



Précis Paper

An in-depth discussion about Sir Garfield Barwick

Abstract – The outstanding career of Sir Garfield Barwick is discussed with reference to relevant case law, events in his career, and personality. This is set within the context of Oliver Jones' recent article in the Australian Bar Review, and his chapter in the book *Great Australian Dissents*.

Discussion Includes

- Overarching Statements
- Sir Garfield Barwick as a barrister
- Favourite case at the Bar
- Other noteworthy cases at the Bar
- Sir Garfield Barwick in Parliament
- Appointment to the High Court
- Time on the High Court
- The Privy Council
- Summary

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An in-depth discussion about Sir Garfield Barwick

1. In this edition of BenchTV, Oliver Jones (barrister), and Adrian Barwick (special counsel and accredited specialist), discuss the remarkable career of Sir Garfield Barwick with reference to Oliver Jones' latest article in the Australian Bar Review, "A secret interview with Sir Garfield Barwick",¹ and his chapter in the book *Great Australian Dissents* "Not so humbly advising? Sir Garfield Barwick and the introduction of dissenting reasons to the Judicial Committee of the Privy Council".²

Overarching Statements

2. Adrian Barwick, the grandson of Sir Garfield Barwick, outlines that the topic of discussion is the events and career of Sir Garfield Barwick, relevant case law, and his personality, with reference to the above two pieces of work by Oliver Jones.
3. Oliver Jones then refers to his keen interest in Sir Garfield as a writer and a practitioner. Furthermore, Adrian Barwick's connection with Sir Garfield Barwick provides invaluable insights into his life.

Sir Garfield Barwick as a barrister

4. Sir Garfield Barwick started his career as a barrister relatively young, going to the Bar straight out of law school in his early twenties. He was undoubtedly the advocates' advocate, and he practised when written submissions were not common, yet, there was a heavy emphasis on pleadings. It was a time in which one had to win with the force of their oral arguments.
5. He could distil seemingly complex propositions into plain English. In his analysis of the *Dismissal*,³ he reduces it into three main propositions; first, the Senate has the power to refuse supply; second, without supply, a government cannot govern; and third, the government must be discharged if it cannot get supply. It was in this way that he exposed the fundamentals by removing the complexity.
6. He was also a great jury advocate with firm confidence in the jury system, asserting that they generally get things right. He was quick-witted with incisive intellect, with the perfect amount of innate confidence.

¹ Oliver Jones, 'A secret interview with Sir Garfield Barwick' (2020) 49(3) *Australian Bar Review* 375-402.

² 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: Cambridge University Press, 2016) 116-130.

³ Sir John Kerr, *Matters for Judgment*, (Macmillan Australia, 1978) 342-344.

7. Sir Garfield Barwick was a hard worker, keeping himself available as a sole practitioner, completing pro bono work and criminal cases once a year.
8. Regarding statutory interpretation, he could make a statute look inane or make it look forceful.

Favourite case at the Bar

9. Sir Garfield Barwick's favourite case at the Bar was *Leeder v Ellis*.⁴ The case regarded a family provision claim by the widow of a deceased against an executrix of an estate.⁵ Mr Ellis was an electrical engineer who passed away in 1949. The executrix was on intimate terms with the deceased, yet, this fact was not directly raised during the litigation.
10. The executrix had loaned money to the deceased during his illness so that he could comply with mortgage repayments. In the will, Mr Ellis had left some furniture to his widow, yet, the bulk of his estate was otherwise left to the executrix, which was comprised of a heavily mortgaged house.
11. The trial judge in the Supreme Court of New South Wales refused the family provision order for futility because the estate was insolvent. The widow appealed the decision to the Full Court of the Supreme Court as the property value increased following the decision, but it was unsuccessful.
12. However, on appeal to the High Court, the judges found in favour of the widow. This was on the basis that there 'should not be any tenderness shown' to any creditor whose debts are acquired out of a relationship with a married man.
13. Consequently, the Privy Council granted the executrix special leave to appeal the High Court's decision.⁶ Sir Garfield Barwick appeared pro bono for the appellant, as he was quite passionate about the case. In the final hearing, he did not initially refer to the critical passage. However, to raise the board's curiosity, he inserted a quote that 'no tenderness may be shown' concerning a mistress.
14. The Law Lords could not see on principle how the High Court could deny the debt, and the appeal was allowed. This was another example of how he could reduce the complexity of a case to its essential elements.

Other noteworthy cases at the Bar

15. One of Sir Garfield Barwick's most surprising defeats at the Bar was *Dalgety*,⁷ a highly technical case regarding Crown immunity.

⁴ [1951] HCA 44; (1951) 82 CLR 645

⁵ *Testator's Family Maintenance and Guardianship of Infants Act 1916* (NSW).

⁶ *Leeder v Ellis* [1952] UKPCHCA 2; (1952) 86 CLR 64.

⁷ [1944] HCA 269 CLR 18; (1944) 69 CLR 18.

16. At common law, the Crown could only be sued in contract if it had granted a 'petition of right' enabling the action to proceed. Western Australia enacted legislation abolishing the petition procedure, which permitted actions in contract against the Crown. In this instance, the question was whether, by implication, there could no longer be an action against the Crown under petition procedure for monies already received.
17. Sir Garfield argued that the Western Australian statute did not affect the common law prerogative of the Crown to grant a petition in that particular case.
18. However, he was unsuccessful, as the High Court majority held there was no longer scope for such an action against the Crown for money they had obtained, regardless of the petition procedure.
19. Adrian Barwick lists several other well-known cases in Sir Garfield Barwick's career including, *Breskvar v Wall*,⁸ the *Bank Nationalisations Case*,⁹ the *Communist Party Case*,¹⁰ and the *Dobell Painting Case*.¹¹
20. Furthermore, Ashley Tsacalos, Partner at Clayton Utz, wrote his PhD thesis at the University of Sydney on Sir Garfield Barwick's constitutional law cases.¹²

Sir Garfield Barwick in Parliament

21. Sir Garfield Barwick entered Parliament under the government of Robert Menzies and progressed swiftly to Attorney General and Minister for External Affairs. He was the holder of both portfolios simultaneously, yet, eventually held only the External Affairs portfolio before he was appointed Chief Justice.
22. Adrian Barwick refers to the interesting case *Bailey v Kelsey*,¹³ which concerned the *Fugitive Offenders Act 1881* (Imp). A magistrate in London issued a warrant under the Act, and the subject was resisting the warrant claiming that the offence was not, as required by the Act, 'punishable by hard labour'. This case was before the High Court from the Northern Territory on appeal.
23. The case had broad implications, as the above Act was still applicable in several common law jurisdictions. The British government was eager to uphold the validity of the warrant. The British government proposed flying over an English QC to argue the case. However, Sir Garfield resisted, contending that he would argue the case. Britain agreed.
24. The case's conclusion was a unanimous joint judgement in his favour, demonstrating his standing as a lawyer and his nationalism.

⁸ (1971) 126 CLR 376.

⁹ *Bank of New South Wales v Commonwealth* [1948] HCA 7; (1948) 76 CLR 1.

¹⁰ *Australian Communist Party v The Commonwealth* [1951] HCA 5; (1951) 83 CLR.

¹¹ *Attorney-General v Trustees of National Art Gallery of NSW & Anor* (1945) 62 WN (NSW) 212.

¹² Ashley Tsacalos, 'Effective appellate advocacy: the ideal and the reality: explored through the advocacy of Sir Garfield Barwick in constitutional law cases' (PhD Thesis, The University of Sydney, 2012).

¹³ (1959) 100 CLR 352.

Appointment to the High Court

25. Robert Menzies appointed Sir Garfield Barwick to become Chief Justice, and he went on to become the longest-serving Chief Justice in Australia.
26. He was commonly referred to as 'Chief Justice of Australia', a notion favoured by Dixon CJ and supported by Whitlam as Prime Minister.

Time on the High Court

27. On the High Court, Sir Garfield Barwick had a close relationship with his fellow High Court Judges. His colleagues, when joining the Court, McTiernan, Kitto, Taylor, Menzies, Windeyer, and Owen, were all about the same age, and it can be described as a comparatively harmonious period.
28. In the 1970s, the succession of new younger appointment of judges, Gibbs, Stephen, Mason, Jacobs, Murphy, Aickin, and Wilson, was the highest number of Justices ever appointed in a single decade by the Australian government. This appointment created a complete generational change for Sir Garfield Barwick.
29. A significant litigation case that was before the High Court during this time was *Ansett v Wardley*.¹⁴ Wardley was the first woman to become a pilot for Ansett Australia, a major Australian airline at the time.
30. Wardley had continually applied to become a pilot over many years, yet, numerous male pilots were accepted. She made a sex discrimination claim to the Victorian Equal Opportunity Commission, for which she was awarded damages.
31. The matter progressed up the appeal ladder to the High Court, and in 1980 the High Court dismissed the appeal. When there is an inconsistency between Commonwealth and State laws, under s 109 of the *Australian Constitution*, federal law prevails.
32. The case included controversy over the number of judges listed to sit, with Justices Murphy and Gibbs initially not assigned, but Justice Murphy was added after protesting to Sir Garfield and alleging bias on his part.

The Privy Council

33. Sir Garfield Barwick also sat as a member of the Privy Council. As a barrister, he became very close to the English legal institution, which continued when he was a judge. He would frequently sit as a member of the Privy Council while also Chief Justice.
34. While his cases on the Privy Council were not as momentous, what is far more significant is the institutional reform he brought to the Privy Council.

¹⁴ [1980] HCA 8; (1980) 142 CLR.

35. The Privy Council prohibited judgements with dissenting reasoning. However, it did not prohibit a dissenting vote. Nevertheless, a dissent was not able to explain the reasoning for disagreeing with the majority.
36. Many Australian Judges had pushed for the prohibition to be lifted, and in 1966 he successfully lobbied the Lord Chancellor to do so. Dissenting reasoning was allowed by Lord Gardiner, and Sir Garfield Barwick delivered such reasoning himself in *Public Prosecutor v Oie Hee Koi* [1968] AC 829.

Summary

37. The career of Sir Garfield Barwick was varied and fascinating. His technique as a barrister and his philosophy is still very relevant today. The detailed accounts of his interactions with colleague Justices show just how vital personal dynamics are in understanding the High Court.
38. There is much to be admired about his qualities as he was incredibly incisive, forthright, fearless, and independent. Nevertheless, it is some of these characteristics that drew much criticism. However, he was an extremely remarkable man.

BIOGRAPHY

Oliver Jones

Barrister, Fourth Floor Selborne Chambers, Sydney

Oliver Jones is a specialist in immigration and citizenship litigation. His cases concern skilled migration, refugee law, spousal visas and citizenship matters. Oliver regularly appears for applicants in the Federal Circuit Court and the Federal Court. Where appropriate, Oliver appears in the Administrative Appeals Tribunal. He regularly gives seminars for Legalwise and writes in scholarly journals on international law, statutory interpretation and precedent.

Adrian Barwick

Special Counsel and Accredited Specialist, Williamson Barwick, Sydney

Adrian advises clients engaged in a broad range of private sector industries, from manufacturing and mining, through to professional services, as well as clients employed in the public sector, and not-for-profit organisations. In 2005, Adrian qualified as a Law Society Accredited Specialist in Employment & Industrial Law. He has presented at state and national conferences on a range of topical issues falling within his field of expertise.

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