the proposition, a little like the one about monkeys typing Shakespeare, that given enough time almost anything has a finite probability of happening. Six years later, in 1993, I barely found the strength, when he appeared before me for the plaintiff in *Newcrest Mining (WA) Ltd v Commonwealth*,³ on remitter from the High Court in all respects save for the constitutional question, to resist his siren song invitation to have a go at the constitutional question anyway. Our encounters were brief, but each a delight in its own way. I have been invited to present many lectures named after significant legal personalities. None has given me greater pleasure than the invitation to present this the 16th lecture in the series established by the New South Wales Bar Association to honour his memory. There are few public lectures named for advocates. Maurice Byers is properly honoured. He was an important figure in the development of Australian constitutional and public law. He was an unforgettable advocate and as those who had the privilege of working with him know he was a man of integrity, modesty and humour.

A search of the *Commonwealth Law Reports* discloses that Maurice Byers appeared in the High Court in more than 200 cases between 1946 and 1996. His first reported appearance was as junior to Spender KC representing one Caldwell who had been convicted of selling meat on the black market contrary to the National Security (Prices Regulations). The meat comprised two pounds and three ounces by weight of gravy beef and four lamb kidneys sold for three shillings and eight pence, being a greater price than the maximum of two shillings and four pence which was fixed in relation to those goods under the regulations. Mr Caldwell was sentenced to three months imprisonment and hard labour for that offence. The relevant regulation, however, was found invalid on appeal to a Court of Quarter Sessions and the conviction quashed. The informant, represented by two

Kings Counsel, Mason KC, an uncle of Sir Anthony Mason, and Badham KC, leading Benjafeld as junior counsel, appealed by special leave to the High Court. The appeal was allowed and the conviction restored.⁴

From a small and inauspicious beginning in *Horseley v Caldwell*, a beginning of the kind familiar to many advocates, Maurice Byers rose to answer the description that Sir Gerard Brennan applied to him in the first of these lectures as 'one of the towering figures of the bar'.⁵ Of his ability to persuade the High Court, Sir Gerard spoke from personal experience:

The High Court was his milieu. He knew its members well — indeed, he had led several of us at the Bar. He knew its cast of mind and, I suspect, its internal dynamics. His enjoyment of advocacy there evoked a corresponding judicial response. His forensic triumphs were notable. May I repeat the estimate I made from the bench on an earlier occasion: 'His participation in the work of this Court was perhaps no less on that side of the Bar table than it would have been on this.'⁶

And in his 2007 Byers Lecture, Justice Heydon remarked on what he called Maurice Byers' 'mesmeric powers over the High Court' and his extraordinarily high rate of victory and correspondingly great influence on constitutional development.⁷

Sir Anthony Mason cast some light on the relationship between Byers at the bar table and the justices on the bench in a paper on the 'Role of Counsel in Appellate Advocacy', delivered to the Australian Bar Association in 1984. Sir Anthony warned his listeners against reading lengthy passages from the court's decisions saying it was suggestive of a belief that the members of the court were ravaged by Alzheimer's disease. He added:

The belief is unfounded. It is not shared by Sir Maurice Byers QC. Instead, he attributes to us an elephantine recollection of the most obscure decisions. Almost invariably he introduces a reference to authority by saying: 'Your Honours will forgive me for reminding you of ...'. He often delights in then mentioning a case which is a total stranger.⁸

My personal encounters with Maurice Byers were relatively few and relatively brief and I have already mentioned most of them, save one which I will mention in closing. It is in part through the prism of his work that I want to say something about advocacy and legal change, perhaps opening with his

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own modest disclaimer in his 1987 article 'From the Other Side of the Bar Table: An Advocate's View of the Judiciary', when he wrote:

[The advocates'] effect upon the law, and thus upon society is second hand, contingent and transmuted; occasionally burlesqued. It is manifested in the judgments of those he has addressed; sometimes it emerges more powerful, subtle and convincing because of its passage through the prism of another reflecting mind. Sometimes not.⁹

Koowarta, the external affairs power and the *Racial Discrimination Act 1975* (Cth)

There were many cases in Sir Maurice's long career which could be chosen as a basis for talking about legal change. For sentimental reasons, I will refer to *Koowarta*, in which I was briefed as one of two junior counsel led by Sir Maurice as Commonwealth solicitor-general. It was our first substantive engagement. The legal question was whether provisions of the *Racial Discrimination Act 1975* (Cth), prohibiting discrimination based on race, colour, nationality or ethnic origin, were laws with respect to external affairs. The Preamble to the Act recited that it had been passed to give effect to the International Convention on the Elimination of All Forms of Racial Discrimination to which Australia was a party. The external affairs power had not previously been considered by the court with respect to a subject so sharply focussed on the domestic behaviours of members of the Australian community in dealing with each other and others.

An expansive interpretation had been foreshadowed in dicta in *Burgess' Case* in 1936.¹⁰ Chief Justice Latham thought it impossible to say *a priori* that any subject was necessarily such that it could never properly be dealt with by international agreement.¹¹ Starke J, in similar vein, accepted that the power was comprehensive in terms and must be commensurate with the obligations that the Commonwealth may properly assume in its relations with other powers or states.¹² He floated the criterion that the matter should be 'of sufficient international significance to make it a legitimate subject for international co-operation and agreement'.¹³ Dixon J said that it could not be supposed that the primary purpose of the external affairs power was to regulate conduct occurring abroad. However it seemed an 'extreme view' that merely because the Executive Government undertook with some other country that the conduct of persons within Australia should be regulated in a particular way, the legislature thereby obtained the power to enact that regulation.¹⁴ Evatt and McTiernan JJ approached what Dixon J regarded as the extreme view when they said:

the fact of an international convention having been duly made about a subject brings that subject within the field of international relations so far as such subject is dealt with by the agreement.¹⁵

Sir Owen Dixon's 'extreme view' epithet was to be deployed by Daryl Dawson QC, the solicitor-general for the State of Victoria intervening in support of Queensland in *Koowarta*, when submitting that the logical conclusion of that view was that there were no limits to the external affairs power. It might, over the course of time, be the vehicle for the obliteration of legislative powers of the states.¹⁶

Although there were other decisions on the external affairs power between *Burgess* in 1936 and *Koowarta* in 1983,¹⁷ no case had dealt with the application of the external affairs power to legislation with such a wide-ranging application to purely domestic conduct. Maurice Byers had argued the *Seas and Submerged Lands Case* for the Commonwealth in 1975. *Koowarta* was the beginning of a watershed moment in Australian constitutional history. It came before the court at a time when the question whether the external affairs power extended to the subject matter of all treaties or was confined by a requirement that the subject matter be international in character or of sufficient international significance was unresolved. *Koowarta* set the stage for its resolution. It had not come squarely before the High Court previously because Commonwealth governments had generally not ratified treaties on subjects outside their heads of legislative power unless there were state laws in conformity with the treaty.¹⁸ Subject to an elusive exclusion of 'colourable treaties' Mason, Murphy and Brennan JJ found the existence of the Convention sufficient to give rise to an external affair.¹⁹ Stephen J, the fourth member of the 4-3 majority, maintained a requirement that the Convention had to be on a topic of sufficient international concern.²⁰

A more definitive exposition emerged from the *Tasmanian Dam Case*,²¹ decided 14 months after *Koowarta*. Provisions of the *World Heritage Properties Conservation Act 1983* (Cth), giving effect to the Convention for the Protection of the World Cultural and Natural Heritage, were held to be within the external affairs power.²² Again, Maurice Byers appeared for the Commonwealth defending the validity of its legislation against a challenge by Tasmania, represented by Robert Ellicott QC and Murray Gleeson QC, among others, supported by David Jackson QC for Queensland and JD Merralls QC for the Hydro Electric Commission of Tasmania. Byers invoked the views of Mason, Murphy and Brennan JJ in *Koowarta* as to the scope of the power. Leslie Zines was one of the junior counsel for

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Tasmania, uncharitably characterised by some of his academic colleagues as having gone over to the dark side of the Force. He described the decision in the case as resolving the issue left unresolved in *Koowarta*. As he put it:

This time a clear majority (Mason, Murphy, Brennan, and Deane) held that the Commonwealth could give effect to any international obligation imposed by a bona fide treaty or by customary international law. They all indicated that the power was not limited to the fulfilment of obligations.²³

Koowarta was a step in a process of change in the interpretation of the scope of the external affairs power. It had a more particular consequence. The Racial Discrimination Act, coupled with s 109 of the Constitution, was later to play a central role in conferring a constitutional protection, as against state and territory parliaments, upon the customary native title which was to be recognised by the High Court in 1992. That consequence is discussed later in this lecture. One of its most politically and socially charged sequelae was the decision of the High Court in *Wik Peoples v Queensland*²⁴ that statutory pastoral leases granted under state laws before the enactment of the Racial Discrimination Act did not necessarily extinguish native title. The possibility therefore arose that native title could be asserted over large areas in which it was thought to have been extinguished by historic leases. If such native title subsisted beyond the time of enactment of the Racial Discrimination Act it would be protected against uncompensated and therefore discriminatory extinguishment by state laws. The implications for indigenous claimants as well as for the pastoral and mining industries were obvious. In *Wik* Maurice Byers appeared as leading counsel for the Thayorre People alongside Walter Sofronoff, who represented the Wik Peoples, claiming that the relevant pastoral lease had not extinguished native title.

Factors in legal change

There are many variables at play when legal change is effected through the courts, not the least of those variables being their composition at different times. Generally, however, change occurs within broadly understood boundaries of judicial law-making applicable to the interpretation of the Constitution and statutes made under it and in the development of the common law. For the most part it is incremental. Case-by-case a body of law is built up and evolves through that process. Evolution may be quickened in response to new classes of case thrown up by changing political, social and economic conditions, commercial practice and new technologies. When the possibility of major development arises, be it in the

interpretation of the Constitution, in the common law and equity, or a new application of an important statute, more than one plausible choice may be presented.

Where the Constitution and statutes are concerned, any development must take place within the limits set by their texts. Within those limits, even those set by the most tightly drafted statutory text, there are nuances and shades of meaning and sometimes silences. There is no interpretive equivalent of 19th century Newtonian physics to provide complete and determined answers. The uncertainty principle which lies at the heart of much 20th and 21st century physics, expressed mathematically as $\Delta p \cdot \Delta x = h$, can roughly be translated as 'nothing in the universe can be nailed down'. Nevertheless it is a principle, not a prescription for cosmic anarchy. Similarly, when it comes to texts, uncertainty underpins meaning, but meaning is not at large. If a constructional choice is identified and made according to rules which reflect the proper function of the interpreter, it can be regarded as legitimate even though reasonable minds may differ about which choice is preferable. This is the case with the Constitution, which uses broad language and has gaps and silences which, according to perspective, leave room for or require implications. The point was made with respect to statutory interpretation and the discernment of legislative intention in a joint judgment of six Justices of the High Court in *Lacey v Attorney-General (Qld)*²⁵ when they said:

Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.²⁶

Textual, contextual, purposive and historical factors will be in play and called upon in advocacy about the interpretation of a constitutional text. To use a metaphor borrowed from the almost equally difficult area of contested market definition in competition law, construction may involve something analogous to a purposive focussing process. The preferred construction may be that which appears to the judge to present the sharpest picture of meaning having regard to the question which is posed. This is a cognitive aspect of judicial decision-making. There is also a volitional aspect for there may in the end be more than one clear and obvious answer to a question and one must be chosen. Advocacy resides in sharpening for the judge a preferred picture and offering reasons for one choice over others. There are many variables in play and it is rarely that

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one can say that advocacy was determinative as distinct from instrumental. One thing is clear, however. Timid, pedestrian, narrowly focussed or muddled advocacy is likely to have little effect on the outcome of the case, save to allow superior advocacy to make the difference where the choice is a close call.

The dynamics of the interaction

Although there has been much literature on the role of the academic writer in influencing judicial decision-making, there is much less on the role of the advocate. In 2001, Stephen Gageler wrote of the heavy emphasis placed by the adversary system on the role of counsel.²⁷ Ideally, as he described it, the system relies upon all available arguments being put on behalf of the parties or by *amici curiae* leaving it to the court to evaluate the competing arguments and choose between them. That is an ideal conception and perhaps one which casts the court as a kind of passive receptor. As he went on to say however:

The system in reality has always seen the Court take a significant part in shaping the form of the arguments presented to it. The Court has also been inclined—to different degrees at different times—to formulate its own solutions to problems independently of the arguments presented.²⁸

A recent example of that phenomenon arose in the course of argument in *Williams v Commonwealth*,²⁹ which concerned the validity of funding arrangements entered into by the Commonwealth for a National School Chaplaincy Program. In the early stages of the argument for the plaintiff, the court questioned what became known in the judgment as 'the common assumption' among the parties that the Executive Government of the Commonwealth had power to expend money on activities without statutory authority if they concerned a matter within a head of Commonwealth legislative power. The report of the argument in Volume 248 of the *Commonwealth Law Reports* shows an unusually high number of questions on that point directed to their beneficiary, senior counsel for the plaintiff in the Special Case.³⁰ Heydon J in his dissenting judgment described, with the aid of colourful metaphor, what ensued:

The extent to which the Common Assumption was actually common began to break down when Western Australia began its oral address. It withdrew the relevant part of its written submissions. Victoria and Queensland followed suit. In due course, the plaintiff and most government interveners withdrew their assertion of the Common Assumption and lined up against the defendants. This great renversement des alliances created a new and unexpected hurdle for the defendants. So the Court was as

on a darkling plain, swept with confused alarms of struggle and flight, where ignorant armies clash by night – although the parties were more surprised than ignorant.³¹

The task of the advocate beneficiary in such a circumstance is to seize the moment. On the other side of the argument it may be to persuade the court that it is heading in a wrong direction. Sir Anthony Mason made the point in his paper on advocacy:

It sometimes happens in argument that the Court demonstrates a propensity to go off suddenly on a wild frolic of its own. It will express a view which, though not explicitly rejected by the cases, is nevertheless not entirely consistent with the approach which they take. When this disturbing propensity is manifested counsel is justified in reading the relevant passages from the judgments until all outward signs of heresy have been extirpated.³²

A picture of the adversarial system which would present the court as passive receptor of argument, is a caricature. In the High Court today when the parties come before it for oral argument extensive written submissions in chief and in reply have been filed. The court has read the submissions. What follows should be an adversarial endeavour as between the parties and an interactive endeavour as between the parties and the court in which the court seeks a path to the outcome of the case and principles, pre-existing or developed in the decision itself, which support that outcome.

It is no purpose of this lecture to discuss the techniques of good appellate advocacy. They are generally well known and Maurice Byers was a master of them, including the use of light touch humour which was not always self-deprecating. He did demonstrate, however, that it helps to have an established track record and a degree of natural authority with the court. When, in *Fencott v Muller* I sat down after presenting my submissions for the respondent in support of an expansive approach to the accrued jurisdiction of the Federal Court and to the corporations power, Maurice Byers rose, intervening for the Commonwealth in support of our side of the argument. It was not my imagination that the court suddenly seemed more attentive and more pens seemed to be at the ready. He did not disappoint. I had been taxed in argument by Justice Dawson about the validity of accessorial liability provisions of the *Trade Practices Act 1974* (Cth) with the affecting example of an office boy taking a misleading and deceptive message from one company to another. Maurice Byers observed of what he called 'that wretched office boy' that 'he probably hailed from Victoria' and that he proposed to say nothing further about him. The decision in that case followed the 4–3 divide of a number of important judgments around that time.

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It was important for what it had to say about the ability of the Federal Court to entertain non-federal claims which were closely connected to the federal claim or claims grounding jurisdiction. That decision and subsequent expositions of the accrued jurisdiction took a lot of the sting out of the failure of the state to federal cross-vesting system as a result of the decision of the High Court in *Re: Wakim; Ex parte McNally*.³³ It was also, I think, conducive to a strengthening of the notion of a national integrated judicial system which was to play a part in the *Kable* decision,³⁴ another product of the advocacy of Maurice Byers, and the cases which followed on from it. The Federal Court moved further from its original conception as a court of specialised statutory jurisdiction and in functional terms closer to a court of general civil jurisdiction.

A tipping point for change — *Engineers*

For an advocate to effect a development or change in the law, it is generally necessary that he or she first perceive the existence of possibilities for development. It may be the case that a proposition which has emerged from a line of decisions may be under stress in dealing with novel circumstances to which it nominally applies. Sir Anthony Mason in his paper on advocacy pointed out that persuasion calls not only for mastery of the materials but also for an element of constructive imagination and boldness of approach. He added that it remained a matter of surprise to him that controversial propositions, though supported by some authority, were not subjected to earlier challenge.³⁵ The particular example he chose was *R v Marshall; Ex parte Federated Clerks' Union of Australia*³⁶ in which the High Court indicated that it might be prepared to reconsider the prevailing narrow interpretation of 'industrial disputes' in s 51(xxxv) of the Constitution.³⁷ However the point was not argued in the court until the *Australian Social Welfare Union Case*³⁸ some eight years later.

A paradigm example of a major change whose time had come, although the allocation of credit for the change is somewhat obscured by the passage of time and the paucity of records, was the decision of the High Court in the *Engineers' Case*³⁹ in 1920. The particular question was whether a Commonwealth industrial award could bind Western Australian state entities. The question could have been answered in favour of the Commonwealth even within the existing doctrine of inter-governmental immunities on the basis that the state entities were engaged in trading activities.⁴⁰ Instead, the court took the opportunity to overturn that doctrine along with the doctrine of reserve state powers which was a kind of implied carve-out from Commonwealth heads of power.

There is no transcript of the argument in the case, which took six days. Some credit for the change was later claimed by Robert Menzies who at the age of 25 as a barrister of two years standing, appeared for the Amalgamated Society of Engineers. In his book *Central Power in the Australian Commonwealth* published in 1967,⁴¹ he recounted that he was putting the argument that the state entities were trading enterprises when Starke J intervened saying '[t]his argument is a lot of nonsense.' Menzies, in what he said was an 'inspired moment', agreed. Chief Justice Knox asked why he was putting the argument if he agreed it was nonsense. Menzies replied '[b]ecause ... I am compelled by the earlier decisions of this court. If your Honours will permit me to question all or any of these earlier decisions, I will undertake to advance a sensible argument.'⁴² He was given leave to challenge the decisions, the case was adjourned to allow for interveners to participate and the rest, as they say, was history. Sir Gerard Brennan in a paper entitled 'Three Cheers for Engineers',⁴³ observed that Menzies' account did not seem to accord with the entries in the notebooks of Chief Justice Knox and Sir Isaac Isaacs at the time. Isaacs made a particularly detailed note of the argument of counsel for the Commonwealth, Leverrier KC, recording it thus:

We say that what is called the reciprocal doctrine in *Railway Servants Case* is not only not derivable from the Constitution but is inconsistent with it. The powers of the Commonwealth must be ascertained externally by the ordinary rules of construction applied to the Constitution as a Constitution.⁴⁴

Sir Gerard Brennan commented, '[i]t seems quite clear that Menzies lit the fuse in Melbourne, though the main charge for exploding the notion of reciprocal supremacy seems to have been provided by Isaacs and Rich JJ in the earlier *Municipalities Case*. Yet it was Leverrier's rather than Menzies' advocacy which seems to have had the greatest impact on the putative author of the majority judgment.'⁴⁵

More recently, and following the discovery of Robert Menzies' handwritten notes made before and during his appearance as counsel, Professor Gerard Carney has essayed a reassessment of his role in the case.⁴⁶ Menzies' notes included a passage, the last sentence of which, as Carney says, 'resonates across the decades of Australian constitutional history'.⁴⁷ It was embedded in point 10 of a series of numbered propositions:

For certain purposes *one country and one people*. No answer to say that States reserve their independence on those matters. Contrary argument based on a distrust of Federal Govt. Abuse of power no argument against existence of powers.⁴⁸

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The *Engineers' Case* took six days to hear. This was an era in which much more time was allowed for the development of oral argument than is the case today. Menzies later recounted that Sir Edward Mitchell KC, principal counsel for the states, when asked about a point on Tuesday afternoon, said he proposed to deal with it on Thursday afternoon.⁴⁹

If one of the worst written judgments of the High Court in its long history, *Engineers'* was nevertheless the most important in terms of the direction it set for the Australian Federation. Notwithstanding that the young counsel who at the very least 'lit the fuse that led to the explosion of the notion of reciprocal supremacy' was later to establish Australia's major conservative party, it is regularly denounced by conservative commentators.⁵⁰ Whether one agrees with that criticism or not, the direction set in *Engineers* informed the expansive ambulatory approach to the external affairs power developed through *Koowarta* and *Tasmanian Dams* and the approach to the corporations power reflected in the *Work Choices Case*.⁵¹

New readings of old cases

Not every legal change is flagged by a helpful judicial tipoff or initiated by an inspired response to an intervention from the bench. There are, however, indicators of the existence of opportunities for change which arise from time to time. One such is a subsisting interpretation of an authority or line of authorities as defining necessary or sufficient conditions for the existence of some right, obligation, liability, immunity or for application of some legal characterisation. It is not unusual for judicially developed principles to be so read because under those characters they offer tick-box answers to pressing legal questions. Sometimes, however, a careful reading of the judgments from which those conditions are said to emerge, will demonstrate that they are properly applicable in some but not all circumstances. The question has arisen now and again about the activities test for characterisation of a corporation as a financial trading corporation. Is it necessary or sufficient? The question was raised in *Fencott v Muller* concerning a corporation which had not begun to trade. Another example of recent occurrence was the question whether it is enough to characterise a claimed invention as patentable that it answered the description of an 'artificial state of affairs', a term derived from the High Court's decision in *National Research Development Corporation v Commissioner of Patents*.⁵² In the great majority of cases that will be a sufficient criterion. That is not always so as appears from the decision of the court in *D'Arcy v Myriad Genetics Inc.*⁵³ A related question is whether what appears to be an established principle is in truth a factor to be weighed in the application of some larger principle.

Overruling earlier decisions

The advocate should also be astute to observe whether circumstances exist which might persuade the High Court to overrule or depart from a previous decision. An example from a few years ago was the decision of the court in *Wurridjal v Commonwealth*⁵⁴ that the just terms requirement in s 51(xxxi) limiting the powers of the Commonwealth to make laws with respect to the acquisition of property, could apply to laws in relation to the territories made pursuant to s 122 of the Constitution. The court overruled its earlier decision in *Teori Tau v Commonwealth*,⁵⁵ decided in 1969, in which it had held that the guarantee did not extend to laws made in the exercise of that power. The decision had always been under a degree of pressure. Gummow J pointed to some of the difficulties in his judgment in *Newcrest* when the constitutional question was being considered in its proper forum. In particular, as he said, a construction of the Constitution which treated s 122 as disjoined from s 51(xxxi) produced absurdities and incongruities particularly with respect to the people of the Northern Territory, which was formerly part of the State of South Australia and was surrendered to the Commonwealth in 1910.⁵⁶

Criteria for overruling a previous decision of the court were set out in *John v Federal Commissioner of Taxation*⁵⁷. They were:

1. Whether the earlier decision rested upon a principle carefully worked out in a succession of cases.
2. Whether there was a difference between the reasons of the justices constituting a majority in the earlier decision.
3. Whether the earlier decision had achieved a useful result or on the contrary caused considerable inconvenience.
4. Whether the earlier decision had been independently acted upon in a way that militated against reconsideration.

It is not necessary in applying those criteria to ascertain some 'error' in the earlier decision. Where a constitutional decision is concerned, there is the additional factor that, short of a referendum, only the High Court can correct what comes to be perceived as a wrong turning or a misinterpretation or a construction not to be preferred. Any invitation to the court to depart from a previous decision of course confronts the threshold of the cautionary conservative principle that the court will not lightly depart from an earlier decision.

In his 1987 paper, Maurice Byers spoke of the common law as contingent and temporary because it is embodied in the judges. Coherence was mostly maintained because judicial techniques had been developed to make it so. Predictability ensued, but it

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was only approximate. Past decisions are beacons to indicate the future path but do so only broadly. He went on to say '[t]oo assiduous a respect for what has been said in the past cripples the law's development and hamstring both the advocate and the judge.'⁵⁸ He referred to Sir Owen Dixon's approach to arriving at departures in principle. His example was the judgment of the court in *Commissioner for Railways (NSW) v Cardy*⁵⁹ departing from the notion of an implied licence as a criterion of an occupier's liability to a trespasser in favour of a duty of care. Byers characterised Dixon's approach as achieving change by the tools of legalism and a kind of inspired semantics.⁶⁰ He contrasted this with what he called the 'fresh and welcome voice' of Sir Anthony Mason in his Wilfred Fullagar Memorial Lecture in 1987, in which he described the proper function of the courts as to protect and safeguard the democratic process. That process was an evolving concept moving beyond an exclusive emphasis on parliamentary supremacy and majority will and embracing a notion of responsible government which respects the fundamental rights and dignity of the individual and calls for the observance of procedural fairness in matters affecting the individual.⁶¹ Sir Anthony's observation was directed to public law and constitutional law. Byers generalised it to suggest that the means of change in the future would be different in the sense that the only recognised agent of change need no longer be found implicit in the past. The judge would be left free to perform his task guided by such values as Sir Anthony had indicated in the passage he quoted and able to employ a freer, less arthritic judicial process still yielding that predictability which the system demands.⁶² The proposition is pitched at what we are accustomed to call 'a high level of abstraction'. Nevertheless, in the style of Byers' advocacy it inspires reflection on fundamental ideas for judicial function.

A constitutional shift — *Mabo*

I mentioned earlier that the Racial Discrimination Act, upheld against constitutional challenge in *Koowarta*, had a part to play in the rather convoluted history which led to the recognition of native title at common law. That history can be traced back to a significant litigious failure in *Milirrpum v Nabalco Pty Ltd*.⁶³ Blackburn J, applying the decision of the Privy Council in *Cooper v Stuart*,⁶⁴ held that there was no common law doctrine of native title in Australia. *Cooper* had entrenched as a proposition of law for the Australian colonies a particular view of history, namely that the colony of New South Wales was 'a tract of territory practically unoccupied, or without settled inhabitants or settled law at the time when it was peacefully

annexed to the British dominions'. That was notwithstanding Justice Blackburn's finding that the evidence before him disclose 'a subtle and elaborate system highly adapted to the country in which the people led their lives', a system he was prepared to describe as a government of laws, not of men.⁶⁵ The counsel who argued for the Aboriginal plaintiffs in resisting the grant of bauxite mining leases did not take it further. That may well have been a piece of inspired and disciplined restraint on their part. Had they taken the matter on appeal through to the High Court they may well have had a negative answer from that court as then composed. Instead of appealing, senior counsel, AE Woodward QC, accepted appointment to a royal commission into land rights in the Northern Territory.

As a result of the report of the Woodward Royal Commission the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) was enacted. Its object as described by the first commissioner appointed under the Act, Toohey J, was 'to give standing, within the Anglo-Australian legal system, to a system of traditional ownership that has so far failed to gain recognition by the courts.'⁶⁶ It was a statutory land rights scheme based upon an administrative recognition by the Aboriginal land commissioner of traditional Aboriginal owners of land under claim. Grants under the Act are made by the governor-general acting on the recommendation of the relevant Commonwealth minister following a report by the commissioner.⁶⁷

The Northern Territory Government litigated the Act in the High Court on numerous occasions in relation to a variety of issues, many focussing on the jurisdiction of the commissioner and legal limits on the class of land available for claim. There were no less than 14 reported decisions of the High Court touching matters connected with the administration of the Act before the court's decision in *Mabo v Queensland (No 2)*.⁶⁸ In those cases the court was involved in the construction of a Commonwealth statute. But it was a statute in which the concept of traditional land ownership was firmly embedded. Members of the court who took part in the *Mabo (No 2)* decision, in particular Justices Mason, Brennan, Deane and Dawson, heard many of those cases. Justice Toohey of course had been the first Aboriginal land commissioner and had conducted on-country inquiries into traditional ownership. It would be drawing a long bow to propose a direct causative relationship between the High Court's recognition of native title at common law in 1992 and its exposure to a decade of land rights litigation out of the Northern Territory. But the values underpinning the Act could not have been lost on the

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court. There was a strong normative element in the *Mabo (No 2)* judgment. It is not unreasonable to suppose that some of it may have been informed by the experience of the contentious land rights statute. However, another very strong and more explicit normative input, which also had significant practical consequences for native title law was the Racial Discrimination Act.

Mabo and the Racial Discrimination Act

The Racial Discrimination Act was critical to the ultimate success of the *Mabo* litigation. After the claim had been instituted in the High Court and remitted for trial of factual issues to the Supreme Court of Queensland, the State of Queensland enacted the *Queensland Coast Islands Declaratory Act 1985* (Qld) which effectively purported to extinguish the rights which *Mabo* and other plaintiffs claimed in respect of the land and waters of their home island, Mer. In *Mabo v Queensland*⁶⁹, decided in 1988, the High Court held that the Act was invalid for inconsistency with s 10 of the Racial Discrimination Act. The invalidation of the Queensland law foreshadowed large consequences if the court were to ultimately recognise native title at common law. All state or territory laws or executive acts done after the Racial Discrimination Act came into effect were in question if they operated in a discriminatory fashion in relation to native title. For the Commonwealth there was the further question whether its laws or its executive acts might have operated to effect acquisitions of native title rights without just terms and therefore contrary to the requirement of s 51(xxxi).

The process of historic change with respect to indigenous customary title came to fruition with the decision of the High Court in *Mabo (No 2)*.⁷⁰ If one has to assign an instrumental role to advocacy in that litigation, it can be assigned to the late Ron Castan QC, who appeared for the plaintiff, in particular, and his legal team in general. Maurice Byers did not appear in *Mabo* but, as mentioned earlier, took an important part in the *Wik* litigation which led to the setting aside of the assumption that historic pastoral leases extinguished native title. So that which was thought to have been extinguished now came under the protection of the Racial Discrimination Act. That protection was, of course, affected by the 1998 amendments to the Native Title Act but the foundation for more extensive assertions of native title rights and interests throughout Australia than previously imagined had been laid.

Conclusion

Maurice Byers as solicitor-general and as a member of the New South Wales Bar played an instrumental role in Australian legal history. In 1992 he led my colleague, Stephen Gageler, appearing for the plaintiffs in *Australian Capital Television Pty Ltd v Commonwealth*⁷¹ which, coupled with the decision of the court in *Nationwide News Pty Ltd v Wills*,⁷² established an implied freedom of communication on matters relevant to political discussion. The implications of that implication are still being worked out. Of equal if not greater importance, as it turned out, was the decision of *Kable* in which he appeared as leading counsel for the appellant, Gregory Wayne Kable. The report of his argument in the *Commonwealth Law Reports* begins with the proposition that the *Community Protection Act 1994* (NSW) was not a valid law of the Parliament of New South Wales. That was on the basis that the Act prescribed no rule and allowed no defence. He invoked Austin's *Lectures on Jurisprudence* for the proposition that essential to a law is a command which obliges a person or persons to a course of conduct. A law which in substance directs the judicial arm to imprison a particular individual is specific to the point of absurdity. It is about one aspect of one person and is there exhausted.⁷³

It was not the argument which succeeded. At our last encounter before the hearing of the *Kable* case we had a conversation about it. It was the argument in which he was most interested and about which he was almost excited. It was, as they say, right up his alley. However, his argument which laid the foundation for the decision in *Kable* and the cases which followed appears at page 54 of the report:

Chapter III of the Constitution applied to State courts from 1 January 1901; they were impressed with the characteristics necessary for the possession and exercise of Commonwealth judicial power. No legislature, State or federal, might impose on them jurisdiction incompatible with the exercise of that judicial power. Nor could it control the manner of the exercise of judicial power whether conferred by the Commonwealth or States. Since Ch III envisages State courts as being capable of investiture with and exercise of the judicial power of the Commonwealth, it grants to them or prevents their deprivation of those characteristics required of recipients of that power.

Chief Justice Robert French AC, 'Legal Change - the role of advocates'

The rest, as they say, is history. Maurice Byers' personal history demonstrates that advocacy can be instrumental in effecting legal change. It is rarely solely determinative for there are many other factors at play and sometimes, as is demonstrated in the *Milirrpum*, good advocates will keep in reserve an argument whose time has not yet come.

Once again, my thanks for the opportunity to deliver this lecture in honour of a man fondly remembered and greatly admired by all who knew him.

Endnotes

1. (1982) 153 CLR 168.
2. (1983) 152 CLR 570.
3. (1993) 119 ALR 423.
4. *Horsey v Caldwell* (1946) 73 CLR 304.
5. Sir Gerard Brennan, 'Strength and perils: The bar at the turn of the century' in Nye Perram and Rachel Pepper (eds) *The Byers Lectures 2000–2012* (Federation Press, 2012) 4, 4.
6. Ibid citing Sir Gerard Brennan, 'Retirement of Chief Justice Sir Gerard Brennan' (1988) 193 CLR v, vi.
7. The Hon Justice JD Heydon AC, 'Theories of constitutional interpretation: A taxonomy' in Perram and Pepper (above n 5) 132, 133.
8. The Hon Justice AF Mason, 'The Role of Counsel and Appellate Advocacy' (1984) 58 *Australian Law Journal* 537, 539.
9. Sir Maurice Byers, 'From the Other Side of the Bar Table: An Advocate's View of the Judiciary' (1987) 10 *UNSW Law Journal* 179, 179.
10. *R v Burgess; Ex parte Henry* (1936) 55 CLR 608.
11. Ibid 641.
12. Ibid 658.
13. Ibid citing Westel W Willoughby, *The Constitutional Law of the United States* (Baker, 2nd ed, 1929) 519.
14. Ibid 668–9.
15. Ibid 681.
16. (1982) 153 CLR 168, 171.
17. For example, *R v Sharkey* (1949) 79 CLR 121; *Airlines of New South Wales Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54; *New South Wales v Commonwealth ('Seas and Submerged Lands Case')* (1975) 135 CLR 337.
18. Leslie Zines, 'External Affairs Power' in Tony Blackshield, Michael Coper and George Williams (eds) *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 263.
19. (1982) 153 CLR 168, 231 (Mason J), 241–2 (Murphy J), 260 (Brennan J).
20. Ibid 216–7.
21. *Commonwealth v Tasmania* (1983) 158 CLR 1.
22. Other heads of power supportive of aspects of the legislation included the race power (Constitution, s 51(xxvi)) and the corporations power (Constitution, s 51(xx)).
23. Zines, above n 18, 263.
24. (1996) 187 CLR 1.
25. (2011) 242 CLR 573.
26. Ibid 591–92 [43] (footnote omitted).
27. Stephen Gageler, 'Role of Counsel' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 167.
28. Ibid.
29. (2012) 248 CLR 156.
30. Ibid 161–2.
31. Ibid 296 [343].
32. Mason, above n 8, 539.
33. (1999) 198 CLR 511.
34. *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
35. Mason, above n 8, 538.
36. (1975) 132 CLR 595.
37. Ibid 608–9.
38. *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297.
39. *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
40. Kevin Booker and Arthur Glass, 'The Engineers Case' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 34–61.
41. Sir Robert Menzies, *Central Power in the Australian Commonwealth: An examination of the growth of Commonwealth power in the Australian Federation* (University Press of Virginia, 1967).
42. Ibid 38–39.
43. Gerard Brennan, 'Three Cheers for Engineers' in Michael Coper and George Williams (eds) *How Many Cheers for Engineers?* (The Federation Press, 1997).
44. Ibid 148.
45. Ibid.
46. Gerard Carney, 'Reassessment of Robert Menzies' Contribution in the Engineers Case' (2015) 89 *Australian Law Journal* 331.
47. Ibid 345.
48. Ibid (emphasis in original).
49. Ibid.
50. See, for example, Professor Geoffrey de Q Walker, 'The Seven Pillars of Centralism: Engineers' Case and Federalism' (2002) 76 *Australian Law Journal* 678, 714. For an extended critique of *Engineers* and its sequelae and the role of the High Court see James Allan and Nicholas Aroney, 'An Uncommon Court: How the High Court of Australia has Undermined Australian Federalism' (2008) 30 *Sydney Law Review* 245.
51. *New South Wales v Commonwealth* (2006) 229 CLR 1.
52. (1959) 102 CLR 252.
53. (2015) 325 ALR 100; 89 ALJR 924.
54. (2009) 237 CLR 309.
55. (1969) 119 CLR 564.
56. *Newcrest Mining (WA) Limited v Commonwealth* (1997) 190 CLR 513, 600–1.
57. (1989) 166 CLR 417, 438–9.
58. Byers, above n 9, 181.
59. (1960) 104 CLR 274.
60. Byers, above n 9, 182.
61. Sir Anthony Mason, 'Future Directions in Australian Law' (1987) 13(3) *Monash University Law Review* 149.
62. Byers, above n 9, 183.
63. (1971) 17 FLR 141.
64. (1889) 14 App Case 286.
65. (1971) 17 FLR 141, 267.
66. Report on Yingawunarra (Old Top Springs) Mudbura Lands Claim, Report No 5 (Canberra, Australian Government Printing Service, 1980) [70].
67. *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), Pt II and s 50.
68. (1992) 175 CLR 1 ('*Mabo (No 2)*'). For a list of cases see Robert French, 'The Role of the High Court in the Recognition of Native Title' (2002) 30 *Western Australian Law Review* 129, 136.
69. (1988) 166 CLR 186.
70. (1992) 175 CLR 1.
71. (1992) 177 CLR 106.
72. (1992) 177 CLR 1.
73. (1996) 189 CLR 51, 53.