The Barwick approach

The fifth annual Sir Garfield Barwick Address was delivered by the Hon Murray Gleeson AC QC on 20 August 2014.*

It is now just on six years since I ceased to be chief justice of Australia, but when Sir Garfield Barwick[1] was my age he was still vigorously discharging the responsibilities of that office. He retired at the age of 77, as had his predecessor, Sir Owen Dixon. For most of the twentieth century, Justices of the High Court of Australia were appointed for life, as federal judges in the United States, including Justices of the Supreme Court, always have been, and still are.

In 1977, the Australian Constitution was amended so as to require federal judges, including members of the High Court, to leave at the age of 70. I say 'leave' rather than 'retire' because I cannot think of anyone in the last 20 years who, upon leaving the High Court, entered into complete retirement. Sir Anthony Mason, who followed Sir Garfield's successor, Sir Harry Gibbs, as chief justice, left the High Court at 70 and, almost 20 years later, was still an active and influential participant in the work of the Hong Kong Court of Final Appeal. I am sure that most of those who have left the court since 1977 would have remained at least to the age of 75 had that been constitutionally permissible.

On balance, I support the idea of a compulsory retiring age for judges, but I think it was a mistake to fix the age of 70 in the Constitution, which is notoriously difficult to amend. It would be better left to parliament to fix by legislation, as in the Australian states. That way parliament could respond to changing demographic and social circumstances.

When the Constitution was enacted, it was normal for judges of superior courts to be appointed for life (or, more accurately, during good behavior and without any age limit). In the early part of the twentieth century, compulsory retirement for state Supreme Court judges was introduced, and, in New South Wales, the age was fixed at 70. It was related to considerations of physical and mental capacity. At that time, average life expectancy was much lower than at present, and very few people contemplated the possibility of working beyond 70. (Judges, however, included some notable examples of longevity. Sir Frank Gavan Duffy was appointed chief justice of Australia at the age of 80, and Sir George Rich was still sitting on the High Court at the age of 87). Thirty seven years on from the change to the federal Constitution, the number 70 looks slightly old-fashioned! It is already out of line with the corresponding number for many state judges. In another 37 years it is likely to appear incongruously low, at least if its rationale is still related to physical and intellectual capacity. On the other hand, if it were to be given a new rationale, such as the desirability of turnover, then perhaps it should be 60 or 65. Either way, it would have been better dealt with by being committed to legislation than by being frozen in the Constitution. However, there it is, and as a result lawyers are becoming accustomed to the fact that there is life after retirement, even, or perhaps especially, for senior judges.

Since experience remains a quality that is very useful to a lawyer, this is of practical importance. Sir Garfield Barwick was a prime example of that quality. He was, for many years, the leader of the Australian Bar. I once read of commentary written by a law teacher who said he made his name as a leading counsel for the banks in the *Bank Nationalisation Case*[2]. Such an observation fails to take account of the realities of professional life. A barrister who has yet to make his or her name does not get a brief like that. He was briefed to represent the banks in their legal fight for survival because he was regarded as the best, not because he was seen as someone with promise. Briefs of that kind are not delivered as a form of encouragement. He was leading counsel for the banks because he had already made his name in the profession. After he entered federal politics, he was Commonwealth attorney-general for six years. Then he was chief justice of Australia for 17 years.

Sir Garfield had left the bar before I entered practice, but I appeared in many cases before him. One of his characteristics was the breadth of the legal knowledge and the depth of legal understanding that came from his experience; an experience that continued to accumulate throughout his long term of office. This was obvious, not only in constitutional cases, but also in civil and criminal cases of all kinds. The work of the court held no surprises for him. The scale and scope of his immense practice as an advocate equipped him well for judicial office, and he continued to build on that experience as attorney -general and chief justice.

As a presiding judge, Chief Justice Barwick engaged closely with counsel in argument. He regarded his time during a hearing as active working time, and not mere time for patient listening. He often delivered ex tempore judgments, and even where judgment was reserved he made it clear that, by the end of argument, he would have made up his mind. I am sure that, had it suited the convenience of the other members of the court and the circumstances of the case, he could have delivered his judgment immediately following argument in any case on which he sat. This was partly because of his temperament and his intellectual sharpness. Principally, however, it was because of his vast experience. As a barrister, over many years, a day in court would be followed by a succession of conferences at which he was expected to deliver, on the spot, legal advice on important and difficult matters covering the whole range of legal problems. In court, he conducted cases touching all

aspects of public and private law. He continued to build on his knowledge and expertise until his very last day on the court. His judgments were not the products of scholarly reflection upon novel issues. Rather they were the opinions of a practical lawyer who had developed, over a professional lifetime, and continued to develop, a close understanding of legal history and principle, and an intimate working knowledge of adjectival and substantive law.

This can be illustrated by reference to his judgments on some specific issues. I have selected these simply because they appear to me to reflect an approach to the law that was characteristic of Chief Justice Barwick and that reflected his professional background.

Contrast between Australian and United States Constitutions

Most judges regard themselves as orthodox. Beware of those who do not. An unorthodox lawyer is a contradiction in terms. The law is orthodoxy, and judges commit themselves to justice according to law, not according to their personal preferences. It is difficult to think of any form of intellectual activity in which there is a greater pressure to conform. The best evidence of this is the technique by which judges set out to justify their decisions. By the standards of most forms of intellectual endeavor, that technique is intensely conservative. The institutional pressures for conformity include the obligation to give reasons, appellate review of those reasons, the doctrine of precedent and collegiate decision making. Even so, someone who has judged at the highest level for 17 years is likely to develop certain themes, or emphasise certain ideas, often building upon views formed in earlier encounters as an advocate or a legal advisor.

There are a number of such themes that appear in the constitutional judgments of Chief Justice Barwick. I have selected one, which concerns a form of comparative jurisprudence, involving a comparison between two federal Constitutions: that of the United States and that of Australia. I will give two practical illustrations of this theme.

As a matter of history, the framers of the Australian Constitution were powerfully influenced by the model of the federal Constitution of the United States. Our doctrine of the separation of powers is based upon the form and structure of our Constitution, which the framers took in part from the United States model. At the same time, there are differences. The most obvious is that Australia is a monarchy and they are a republic. Another is that we follow the Westminster model of responsible government, whereas they have an executive that is outside, and separate from, the legislature.

In both countries, governmental functions, including legislative power, are divided between the central authority and the states, which from time to time contest the boundaries formed by that division. The term 'federal balance' is sometimes used to describe the current state of that contest. It would be better for lawyers to leave that term to the politicians. There is a risk that constitutional divisions of power, established in a very different social, economic, and international context, will be ossified. The Constitution will be regarded as an heirloom to be conserved in a sealed case and preserved from external influences. More specifically, there is a risk that the balance originally struck in the United States will be regarded as that to be maintained here, come what may.

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An early example of this approach was the view of constitutional interpretation, involving concepts of reserved state powers and immunity of instrumentalities, that prevailed in the first years of the High Court. This view was based on United States authority. It was rejected, somewhat brutally, (the term commonly used is 'exploded') in the *Engineers Case* in 1920[3]. In his retirement speech[4] Chief Justice Barwick said:

> The Constitution gives the Commonwealth certain powers, legislative powers. It describes those powers briefly in words by reference to subjects. It gives to the States the residue of power after the Commonwealth power is defined and exercised. So the problem for the Court always is to decide on the extent of Commonwealth power. The Constitution decides the State power by providing for it to have the residue.
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> Earlier, the first judges thought the way to interpret the words was to say you interpret them against powers reserved to the States. But in the *Engineers Case* that was departed from and it was pointed out . . . you take the words, you decide on the Commonwealth power and you do not decide on the Commonwealth power looking over your shoulder as to what effect your decision will have on State power. The Constitution will take care of that.

In constitutional polemics a number of terms have been used to describe this approach. It is often described as centralist. I would call it unsentimental.

In his judgment in the *Payroll Tax Case*[5] the chief justice explained:

> The Constitution granted by the Imperial Act was 'federal', not in the sense of a union of previously existing States surrendering powers to that union but in the sense that the powers of government were distributed, some by nomination of subject matter and others as residues. Therefore analogies drawn from situations in the United States of America and from judicial conclusions and observations upon the Constitution of that country must, in my opinion, be used, if at all, only with a clear realization of the basic distinction between the constitutional position of the two countries. Thus, though by their union in one Commonwealth, the colonists became Australians, the territorial boundaries of the former colonies were retained for purposes of the distribution of governmental power and function. The constitutional arrangements of the colonies were retained by, and subject to, the Constitution as the constitutional arrangements for the government of those portions of the Commonwealth to be known as States. These, though coterminous in geographical area with the former colonies derived their existences as States from the Constitution itself: and being parts of the Commonwealth became constituent States.

The chief justice referred back to this passage in the *Concrete Pipes Case*[6]. Windeyer J trenchantly expressed similar views in both cases. I was one of the junior counsel for the Commonwealth in both those cases. I recall vividly the reception the court gave to a reference by a state attorney-general to 'the sovereign State of Victoria'. Before 1901 there was no State of Victoria. There was a colony of Victoria, which was manifestly not sovereign. (Unlike its American counterparts it had not fought and won a War of Independence). It became a state, upon federation, by virtue of the Commonwealth Constitution and its powers are defined by, and subject to the Constitution. No-one reading the Constitution could think those powers were sovereign. It is easy for commentators, and even some lawyers, to fall into the error warned against in the passage just quoted. It is especially easy if the language of constitutional discourse in the United States is applied uncritically to Australia. Like some other politico-legal topics, federalism has developed its own rhetoric. Some of that rhetoric is based upon an historical confusion.

A quite different area of constitutional law in which Chief Justice Barwick warned against misunderstandings based upon lack of familiarity with history concerns the matter of human rights. When Americans talk, as characters in popular entertainment often do, of their 'constitutional rights', they are almost always referring to a series of Amendments to the United States Constitution made over a lengthy period after its adoption. These amendments covered various kinds of civil rights. In the latter part of the twentieth century, other Western nations also promulgated formal instruments declaring various human rights. The United Kingdom became party to a European instrument of that kind. That represented a major departure from the British legal tradition that applied when the Australian Constitution was framed in Australia and enacted in the United Kingdom. Now, early in the twenty-first century, many people assume that any Constitution worthy of the name must contain a comprehensive statement of human rights. They are dismayed to find how few of those there are in the Australian Constitution of 1901.

In *Attorney-General (Cth); Ex rel McKinlay*[7] Barwick CJ said:

> 37. [T]he Australian Constitution was developed not in antagonism to British methods of government but in co-operation with and, to a great extent, with the encouragement of the British government. The Constitution itself is an Act of the Imperial Parliament which, except for a significant modification of the terms of s 74, is in the terms proposed by the Australian colonists and accepted by the British Government. Because that Constitution was federal in nature, there was necessarily a distribution of governmental powers as between the Commonwealth and the constituent States with consequential limitation on the sovereignty of the Parliament and that of the legislatures of the States. All were subject to the Constitution. But otherwise there was no antipathy amongst the colonists to the notion of the sovereignty of Parliament in the scheme of governments.
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> 38. Also it is well known that the Constitution of the United States would not have been accepted except on the footing that it would be amended to include a Bill of Rights. It is very noticeable that no Bill of Rights is attached to the Constitution of Australia and that there are few guarantees. Not only are the powers given to the Parliament plenary but there is a large number of provisions in the Constitution which leave to the Parliament the power of altering the actual constitutional provisions. In other words, unlike the case of the American Constitution, the Australian Constitution is built upon a system of confidence in a system of parliamentary Government with ministerial responsibility.

As he was pointing out, our Constitution was not the result of a war, or a revolution, or a struggle against oppression. It was drafted by people who regarded themselves as British, and admired British institutions and legal culture, which in 1901 included a preference for leaving it to parliament to define and protect human rights.[8]

Title to land

One of Australia's most important, and under-rated, contributions to legal science is the system of Torrens title.

The security, transparency, and marketability of title to land are fundamental to our economy. A free and efficient market, according to the capitalist theory by which we order our economic affairs, ensures that land will be held by those best able to exploit its potential, and that in turn creates wealth. It is typical of poor societies that land is not readily transferable and remains for extended periods in the hands of people who are unable to realise its potential. The marketability of land depends upon transparency and security of title. The Torrens system, which is a legal development we have successfully exported, serves this purpose. One aspect of that system is the indefeasibility of registered title.

Chief Justice Barwick wrote some important judgments on this topic. They display a clear appreciation of the wider economic issues at stake. They also display an easy familiarity with the structure and the intricacies of the Real Property Act, which he gained as a practitioner.

A famous judgment is that in *Breskvar v Wall*[9] where he said:

> The Torrens system of registered title of which the [Real Property] Act is a form is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void.

The confidence with which a purchaser of land may deal with a registered proprietor on the faith of what appears on the register, as the chief justice well understood, depends upon the principle of indefeasibility of registered title. He went on to make an important point of policy:

> 'I have thus referred under the description, the Torrens system, to the various Acts of the States of the Commonwealth which provide for comparable systems of title by registration though these Acts are all not in identical terms and some do contain significant variations. It is I think a matter for regret that complete uniformity of this legislation has not been achieved, particularly as Australians now deal with each other in land transactions from State to State.'

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A recognition that the market for land in Australia is not subdivided by geographical boundaries corresponding with the political boundaries of the various states and Territories does not brand someone as a centralist. It may be that, for markets in some kinds of goods or services, there are compelling reasons why regulation is state-based and potentially variable. Sometimes those reasons are based upon historical consideration, the convenience of working through long-established regulatory structures, and the inconvenience of dismantling those structures. Pragmatism has a legitimate role in policy, as does a proper respect for tradition. However, Australians now expect economic policy to be managed by the central authority, and Sir Garfield Barwick was in tune with that way of thinking.

Interpretation of commercial contracts

Australian appeals to the Privy Council, in which Sir Garfield Barwick made so much of his reputation as an advocate, and which were still an important part of the legal scene when I was at the bar, were abolished gradually and by a rather messy legislative process. The abolition was 'grandfathered', so that cases in the pipeline retained the possibility of such an appeal.

The last appeal that went from the High Court to the Privy Council was in 1980. It was from the decision of the High Court in *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd*[10]. I was counsel for the appellant in the Privy Council. I had not appeared in the case in the High Court, which decided the case by a majority of 4 to 1. The dissenter was Barwick CJ. The Privy Council allowed the appeal and upheld the reasons in his dissenting judgment.[11]

The case concerned the meaning and effect of a clause, sometimes called a Himalaya clause, in a bill of lading which is, of course, an archetypal commercial contract. The bill of lading contained provisions limiting the liability of the carrier for loss of or damage to the goods the subject of the contract of carriage. The Himalaya clause was included for the commercial purpose of extending the benefit of that limitation of liability to servants and agents of the carrier. That in turn affected insurance arrangements. The servants and agents were not parties to the contract of carriage, but the clause provided that the carrier contracted as agent or trustee for their benefit. The

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effectiveness of such a clause had previously been upheld by the Privy Council in a New Zealand appeal, but the majority in the High Court distinguished that decision and adopted a different approach. It may be wondered whether they appreciated that the case, which was in reality a dispute between the insurers of the stevedores who claimed the benefit of the clause and the insurers of the consignee whose goods were stolen from the wharf, had been around for so long that an appeal to the Privy Council was, at least theoretically, available. I say theoretically because the greatest difficulty from my point of view was to persuade the Privy Council to give leave to appeal at a time when appeals from the High Court had long ceased to be available in most cases. Once having granted leave, the Privy Council had no difficulty in allowing the appeal, preferring the reasoning in the High Court dissent.

In that dissent, Barwick CJ stressed the evident commercial purpose of the Himalaya clause, and said a court should strive to give effect to that purpose rather than frustrate it. He said[12]:

> Their Lordships' decision in [the New Zealand case] was of great moment in the commercial world and, if I may say so, an outstanding example of the ability of the law to render effective the practical expectations of those engaged in the transportation of goods. It is not a decision of its nature to be narrowly or pedantically confined.

He also said:[13]

> It is apparent . . . that, in order to facilitate the practical course of cargo handling some arrangement for the removal of the goods from the place on the wharf where they rest after release from the ship's tackles must be made before the ship's arrival. Therefore the carrier . . .engages a stevedore to remove, sort and stack the cargo when it is free of the slings. . . . The commercial expectation is that . . . provision to cover carrier and stevedore is effected by or through the bill of lading.

The judgment is an excellent example of an approach to the interpretation of a commercial contract informed by a close understanding of the practical and commercial context. Of course, containerisation has now overtaken some of the factual background, but, in a situation where the argument is ultimately about who is to bear the cost of insuring the goods at a certain stage after transportation but before delivery, it is the understanding and expectation of the parties as to how the goods will be handled and moved that throws light on the purpose of their contacts. The judgment is a fine working example of purposive construction of a commercial document, and the importance of both text and context. I may now be one of the few people who have read it, and I was paid to do so, but if I were a teacher of contractual interpretation I would make it compulsory reading. It is the easiest judgment I ever had to support in a court of final appeal.

Criminal intention

Another example, in a quite different field, of the breadth of Sir Garfield Barwick's experience and knowledge, and of his sure grasp of legal principle, relates to the mental element in crime, and the requirement for criminal culpability that the act of the accused be voluntary.

The law is a normative science, which, in the field of criminal justice, imposes standards of behavior and provides sanctions for breaches of those standards. It proceeds upon an assumption that accords with, and as a matter of history is based upon, the theoretical underpinnings of our moral code. Criminal justice is not completely coextensive with morality, either in the subjects it addresses or the standards it applies, but there is a large overlap. If our criminal laws did not reasonably reflect our moral precepts they would not be acceptable to the public. Although there are philosophers and psychiatrists who would challenge this assumption, many of the basic moral precepts by which we live assume free will. That is the foundation of personal responsibility. As a practical matter, it is not easy to see how it would be possible for the law to create and apply general standards of behavior, enforced by criminal standards, without starting from the assumption that, in general, people are individually responsible for their actions because their actions are the result of personal choices. There is, however, a difference between saying an act is willed, and therefore exposes a person to criminal liability, and saying the person wanted to do the act, or desired the result it produced.

Judges who have to explain the law to juries are often confronted with situations that involve nuances as to voluntariness. In *Ryan v The Queen*[14], a man accused of murder had participated in an armed hold-up at a service station. In a confrontation with the attendant his weapon discharged and killed the attendant. The man was charged with murder. Manslaughter was the possible alternative verdict. It was not the defence case that there should be a verdict of not guilty. In a statement to the police the accused said the gun went off 'accidentally'. Chief Justice Barwick said that in the circumstances that could have meant a number of different things. It might have meant simply that he intended to shoot at, but not to kill, the attendant. That would not have helped the accused (because of the concept of 'felony murder') or it might have meant that he pressed the trigger because of a reflex or convulsive movement. It could have had other shades of meaning. Describing an event as an accident often requires further explanation. The expression 'accident', the chief justice said, was 'most ambiguous'.

The importance of the judgment of Barwick CJ is in his careful examination of the various shades of meaning of the idea of a willed act in its application to a relatively common, and apparently uncomplicated, human situation, and what would now be described as the way he 'unpacked' an assertion that the death of the victim was accidental.

Conclusion

As an advocate, Sir Garfield Barwick was a towering figure, nationally and internationally. In his 17 years as chief justice of Australia he brought the full force of his knowledge, experience and personality to his work. As the presiding judge in appeals to the High Court he was a formidable presence, often intervening in and directing the course of argument. Even in cases where he dissented, no advocate could afford to take him lightly. The other members of the court were all people with their own opinions, and they never deferred to his views, but at the same time they were well aware of his unequalled experience and his intellectual capacity. He tended to be dismissive of arguments with which he disagreed, and there was very few, on the Bench or at the bar, who would care to engage him in a confrontation. His judgments, on a great variety of topics, are regularly cited in argument in the High Court. They appeal to practitioners more, I think, than to law teachers, partly because his eminence was squarely based on practical achievement and experience. His style is more that of an advocate than of a scholar. But it is not only a question of style. His whole approach to the solving of legal problems reflected his professional background. There is a continuity about his long career in the law which is essential to an understanding of his life's work.

Endnotes

* The Hon Murray Gleeson AC, chief justice of New South Wales 1988–1998, chief justice of Australia 1998–2008

1. The Rt Hon Sir Garfield Barwick AK, GCMG, attorney-general of Australia 1958 –1964, chief justice of Australia 1964 –1981
2. *Bank of New South Wales v Commonwealth* [1948] HCA 7; (1948) 76 CLR 1
3. *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129
4. (1981) 148 CLR v
5. *Victoria v Commonwealth* [1971] HCA 16; 122 CLR 353 at [21]
6. *Strickland v Rock Concrete Pipes Pty Ltd* [1971] HCA 40; 124 CLR 468
7. [1975] NCA 53; (1975) 135 CLR at [37] to [40]
8. See *Mulholland v Australian Electoral Commission* [2004] HCA 41; 220 CLR 181; *Roach v Electoral Commissioner* [2007] HCA 43
9. (1971) 126 CLR 376 at 385
10. [1978] HCA 8; (1977) 139 CLR 231
11. (1980) 144 CLR 300
12. At [45]
13. At [51] and [52]
14. [1967] HCA 2; (1967 121 CLR 205.