The life and career of Garfield Barwick

The Sir Garfield Barwick Address was delivered by the Hon RJ Ellicott QC on Wednesday, 17 August 2011.

Sometimes, but rarely, you will meet another human being with an air of authority and purpose about him or her whose sheer enthusiasm for life is so infectious that, while you are with that person, it engulfs you too. They are likely to have a commanding personality. In my experience they are highly intelligent, good communicators and committed compassionate people who see the big picture and are constantly pushing the envelope to achieve some perceived public good. They are not necessarily without fault. In the course of their enthusiasm they can be arrogant, seldom consumed by self doubt, and quick, sometimes too quick, to form views about other people or events.

Nevertheless they are achievers. They usually make a difference and leave great changes in their wake. They are sometimes the pathfinders. Tony O'Reilly and Ted Noffs are two such people I have known. Another is Garfield Barwick.

Barwick is a controversial figure. If you judge his life and contribution by one event, you will surely misjudge him.

Garfield Barwick was born on 22 June 1903 – a federation baby who was to spend much of his long life expounding and interpreting the fledgling Constitution.

His mother, a very intelligent and compassionate woman of commanding presence and his father, small in stature, intelligent and of practical bent, were from backgrounds far removed from the practise of law. She was the third daughter of Australian born parents both from families involved in the wool industry, graziers and operators of wool scours. At the time of federation the family lived in Moree. His father was a printer who met his mother when he was employed by the *Moree Champion*.

For the family it was a battle to maintain a standard of living above the bread line and he was probably only able to be educated at Fort Street and the University of Sydney through winning bursaries. There was no silver spoon around. Their family life was based on a philosophy of hard work, a strong degree of initiative and at times risk taking which led to trouble. For many years the family were committed Wesleyan Methodists who had a strong social conscience. His mother, writing at age 87, describes their early life which revealed an early interest in politics and law which may have affected him:

> After my marriage my husband and I took a great interest in politics, parents and citizens associations – I remember Edmund Barton and George Reid. Before I married I had an interest in debate. My husband was secretary to the local Liberal Society as far back as the time when Holman was seeking a seat in the Commonwealth Government. We were also both interested in the affairs of hospitals.

Barwick says in his autobiography (pages 2–3):

> For six years as an only child I had the undivided attention of my parents. I was early admitted to adult conversation and mingled with the many friends and relatives who crowded through our house in Paddington. To these I talked – indeed I think in those days I must have been a vigorous conversationalist for I remember that once I was offered a boy-proof watch (an item any boy would covet) if I would remain silent for an hour while the offeror carried on a conversation with a lady he was courting. I got the watch – seemingly such an interval of silence was unusual.

The couple who were courting were my father and mother. As it happened my father was his mother's brother and my mother, his father's cousin.

Talking was to be the hallmark of his life as some of us found – even on the benches.

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After sharing the University Medal in law Barwick served a period of articles of clerkship and was admitted to the bar in 1927.

This was the year I was born. My family lived in Moree and later near Cobar. Although first cousins, we were greatly removed by both age and distance. Nevertheless by mail and family visits the exploits of Garfield, the barrister, filtered through. As a result by the age of 10 and despite little, if any, personal contact I became a victim and decided to be a barrister.

During the late 30s and early 40s in the course of visits which I made to his parents' home at Strathfield there were occasions when we met. In the early 40s he, I believe, purchased what, in effect, was a very pleasant

weekender or holiday house on the Woronora River and during visits there I joined in the family fun.

It was at a time when he was about to take silk. But he was by no means the recluse who sat in a corner studying a brief. He joined in the activities, not surprisingly tended to dominate the conversation and enjoyed a good game of tennis. To my young mind he was an extrovert. Indeed the enjoyment of conversation, company and social engagement formed a major part of his life.

Barwick, the advocate

Much has been written and said about Barwick's skill as an advocate. I had the opportunity to see him in action in several cases as junior counsel on both the same or the opposite side. He had exceptional skills in simplifying legal principles, explaining them to a court; and an unusual capacity to conjure up attractive examples to make a point. The latter was a skill he often used as chief justice, to destroy, or sometimes enhance the argument that counsel was advancing.

When appearing for a plaintiff or appellant he tended to be short in chief seemingly having won the judge's agreement, leaving it to reply to complete the demolition of his opponent's argument. It was a skill which judges of lesser mind found difficult to combat. As one observed it was not wise to embrace his sometimes irresistible argument while on the bench but to do so later after quiet contemplation. In personal discussion of legal principle he was often so incisive and persistent that it was easier to say 'yes'.

In his autobiography he states that he did not regard himself as a great cross-examiner. There are some cross-examiners who take a particular word or words from the evidence of a witness and cleverly have the witness contradict his or her own evidence. The cross-examiner with this skill usually has an excellent memory or recall on the run of evidence given and can very quickly to tie the witness in knots. To the onlooker this is impressive though judges often remain unimpressed. More effective, in my experience, is the cross-examination in which the witness is led to contradict the substance of his evidence and to give answers which build up the cross-examiner's case. My recollection of Barwick is that he had a great recall of evidence but fell more into the latter category. I think he is being modest in downplaying his skill as a cross-examiner.

Opinion work was always a valuable part of a barrister's practice in the period prior to 1970. If not busy in court you could earn considerable fees from opinions given in writing or in conference. Barwick describes writing opinions on the back of briefs. What I saw was very different. I only had one brief for opinion with him. It was for Yates Seeds about seed warranties. I took it to him, he read it and after making a few verbal comments, to my surprise, signed it. No doubt he charged an appropriate fee.

What I observed in his chambers at that time amazed me. He had not one secretary but two working feverishly typing opinions. This was at the height of his practice and one can assume that in this period he was earning many times the salary of a judge.

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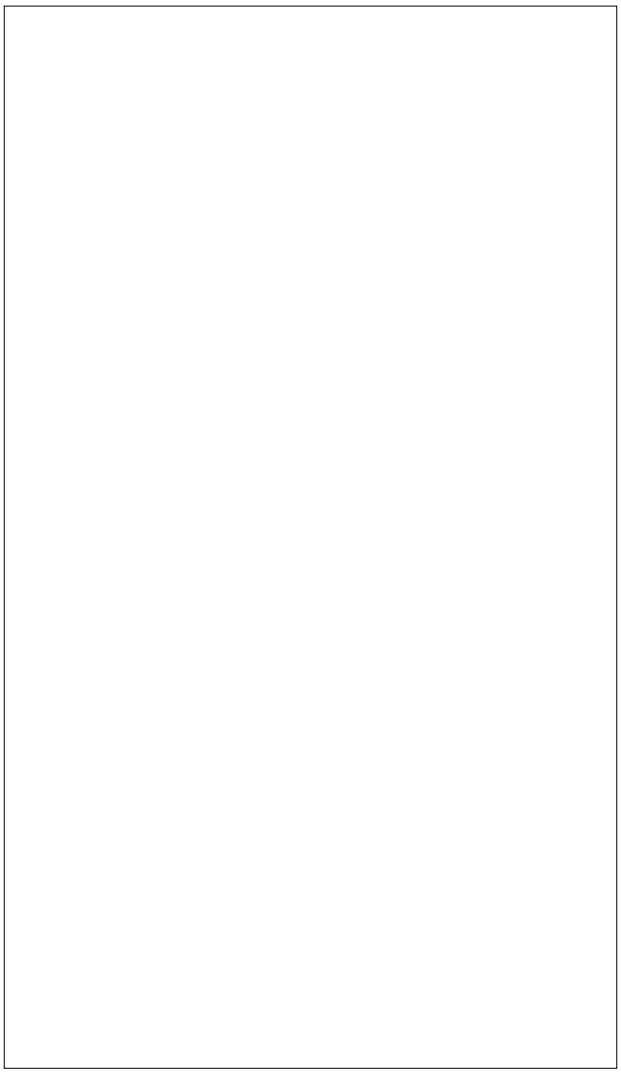
As it happened I appeared with him in what was to be his last case before the Privy Council as a barrister in private practice.

The Estate of Chick, a Moree client, had failed in an appeal on death duty before the NSW Supreme full court. It was decided to appeal to the Privy Council. It was early 1958. Barwick had been elected to the House of Representatives and was about to take his seat in the parliament. I knew he was about to go to London to appear in the well known s 260 case – *Newton's Case*. I rang and told him I had an appeal before the Privy Council and the solicitor had asked me to find out whether he would lead me. He said he would. I said there is only one problem. The client can only afford eight hundred guineas. I said if you would accept three hundred and I took the balance of five hundred, I would be able to take Colleen. He readily agreed.

He had a small flat near St James Palace. There was no time for preparation before the hearing. He had been too busy arguing *Newton's Case* and it had been an uphill battle. I therefore did not see him until the morning of the appeal. He had obviously read and considered the argument. We discussed it and set off across St James Park on foot. There was no mention



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of the argument. Rather he named in Latin and commented upon almost every species of flower or bush we passed in the park. He had an unusual capacity to acquire a detailed knowledge of a subject matter and appear to become an instant expert. It obviously stood him in good stead in mastering a technical brief. It was so in other aspects of his life, be it sailing, as in the Sydney-Hobart Yacht Race, mastering skiing and the terrain of the Kosciusko National Park or taking on the presidency of the Australian Conservation Foundation.

Chick's Case was heard in May 1958. It followed the hearing of *Newton's Case* in which Douglas Menzies QC appeared for the commissioner of taxation.

At the end of *Chick's Case* Barwick and Menzies who were very close friends attended a dinner at the Inner Temple to which I, too, was invited. For me it was a unique experience. Obviously they already had a very close relationship with the law lords and other counsel present. At the conclusion of the dinner I walked back with them along The Strand through Trafalgar Square to Piccadilly Circus. There was neither need nor opportunity for me to say anything!

During the journey Barwick recounted a seemingly endless string of stories. When he took breath Menzies filled in with quotations from *Hamlet* and other Shakespearean works. They were in a celebratory mood. Something special was indeed happening in their relationship. Menzies was returning to Australia to take his place on the High Court which he did on 12 June 1958. Barwick, elected in March to the House of Representatives, was returning for his first sitting in the House. In effect it was at the end of their respective practices at the private bar. Public service was about to engulf their lives. As I disappeared down the underground they passed into the evening mist down Piccadilly.

I had another experience of him involving the Privy Council. I was appearing there in 1960 on a petition for special leave. During the hearing of it I received a cable from the then solicitor-general, Sir Kenneth Bailey, who asked me if I would appear for the Commonwealth in relation to an application for special leave about to be heard in a matter of *Dennis Hotels.* He said if I was to accept the brief I was to read a prepared statement and say no more. He also nominated a fee but said that the attorney-general, Sir Garfield Barwick, had asked him to make it clear to me that if I accepted the brief I should not expect that I would be briefed on the hearing. I accepted the brief and did as I was told. On my return the question of who would get the brief on the hearing was a matter of great discussion. It turned out to be Michael Helsham who had chambers on Barwick's floor.

Barwick's contribution to the bar

In his time at the private bar Barwick had not only established himself as the leading counsel in Australia but by 1950 had also established with others a very high reputation for Australian counsel before the Privy Council. Thereafter there was a growing practice for clients to brief Australian and not English counsel in

matters before that body. The journey by Australian barristers to London continued for another 35 years. It was very important in our development as barristers and in expanding our vision of the world. It is fair to say that this was in part a legacy of Barwick's capacity as an advocate.

When president of the New South Wales Bar Council Barwick managed to obtain from the New South Wales Government a 99-year lease of the land on which Wentworth Chambers was subsequently built. Assisted by Ken Manning and others he was the driving force behind the development of both Wentworth and Selborne Chambers. As a result of his drive and their efforts the bar's role as a significant public institution was greatly enhanced and was then almost wholly housed in its own premises.

I have not referred specifically to any of many well known cases in which Barwick appeared as lead counsel. Some were constitutional cases. His practice however stretched across all areas of litigation. Many of his appearances were in difficult cases where, because of his known brilliance, he was briefed because it was thought, as a last resort, he might be able to snatch a rabbit out of the hat.

I will not refer to particular cases. The point I wish to make however is that there have been many counsel with broad practices during my lifetime who, like him, have appeared sometimes successfully sometimes not in many important cases. There has been none however known, respected and accepted so widely for his brilliance as an advocate. To have achieved this accolade might well be his greatest achievement. Indeed throughout his public career his skill as an advocate played a continuing role in court, cabinet, parliament and on the bench.

At the height of his practice he was extremely busy. One day early in my practice, at the suggestion of my father, I reluctantly rang him and he agreed to see me. At the appointed time I exited the lift on the 5th Floor Chalfont Chambers, I looked down the hallway and saw an emerging phalanx of counsel in robes and solicitors and clients advancing towards me. The lead figure was Garfield Barwick. I was quickly despatched and invited to see him some other time; an invitation I cannot remember accepting.

There was a well-known judge in the 1950s who, at times, even the more talented rising juniors were unable to handle. Barwick is reputed to have met one such counsel on the way back from court who shared his frustration. Barwick offered to go back to the court and lead him in the matter. They went back, Barwick reopened the issue with the judge and it was not long before the judge was saying 'yes Sir Garfield. Of course Sir Garfield' and seemingly making the order.

Barwick was of a different mould to most of his predecessors. He was an activist and warmed to the opportunity to engage in law reform.

I am also reminded of an occasion when I was driving home through Epping. My route took me close to his home in Beecroft. Along Epping Road I was passed by a Jaguar 3.6 travelling at great speed. I recognised the driver. I revved up my Ford Consul and tried to catch up with him. It was in vain. As we drove down Carlingford Road leading to Pennant Hills Road he disappeared into the distance. My mother was always saying to me I was born in a hurry and had been in a hurry ever since. It may have applied to him as well. He travelled in the fast lane.

Barwick as attorney-general

Barwick was of a different mould to most of his predecessors. He was an activist and warmed to the opportunity to engage in law reform.

His preparation of the bill for the first Federal Matrimonial Causes Act and his management of its passage through the parliament was his most successful. When the bill was unveiled and made available for public comment it broke new ground. Divorce was no longer to be dependent on establishing of a matrimonial offence such as adultery or cruelty. The new bill confronted the fact that not all marriages were made in heaven and therefore if one had irretrievably broken down there should be a ground for terminating it. In the bill this was based on separation for a period of five years fault or no fault – a relatively modest reform having regard to the *Family Law Act 1975*. In those days it was controversial, particularly with the churches. His advocacy of the new legislation required substantial tact and effort with select groups and widespread open public meetings.

In the end, it can be said that the measure was widely applauded by most members of parliament and the wider public.

Other reforms related to phone tapping and in amendments to the Crimes Act. These were resisted strongly by the Labor Party and select groups who saw them as an invasion of civil rights.

A major area he examined was restrictive practices and competition. Aided by Professor Jack Richardson, one of his departmental officers, he surveyed relevant legislation and administration in Australia and other countries such the United States and Canada. However, when well advanced in the preparation of draft legislation Menzies decided to reduce his workload to concentrate on external affairs. Snedden became attorney-general and ultimately introduced the Restrictive Trade Practices Act 1963. It was not as comprehensive as Barwick intended. Nevertheless his work had opened a pathway which led in time to the Trade Practices Act.

His work as chief justice

Barwick resigned from parliament on 24 April 1964 and was sworn in as chief justice of the High Court on 27 April 1964.

Time does not allow any real analysis of his contribution as chief justice. Some aspects are controversial.

There can be no question that for the foreseeable future he established the broad framework within which the High Court would do its work. From the time of federation it was expected that the High Court would ultimately have its seat at the seat of government. Early in his chief justiceship Barwick secured the agreement of the Holt and Gorton governments to construct the High Court in Canberra. It is well known that he was closely involved in the choice of site and architect and in the daily construction of the building. As attorney-general and later minister for the capital territory I had responsibilities in relation to the construction of the court building. His attention to detail is legendary. He insisted on approving the actual appearance of the bush hammering of the outer concrete of the building. Numerous tests were undertaken in his presence to get it right. Inspections of the progress of the work were frequent. On some visits we walked up what seemed endless stairways to examine the progress of the works. When the finishing touches were undertaken at his insistence he was intent on having every detail checked. Acoustics in the main court and wall hangings were particular examples.

After the dismissal of Whitlam he came under attack from Gareth Evans, shadow attorney-general. It was payback politics and had no real substance to it. For instance, in No. 2 Court the judges could be seen from well outside the building. They were open to being assassinated by a terrorist or a crackpot with a telescopic firearm. The glass to protect them cost in excess of $1 million. It was clearly needed.

At an administrative level Barwick insisted that the court control its own budget and administration and legislation was passed to achieve this.

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The opening of the court by Queen Elizabeth II in 1980, coming as it did towards the end of his chief justiceship, fulfilled his strong resolve to establish the court in Canberra as one of the three arms of government.

Other major reforms took place. The governments of the day, at his urging, took steps to lessen the workload of the court. He, as attorney-general, had urged the setting up of the Federal Court with wide jurisdiction for this purpose. This initiative was taken up by Nigel Bowen and a Superior Court Bill was introduced. Nigel was succeeded by Tom Hughes. Tom and I, then solicitor-general, took the view that much of the court's original jurisdiction should be undertaken by the state courts under s 77(iii) of the Constitution. Tom discussed the matter with both Barwick and Sir Kenneth McCraw, the NSW attorney general. In January1972 he wrote on the matter to Ivor Greenwood, the then attorney general, who shared our view, saying that after a great deal of consideration he had come to think the best solution to be that the Supreme courts should be given jurisdiction in taxation and individual property matters.

The first legislative steps to achieve this (in that case – taxation matters) were implemented by legislation passed early in the term of the Whitlam government.

His work in court

Appearances before him as chief justice could be daunting to counsel. He adopted the view that a justice should use the oral hearing to progress his or her determination of the appeal. Counsel should be questioned, if needed, as part of the process. At times Barwick, the advocate, emerged in probing the argument. Counsel needed to be ready for it.

In a case involving s 92 *Mead v Mowbray* I intervened for the Commonwealth as solicitor-general and presented an argument which favoured the State of Tasmania and was clearly contrary to Barwick's point of view. I was heavily questioned by him. On that day I was still on my feet when the court adjourned. As he led the justices out of the court behind a partition at the rear of the bench I could hear him saying: 'That's a lot of nonsense Bobby is talking isn't it?' As it happened Tasmania won the case 4 to 3.

Later I attended court on another s 92 case with a view to intervening. I did not apply immediately at the start of the case. After lunch on the second day Barwick looked down at me in the well of the court and said: 'What are you doing here Mr Solicitor?' I explained that I might wish to seek leave to intervene. He turned to his fellow justices and said: 'Do we need to hear the Solicitor?' They shook their heads and he said: 'Well leave would be refused Mr Solicitor.' As it turned out this was the *causa causans* of s 78B of the Judiciary Act. I introduced it as attorney-general. It gave Commonwealth and state attorneys-general the right to intervene in constitutional matters.

Judgments

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 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. At the same time it has to be said that the justices who sat with him were not themselves shrinking violets but independent of mind and very good lawyers not likely to follow him blindly. He is criticised for the decisions he handed down in taxation matters but it has to be remembered that in doing so he had to be supported by sufficient other justices.

History I believe will assess his contribution as a judge to the development and exposition of legal principle and public and private law in Australia as exceptional. In all he served 16 years and nine months as chief justice.

Barwick and the Whitlam government

During his chief justiceship two matters arose which closely involved the Whitlam Government.

One of the early initiatives of that government was to institute proceedings against France to stop atmospheric nuclear testing at its Pacific test centre near Tahiti. I was solicitor-general at the time and was given the task of preparing and sharing in the presentation of the initial application for interim measures.

Because Australia did not have a member on the court it was entitled to appoint an ad hoc justice and Barwick was chosen for that role. He had of course been a former minister for external affairs. It involved his being absent from the court for lengthy periods running into months.

The hearing of the application for interim measures took place on 21 and 22 May 1973. Both the attorney-general followed by myself as solicitor-general, were to address the court.

En route to the court Lionel Murphy said to me: 'Don't be long.' I replied: 'I'll take as long as my prepared speech requires which will take as long as the court schedule allows.' It was not a good start. When we reached the robing room Murphy said: 'We should all appear without our wigs.' I said: 'Under the court's practice we are all to wear the dress we wear before our highest national court. Murphy, if you want to take off your wig you should do it at home before the High Court not here.' He appeared without his wig, the rest of us did not. The matter was later raised by Lachs, the president, with Barwick who asked him 'Is the attorney-general trying to insult us?' When Barwick tackled Murphy later Murphy asserted he had Lach's agreement to do it (*Radical Tory* page 256). If he did

have it he would surely have mentioned it to us in the robing room.

It was only the first of the events involving Barwick during the nuclear test case. There were 15 judges and one ad hoc judge. When the hearing concluded in The Hague I discussed with Eli Lauterbacht (as he then was) how he thought we had fared. He knew the court well. He went through the various members assessing what he thought were their likely attitudes and said: 'We could win by 9 to 7.' It was not unusual for me and other counsel at the end of a High Court hearing to discuss what we thought our chances were and conclude that we might win say by 6 to 1 or lose by 5 to 2 as the case may be.

When I returned to Australia Whitlam asked me what our prospects were. I told him of my discussion with Lauterbacht and said: 'We think we could win by 9 to 7.'

Before the decision of the court was handed down Whitlam addressed, as I recall it, a meeting of the Law Institute in Victoria. It was a private meeting and in the course of it, in answer to a question he said, repeating what I had said, 'We think we could win by 9 to 7.'

News of what Whitlam said leaked out to the Australian and international press.

After a preliminary conference following the hearing, the court took a preliminary vote as was its practice and there was a majority in favour of Australia and arrangements were made for preparation of the judgment. The majority was 9 to 7 or thereabouts. Barwick then left for London for a short period and came back to The Hague for the approval and delivery of the judgment on 22 June 1973. In fact the majority, in the absence of Lachs and another judge was 8 to 6. When Barwick arrived he faced a very unpleasant situation and found he was suspected of having leaked the result of the vote to Whitlam. Barwick of course denied it but Gros, the French judge, was particularly suspicious. My understanding is that this was followed by a more formal enquiry which Gros demanded and which eventually cleared Barwick.

Of course he was innocent and Whitlam too was innocent. The court had not yet delivered its decision when Whitlam spoke. What was not known at the time is that I was the source of Whitlam's statement.

There can be no doubt that Barwick in the semi-political atmosphere of the International Court used his skills as an advocate and he befriended and persuaded a number of judges of the justice of Australia's case. In retrospect this case was one of the few successful initiatives of the Whitlam government. It was based in part on Barwick's success as Australia's ad hoc judge and there was every reason for Whitlam to be pleased with his efforts. But, of course, there was more to come – the dismissal by Sir John Kerr of Whitlam as prime minister.

Because of his giving advice to Kerr on the powers of the Senate in relation to supply and of the existence of a reserve power of dismissal he has been and still is heavily criticised, indeed pilloried, by, among others, Whitlam and the Labor Party. They are great haters and great lovers. They are endeavouring to perpetuate a baseless myth that the Whitlam government was the victim of a massive conspiracy either between individuals or between the forces of conservatism. Had Barwick given the contrary advice he would now be a Labor hero!

In an opinion which I had published on 16 October 1975 I expressed views that the government needed the authority of parliament to spend money and that without supply could not govern. If the prime minister was not prepared to advise him to dissolve parliament to resolve the disagreement between the two houses it was open to the governor-general to dismiss Whitlam and his ministers and seek others who would so advise.

Barwick's advice to the governor-general was that under the Constitution the Senate had equal power with the House of Representatives over money bills except the Senate could not initiate or amend it. A prime minister who could not ensure supply because the Senate failed to pass the appropriate bills must either advise a general election or resign. If being unable to secure supply he refuses to take either course the governor-general had constitutional power to dismiss him and would have the constitutional authority and duty to invite the leader of the opposition to form a caretaker government on certain conditions.

In the broad the two views coincided, though expressed in different language.

For many years it was alleged that I had been a messenger or a co-conspirator. Nothing was further

from the truth. The views I expressed were based on my own research mainly in connection with the 1974 double dissolution and my reading of such works as Evatt's *King and Dominion Governors* and Forsey's on the subject. At no stage during the 1975 events, or for that matter in relation to the 1974 events, did I discuss these matters with Barwick. Further, the views we both expressed were not only well and truly open, based on Evatt and Forsey, but I am bold to say correct, and now seem to be widely accepted.

Barwick was, of course, also heavily criticised for giving advice.

Barwick's view was that it was fundamentally a political matter and that, as in fact happened, it was quite unlikely that it would come before the court. If it had of course he would surely have not sat. This could have been of no disadvantage in the circumstance to any party seeking to put to the court views opposite to Barwick's.

He also relied in giving advice on past instances where a governor-general had sought from, and been given advice by, the chief justice.

Kerr clearly wanted to be as sure as he could that he had the requisite authority. He had sought the advice of the government's law officers. This had not been forthcoming. All he was given was a draft by the Solicitor-General Maurice Byers but with his signature crossed out by the attorney-general.

Barwick was also asked by Kerr to ascertain if Sir Anthony Mason agreed with his (Barwick's) advice. Barwick consulted Mason who said he did.

Practising and academic lawyers may argue and express views on the various issues involved and their views may differ. One thing that seems clear is that Barwick considered it was proper for him to advise the governor-general. This had happened in the past on significant matters and that the advice he gave as to the power of the Senate in relation to supply, the duties of a prime minister faced with a refusal or failure to give supply and the existence of a reserve power are now widely accepted. Further, as Sir David Smith has pointed out, the Labor Party in opposition on over 100 occasions asserted that the Senate had power to refuse supply.

The condemnation of Barwick for advising Sir John Kerr has been grossly unfair and, I believe, heavily biased. History's judgment will have much greater balance.

Conclusion

This was undoubtedly a remarkable life. He had an amazing mind and an indomitable spirit. His enthusiasm for life and his own involvement in it was immediate and boundless. In many respects he was a pathfinder. He laid foundations and showed the way. If he believed a particular action on his part was proper and public duty required it he took it.

I do not suggest he was beyond criticism or fault or controversy. But his life, as he lived it and as I experienced it was infectious and to share a part of it made you feel you were well and truly alive. You had to be on your guard to keep up. In 1958 he took Colleen and myself on the London tube to Holborn to visit a jewellery shop. Before I knew it he was on the crowded train with Colleen and I was left stranded at the station! That's what it could be like. You sometimes had to play catch up!