A RADICAL TORY: GARFIELD BARWICK'S REFLECTIONS AND RECOLLECTIONS (1995)

*Gary A Rumble**

Garfield Edward John Barwick, born on 22 June 1903, is undoubtedly one of the most important Australians of the century. As counsel, Barwick had an important role in the landmark cases in the High Court and the Privy Council in the 1940s and the 1950s. As Attorney-General for the Commonwealth through 1958 to 1963, he was involved in initiatives in matrimonial causes, company law and trade practices. Sir Garfield's career also included service as Minister for External Affairs (1961-1964).

This book of his recollections and reflections has a clarity and force which come in part from its simplicity of style and in part from the personality of the author. It provides an important historical record of Sir Garfield's view of a number of key events in Australian history — especially Australian legal history. It also provides insight into the philosophy and values of this influential Australian lawyer.

In many ways it is Sir Garfield's description of his formative years and his twenty or so years in practice before he rose to prominence as a practitioner which gives the most interesting insights into his approach to the practice and development of law. In an early chapter, Sir Garfield sets out some of the family background to, and the key elements of, his values:

> My mother, a Wesleyan Methodist, attended the Bourke Street Methodist Mission, and I regularly attended its Sunday school in Flinders Street, Darlinghurst. The Methodist Church conducted Statewide annual examinations in biblical knowledge in which I regularly competed. I won many prizes, nearly always books — biography, travel or adventure. Among these prizes were two volumes of which I became very fond. My reading of them may have stimulated or at least fortified my interest in government and my desire to become a lawyer. They were biographies of Abraham Lincoln and James Garfield, both by Thayer. Each of these men was a lawyer and each became President of the United States ... Both came from humble circumstances and succeeded by their own efforts. Of the two men, I think Lincoln attracted me most. I still regard him as a very great man and his recorded sayings as wise.
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> These books told that self-help and whole-hearted application to the daily task could lead to prominence and success in life. They taught me that lack of money did not prevent the full use of what talents one possessed.[1]

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1 Sir Garfield Barwick, *A Radical Tory: Garfield Barwick's Reflections and Recollections* (1995) at 4-5.

Barwick was an outstanding student and despite the disruption of family illness he did well at school and later at University with the aid of a bursary.[2] After completing an Arts degree, he took articles as a law clerk in 1922 and worked full-time in a solicitor's office — where he had considerable responsibility for his young age — while studying law. He was admitted to the New South Wales Bar in 1927. Barwick had to make his way in the practice of law without the advantage of family or other connection or money — a point which he notes with justifiable pride.[3] Through the 1930s Barwick's practice "depended mainly on those who were often themselves battling against the odds".[4] Barwick says that during this period he had no interest in practising in the High Court because he feared that frequent appearances in that Court in Darlinghurst would affect the management of his Supreme Court practice.[5]

The book's glimpse of these Barwick years sheds a new light on a story Sir Garfield recounted to a luncheon I attended in 1979.[6] The story related to what I believe is the earliest reported High Court constitutional case involving Barwick as a barrister — the 1938 decision *R v Federal Court of Bankruptcy; Ex parte Lowenstein*.[7] Barwick's instructing solicitor pressed him to find some grounds for challenging or at least delaying commencement of a gaol sentence because the client was apprehensive about spending winter in gaol. Barwick then identified an argument based on separation of powers grounds. The argument gained support from Justices Dixon and Evatt, but the majority were against it. Unfortunately for the client, by the time the High Court decision was obtained the seasons had come around to winter again.

Barwick's steady progress in the law and this relatively quiet entry into the constitutional law lists might be contrasted with the careers of two other notable Australian lawyers — Dr Evatt and R G Menzies — both of whom had appeared in their mid-twenties in the *Engineers* case in 1920.[8] R G Menzies had served as Victorian Attorney-General and was Prime Minister by the end of the 1930s. Dr Evatt was appointed to the High Court in 1930 and served there for most of the 1930s before the war crisis caused him to re-enter Federal politics.

The picture during Barwick's formative years and in his first twenty years in practice is one of dour but resolute progress through self-reliance, hard work and native talent. His "Reflections and Recollections" then start to range over topics reasonably well known to most students of Australian law. Barwick took silk in 1942 and his constitutional law practice grew. By the end of the 1940s his standing as *the* leading constitutional silk was confirmed by his role amongst a galaxy of legal talent in the *Bank Nationalisation* case.[9] Chapter 5 sets out an interesting collection of anecdotes about the manner of preparation of the submissions in this case and about the the world which grew up around the caravan of counsel and wives who travelled to England for the case. Sir Garfield's discussion of the preparation for the argument for the *Bank Nationalisation* case indicates that he still cleaves to the view regularly stated

2 Ibid at 11-12.
3 Ibid at 5, 16, 28, and 29.
4 Ibid at 28.
5 Ibid at 29.
6 Australian National University Law Society luncheon, 6 April 1979.
7 (1938) 59 CLR 556.
8 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
9 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 (High Court); (1949) 79 CLR 497 (Privy Council).

by him while Chief Justice that his interpretation of the "freedom" guaranteed by s 92 of the Constitution — a view which sat well with his own philosophy and values — is self-evident and unarguable.[10] There is no reference to the fact that a unanimous joint judgment of the High Court in *Cole v Whitfield*[11] rejected his interpretation, let alone any response to the grounds set out in that judgment.

A significant omission from the book is any direct comment on the High Court's recent recognition of doctrines of implication of constitutional rights and freedoms. Barwick records his support for the famous "serfdom" judgment of Jordan CJ which was overturned by the High Court on appeal:[12]

> I thought Jordan was right and that he had the right judicial attitude towards the exercise of executive power. The courts exist to protect the citizen against its excesses.[13]

This attitude to the relationship between the judiciary and the Executive is to be contrasted with Sir Garfield's views on the relationship between the judiciary and the Parliament:

> But a clear distinction must be made between the logical process of applying the law, which as I have said is considered as objectively existing, and an attempt to resolve the dispute according to personal philosophy or inclination.[14]

Surely Sir Garfield's view that Jordan had the right "attitude" towards the exercise of judicial power amounts to an endorsement of the view that there are some areas of personal philosophy which judges should take into account?

Sir Garfield records the *Communist Party* case[15] as one of his losses — he comments that:

> My argument about the validity of the Act was unconvincing. Only the Chief Justice [Latham] was prepared to uphold its validity on the grounds set out in his reasons rather than on my argument. Latham CJ, while still in office, once told me that my argument in the Communist Party case was the worst he had heard from me. I have no reason to question his judgment.[16]

He seems almost pleased to have lost the case. He does not go on to explain why his argument — at the peak of his career as a High Court constitutional advocate — was so poor. Sir Garfield had already informed us that the case was "most difficult to win" and that he "was not consulted before being briefed to appear in the High Court".[17]

Sir Garfield's account of his years as Attorney-General ranges across matters such as his moves to introduce controls on ASIO telephone taps,[18] to reform divorce law [19] and company law and his attempts to introduce trade practices legislation.[20] There is a similar list of weighty issues in which he was involved as Minister for External Affairs. Sir Garfield generally refers the reader to the Commonwealth Law Reports for an

10 Sir Garfield Barwick, above n 1 at 73.
11 (1988) 165 CLR 360.
12 *Reid v Sinderberry* (1944) 68 CLR 504.
13 Sir Garfield Barwick, above n 1 at 45.
14 Ibid at 275.
15 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.
16 Sir Garfield Barwick, above n 1 at 48.
17 Ibid.
18 Ibid at 135-139.
19 Ibid at 119-130.
20 Ibid at 143-151.

evaluation of his work as Chief Justice,[21] but does allow himself to defend his approach to taxation cases.[22]

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The book contains a shortened version of the arguments which Sir Garfield has previously published in 1983 in *Sir John did his Duty*,[23] defending both his own and Sir John Kerr's actions in the 1975 constitutional crisis as well as defending the advice that Sir Garfield gave Sir John:

> [T]he Senate has constitutional power ... to refuse supply ... Accordingly, my opinion is that, if Your Excellency is satisfied in the current situation that the present Government is unable to secure supply, the course upon which Your Excellency has determined is consistent with your constitutional authority and duty.[24]

A major difficulty with the 1975 Barwick advice has always been that if there are no deadlocked Bills to provide a basis for a double dissolution, a hostile Senate could keep denying the House of Representatives supply and the Governor-General would be duty bound — according to the Barwick analysis — to keep sending the House of Representatives back to the polls until the Senate accepted the Government.[25] The Senate itself would not be subject to being sent to the polls. In 1975 there happened to be deadlocked Bills which provided the basis for a double dissolution. However, Barwick's analysis is built on the proposition that a Government may stay in office only if it can obtain supply from the Parliament and was not dependent on the circumstance that there happened to be deadlocked Bills. The 1983 book gave passing acknowledgement to that weakness in the Barwick advice — it seems that it is to be assumed that the Senate will act responsibly[26] — but the issue is not acknowledged let alone addressed in Sir Garfield's 1995 review of the issues.

The most important and — for this reader at least — new information in the 1995 book about the events of 1975 is Sir Garfield's account of a visit he made to Sir Robert Menzies in Melbourne. It is not entirely clear from the text when the visit occurred, but it was at the end of the October sittings of the High Court in Melbourne:

> I called on Sir Robert early in the Melbourne sittings of the High Court in October 1975 ... [A]t the end of the sittings, as I was leaving to return to Sydney, I decided to call on him again ... Just after we began to converse, his secretary brought him a message from Malcolm Fraser. The message was simply that "we are acting". I had been following the newspaper accounts of events in the Parliament and consequently understood the purport of the message. It also alerted me, by inference, to the fact that there had already been some earlier communication between Fraser and Menzies.
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> The arrival of the message very obviously disturbed Sir Robert. He was somewhat angered by it. He said to me, quite testily, "The young fools are too impatient. If they give this fellow (meaning Gough Whitlam) enough rope he will hang himself".
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> He then turned to me and said, "Gar, what would you do?".

21 Ibid at 228.
22 Ibid at 229.
23 Sir Garfield Barwick, *Sir John did his Duty* (1983).
24 Sir Garfield Barwick, above n 1 at 292.
25 Professor Geoffrey Sawer, *Federation Under Strain* (1977) at 158-160.
26 Sir Garfield Barwick, above n 23 at 127.

"Assuming a proper occasion", I said, "I would not be troubled by a refusal of Supply by the Senate. After all, it is the Parliament's traditional and ultimate means of control of the Executive. Whether or not there is an occasion to do so now, I cannot really say. I do not know enough of the facts. But I do not think Fraser realises how bad things are with the country. If they are to be put right, Fraser if in government must do some very unpopular things. So what would trouble me would be the certainty that in three years the government would be most unpopular. On political grounds, I would not refuse Supply unless I felt very certain of such a large majority from the electorate in the ensuing election that, at the end of three years, the government could stand the loss of a substantial number of seats and still survive. If it did, things would be easier three years later. I cannot see such an electoral result at the present time".

He smiled at me and said, "That would be asking too much".

"Yes it would. But that is what I think."

After some pleasantries, I left to catch my plane. In all, the interview was brief and in a sense casual, yet to my mind memorable.[27]

Later, Sir Garfield denies any contact with Opposition Leader Fraser in relation to the events of the time.[28] Yet here we have from Sir Garfield's own pen an acknowledgement that in a context where a number of major issues about Supply were being debated in the press, Sir Garfield stated to Sir Robert his view to the effect that a refusal of Supply was within the Senate's rights and would force the Government to an election with the added comment that things were "bad with the country". Sir Garfield did that knowing that Sir Robert was in communication with Mr Fraser.

Surely Sir Garfield would not assert that it would have been consistent with his position as Chief Justice for him to have provided those comments directly to Fraser. Did he not see any risk in giving those comments to Sir Robert? It may be that Sir Robert never passed on the substance of this view of Sir Garfield. It may be that if he did, he did not attribute it to Sir Garfield; yet it must at least have been of some reassurance for Sir Robert to hear the Chief Justice's views on these key aspects of the matter. What might Sir Robert have done if Sir Garfield had expressed some reservations about the proposed action?

A dozen years ago I wrote:

> 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.[29]

I still stand by that appraisal — but I acknowledge that the political mood has swung back closer to alignment with Sir Garfield's view of the world. In his concluding remarks Sir Garfield offers this appraisal of himself:

> When in 1953 I became a knight bachelor and received from the College of Arms armorial bearings I took as my motto "Work with courage to achieve". That expressed my philosophy and the course of my life. I think that in the end I did achieve much both for my family and for the community at large.[30]

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27 Sir Garfield Barwick, above n 1 at 214-215.

28 Ibid at 293.

29 G A Rumble, "Sir Garfield Barwick's Approach to the Constitution" — unpublished PhD thesis ANU (1983).

30 Sir Garfield Barwick, above n 1 at 299.

This remarkable book — and the public record — contain ample evidence to support this assessment.