

Barwick by David Marr

Acclaimed journalist and author David Marr has a history of producing very good biographies. His first, *Barwick*, has recently been reprinted 25 years after first being published. First-time readers today will appreciate that the intervening decades have not robbed Barwick (2nd edn) of any of the attractions which made the first edition a bestseller in the 1980s.

It could have been predicted that in addition to providing commentary on Sir Garfield Barwick as an individual, Marr's portrait of the seventh Chief Justice of Australia would, for completeness, also need to touch on some significant moments in the evolution of Australia's institutions of government. *Barwick* (2nd edn) fulfils this expectation with valuable insights into several important legal events in which Barwick was involved and through which he helped shape Australian political history.

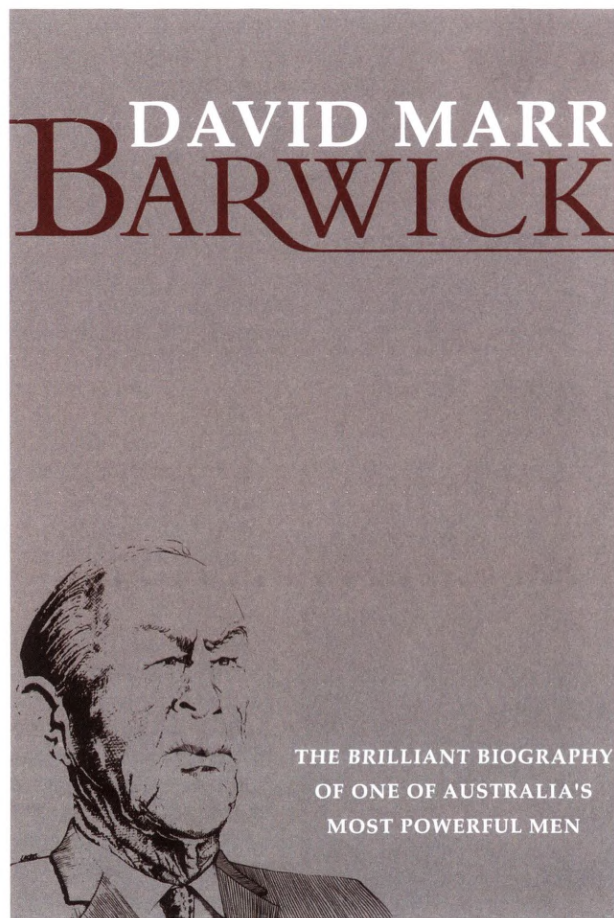
"Valuable insights into several important legal events in which Barwick was involved and through which he helped shape Australian political history."

One such event was Chifley's attempt in 1947 to nationalise private banking. Marr fully captures the drama and political atmosphere of the time with a vivid account of the circumstances giving rise to the *Banking Act 1947* (Cth), which purported to prohibit the carrying-on of banking business by private banks in Australia. Marr's analysis of Barwick's role in what was to become known as "the Bank Nationalisation Case" is gripping reading as he recounts how the banks retained Barwick to argue that the abolition of a bank was an unconstitutional check on the "freedom" of each bank to trade across state borders.

According to Marr, Barwick's principal contribution to post-war Australia was the "extension and definition of the boundaries of authority in the Federation".¹ To the extent that Marr relates this contribution to Barwick's time as Chief Justice, the contribution has arguably not proven to be as enduring as Barwick himself perhaps would have liked. For example, while Barwick led the High Court in its shift away from the "Dixon view" of s92 of the Constitution towards his own distinctive view, this view was in turn displaced by *Cole v Whitfield* (1988),² in which the High Court cast aside much of the pre-existing case law on s92, including (arguably at least) the *Bank Nationalisation Case*.³ Barwick is reported to have said of this decision, "I'd have great fun appealing from that with the Privy Council. Dear me, it's terrible tosh, you know".⁴

While the decision in *Cole v Whitfield* had yet to be delivered when *Barwick* was first published, *Barwick* (2nd edn) would probably have benefited from an acknowledgement of it, especially since the decision arguably supports Marr's own observation that "... Barwick's lasting memorial will not be found in the law reports."⁵

The book gives a fascinating insight into the differences and eventual falling out between Barwick and his predecessor as Chief Justice, Sir Owen Dixon. As Marr astutely points out, the different judicial techniques of the two



Chief Justices are evident in their respective approaches to the interpretation of s92. Where Dixon preferred to rationalise and depoliticise his approach, Barwick's interpretation rested on an underlying ideological vision. In the courtroom Dixon liked to engage counsel in philosophical reflection, whereas Barwick was interested only in asserting his view and having it prevail.

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Marr suggests that, after his appointment as Chief Justice, Barwick was uncomfortable expounding the truth of the matters before him. Instead, he approached his judicial work as though he were counsel arguing his brief. This distinction between the role of the advocate and that of judge is a point that makes *Barwick* (2nd edn) particularly valuable to junior legal practitioners considering a career at the bar. Through Marr, readers come to realise that unlike a judge, a barrister's task is not to set out the true position of the parties, but rather to manipulate the elements of the law and apply them to suit their brief. The book's insights into life at the bar may well leave some readers intimidated and discouraged from aspiring towards a career as a barrister.

Marr's portrait of Barwick is painted without romance or sugary reverence. One of the universal themes of the

book appears to be the contrast between Barwick's stated respect for the law and his apparent misapprehension of his duties and responsibilities as holder of the highest legal office and as the head of a non-political organ of government. The contrast is most acute as Marr recounts Barwick's role in informally allowing the office of the High Court to become implicated in the fateful events of November 1975.

After analysing Barwick's famous letter of advice to then Governor General Sir John Kerr "layer by layer", Marr concludes that Barwick essentially told Kerr "what he *ought* to do" about the extant supply crisis. Of course, Kerr never explicitly sought advice from Barwick on what he *ought* to do, but rather on what he was constitutionally empowered to do. If Kerr's own memoirs are to be believed, by the time he consulted Barwick about the matter he had already "arrived conclusively" at his decision as to what to do.⁶ Nevertheless, if Marr is correct, the significance of Barwick's advice would be that it was of a fundamentally political kind.

Barwick (2nd edn) is a study of reputation and power but little else. The book does not, for example, enrich our understanding of Barwick's friendships or his relationship with his wife and children. Marr acknowledges that, although initially cooperative, Barwick himself turned against the publication of the first edition of the book. This may be one reason the book fails to penetrate Barwick's private life.

It is acknowledged in the Afterword that another difficulty Marr encountered in writing the book was that Barwick made his name in areas of obscure legal complexity that each require full exploration in order to fully appreciate his impact. While such exploration is largely beyond the scope of *Barwick* (2nd edn), Marr's compact journalistic writing style permits a surprising depth of complexity in some of the main areas of Barwick's work.

Barwick (2nd edn) has been described as an Australian classic. It is fitting that Marr, accomplished biographer, legal journalist and himself no stranger to controversy, should be the one to present readers with this fine and insightful portrait of one of this country's most powerful and controversial legal figures.

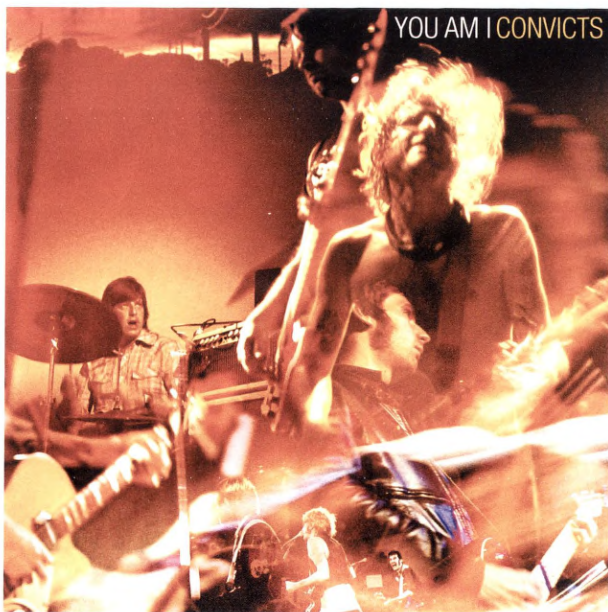
Endnotes

1. See Marr at 77.
2. 165 CLR 360.
3. See further, Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (2nd edn) 1998, 958-966.
4. See Blackshield and Williams at 976.
5. See Marr at 294.
6. Sir John Kerr, *Matters for Judgment* (1978) at 341.

Reviewed by **David Kelsey-Sugg**,
Maurice Blackburn Cashman

Convicts

You Am I (Virgin) ★★★★★ 5 stars



Put simply, this album proves what a lot of people already knew – You Am I is the greatest rock band Australia has ever produced. Like an old prizefighter pulling himself from the canvas for one last shot, *Convicts* is blistering 35 minutes of everything there is to love about genuine Aussie rock 'n roll.

After an extended hiatus, the band (Tim Rogers, Rusty Hopkinson, Andy Kent and Davey Lane) play like their

lives depend on it (and, if you believe the gossipmongers, for good reason). The album is easily Davey Lane's best performance on a You Am I record, Hopkinson only further proves his status as one of the best drummers around and Andy Kent holds it all together in laconic style. However, its Rogers' songwriting that elevates this album from a great rock record to a classic.

"Thank God I've Hit the Bottom" bursts the album out of the gates and has to be witnessed live for full appreciation. "Thuggery", a ferocious rebuke from Rogers to all the naysayers and aforementioned gossipmongers, is a song that not many are capable of writing. The album's first single, "It ain't funny how we don't talk anymore", will get your toe tapping as Rogers declares himself "The new Pompeii". "Gunslingers" is classic You Am I and "Friends like you" has a venomous crack at those who sold out Rogers in recent (and more turbulent) times.

There's a distinct (and seemingly intentional) lack of trademark ballads on this album. Some of the band's more famous tunes to date have been heartfelt low tempo tunes like "Heavy heart", "If we can't get it together" and "Damage" but once you listen to this album you realise they would probably have been out of place.

It's albums, and bands, like this that makes kids go out and buy a guitar and start "windmilling" in charismatic Rogers style. Aussie bands like Jet, Silverchair and the Vines even themselves admitting that they don't know where they'd be if this You Am I didn't exist. From a band that was apparently inches away from self destructing and chucking it all in, this album will restore your faith in rock 'n roll.