Edmund Barton: 'The one man for the job'

By Geoffrey Bolton AO
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Sir Edmund Barton's entry in the index to Crisp's *Parliamentary Government of the Commonwealth of Australia*[1] reads '1849-1920; (A, B, D, F, G, H, J, K)'. The letters A-K are used as a shorthand description of the principal offices attained, and mean in this case that Barton was a member of both New South Wales and Commonwealth Parliaments, a New South Wales minister, a Commonwealth cabinet member and prime minister, a justice of the High Court, and a member of the first and second national federal conventions of 1891 and 1897-8.

No other person in that index of distinguished Australians achieved so many offices. Even then, Barton's importance is understated. Barton was no ordinary delegate to the 1891 convention, but a member (with Griffith and Kingston) of the informal but enormously influential working party on the Lucinda in 1891, which first drafted the document which became the Australian Constitution. He played a key role at both conventions in securing the acceptance of the crucial compromise that became s53, qualifying the Senate's power to deal with money bills.[2] Without this, the entire federation movement could easily have foundered through lack of agreement between large and small colonies. As a New South Wales politician, he was the attorney general who introduced legislation for universal male suffrage and single member seats, and the acting premier during the Broken Hill miners strike in 1892 who refused the employers' demands to send in military forces. While the federation movement was becalmed in the mid 1890s, he spent much time cultivating and encouraging what would now be called 'grass-roots' organisations supportive of federation. He was the most popular of all the elected delegates to the second federal convention of 1897-8, and was elected its leader as well as chair of its Constitutional Committee and convener of its Drafting Committee. And his role (in part clandestine) between 1897 and 1900 in obtaining a Constitution which was acceptable, both to the Australian colonies and the Colonial Office, was vital. More than any other single individual, Barton caused the Australian colonies to federate.

Yet it seems that in large measure Barton's considerable intellectual gifts (he was dux of his school and obtained a First in Classics and a special prize from Sydney University) were squandered. He became known as an indolent epicure, a man who preferred to spend long hours in the Athenaeum Club rather than in Parliament or his chambers or with his family. His career at the Bar was not a great success. His nickname 'Tosspot Toby' stuck, and his physique, too, approached that of Sir Toby Belch from an early age.

Barton's story is described sympathetically and enthusiastically by Emeritus Professor Bolton, whose clear prose shows an obvious familiarity with most of the available primary materials, but without the constrictions of complete scholarly apparatus. There are points of interest and insight on most pages.

Strangely, no mention is made of Martha Rutledge's slim monograph on Barton,[3] which discloses the irony that the man who, more than any other, was responsible for the drafting of the Commonwealth Constitution, failed in his application as a young barrister in 1874 to become parliamentary draftsman in New South Wales.[4]

Inevitably, Bolton focuses on the political aspects of his subject's career. A legal biographer might have given more prominence to Barton's experiences with the Privy Council, which culminated, of course, in his successful brokering of the compromise in 1900 with the Colonial Office whereby the High Court was the final court of appeal in relation to *inter se* appeals, but the Privy Council's position was otherwise preserved. As a barrister, Barton never appeared in the Privy Council, although much later he sat on some commercial appeals.[5] However, as a litigant, Barton himself brought appeals to the Privy Council twice. His first encounter occurred during his four year tenure as speaker of the Legislative Assembly (the only years during which his attendance in the chamber was other than desultory), when he had suspended the notorious journalist Adolphus Taylor for a week for disruptive behaviour. After a second suspension (for re-entering the chamber before the first suspension had expired), Taylor commenced proceedings for assault against Barton, and demurred to Barton's defence on the basis that the Standing Orders pursuant to which he had acted (which adopted those in force from time to time at Westminster) were invalid and moreover that the chamber's only inherent power was to suspend for a single sitting. The Supreme Court of New South Wales agreed and Barton's appeal (on behalf of the chamber) to the Privy Council was dismissed.[6] There is not a trace of bitterness in his reasons when the same issue came before him as a justice of the High Court (in this case, the member's disorderliness lay in the failure to uncover his head and make obeisance to the chair when leaving the chamber).[7] The powers of the New South Wales chambers have not to this day been entirely defined, although the facts on which such issues are now presented are of more moment than a century ago.[8]

Bolton's account of the above is short and non-legal (which is no criticism). He also provides a sympathetic and probably over-generous portrayal of Barton's other appeal to the Privy Council. Barton's father had speculated in land and, by 1874, had mortgaged the entirety of his holdings to the Bank of New South Wales, which took possession. In December 1884, the Full Court of the Supreme Court of New South Wales held that the bank lacked a power of foreclosing. Immediately thereafter, Barton commenced proceedings on behalf of his father's estate seeking to redeem the old mortgage and regain lands which, by this time, had dramatically increased in value on account of Sydney's growth, relying on the Full Court decision. His success at first instance was short-lived: the Privy Council,

not unpredictably, allowed an appeal from the original decision,[9] after which the bank's success on appeal against Barton, and Barton's failure on subsequent appeal to the Privy Council,[10] were equally certain. Bolton describes the episode as ill-fortune, but it is hard not to agree with the Full Court's assessment of Barton's litigation: 'This suit had its origins solely in, and was never contemplated until, [the earlier Full Court] decision'.[11]

No doubt Barton's lack of success as a party to litigation before the Privy Council moulded his desire - not satisfied until 1986 - to establish the High Court as the ultimate Australian appellate court.

Barton's subsequent impecuniousity in the mid 1890s was solved in a way which enabled him to participate in the second federal convention. The 'workaholic' silk Charles Gilbert Heydon - described in the *Australian Dictionary of Biography* as 'the most inveterate worker that ever wore a wig' - accepted the task of reviewing the whole of New South Wales statute law for repeal, consolidation and simplification, and turned away a railway arbitration over which Barton was then asked to preside. The arbitration lasted 323 hearing days, but with adjournments whenever the convention was sitting (Barton's great friend and fellow delegate Richard O'Connor who was appearing before him was similarly advantaged by this arrangement).

It was at the second convention that Barton's skills both as chair and on the Drafting Committee were most needed. In addition to pushing through debate on the hundreds of amendments which the colonial legislatures had proposed, he, together with Reid, caused to be incorporated amendments prompted by secret memoranda which Reid had received from the Colonial Office when he had visited London to participate in the Jubilee celebrations.[7] For example, the Colonial Office required the removal of references to 'treaties made by the Commonwealth', because the Commonwealth was not contemplated to be a sovereign entity; accordingly, Barton had moved this amendment in the Legislative Council, and Barton and Reid put the argument for the deletion, successfully, in the convention. On less important matters, amendments were inserted by Barton's Drafting Committee without debate. Many more of the proposed amendments were pedantic, and were ignored by Barton, who in relation to one wrote 'This is a Constitution, not a Dog Act'.

In Bolton's book, one will read little of Barton's 16 years of service on the High Court, the judgments from this period being covered in fewer than 10 pages within a short concluding chapter (although even this slight coverage is far superior to all alternative accounts). Nonetheless, the conventional implied criticism that he failed to dissent from Griffith CJ in the first eight years of the Court's existence is repeated; one asks why is it necessarily a bad thing for an appellate court to be in agreement? Together with Griffith and O'Connor, he introduced underlying doctrines from United States constitutional law into Australian constitutional jurisprudence (see eg *D'Emden v Pedder*[13] and *Duncan v State of Queensland*[14]), an approach in part eschewed by the majority of the court shortly after his death in *Engineers*.[15] But many United States doctrines remained unquestioned. In particular, Australia did not need a chief justice of the legal and political skill of John Marshall to establish the applicability of the principles in *Marbury v Madison* - more important than the early decisions of the High Court in this regard was the work undertaken by Barton and others in the preceding decade.

In private law, Barton J's judgments continue to carry weight. In *Perpetual Executors and Trustees Association of Australia Ltd v Wright* he showed how the presumption of advancement may be rebutted when a transfer of property is made in an illegal attempt to defraud creditors, that illegal purpose not having been carried into effect.[16] His analysis was cited with approval by the English Court of Appeal in *Tribe v Tribe*,[17] and remains authoritative in Australia, notwithstanding *Nelson v Nelson*.[18]

As a political biography, the work is lucid, fascinating and first-rate, and benefits from more thorough research (partly from sources not previously available) than that used by earlier biographers. It will become the standard work. Although there are some shortcomings in Bolton's treatment of Barton's contribution to the law, it does not purport to be a legal biography, and doubtless it is churlish to criticise the book on this ground in the absence of legal biographies of Australian judges of far greater significance.[19]

Reviewed by Mark Leeming

1 Longmans, Green & Co (London), 1954 2nd ed.
2 For the origins of this clause, see Leeming, 'Something that will appeal to the people at the hustings: Paragraph 3 of section 53 of the Constitution' (1995) 6 *PLR* 131 and Schoff, 'Charge or burden on the people: Third paragraph s53 of the Constitution' (1996) 24 *Fed L Rev 43*.
3 *Edmund Barton*, Oxford University Press (Melbourne), 1974.
4 Barton made application on 23 November 1874, and wrote further letters dated 7 December 1874 and 11 March 1875 (personal communication, Mr Dennis Murphy QC, Parliamentary Counsel).
5 Including *The Odessa* [1916] 1 AC 145 and *The Roumanian* [1916] 1 AC 124.
6 *Taylor v Barton* (1884) 6 NSWLR 1; *Barton v Taylor* (1886) 11 App Cas 197.
7 *Willis and Christie v Perry* (1912) 13 CLR 592.
8 See *Egan v Willis* (1998) 195 CLR 424; *Egan v Chadwick* (1999) 46 NSWLR 563.
9 *Bank of New South Wales v Campbell* (1886) 11 App Cas 192.
10 (1890) 15 App Cas 379.
11 By coincidence, Taylor's and the Bank's successes are reported on consecutive pages of the Appeal Cases, and the Solicitor-General, Sir Horace, later Lord, Davey appeared for the appellant on both occasions.
12 This was first pointed out by de Garis and La Nauze: B K de Garis, 'The Colonial Office and the Commonwealth Constitution Bill' in Martin, *Essays in Australian Federation* (Melbourne University Press, 1969), pp94-121; La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972), pp172-221.
13 (1904) 1 CLR 91.
14 (1916) 22 CLR 556.
15 (1920) 28 CLR 129 esp at 146.
16 (1917) 23 CLR 185.
17 [1996] Ch 107.
18 (1995) 184 CLR 538.
19 Notably, Sir Owen Dixon. Grant Anderson's excellent but unpublished monograph (1991) on Dixon (from which was derived his *ADB* entry) demonstrates how informative such a biography would be.