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## BOOK REVIEWS

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### Multifaceted Brilliance



A RADICAL TORY — GARFIELD BARWICK'S REFLECTIONS AND RECOLLECTIONS

*By Sir Garfield Barwick*  
(Federation Press 1995 pp 330 \$49.95)

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**W**HATEVER one's view of Sir Garfield Barwick, it is indisputable that he has been one of the leading figures in Australian legal and political history this century. Indeed, having been born in 1903, his life spans almost the entire history of Australia as a nation.

This new book, as he acknowledges, was written under conditions of considerable difficulty, given his age and particularly the fact that he is almost blind. Although the recounting of particular events is necessarily subjective, it is evident that he retains his intellectual capacity and sharpness of recollection. The book is not so much a description of events as a recounting of his perception of events.

From a legal point of view, the recollections are important because of the major contributions the author has made in Australia, and to some extent England, to the legal profession, through his dominance of the Bar and Bench. His advice to Sir John Kerr in relation to the political crisis in 1975 also marks him as a significant player in Australia's political history. Even today, as this book witnesses, he continues as a contributor to conservative legal and constitutional thinking in this country.

The title of the book, *A Radical Tory*, is itself intriguing and revealing. It was suggested by a former member of the House of Representatives and minister in the Whitlam government, Clyde Cameron — one of the few figures in the Labor Party with whom Barwick seems to have had any affinity. The author obviously sees the title as an appropriate description of his own personal and political philosophy.

Barwick's attitude to others is consistent with his personal credo. He reserves his praise for practical hard-working men, particularly those who have succeeded through their endeavours at the bar. His *bêtes noires* include academic lawyers, trade unionists and the press, whom he sees as interested, not in providing information about political and legal events, but solely in pursuing the dramatic.

There can be no question about Barwick's contribution to the Australian legal profession (chapters 1 to 7). He rose to eminence as counsel and assumed the profession's highest offices as Attorney-General and Chief Justice. During the late 1920s and 1930s, he forged something of a reputation as an industrious legal all-rounder. But it was not until the advent of the second world war, when he challenged

restrictions under National Security Regulations, that he was able to distinguish himself as a constitutional advocate. His professional and personal view on intrusions into civil liberty by way of unnecessary executive intervention was paralleled by success in persuading the courts to overturn many Commonwealth regulations as *ultra vires*.

After his appointment as King's Counsel in 1942, he forged a formidable reputation in constitutional law, thwarting many of the major planks of the Chifley government's post-war reconstruction. Most famous of these was the attack he led on that government's attempt to nationalise the banks. Though he says little about them, he was also prominent in many section 92 cases and was largely the architect of the 'individual rights' theory of section 92 (ie, the unfettered right of the individual to engage in interstate trading). This theory held sway, particularly while Barwick himself was on the High Court, until its demise in 1988.<sup>1</sup> He also led in many major cases including the Communist Party case where he unsuccessfully urged the High Court to uphold the legislation of the Menzies government banning the Communist Party. He also appeared for the Australian Security Intelligence Organisation (ASIO) in the Petrov Royal Commission. He is, however, sceptical about the utility of royal commissions, likening them to witch-hunts (p 141).

It is clear that Barwick has had an enormous and enduring effect on constitutional advocacy in Australia. Remarkably, he admits to rarely having used more than a few notes when arguing any case. He recounts one occasion when he wrote out an argument in full, only to dispense with it in court. He was the master of the discursive style of argument, welcoming judicial intervention. He considered engagement with the bench in vigorous interchange as the most effective way to resolve a dispute. It is notable that as a judge he maintained the same approach. Consistently with this view, Barwick expresses scepticism about the use of written submissions, and is critical of current High Court reliance on them.

Clyde Cameron's suggestion that Barwick was a 'radical' Tory probably owes as much to his period as a parliamentarian and government minister as anything else (chapters 8 to 17). It is beyond doubt that, as Attorney-General, he left behind him a significant legacy of legislation. Despite virulent and acrimonious opposition, he managed to obtain consensus on both sides of politics sufficient to ensure the passage of the controversial Matrimonial Causes Act 1959 (Cth) and the Marriage Act 1960 (Cth). These were, for the time, progressive attempts to ensure a national coverage of family law matters. However, consistent with his conservatism, he attributes much of the breakdown in contemporary Australian family life and society to the shift from a fault-based family law to the matrimonial regime introduced in 1975 by Lionel Murphy.

His protection of civil liberties, in particular the right to privacy, was also signalled by the passage of the Telephone Interception Act 1958 (Cth). Rather than rely on prerogative powers as the basis for ASIO's conduct of telephone interceptions he determined that this should be placed on a statutory footing with oversight vested in the Attorney-General. Notably, he suggests that judicial supervision in granting warrants for intercepts is an undesirable infringement of the independence of the

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1. See *Cole v Whitfield* (1988) 165 CLR 360.

judiciary (an interesting observation in the light of *Grollo v Commissioner of Federal Police*<sup>2</sup>). He was also firmly against the suggestion that the police should be given the right to tap telephones.

Barwick can, however, be criticised for lack of political judgement, a factor he himself appears to concede, by pressing amendments to the Crimes Act 1914 (Cth) to strengthen official secrecy (he had an abhorrence of leaks to the press) and the Act's treason provisions. Despite his attempts to introduce anti-monopoly legislation, it was left to his successor, Billy Snedden, to achieve the passage of the Trade Practices Act 1965 (Cth). He is highly critical of the changes to the legislation introduced by Attorney-General Murphy in the 1970s. He sees them as largely 'socialist' and destructive of corporate initiative, which is ironic given that they are based on American anti-trust theory.

It is perhaps the naiveté of Barwick's vision about the political nature of parliamentary institutions under the Constitution that undermines his chapter on the 1975 political crisis. This, for the most part, merely reiterates what he wrote in his earlier book, *Sir John did his Duty*,<sup>3</sup> the exception being that he confirms that he consulted Sir Anthony Mason on Sir John Kerr's behalf regarding the legal power of the Governor-General to dismiss a Prime Minister. Both Barwick's and Kerr's views have since been strongly criticised but Barwick dismisses the criticisms as due to ignorance on the part of commentators (particularly academic lawyers) and also to the interest of the press in sensationalising events rather than setting forth constitutional truths. One has only to read Paul Kelly's recent book on the 1975 crisis — *November 1975: The Inside Story of Australia's Greatest Political Crisis*<sup>4</sup> — to appreciate many of the flaws in Barwick's advocacy of the correctness of Sir John's action. To assert that Kerr's dilemma was 'solely' due to the misconduct of Whitlam and his ministers seems to overlook the fact there were other players in the game — Malcolm Fraser (ironically, not a Senator) being one. There is also the failure to distinguish between a *rejection* of supply as against a mere *deferral* of passage. Overall Barwick adheres to the misconception that it was essentially a constitutional rather than a political crisis. For those who retain partisan views on these matters, Barwick says nothing new to convince his critics, although the republication of his assertions may reinforce those of like mind.

Barwick ends on a truly Conservative note, lamenting the handouts continually provided by successive governments whilst those who produce wealth lose much of the benefit of their endeavours in high taxation and government charges. He sees none of this as encouraging personal initiative and endeavour. He expresses the hope that Australians will turn back to hard work and self-sufficiency in furtherance of long-term national goals. Since his book was published before the recent federal election in March 1996, it may be that, with the change of government, he now feels more optimistic about Australia's future.

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2. (1995) 69 ALJR 724.