BARWICK THE JUDGE

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A striking feature of the recent obituary reflections on the life of Sir Garfield Barwick is the scant reference to his judicial career. With the natural exception of Chief Justice Brennan's High Court tribute,[1] commentators from the Governor-General down have emphasised Sir Garfield's virtuosity as an advocate and his brief political career, but virtually his only action as Chief Justice to receive media attention was his letter of advice to the Governor-General on 10 November 1975. His judicial work was rarely mentioned. Interestingly, Barwick himself appeared to share these priorities, for his post retirement writings and addresses largely harked back to his halcyon years at the Bar or vehemently defended his extrajudicial advice of 1975.[2] This article attempts to redress the omission by assessing Sir Garfield's 17 year tenure on the High Court, including his leadership of the Court, his work as a judge and his influence on Australian law.

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1 (1997) 187 CLR (no pagination).

2 See especially Sir Garfield Barwick, *Sir John did his Duty*, Serendip Publications (1983) and *A Radical Tory: Garfield Barwick's Reflections and Recollections*, Federation Press (1995).

I. CHIEF JUSTICE

Although appointed to the High Court straight from Cabinet, Barwick's was not a true 'political' appointment (like those of Lionel Murphy in 1975 or Edward McTiernan in 1930) in the sense of being attributable to political considerations rather than legal talent. Had the chief justiceship fallen vacant before he entered Parliament in 1958, Barwick would have been the leading candidate for the position, with the possible exception of Justice Sir Frank Kitto who would have been difficult to appoint since he was not the senior puisne justice (that was McTiernan who, in 1964, was already over 70 years old and had served on the Court for 34 years). For at least the preceding decade, Barwick had enjoyed a rare national pre-eminence at the Bar. Sir William Deane recently described him as "probably the leading appellate advocate our country has produced",[3] and even Gough Whitlam (certainly no fan in recent years) considered Barwick "the most successful barrister in Australian history".[4]

Barwick's accession to the chief justiceship in April 1964 would nevertheless have been far from easy. He openly acknowledged his uncertainty whether to leave politics,[5] and was succeeding the almost legendary Sir Owen Dixon whose lustre among Australian lawyers, especially in Melbourne, still remains largely undimmed a quarter-century after his death. (Dixon is virtually an Australian "icon" in the true sense and urgently requires a biography to humanise him).[6] Barwick's new colleagues had all served under Dixon for several years and, although Barwick knew them all (Sir Douglas Menzies was the only close friend) and had appeared at the Bar with several of them, they are unlikely to have considered anyone in Australia capable of filling the "old chief's" ample shoes.[7] As a constitutional scholar aptly put it: "The shadow of Dixon fell long over Barwick's Court".[8] Barwick, however, was not given to reticence and had a strong sense of the prerogatives of the Chief Justice.[9]

Barwick's judicial technique was very different from that of Dixon and his followers, such as Kitto. In discussing advocacy skills, Barwick always stressed the importance of distinguishing between relevant and irrelevant facts and considerations, and the need to isolate the essential issues in a legal problem.[10] His approach to judging was similar, and consequently less intellectual and more pragmatic and down to earth than that of Dixon or Kitto. In many respects it was more attuned to the times during which the High Court completed the process of breaking free from its largely self imposed tutelage to English courts and began to develop an indigenous common law for Australia.

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3 Sir William Deane, "The Death of Sir Garfield Barwick", Media Release, 15 July 1997.

4 EG Whitlam, Book Review, *Sydney Morning Herald,* 23 May 1980, p 7.

5 Swearing-in Speech (1964) 110 CLR xiv at xxi.

6 For a brief beginning, see D Dawson and G Anderson, "Dixon, Sir Owen", in *Australian Dictionary of Biography*, vol 14, Melbourne University Press (1996), pp 7-10.

7 See D Marr, *Barwick*, Allen & Unwin (1980), pp 213-14.

8 GA Rumble, *Sir Garfield Barwick's Approach to the Constitution* (PhD thesis, ANU, 1983), p 481.

9 See for example Australia, House of Representatives 1960, Debates, vol HR 29, pp 3837-8 (8 December 1960).

10 See D Bailey, "Conversation with Sir Garfield Barwick" (1983) 57 *Law Institute Journal* 1304 at 1305.

II. COMMON LAW

Appeals in matters of private law (except federal matters after 1968) lay from the High Court to the Privy Council until 1975.[11] Consequently, the High Court was generally bound by Privy Council decisions on such matters. The intermediate English appellate court - the Court of Appeal - and the highest English court - the House of Lords - were not part of the Australian judicial hierarchy and the High Court was, therefore, not legally bound by their decisions. It nevertheless decided generally to follow them, even in preference to an earlier decision of its own.[12] This made practical sense in the case of the House of Lords whose judges sat on the Privy Council, but in regard to the Court of Appeal was a pure act of judicial self denial in the interest of maintaining uniformity in the common law throughout the British Commonwealth.

Nevertheless, Australian judicial deference to the United Kingdom inevitably waned. By the end of Sir Owen Dixon's tenure the High Court had refused to follow a decision of the House of Lords which it considered "misconceived and wrong".[13]

Notwithstanding his Anglophilia, Barwick believed strongly in Australian judicial independence from the United Kingdom. Even while appeals still lay from the High Court to the Privy Council, he emphasised the High Court's obligation "to declare the common law ... for Australia".[14] Its task was "to express what is the law ... as appropriate to current times in Australia. This will not necessarily be identical with the common law of England".[15] The Privy Council conceded that the common law could vary in different jurisdictions, and affirmed a High Court decision which had refused to follow a recent decision of the House of Lords.[16]

When Privy Council appeals from the High Court ended in 1975, the High Court became, in Barwick's words, "the final arbiter of what is the common law in Australia".[17] This cast upon the Court "a very heavy responsibility" to be fulfilled by "its own close, critical and independent" examination of the legal issues. While paying "the highest respect" to decisions of the House of Lords, it "must ... decide for itself upon principle what is the common law".[18]

These remarks suggest a liberal, innovative approach to judicial development of the common law, but Barwick's views on that subject are hard to pin down. It is difficult to reconcile decisions and observations in different cases and, as on constitutional issues, he appears to have become more conservative with the passage of time. His early remarks suggest a willingness to depart from precedent and adapt the common law to changing circumstances:

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11 See *Privy Council (Appeals from the High Court) Act* 1975 (Cth); *Privy Council (Limitation of Appeals) Act* 1968 (Cth).

12 *Piro v W Foster & Co Ltd* (1943) 68 CLR 313; *Waghorn v Waghorn* (1942) 65 CLR 289.

13 *Parker v R* (1963) 111 CLR 610 at 632.

14 *MLC v Evatt* (1968) 122 CLR 556 at 563.

15 *Ibid.*

16 *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590.

17 *R v O'Connor* (1980) 146 CLR 64 at 70.

18 *Ibid.*

> [W]here no authority binds or current of *acceptable* decision compels, it is not enough, nor indeed apposite, to say that the function of the Court in general is to declare what the law *is* and not to decide what it *ought* to be.[19]

These remarks are difficult to reconcile with the Barwick Court's decision a decade later (to which only Murphy J dissented) that the common law doctrine of attainder of felons (or 'civil death') which barred a capital felon from civil suit remained law in New South Wales notwithstanding its violation of "fundamental standards of human rights" (as Murphy J noted).[20]

Barwick's 'is - ought' distinction of 1968 should be contrasted with some extrajudicial observations towards the end of his tenure. Barwick noted realistically, if not cynically, that:

> The more the judiciary appear as interpreters and the less as law makers, the more acceptable judiciary law is likely to remain, and, the fewer departures, particularly of a radical kind, from existing precedent, the less likely the judiciary will appear to be legislators.[21]

Stressing the common law's grounding in community attitudes,[22] he continued:

> It can never be the function of the judiciary to express views of what the law should be, irrespective of whether or not as so expressed it is conformable to the community's sense of fairness and justice. That the judiciary are to declare what the law *is* and not what it is not but *ought* to be is ... axiomatic.[23]

Barwick's observation that "it is only to the extent that the judiciary accurately discerns and expresses the community sense of fairness and justice that the community will, in the long run, accept what is ... laid down by a judiciary not responsible to an electorate"[24] may be sound sociology. However, he vastly overestimates a judge's ability to differentiate between personal opinions and 'community attitudes', never troubling to consider how the latter are to be discerned. Barwick's prescription that "[i]t is what the reasonable man thinks right and just which forms the criterion: not what the judge thinks the reasonable man ought to think but does not",[25] is an example of his capacity for sophistry. It is matched only by his subsequent distinction between overturning accepted precedent (which should be left to Parliament) and correcting an earlier decision which was "*erroneous when made*" (which is a proper judicial function): "This correction of error does not involve a change in principle: it affirms what the principle was at the earlier time but misapplied".[26] Hardly a defensible distinction, but not bad for a 92 year old!

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19 Note 14 *supra*. Emphasis added.

20 *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583. See Murphy J at 611.

21 Sir Garfield Barwick, "Judiciary Law: Some Observations Thereon" (1980) 33 *Current Legal Problems* 239 at 242-3.

22 *Ibid* at 243-4.

23 *Ibid* at 244. Emphasis added.

24 *Ibid*.

25 *Ibid*.

26 *Radical Tory*, note 2 *supra*, p 224. See, likewise, p 218.

III. THE CONSTITUTION

Barwick considered his technique of constitutional interpretation to be legalistic in the tradition of Sir Owen Dixon,[27] but few would characterise it thus. He was far more pragmatic and policy oriented than Dixon. A leading commentator described his approach in taxation litigation as "primarily policy-oriented", adding: "His judicial style has more in common with Murphy J than it has with, say, Sir Owen Dixon".[28] Indeed Barwick and Murphy mirror one another in many respects: while Murphy's interpretation of taxation legislation and ss 90 and 92 of the Constitution upheld governmental power, presumably to facilitate public advancement of social justice, Barwick's decisions in these fields supported individual initiative and private enterprise - understandable perhaps for the self made man who proudly rose from nothing through his own endeavours. As a commentator rightly noted in 1960, he had "an ideological passion for a free economy".[29]

Barwick denied the existence of any moral obligation to pay tax[30] and demonstrated an "exceptionally strong tendency ... to find for the taxpayer".[31] He decided against the Commissioner to a greater degree than any other justice, except perhaps Sir Keith Aickin who served for only six years.[32] He interpreted "excise" in s 90 of the Constitution broadly (like Dixon before him and the High Court majority in the recent *Ha* case),[33] and adopted an almost laissez faire approach to s 92.

Yet Barwick appears to have lacked self awareness. After years of battling for an extremely liberal interpretation of "freedom" in s 92, he asserted that:

> Nothing I have ever written, nor, as far as I am aware, nothing that has been said in the decided cases, on the operation of s 92 has depended on any other consideration than the words of the Constitution itself.[34]

He genuinely seems to fail to appreciate the inherent flexibility of constitutional interpretation. It is difficult to imagine a more open ended constitutional provision that s 92 ("trade, commerce, and intercourse among the States ... shall be absolutely free"), yet Barwick could claim that "there is no ambiguity in the meaning" of its words.[35] And what is one to make of the apparently naive comment in his retirement speech that a judge "has no choice" in interpreting the Constitution: "To talk of him as a centralist or a centrist is quite inapt, but I hear it"?[36] Why, then, did Isaacs and Murphy, for example, generally interpret Commonwealth power more liberally than, say, Griffith, Gibbs or Dawson?

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27 Note 10 *supra* at 1307.

28 G Lehmann, "The Income Tax Judgments of Sir Garfield Barwick: A Study in the Failure of the New Legalism" (1983) 9 *Monash University Law Review* 115 at 154.

29 "Absolutely Free Man", *Nation*, 4 June 1960, 8 at 10.

30 *Radical Tory*, note 2 *supra*, p 229.

31 Lehmann, note 28 *supra* at 151.

32 *Ibid.* For a comparative table, see 149-50.

33 *Ngo Ngo Ha v NSW* (1997) 146 ALR 355.

34 *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 at 295.

35 *Ibid* at 294.

36 (1981) 148 CLR v at ix.

Employing the terminology Barwick eschewed, his position on the federal spectrum was moderately pro-Commonwealth. He acknowledged that "[t]reated as a general question, I don't disagree with giving Commonwealth power its full significance",[37] and saw "the sense of unity of the Australian people" as a major High Court achievement.[38] The *Concrete Pipes* decision of 1971,[39] liberating the Commonwealth's corporations power and thereby greatly expanding Commonwealth power over commercial activity, was notable in this respect, and probably represents the Barwick Court's greatest legacy.[40]

Barwick's retirement speech included a strong plea to ensure that "the triumph of the *Engineers' Case* is never tarnished",[41] yet here again he lacked self awareness for he himself had succumbed to the "little echoes" of the "exploded" reserved State powers doctrine he so deprecated[42] in cases on the trade and commerce power and in other areas.[43]

Several leading constitutional decisions[44] have led to suggestions that Barwick adopted a markedly less centralist perspective in reviewing Whitlam Government legislation but, while he did indeed vote against such legislation more often than in favour, it is difficult to draw any general inferences therefrom. Barwick upheld some significant Whitlam measures,[45] and it must be remembered that the Whitlam Government was considerably more adventurous with Commonwealth power than its conservative predecessors.

IV. OVERALL ASSESSMENT

Barwick's leadership of the High Court was a mixed success. He had a grandiose vision of the Court as "*the* most important institution in the Australian federation",[46] and was instrumental in securing for it a grand and functional building of its own in Canberra, something which Dixon had "emphatically opposed".[47] However, his colleagues resisted his bullying attempts to dominate them, from proposals for greater coordination in judgment writing, including

37 Note 10 *supra* at 1306.

38 Sir Garfield Barwick, Book Review (1981) 4 *UNSWLJ* 131 at 134.

39 *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.

40 See likewise, Rumble, note 8 *supra*, p 488.

41 148 CLR at x.

42 *Ibid.*

43 See *Airlines of NSW Pty Ltd v NSW* (No 2) (1965) 113 CLR 54; the *Western Australian Airlines* case (1976) 138 CLR 492; Rumble, note 8 *supra*, p 485.

44 See *Bradley v Commonwealth* (1973) 128 CLR 557; the *PMA* case (1975) 134 CLR 81; the *AAP* case (1975) 134 CLR 338; the *Territory Senators* cases (1975) 134 CLR 201 and (1977) 139 CLR 585; *Russell v Russell* (1976) 134 CLR 495; the *Western Australian Airlines* case, *ibid.*

45 The *Offshore Sovereignty* case (1975) 135 CLR 337, *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1.

46 *Radical Tory*, note 2 *supra*, p 240. Emphasis added. Compare Sir Anthony Mason's view that the High Court is "Australia's greatest institution": A Mason, "The Future of the High Court of Australia" (1996) 12 *QUTLJ* 1 at 8.

47 *Radical Tory*, note 2 *supra*, p 239.

regular conferencing,[48] to the abandonment of State circuits and enforced residence in Canberra, on which they successfully addressed a separate submission to Cabinet in opposition to his.[49] In a major snub, the *High Court of Australia Act* of 1979 expressly vested the Court's administration in the Court as a whole,[50] in marked contrast to the Federal and Family Courts which are administered by their Chief Justices.[51] Barwick himself conceded that his colleagues were "not prepared to agree that the Chief Justice should have the administration".[52]

Barwick also failed to lead the Court in its judicial work: "It is difficult to find many constitutional issues where Barwick CJ's thinking dominated or led the Court".[53] There are few parallels with the joint judgments of the Dixon Court, and nothing to match the remarkable unanimous judgments of the Mason Court in *Cole v Whitfield*[54] and the Brennan Court in *Lange v Australian Broadcasting Corporation.*[55] As a contemporary commentator noted:

> It is in the *intellectual* cohesion of [the justices'] public utterances that the problem lies ... [T]oo often, the result ... is seven different judgments which point in seven different directions. It is not that the judgments give different *answers*, but that too often they do not even address themselves to the same *questions*.[56]

If Barwick was not a particularly successful chief justice, how should his record as a justice be evaluated?

Barwick worked hard, demonstrated clear mastery of legal concepts, and wrote clearly, though often clumsily and inelegantly. Ironically, the very qualities which underlay his pre-eminence as an advocate represented his principal weaknesses as a judge. His emphasis on isolating the nub of an issue resulted in excessive simplicity of analysis, with mere assertion substituting for reasoned argument,[57] as is well illustrated in his letter of advice to Sir John Kerr and his book *Sir John did his Duty.*[58] He was too argumentative and unjudicial in temperament, essentially remaining an advocate on the bench, both during argument and in writing judgments. His fierce "determination to win"[59] and ferocious self assurance, often seen as arrogance, prevented him attempting to conciliate or win over colleagues who disagreed with him.

These qualities are demonstrated by the Barwick Court's experience with s 92 of the Constitution. Barwick's fame as an advocate was founded on his successful challenges to the Chifley Government's airline and bank

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48 See, *ibid*, pp 223, 251; Marr, note 7 *supra*, p 233.

49 See note 7 *supra*, pp 298-99; *Radical Tory*, note 2 *supra*, pp 240-42.

50 Section 17(1): "The High Court shall administer its own affairs".

51 *Federal Court of Australia Act* 1976 (Cth) s 18A (1); *Family Law Act* 1975 (Cth) s 38A(1). Both provide: "The Chief Judge is responsible for managing the administrative affairs of the Court."

52 Note 10 *supra* at 1309.

53 Note 8 *supra*, p 482.

54 (1988) 165 CLR 360.

55 (1997) 145 ALR 96.

56 AR Blackshield, "The High Court: Change and Decay" (1980) 5 *Legal Service Bulletin* 107 at 108. Emphasis in original.

57 Note 8 *supra*, p 490.

58 Note 2 *supra*.

59 Note 7 *supra*, p 280.

nationalisations on the ground of s 92.[60] He considered the Dixon Court's approach to the section excessively narrow and artificial, which in some respects it was. He advocated a more pragmatic approach to determining whether legislation had a "direct" effect on interstate commerce, and had carried the Court with him on this issue by 1975.[61] Had he been satisfied and stopped there, his goal would have been largely achieved and *Cole v Whitfield*[62] might never have occurred. However, he continued to press for a more absolute notion of "freedom" which excluded the interests of the general community, meeting strong opposition from Justices Mason, Jacobs and Stephen. The Court eventually fractured in several directions,[63] enabling the Mason Court to devise a new and much narrower test in *Cole v Whitfield*, which Barwick condemned as "terrible tosh".[64] Sir Anthony Mason rightly considers the case his Court's greatest achievement,[65] but Barwick was the ironic catalyst. Without him it might never have occurred.

Barwick was once described as "very clever, but not deep".[66] He lacked the breadth of vision and depth of principle to leave a permanent judicial legacy in the class of Griffith, Isaacs or Dixon. Although undeniably "a force of nature" in Australian legal and political history,[67] less than two decades after his retirement his lasting impact on Australian legal doctrine appears slight. As Gary Rumble aptly concluded:

> It may be that the reason why Barwick may not be mentioned in the same breath as Dixon when great Australian constitutional judges are being discussed, is that Barwick's faith in hard work and market forces was not by itself a broad enough framework with which to resolve the constitutional issues of Australia in the second half of the twentieth century.[68]

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60 *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29; *Bank of NSW v Commonwealth* (1948) 76 CLR 1, affirmed [1950] AC 235.

61 *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559.

62 (1988) 165 CLR 360.

63 See *Uebergang v Australian Wheat Board,* note 34 *supra.*

64 "Bar News Interviews Sir Garfield Barwick ...", *Bar News* (New South Wales Bar Association), Summer 1989, 9 at 17.

65 "In Conversation: An Interview with Sir Anthony Mason" (1996) 17 *Singapore Law Review* 3 at 6. See also L Zines, "Most Significant Case of the Mason High Court" (1995) 30 (5) *Australian Lawyer* 18.

66 Anonymous, quoted in C McGregor, "Barwick, the Old Fox", *National Times,* November 28 - December 3, 1977, p 4.

67 DMM, Book Review (1995) 69 *ALJ* 842 at 844.

68 GA Rumble, Book Review (1995) 23 *FLRev* 378 at 382.