Barwick-His Place in the Legal Pantheon

Personal

I have always admired Garfield Barwick. At one level, I was attracted by his relatively short, pragmatic judgments. They seemed to blend the certainty concerning legal principle, demonstrated by the nineteenth and twentieth century English judges, with an approach which was more typically Australian. Barwick eschewed the frequently florid, and superficially learned language of the English judges, rather adopting more direct, also uniquely Australian language. At one level, my admiration may have arisen out of my preference for a short, direct judgment over a long, abstruse one, an understandable point of view for a student, a practitioner or a judge. But Barwick's appeal was more than that. One had confidence that he fully understood the concepts with which he was dealing, the practical effects likely to flow from his decision and the need for certainty in the law. To some extent my confidence was derived from knowledge of his relatively humble background, his great success at the Bar, his efforts as a politician and minister, and, as time went on, his experience as a judge.

My attraction to his judgments tended to make me defensive of him, in connection with criticisms of his attitude to tax matters and with reference to his involvement in Kerr's dismissal of Whitlam, an involvement which we now know to have been much less than that of Sir Anthony Mason. Much of both streams of criticism seemed, and seems to involve ex post facto rationalizations and judgments based upon legal and social attitudes which were not those prevailing for most of Barwick's life, or for much of my own early life, together with a healthy dose of purely political prejudice. Such criticism made assumptions about the character of the man, for which assumptions there seemed to be little evidence. There is, and perhaps has always been a tendency for Australians to assume that most

lawyers, particularly successful barristers, and therefore silks and judges, are "silvertails", as they say, usually meaning that they were educated in non-government schools and at universities, largely at the expense of wealthy parents. We all know that these views have little factual basis when applied to our own generations. They certainly did not apply to Garfield Barwick.

My admiration, if that is what it was, was deepened by my few fleeting meetings with him. Whilst I was at university, it was always a feature of the High Court's visits to Brisbane that most of the High Court Judges who had come to town would visit the Law School for drinks with the undergraduates. Barwick always seemed to be at ease in that company, although he tended to tell the same stories each year, a weakness which many of us share, particularly as we grow older. His relationships with the other judges seemed cordial and marked by mutual respect. Looking back, with the benefit of my own extended association with judges at all levels, I have no reason to doubt the correctness of those observations. I met him on one other occasion. At the end of my university studies, I applied unsuccessfully for the position as his associate. I was amazed that the Commonwealth flew young graduates to Sydney from all over the country, first class, to be interviewed for the job. That would not happen today, even if there were still first class domestic air travel. At that time, the High Court's Sydney premises were in the Quarter Sessions building at Darlinghurst. It was a convivial if, from my point of view, unsuccessful interview.

Some Anecdotes

There are many stories about Barwick, but there are two which relate to his sittings in Brisbane, both of which stories are certainly true. The first was told by Bill Pincus. As President of the Bar Association, he went to the old (that is the 1970s) District Court building to take Barwick to lunch at the Bar Common

Room. As a consequence of the 1968 fire, the now recently demolished District Court building was, at that time, temporarily occupied by the Supreme Court. Hence, for the duration of the High Court's sittings, it was also used by that Court. The Bar Common Room was a little unprepossessing. There was a small, ground floor coffee shop in the old Inns of Court (a former boot factory), opening on to North Quay. The coffee shop was operated by the renowned Bruno Cappelletti. The Common Room was behind the coffee shop, and lunch was ordered from Bruno's menu.

Barwick and Pincus walked down George Street to Ann Street. Pincus stopped at the lights opposite the Grosvenor Hotel. There was no traffic, and Barwick asked, rather grumpily, why they were stopping. Pincus pointed to the "Don't Walk" sign. Barwick grunted and walked across against the lights, much to Pincus's amazement. He regularly told the story, finishing by saying of Barwick, "Sydney larrikin!" I am not sure whether that is a story about Barwick or about Pincus.

The events to which the second story relates may have occurred at the same sittings. A short, pudgy and balding barrister was addressing the court at length about a Testators' Family Maintenance decision which was the subject of appeal. His submissions seemed to focus upon the assertion that the beneficiary for whom he was appearing could not, from her bequest, even manage to make a donation to the Church. Barwick, on a number of occasions, had indicated that if counsel wanted to make such a submission, he should enter the Parliament.

The courtroom used for appeals had very good acoustics, but the High Court Judges were not aware of this. At one stage McTiernan J, who was sitting to Barwick's right, leant over to him and said concerning counsel, "He looks like

Cupid in a wig, doesn't he?" Barwick replied, "Yes, he does", the exchange being heard by all in the crowded courtroom.

Background

Who was Garfield Barwick? It is well known that he was a successful barrister, a minister in Bob Menzies' government and Chief Justice of Australia. It is generally believed that he favoured the taxpayer in revenue cases. It is known that he was involved in Kerr's dismissal of Whitlam. It is less well-known that he lived to the age of 94, or that his sight had, in his later years, failed as the result of diabetes. It was said at the Queensland Bar, that in Barwick's declining years, Hal Godsall, a longstanding member of our Bar, frequently visited and read to him. It was further said that they had been at university together. There is no easy way of checking the accuracy of those matters, but they are likely to be true.

The other thing that is widely known about Barwick is that he had been bankrupted. The circumstances of his bankruptcy and its effects upon him have been discussed in detail by Justice Greenwood of the Federal Court, in a paper delivered at the International Personal Insolvency Conference in 2016.[1] The conference focussed upon the extent to which bankruptcy could provide a debtor with a fresh start. One can only say that Barwick was an outstanding example of such renewal. As you may know, he was bankrupted on the basis of debts which he had incurred on behalf of his brother. The proceedings were drawn out and hard fought in ways which are not uncommon today. They undoubtedly had a significant impact upon a young man, in his early years at the Bar.

[1] Andrew Greenwood, 'Barwick, Bankruptcy and the Human Dimension' (Paper presented at the International Personal Insolvency Conference 2016, Faculty of Law, Queensland University of Technology, 7 September 2016).

Sources

There are many papers concerning Barwick. There is one biography, David Marr's work entitled, "Barwick". There appear to have been three editions, published in 1980,[2] 1992[3] and 2005.[4] The 1992 edition bears, on the cover, the subtitle, "The Classic Biography of a Man of Power". Neither the 1980 nor the 2005 edition bears those words. The 1992 edition contains an "introduction" which does not appear in the 1980 or the 2005 edition. There is an autobiography entitled, "A Radical Tory", subtitled, "Garfield Barwick's Reflections and Recollections".[5] It was published in 1995 and reprinted in paperback in 1996. Barwick also wrote a short dissertation concerning Kerr's dismissal of Whitlam entitled, "Sir John did his Duty".[6] I have drawn on those publications and some of the papers.

In the introduction to the 1992 edition of his biography, Marr writes:

> *I began to write Sir Garfield Barwick's life with a single purpose: to pin on the man his responsibility for the crimes of 11 November 1975. Along the way, this book grew into something else.*[7]

The introduction does not appear in the 1980 or the 2005 edition. It seems, however, that Marr's view of Barwick remained unchanged. In a paper given on 4 March 2015, Marr said, apparently in explaining his biographical method:

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[2] David Marr, *Barwick* (George Allen & Unwin, 1980).
[3] David Marr, *Barwick* (Allen & Unwin, 2nd ed, 1992).
[4] David Marr, *Barwick* (Allen & Unwin, 3rd ed, 2005).
[5] Garfield Barwick, *A Radical Tory: Garfield Barwick's Reflections and Recollections* (The Federation Press, 1995).
[6] Garfield Barwick, *Sir John Did His Duty* (Serendip Publications, 1983).
[7] David Marr, *Barwick* (Allen & Unwin, 2nd ed, 1992) xi.

> *What I learned writing those profiles I applied to my first fat biography – of Garfield Barwick. I wanted to find out how that little bastard had come, in a single lifetime, from being a devoted Labor man to plotting the coup d'état of 1975. Along the way, I found a great deal to admire in him – the sheer skill of Barwick the lawyer – but the book was written as a character study to explain how that man could have lent himself to that disgraceful action.*[8]

The Early Years

In his paper, Justice Greenwood describes Barwick's early years. Of course, Marr and Barwick also deal with this aspect. I propose only to identify a few matters which may inform my overall theme. There are differences between Marr's account of Barwick's early background and Barwick's own recollections. Curiously, Marr commences his first chapter, "A Start in Life" with the proposition advanced by EP Thompson: "As a dogma, Methodism appears as a pitiless ideology of work".[9] Barwick was raised as a Methodist. Thompson has been described as, "the greatest Marxist historian of the English speaking world",[10] perhaps not a particularly enviable claim to fame. One may confidently assume that Marr does not see Barwick's religious upbringing as having had a positive effect upon his development. He seems to view Methodism as being conservative in a most undesirable way, apparently implying that Barwick's personality reflected such undesirable characteristics. Marr writes:

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[8] David Marr, 'Politics and Character' (Paper presented at The Hazel Rowley Memorial Lecture, Adelaide Festival, 4 March 2015).
[9] David Marr, *Barwick* (Allen & Unwin, 3rd ed, 2005) 1.
[10] David McNally, 'E P Thompson: class struggle and historical materialism' (1993) 61 (Winter) *International Socialism* 75, 75.

> *[Barwick's] upbringing as a Methodist entailed a disciplined approach to the day: fresh air, grace before meals, and when the time came, the pursuit of useful knowledge. Speculative intellectual enquiry was rather discouraged; music was useful if it emphasised the hymns of Wesley and the devotional works of Bach and Handel; literature was not very useful. The point of reading was to read to the point.*[11]

Marr observes that Barwick's attendance at a Sydney school conducted by the Church of England "presented no doctrinal conflict".[12] Marr considers that the Church in Sydney "was steeped in Methodist thinking and rhetoric",[13] a view which is still prevalent amongst Anglicans outside of the Archdiocese of Sydney. Marr's dislike of early 20th century Methodism apparently extends to low church Anglicanism.

Marr otherwise describes Barwick's upbringing as having been rather bleak. His father was a tradesman. His mother's family had also been in trade in rural New South Wales. Barwick's education was financed by scholarships, particularly at Fort Street High School and Sydney University. Marr suggests that his parents' marriage effectively broke down. This bleak description of Barwick's early years is to be compared with Barwick's own apparent gratitude for a happy childhood. He completely rejects the suggestion that his parents were estranged.

It may not matter much whether Barwick's account of his childhood is to be preferred to Marr's. However it is fair to say that Marr's account seems, in general, to reflect his impressions of conditions in working class areas of Sydney

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[11] David Marr, *Barwick* (Allen & Unwin, 3rd ed, 2005) 4.
[12] David Marr, *Barwick* (Allen & Unwin, 3rd ed, 2005) 4.
[13] David Marr, *Barwick* (Allen & Unwin, 3rd ed, 2005) 4.

at the relevant time, rather than to give an accurate account of the Barwick family's life. Nonetheless Marr certainly demonstrates the fallacy of any attempt to characterize Barwick as a "silvertail". He does not seek to do so. Describing Barwick's entry into practice, Marr says of him:

> *Never had connections and money mattered so much to the young man as he looked around Phillip Street for chambers. If he had served articles with one of the prestige firms, or if his father had money, or if some leading King's Counsel were a family friend, his career would have begun painlessly. He had none of those advantages. For a man in Barwick's position the Bar was virtually a closed shop. There was no place for him in one of the houses run by Lamb or Maughan, he would be lucky to find a corner anywhere.*[14]

I have said a little about this aspect of Marr's account of Barwick's upbringing because, in my view, Barwick's later work reflected the benefit of his social and religious background, and that it played a part in his major contributions to modern Australian society, particularly in the areas of matrimonial law and competition law.

I have previously referred to Marr's assertion in his 2015 paper, that Barwick had, later in life, betrayed his roots. One might think that Barwick's willingness to help his brother financially, despite the possible consequences for a young barrister, suggests a rather more human and likeable character than that identified by Marr and others, demonstrating, as it does, that fundamental virtue, family loyalty. Further, his experience in the bankruptcy court must inevitably have

[14] David Marr, *Barwick* (Allen & Unwin, 3rd ed, 2005) 15.

given him an understanding of the human suffering frequently involved in litigation, an understanding which few judges or practitioners share. It seems likely that those experiences stayed with him, leading to the progressive views reflected in his later political work.

The Bar

I will not spend much time on Barwick's time at the Bar. My purpose is to identify his long term contributions to Australian law and society rather than to speculate about events long past. Although barristers often have great reputations amongst other lawyers, their work as advocates and legal advisers is inevitably driven by duty to the client, not by direct concern for the public good, save to the extent that such work upholds the rule of law. Judges, on the other hand, in whatever they say or write judicially, inevitably contribute to the body of the law, even if only by their errors. Certainly, Barwick's contributions to our law and society lie in his political and judicial life, rather than in his work at the Bar. However one incident in his time at the Bar likely had significant long term consequences for him and perhaps, the country.

In 1932, as a junior barrister, he witnessed and, to an extent, participated in events surrounding the dismissal of Jack Lang's government, by the Governor of New South Wales, Sir Philip Game. In the mid-1960s, when I was first at university, and no doubt in earlier years, law students and political science students were well aware of this exercise of the reserve power of the Crown. In effect Lang had refused to pay interest due on State borrowings. In today's jargon, he decided that the State's creditors should take a haircut. There was, of course, doubt about the legality of Lang's actions. Barwick was supportive of Lang and actively campaigned for him. Lang's position, and that of Whitlam in 1975, had clear similarities. Further, as with Whitlam and Kerr, Lang had advised Game to take

advice only from the State Attorney-General. However, like Kerr, Game rejected this advice and conferred with the Chief Justice, Sir Philip Street.[15]

The Dismissal

It might be argued that Barwick's involvement in the 1975 dismissal is not really relevant to a paper of this kind. However such involvement seems to have coloured general perceptions concerning his contribution to public life in this country. For that reason, I shall say something about the subject, primarily for the purpose of highlighting recent scholarship in the area, and some of the earlier views which have not received much attention over the years.

My own recollection is that in 1975, not much was said about the 1932 dismissal, although subsequent commentators have referred to it extensively. Both Barwick and Kerr lived through the 1932 crisis and were colleagues at the Bar. Mason was also undoubtedly aware of it, although he was too young to have participated. Knowledge of such an event would inevitably have affected their views of the 1975 situation. In the legal profession, precedent has persuasive force. Further, private discussions of delicate matters are, and have long been, part of the Bar's culture, and of that of the Judiciary. However, Barwick agreed to Kerr's request that the content of the advice be made public.[16] That Barwick so agreed suggests to me that he was well aware of the delicacy of the situation, and that he was willing to stand by his advice in public. These considerations seem to me to explain, I might say to justify, the courses taken by Kerr, Barwick and Mason in 1975.

[15] David Marr, *Barwick* (Allen & Unwin, 3rd ed, 2005) 21-25.
[16] Garfield Barwick, *Sir John Did His Duty* (Serendip Publications, 1983) 87.

It is worth noting that in 1932, a number of Sydney silks wrote to Game, recognizing the vice-regal power to dismiss a government which was acting unlawfully, or clearly intending to do so.[17] Since writing this part of the paper, I have discovered from Professor Twomey's recent work "The Veiled Sceptre"[18] that in 1975, Keith Aicken QC, Murray Gleeson QC and Professor Lane had given a joint opinion that:

> *There is precedent to support the view that in such a case it would be within the power of the Governor-General to dismiss his Ministers and to seek the advice of other Ministers if it is available. By the time such a state of affairs had been reached the political situation could be so fluid that it is difficult to predict the source of such alternative advice. If, however, the Governor-General were advised by new Ministers to dissolve Parliament he could act on that advice.*[19]

Game's decision was treated by the New South Wales community in the same way as Kerr's was by the Australian people. In each case, the dismissed leader lost the ensuing election.

We have known for some time that both Barwick and Mason thought it appropriate to advise Kerr. Sir Harry Gibbs supported that view.[20] Now, in a review of Professor Twomey's recent publication, Murray Gleeson observes that

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[17] David Marr, *Barwick* (Allen & Unwin, 3rd ed, 2005) 23.
[18] Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (Cambridge University Press, 2018).
[19] Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (Cambridge University Press, 2018) 334-335.
[20] Harry Gibbs, 'The dismissal and the Constitution' in Michael Coper and George Williams (eds), *Power, Parliament and the People* (The Federation Press, 1997) 146, 150-151.

the author demonstrates that there was nothing unusual about Kerr's consulting Barwick and that:

> *She gives chapter and verse of past examples. In future it will be a brave or reckless commentator who declares action in this area to be unprecedented without first consulting this book. In the case of Sir John Kerr, the Governor-General himself was a former (state) chief justice, who undoubtedly had his own views on his power. Whatever epithets may be applied to his turning to Chief Justice Barwick for advice, 'unprecedented' is not one of them. The expanding range of potential justiciability of actions of a Governor-General or Governor may inhibit the seeking of advice from a judge in some circumstances. Subject to that qualification, it is understandable why a vice-regal officer, who is theoretically able to obtain advice from anyone he or she thinks fit to consult, would look to a chief justice. It avoids the criticism of shopping around for a favourable opinion. Someone who can point to the head of the independent branch of government, the judiciary, as a time-honoured source of advice may have some difficulty justifying approaching someone else instead. Furthermore, in the Australian states it is not unusual for the chief justice also to be the lieutenant-governor, and this is probably an additional reason why consulting the chief justice has been seen as providing a greater level of protection than making some other, less obvious, choices.*[21]

I should refer to one spurious argument, apparently advanced by Whitlam to Kerr, that because the High Court had held, in 1921, that it could not give advisory

[21] Murray Gleeson, 'Book Review: The Veiled Sceptre – Reserve Powers of Heads of State in Westminster Systems by Anne Twomey' (2018) 45(3) *Australian Bar Review* 319, 323.

opinions, neither could an individual member of the Court.[22] The reference is presumably to *In re The Judiciary Act*.[23] Clearly, in advising Kerr, Barwick was not exercising the judicial power of the Commonwealth. Although his advice was about a matter of government, and no doubt, Kerr had sought his advice because of his position as Chief Justice, Barwick was acting in a private capacity. It might be argued that his conduct was incompatible with his position as Chief Justice. Indeed, there was such criticism. However it had nothing to do with that decision.

Finally, I should point out that Professor Twomey asserts that in Australia, between 1904 and 1985, judges gave advice to vice-regal officers on at least 20 occasions.[24] Barwick identifies some of those occasions. On one occasion Sir Samuel Griffith, as Chief Justice of Australia, gave advice to the Governor-General. More surprisingly, in 1952, Sir Owen Dixon, then Chief Justice of Australia, advised the Governor of Victoria. I should add that both Sir Gerard Brennan and the Hon Robert French have suggested that it is no longer acceptable that such advice be given.[25]

I shall not comment further upon either Barwick's advice or Kerr's actions. My point is that distinguished people of goodwill took, and take, different views of the events in both 1932 and 1975. The weight of respectable opinion suggests that Barwick's conduct was at least arguably correct. Perhaps this possibility

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[22] Paul Kelly and Troy Bramston, *The Dismissal in the Queen's Name* (Penguin Australia, 2015) 203-204. See also Jennifer Hocking, *The Dismissal Dossier: Everything You Were Never Meant to Know about November 1975* (Melbourne University Press, 2015) 28.

[23] (1921) 29 CLR 257

[24] Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (Cambridge University Press, 2018) 68.

[25] See Paul Kelly and Troy Bramston, *The Dismissal in the Queen's Name* (Penguin Australia, 2015) 50; Robert French, 'The Chief Justice and the Governor-General' (Speech delivered at the *Melbourne University Law Review* Annual Dinner, Melbourne, 29 October 2009).

should now be accepted, with the consequence that it should also be accepted that he acted in good faith.

Taxation

An aspect of Barwick's work which has generated denigration and dislike is his perceived attitude to tax matters. At the Bar, Barwick certainly acted for taxpayers against the Commissioner, as did, and do, many of us. No doubt he advanced arguments which, some may think, lacked merit. Again, so have many of us. That a barrister has practised in a particular area does not mean that he or she will take to the Bench any particular approach to cases in that area. My own experience suggests that such a tendency, if it exists at all, must be very rare.

In considering Barwick's approach to tax cases, one must keep in mind that his judicial work was almost entirely appellate. As an appellate Judge he was, as all appellate judges are, generally limited by the way in which the case was conducted and, to some extent, decided below and indeed, by the way it was conducted on appeal. Further, he was only one member of the Court as constituted in each case.

Marr cites a passage from a speech in which Barwick described the work of the High Court as being legal rather than political. Marr then says:

> *Income tax disputes were, traditionally, the single largest source of business before the High Court. Barwick came to the subject with an ideological determination which had not changed in the 25 years since he made his name attacking wartime security regulations. His approach to tax was much the same, and sprang from the same convictions: taxes were penalties imposed by the state which stood between citizens and their right*

> *to prosper from their enterprise. Tax laws could be construed in highly technical terms, without regard for the purpose they were designed to serve. It was not a lawyer's concern if the state was left without wartime powers, nor was it a lawyer's worry that the rich might avoid contributing to the revenue.*[26]

Whilst tax work was, and often is, a significant part of a successful silk's practice, Marr's view of the High Court's work, then and now, is a little narrow. In any event, the above extract seems to suggest that Barwick was alone in the approach which he took to tax cases, a proposition which is quite unlikely. Further, I suspect that many taxpayers, past and present, would see some merit in Barwick's approach. Clearly, Marr's observation about government war-time powers is meant to be derogatory of Barwick's work. Yet that effect is achieved by rhetoric in the less worthy meaning of that word – extravagance or artifice. To say that a barrister has successfully challenged war-time security regulations is merely to say that he or she has performed an advocate's duty to assist in upholding the rights of a citizen, even when such rights conflict with the government's view as to national security. Similarly, to say that a court has struck down tax legislation may say no more than that it has done its duty.

Taxation is necessary in order that government can function, but there must be a balancing exercise between the government's needs and the needs and rights of the subject. Marr's view as to the proper balance between the public interest and individual rights and interests no doubt differs from Barwick's. However Barwick cannot be criticized for that, let alone denigrated as he has been, unless it be asserted that he deliberately abandoned his duty in order to pursue a personal

[26] David Marr, *Barwick* (Allen & Unwin, 3rd ed, 2005) 227-228.

agenda, an assertion which has been tacitly made, but never, in my view, established.

Today, we still have strongly-held, but conflicting views about matters of great importance: migration, the environment, crime and sentencing, industrial law and many other such issues. Judges frequently have to decide issues which arise out of bitter disagreements concerning these matters. Judges are still occasionally accused of favouring one side of a national argument at the expense of the other. Occasionally, too, there are suggestions that some judges have fixed positions, favouring one side or the other. One might expect and, perhaps, fervently hope that when the dust has settled, a calmer and fairer assessment of a judge's work might be made. However there are some who consider that Barwick is not entitled to be seen as a lawyer who, in practice and as a Judge, struggled with the conflict between state and citizen, which conflict is an inevitable feature of a democracy. Peaceable resolution of such conflict is the very purpose of the law, the legal profession and the courts.

Marr's attack on Barwick's approach to taxation matters starts with, and is largely based upon the latter's involvement in three cases:

- *Federal Commissioner of Taxation v Newton;*[27]
- *WP Keighery Pty Ltd v Federal Commissioner of Taxation;*[28] and
- *Federal Commissioner of Taxation v Casuarina Pty Ltd.*[29]

[27] (1957) 96 CLR 577 (High Court); (1958) 98 CLR 1 (Privy Council) ('*Newton*').
[28] (1957) 100 CLR 66 ('*Keighery*').
[29] (1971) 127 CLR 62 ('*Casuarina*').

All three cases arose out of the unlamented s 260 of the 1936 Tax Act.[30] As it is not much discussed today, I should remind you of its terms. It provides that:

> *Every contract, agreement, or arrangement … shall so far as it has or purports to have the purpose or effect of in any way, directly or indirectly:*
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> *(a) altering the incidence of any income tax;*
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> *(b) relieving any person from liability to pay income tax or make any return;*
>
> *(c) defeating, evading, or avoiding any duty or liability imposed on any person by this Act; or*
>
> *(d) preventing the operation of this Act in any respect;*
>
> *be absolutely void, as against the Commissioner, … .*

Newton involved assessments based on s 260. The facts of the case are complex and not really relevant for present purposes. At first instance Kitto J set aside the assessments. The Full High Court upheld an appeal by the Commissioner. Barwick did not appear, at first instance or on appeal.

In 1957, after the High Court's decision in *Newton*, the Court gave judgment in *Keighery*. In that case, Barwick appeared for the taxpayer and was successful. The question was whether a company which had avoided a tax liability by becoming a non-private company should, pursuant to s 260, be treated for tax purposes as a private company. Put briefly, the High Court held that the fact that a private company was turned into a non-private company, leading to a favourable tax outcome, was not, of itself, sufficient to engage s 260. *Newton* was argued in

[30] *Income Tax Assessment Act 1936* (Cth).

the Privy Council in May 1958. Barwick appeared unsuccessfully for the taxpayer. In delivering the Judicial Committee's advice Lord Denning said:

> *Nor can anyone, by seeing a private company turned into a non-private company, predicate that it was done to avoid … tax.*[31]

His Lordship cited the decision in *Keighery* as authority for that proposition. In *Keighery*, Dixon CJ, Kitto J and Taylor J, had also said (McTiernan J concurring):[32]

> *Whatever difficulties there may be in interpreting s. 260, one thing at least is clear: the section intends only to protect the general provisions of the Act from frustration, and not to deny to taxpayers any right of choice between alternatives which the Act itself lays open to them. It is therefore important to consider whether the result of treating the section as applying in a case such as the present would be to render ineffectual an attempt to defeat etc. a liability imposed by the Act or to render ineffectual an attempt to give a company an advantage which the Act intended that it might be given.*[33]

Lord Denning said nothing about this passage.

Casuarina was argued, at first instance and on appeal, in 1970. The Commissioner submitted that notwithstanding its approval of one narrow aspect of the decision in *Keighery*,[34] the Privy Council, in *Newton*, had effectively

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[31] *Newton* (1958) 98 CLR 1, 9.
[32] *Keighery* (1957) 100 CLR 66, 94.
[33] *Keighery* (1957) 100 CLR 66, 92-93.
[34] *Casuarina* (1971) 127 CLR 62, 79.

overruled that broader proposition. At first instance in *Casuarina*, Windeyer J rejected that submission.[35] On appeal Barwick CJ, Owen, Walsh and Gibbs JJ upheld his decision.[36] The primary judgment was written by Walsh J, not Barwick.

In order to understand the matter in issue, it is necessary that we keep in mind the relative novelty of income tax and the attitude which, until quite recently was taken to it by the courts. For many years, in the United Kingdom and in this country, courts generally took the approach articulated by Lord Atkin in *Inland Revenue Commissioners v Duke of Westminster*.[37] Lord Atkin said:

> *… it has to be recognized that the subject, whether poor and humble or wealthy and noble, has the legal right so to dispose of his capital and income as to attract upon himself the least amount of tax. The only function of a court of law is to determine the legal result of his dispositions so far as they affect tax.*[38]

In *Keighery* and in *Casuarina*, the High Court did not substantially depart from that position. It is at least arguable that the Privy Council in *Newton* had adopted a broader approach to s 260. However *Casuarina* was decided after the abolition of appeals to the Privy Council in matters arising under Commonwealth law. The report does not indicate whether there was, in that case, a residual right to apply for special leave to appeal to the Privy Council. However it is hardly surprising that the Court should have preferred its own earlier views to those of the Judicial Committee.

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[35] *Casuarina* (1971) 127 CLR 62, 78.
[36] *Casuarina* (1971) 127 CLR 62, 63.
[37] *Inland Revenue Commissioners v Duke of Westminster* [1936] AC 1.
[38] *Inland Revenue Commissioners v Duke of Westminster* [1936] AC 1, 8.

Dixon CJ, Kitto, Taylor and McTiernan JJ comprised the majority in *Keighery*. Barwick, and Owen, Walsh and Gibbs JJ comprised the majority in *Casuarina*, upholding the decision of Windeyer J at first instance. Clearly, Barwick was not on a frolic of his own. Yet Marr says:

> *The Casuarina Case was only the first step in the long process of reversing the defeat of Newton's Case. To the task Barwick brought all his extraordinary forensic agility and the driving force of assumptions which had ruled his life since he was a young man, all of them unsympathetic to the principles of levelling and sharing implied by income tax: thrift, enterprise, competition, work. These were virtues to be rewarded not taxed.*[39]

Again I observe that not everybody shares Marr's enthusiasm for taxation, especially as a social leveller. Marr seems to suggest that in *Casuarina*, Barwick sought to vindicate his unsuccessful submissions in the Privy Council in *Newton*. When one keeps in mind that his only involvement in *Newton* was in the Privy Council, one wonders why he would have cared very much about the outcome, however industriously he may have argued on the clients' behalf. Most barristers would not. I must say that in my own experience, I have never identified, in any judge of a superior court, a desire to misuse his or her judicial office in order to justify some position taken at the Bar, or as a judge in an earlier case. I doubt that any judge, having an eye to his or her own long term reputation, would engage in such a pointless exercise. Further, if one keeps in mind the fact that in *Casuarina* and in subsequent appellate cases, Barwick was only one member of

[39] David Marr, *Barwick* (Allen & Unwin, 3rd ed, 2005) 229.

the Court, any criticism must be, in the cases in which his views prevailed, that he had overborne the other Judges comprising the majority. Very few High Court Judges have ever demonstrated a willingness to be so overborne. In reality, it is clear that to a substantial extent, Barwick's contemporaries shared his views. Any criticism, if justified, cannot be of Barwick, but of the Court over which he presided, as constituted from time to time, and perhaps, of the Court in *Keighery* under Dixon.

A second trenchant critic of Barwick's tax work is Geoffrey Lehmann, a tax lawyer. He is also a published poet. In an article published in 1983 entitled, "The Income Tax Judgments of Sir Garfield Barwick: A Study in the Failure of the New Legalism",[40] Lehmann attacks both Barwick and many of his colleagues on the High Court for their treatment of tax cases. The thrust of his criticism seems to be that they adopted an unduly simplistic approach to the facts of the cases and, "deliberately excluded the commercial context in which the relevant transactions occurred".[41] At the same time, Lehmann says, "the legal logic employed in tax decisions was often convoluted and tortuous".[42]

Lehmann analyses, in detail, many of the decisions to which Barwick was party, criticizing the approach taken to the facts and the law. However it is, to say the least, adventurous to argue that the Court, over many years, misconceived fundamental aspects of the law concerning taxation, upon the basis that, with the benefit of hindsight, a different approach might have been taken to both the facts and the law. Lehmann at least suggests that Barwick prevailed over his

[40] Geoffrey Lehman, 'The Income Tax Judgments of Sir Garfield Barwick: A Study in the Failure of the New Legalism' (1983) 9(3) *Monash University Law Review* 115.
[41] Geoffrey Lehman, 'The Income Tax Judgments of Sir Garfield Barwick: A Study in the Failure of the New Legalism' (1983) 9(3) *Monash University Law Review* 115, 117.
[42] Geoffrey Lehman, 'The Income Tax Judgments of Sir Garfield Barwick: A Study in the Failure of the New Legalism' (1983) 9(3) *Monash University Law Review* 115, 123.

colleagues, leading them into error. I have already expressed my doubts concerning such a suggestion. At one point, Lehmann says that the other High Court Judges had not been trained in tax matters and therefore deferred to Barwick's supposedly superior experience. Lehmann hints that had they listened to the accountants, things would have been different.

Lehmann's paper no doubt provides an interesting critique of a line of cases. However, as with Marr, Lehmann seems unable to accept that Barwick's views were broadly consistent with those of his colleagues.

I do not wish to spend too much time on the tax question. My own tax experience is limited, although perhaps more extensive than I would have preferred. I am not asserting that Barwick was an ardent protector of the revenue. Rather, I am suggesting that in his time, his position was not so different from that prevailing in the legal community in which he operated, and that again, there seems to be no basis for asserting that he acted in bad faith.

For those who may be interested in a more detailed, and broadly favourable discussion of Barwick's tax decisions, I mention the article written by my late colleague Graham Hill.[43] At the time of his death in 2005 he was, in my view, the foremost taxation Judge in the country.

Barwick's Other Judicial Work

Given the tendency amongst some commentators to be negative about anything concerning Barwick, it is not surprising that there is a perception that he achieved little as a judge. However at least two problems lie in the way of any useful

[43] Graham Hill, 'Barwick's Legend' (1997) 32(3) *The Tax Specialist* 150.

generalization about a judge's career achievements. The first is the very nature of the judicial function. The role of the courts, and particularly that of the judges, is to quell disputes between subjects, and between the state and subjects. A corollary to that proposition is that a judge can only decide the cases on which he or she sits, at first instance, or on appeal. For the parties and their lawyers, success will be measured by the extent to which they perceive the hearing and adjudication to have been fair and, particularly in the case of the losing party, by the extent to which he or she understands the reasons for such loss. When lawyers, not involved in a particular case, look at a decision, they may be disappointed that more was not said about a particular issue, but they understand that in general, a court will only address those matters which must be addressed in order to quell the dispute.

I suspect that when a legal academic looks at a decision, he or she is searching for something else, some broader statement of principle, or some basis upon which he or she can assert support for a theory already postulated, or to be postulated. When a practising lawyer speaks about a judge or retired judge, he or she will describe the characteristics which attend or attended the performance by that judge of his or her duty, not provide a generalized assessment of his or her contribution to legal theory. Even the High Court's workload is ultimately determined by the parties, although the Court has some capacity to refuse leave to appeal. It can avoid unsuitable cases, but it can only choose its cases from those presented to it by the parties.

There is a second circumstance which makes it very difficult to assess and describe an individual judge's overall career. Such a task can only be undertaken at a particular point in time, and perceptions change with time. Cases which were,

at one stage, apparently very important, may quickly become mere historical footnotes. The reverse is also true.

In the years since Barwick retired in 1981, the law has changed dramatically. I have, on other occasions, pointed to the shift in emphasis from the common law and rules of equity to statutory construction, as the basis for so much of our practical jurisprudence. How frequently are courts now called upon to consider the decision in *Pusey v Mount Isa Mines*,[44] a case which was, in its time, of great significance in connection with causation in personal injuries cases? It involved an examination of *Wagon Mound No 1*,[45] *Wagon Mound No 2*[46] and *Chapman v Hearse*,[47] all cases which, in the late 1960s and 1970s were at the very heart of tort law. Yet there are probably many here tonight who have not heard of them, let alone cited them. The same might be said of the decision in *MLC v Evatt*,[48] although it has perhaps a little more currency.[49] Barwick was in the majority in both cases.

The law is a dynamic force. It is always changing. The greatest source of change today is legislation, not new judicial insights into the common law. Constitutional law is also dynamic in that sense although, by definition, such change may not be the direct result of legislation. It is the notion of a "living constitution" which accommodates changes in approach brought about by social and technological developments, leading to legislation which would have been

[44] *Mount Isa Mines v Pusey* (1971) 125 CLR 383.
[45] *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (Wagon Mound (No 1))* [1961] AC 388.
[46] *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (Wagon Mound (No 2)* [1967] AC 617.
[47] *Chapman v Hearse* (1961) 106 CLR 112.
[48] *Mutual Life & Citizens Assurance Co Ltd v Evatt* (1968) 122 CLR 556.
[49] Although the High Court's decision in *MLC v Evatt* was reversed in the Privy Council, it has subsequently been instrumental in shaping the law in Australia. See e.g. *L Shaddock & Associates v Parramatta City Council (No 1)* (1981) 150 CLR 225; *San Sebastian Pty Ltd v Minister Administering Environmental Planning Act* (1986) 162 CLR 340.

unimaginable at Federation. Same-sex marriage is an example. The plethora of cases concerning unlawfully elected politicians is another, arising, as they effectively did, out of the notion of citizenship which was unknown in 1901.

Another tendency contributing to the difficulty of assessing a Chief Justice's judicial work is, to me, the pointless practice of describing the High Court as if it were the creature of the Chief Justice, from time to time. It is sometimes said that such device simply identifies the period of time with which the relevant commentator is concerned. However it appears to have what might be described as a "reverse eponymous effect", by which the perceived characteristics of the Court's decisions are attributed to the Chief Justice whose name has been used to identify the Court as constituted during the relevant period. Hence the perceived strengths or weaknesses of a line of decisions made in a particular area, such perceptions themselves frequently being matters of opinion, are attributed to the Chief Justice of the day, without necessarily demonstrating that he or she was the guiding genius, rather than one of a group of like-minded judges. That approach overlooks the ingrained independence of the judges. In a small court, such as the High Court, the Chief Justice is really only the first amongst equals.

What else can one say about Barwick's judicial work? In preparing this paper, I looked quickly at almost eighty of his judgments, selected according to the number of occasions on which they have been cited. In some he dissented, in some he concurred. When he concurred, he not infrequently wrote a few pages by way of elaboration. He wrote a significant number of individual judgments, even when he was in the majority. His reasons did not always attract concurrence. His criminal appeal judgments are particularly worthy of note. They are of very high quality, amongst the best criminal appeal judgments that I have read. The

decisions in *Ireland*,[50] *Ratten*,[51] *Griffiths*,[52] *Driscoll*,[53] *Pemble*,[54] *Kilby*,[55] *Green*[56] and *McBride*[57] have all, in one way or another, stood the test of time.

There are many other noteworthy cases. As might be expected, there are a few insolvency cases. They include *Sandell v Porter*,[58] *Queensland Bacon v Rees*[59] and *Wren v Mahony*.[60] A number of early cases under the *Trade Practices Act 1974* (Cth) were important to the development of that area of the law and of the jurisdiction of the Federal Court. They include *Hornsby Building Information Centre*,[61] *Philip Morris*[62] and *Western Australian National Football League*,[63] all of which were regularly cited during the formative years of the *Trade Practices Act*, and are still cited from time to time. Further, Barwick, as Attorney-General, had urged the establishment of a superior federal court.[64] There are a number of other cases which have survived, including *MMM*,[65] a patent case and, in the area of conveyancing, *Breskvar v Wall*,[66] *Upper Hunter v Australian Chilling and Freezing*,[67] *Travinto Nominees v Vlattas*[68] and *Neeta (Epping) v Phillips*.[69]

[50] *R v Ireland* (1970) 126 CLR 321.
[51] *Ratten v R* (1974) 131 CLR 510.
[52] *Griffiths v R* (1977) 137 CLR 293.
[53] *Driscoll v R* (1977) 137 CLR 516.
[54] *Pemble v R* (1971) 124 CLR 107.
[55] *Kilby v R* (1973) 129 CLR 460.
[56] *Green v R* (1971) 126 CLR 28.
[57] *McBride v R* (1966) 115 CLR 44.
[58] *Sandell v Porter* (1966) 115 CLR 666.
[59] *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266.
[60] *Wren v Mahony* (1972) 126 CLR 212.
[61] *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre* (1978) 140 CLR 216.
[62] *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457.
[63] *R v Judges of FCA & Adamson; Ex parte WA National Football League (Inc)* (1979) 143 CLR 190.
[64] R. J. Ellicot, 'The life and career of Garfield Barwick' [2011] (Summer) *Bar News* 62, 66.
[65] *Minnesota Mining & Manufacturing Co & 3M Australia Pty Ltd v Beiersdorf (Aust) Ltd* (1980) 144 CLR 253.
[66] *Breskvar v Wall* (1971) 126 CLR 376.
[67] *Upper Hunter v Australian Chilling & Freezing Co Ltd* (1968) 118 CLR 429.
[68] *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1.
[69] *Neeta (Epping) Pty Ltd v Phillips* (1974) 131 CLR 286.

Out of interest I draw attention to Barwick's reasons in *Administration of the Territory of Papua and New Guinea v Guba.*[70] That case concerned the acquisition by the colonial authority, in the late nineteenth century, of land traditionally held by an indigenous group. Barwick's reasons are notable for the ease with which he deals with the notion of indigenous group ownership, a concept with which many judges are still struggling in the Australian context.

I should like to conclude this part of the paper by referring to the views of two commentators, Professor George Winterton[71] and former Federal Court Judge, Attorney-General and Solicitor-General, Bob Ellicott.[72] Professor Winterton's article was written shortly after Barwick's death in 1997. He gives a fairly negative assessment of Barwick's work as Chief Justice. In particular he refers to Barwick's reasons in *North Eastern Dairy Co Ltd v Dairy Industry Authority of New South Wales,*[73] suggesting that the extremity of his views in that case led to the Court's unanimous decision in *Cole v Whitfield.*[74] These cases involved s 92. I do not intend to discuss those cases or that fraught constitutional issue. However Professor Winterton's suggestion that an earlier decision might provoke a later decision is of some interest. An associated idea emerges from Ellicott's paper, given in 2011. Ellicott was, as we know, related to Barwick. He also had a relatively close association with him, personally and professionally. In his paper he said of Barwick's work:

> *A combination of the position of chief justice, his intellect and personality mandated that he would be the dominant figure in the court. He was not*

[70] *Administration of the Territory of Papua New Guinea v Daera Guba* (1973) 130 CLR 353.
[71] George Winterton, 'Barwick the Judge' (1998) 21(1) *UNSW Law Journal* 109.
[72] R. J. Ellicot, 'The life and career of Garfield Barwick' [2011] (Summer) *Bar News* 62.
[73] *North Eastern Dairy Co Ltd v Dairy Industry Authority of New South Wales* (1975) 134 CLR 559.
[74] *Cole v Whitfield* (1988) 165 CLR 360.

> *always in the majority but he presided over the court when the foundations for the expansion of Commonwealth power were laid. For instance, the decisions of the Barwick Court in the Concrete Pipes Case, the Payroll Tax Case and the Seas and Submerged Lands Case were instrumental in establishing the taxation, corporation and external affairs powers as a future basis for strong involvement by the Commonwealth in the implementation of national economic and social policy in an economy already dominated by Commonwealth monetary and fiscal policy.*[75]

It had occurred to me, early in the preparation of this paper, that inconsistent judgments, and the resolution of such inconsistency, comprise a sort of dialectic model, similar to that attributed to Hegel. I am no student of philosophy, but in a first year course in German Language and Civilization, I was exposed to this concept. It has always intrigued me. In a way, it explains how we resolve so many problems in the law. Once a position is settled, we tend to think of the originator of the final position as being its guiding genius. In fact, it is more likely that conflicting views contribute substantially to that final outcome, such outcome being a synthesis drawn from those conflicting views. If so, that is an even more persuasive reason for exercising great care in dismissing the work of those who have gone before us, simply because they cannot be described as the architects of overarching theories.

Political Career

I turn to Barwick's time in politics. I want to say a little about the *Matrimonial Causes Act 1959* (Cth), and his work in connection with competition law, which

[75] R. J. Ellicot, 'The life and career of Garfield Barwick' [2011] (Summer) *Bar News* 62, 67.

work led to the first relatively recent legislation in that area in this country, the *Trade Practices Act 1965* (Cth).[76]

It is now so long since the enactment of the *Family Law Act 1975* (Cth), that I should say a little about the law of divorce prior to the enactment of the *Matrimonial Causes Act* and thereafter. Prior to that Act, divorce was regulated by State and Territory laws. Under those laws, a divorce would be granted only if one party was able to demonstrate that the other had committed conduct which was once described as a "matrimonial offence", but had come to be called a "ground" for divorce. Nonetheless such grounds still involved elements of fault. There were numerous grounds such as adultery, desertion and cruelty. However there was a fear that the parties might agree artificially to construct an apparent ground. Hence it was necessary that the petitioner swear that he or she had not condoned or connived at the ground, or acted in collusion with the respondent with the intent to cause a perversion of justice, that is the grant of a divorce in the absence of a proper ground. Adultery and certain other conduct by the petitioner raised a discretionary bar to a decree, even when a ground was established. Thus, a deserted party might not be able to obtain a divorce on that ground, if he or she had committed adultery during the desertion period.

Many of these constraints were also present in the *Matrimonial Causes Act*. However the great advance made by that Act was the creation, as a ground for divorce, of separation for five years. In effect, and subject to a few minor qualifications, this ground was the basis for "no fault" divorce. There had been some attempts in earlier State legislation to achieve such a result, but the *Matrimonial Causes Act* took a much more liberal approach. The *Family Law*

[76] See Russell Miller, *Australian Competition Law and Policy* (Thomson Reuters, 3rd ed, 2018) 14-16.

Act would later reduce the period of separation to one year and abolish other grounds. However it is doubtful whether Senator Murphy could have effected that reform, had the *Matrimonial Causes Act* not led the way. I say that, having regard to social circumstances in Australia at the time, particularly the opposition of both the Church of England, as it was then known, and the Roman Catholic Church to divorce. Other Churches had a more humane approach to the question. In that light, it is instructive to read Barwick's observations concerning the proposed ground of separation. He said, in the second reading speech:

> *Mr Speaker, one of the great foundations of our national life is the family, and in turn the family is founded on marriage. National interest is best served and family life is best nurtured when marriage is truly life-long. The prevalence of broken marriages does threaten our strength and imperil our future. The ideal society would know no occasion for divorce.*
>
> *But, Mr Speaker, it is not given to us all, as humans, to choose, often in years of immaturity, a life-long partner with wisdom and an adequate appreciation of the personality-often itself immature-of our choice. Nor are we all able to bear with resignation and fortitude the maladjustments and torments of a faulty choice. Few indeed have the saintliness of Hosea, who forgave and embraced again his unfaithful wife.*[77]

Concerning the existing State legislation, Barwick observed that such legislation was largely based on the concept of matrimonial offence. He continued:

[77] Commonwealth, *Parliamentary Debates*, House of Representatives, 14 May 1959, 2224 (Garfield Barwick, Attorney General).

> *But there are those who feel that recognition of the importance of family life must itself cause us to seek some way out of the situation that arises when man and wife, without misconduct or matrimonial offence on the part of either, become estranged and break off their relationship beyond all possibility of reconciliation, and out of that other situation where the innocent party refuses to take the initiative and to seek a dissolution, preferring to imprison the other party within bonds which have become meaningless and little more than a provocation. Accordingly, some communities have provided a means whereby two people so placed may be enabled with regularity within the law to start a family afresh with another.*[78]

It is impossible to know for sure whether this insightful and tolerant assessment of intimate failed relationships was influenced by Barwick's non-conformist upbringing. As much seems likely. Clearly, he did not entertain the stricter views of the larger denominations. This part of the second reading speech suggests a humane statesman, aware of human weaknesses and the need for tolerance and understanding. It is worth reading in full. It bears no resemblance to the second reading speeches to which we have recently become accustomed. With all respect to Lionel Murphy, it is difficult to imagine him so ably addressing the distinction between the sacred and the secular, the personal and the political.

It is well-known that as Attorney-General, Barwick, almost single-handedly, commenced the debate which led to the *1965 Trade Practices Act*. However, before it was enacted, he went to the High Court. In the form in which it was

[78] Commonwealth, *Parliamentary Debates*, House of Representatives, 14 May 1959, 2224-5 (Garfield Barwick, Attorney General).

eventually enacted, it did not survive judicial scrutiny.[79] However many of Barwick's ideas inform the current legislation in its dealings with anti-competitive conduct. His views can be divined from a 1962 statement to Parliament, delivered in his absence by the Acting Attorney-General. In that statement, Barwick said:

> *The Government, having been furnished with the results of my efforts in this connexion, has concluded, and I think few, if any, will deny, that there are practices current in the community which by reason of their restrictive nature are harmful to the public interest-that interest being in the maintenance of free enterprise under which citizens are at liberty to participate in the production and distribution of the nation's wealth, thus ensuring competitive conditions which tend to initiative, resourcefulness, productive efficiency, high output and fair and reasonable prices to the consumer.*[80]

He continued:

> *Before outlining the schedule of legislation which the Government has in contemplation, I ought to indicate broadly the philosophy which underlies it. In opening the second session of the twenty-third Parliament, the Governor-General indicated that the Government desired to protect and strengthen free enterprise against tendencies to monopoly and restrictive practices in commerce and industry. I have already referred to the place competition has in the maintenance of free enterprise. The Government*

[79] Russell Miller, *Australian Competition Law and Policy* (Thomson Reuters, 3rd ed, 2018) 20-23.
[80] Commonwealth, *Parliamentary Debates*, House of Representatives, 6 December 1962, 3103 (Gordon Freeth, Acting Attorney-General).

> *believes that practices which reduce competition may endanger those benefits which we properly expect and mostly enjoy from a free-enterprise society.*[81]

He also said:

> *The criterion or test which accords with the Government's philosophy and its understanding of the needs of the economy as a whole is that a practice which in its operation substantially restricts competition, either in a particular area or areas of business activity or generally, and which cannot be shown to be justified as either conferring a public benefit or as having no public detriment, is harmful.*[82]

These are not the words of a political time-server who is echoing party policy, partially digested and reworded by political staffers. Nor are they the words of a capitalist, red in tooth and claw, or a defender of the rich and powerful. These are the words of a man who understood the need to limit the potentially harmful consequences of commercial greed, for the ordinary citizen. Again, it is not difficult to see a connection between his familial and religious background and his concern for his fellow Australians.

For those who wish to investigate Barwick's approach to competition law, I refer you to his article "Some Aspects of Australian Proposals for Legislation for the Control of Restrictive Trade Practices and Monopolies".[83] For a summary of his

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[81] Commonwealth, *Parliamentary Debates*, House of Representatives, 6 December 1962, 3103 (Gordon Freeth, Acting Attorney-General).
[82] Commonwealth, *Parliamentary Debates*, House of Representatives, 6 December 1962, 3104 (Gordon Freeth, Acting Attorney-General).
[83] Garfield Barwick, 'Some Aspects of Australian Proposals for Legislation for the Control of Restrictive Trade Practices and Monopolies' (1963) 36 *Australian Law Journal* 363.

contribution to the competition debate see the book by Kerrie Round and Martin Shanahan and Miller's work, referred to above.[84]

Other Matters

Barwick's career at the Bar began in 1927. He left practice in 1958 when he was elected to Parliament and shortly thereafter, became Attorney-General. He served as a Minister until his appointment to the High Court in 1964, first as Attorney-General, later as Minister for External Affairs and, for an extended time, as both. I would have liked to say something about his time as Minister for External Affairs, but it is not an area in which I have any experience, and it is beyond the scope of this paper. In any event, time would not permit.

There are other aspects of the Barwick story which I would have liked to discuss. He has been criticized, indeed ridiculed for his desire to create a home for the High Court in Canberra. He certainly made every attempt to ensure that the building was worthy of the institution which it was to house. Chief Justices, at federal level and in the states and territories, have, since the late 1960s, been undertaking similar exercises, with the same goal and similar determination. Some have been successful, and some not. At least one is still trying. I would also have liked to say a little about the abolition of appeals to the Privy Council.

Barwick served on the High Court until 1981. In all he was, for 31 years, in private practice and, for 23 years in public office.

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[84] Kerrie Round and Martin Shanahan, *From Protection to Competition: The politics of trade practices reform in Australia* (The Federation Press, 2015); Russell Miller, *Australian Competition Law and Policy* (Thomson Reuters, 3rd ed, 2018).

I return to Marr. His last paragraph is entitled "Look on my Works". Most of us will recognize these words as coming from Shelley's "Ozymandias". The message of the poem is the transient nature of human achievement. There can be little doubt that Marr is setting the stage for a final denunciation of Barwick's work. If there is any doubt about that, his last two paragraphs dispel it. Marr says:

> *At first sight, the motto he chose on promotion to the rank of G.C.M.G. seemed incomplete: 'Work with Courage to Achieve' but, in retrospect, it might be read as a candid account of his ambition. At heart, Barwick strove for achievement alone. The purpose of all that striving was to win, and the satisfaction of victory appeared, for Barwick, to last only until the next round. He had to keep going.*
>
> *But Barwick had brought no one with him. Self-assertion is a lonely career. No group of supporters formed to propel him to political leadership, no school of thought grew from his work on the court. He was his own man, but without followers. Near his goal, turning, he saw no one behind. How could there be? He cut through the thorn forests but left no path for others to follow. The forest closed in behind him as, alone, he headed for his elusive goal: victory.*[85]

Poetic perhaps, but hardly fair, or even realistic. At least that is my view.

The Hon John Dowsett AM

[85] David Marr, *Barwick* (Allen & Unwin, 3rd ed, 2005) 299.