A secret interview with Sir Garfield Barwick

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1 Introduction

More than 2 decades after his death, Sir Garfield Barwick remains a figure of fascination in the legal profession. Only recently, Sir Anthony Mason delivered an address entitled 'The Art of Advocacy: Sir Garfield Barwick, the Radical Advocate'.[1] Yet, there is an important document providing much insight into Barwick, which has not been fully explored in the literature on the man.

In early 1981, Barwick was a few weeks from retirement as Chief Justice of Australia. All of his reserved judgments were complete.[2] Barwick embarked on one final task. He participated in the National Library's Oral History Project, which he had helped initiate.[3] Barwick's interviewer for the Project was his former parliamentary colleague and political opponent, the Hon Clyde Cameron. The interview was conducted over 1 year. The audio is more than 70 hours long. The transcript is over 1,600 pages long. Both have become available online at the National Library's website.[4]

Apart from its scale, there is something else noteworthy about the interview. At Barwick's insistence, it was to be a secret. In other words, the interview was conducted on the basis that it would remain embargoed for a lengthy period.[5] At the end of the interview, Barwick expressed the hope that 'somebody someday gets some good out of [it]'.[6] In particular, he said that, because of the interview, 'when they come to really write history, they'll have something to go on, not simply some journalist's idea'.[7] This surely refers to Mr David Marr, whose

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[1] Anthony Mason, 'The Art of Advocacy: Sir Garfield Barwick, the Radical Advocate' [2017] (Spring) *Bar News* 54. See also, eg, Oliver Jones, '*Public Prosecutor v Oie Hee Koi* (1968): Not So Humbly Advising? Sir Garfield Barwick and the Introduction of Dissenting Reasons to the Judicial Committee of the Privy Council' in Andrew Lynch (ed), *Great Australian Dissents* (Cambridge University Press, 2016) 116; Justice Andrew Greenwood, 'Barwick, Bankruptcy and the Human Dimension' (2017) 17(1) *Queensland University of Technology Law Review* 1; John Dowsett, 'Barwick: His Place in the Legal Pantheon' [2018] *Queensland Judicial Scholarship* 27; and RV Gyles, 'Barwick Today' (2019) 47(2) *Australian Bar Review* 99.

[2] 'Sir Garfield Barwick and the Hon Clyde R Cameron Reminisce', Conversation with Sir Garfield Barwick (Clyde R Cameron, Oral History Division, National Library of Australia, 30 January – 1 December 1981) 14 <https://nla.gov.au/nla.obj-215221051/listen> ('TS').

[3] Ibid 182.

[4] Ibid.

[5] Ibid.

[6] Ibid 1669.

[7] Ibid.

gripping biography of Barwick was first published in 1980.[8] In his memoir, *A Radical Tory*, Barwick criticised Marr's accuracy and motives.[9] He was also scathing of Marr's work in the interview.[10]

This article takes the first step in digesting the interview to ensure its place alongside other accounts. With so much material in the interview, this article places more emphasis on Barwick's career in the courts than in the Federal Parliament. The man is trenchant about his philosophy as a barrister. He is candid about his colleagues at the Bar. He is critical of Dr Herbert Evatt KC and Sir Owen Dixon. He speaks freely of his colleagues on the High Court, including their involvement in the dismissal of the Whitlam government.

The interview also reveals Barwick's personality. As Cameron suggested, there was far more to the man than 'a cold, calculating, humourless law machine, with quite an extraordinary brain, but no heart'.[11] Barwick could be humane but prejudiced. He was a broad internationalist yet also an Anglophile. Barwick was well read and had an incisive outlook on many subjects. Still, he insisted his judgments were not political and he disliked academic lawyers. In short, Barwick was complex and according to Cameron contradictory, which the interview helps reveal.[12]

2 Barwick at the Bar

2.1 Philosophy as a barrister

Barwick talks at length in the interview about his time at the NSW Bar. He was proud of the fact that 'I did keep myself available to everybody'.[13] Barwick had one rule by which he 'abided … all of my practising days', which was to make himself available to the sole practitioner. He did so even after big firms became his 'bread and butter' as he did not wish a client to think 'a big firm can get Barwick to do it' but the 'little man' could not.[14] There were only two reasons Barwick would refuse a brief: (a) he was unavailable because he had committed himself for the relevant period; and (b) he had some personal disqualification.[15] He

[8] David Marr, *Barwick* (Allen & Unwin, 1980). The author has used the page numbers from the 2005 edition of the book, also published by Allen & Unwin, which he does not understand to be materially different from the 1980 edition.
[9] Garfield Barwick, *A Radical Tory: Reflections and Recollections* (Federation Press, 1996) viii–ix.
[10] See, eg, TS (n 4) 120, 135, 253–4, 262–3, 286, 304, 341, 383–4, 418, 655, 1020–1, 1390, 1393, 1397, 1399, 1409, 1419, 1424, 1434–7, 1439, 1451, 1496, 1524, 1540–1, 1554, 1557, 1561, 1633, 1641, 1643.
[11] Ibid 47.
[12] Ibid 11.
[13] Ibid 5. See also 99. Barwick was 'never enamoured of the retainer system', although he had 'bank retainers for long years': at 7–8. See also, in relation to a retainer from Shell: at 1525. Compare Marr (n 10) 76.
[14] TS (n 4) 256.
[15] See, eg, Barwick's repeated refusal of a lucrative brief to appear before or advise upon the Royal Commission on Liquor Laws (NSW) ('Liquor Royal Commission') for the breweries due to his brother Douglas being in the liquor trade: ibid 1523–4. See also 1271.

did not turn down a brief according to whether it was easy or difficult. He did not consider such choices open to him.[16]

Barwick also felt that no client 'couldn't come to me because I was identified with some interest that he didn't care for'.[17] In particular, despite rumour to the contrary, Barwick had never been a Freemason.[18] Such non-alignment 'ought to be a real philosophy of the barrister'.[19] For this reason, Barwick devised the motto of the NSW Bar, 'the servants of all but the servant of none'.[20] Barwick favoured the barrister's wig and suggested that it was derived from a 'common wig' worn by those who were not declaring their religious or political inclination.[21] Barwick's notion of a barrister not being aligned extended to the advice given by the barrister to a client. A barrister tending to give an opinion tailored to the known requests of a client was a 'damned fool' and 'recreant to his office'.[22]

2.2 Earnings

Despite a philosophy of openness to all, Barwick became an expensive counsel, which Cameron suggests must have restricted his availability.[23] In reply, Barwick revealed how he set his fees:

> the Bar should never have a fee above what a client could really afford, so that by the amount of the fee they were denying him service. And if I thought that a person was unable to pay, I was quite willing, provided other things were right, to work, and I have worked, for what you might call diminished fees … a barrister is a leveller, because when he's got a big corporation that can afford, well he makes them pay. And that gives him the substance to be able to do it more cheaply for others.[24]

On the other hand, Barwick recalls occasions where he insisted on lowering fees offered by a wealthy client because the offer was too high and he felt excessive fees were damaging to the Bar.[25] Barwick proudly considered litigation conducted by a divided profession to be more affordable than it would be within a fused profession.[26] Barwick suggests he was never 'very interested in making a lot of money'.[27] Still, when he left the Bar for Parliament, Barwick

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[16] Ibid 256. See also 99.
[17] Ibid 5.
[18] Ibid 6–7.
[19] Ibid 5.
[20] Ibid 809–10.
[21] Ibid 5, 186. Barwick also favoured robes, and robes of senior counsel made of princetta. He felt that courtroom attire, particularly the wig, helped keep order, including the sole occasion he felt violent in court and nearly punched Clive Evatt QC: ibid 999, 1015.
[22] Ibid 267.
[23] Ibid 5.
[24] Ibid 5–6. For an incident where Barwick insisted on an unmarked brief and refused a marked brief because the solicitor was habitually mean with fees, see 1525–6. Compare Marr (n 10) 76.
[25] TS (n 4) 35–6, 319. Barwick also followed during the War the practice of, when the solicitor added the name of a barrister absent on service on the back of the brief, allowing half the brief fee to be paid to that barrister: at 1439.
[26] Ibid 269–70. See also 1527.
[27] Ibid 36.

broadly estimates he was earning 30,000 pounds a year,[28] which he emphasises 'only a very few' barristers achieved.[29]

2.3 Favourite case at the Bar

Barwick appeared without fee before the Judicial Committee of the Privy Council in *Leeder v Ellis* ('*Leeder v Ellis*').[30] The case, he said, 'gave me more pleasure than anything in my professional life'.[31] It was an estates dispute and, in particular, a family provision claim. There were two parties — an executrix, who inherited the whole of the estate, and the widow of the deceased. It was widely assumed, but never squarely raised in the case, that the executrix had been in a sexual relationship with the deceased.

The principal asset in the estate was a house, which was heavily mortgaged. The executrix had lent the deceased a significant amount of money to meet the mortgage repayments during his long illness. The widow's challenge to the will failed at first instance. The trial judge accepted that she would have been entitled to a family provision order. However, taking into account the debt of the estate to the executrix, and the evidence of the value of the property, the estate was insolvent. The order would be futile.[32]

The trial judge's decision led to three appeals. The house had been subject to a sales control under legislation enacted in 1948. The sales control had ceased to apply to the house following the death of the deceased. There was detailed evidence, which was not before the trial judge, that its value had risen significantly by the time of the trial. The first appeal, by the widow to the Full Court of the NSW Supreme Court, was to have the fresh evidence admitted. The appeal was unsuccessful.[33]

There was a different result in the second appeal, by the widow to the High Court. The Court unanimously allowed the appeal on the evidence before the trial judge, with the majority (Dixon, Williams and Kitto JJ) also favouring the fresh evidence. The widow gained a family provision order and the executrix had to pay the costs of both appeals.[34] The majority remarked that '[n]o tenderness need be shown to a creditor whose debt grew out of a liaison' with 'a married man'.[35] Their Honours found that the debt of the executrix was 'bound up with the

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[28] Ibid 36, 318–19. Barwick considered that, had he been practising at the Inner Bar in 1981 when the interview was made, he would have been earning at least $500,000: at 36.
[29] Ibid 319.
[30] [1953] AC 52 ('*Leeder v Ellis*').
[31] TS (n 4) 26.
[32] *Re Ellis* (Supreme Court of New South Wales, Sugerman J, 4 August 1950). The reasons for judgment are available as part of the Record of Proceedings of *Leeder v Ellis* (Privy Council, Appeal No 11 of 1952, 21 July 1953) 30–3 <www.bailii.org/uk/cases/UKPC/1952/1952_32(image3).pdf> ('Record').
[33] *Re Ellis* (Supreme Court of New South Wales, Street CJ, Maxwell J and Roper CJ in Eq, 1 November 1950). Again, the reasons for judgment are at the Record (n 34) 38–41.
[34] *Ellis v Leeder* (1951) 82 CLR 645.
[35] Ibid 652.

illicit cohabitation' was 'not one the existence and validity of which had been admitted nor had it been proved in a court of law'. The debt 'could not, therefore, be assumed'.[36]

These remarks became prominent on the third appeal, by the executrix to the Privy Council. Barwick became involved at this point and 'never got a cent for it'.[37] Two appearances were required. Barwick sought special leave to appeal to the Privy Council. This was granted after an oral hearing, without a contradictor, before Lords Normand, Oaksey and Radcliffe.[38] The appeal was later heard before Lords Porter, Oaksey, Tucker, Asquith and Cohen.[39]

2.4 Advocacy not skulduggery

Marr describes Barwick's advocacy at the hearing of the appeal as follows:

> Barwick knew that one of the law lords had recently married his mistress, so instead of beginning the argument by reading the High Court judgement in the usual way, Barwick surveyed the principles, making occasional tantalising allusions to the facts. Towards the end of the day, when the Board's curiosity was raised to a pitch, he dramatically produced the judgment at the passage reading 'No tenderness need be shown …'. The recently married Law Lord leant forward and exclaimed, 'What?'. Barwick had them.[40]

Barwick is critical of Marr's account. To Barwick's knowledge, none of the Law Lords hearing the application for special leave or the appeal itself had recently married, let alone to a mistress.[41] It was 'very rough' on the Law Lords that Marr 'should say so'.[42] However, Marr's account is otherwise accurate. Barwick recalls:

> Now the effect of [reading the passage], I must say, was electric. It was Lord Asquith who reacted first, and he asked me immediately, 'Tell me, is this woman accused of being this man's paramour?'. And I said, 'She was not'. He said, `Was it an issue in the case?'. 'Yes,' I said, 'there was evidence that she went to his house every weekend for years'. 'Well,' said Asquith, 'in my book it is just to charge as well as prove a fact like that'. And then he said, 'By the way, is the law that if I lend my mistress a hundred pounds I can never recover it?'. I said, 'I hadn't thought that was the law, my Lord, until I read this judgment'.
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> Thereupon immediately, Lord Oaksey said to me, 'Tell me, what was the issue before the primary judge?'. I said, 'Whether there was any money owing to this executrix'. 'Yes' he said. 'I thought so'. And he said, 'Didn't the primary judge believe her?'. I said, 'He did, and whilst he didn't quantify the debt, he said there was a considerable debt due to her. He had no need to fix the amount because in any case the estate was insolvent'. 'Yes,' said Oaksey, 'that's what I thought. How can it be said that her debt hadn't been proved in a court of law?'. I said, 'In truth, my Lord, it can't be said, but has been said unfortunately'.

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[36] Ibid.
[37] TS (n 4) 28.
[38] Ibid 272. See also Order in Council granting special leave to appeal to His Majesty in Council, 14 November 1951: Record (n 34) 56.
[39] *Leeder v Ellis* (n 32).
[40] Marr (n 10) 126.
[41] TS (n 4) 272. See also 273.
[42] Ibid 273.

2.5 Style before Law Lords

It is possible to detect in Barwick's account his frank, almost informal, dialogue with the Law Lords. This forms part of what Mason describes as Barwick's exceptionally close relationship with the English legal establishment, including the members of the Privy Council.[43] There is also much pluck in Barwick's description of the decision of the High Court. He once apologised to Lord Monckton for his directness as an advocate, only to be told 'we like it' and that the English had 'lost the art of doing it'.[44]

In this respect, Marr describes Barwick as 'one of the great brawlers of Phillip Street' and 'on balance a better plaintiff's than defendant's counsel'.[45] Barwick says he was 'never a brawler' and 'did most of my work for defendants'. However, according to Barwick, Marr is right 'to this extent':

> I never tolerated any unfair treatment of me or my client by a judge. I mean I'd step up if I thought he was unfair or unjust in anything that he said or did, I didn't allow it to go by default.[46]

The presence of questions by their Lordships and immediate answers by Barwick is also significant. Barwick suggested he contributed to making this practice the norm in the Privy Council:

> See, in my court craft I always encouraged a judge to speak to me, and if he wanted, to interrupt me, or put his point of view. I always liked that. And that profited me very much when I began to work with the Privy Council, because the first time one of their Lordships asked me a question he very apologetically said he'd like to ask me something, and I said yes. And when I went to answer him, he said, 'Oh no, don't answer me now.' He said, 'Take your time.' 'No, no,' I said, 'I'd like to answer it.' And he had the attitude well, you're very foolish, because the English counsel would go away and think about it and answer the next day. Well, they found out that I could answer questions, and they liked it and I liked it and it profited me no end.[47]

Barwick as an advocate was well-suited to dialogue with the Bench. He says he had no capacity to memorise a speech, although he had seen English counsel do so. However, he was able to formulate the scheme of a speech in his mind and then 'speak it naturally, thinking it out again' as if he were 'doing it for the first time on my feet'.[48] Barwick took care to ensure that such dialogue did not leave his case unclear or disparate. Before the Privy Council, he would 'argue in the broad' and end by saying:

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[43] Mason (n 1) 56.
[44] TS (n 4) 788.
[45] Marr (n 10) 30.
[46] TS (n 4) 1421. See also 127, 1002. Barwick also denies Marr's claim (ibid 35) that for a long time the big firms did not brief him: ibid; TS (n 4) 1435.
[47] TS (n 4) 378–9. See also 788. Barwick notes that Canadian advocates tended to stick to a script making them less responsive to questions from the Board: at 1106–7.
[48] Ibid 1538.

> 'Well now, my Lords, I'll put that in formal shape'. And they would say to me 'Well just at dictation speed' and then they would write down my propositions as I'd formulate them. It was very powerful.[49]

Due to this technique, Lord Roskill, and doubtless others, referred to Barwick as 'the man from whom the Privy Council takes dictation'.[50]

Leeder v Ellis has been described by Mason as an example of Barwick's capacity as an advocate 'to identify a chink in the judgment under challenge and to exploit it to the full'.[51] Cameron suggests that Barwick's success lay in his 'capacity to simplify quite profound problems'.[52] Barwick's agreement is qualified. It was not a matter of simplifying but rather 'to get rid of complexity and expose the fundamentals'.[53] This cast of mind sometimes led Barwick to radical submissions, such as his ultimately successful argument that, despite long practice to the contrary in the Magistrates Court, there was not per se an offence of being the manager of unlicensed premises.[54]

2.6 Clinical advocate

In *Leeder v Ellis*, Barwick felt that the majority in the High Court had been 'very, very wrong'[55] and that it was a 'singularly wicked thing that was done by the court'[56] through 'absolutely dreadful words'.[57] Barwick said he was never more proud to be 'putting something right'.[58] However, it should not be inferred that Barwick was an emotional advocate. He emphasises that the 'barrister is completely divorced personally'. He 'puts the point that the client needs to have put to get success' and 'doesn't make that part and parcel of his own philosophy at all'.[59]

Barwick says sometimes he 'had formed the view that the point which' he was 'putting was in fact right'. However, on other occasions, he had to put a point he 'wasn't prepared to think was right but it was a point of view that suited the circumstances of the client and he was entitled to [the] best endeavour in putting the point, short of misleading a court'.[60] This is the 'great point of an advocate', namely that he has to 'appear for the worthy and the unworthy'.[61]

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[49] Ibid 1105.
[50] Ibid.
[51] Mason (n 1) 57.
[52] TS (n 4) 1374.
[53] Ibid.
[54] Ibid 169. The case is *Ex parte Thompson; Re Ryan* (1940) 41 SR (NSW) 10.
[55] TS (n 4) 5.
[56] Ibid 273.
[57] Ibid 1250.
[58] Ibid 273.
[59] Ibid 1415.
[60] Ibid 1415–16.
[61] Ibid 572.

2.7 Astonishing defeat

Barwick provides another example of when he was sure he was right. *R v Dalgety and Co Ltd* ('*Dalgety*')[62] is a fascinating case about the extent to which the Crown in right of Western Australia was liable for actions in private law. The common law had long permitted those actions, particularly in contract, where the plaintiff received a petition of right from the Crown. Western Australia enacted legislation enabling actions in private law against the Crown in contract without the petition procedure and for certain classes of torts. The party represented by Barwick had obtained a petition of right from Buckingham Palace, rather than the Governor of Western Australia. He relied upon it to bring an action against Western Australia for money had and received.

The principal question which arose was whether the legislation operated as a code. Did it permit an action against the Crown in contract or tort and thereby abolish an action against the Crown for money had and received, traditionally brought under a petition of right? The High Court held, by a majority comprising Latham CJ, Rich, McTiernan and Williams JJ, that it did. There was a forceful dissent by Starke J. Barwick said he 'always was astonished that I lost that case'.[63] Unlike *Leeder v Ellis*, there was not to be any appeal to the Privy Council.

Dalgety is an insight into Barwick because it is so different from *Leeder v Ellis*. Barwick's concern in *Leeder v Ellis* was that the High Court had been judgemental and unjust. *Dalgety* is a far more technical case. For some, even in the 1940s, there may have been little apparent justice in the suggestion that Buckingham Palace should play a part in litigation against Western Australia. However, *Dalgety* demonstrates Barwick's range as a lawyer. His passion was not restricted to factual injustice but extended to erudite cases without such appeal. It is unsurprising, therefore, that Barwick also delighted in exploiting obscure procedure and interrogating expert evidence on subjects outside of the law.[64]

2.8 Nationalisation of the banks

One might be forgiven for thinking *Commonwealth v Bank of New South* ('*Bank Nationalisation Case*')[65] belongs in the same company as *Leeder v Ellis* and *Dalgety*. Barwick states that he believed in free enterprise and thought nationalisation 'bad for everybody'.[66] Marr suggests that the *Bank Nationalisation Case* was, therefore, ideal for Barwick. He 'fought best when he believed in what he was fighting for' as it 'gave his attack extra cunning and

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[62] (1944) 69 CLR 18 ('*Dalgety*').
[63] TS (n 4) 1413. Barwick thought little of his opponent, Dunphy, then Solicitor-General of Western Australia and later a judge of the Supreme Court of the Australian Capital Territory: at 861–2.
[64] Ibid 988–90.
[65] [1950] AC 235 ('*Bank Nationalisation Case*').
[66] TS (n 4) 1467.

stamina'.[67] Barwick dismisses this as 'simply journalese'.[68] The brief was 'frightfully difficult'[69] and, as it happens, Barwick denies Marr's claim that he received a 'ransom fit for the daughter of a King'.[70]

What Barwick enjoyed most about the litigation was that, when it reached the Privy Council, it became his first opportunity to go abroad.[71] Less enjoyable was Barwick's opponent: the Hon HV Evatt KC, the Member for Barton and Attorney-General and Minister for External Affairs for Australia. They had some history. Barwick had once been led by Evatt at the Bar. The two counsel had a public disagreement when Evatt accused Barwick in open court of failing to find pertinent authorities. Barwick claimed he had previously drawn the authorities to Evatt's attention and Evatt had not been interested. Barwick was so furious he swore at Evatt and left court.[72]

Barwick thought Evatt a poor advocate.[73] He was upset when, at the hearing in the Privy Council of the *Bank Nationalisation Case*, Evatt embarrassed another of his junior counsel. This was the 'distinguished' and 'gentle' Sir Kenneth Bailey, appearing as Solicitor-General led by Evatt.[74] Evatt interrupted Bailey's address and roughly made him sit down so that Evatt could answer a question put to Bailey by the Law Lords.[75] This may have prompted Lord Radcliffe to describe Evatt to Barwick as a 'real oaf of a man'. In reply, Barwick emphasised Evatt's capacity for charm, which Radcliffe later recognised.[76] Even so, Barwick thought Evatt wanted to 'destroy' the applicable jurisprudence of Sir Owen Dixon before the Law Lords. Evatt did so by reading one Dixon judgment after another. It was, Barwick felt, one of the 'cleverest' and 'most dreadful' things Evatt ever did. It forced Barwick to rewrite his opening argument so as to obscure his reliance on Dixon.[77]

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[67] Marr (n 10) 58.
[68] TS (n 4) 1467.
[69] Ibid 626. Barwick spoke for 9 days before the Privy Council and did not have any other counsel speak on s 92: at 848.
[70] Marr (n 10) 75. Barwick claims he made that remark about the Liquor Royal Commission, a brief he never accepted: TS (n 4) 1523–4.
[71] TS (n 4) 626. Barwick also disputes Marr's suggestion that there was an adjournment of the *Bank Nationalisation Case* (n 67) because their Lordships were 'tired': Marr (n 10) 71. It was the regular Easter break, during which two Law Lords, Du Parcq and Uthwatt, passed away: TS (n 4) 1479–80. As to their voting intentions in the case, see 239.
[72] TS (n 4) 242, 1403. Compare which suggests Barwick swore at Evatt outside court. See also Marr (n 10) 19. The case is *Nicholson v Southern Star Fire Insurance Co Ltd* (1927) 28 SR (NSW) 124.
[73] TS (n 4) 238, 639. See also 361.
[74] Barwick greatly respected Bailey and made him the first Commonwealth Queen's Counsel ('QC') to assist his status as High Commissioner for Australia in Ottawa, Canada. Barwick was bold enough to revive a dormant prerogative power for this purpose. The only precedent of which he was aware had arisen when (Sir) Hayden Starke had unsuccessfully asked Billy Hughes to make him a Commonwealth KC. This was because Starke refused to seek silk from Chief Justice Irvine of Victoria, with whom he had fallen out: ibid 1282–3.
[75] Ibid 786.
[76] Ibid 787.
[77] Ibid.

2.9 Consistent loser

Cameron suggests in the interview to Barwick that he obviously liked to win in court. Barwick does not disagree but says the desire to win was no 'overbearing facet of my existence'.[78] *Dalgety* soon 'passed out of mind'.[79] Perhaps understandably, Barwick is less forthcoming about cases where he did not believe he was right. However, when it comes to his famous defeat in *Australian Communist Party v Commonwealth*,[80] Barwick 'always questioned whether we could possibly get by'.[81]

In fact, Barwick became accustomed to losing at the Bar. He got to know the category of case where 'the only thing you can do with a client is to give him a respectable funeral, he's got no hope from the start, you know you can't win'.[82]. In 1 year where he was in court almost every day, Barwick won a case on the first day of term and did not win another until late August.[83] This pattern, perhaps to the surprise of observers of the legal profession, underscored Barwick's standing as a barrister.

Demonstrating the point, the Hon EG Whitlam QC, as the Member for Werriwa replying to Barwick's maiden speech as the Member for Parramatta, said to the House:

> Honourable Members have listened to the maiden speech of the greatest lawyer to enter this Chamber since the Leader of the Opposition (Dr Evatt) and the greatest advocate to enter it since the Prime Minister (Mr Menzies). … every member who serves in this place has gained satisfaction and status from the fact that a practising lawyer who has probably no equal in this country and no superior in the English speaking world has … come to serve with us here. … there is great truth in the axiom, which has been followed ever since the war by all the principal commercial interests in this country, that if you had a good case at law it did not very much matter whom you briefed to appear for you, but if you had an unmeritorious, an unsympathetic and an unlikely case, your only hope was to brief Barwick.[84]

2.10 Vicissitudes of life at the Bar

It is noteworthy that, despite his success, Barwick describes his life at the Bar in terms many barristers would understand. He knew what it was to be short of money as a barrister, including because of fees unpaid. He had to learn how to manage uneven cash flow and the tendency not to conserve income.[85] Barwick took silk against the advice of contemporaries that he would starve.[86] He gained broad experience, including a lot early on in criminal law, which would later benefit him as a judge.[87] Even after Barwick gained seniority, he insisted for the

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[78] Ibid 1413.
[79] Ibid.
[80] (1951) 83 CLR 1.
[81] TS (n 4) 267.
[82] Ibid 1412.
[83] Ibid 1413.
[84] Commonwealth, *Parliamentary Debates*, House of Representatives, No 33 of 1958, 14 August 1958, 441. Barwick doubted Whitlam's sincerity: ibid 820.
[85] TS (n 4) 1429, 1553.
[86] Ibid 1435.
[87] Ibid 167, 1636.

remainder of his practising days upon doing at least one criminal case a year. At the Bar, 'criminal work kept a man near the earth'.[88]

Barwick felt that a barrister 'spends eight, ten, fifteen years climbing up, he has a few years when he's at his top and then he declines'.[89] Barwick was beginning to perceive his own potential decline shortly before he entered politics. He reached a point at the Bar where 'there wasn't much more I could do going upwards'. Yet 'it was very hard to walk on the level' and he would 'very soon be walking downhill' if he stayed at the Bar.[90] Barwick had this realisation after he impulsively scolded in open court an equity judge who had once been his junior, much to the judge's embarrassment.[91]

The stress of the Bar was considerable and Barwick's diabetes had to be carefully managed.[92] Barwick did his own work, 'never relied on a junior' and laboured long hours.[93] He carried this practice over to when he became Attorney-General. Barwick recalls a confrontation with Bailey which is faintly amusing to the modern reader. As Attorney, Barwick received requests for advice. In accordance with his disciplined life at the Bar, he wrote his own opinions and sent them off. Bailey was compelled to remind Barwick that he had a Department and it was customary for it to see the opinions of the Attorney before they were released. Barwick acquiesced to this practice but continued to write his own opinions.[94]

On one occasion, Barwick was even more self-reliant as Attorney-General, just as if he were still at the Bar. In 1959, there was pending before the High Court a criminal appeal from the Northern Territory concerning the *Fugitive Offenders Act 1881* (Imp) 44 & 45 Vict, c 69 ('*1881 Act*'). The case arose out of a warrant issued by a magistrate in London purportedly under the *1881 Act*. The subject of the warrant was resisting the application of the *1881 Act* on the ground that the offence set out in the warrant was not punishable by 'hard labour'.

The case had significant implications for the operation of the legislation throughout the Commonwealth of Nations. The British Government was anxious that the High Court reach a result favourable to the warrant. It proposed sending English counsel to intervene in the case on their behalf. Barwick takes up the story:

> And I took exception to that, I said I didn't see why they should be putting their frames in. And they … said it was terribly important.
>
> 'Well,' I said, 'if you think it's that important, I'll go down and do it myself, but there'll be no English counsel'.

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[88] Ibid 220, 621.
[89] Ibid 193. See also 1636.
[90] Ibid 1560.
[91] Ibid 1559–60.
[92] Ibid 1559.
[93] Ibid 168, 1416. As to the limited circumstances in which Barwick, once a silk, would argue part only of a case, see TS 1537. Barwick likewise did not rely on his associates while Chief Justice: ibid 1260.
[94] Ibid 386–7.

> And so I went down and did it myself and we succeeded in upholding the Act.

The case was *Bailey v Kelsey*,[95] which records Barwick as Attorney-General appearing for the respondent and the court delivering a single set of reasons for judgment.[96] It was one of several appearances by Barwick, while Attorney-General, as counsel in the interests of the Commonwealth.[97]

3 Barwick's appointment to the High Court

3.1 A discreet understanding with Menzies

It is no secret that Barwick's entry into federal politics was procured by Menzies.[98] However, Barwick reveals in the interview previously unconfirmed details of their discussions. Menzies called at Barwick's Chambers in Sydney. Barwick recalls:

> [Menzies] explained to me that there was a future for me if I wanted to come into politics, and he would like me to come into politics. And I was hesitant and said that I wasn't sure of that by any means, and we talked the prospects over.[99]

One reason for Barwick's hesitation was that he did not want a political career to preclude his appointment to the Bench. He recalls the following exchange with Menzies:

> I said to him I wanted it quite understood that he wouldn't deny me an appointment which he otherwise would have given me, because I'd been in politics. And he agreed with me. … But that's the only sort of tacit understanding I had. It wasn't the promise of an appointment, but was that he wouldn't deny me an appointment that he otherwise would have given me, had I not been in politics.[100]

3.2 Judgeships eschewed by Barwick

Barwick recounts that, only a few years hence, there was an attempt to nominate him as Chief Justice of New South Wales, in order to prevent Evatt assuming the position. Barwick flatly refused.[101] Menzies also offered to appoint Barwick, then still a backbencher, a puisne Justice of the High Court. Barwick refused and argued successfully for Menzies to appoint Sir Victor

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[95] (1959) 100 CLR 352.
[96] Ibid 354.
[97] See also Barwick's appearance before the Privy Council for the Commonwealth intervening in *Dennis Hotels Pty Ltd v Victoria* [1962] AC 25, 36 and before the High Court for the defendants in *Fishwick v Cleland* (1960) 106 CLR 186, 190.
[98] Marr (n 10) 132–4.
[99] TS (n 4) 1212.
[100] Ibid 1212–13. Menzies may have been sympathetic because, as he later said to Barwick, he would have loved to have been Chief Justice of Victoria: at 450.
[101] Ibid 450, 1529. Barwick says he had been 'offered every vacancy in New South Wales for many years': ibid 450. See also the talk that he would be appointed from the Bar to replace Chief Justice Sir John Latham (at 79) and Chifley's threat to Evatt to send for Barwick in preference to Evatt's proposed appointments to the Court (at 1006).

Windeyer rather than Sir William Owen.[102] These appointments are described in more detail below.

3.3 The Chief Justiceship was not being 'kicked upstairs'

It was much later that the question of Barwick's appointment as Chief Justice of the High Court arose. Marr has suggested that Barwick was forced by Menzies to take the position following discord over the *Australia, New Zealand and United States Security Treaty* ('*ANZUS*') alliance and the involvement of Australia in the Malayan emergency. 'The old man kicked me out', Marr reports Barwick as saying.[103]

Barwick emphatically denies saying this or being sidelined by Menzies. It is 'absolutely apocryphal' and even 'wild imaginings'.[104] The suggested discord over *ANZUS* and Malaya was an 'absolute furphy'.[105] However, Marr does not appear to be alone, with Barwick recalling press comment that he was, by Menzies, 'kicked upstairs to push me out of the road'.[106] There were also questions from the Opposition in Parliament referring to *ANZUS* and Malaya.[107]

3.4 Sir Owen Dixon retires suddenly

The reality, according to Barwick, was that Menzies said to him one day that 'Dixie', as some Victorians called the Chief Justice, wished to retire. Barwick was incredulous, as he had thought Dixon, while in decline for some years, would wish to die in office.[108] Barwick recalls saying to Menzies:

> 'Oh,' I said, 'that puts us in a great difficulty.' I said, 'There's no candidate, there's nobody that is in practice.' I said, 'There are two of us who could fill this post, you and myself, and you couldn't and I don't particularly want to.[109]

This reflects Barwick's thinking that appointees to the Chief Justice should not come from within the court or the lower judiciary and should, where possible, have political experience.[110]

Barwick suggested to Menzies that Dixon be persuaded to take a year's leave, as had Chief Justice Sir John Latham, so Menzies could locate a successor other than himself or Barwick.[111]

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[102] TS (n 4) 816, 890.
[103] Marr (n 10) 209.
[104] TS (n 4) 1638.
[105] Ibid 823.
[106] Ibid 448.
[107] Ibid 820–4. Cameron shares the concern: at 825–6. See also 873–4.
[108] Ibid 311. See also 812, 849.
[109] Ibid 311. See also 812.
[110] Ibid 787–9, 319–20. Barwick felt the same way about puisne Justices and would favour a High Court where 'at least half' had political experience: at 814–15. See also 1635.
[111] Ibid 311, 449–50, 812–22.

Menzies 'liked the idea'.[112] However, Dixon insisted on retiring immediately. Barwick then asked Menzies to invite Dixon to delay the ceremonial sitting for his retirement so that Barwick, who was going to the Philippines on official business, could attend.[113] Barwick said to Menzies 'I practised before this man for so many years, all my practising days really'.[114] Yet Dixon insisted on the sitting taking place immediately. Barwick felt Dixon did so in the knowledge that Barwick could not be present.[115]

3.5 Barwick's attitude to Dixon

Barwick was ambivalent about Dixon. He recognised that he was a 'very great lawyer'.[116] Barwick felt Dixon had been wrongly denied the position of Chief Justice at an earlier stage on partisan grounds.[117] Barwick also felt that, contrary to speculation at the time, Dixon rather than Barwick should have succeeded Latham as Chief Justice.[118] However, he was not fond of the man.[119] Barwick found Dixon a 'most intensely conservative man' and there was 'more chance of finding a political bias … in something he writes than any of us'.[120] He considered *R v Kirby; Ex parte Boilermakers' Society of Australia*[121] a 'terrible decision' and a 'tragedy',[122] being both 'needless and mischievous'.[123] He disliked Dixon's blatant invitations in previous proceedings for counsel to take the point.[124]

Also, Dixon 'for all the appearance of humility was an extremely vain man who liked flattery'.[125] Barwick never wished to accord Dixon the adulation he received from Victorians.[126] Indeed, Barwick felt Dixon capable of getting his judgments wrong and found it satisfying to have them reversed by the Privy Council. The most heartfelt example for Barwick was *Leeder v Ellis*. Another example in Barwick's mind was *National Bank of Australasia Ltd v Scottish Union and National Insurance Co*,[127] a rather dry case concerning whether a scheme of arrangement, dating back to the bank crash of the 1890s, had intended English or Australian currency. The Board accepted Barwick's submission, reversing a

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[112] Ibid 311.
[113] Ibid.
[114] Ibid.
[115] Ibid 311–12, 448, 812.
[116] Ibid 998.
[117] Ibid 79.
[118] Ibid.
[119] Ibid 1234.
[120] Ibid 638. See also 1225.
[121] (1956) 94 CLR 254, aff'd: *A-G (Cth) v The Queen* [1957] AC 288.
[122] TS (n 4) 499.
[123] Ibid 860.
[124] Ibid 8–9, 371, 499–500. Barwick notes that, by and large, Dixon did not adopt such tactics: at 1437.
[125] Ibid 853, 1250–1.
[126] Ibid 850, 853, 1213, 1234. As to Barwick's view of the Victorian Bar generally, see 1003.
[127] (1951) 84 CLR 177.

majority of the High Court and upholding a dissent from Latham CJ.[128] Barwick felt Dixon had been 'just wrong again'.[129]

3.6 Dixon tries to block Barwick

If Barwick could be described as ambivalent about Dixon, it seems Dixon was hostile toward Barwick. He did not like it when Barwick was critical of his decisions, which Barwick had been heard to describe in terms such as 'yards of judgment' without 'any completely outright statement'[130] and as having 'the word "perhaps" dotted on every page'.[131] Dixon was resentful that Barwick had him reversed by the Privy Council, particularly without a fee in *Leeder v Ellis*.[132]

Once Barwick became aware that Dixon insisted on retiring immediately, he said to Menzies that, while he was not asking for the job, he would become Chief Justice if Menzies so wished.[133] According to Barwick, Menzies was 'very upset' to be losing Barwick from the Ministry and would have 'liked to have avoided it'.[134] Barwick suspected this was because Menzies wanted him to oppose Holt in a leadership struggle when the time came for Menzies to go.[135]

However, Dixon had 'forced [the] hand' of Menzies.[136] Barwick and Cameron wondered whether references by Dixon at his retirement sitting to past speed in the appointment of a new Chief Justice were calculated to undermine his appointment.[137] Barwick was not surprised at rumours Dixon lobbied for Sir Keith Aickin to be made Chief Justice, but doubted that Menzies would have given Dixon an undertaking to do so. Barwick also thought it plausible to hear that the Deputy Prime Minister, the Hon John McEwen, lobbied for him with Menzies, having become aware through Menzies of the understanding between the two men regarding judicial office before Barwick entered Parliament.[138]

3.7 Menzies moves quickly

After Dixon's retirement sitting, Barwick returned from the Philippines to Canberra. He reminded Menzies that he was set to depart for a 3-week trip to Europe. However, Menzies refused to leave the Chief Justiceship vacant for that period. The Cabinet agreed to Barwick's

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[128] *National Bank of Australasia Ltd v Scottish Union and National Insurance Co Ltd* [1952] AC 493, 508, 511 (Lord Cohen for the Board).
[129] TS (n 4) 1234. See also 1232–3, which includes an account of Barwick socialising with Viscount Simon, who was presiding over the appeal.
[130] Ibid 853.
[131] Ibid 1252.
[132] Ibid 1213, 1234, 1250.
[133] Ibid 448.
[134] Ibid 449.
[135] Ibid 814, 940.
[136] Ibid 449.
[137] Ibid 811–12. See 'Retirement of the Chief Justice' (1964) 110 CLR v, xii.
[138] TS (n 4) 1210–11, 1251–3.

appointment while he was flying from Canberra to Sydney, where he was to depart the next day for Moscow. At such short notice, the visit was cancelled, much to the irritation of Barwick's 'girlfriend'.[139] Cameron later perceived Menzies to have regretted rushing Barwick's appointment.[140]

4 Barwick and his early colleagues on the High Court

One of the most interesting aspects of the interview is Barwick's description of his fellow Justices of the High Court and his relations with them. At the time he was made Chief Justice in 1964, the puisne Justices were as follows: Sir Edward McTiernan, Sir Frank Kitto, Sir Alan Taylor, the by now Sir Douglas Menzies, Windeyer and Owen.[141] All were of a similar age to Barwick and many were his good friends.

4.1 Appointments of Windeyer and Owen

As indicated, Barwick thought highly of Windeyer and as a backbencher advised Menzies to appoint Windeyer to the High Court ahead of Owen. Barwick was mindful that Windeyer 'had not had a great deal of experience' but thought he would 'make up very well'. Further, while Owen had great experience as a barrister and judge, he had done less constitutional work than Windeyer.[142] Barwick also felt appointees to the High Court should be made directly from the Bar, particularly because it would prevent the possibility of promotion from influencing judges in lower courts or those judges being selected according to inclinations evident in their past work.[143]

However, Barwick as Attorney later effected Owen's appointment to the High Court. He had been a good judge of the NSW Supreme Court (and in Barwick's view better than Owen's father who had held the same office). Menzies supported Owen, which influenced Barwick. As well, even though it might be regarded as 'not proper', Barwick wished to relieve Owen from the 'terrible time' he had as senior puisne judge under NSW Chief Justice Evatt.[144]

Barwick says little in the interview about Windeyer and Owen as colleagues on the High Court. Barwick suggests Windeyer was not overtly political.[145] He rose to the occasion of being a Justice of the High Court as Barwick had anticipated.[146] Barwick had long been friendly with

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[139] Ibid 449, 811–12. Barwick's use of the word 'girlfriend' appears to be an affectionate reference to his wife, Norma: at 312–13.
[140] Ibid 823–4.
[141] Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 3rd ed, 2002) 551.
[142] TS (n 4) 816. See also 890.
[143] Ibid 79, 967, 1379.
[144] Ibid 891–2, 1545.
[145] Ibid 1646.
[146] Ibid 890.

Owen and found him a 'mild man' not prone to 'savage action'. He was 'always all wool and a yard wide', meaning a man of quality and sincerity.[147]

4.2 Barwick and Kitto clash following death of Taylor

Barwick and Kitto were old friends and Kitto had been Barwick's junior in the *Bank Nationalisation Case*.[148] Barwick indicated that Kitto influenced his reasons for judgment and he would 'always respect' what Kitto had to say. Barwick considered him 'quite a good lawyer, though a very narrow one'.[149] However, Barwick and Kitto were at loggerheads following the death in office of Taylor in 1969. Taylor and Barwick had been close friends.[150] He had significant influence over Barwick's reasons for judgment.[151] He was a 'jocular fellow'.[152]

Barwick and Taylor had drafted joint reasons for judgment in *Western Australia v Hamersley Iron Pty Ltd [No 1]* ('*Hamersley Iron*').[153] The draft was, according to Barwick, virtually complete with the only question which remained being whether to include a reference to a particular authority.[154] Owen and Windeyer had drafted separate reasons to the same effect. McTiernan, Kitto and Menzies had drafted separate reasons to the opposite effect. Barwick proceeded to list the matter for delivery of judgment.

At a conference of Barwick and the remaining five Justices, Kitto challenged Barwick's power to list the matter for judgment and insisted that Barwick list the matter for re-argument. Barwick describes what followed:

> I said, 'Well, I don't see that the parties should be put to the expense of that when we've got here a clear majority'. He said, 'We're evenly divided'. 'Well,' I said, 'formally that's true. But you know as well as I know that Alan Taylor joined with me in the judgment and he made up a majority of four to three'. … Kitto then said 'Well, you've no authority'. 'Well,' I said, 'look, I don't pretend to have any authority. We're all here, let's ask the question, do we deliver judgement?'. And I went round the room, taking each fellow's view, and there was a clear majority. So then I delivered the judgment and it's in the books.[155]

Barwick's reasons for judgment indicated they had been produced jointly with Taylor but noted that, following Taylor's death, the decision was formally reached by his casting vote as Chief Justice under s 23 of the *Judiciary Act 1903* (Cth).[156] Barwick felt that the disagreement at conference prompted Kitto to indicate in a related judgment that, due to the casting vote, the

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[147] Ibid 718, 891, 1545.
[148] Ibid 127. See, in relation to the *Bank Nationalisation Case* (n 67), ibid 848, 1471–2.
[149] TS (n 4) 1370.
[150] Ibid 238. See also 1554.
[151] Ibid 1370.
[152] Ibid 1646. See also 238.
[153] (1969) 120 CLR 42 ('*Hamersley Iron*').
[154] TS (n 4) 1639.
[155] Ibid.
[156] *Hamersley Iron* (n 155) 50.

reasons of the statutory majority did not give rise to binding precedent.[157] Kitto was 'inviting another case'.[158] When it came, Barwick effectively increased his majority.[159]

The death of Taylor led shortly to the appointment of Sir Cyril Walsh.[160] Barwick respected Walsh 'enormously'. He had a 'very good' or 'first class' mind. Walsh was a 'great friend' of Barwick's, nurtured by their time on the same floor as barristers.[161] He died at a relatively young age in 1973 and Barwick considered him a great loss to the court.[162]

4.3 Douglas Menzies has Barwick provoke Parliament

Douglas Menzies was probably Barwick's dearest friend.[163] However, Barwick felt Douglas Menzies had somewhat less influence than others over his reasons for judgment.[164] Douglas Menzies was a great gossip and had an impish sense of humour.[165] He spurred Barwick into a provocative, though historically well-founded, gesture in Parliament. Barwick was to be present in the Senate as Chief Justice in Windsor dress, where he was to swear in Sir Paul Hasluck as Governor-General. Part of the Windsor dress was a tricorn hat, which Dixon had always carried under his arm.

Barwick did not own such a hat so asked to borrow one from Douglas Menzies. Douglas Menzies reminded Barwick that it was traditional for the representative of the judiciary to indicate its independence from the other arms of government by placing his hat on the table of the House. He made the loan of his tricorn hat conditional upon Barwick doing so. Barwick complied, gently placing his hat on the table as the mark of independence. It was a controversial move, objected to in Parliamentary debate as defying the Parliament or committing a misdemeanour. However, Barwick felt history and principle were on his side.[166] The President of the Senate agreed, noting that the tradition probably went back as far as the reign of Charles I.[167]

4.4 McTiernan's retirement

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[157] TS (n 4) 1640; *Western Australia v Hamersley Iron Pty Ltd [No 2]* (1969) 120 CLR 74, 83.
[158] TS (n 4) 1640.
[159] Ibid; *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1.
[160] Blackshield and Williams (n 143).
[161] TS (n 4) 1067, 1640.
[162] Ibid 1640.
[163] Ibid 9, 371, 500.
[164] Ibid 1370.
[165] Ibid 1645–6.
[166] Ibid 1382–5. Commonwealth, *Parliamentary Debates*, House of Representatives, 30 April 1969, 1483; Commonwealth, *Parliamentary Debates*, Senate, 30 April 1969, 1079. A video of the incident, clearly showing the hat on the table of Parliament, is available at British Movietone, 'Swearing in of Sir Paul Halsuck: No Sound' (Youtube, 21 July 2015) <www.youtube.com/watch?v=G7kBG2dj6Qo>, with the hat shown in Barwick's possession to the viewer's right of his chair from 2:38 and to the viewer's right of the table from 2:51. Curiously, the moment when Barwick must have placed the hat on the table has been omitted.
[167] Commonwealth, *Parliamentary Debates*, Senate, 30 April 1969, 1079.

Barwick and McTiernan were on close terms.[168] Barwick thought McTiernan had insufficient experience at the time of his appointment in 1930.[169] However, he considered McTiernan a good lawyer.[170] He was also 'completely honest according to his lights', by which Barwick meant he brought integrity to his decision-making.[171] Cameron understood that Whitlam had been negotiating with McTiernan for his retirement but McTiernan delayed matters by insisting on a car and driver for life, which was not resolved prior to the dismissal.[172]

Barwick understood that McTiernan did not wish to retire. McTiernan fell and broke his hip in 1976.[173] Even so, McTiernan wanted to sit. Barwick opposed this:

> Edward didn't particularly want to leave, you know. Even after he had his injury he wanted me to let him come on to the Bench early in the morning, when no one was there, and sit by himself until it was time to assemble the Court, and then to sit there by himself at the end of the day. People would get him off, because he couldn't walk upstairs without assistance, I said it wasn't on, it wasn't on. But he was very anxious not to go.[174]

McTiernan retired that year.[175]

5 Barwick and the younger generation on the High Court

In the 1970s, there were many appointments to the Court in quick succession. In 1970, Kitto retired and was replaced by Sir Harry Gibbs. In 1972, there were two appointments. Windeyer retired and was succeeded by Stephen. The death of Owen led to the elevation of Mason. As indicated, Walsh died in 1973, with the resulting appointment of Sir Kenneth Jacobs. In late 1974, Douglas Menzies died and the vacancy on the Court fell to Lionel Murphy.[176]

McTiernan's retirement saw the arrival at last of Aickin, although Dixon had not lived to see it. The resignation of Jacobs in 1979 caused the appointment of Sir Ronald Wilson.[177] In short, from 1976, there was no puisne Justice who had been present when Barwick joined the court. Moreover, each puisne Justice was significantly younger than Barwick. The court was no longer composed of Barwick's contemporaries and friends.[178] There would be more opposition to the authority of Barwick from the younger men appointed to the court.[179]

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[168] TS (n 4) 1401–2.
[169] Ibid 639.
[170] Ibid 1401.
[171] Ibid 243. See also 1646.
[172] Ibid 522.
[173] Justice Michael Kirby, 'Sir Edward McTiernan: A Centenary Reflection' (1991) 20(2) *Federal Law Review* 165, 180.
[174] TS (n 4) 522.
[175] Blackshield and Williams (n 143).
[176] Ibid.
[177] Ibid.
[178] TS (n 4) 1098.
[179] Ibid 1101.

5.1 Dim view of Gibbs

Barwick refers to several matters of judicial structure or administration on which he disagreed with Gibbs. When Gibbs was sworn in as Barwick's successor in preference to Robert Ellicott QC,[180] his speech lamented the lack of integration of federal and state judicial systems.[181] Barwick would later convey his solution to Gibbs: rely on the autochthonous expedient as much as possible. The Family Court and the Federal Court were a mistake. His own suggestion of a federal superior court had been too wide. Its principal merit should have been as a transient court for all of the territories to overcome the problem of long-term resident judges going 'to seed'. Most other significant federal trial work should have been left to State Supreme Courts.[182]

Soon after Gibbs succeeded Barwick, there were indications that he would be styled Chief Justice of the High Court rather than Chief Justice of Australia.[183] Barwick thought this 'very foolish'.[184] The title Chief Justice of Australia was statutory and had been used in relation to Sir Samuel Griffith.[185] Griffith's successor, Sir Adrian Knox, had been described as such in correspondence and so used the title.

Sir Owen Dixon had Chief Justice of Australia on his door. Barwick initially doubted whether this was correct. However, upon researching the matter and discovering the past practice, particularly the statutory description of Griffith, Barwick had such a sign put on his door. Whitlam accommodated the practice by having altered the Letters Patent from the Governor-General to Barwick to open Parliament so that they referred to the Chief Justice of Australia.[186]

Barwick feared for the capacity of Gibbs to administer the court as Chief Justice. Gibbs had been part of a number of the Justices, including Mason and possibly Murphy, who had resisted a proposal that Barwick be given a statutory function of administering the court. They wished matters of administration to be decided by the Justices collectively.

Barwick considered Gibbs a 'vacillating man' and 'not a man of decision at all'. He said that, of a morning, Gibbs would come to have a 'registrar, a clerk and a librarian' in his Chambers 'wanting things decided'. However, he would be unable to make 'snap decisions about administration'. He would instead refer things a meeting of the Justices and it would be

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[180] Ibid 51.
[181] (1981) 148 CLR xii.
[182] TS (n 4) 398–9. See also 1237; and Sir Garfield Barwick, 'The Australian Judicial System: The Proposed New Federal Superior Court' (1964) 1(1) *Federal Law Review* 1.
[183] TS (n 4) 184. As to Barwick's view of Ellicott as a superior candidate for the chief justiceship, see 51.
[184] Ibid 184.
[185] *Chief Justice's Pension Act 1918* (Cth) s 2(1). But see *Judicary Act 1940* (Cth) s 3(1).
[186] TS (n 4) 184–5. The initiative to change the letters patent apparently came from Whitlam rather than Barwick: at 1600.

'hopeless'.[187] Barwick also thought Gibbs was wrong to favour time limits on oral argument in the High Court and to prefer written submissions. The Chief Justice should be the person presiding over hearings so as to minimise delay without the strictness of a time limit.[188]

Barwick resented Gibbs's support for the court sitting across Australia and his resistance to Justices living in Canberra. Barwick thought that, in Canberra, the Justices would learn to work together, leading to fewer and shorter judgments and their faster delivery.[189] Barwick refused to sign a proposed itinerary for court sittings outside of Canberra, but it was issued nonetheless.[190] Barwick thought that Gibbs had lobbied the Attorney-General, Mr Peter Durack QC, to head off such a requirement of residency, which was well advanced under Barwick.[191] Barwick felt Gibbs saw himself more as a Queenslander than as an Australian.[192]

5.2 Affection for Stephen

Of the younger generation of Justices, Barwick refers to Stephen in the warmest terms. Barwick was 'very fond' of Stephen and they were 'very close friends'.[193] He found Stephen 'quite a good lawyer' but 'philosophical' and 'idealistic'. Stephen was earnest and 'in some ways inexperienced in the ways of the world'.[194] Stephen's reasons for judgment did not very much influence Barwick.[195] Stephen strongly opposed Barwick's suggestion of more colourful robes for the Justices which would move away from 'drab black'.[196]

Barwick suspected that Stephen was motivated to accept his appointment as Governor-General because he was 'a little bored with the work of the Court' and possibly 'a little tired of what he would see of Murphy's manoeuvring'.[197] Barwick had been sounded out as a possible Governor-General when Lord Casey was about to retire. Barwick stoutly refused.[198] He was puzzled that Stephen, as a relatively young man, had taken the office and predicted that there would be no further office for Stephen at the end of his tenure.[199]

An intriguing question is the extent to which Barwick discussed with Stephen his letter of advice to the Governor-General, Sir John Kerr, as to withdrawing Whitlam's commission as Prime Minister on 11 November 1975. It has long been suggested by Whitlam that Barwick,

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[187] Ibid 535. See also 1103.
[188] Ibid 1105–6.
[189] Ibid 1031, 1100.
[190] Ibid 1101–2.
[191] Ibid 650.
[192] Ibid 1033, 1481.
[193] Ibid 1372.
[194] Ibid 1368–9, 1645.
[195] Ibid 1369.
[196] Ibid 1603.
[197] Ibid.
[198] Ibid 1368.
[199] Ibid. Barwick could not have been more wrong: Philip Ayres, *Fortunate Voyager: The Worlds of Ninian Stephen* (Miegunyah Press, 2013) chs 6–11.

at the request of Kerr, secured the approval of other Justices, including Stephen, before the dismissal occurred.[200]

However, in the interview, Barwick states that he showed the advice to Stephen, who said 'it was a very good letter'.[201] It is apparent that Barwick recalls this occurring after the advice was sent, which was on 10 November. However, it is unclear whether it was before the dismissal or afterward, particularly once Barwick had circulated the advice to all of the Justices.[202]

5.3 Falling out with Mason

Barwick was 'friendly' with Mason and welcomed his appointment to the court. When Mason had been in practice, Barwick had 'assisted him in some ways'.[203] Barwick says emphatically he himself would never have lobbied another Justice to his view of a case.[204] Yet Barwick perceived that Mason had pressured McTiernan in the *Western Australia v Commonwealth* ('*First Territory Senators Case*').[205] Doing so would have been fruitful, as the court was otherwise evenly divided and Barwick was opposed to Mason's view.

Barwick was 'quite disgusted' with Mason over the case. A 'coolness' developed between the two men, which Barwick was certain Mason perceived as the latter commented upon it to Lady Barwick.[206] Other disagreements developed. As with Gibbs, Barwick and Mason disagreed over whether the court would sit outside Canberra.[207] Mason 'wanted to live in Sydney'.[208] Barwick also felt Mason was the 'mainspring' of the younger puisne Justices opposed to Barwick having sole responsibility for the administration of the court.[209] Barwick thought Mason closer to Murphy than Stephen ever was.[210]

However, Barwick and Mason retained effective relations at a critical time in constitutional history: the 1975 crisis. Barwick revealed to Cameron for the first time ever in the interview that, at Kerr's request, he had consulted Mason as to the correctness of his letter of advice to Kerr after it was delivered but before the dismissal. Barwick knew Kerr had made the request on the basis that Mason was previously Commonwealth Solicitor-General. Mason had

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[200] See, eg, Gough Whitlam, *Abiding Interests* (University of Queensland Press, 1997) 4.
[201] TS (n 4) 1372.
[202] Marr (n 10) 281–2. Kerr's papers say it was before the dismissal whereas Barwick indicated many years after the interview that it was 'some days later': Paul Kelly and Troy Bramston, *The Dismissal: In the Queen's Name* (Penguin, 2015) 48.
[203] TS (n 4) 1643–4.
[204] Ibid 1643.
[205] (1975) 134 CLR 201.
[206] TS (n 4) 1644.
[207] Ibid 1100.
[208] Ibid 1102.
[209] Ibid 1103.
[210] Ibid 1369.

approved of the advice, saying 'Of course, it's quite right'.[211] Barwick later publicly revealed the interaction with Mason in 1994 in a radio interview.[212]

5.4 Whitlam appointees

Barwick had little time for either Jacobs or Murphy. Whitlam raised with Barwick the possibility of appointing Jacobs. Barwick was opposed.[213] He would have preferred (Sir) Maurice Byers and perceived him to have sympathies attractive to Whitlam.[214] Barwick felt Whitlam appointed Jacobs because they had attended the same school and Whitlam thought Jacobs would go along with his views. So much transpired in the *First Territory Senators Case*, for which Barwick found no legal justification.[215]

Jacobs was a 'bit of bad luck' and even a 'disaster' for the court.[216] While Barwick considered Jacobs a 'nice enough fellow', whom he had known for a long time, the man just 'wasn't up to weights'.[217] None of the work by Jacobs on the court caused Barwick to alter his view.[218] Jacobs 'brought this airy-fairy sort of stuff to the Court and he was party to a couple of very doubtful decisions'.[219] On the other hand, when Jacobs fell ill and was contemplating resignation, Barwick was sympathetic. Barwick tried to persuade Jacobs to take leave and see 'how his medical condition went'. However, one factor was that Jacobs had an English wife and, therefore, was 'very anxious to live in England'.[220]

Barwick had also opposed Murphy's appointment.[221] Barwick felt Murphy was politically biased.[222] He was neither a judge nor a lawyer.[223] Barwick felt that Murphy was always manoeuvring behind the scenes at the court.[224] His judgments were prepared very slowly.[225] The appointment was Barwick's greatest disappointment so far as the court was concerned.[226] However, Barwick claimed not to hold personal animosity toward Whitlam or Murphy.[227]

Barwick largely accepts Marr's account of Barwick contacting the Chairman of the Victorian Bar, Richard McGarvie QC, to dissuade the Victorian Bar from condemning the appointment

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[211] Ibid 1050.
[212] Barwick, *A Radical Tory* (n 11) 298. Mason's broader relations with Kerr throughout the 1975 crisis have been revealed more recently: see, eg, Kelly and Bramston (n 204) ch 4.
[213] TS (n 4) 520, 1007.
[214] Ibid 521, 1230.
[215] Ibid 1007–8, 1231.
[216] Ibid 1231.
[217] Ibid 519.
[218] Ibid 1231.
[219] Ibid 1007.
[220] Ibid.
[221] Ibid 80, 1231. See Whitlam (n 202) 33–4. See further n 275 below.
[222] TS (n 4) 636, 1013.
[223] Ibid 302.
[224] Ibid 1368.
[225] Ibid 1032.
[226] Ibid 519.
[227] Ibid 1643.

of Murphy, after Cameron had confirmed the account with McGarvie.[228] He states his motive was not to help Murphy specifically but because condemnation of appointments could undermine the court.[229]

Barwick rejects academic queries as to whether he and Murphy recused themselves from cases involving legislation from their time as Attorney-General, reflecting a broader contempt for academic lawyers.[230] Barwick thought it was coincidental that he did not sit in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*.[231] He felt the same about Murphy's absence from *Russell v Russell* ('*Russell*').[232] He considered recusal a matter for the individual judge and would never have lobbied Murphy to do so.[233] Cameron enquired of these events with Murphy. Murphy confirmed Barwick's account of *Russell*. He also explained that McTiernan was unwell and was not to sit on *Russell*. Murphy wanted to prevent a court of six Justices, so as to head off the possibility of Barwick having a casting vote.[234]

The constitution of the court in another case led to a quarrel between Barwick and Murphy. *Ansett Transport Industries (Operations) Pty Ltd v Wardley* ('*Wardley*')[235] concerned the right of a woman to serve as an airline pilot. Barwick listed the case for hearing before five Justices, excluding Gibbs and Murphy. Murphy accused Barwick of deliberately excluding him from the case. Barwick lost his temper with Murphy. He said Murphy could sit but must not make such accusations. The hearing went ahead with six Justices, including Murphy.[236]

However, there were times of respect in the relations between the two men. On the last day Barwick sat before his retirement, Murphy wore a full bottom wig in court. He had hitherto refused to wear a wig on the Bench. Barwick understood Murphy to have done so as a tribute to Barwick, as he supported judicial wigs. Barwick was pleased by the gesture.[237]

5.5 Last new brethren

Aickin and Wilson were the last two appointments before Barwick retired. Barwick knew that Dixon had wanted Aickin rather than Barwick to be Chief Justice. Barwick did not think

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[228] Ibid 1010, 1228–9, 1231–2. See Marr (n 10) 246–7.
[229] TS (n 4) 1010.
[230] AR Blackshield, 'Judges and the Court System' in Gareth Evans (ed), *Labor and the Constitution 1972-1975: Essays and Commentaries on the Constitutional Controversies of the Whitlam Years in Australian Government* (Heinemann, 1977)**105,** 119–120; ibid 1015–16, 1170, 1179–80, 1397–8, 1626.
[231] (1970) 123 CLR 361.
[232] (1976) 134 CLR 495 ('*Russell*').
[233] TS (n 4) 1013–14, 1099.
[234] Ibid 1100. Doubtless Barwick would have regarded this as an example of Murphy manoeuvring: see above n 198.
[235] (1980) 142 CLR 237 ('*Wardley*').
[236] TS (n 4) 1100.
[237] Ibid 9, 185.

Aickin would have been suitable for that position. Aickin 'wasn't a very strong personality'.[238] He would not have been able to 'administer the Court' and 'make it gee'.[239]

Barwick perceived no animosity from Aickin over the fact that, against Dixon's wishes, Aickin had not been made Chief Justice. However, Aickin had previously been offered a puisne Justiceship before he accepted appointment in 1976. Barwick felt it plausible that Aickin had refused the first offer of appointment as a 'hangover' from Aickin's 'association with Dixon and Dixon's dislike' of Barwick. In the event, Aickin and Barwick became 'quite friendly'. Aickin was a 'very good lawyer'. He was 'slow but very objective in his views'. He had 'no sort of party political touches'.[240]

Barwick sat only briefly with Wilson, it being less than 2 years from Wilson's appointment in 1979 to Barwick's retirement in 1981. Barwick favoured Wilson's appointment, although he had no role in bringing it about. Barwick felt Wilson would have to spend some time on the Court gaining experience, which Wilson lacked coming from a smaller State.[241] Barwick was disappointed that the Attorney-General promised Wilson he could continue living in Perth, as Barwick wanted all the Justices to live and sit in Canberra.[242]

6 Barwick as an international jurist

It is clear from the interview that Barwick had a keen interest in the wider world. He says, unsurprisingly, that he was fond of England and admired its achievements. He happily confessed to being an Anglophile.[243] However, Barwick's interest was not limited to England. He was well acquainted with many important legal and political figures from Asia.[244] He appears to have known much about, and done significant things in, this part of the world.[245]

However, this article will focus on discussion in the interview of Barwick's work as an international jurist. There are two contexts. First, there is Barwick's membership of the Judicial Committee of the Privy Council. Second, there is Barwick's time as a judge ad hoc of the International Court of Justice.

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[238] Ibid 1380.
[239] Ibid. Barwick gives an example of his own capacity to do in relation to production by other Justices of reasons for judgment in cases where Barwick had sat before his retirement: at 1032.
[240] Ibid 1379–80. See also 637.
[241] Ibid 291.
[242] Ibid 650, 1031, 1101. Barwick understood Wilson's wife wished to keep their adopted son at school in Perth: at 1101.
[243] Ibid 44, 1526. Unlike Menzies, though, Barwick did not see himself as 'British to the bootstraps': at 44.
[244] See, eg, ibid 44–5 (Lee Kuan Yew), 142, 426 (Tunku Abdul Rahman), 255 (referring to a Chief Justice of Burma, probably Myint Thein), 691–2 (President Khan and Chief Justice Kadir of Pakistan).
[245] See, eg, ibid 631–2 (Indochina), 662, 664–5, 824–5, 833, 866, 874–8, 942–3 (Indonesia), 689–91 (India), 691–2 (Pakistan), 879–81 (East Timor and the islands of the Pacific), 1285 (Singapore).

Barwick's contribution to the Judicial Committee, in the form of successfully lobbying to have lifted its prohibition on the publication of dissenting reasons, has been explored elsewhere.[246] It is, therefore, unnecessary to revisit those aspects of the interview here. Barwick found that, apart from the relative absence of ceremony, the Judicial Committee was much like any other court.[247] This could be a strength and a weakness. Barwick recalls:

> Every tribunal that I've known at some stage or other likes a performer in front of them. It's a fact, I've noticed that; I remember watching a chap in the Privy Council one day and he was no better than a performer, he didn't have much … But afterwards one of the members of that body said to me, 'My word, he was very good wasn't he'. It surprised me but it was that he was a performer … For the moment he impressed them, and then they went away and thought about it.[248]

Barwick was far more enthusiastic about the Privy Council than Dixon, who refused to sit as a member of the Judicial Committee.[249] Indeed, Barwick sat on the rare occasions when the Board had two Commonwealth judges in the same case.[250] He felt that it was of great benefit to an individual Justice and the High Court to have such time abroad. He explained:

> the judge doesn't get very much leave, he's got to work constantly, and it was a good thing to have some reason to give him a movement abroad, to meet different people for a short period and give him a breather, And sending him to the Privy Council, letting him sit in a different atmosphere and get different experience was all, to my way of thinking, profitable, both to him and to the country.[251]

Even so, Barwick felt it right that appeals to the Privy Council came to an end.[252] Stephen was the last Justice to be made a Privy Counsellor.[253] Mason, for reasons Barwick does not indicate, was never offered appointment as Privy Counsellor.[254] Nor were subsequent members of the High Court.[255]

Barwick explores with Cameron his time as a judge ad hoc of the International Court of Justice ('ICJ') in the *Nuclear Tests Case (Australia v France) (Judgment)*.[256] There were 14 judges, including Barwick. Barwick was in dissent,[257] as were five other judges.[258] Murphy appeared as counsel for Australia. Barwick attributed his inability to form a majority to an Indian judge, Mr Nagendra Singh, who later became President of the ICJ. Barwick says that Singh 'thought

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[246] See Jones (n 1).
[247] TS (n 4) 10, 333.
[248] Ibid 1475–6.
[249] Ibid 1625.
[250] Ibid 1283–4. The cases were *Public Prosecutor v Oie Hee Koi* [1968] AC 829 ('*Oie*') (with Sir Douglas Menzies) and *Walton v The Queen* [1978] AC 788 (with Sir Richard Wild, Chief Justice of New Zealand).
[251] TS (n 4) 1638.
[252] Ibid 1625.
[253] Ibid. Sir Harry Gibbs, while Chief Justice of Australia, was the last Australian to sit on the Judicial Committee: *Australia and New Zealand Banking Group Ltd v Beneficial Finance Corporation Ltd* [1983] 1 NSWLR 199.
[254] TS (n 4) 1625.
[255] Ibid.
[256] [1974] ICJ Rep 253.
[257] Ibid 391.
[258] Ibid 321, 372.

my side was right [but] voted against us because Pakistan and India were likely to have a [similar] dispute and that was the end of it'.[259]

A complication arose during Barwick's time on the ICJ. Their Excellencies were poised to deliver judgment in the *Nuclear Tests Case*. Whitlam publicly predicted what the result would be, right down to voting patterns. It was assumed at the Hague, perhaps with the encouragement of the French judge André Gros, that Barwick had leaked the outcome to Whitlam. Barwick was 'terribly embarrassed'. Whitlam had been a 'show off'. Barwick endured several unpleasant days at the Hague. He complained to Whitlam, who later apologised to the President of the ICJ.[260]

Cameron took some steps to get to the truth of what occurred. He spoke to Ellicott. Ellicott had been asked by Whitlam what he felt the result would be. Ellicott had made an educated guess, which turned out to be quite accurate. Whitlam, knowing of Ellicott's family links to Barwick, may have assumed that there had been some contact on the subject between Barwick and Ellicott. Whitlam could not resist pre-empting the announcement of the result. Cameron also reveals that Murphy was very upset by what occurred.[261]

7 Barwick as a man

There is frank discussion between Barwick and Cameron about the personality of the subject. As indicated in the introduction, Cameron wished to explore the complexity and contradictions of the man. There are attractive insights in the interview. At least as a Minister, Barwick had the 'common touch'.[262] He seems to have been gregarious, socialising with the Law Lords and wanting barristers in Sydney to socialise more with High Court Justices.[263] Cameron describes him as warm and having a lovely smile, without the coldness or scorn some seemed to apprehend.[264] He was widely read, a keen dancer and a tenacious skier.[265]

However, the interview reveals other things, some of which are unattractive, to say the least. Barwick says he hates homosexuality, albeit with the agreement of Cameron.[266] He is opposed to multiculturalism, notwithstanding a wide circle of friends abroad.[267] Barwick takes a dim view of feminism and perhaps on occasion women in the courts.[268] He did not think he was domineering or intimidating, although others might have seen him that way.[269] Barwick saw himself as self-confident but not egotistical.[270] Above all, Barwick seems convinced of his

[259] TS (n 4) 695.
[260] Ibid 694.
[261] Ibid 695.
[262] Ibid 32, 322.
[263] Ibid 821.
[264] Ibid 47, 1001. As to Barwick's use of his smile as an advocate, see 48.
[265] Ibid 139, 1433, 1464.
[266] Ibid 103.
[267] Ibid 426–7.
[268] Ibid 254–5, 651–2.
[269] Ibid 243–4, 1257, 1407.
[270] Ibid 153.

own correctness and does not yield to detractors. In particular, he is unapologetic about the Dismissal and his role in it.[271]

Even so, Barwick emerges from the interview as incisive. On so many subjects, he had a striking ability to get to the heart of the matter. This capacity extended well beyond questions of law. On the other hand, Barwick did not seem to enjoy intellectualising for its own sake. His deep thought was reserved for when, at a practical level, it was required. The man was not especially philosophical or reflective, which perhaps explains why he considered most law journals 'better left unwritten' and academics 'divorced from life'.[272] It may be unproductive to say more about Barwick's personality as it emerges in the interview. Much will be subjective to the reader. However, it is fair to say that Cameron succeeded in his aim of grounding a richer view of Barwick than other accounts.

8 Conclusion

In 1997, only days before Barwick passed away, Whitlam gave a speech to the Sydney Institute.[273] It concerned the recent publication of his book, *Abiding Interests*.[274] Whitlam criticised oral history generally and the work of Barwick and Cameron in particular. He said:

> I maintain the higher claim of the written word over what is increasingly seen as its substitute, the so-called oral history. The important thing is that one can be checked, challenged, verified or refuted; the other is intended to be swallowed whole by an unsuspecting posterity, when such checks are no longer available.
>
> Historians should be alert to the dangers of attaching undue authenticity to these voices from the grave. In this book, I give a striking example of the pitfalls. It relates to the appointment of Senator Lionel Murphy to the High Court in February 1975. I am able to correct the version contained in the five volumes of transcriptions lodged with the Australian Archives, the progeny of 18 months of oral intimacy between Sir Garfield Barwick and Clyde Cameron in 1981 and 1982.
>
> My point here is that it was possible for me to challenge their secret discussions on Murphy only because Sir Garfield chose to preview them in this book, A Radical Tory. (A very good Sydney Institute kind of term, if I may say so). Otherwise they are embargoed until the year 2006.[275]

Against this, it may be said that, without confidentiality, oral history would lack some of the frankness evident in the interview. It is true that the interview is not as verified, methodical or polished as written history. However, it is a welcome addition to knowledge of the life and career of Barwick. It may not be flawless, but it is a substantial document. It should at least be consulted by any historian writing on events in which Barwick was involved.

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[271] Ibid 309, 1045, 1050, 1262–3.
[272] Ibid 1626–7.
[273] Gough Whitlam, 'Gough's Abiding Interests' (1997) 9(3) *Sydney Papers* 82.
[274] See above n 201.
[275] Whitlam (n 274) 82–3.

The interview is also of use to the legal profession. The fascination of that profession with Barwick persists decades after his death. He remains one of the greatest ever advocates. His discussion of his time at the Bar is revealing and instructive. Also, the dynamics of the High Court tend to intrigue lawyers. This interest is more than mere gossip. For those that appear in the High Court or apply its pronouncements, knowledge of its inner workings adds a layer of understanding. The interview benefits comprehension of the court when Barwick was Chief Justice and perhaps beyond.

It may be inferred that Cameron felt the perception of Barwick would but for the interview have been left incomplete, particularly in the wake of Marr's biography. It is possible the interview will enthrall those interested in what Barwick was like as a man and how he reacted to the views of others, including Marr. It is further possible that, as Cameron may have wished, the interview will endear some to Barwick. Whether or not this occurs, the author hopes this article assists the interview in reaching the wider audience it deserves.