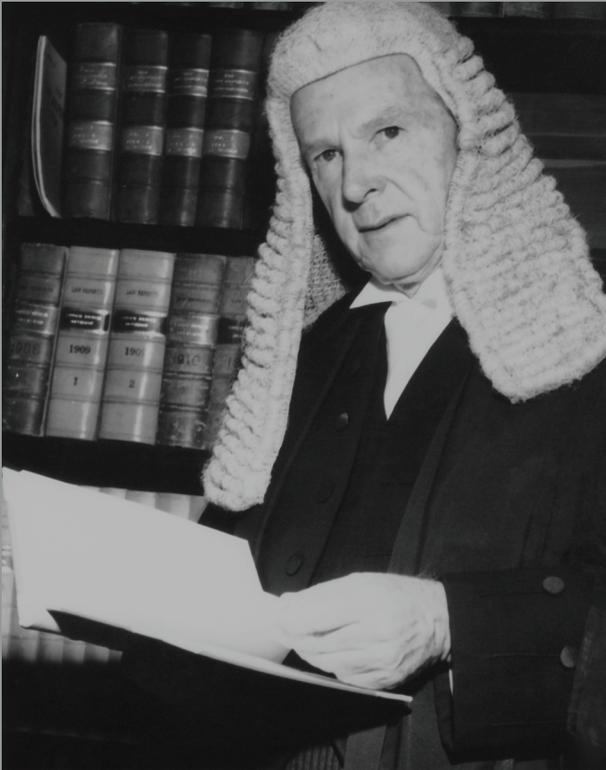


The Right Honourable Sir Garfield Barwick AK, GCMG, QC

(b. 22.6.1903 d. 13.7.1997) (Chief Justice from
1964-1981)



AUSTRALIAN
CONSTITUTION
CENTRE



...liberty is not necessarily served by verbal formulae ... rather, it is an independent judiciary, by developing and applying the principles of the common law with its emphasis on the essential importance of the individual and the citizens' duty to his neighbours, its insistence on the observance of natural justice where the citizen is likely to be affected in person or property and the use of habeas corpus in relation to physical restraint, and requiring the executive and legislative arms under the allotted limits, which will ensure that tyranny does not gain sway

By Sir Garfield Barwick, *A Radical Tory*

Garfield Barwick is the longest serving Chief Justice of the High Court. He was born in Sydney in 1903 and attended school in Darlinghurst and Surry Hills. He went on to study at the University of Sydney and graduated with a BA in 1922 and an LLB in 1925. He was admitted to the Bar 1927.

Barwick first appeared in the High Court in 1929, but it wasn't until 1942 that he became a silk and expanded his practice. He became an expert in

section 92 of the Constitution (interstate trade, commerce and intercourse), then one of the most challenged sections and deals with interstate trade and commerce. He also led legal teams at the Privy Council. And after 1948 he became involved in almost every significant constitutional case in the High Court and Privy Council that originated outside Victoria. He mostly appeared for parties that were challenging the validity of state or Commonwealth legislation. He was well suited to attacking legislation, rather than defending it. One important case in which Barwick did defend legislation was in the Communist Party Case in 1951. This was considered by Chief Justice Latham to be the worst argument he had heard from Barwick and the legislation was ultimately invalidated by the majority of the High Court bench (Latham dissented).

In 1953 Barwick was knighted which was a great honour for a barrister. Only three of the seven High Court Justices had a knighthood at the time. He was elected to the House of Representatives as the Liberal member for Parramatta in 1958 and was appointed as Attorney-General. He held this office until 1963. His most notable achievement was new legislation that allowed divorce on the ground of irretrievable breakdown of marriage. He was also the Minister for External Affairs for a number of years. It is said that as a lawyer used to prosecuting cases he had an adversarial approach to diplomacy. In 1964 he was appointed to the High Court as the Chief Justice. By the time of his appointment, he had appeared in the High Court no less than 173 times. He was the last politician to be appointed Chief Justice. He joined the Court as it began its transition to the apex of the Australian judicial system. Appeals to the Privy Council on federal matters were abolished four years later, along with appeals from the High Court in 1975

To use his words, the High Court was now "the final arbiter" of the Australian common law.

In constitutional matters, Barwick was moderately pro-Commonwealth, but had a very permissive view of section 92 of the Constitution. He was a great believer of free enterprise, which required competition and he favoured small business. He

had a marked tendency to find for the taxpayer, deciding against the Tax Commissioner to a greater degree than almost any other Justice.

Barwick was instrumental in establishing a permanent seat for the High Court with its own building in Canberra, but his plans to cease sitting in the state capitals was overridden by his colleagues. Barwick supported the establishment of the Federal Court to relieve the High Court from trial work.

Barwick is probably remembered most for providing the advice to Governor-General John Kerr that he had the power to dismiss Prime Minister Gough Whitlam in 1975. He defended his decision to provide this advice until the day he died. Barwick retired from the Court at the age of 77 in 1981 and died in 1997 at the age of 94.

Chief Justice Barwick in constitutional decisions that encapsulate the vision of him as Chief Justice

1. *The Chief Justice has from time to time advised the Governor-General on constitutional matters, most controversially in 1975 when Barwick advised John Kerr. Opinion is divided on whether the giving of such advice is appropriate. Sir Anthony Mason Chief Justice 1987 to 95)*. P91 Oxford HCA.

2. *The events of 11 November 1975, when the Governor-General John Kerr brought the Whitlam Government to an end by dismissing Prime Minister Gough Whitlam, left many unresolved questions two of which affected the High Court. Could the High Court have intervened in the events leading up to the dismissal? And should Chief Justice Barwick have intervened by advising the Governor-General that he had the power and duty to act? (Barwick defended his extra-judicial role by insisting there was no way the Court could have become involved judicially). Tony Blackshield. Oxford HCA p.213) See the legendary picture of Whitlam dismissal Sir David Smith, GGs secretary, reading the proclamation dissolving parliament).*

3. Chief Justice Barwick has been described as having "persisted with an extreme rationale of legalism when it was going out of judicial fashion".⁴ For example, in *Attorney-General (Cth); Ex rel Mckinlay v Commonwealth* [1975] HCA 53; 135 CLR 1, Barwick CJ stated (at 17) that:

The only true guide and the only course which can produce stability in constitutional law is to read the language of the Constitution itself,

no doubt generally and not pedantically, but as a whole: and to find its meaning by legal reasoning. I respectfully agree with Sir Owen Dixon's opinion that 'there is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism'".

4. In explaining why Constitutional restrictions on legislative power should not be implied as readily as in the United States, Barwick CJ stated (Mckinlay at 23-4):

[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 of 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 government.

...

[U]nlike the case of the American Constitution, the Australian Constitution is built upon confidence in a system of parliamentary Government with ministerial responsibility. The contrast in constitutional approach is that, in the case of the American Constitution, restriction on legislative power is sought and readily implied whereas, where confidence in the parliament prevails, express words are regarded as necessary to warrant a limitation of otherwise plenary powers.

5. Barwick CJ made observations of a similar nature in *Victoria v Commonwealth* [1971] HCA 16; 122 CLR 353, stating that (at 371):

[T]he Constitution does not represent a treaty or union between sovereign and independent States. It was the result of the will and desire of the people of all the colonies expressed both through their representative institutions and directly through referenda to be united in one Commonwealth with an agreed distribution of governmental power. The whole "agreement" or as it is sometimes called "the compact" of the people of the colonies was to be and was expressed in an Act of the Imperial Parliament not in any sense as a treaty or an agreement of union, or as a confederation of States but as a statutory Constitution under the Crown.

(Principle: nationhood)

4. On the powers of the Commonwealth Parliament, Barwick CJ stated in the same case (at 364) that:

[T]o describe a problem as national, does not attract power. ... However desirable the exercise by the Commonwealth of power in affairs truly national in nature, the federal distribution of power for which the Constitution provides must be maintained.

5. In *Spratt v Hermes* [1965] HCA 66; 114 CLR 226, Barwick CJ similarly stated (at 247) that:

[T]he Constitution brought into existence but one Commonwealth which was, in turn, destined to become the nation. The difference in the quality and extent of the powers given to it introduced no duality in the Commonwealth itself. The undoubted fact that the Commonwealth emerged from a federal compact or that that compact is reflected in the limitations placed upon some of the powers of the Commonwealth or that the new political entity derived from a union of the peoples of the former colonies does not deny the essential unity and singleness of the Commonwealth.

(Principle: the rule of law)

6. On the test for Constitutional validity, Barwick CJ stated in *Strickland v Rocla Concrete Pipes Ltd* [1971] HCA 40; 124 CLR 468, having described the doctrine of "reserved powers" as "exploded" by Engineers, that (at 491):

The Constitution itself provides the criterion of validity: the law must be with respect to a topic of granted power. For my part the formula requires no explanation: in any case, it is the text and no commentary upon it however helpful may displace it. The constitutional formula requires a substantial connexion between the topic and the law. What will suffice in any particular instance to require an affirmative answer to the question whether it is a law with respect to the subject matter necessarily involves a matter of degree co-related to the nature of the power and to the provisions of the Act as they would operate in the area in which it is held they were intended to operate.

7. On the circumstances in which the Court should depart from an earlier interpretation of the Constitution, Barwick CJ stated in *Queensland v Commonwealth* [1977] HCA 60; 139 CLR 585 that (at 592-3):

The Constitution, unless altered in a constitutional manner, was intended to be permanent, just as the union of the people of the colonies "in one indissoluble Federal Commonwealth" upon the terms of the Constitution was intended to be permanent.

...

The area of constitutional law is pre-eminently an area where the paramount consideration is the maintenance of the Constitution itself. Of course, the fact that a particular construction has long been accepted is a potent factor for consideration: but it has not hitherto been accepted as effective to prevent the members of the Court from departing from an earlier interpretation if convinced that it does not truly represent the Constitution. ... The Constitution may be rigid but that does not imply or require rigidity on the part of the Court in adherence to prior decisions. No doubt to depart from them is a grave matter and a heavy responsibility. But convinced of their error, the duty to express what is the proper construction is paramount.

(Principle: what is the Australian Constitution?)

