BOOK REVIEWS

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HISTORY, JUSTICES AND THE HIGH COURT: AN INSTITUTIONAL PERSPECTIVE

A RADICAL TORY: GARFIELD BARWICK'S REFLECTIONS AND RECOLLECTIONS

Garfield Barwick

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INTRODUCTION

PARAPHERNALIA abounds: law reports, extra-curial publications and speeches, constitutional and statutory texts, counsels' oral arguments and written submissions and the formidable bench of seven Justices. Peering behind that public facade - perhaps, into the *sanctum sanctorum* - is rarer and more difficult. Details and documents of the Australian High Court's private proceedings and internal decision-making processes are far from accessible. The contrast is stark.

Consequently, beguiling questions remain unanswered. How are opinions formulated and written? In solitary isolation or during debate and dialogue? How are decisions made? What overt and covert influences are decisive or, at least, have some effect? Biographically, who are the Justices? What happens "inside" the High Court? Should this balance - the public/private dichotomy - be redressed? At least from the historians' perspective of ascertaining, recording and analysing events, the individuals' role, influence and responsibility, and the lawyers' curiosity and need to know for the purposes of understanding the law and its development, affirmative responses can be advanced. If so, how can that be accomplished? Assume that the relevant documentation exists. Publication of judicial biographies, autobiographies and memoirs, oral narratives, letters and correspondence, High Court histories, internal memoranda, draft opinions and comprehensive chronicles of individual cases would constitute an initial foray.

Reflections and Recollections[1] of a former High Court Chief Justice might have been expected to reveal more than a hint about the unknown. Sir Garfield Barwick[2] devotes most attention to the other aspects - education, advocacy and politics (parliamentary and ministerial) - of his life.[3] Relatively little reflection or recollection encompasses the Justices, their intra-mural relationships or the adjudicative process. That is, life on and in the High Court is obscured from public voyeurism.

Of course, *A Radical Tory* contains the anticipated legal litany of High Court and Privy Council cases in which Barwick was senior counsel.[4] Prominent constitutional law examples include the *Airlines* case,[5] the *State Banking* case,[6] the *Bank Nationalization* case,[7] the *Communist Party* case,[8] and *Dennis Hotels*.[9] Utilising a succinct, direct and dialogic method of formulating and presenting legal arguments,[10] Barwick's legendary reputation[11] (especially among a small coterie of Australian and English lawyers[12]) emerged. Interestingly, from Barwick's perspective several factors ought to be taken into account in assessing his reputation. First are Barwick's "many failures; perhaps ... many more losses than successes ... [s]ome failures [being] due to [his] poor advocacy".[13] Second, he "had no desire to practise in the High Court".[14] Third, Barwick's failure to "fully" master or develop a "talent" for the cross-examination of witnesses.[15] Even so,[16] his "practice in the High Court [and Privy Council[17]] grew considerably, into almost unmanageable proportions". Indeed, Barwick "remember[s] an occasion when [he] appeared in every case in the list for the [High Court] sittings except one, a situation which placed a

considerable strain on [Barwick's] capacity to prepare [him]self adequately for each case".[18]

Eschewed from *A Radical Tory* is a similar self-assessment of Barwick's judicial opinions and decisions.[19] Only one exception - a fleeting glance at his "decisions in taxation cases"[20] - is made. Otherwise, Barwick is content to leave his "work as a judge"[21] in the Commonwealth Law Reports.[22] Therefore, evaluation of that "work" must continue to proceed, except for some fundamental premises,[23] without Barwick's assessment. At this juncture, for example in the domain of constitutional law,[24] Barwick's judicial "work" has not, like his advocacy, received accolades.[25] Rather, the reverse has occurred.[26] As a result, postulating a dichotomy between Barwick the advocate and Barwick the judge[27] appears to be easy. That is, the former, compared to the latter, may well have had a greater impact and enduring significance on Australian law, especially constitutional law. However, in reality, both are ephemeral. Already each is being swept away by inevitable changes in judicial doctrines,[28] processes and procedures.[29] Perhaps only Barwick's "personal advice"[30] to Governor-General Kerr in November 1975[31] will be more resistant to that fate.

INSIDE THE HIGH COURT

What goes on inside the High Court? Glimpses are available.[32] *Reflections and Recollections* provide a few more. Of course, evaluations might be required as to whether even more should be public and, if so, for what uses and purposes. Assume, for example, that public knowledge in 1937 included Justice Dixon's[33] private view that "[i]n [s92] cases relating to transport ... if not in all cases, [Dixon thought] it ... almost clear that [Justices] must proceed by arbitrary methods. No doubt there will be limits but political and economic considerations will guide the instinct of the [High] Court chiefly."[34] How, if at all, would that have altered various facets of, for example, Dixon's judicial work? First, the public perceptions of what, in the context of judicial decision-making, was "strict and complete legalism"[35] and that Dixon (and the High Court) decided constitutional cases by such "legalism". Second, the interpretation and evaluation of Dixon's judicial opinions. Third, the content and manner of arguments presented by lawyers, including Barwick, to Dixon.

In this context of the internal deliberations of the High Court's decision-making process, *Reflections and Recollections* reveals, at least during Barwick's tenure as Chief Justice (27 April 1964 - 11 February 1981), that

When [Barwick] joined the High Court [he] made no attempt to give [other Justices] leadership in the decision of cases ... [Barwick made no] attempt to influence [new Justice's] views otherwise than by the circulation of [his] own reasons for judgment.

...

Judges worked independently on their judgments. The High Court never had, and did not develop, a practice of formal consultation among all members of the Bench before reasons were prepared, though discussion did take place between individual judges. As far as [Barwick] was aware, however, there was no lobbying by one judge of others ... Not only was there no formal discussion before the hearing but also the court did not formally decide as a body on the result. That only emerged when the individual reasons for judgment were circulated, sometimes not till the last of such reasons came to hand.

...

[Barwick] never lobbied any ... judge to seek his concurrence in any view of [Barwick's. This] would be a very bad thing for the public if any Chief Justice or ... any judge, did that. There is ... plenty of room for consultation between judges, leading ... at times to joint judgments. For [Barwick] the acceptable way of influencing [other Justices'] views was to circulate ... [his] reasons for judgment as soon as ... completed ... just as [other Justices] may influence [Barwick's] views by circulating theirs.

In any case there was little time or opportunity for the frequent meetings and discussions ... necessary to produce a unanimous decision. The habit of individual expression was also so well-ingrained among [Justices] with whom [Barwick sat] that [he] thought a radical change in this respect would be disruptive and doubtful of success.

But with the arrival of new [Justices Barwick tried] ... to make some changes. [His] first suggestion was that ... one judge at the conclusion of the hearing should be asked to prepare and circulate a draft of the facts, from which any judge could request a variation ... [A]ny particular emphasis desired by a judge could be made in his own reasons ... This proposal ... proved unacceptable.

> Later, and in relation to a particular case, [Barwick] suggested holding a conference at or soon after the conclusion of a hearing so that the fundamental issues could be determined and perhaps the general inclination of the individual minds exposed. This found no favour either.
>
> [Barwick made another] attempt at a means of moving towards common ground ... It was the practice of judges not to circulate anything until they had a complete and final statement of their reasons for judgment. It was unusual for all judges who had heard a case, or even a majority of them, to circulate reasons in that case at or about the same time. There was often a substantial interval between the circulation of ... reasons ... [Barwick considered] ... that if judges could be persuaded to circulate a tentative draft set of reasons while their minds had not finally resolved the problem ... these ... drafts might be circulated earlier than final reasons and thus reduce the effect of the gap. [Barwick's] suggestion was not adopted. Indeed, some judges told [Barwick] ... they did not really feel able to produce even tentative reasons and preferred to hold any circulation of reasons till they had reached a final conclusion. [Barwick] ... accepted that [his] proposal was impractical.
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> ...
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> One of the characteristics of the High Court is the strong individualism of its members. A mechanism for consultation and for the search for common views has not so far existed. By placing the [Judges' chambers] around the library [in the High Court] ... [Barwick] thought to furnish some stimulus to informal consultation between judges. Space adjacent to the Chief Justice's chambers was also provided for meetings of the judges. In this room was placed a circular table, whose design ... allowed no dominant presence.[36]

Reflections and Recollections exposes a stark panorama: seven judges, often in very close physical proximity for a number of years, each writing judicial opinions virtually in isolation. Collaboration and collegiality, at least on a formalised basis, are almost non-existent. Comparison with the United States Supreme Court - where there are established traditions of regular conferences of the Justices on each case, circulation of draft

opinions and memoranda, and other intra-mural discussions on cases between Justices - exhibits an alternative mode of judicial decision-making.[37] However, more information is needed to accurately and adequately ascertain and assess the High Court's internal deliberations and, perhaps occasionally, machinations.[38] In this milieu, scholarship on the United States Supreme Court's inner labyrinths may provide a guide. Examples include publication of original and primary documents: draft opinions, internal memoranda and Justices' letters[39] and diaries.[40] Building upon such documentation, with assistance from Justices court papers[41] and law clerks' reminiscences,[42] judicial biographies,[43] histories of the Court[44] and comprehensive chronicles of individual cases[45] reveal and contextualise this normally confidential[46] facet of judges' work.[47]

Do High Court equivalents - unpublished or published - exist? Of the latter, there are some biographies,[48] court histories[49] and case chronicles.[50] Whether and, if so, in what quantity and where the former are extant remains obscure.[51] Assume Barwick's rendition, as a generalisation, is correct for the short period between 1964 and 1981.[52] Previously, was that the situation? Subsequently, has it continued? For example, did Chief Justices Griffith[53] and Dixon[54] dominate the High Court? Were the Justices who sat with Griffith and Dixon influenced, persuaded or over-awed by them?[55] What processes were utilised in the evolution of judicial opinions? Since 1981, has the "circular table ... adjacent to the Chief Justice's chambers"[56] been used, for example as a conference venue, by the Justices to discuss cases and collaborate on writing opinions? Is the unanimous judgment in *Cole v Whitfield* [57] an example? But why should such matters be revealed? Their publication would be interesting and informative not only for intrinsic and historical value. It would quantitatively and, hopefully, qualitatively increase knowledge about an important Australian[58] institution. Consequently, that would assist in evaluating the Justices' opinions and functions.[59] Eradication of myths by a more accurate and comprehensive High Court portrait ought to benefit all - those who will never become and those who will become one of the august seven.[60]

THE CHIEF JUSTICE

Upon his appointment to the High Court, "Barwick had inscribed in gold leaf on his door at the Taylor Square court in Sydney: Chief Justice of Australia".[61] In 1995[62] Barwick enunciated a less grandiose, more circumscribed conception of the office of Chief Justice, its functions and powers.

> [The Chief Justice] ought to administer the [High] Court, manage its business, control its staff and arrange its lists, taking into account in all these matters the opinions and wishes of his colleagues, whom he should consult as necessary. For the rest he is only one among equals.[63]

However, Barwick's *Reflections and Recollections* belies that *pari passu* view. First, in legislatively specified circumstances, the Chief Justice has a casting vote.[64] Second, "as Chief Justice [Barwick] ranked in the Commonwealth order of preference before any of the ministers of the Crown other than the Prime Minister [and other Justices] ranked below the ministers".[65] Third, "the Chief Justice ... acted as the deputy of the Governor-General to perform the first part of the [Commonwealth] parliamentary opening ceremony".[66] Fourth, "the office of Chief Justice of Australia ... is in itself a unique office and its place in the constitutional and judicial life of the nation is pre-eminent".[67] Such a notion has been elaborated:

> As head of 'an organ of government' Barwick saw himself invested with great and vague powers. His sense of the power of [the Chief Justice] was to grow over the ... years.
> ...
> [Barwick] came to believe that the Chief Justice of Australia had his own prerogative rather like that of the Governor-General: it was vague and nowhere written down, and its source was neither the [Commonwealth] Constitution nor statute but sprang from the traditions of the office itself. [Barwick] saw the Chief Justice as the custodian of constitutional proprieties in the [Australian] Federation.[68]

Does such pre-eminence and any consequential powers encompass "a private duty to advise the Governor-General on constitutional matters"?[69] Possibly by the end of September 1975, in relation to non-justiciable, but not justiciable, questions,[70] Barwick was "convinced that [he] ought to give such advice if it were sought".[71] Indeed, Barwick was aware that Chief Justices and "other justices", on non-justiciable matters, "had given legal advice personally to a Governor-General".[72] Barwick had done so on two previous occasions.[73] As a matter of principle and propriety should such advice be given? Despite arguments to the contrary,[74] Barwick[75] adheres to an affirmative response:

> On principle, it seemed to [Barwick] that if the matter on which advice was sought was not a justiciable matter, the advice would in reality not be given in a judicial capacity. It would rank no higher than personal advice though undoubtedly, because of the office of Chief Justice, it might appear to carry more weight and even to be the likelier to be correct.
>
> The giving of advice seemed to [Barwick in 1975 and 1995] quite clear on principle. To give such advice to the representative of the Crown at his request did not seem to [Barwick] to compromise the independence of the Chief Justice, including his independence of the executive, or that of the judiciary. Nor did it involve any admixture of constitutional power. [Barwick] considered also whether it would be proper to give advice on a justiciable matter and decided that it would not.[76]

Given the contrasting conceptions of the office of Chief Justice and the political[77] and legal[78] controversies surrounding Barwick's advice of 10 November 1975, more ought to be publicly available and known about that office, its powers and functions and when, why and the extent to which successive Chief Justices[79] have claimed and exercised prerogatives of that office. Once ascertained, careful evaluations can proceed and, if necessary, a clearer demarcation of the Chief Justice's role and responsibilities, additional to puisne judges, will emerge.[80]

GUARDIAN OF THE CONSTITUTION

Who guards the Commonwealth Constitution: the High Court, Judicial Committee of the Privy Council, Commonwealth Parliament, Governor-General, the people or, at least, Commonwealth electors? In the context of a federal Constitution, where division and separation of power and checks and balances have textual warrant and are pragmatically significant, is it possible and desirable to have several such guardians? Barwick in *A Radical Tory* designates the Privy Council as "the ultimate tribunal" in Australia's constitutional system.[81] Of course, that may have been the situation when appeals existed from Australian courts, including the High Court, to the Privy Council. Indeed, Barwick appeared as counsel in constitutional cases before that "ultimate tribunal".[82] However, that was before the avenues of appeal, except the "theoretical possibility" of a High

Court certificate permitting the Privy Council to determine an "inter se" question,[83] were legislatively closed.[84]

Reflections and Recollections also suggests that the Commonwealth Parliament[85] is a guardian of the Constitution. One example is "[t]he control of the Governor-General's action in choosing or in dismissing a ministry is not through the courts but through the [Commonwealth] Parliament".[86] Second, House of Representatives no-confidence votes[87] and Senate "failure to carry the budget" are, Barwick suggests, Commonwealth parliamentary controls over Commonwealth Ministers.[88] Whether Barwick's position that such a denial of supply requires either the Ministry "to resign forthwith or to advise the Governor-General to dissolve the House of Representatives" and, if neither occurs, the Governor-General to dismiss the Ministry is correct[89] remains a vehemently disputed constitutional law issue.[90] A third example might be other parliamentary powers, for example, initiation of amendments to the Constitution[91] and legislative power to provide something other than is stipulated in the Constitution's text.[92]

The people, or at least the electorate, provide for Barwick another possible constitutional guardian.[93] *Reflections and Recollections* suggests that "the electorate chooses the [Commonwealth] Parliament"[94] and only "the people expressing themselves through a general election", not the Governor-General or courts, can resolve disputes between Parliament and Ministers which continue even after the former has lost confidence in the latter, for example as indicated by a "failure to carry the budget".[95] Electors might also be perceived as guarding the Constitution through their approval or rejection of amendment referenda.[96] If the Constitution's opening words - "whereas the people" and the idea that "ultimate sovereignty reside[s] in the Australian people"[97] - are taken seriously the real guardian might be discerned.[98]

That the Governor-General is "the ultimate guardian of the Constitution" has also been postulated.[99] Barwick, via s61 of the Constitution, the Governor-General's oath[100] and non-justiciability, appears to move towards a similar conclusion.

> Section 61 of the Constitution ... imposes ... an obligation on the Governor-General to maintain the Constitution. So does his oath of office in which he expressly undertakes to maintain the Constitution. To read Section 61 and the terms of the oath as doing no more than enabling the

> Governor-General to maintain the Constitution is to rob the section and the oath of much of their substance.
>
> The Constitution undoubtedly provides for a Federal parliamentary democracy. Central to that concept is the Vice-Regal maintenance of a Ministry to whom the Parliament is prepared to provide money to carry on the ordinary annual services of government.
>
> It can scarcely be consistent with parliamentary democracy for a Governor-General to maintain as his advisers a Ministry to whom the Parliament will not provide supply.
>
> Thus ... an obligation to keep as his advisers only a Ministry which can secure supply from the Parliament is involved in the obligation to maintain the Constitution imposed by the section and the Vice-Regal oath of office. Such an obligation may ... properly be called a legal duty, albeit a duty not legally enforceable.[101]

However, Barwick has also resolutely proclaimed issues to be justiciable and the High Court as the guardian of the Constitution.[102] While not as direct or forceful as Barwick's judicial opinions, *A Radical Tory* clearly endorses that stance. For Barwick,

> [t]he High Court ... is the most important institution in the Australian federation. It has the function of interpreting and applying the [Commonwealth] Constitution.[103]

Despite dogmatism over the constitutional foundation and domain of judicial review,[104] *Reflections and Recollections* concedes that at least two exceptions exist.[105] First, the Governor-General's "action in appointing and ... dismissing a ministry is not justiciable ... [C]ontrol of the Governor-General's action ... is not through the courts but through the [Commonwealth] Parliament."[106] Second, contrary to the orthodox view,[107] Barwick, before giving "personal advice",[108] decided an antecedent question: Was the issue the Governor-General raised[109] justiciable? By deciding that question, in the absence of a court decision to sustain a negative response,[110] Barwick's actions at least imply that the question - is this issue justiciable? - is itself a non-justiciable issue. In contrast to the orthodox view where courts control the scope, if any, of non-justiciability, Barwick's thesis has the potential to radically undermine judicial review.[111] If other constitutional issues are also non-

justiciable,[112] that curtails the notion that the High Court is guardian of the Constitution.

Vulnerability stalks the High Court. Jurisdiction stripping,[113] removal of judges,[114] packing the court,[115] curtailment of funding,[116] non-enforcement of court orders[117] and, perhaps, abolition[118] are constitutional, if not necessarily realistic,[119] examples.[120] By focussing attention on others - the Governor-General, Commonwealth Parliament and Barwick - *A Radical Tory* saves from obscurity the obvious: in the midst[121] of the November 1975 turmoil[122] no-one turned[123] to the High Court. Inevitably, that engenders large and fundamental questions: What is the High Court's role? What theories of judicial review, constitutionalism, democracy and justice are being adumbrated and implemented?[124]

CONCLUSION

Ultimately, like Barwick's advocacy[125] and judicial expositions of the Constitution,[126] *Reflections and Recollections* is schizophrenic.[127] Of course, that need not evoke remorse. Rather, by articulating clashing and divergent views, Barwick provocatively reminds Australians that there ought to be more known about the Constitution and the High Court. Historians, biographers and constitutional lawyers are, therefore, required. In this quest, however, personal *Reflections and Recollections* should not be abandoned.

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1 G Barwick, *A Radical Tory: Garfield Barwick's Reflections and Recollections* (Federation Press, Annandale 1995). Initial reviews include Winterton, "Matters for Argument" *The Age*, Extra, "Books", 12 August 1995 at 8; Blackshield, "A Pugnacious Combatant" *Weekend Australian*, Weekend Review Section, 15-16 July 1995 at 7; Wainwright, "Barwick, a legal history" *Sunday Times*, 1 October 1995 at 52; Maclean, "Book Review" (1995) 69 *ALJ* 842; Castles "Autobiography of Garfield Barwick" (1995) 175 *Aust Book Rev* 40; McCarthy, "Reflections from a man of his time" *Canberra Times*, 20 November 1995 at 11; Rumble, "Book Review" (1995) 23 *FLR* 378. See also G Barwick, *Sir John Did His Duty* (Serendip Publications, Wahroonga 1983). Reviews include Sawer, "Barwick disputed on whether Sir John did his duty" *Canberra Times*, 14 December 1983 at 2; Kelly, "Fundamentally different views of Parliament" *Sydney Morning Herald*, 4 November 1983 at 9; Solomon, "November 11: Barwick's defence" *Australian Financial Review*, 11 November 1983 at 35; Evans, "'No duty' to dismiss Government" *Canberra Times*, 12 November 1983 at 16; Baker, "Barwick's Truth of the Matter" *The Age*, 10 November 1983 at 11; Winterton, "The Third Man" (1984) 28(4) *Quadrant* 23; Paul, "An Epistle from Paul" (1984) 28(4) *Quadrant* 27; Howard, "But did Sir Garfield do his duty?"

(1984) 58 *LIJ* 136; Kennan, "Book Review" (1984) 14 *MULR* 735; Starke, "Book Review" (1984) 58 *ALJ* 120; Gibb, "Book Review" (1984) 9 *Adel LR* 426; Thomson, "Book Review" (1983) 6 *UNSWLJ* 255.

2 Garfield Edward John Barwick (born 22 June 1903; admitted to NSW Bar 1927; King's Counsel 1941; Member of the House of Representatives 1958-1964; Commonwealth Attorney-General 1958-1964; Minister for External Affairs 1961-1964; Chief Justice of the High Court 27 April 1964 - 11 February 1981). Biographical material includes Sawer, "Absolutely Free Man" 45 *Nation*, 4 June 1960 at 8; "Sir Garfield Barwick Completes Ten Years as Chief Justice" (1974) 48 *ALJ* 165; McGregor, "Barwick, The Old Fox" *National Times*, 28 November - 3 December 1977 at 2; "Barwick, Rt Honorable Sir Garfield Edward John" in *Who's Who In Australia* (Information Australia, Melbourne, 32nd ed 1996) 181; D Marr, *Barwick* (Allen & Unwin, Sydney 1980). Reviews of Barwick include Blackshield, "Barwick - great and vague powers" (1980) 21 *Aust Book Rev* 1; Turnbull, "Barwick, an advocate on the bench" *Bulletin*, 24 June 1980 at 79; Whitlam, "Barwick By Whitlam, A Non Admirer" *Sydney Morning Herald*, 23 May 1980 at 7; Hughes, "'Barwick', study of reputation, power" *Canberra Times*, 26 May 1980 at 19; Beale, "Barwick's time to come" *Weekend Australian*, 5-6 July 1980 at 8; Masson, "Barwick: A man of power and dignity" *West Australian*, 26 July 1980 at 31; Churches, "Book Review" (1980) 7 *Adel LR* 409; Sexton, "Book Review" (1980) 11 *FLR* 460. For Barwick's publications see G Rumble, *Sir Garfield Barwick's Approach to the Constitution* (Ph D thesis, ANU 1983) 3-4 (bibliography); Barwick, "Some Observations on the Privy Council" (1985) 2 *MLJ* cxix; "Barwick on Parliament, Law and Rubber Stamps" (1994) 94(2) *Aust Const Monarchy* 6; Barwick, "Dismissal by the Governor-General" *Canberra Times*, 9 December 1983 at 2; Barwick, "Sir John Did His Duty" *Times Literary Supp*, 17 August 1984 at 917; Barwick, "Sir Garfield v Gareth Evans" (1985) 29(1&2) *Quadrant* 3; Barwick, "The Economics of the 1975 Constitutional Crisis" (1985) 29(3) *Quadrant* 37; Barwick, "Letter" (1985) 29(6) *Quadrant* 4; Barwick, "Parliamentary Democracy in Australia" (1995) 25 *UWALR* 21; Barwick, *Precedent in the Southern Hemisphere* (Magnes Press, Hebrew University, Jerusalem 1970); Barwick, *The Monarchy in an Independent Australia* (Sir Robert Menzies Lecture Trust, Monash University, Victoria 1982); Barwick, "Law and the Courts" in A Madden & W Morris-Jones (eds), *Australia and Britain: Studies in a Changing Relationship* (Sydney University Press in association with the Institute of Commonwealth Studies, University of London, Sydney 1980) 145; Barwick, "Democracy in Australia" in *Upholding the Australian Constitution: Proceedings of the 5th Conference of the Samuel Griffith Society* (Samuel Griffith Society, East Melbourne 1995) 205; Barwick, "Federalism in Australia - its Origins, its Operation and its Future" (unpublished, Edmund Barton Lecture Trust 1983). Barwick's interviews include "People to Watch - A Lawyer Fresh to Politics" *London Times*, 9 November 1959; "Sir Garfield Barwick Addresses the National Press Club in Canberra" 10 June 1976 (reproduced in "Barwick Explains His Role" *Australian Financial Review*, 11 June 1976 at 2, R Hall & J Iremonger, *The Makers and the Breakers: The Governor-General and the Senate vs the Constitution* (Wellington Lane Press, Sydney 1976) 211-216; Marr, *Barwick* 284-285); Kelly, "Barwick finally reveals why he advised Kerr, and why Kerr was right" *Sydney Morning Herald*, 3 November 1983 at 1; Kelly,

"Barwick - still the jurist, and still above them all" *Sydney Morning Herald*, 5 November 1983 at 5; "Sir Garfield Barwick reminisces" (Summer 1989) *Bar News: J of NSW Bar Ass* 9 (reprinted in (1989) 30 *Qld Bar News* 17); "Conversation with Sir Garfield Barwick" (1983) 57(12) *LIJ* 1304; Phillips, "Sir John Did His Duty: A Timely conversation with Sir Garfield Barwick" (1984) 46 *Labour History* 142 (partially reproduced in Marr, *Barwick* 271-272); "Sir Garfield Barwick is interviewed [by Paul Murphy] about his relationship with Sir John Kerr" 26 March 1991 (broadcast 28 March 1991) (reprinted in Barwick, *A Radical Tory* 303-308); "Sir Garfield: A Life" 5 January 1994 (Department of the Commonwealth Parliamentary Library Information Storage and Retrieval System); G Henderson, *Menzies' Child: The Liberal Party of Australia, 1949-1994* (Allen & Unwin, St Leonards 1994) 243-245; Barwick, *A Radical Tory* 231 ("frank ... interviews ... fill a great number of tapes [and] transcriptions fill five stout volumes ... with the Commonwealth Archives ... under embargo" until "2006").

3 Barwick, *A Radical Tory* 2-215. Barwick's period as Commonwealth Attorney-General (1958-1964) might be compared with that of other Chief Justices and Justices who were Attorneys-General; eg, Isaacs (July 1905 - October 1906), Latham (1926-1929, 1931-1934), Evatt (1941-1949), Murphy (19 December 1972 - 9 February 1975). See, eg, Z Cowen, *Isaac Isaacs* (Oxford University Press, Melbourne 1967) 97-112; Z Cowen, *Sir John Latham and Other Papers* (Oxford University Press, Melbourne 1965) 7-17, 24-26; K Tennant, *Evatt: Politics and Justice* (Angus and Robertson, Sydney 1970); P Crockett, *Evatt, A Life* (Oxford University Press, Melbourne 1993); M Sexton, *Illusions of Power: The Fate of a Reform Government* (Allen and Unwin, Sydney 1979) 68-90; Maher, "Murphy the Attorney General" in J Scutt (ed), *Lionel Murphy: A Radical Judge* (McCulloch Publishing, Carlton 1987) 36-59.

4 Barwick, *A Radical Tory* 20-23, 48-79. For his "non-judicial" opinions see 81 ("adviser to governments on constitutional questions"), 96 ("advised ... governments of both political persuasions"), 290 (advising Governors-General Casey and Hasluck), 281-297 (advice to Governor-General Kerr); Marr, *Barwick* 90-91 (advice to Prime Minister on s57). See also fn72 below.

5 (1946) 71 CLR 29 (Commonwealth legislation giving Commonwealth authority a monopoly over interstate airline services unconstitutional). See generally Barwick, *A Radical Tory* 51-55; Marr, *Barwick* 44-51; L Zines, *The High Court and the Constitution* (Butterworths, Sydney, 3rd ed 1992) 103-104.

6 (1947) 74 CLR 31 (Commonwealth legislation requiring States and local governments to bank with Commonwealth Bank or establish their own banks unconstitutional). See generally Barwick, *A Radical Tory* 55-57; Marr, *Barwick* 52-56; L Zines, *The High Court and the Constitution* 277-279.

7 (1948) 76 CLR 1 (High Court); (1949) 79 CLR 497 (Privy Council) (*Banking Act* 1947 (Cth) prohibition of private banking unconstitutional). See generally Barwick, *A Radical Tory* 57, 62-79; A May, *The Battle For The Banks* (Sydney University Press, Sydney 1968); Marr, *Barwick* 56-74; L Zines, *The High Court and the Consitution* 104-106; M Coper, *Freedom of Interstate Trade Under the Australian Constitution* (Butterworths, Sydney 1983) 92-96, 102-107.

8 (1951) 83 CLR 1 (*Communist Party Dissolution Act* 1950 (Cth) unconstitutional). See generally Barwick, *A Radical Tory* 48; Marr, *Barwick* 78-

88; Thomson, "An Australian Bill of Rights: Glorious Promises, Concealed Dangers" (1994) 19 *MULR* 1020 at 1023 fn12 (references).

9 (1960) 104 CLR 529 (High Court); (1961) 104 CLR 621 (Privy Council) (Victorian licence fee not a s90 excise). See generally Barwick, *A Radical Tory* 20-23; *Capital Duplicators v ACT [No 2]* (1993) 178 CLR 561.

10 For oral arguments see, eg, Barwick, *A Radical Tory* 32 ("brief", "condensing"), 77-78 ("dialogue"), 219 (finding and "concentrating" on "critical issue", persuading "hearers"); Sawer, "Absolutely Free Man" 45 *Nation*, 4 June 1960 at 8; Williams, "Reading the Judicial Mind: Appellate Argument in the Communist Party Case" (1993) 15 *Syd LR* 3; G Williams, *The Communist Party Case: A Study in Law and Politics* (LL B (Hons) thesis, Macquarie University 1991) 38-51. For his written arguments see, eg, Barwick's letter of 10 November 1975 to Governor-General Kerr reprinted in Barwick, *A Radical Tory* 291-292; Marr, *Barwick* 271-277, 283; Commonwealth Law Reports 1964-1981, vols 111-148, 180. It has been suggested that "[t]he [1975] Barwick letter was the work of a great advocate and bore the characteristic thumb prints of the Barwick style ... There was nothing strained in its language, it employed a 'tin-tacks' rhetoric, and among the dozens of opinions written during the [1975] crisis it appeared to be one of the least abstruse. It put forward a tantalising simplification of the complex problems ... mixing fact, argument and assertion into a text of persuasive force. Taken apart layer by layer, it revealed something of its true complexity and daring ... His letter was perfectly fashioned for the task: pithy ... forceful ... short: it was the work of an advocate who understood his task and audience perfectly": Marr, *Barwick* 271, 283. Compare fn26 below. Barwick's 1995 argument, in *A Radical Tory* 296-297, regarding temporary supply, has been labelled "breathtakingly convenient - and imaginative. One can see why Barwick was such a great advocate": Winterton, "Matters for Argument" *The Age*, Extra, "Books", 12 August 1995 at 8.

11 See, eg, Whitlam, "Barwick By Whitlam, A Non-Admirer" *Sydney Morning Herald*, 23 May 1980 at 7 ("most successful barrister in Australian history"); Blackshield, "Barwick - great and vague powers" (1980) 21 *Aust Book Rev* 1 ("In the late 1940s and early 1950s [Barwick] dominated the Australian legal profession in a way that has never been equalled"); Kennan, "Book Review" (1984) 14 *MULR* 735 ("most brilliant advocate of his generation"); Marr, *Barwick* 210 ("without peer"). Does Barwick compare favourably with great American and English advocates? Compare, eg, Baxter, "Daniel Webster: The Lawyer" in K Shewmaker (ed), *Daniel Webster: "The Completest Man"* (University Press of New England, Dartmouth College, Hanover 1990) 138-202; E Griswold, *Ould Fields, New Corne: The Personal Memoirs of a Twentieth Century Lawyer* (West Publishing Company, St Paul, Minnesota 1992); M Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961* (Oxford University Press, New York 1994); N Hooke & G Thomas, *Marshall Hall: A Biography* (Barker, London 1966).

12 Barwick, *A Radical Tory* 32 ("High Court judges were impressed"), 77, 97-98.

13 Barwick, *A Radical Tory* 48. One example was the *Communist Party* case, (1951) 83 CLR 1.

14 Barwick, *A Radical Tory* 29. See also 33 ("not seek to build a practice in [the High] Court").

15 As above 23.

16 But note that EM Mitchell's death in 1943 may have helped as Barwick was "briefed in work which would have gone to [Mitchell] had he survived": as above 33.

17 As above (Barwick "appeared regularly before the Privy Council").

18 As above.

19 Barwick's judicial opinions are in the Commonwealth Law Reports volumes 111-148, 180 (1964-1981). Barwick also sat on the Judicial Committee of the Privy Council and as a Judge ad hoc International Court of Justice: Barwick, *A Radical Tory* 222, 254-258. For assessments see, eg, Rumble, *Sir Garfield Barwick's Approach to the Constitution*; Coper, *Freedom of Interstate Trade Under the Australian Constitution* 191-274.

20 Barwick, *A Radical Tory* 229. See, eg, Marr, *Barwick* 293; Lehman, "The Income Tax Judgments of Sir Garfield Barwick: A Study in the Failure of the New Legalism" (1983) 9 *Mon LR* 115; Roberts, "Barwick's tax role comes in for some unfair criticism" *Financial Review*, 8 November 1995 at 18.

21 Barwick, *A Radical Tory* 228.

22 Compare the self-assessment in Warren, *The Memoirs of [Chief Justice] Earl Warren* (Doubleday, Garden City, New York 1977) 275-349.

23 Examples include the High Court as guardian of the Constitution and the Governor-General's executive power. Barwick, *A Radical Tory* 243, 281-298. For an elaboration see Rumble, *Sir Garfield Barwick's Approach to the Constitution.*

24 See, eg, Sexton, "Book Review" (1980) 11 *FL Rev* 460 ("absence of any coherent philosophy in the construction of the Constitution"); Rumble, *Sir Garfield Barwick's Approach to the Constitution* 490 ("Barwick may not be mentioned in the same breath as Dixon when great Australian constitutional judges are being discussed").

25 Evaluations of Barwick's non-constitutional judicial "work" (except for taxation: see fn20 above) are rare.

26 See, eg, Marr, *Barwick* 291, 293-294 ("Few monuments will remain in the law reports"); Blackshield, "Barwick - great and vague powers" (1980) 21 *Aust Book Rev* 1 at 4 ("contradictory and unpredictable nature of Barwick's ... judicial record. His ... judgments alternate from pragmatic audacity to crabbed legalism"); Sexton, "Book Review" (1980) 11 *FLR* 460 ("absence of any coherent philosophy"); Rumble, *Sir Garfield Barwick's Approach to the Constitution* 5 (Ph D thesis "evaluate[s] Barwick's reasoning and doctrine against criteria of coherency and consistency").

27 But was Barwick always an advocate, even when he was Chief Justice? Compare Marr, *Barwick* 211 ("old defeats to be rectified, old enthusiasms to be pursued") with Rumble, *Sir Garfield Barwick's Approach to the Constitution* 482-484 (rejecting "crude hypotheses").

28 See, eg, *Cole v Whitfield* (1988) 165 CLR 360 (s92 only prohibits protectionist measures which discriminate against interstate trade and commerce). Compare Barwick, *A Radical Tory* 72 (discrimination "a very unsatisfactory criterion"). Perhaps, for a reverse example, see Kirby, "Lionel Murphy and the power of ideas" (1993) 18(6) *Alt LJ* 253.

29 For example, presentation of "detailed written arguments" and special leave requirements. Solomon, "Controlling the High Court's Agenda" (1993)

23 *UWALR* 33 at 41-44; Jones, "High Court Procedure under the *Judiciary Act*" (1994) 68 *ALJ* 442.

30 Barwick, *A Radical Tory* 82, 290. Compare Barwick's letter of 10 November 1975 (fn10 above) ("myself, as Chief Justice").

31 See, generally, Barwick, *A Radical Tory* 281-298; P Kelly, *November 1975: The Inside Story of Australia's Greatest Political Crisis* (Allen & Unwin, St Leonards, NSW 1995).

32 See, eg, Lloyd, "Not Peace but a Sword! - The High Court under JG Latham" (1987) 11 *Adel LR* 175; McQueen, "The High Court of Australia: institution or organisation" (1987) 59(1) *Aust Q* 43; McMinn, "The High Court Imbroglio and the Fall of the Reid - McLean Government" (1978) 64 *JRAHA* 14. Others are in judicial biographies and High Court histories. See, eg, Thomson, "Judicial Biography: Some Tentative Observations on the Australian Enterprise" (1985) 8 *UNSWLJ* 380 at 383-397 (references); J Bennett, *Keystone of the Federal Arch: A Historical Memoir of the High Court of Australia to 1980* (Australian Government Publishing Service, Canberra 1980); B Galligan, *Politics of the High Court* (University of Queensland Press, St Lucia, Qld 1987). Compare, for example, B Woodward & S Armstrong, *The Brethren: Inside the [United States] Supreme Court* (Simon & Schuster, New York 1979); Sapphire, "The Value of The Brethren: A Response to Its Critics" (1980) 58 *Tex L Rev* 1475; Fiscus, "Studying The Brethren: The Legal-Realist Bias of Investigative Journalism" [1984] *Am Bar Foundation Research J* 487; Atkinson, "Justice Sherman Minton and Behaviour Patterns Inside the Supreme Court" (1974) 69 *Nw U L Rev* 716; P Cooper, *Battles on the Bench: Conflict Inside the Supreme Court* (University Press of Kansas, Lawrence, Kansas 1995).

33 High Court Justice (4 February 1929 - 17 April 1952) and Chief Justice (18 April 1952 - 13 April 1964). See, eg, N Stephen, *Sir Owen Dixon: A Celebration* (Melbourne University Press, Carlton, Victoria 1986); G Fricke, *Judges of the High Court* (Hutchinson of Australia, Melbourne 1986) 111-122; Dawson & Nicholls, "Sir Owen Dixon and Judicial Method" (1986) 15 *MULR* 543; G Mann, *The Rt Hon Sir Owen Dixon, OM, GCMG, 1886-1972* (LL B (Hons) thesis, Melbourne University 1975). For a critical perspective on Dixon's "informal extra-judicial activities" see Maher, "Tales of the Overt and the Covert: Judges and Politics in Early Cold War Australia" (1993) 21 *FL Rev* 151 at 168-175.

34 Letter of 1 June 1937 from Justice Dixon to Chief Justice Latham quoted in Bennett, *Keystone of the Federal Arch: A Historical Memoir of the High Court of Australia to 1980* 67. Compare Dixon's letter of 26 November 1935 to Justice Evatt: "I have been spending so much time in finding conclusions for reasons and reasons for conclusions in the very many cases now awaiting judgment that without a mental purgation I am unequal to the task": quoted in Bayne, "The Court, the Parliament and the Government - Reflections on the Scope of Judicial Review" (1991) 20 *FL Rev* 1 at 34 fn194.

35 (1952) 85 CLR xiv (Dixon's address at his swearing in as Chief Justice).

36 Barwick, *A Radical Tory* 218, 222-223, 251. For similar proposals see G Sawer, *Australian Federalism in the Courts* (Melbourne University Press, Melbourne 1967) 49-51; Fricke, *Judges of the High Court* 119 ("Dixon ... introduced a system of preliminary judicial conferences"). See also Marr, *Barwick* 221-223 ("talking on stairs," "shouting down into the stairwell," "haphazard" conferrals,

"casual and ad hoc" bargaining system "involved much of the horse-trading condemned by critics of the United States Supreme Court").

37 See, eg, H Perry, *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Harvard University Press, Cambridge, Massachussetts 1991); D Provine, *Case Selection in the United States Supreme Court* (University of Chicago Press, Chicago 1980); D O'Brien, *Storm Center: The Supreme Court in American Life* (Norton, New York 1993) 142-346; W Rehnquist, *The Supreme Court: How It Was, How It Is* (Morrow, New York 1987) 253-303; B Schwartz, *The Ascent of Pragmatism: The Burger Court in Action* (Addison-Wesley Publishing Company, Reading, Massachussetts 1990); H Spaeth & S Brenner, *Studies in US Supreme Court Behavior* (Garland Publishing, New York 1990); Hutchinson, "Felix Frankfurter and the Business of the Supreme Court, OT 1946 - OT 1961" [1980] *Sup Ct Rev* 143. See also fnn39, 42 below.

38 See, eg, Fricke, *Judges of the High Court* 28-29, 46, 99, 104, 132; Lloyd, "Not Peace but a Sword! - The High Court under JG Latham" (1987) 11 *Adel LR* 175 at 180-186.

39 See, eg, Thomson, "Conflict Among the Brethren" (1990) 1 *PLR* 100 (references); Thomson, "Book Review" (1987) 22 *Harv CR - CL L Rev* 290 (references); Schwartz, "An Administrative Law 'Might Have Been' - Chief Justice Burger's Bowsher v Synar Draft" (1990) 42 *Admin L Rev* 221; O'Brien, "John Marshall Harlan's Unpublished Opinions: Reflections of a Supreme Court at Work" [1991] *J Sup Ct Hist* 27; Novick, "The Unrevised Holmes and Freedom of Expression" [1992] *Sup Ct Rev* 303; Paulsen & Rosen, "Brown, Casey-Style: The Shocking First Draft of the Segregation Opinion" (1994) 69 *NYUL Rev* 1287; L Lusky, *Our Nine Tribunes: The Supreme Court in Modern America* (Praeger, Westport, Connecticut 1993) 177-190; Brenner, "The memos of Supreme Court law clerk William Rehnquist: conservative tracts or, mirrors of his justice's mind?" (1992) 76(2) *Judicature* 77; Thomson, "Playing With a Mirage: Oliver Wendell Holmes Jr and American Law" (1990) 22 *Rutgers LJ* 123 at 168-171; R Posner (ed), *The Essential Holmes* (University of Chicago Press, Chicago 1992); M Urofsky (ed), *The Douglas Letters* (Adler & Adler, Bethesda, Md 1987); M Urofsky & D Levy, *'Half Brother, Half Son': The Letters of Louis D Brandeis to Felix Frankfurter* (University of Oklahoma Press, Norman 1991); M Urofsky & D Levy (eds), *Letters of Louis D Brandeis* (State University of New York Press, Albany 1971-1978) (5 vols); M Freedman (ed), *Roosevelt and Frankfurter: Their Correspondence, 1928-1945* (Little, Brown, Boston 1967). See also M Marcus (ed), *The Documentary History of the Supreme Court of the United States, 1789-1800* (Columbia University Press, New York 1985-1994) (5 volumes published to date).

40 See, eg, J Niven (ed), *The Salmon P Chase Papers* Vol 1: Journals, 1829-1872 (Kent State University Press, Kent, Ohio 1993); J Lash, *From the Diaries of Felix Frankfurter* (Norton, New York 1975). For oral memoirs see, eg, Frankfurter, *Felix Frankfurter Reminisces* (Reynal and Company, New York 1960); Urofsky, "The Brandeis-Frankfurter Conversations" [1985] *Sup Ct Rev* 299; Fry, "The Warren Tapes: Oral History and the Supreme Court" [1982] *Yearbook: Supreme Court Historical Society* 10; Rawls, "The Earl Warren History Project: An Appraisal" (1987) 56 *Pac Hist R* 87.

41 See, eg, D Stephenson, *The Supreme Court and the American Republic: An Annotated Bibliography* (Garland Publishing, New York 1981); A Wigdor,

The Personal Papers of Supreme Court Justices: A Descriptive Guide (Garland Publishing, New York 1986); A deVergie & M Kell, *Location Guide to the Manuscripts of Supreme Court Justices* (Tarlton Law Library, University of Texas School of Law, Legal Bibliography Series, Number 16, September 1978); H Johnson, C Cullen & N Harris (eds), *The Papers of John Marshall* (University of North Carolina Press, Chapel Hill, North Carolina 1974-1995) (8 volumes published to date).

42 See, eg, J Wilkinson, *Serving Justice: A Supreme Court Clerk's View* (Charterhouse, New York 1974); Greenya, "Super Clerks" (1992) 6(5) *Washington Lawyer* 37; "Terms of Assessment" (July 1994) 80 *Am Bar Ass J* 52; Chen, "The Mystery and the Mastery of the Judicial Power" (1994) 59 *Mo L Rev* 281. See also J Oakley & R Thompson, *Law Clerks and the Judicial Process* (University of California Press, Berkeley 1980).

43 For references see, eg, M Urofsky (ed), *The Supreme Court Justices: A Biographical Dictionary* (Garland Publishing, New York 1994); C Cushman, *The Supreme Court Justices: Illustrated Biographies, 1789-1993* (Congressional Quarterly, Washington DC 1993) 535-550 (bibliography).

44 See, eg, *Oliver Wendell Holmes Devise History of the Supreme Court of the United States* (Macmillan, New York 1971-1994) (9 volumes published to date); B Schwartz, *A History of the Supreme Court* (Oxford University Press, New York 1993). On the establishment, progress and objectives of the Holmes Devise History project see Levinson, "Book Review" (1989) 75 *Va L Rev* 1429 fn2; Moglen, "Holmes Legacy and the New Constitutional History" (1995) 108 *Harv L Rev* 2027 at 2027-2029. See also J Snell & F Vaughan, *The Supreme Court of Canada: History of the Institution* (published for the Osgoode Society by the University of Toronto Press, Toronto 1985).

45 Prominent examples include D Fehrenbacher, *The* Dred Scott *Case: Its Significance in American Law and Politics* (Oxford University Press, New York 1978); E Monroe, *The* Wheeling Bridge *Case* (Northeastern University Press, Boston 1992); R Cortner, *A Mob Intent on Death: The NAACP and the Arkansas Riot Cases* (Wesleyan University Press, Middletown, Connecticut 1988); P Irons, *Justice at War: The Story of the Japanese American Internment Cases* (Oxford University Press, New York 1983); M Marcus, *Truman and the Steel Seizure Case: The Limits of Presidential Power* (Columbia University Press, New York 1977); R Kluger, *Simple Justice: The History of* Brown v Board of Education *and Black America's Struggle for Equality* (Knopf, New York 1976); P Wilson, *A Time to Lose: Representing Kansas in* Brown v Board of Education (University Press of Kansas, Lawrence, Kansas 1995); R Polenberg, *Fighting Faiths: The* Abrams *Case, The Supreme Court, and Free Speech* (Viking, New York 1987); E Cleary, *Beyond the Burning Cross: The First Amendment and the Landmark* RAV *Case* (Random House, New York 1994); D Manwaring, *Render Unto Caesar: The Flag Salute Controversy* (University of Chicago Press, Chicago 1962); D Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of* Roe v Wade (Macmillan, New York 1994); M Urofsky, *A Conflict of Rights: The Supreme Court and Affirmative Action* (Scribner's Sons, New York 1991).

46 Confidentiality for Justices' decision-making can be compared to judicial responses to executive confidentiality claims, eg, *United States v Nixon* (1974) 418 US 683 (President required to produce papers and tapes) and

Commonwealth v Northern Land Council (1993) 176 CLR 604 (disclosure of Cabinet documents in exceptional circumstances where public interest in Cabinet confidentiality outweighed by public interest in administration of justice).

47 In addition to law reports, lawyers' briefs and arguments are published. See, eg, P Kurland & G Casper (ed), *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* (University Publications of America, Frederick, Maryland 1978-) (volumes 1-276 published to date); P Irons & S Guitton, *May It Please the Court: The Most Significant Oral Arguments Made Before the Supreme Court Since 1955* (The New Press, New York 1993); L Friedman (ed), *Argument : The Oral Argument before the Supreme Court in* Brown v Board of Education of Topeka, *1952-55* (Chelsea House Publishers, New York 1969); L Friedman, *Obscenity; the Complete Oral Arguments Before the Supreme Court in the Major Obscenity Cases* (Chelsea House Publishers, New York, 1970); L Friedman (ed), United States v Nixon*: The President Before the Supreme Court* (Chelsea House Publishers, New York 1974). A microfiche series, with printed indices, is also available. See *Oral Arguments of the Supreme Court of the United States: The Warren Court, 1953 Term - 1968 Term* (University Publications of America, Frederick, Maryland 1980-); *The Complete Oral Arguments of the Supreme Court of the United States* (University Publications of America, Frederick, Maryland 1980-).

48 See, eg, Thomson, "Judicial Biography: Some Tentative Observations on the Australian Enterprise" (1985) 8 *UNSWLJ* 380 at 393-397 (bibliography).

49 See, eg, Bennett, *Keystone of the Federal Arch: A Historical Memoir of the High Court of Australia to 1980*; B Galligan, *Politics of the High Court.*

50 See, eg, A May, *The Battle for the Banks* (Sydney University Press, Sydney 1968); G Williams, *The Communist Party Case: A Study in Law and Politics* (LL B (Hons) thesis, Macquarie University 1991); Winterton, "The Significance of the Communist Party Case" (1992) 18 *MULR* 630; Maher, "Dissent, Disloyalty and Disaffection: Australia's Last Cold War Sedition Case" (1994) 16 *Adel LR* 1.

51 Examples, which may provide an indication of what is available, include R Joyce, *Samuel Walker Griffith* (University of Queensland Press, St Lucia, Qld 1984) 412 ("Diaries, 1862-1912. 54 volumes"); Barwick interviews, fn2 above; *Sir John Latham: A Guide to His Papers in the National Library of Australia* (Manuscript Section, National Library of Australia, Canberra 1980); R Joyce, *Samuel Walker Griffith* 412; Joyce, "Samuel Griffith, the Biographer, and the matter of Sources" in J Walter & R Nugent (eds), *Biographers at Work* (Griffith University for the Institute for Modern Biography, Nathan, Qld 1984) 17.

52 "Short" because the High Court commenced operation on 6 October 1903: Bennett, *Keystone of the Federal Arch: A Historical Memoir of the High Court of Australia to 1980* 23.

53 1903-1919. See, eg, Fricke, *Judges of the High Court* 18, 19, 46 (dominance and command of High Court).

54 "Dixon's authority over the [High] Court was not only reflected in the more civilized court room atmosphere; his influence behind the scenes was also important ... But Dixon did not attempt to browbeat puisne Judges into accepting his views": Fricke, *Judges of the High Court* 118-119. See also fn33 above.

55 Compare Barwick's view of the Chief Justice's function in text accompanying fnn61-80 below. An American example is L Baker, *John Marshall: A Life in Law* (Macmillan, New York 1974); Seddig, "John Marshall and the Origins of Supreme Court Leadership" (1975) 36 *U Pitt L Rev* 785. See also fn63 below.

56 Barwick, *A Radical Tory* 251.

57 (1988) 156 CLR 360. See fn28 above. See, eg, Coper, "Section 92 of the Australian Constitution Since *Cole v Whitfield*" in H Lee & G Winterton (eds), *Australian Constitutional Perspectives* (Law Book Company, Sydney 1992) 129.

58 Not merely Commonwealth because (although the High Court receives jurisdiction and funding from the Commonwealth Parliament and judicial appointments are made by the Commonwealth executive) it decides issues involving Commonwealth, State and Territory constitutions, laws and the common law. With respect to State and Territory constitutions and the common law, this is a marked contrast with the US Supreme Court.

59 For Barwick's formalistic view of those functions, including resolving disputes (not "social engineering"), applying (not making) the law, interpreting the Constitution and utilizing precedent see Barwick, *A Radical Tory* 218, 224, 240, 274-275.

60 Compare Learned Hand's remark: "Who in hell cares what anybody says about [constitutional questions] but the Final Five of the august Nine ... ?": Judge Hand's letter of 6 February 1934 to Chief Justice Stone, quoted in A Mason, *Harlan Fiske Stone: Pillar of the Law* (Viking Press, New York 1956) 384. See generally Thomson, "Learned Hand: Evaluating a Federal Judge" (1995) 22 *N Ky L Rev* 763.

61 Marr, *Barwick* 212. Compare *Commonwealth Constitution* s71 ("The High Court shall consist of a Chief Justice").

62 On 8 December 1980 Barwick considered that "it is quite clear that in every instance a chief justice is regarded as having some functions beyond those of other justices": quoted in Marr, *Barwick* 211. See also text accompanying fnn67-73 below.

63 Marr, *Barwick* 221-222. Even on this narrow view, a Chief Justice is above other Justices. Further, these administrative functions give Chief Justices power. See, eg, Marr, *Barwick* 221-222 ("controlled flow of work," "assigned cases," "determined which of the justices would hear which issues"). Add to this Barwick's view that "[t]he most important function of the Chief Justice during a hearing ... is to identify and bring to the fore the problems the case presents, to establish the issues of fact and law which arise for solution, and to put aside peripheral and irrelevant considerations." In these matters, Barwick was "rarely" challenged: Barwick, *A Radical Tory* 218-219. Compare the power and use or misuse of "administrative" opinion assignment in the US Supreme Court: see, eg, J Jeffries, *Justice Lewis F Powell, Jr* (Scribner's Sons, New York 1994) 333, 337-339; Ulmer, "The Use of Power in the Supreme Court: The Opinion Assignments of Earl Warren, 1953-1960" (1970) 19 *J Pub L* 49. See, generally, R Steamer, *Chief Justice: Leadership and the Supreme Court* (University of South Carolina Press, Columbia, South Carolina 1986); Morrison & Stenhouse, "The Chief Justice of the United States: More than Just the Highest Ranking Judge" (1984) 1 *Const Commentary* 57.

64 *Judiciary Act* 1903 (Cth) s23 (in cases, other than appeals from a High Court Justice, State or Territory Supreme Courts, the Federal Court, Industrial Relations Court or Family Court, "the opinion of the Chief Justice, or if [the Chief Justice] is absent the opinion of the Senior Justice present, shall prevail"). See, eg, Sawer, *Australian Federalism in the Courts* 47-48.

65 Barwick, *A Radical Tory* 249.

66 As above 251. Barwick "believed the tradition of the Chief Justice swearing in Senators at the opening of the [Commonwealth] parliament that [Senators] and ... members of the House of Representatives ... sat by virtue of his imprimatur": Marr, *Barwick* 212.

67 Barwick, *A Radical Tory* 269.

68 Marr, *Barwick* 211-212. Similarly, see Blackshield, "Barwick - great and vague powers" (1980) 21 *Aust Book Rev* 1 at 4-5.

69 Marr, *Barwick* 212.

70 On justiciability see G Lindell, *Justiciability of Political Questions Under the Australian and United States Constitutions* (LL M thesis, University of Adelaide 1972); Lindell, "The Justiciability of Political Questions: Recent Developments" in Lee & Winterton (eds), *Australian Constitutional Perspectives* 180; Mulhern, "In Defense of the Political Question Doctrine" (1988) 37 *U Pa L Rev* 97; Nagel, "Political Law, Legalistic Politics" (1989) 56 *U Chi L Rev* 643; *Nixon v United States* (1993) 506 US 224.

71 Barwick, *Sir John Did His Duty* 77. See also 84 ("It would be strange if the Governor-General were unable to seek the advice of the Chief Justice on a non-justiciable question"). Barwick's letter of 10 November 1975 stated that he "considered [himself], as Chief Justice of Australia, free, on Your Excellency's request, to offer you legal advice as to your Excellency's constitutional rights and duties in relation to an existing situation which, of its nature, was unlikely to come before the [High] Court": Barwick, *A Radical Tory* 291.

72 As above 290-291. Further discussions and examples are in Barwick, *Sir John Did His Duty* 87-94; G Sawer, *Federation Under Strain: Australia, 1972-1975* (Melbourne University Press, Carlton, Victoria 1977) 157-158; Marr, *Barwick* 284; Paul, "The Dismissal: History Justifies Barwick's Advice" 130 *Bulletin*, 1 March 1983 at 50; Sawer, "Parallels between State and Federal crises not really relevant" *Canberra Times*, 23 March 1983 at 2; Paul, "Constitutional Consultations" *Canberra Times*, 14 April 1983 at 2; Sawer, "Barwick Disputed on Whether Sir John Did his duty" *Canberra Times*, 14 December 1983 at 2; Winterton, "The Third Man" (1984) 28(4) *Quadrant* 23 at 26; Paul, "An Epistle from Paul" (1984) 28(4) *Quadrant* 27 at 36-37; Markwell, "On Advice from the Chief Justice" (1985) 29(7) *Quadrant* 38. Apparently, Justice Mason also gave legal advice to Governor-General Kerr: P Kelly, *November 1975: The Inside Story of Australia's Greatest Political Crisis* 226-227. See also Lloyd, "Not Peace but a Sword! - The High Court under JG Latham" (1987) 11 *Adel LR* 175 at 195-196 (Latham's advice on constitutional issues to Commonwealth ministers). Compare US Supreme Court Justices' advice to American Presidents: see, eg, B Murphy, *The Brandeis/Frankfurter Connection: The Secret Political Activities of Two Supreme Court Justices* (Oxford University Press, New York 1982); Danelski, "The Propriety of Brandeis's Extrajudicial Conduct" in N Dawson (ed), *Brandeis and America* (University Press of Kentucky, Lexington, Kentucky 1989) 11; Nathanson, "The Extra-Judicial

Activities of Supreme Court Justices: Where Should the Line be Drawn?" (1983) 78 *Nw U L Rev* 494; L Kalman, *Abe Fortas: A Biography* (Yale University Press, New Haven 1990) 293-318.

73 Barwick, *A Radical Tory* 290 (advice to Governor-General Casey on two questions and to Governor-General Hasluck on the office of Governor-General). See also 214-215 (advice to former Prime Minister Menzies on Senate's refusal of supply). For Barwick's other "extra-judicial" activities and his view that he "had to be careful not to become involved in political matters" see 259-264. But, for criticism, see J Wright, *The Coral Battleground* (Thomas Nelson (Australia), West Melbourne, Victoria 1977) 80; Whitlam, "Barwick By Whitlam, A Non Admirer" *Sydney Morning Herald*, 23 May 1980 at 7. See also fn77 below (1975 involvement in politics).

74 See fn72 above (Sawer and Winterton).

75 Supporters of Barwick's position include Paul and Markwell: see fn72 above.

76 Barwick, *A Radical Tory* 290-291. This passage is an almost verbatim reproduction from Barwick, *Sir John Did His Duty* 76-77. However, the former omits two sentences in the latter: "It did not involve [Barwick] in trespass upon the executive power. [Barwick] did not breach the strictest view of the separation of powers." In this context, note the suggestion that "Barwick CJ indicated his dissatisfaction with the outcome in the *Boilermakers* case and showed no enthusiasm for a subtle and technical doctrine of separation of powers": Rumble, *Sir Garfield Barwick's Approach to the Constitution* 483. Compare *Grollo v Commissioner of the Australian Federal Police* (1995) 69 ALJR 724 (discussing relationship between separation of powers and persona designata doctrine). See also fnn107, 110 below (justiciability of decision as to whether an issue is non-justiciable).

77 See, eg, Marr, *Barwick* 284 ("hustings," "petitions and letters of protest," "chanting" and "hostile" professional criticism). See, generally, Kelly, *November 1975: The Inside Story of Australia's Greatest Political Crisis.*

78 Two issues are involved. Are the issues involved in Barwick's advice non-justiciable?: see text accompanying fnn106-112 below. Are Barwick's propositions correct as a matter of constitutional law?: see text accompanying fnn89-90 below.

79 For biographies see Thomson, "Judicial Biography: Some Tentative Observations on the Australian Enterprise" (1985) 8 *UNSWLJ* 380; J Priest, *Sir Harry Gibbs: Without Fear or Favour* (Scribblers Publishing, Mudgeeraba, Qld 1995); Waterford, "His Honour: The Radical" (April 1995) *The Independent Monthly* 84; Jackson, "Sir Anthony Mason AC, KBE" (1995) 69 *ALJ* 610.

80 Compare fn63 above (American scholarship).

81 Barwick, *A Radical Tory* 72.

82 For example in *Bank Nationalisation* (1949) 79 CLR 497; *Hughes & Vale Pty Ltd v NSW [No 1]* (1945) 93 CLR 1. Barwick sat on the Privy Council and considered the Privy Council of "benefit": Barwick, *A Radical Tory* 61, 222, 256. But see Marr, *Barwick* 293 (Barwick's involvement in attempts to end Privy Council appeals).

83 See *Commonwealth Constitution* s74; P Lane, *Lane's Commentary on The Australian Constitution* (Law Book Company, Sydney 1986) 386-387 ("theoretical possibility" of appeals from High Court to Privy Council). See also

Australia Act 1986 (Cth & UK) ss11, 16 (definition of "Australian court" excludes "the High Court").

84 See, generally, A Blackshield, *The Abolition of Privy Council Appeals: Judicial Responsibility and "The Law for Australia"* (Adelaide Law Review Association, University of Adelaide 1978); Blackshield, "The Last of England: Farewell to their Lordships Forever" (1982) 56 *LIJ* 780; "'Patriation' to Australia of the Privy Council's Appellate Jurisdiction" (1984) 58 *ALJ* 307; Goldring, "The Privy Council as a Constitutional Court: Canadian Antecedents of Australian Constitutional Interpretation" (1992) 10(1) *Aust-Canadian Stud* 1.

85 Before 3 March 1986, the United Kingdom Parliament may (through the doctrine of UK Parliamentary sovereignty) have been considered a guardian of the *Commonwealth Constitution.* For a debate as to the pre-1986 position see Thomson, "Altering the Constitution: Some Aspects of Section 128" (1983) 13 *FL Rev* 323 at 342-344. Post 3 March 1986 see *Australia Act* 1986 (Cth & UK); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 138 per Mason CJ ("the *Australia Act* 1986 (UK) marked the end of the legal sovereignty of the Imperial Parliament").

86 Barwick, *A Radical Tory* 284. That is, the Commonwealth Parliament controls s64 of the *Commonwealth Constitution.* If the Governor-General's constitutional duty to dismiss a Prime Minister, who cannot obtain supply from the Parliament, flows from s61 of the Constitution and the Vice Regal oath of office (see text accompanying fn101 below), does the Commonwealth Parliament also control s61 and that oath?

87 For a discussion of no-confidence motions and "constructive" no-confidence motions see Winterton, "The Constitutional Position of Australian State Governors" in Lee & Winterton (eds), *Australian Constitutional Perspectives* 274, 296-297, 324-326. See also fn95 below (Senate rejection or deferral of supply as a no-confidence motion).

88 Barwick, *A Radical Tory* 284, 285. See also Barwick, *Sir John Did His Duty* 54-57, 100 ("it is through its power over the Consolidated Fund that the Parliament controls the executive government").

89 Barwick, *A Radical Tory* 284, 285. Similarly, see Barwick, *Sir John Did His Duty* 4-5, 54-57, 97-124; Barwick, "The Economics of the 1975 Constitutional Crisis" (1985) 29(3) *Quadrant* 37; Barwick, "Dismissal by the Governor-General" *Canberra Times*, 9 December 1983 at 2; Barwick, "Sir John Did His Duty" *Times Literary Supplement*, 17 August 1984 at 917-918; Barwick, "Parliamentary Democracy in Australia" (1995) 25 *UWALR* 21 at 24-25. Other proponents of this view include Paul, "An Epistle from Paul" (1984) 28(4) *Quadrant* 27; Markwell, "The Dismissal" (1984) 28(3) *Quadrant* 11; Markwell, "Sir John Did His Duty" *Times Literary Supplement*, 29 June 1984 at 727; Aickin, Gleeson & Lane, "Opinion" in Sexton, *Illusions of Power: The Fate of a Reform Government* 218-221; Kelly, *November 1975: The Inside Story of Australia's Greatest Political Crisis* 231; Ellicott, "Opinion" in Kelly, *November 1975: The Inside Story of Australia's Greatest Political Crisis* 145-148, 318-321.

90 Those disagreeing with this Barwick view include Sawer, *Federation Under Strain: Australia, 1972-1975* 141-172; Sawer, "Barwick Disputed on Whether Sir John Did His Duty" *Canberra Times*, 14 December 1983 at 2; Byers, "Opinion" in Kelly, *November 1975: The Inside Story of Australia's Greatest Political Crisis* 322-342; Solomon, "November 11: Barwick's Defence"

Australian Financial Review, 11 November 1983 at 35, 38; Evans, "Sir John Did His Duty" *Times Literary Supplement*, 22 June 1984 at 696-697; Evans, "No duty' to dismiss Government" *Canberra Times*, 12 November 1983 at 16; Evans, "Repatriating the Debate" (1984) 28(11) *Quadrant* 76; Winterton, "Matters for Argument" *The Age*, Extra, "Books", 12 August 1995 at 8; Winterton, 'The Third Man" (1984) 28(4) *Quadrant* 23 at 23-25; Winterton, "Sacking Highlights Dangers of Brinkmanship" *Weekend Australian*, The Dismissal, 11 November 1995 at 4; Kelly, *November 1975: The Inside Story of Australia's Greatest Political Crisis* 290-295, 312.

91 *Commonwealth Constitution* s128 ("The proposed law for the alteration [of the Constitution] must be passed by an absolute majority of each House of the [Commonwealth] Parliament"). But such a proposed law can also be put to a referendum even if it is only passed by one House: see s128 para 2.

92 *Commonwealth Constitution* s51(xxxvi) (Commonwealth legislative power to deal with matters where the Constitution's text indicates that "the Parliament [can] otherwise provide[ ]"). For an exposition, within the context of the relationship between s51(xxxvi) and s96, see G Winterton, *The Appropriation Power of the Commonwealth* (LL M thesis, University of WA 1968) 178-192; Saunders, "Towards a Theory for Section 96" (1987) 16 *MULR* 1 at 8-10. Barwick has suggested that "a large number of provisions in the Constitution ... leave to the [Commonwealth] Parliament the power of altering the actual constitutional provisions": *Attorney-General (Cth); ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 24.

93 Barwick, *A Radical Tory* 283, 284, 285, 296.

94 Barwick, *A Radical Tory* 283. But note *Commonwealth Constitution* s1 (Parliament includes "the Queen"), s15 (State Governors and Parliaments can, and do, appoint Senators). The extent, if any, to which territorial senators may be appointed, as provided for by the *Commonwealth Electoral Act* 1918 (Cth) s44, rather than elected, may depend on the meaning of "representation" in *Commonwealth Constitution* s122. See also Barwick, *A Radical Tory* 233-234, 286 (discussing s15 and appointment of Senators). Barwick suggests that the 1977 amendment to s15 "turned the [s15] senator into a representative of a political party and not merely one of the State which elected or appointed him. This was a considerable inroad into the theory of the federation, and ... [i]t further entrenched the party system and increased its dominant position in the [Commonwealth] Parliament": Barwick, *A Radical Tory* 234. However, Barwick does not consider the implications, if any, of this view for his propositions that "the democratic nature of government" in Australia "is safeguard first by [the Commonwealth] Parliament being elected by the people" and that the Governor-General's actions of November 1975 "demonstrated the place and strength of the [Governor-General's] office in the operation of parliamentary democracy": Barwick, *A Radical Tory* 292, 297.

95 Barwick, *A Radical Tory* 284-285. For a different view of the consequences of a Senate vote to reject or defer supply, namely, "its constitutional insignificance" even if it constitutes a vote of no-confidence in the Commonwealth government, see Winterton, "The Third Man" (1984) 28(4) *Quadrant* 23 at 24-25; Winterton, "Sacking Highlights Dangers of Brinkmanship" *Weekend Australian*, The Dismissal, 11 November 1995 at 4. Barwick supporters include Paul, "An

Epistle from Paul" (1984) 28(4) *Quadrant* 27 at 28-35. See also fnn89, 90 above.

96 *Commonwealth Constitution* s128 ("electors ... qualified to vote for the House of Representatives"). See, generally, B Galligan & J Nethercote (eds), *The Constitutional Commission and the 1988 Referendums* (Centre for Research on Federal Financial Relations and Royal Australian Institute of Public Administration (ACT Division), Canberra 1989).

97 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 138 per Mason CJ.

98 For American views see, eg, E Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (Norton, New York 1988); Thomas, "Just Say Yes" 35(18) *NY Rev of Books*, 24 November 1988 at 43; B Ackerman, *We The People: Foundations* (Belknap Press of Harvard University Press, Cambridge, Massachussetts 1991); Ackerman & Katyal, "Our Unconventional Founding" (1995) 62 *U Chi L Rev* 475; "Symposium on Bruce Ackerman's We the People" (1994) 104 *Ethics* 446-535.

99 Editorial, "An Arrogant Silence" *Canberra Times*, 4 July 1975 at 2 (quoted in and criticised by Zines & Lindell, "Guardian of the rule of law" *Canberra Times*, 2 August 1975 at 2). See also Winterton, "The Constitutional Position of Australian State Governors" in Lee & Winterton (eds), *Australian Constitutional Perspectives* 295 ("The Governor is undoubtedly 'the *ultimate* constitutional watchdog for protecting parliamentary democracy and the constitution'") (emphasis added, quoting Tasmanian Department of Education and the Arts, *The Role of the Governor of Tasmania* (Tasmanian Department of Education and the Arts in conjunction with His Excellency the Governor's Establishment, Hobart 1990) 9).

100 Governors-General swear two oaths: the oath of allegiance and the oath for the due execution of the Governor-General's office. On 11 July 1974 Sir John Kerr took an oath of office: "I, Sir John Robert Kerr, do swear that I will well and truly serve Her Majesty Queen Elizabeth the Second, her heirs and successors according to law, in the office of Governor-General of Australia and Commander-in-Chief of the Defence Force of Australia, and that I will do right to all manner of people after the laws and usages of Australia, without fear or favour, affection or ill-will. So help me God." On 11 November 1974 he took an oath of allegiance: "I, Sir John Robert Kerr, do swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her heirs and successors according to law. So help me God." See, eg, "Instructions to our Governor-General" dated 29 October 1900 and 11 August 1902 in *Statutory Rules made under Commonwealth Acts from 1901 to 1956 and in force on 31st December, 1956* Vol 5 (Butterworths & Law Book Company, Sydney 1960) 5310-5313; Letters Patent Relating to the Office of Governor-General of the Commonwealth of Australia dated 21 August 1984. Compare the President's oath in the United States Constitution Article II s 1 cl 7 ("I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States").

101 G Barwick, "Dismissal by the Governor-General" *Canberra Times*, 9 December 1983 at 2. Critics of this reliance on s61 include Evans, "'No duty' to dismiss Government" *Canberra Times*, 12 November 1983 at 16; G Winterton,

Parliament, The Executive and The Governor-General: A Constitutional Analysis (Melbourne University Press, Melbourne 1983) 31-38, 228-233 (also criticising the thesis combining "the Constitution [s61] 'maintenance' power ... with the doctrine of the [Crown's] reserve powers ... to create a power in the Governor-General to act on his own initiative to 'maintain' the Constitution"). Compare fn99 above. See also *Attorney-General (Cth); ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 29 per Barwick CJ ("Section 61 places in the executive power of the Commonwealth, among other things, the execution of the constitutional manner of determining the number of members to be chosen in the States to execute the Constitution.").

102 See, eg, *Cormack v Cope* (1974) 131 CLR 432 at 449, 452, 453, 454, 455, 460; *Attorney-General (Cth); ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 17; *Victoria v Commonwealth* (the *PMA* case) (1975) 134 CLR 81 at 117-119; *Western Australia v Commonwealth* (1975) 134 CLR 201 at 233; *Victoria v Commonwealth* (1975) 134 CLR 338 at 364. For Barwick's distinction between the *PMA* case and his 10 November 1975 advice see Barwick, *Sir John Did His Duty* 83-84.

103 Barwick, *A Radical Tory* 240. See also 243, 250, 275, 276.

104 See fn102 above. For opposing arguments and exceptions see Lindell, "The Justiciability of Political Questions: Recent Developments" in Lee & Winterton (eds), *Australian Constitutional Perspectives* 223-239.

105 For others see Lindell, "The Justiciability of Political Questions: Recent Developments" in Lee & Winterton (eds), *Australian Constitutional Perspectives* 229-239. See also fn112 below.

106 Barwick, *A Radical Tory* 284. See also 291; Barwick, *Sir John Did His Duty* 68, 74, 76-87, 94, 100, 105-106, 109; Barwick, "Sir John Did His Duty" *Times Literary Supplement*, 17 August 1984 at 918; Barwick, "Sir Garfield v Gareth Evans" (1985) 29 (1&2) *Quadrant* 3-4. Other proponents of non-justiciability include Markwell, "The Dismissal" (1984) 28(3) *Quadrant* 11 at 17-18; Markwell, "Sir John Did His Duty" *Times Literary Supplement*, 29 June 1984 at 727; Markwell, "On Advice from the Chief Justice" (1985) 29(7) *Quadrant* 38 at 41-42; Paul, "An Epistle from Paul" (1984) 28(4) *Quadrant* 27 at 35-36; Kelly, *November 1975: The Inside Story of Australia'a Greatest Political Crisis* 226. Proponents of justiciability include Winterton, "The Third Man" (1984) 28(4) *Quadrant* 23 at 25-26; Winterton, *Parliament, The Executive and The Governor-General: A Constitutional Analysis* 125-127, 307-308; Howard, "But did Sir Garfield do his duty?" (1984) 58 *LIJ* 136; Sawer, *Federation Under Strain: Australia, 1972-1975* 158; Sawer, "Barwick Disputed on Whether Sir John Did His Duty" *Canberra Times*, 14 December 1983 at 2; Sawer, "Parallels between State and Federal crises not really relevant" *Canberra Times*, 23 March 1983 at 2; Evans, "'No duty' to dismiss Government" *Canberra Times*, 12 November 1983 at 16; Evans, "Repatriating the Debate" (1984) 28(11) *Quadrant* 76 at 77; Starke, "Book Review" (1977) 51 *ALJ* 276 at 277; Starke, "Book Review" (1984) 58 *ALJ* 120; Aust, Constitutional Commission, Advisory Committee on Executive Government, *Report of the Advisory Committee on Executive Government* (Constitutional Commission, Sydney 1987) 45. For the suggestion that "the difference between these opposing views on [whether the legal validity of the Governor-General's 1975 dismissal of the Prime Minister is or should be treated as a justiciable issue] may not be as great as first appears", see Lindell,

"The Justiciability of Political Questions: Recent Developments" in Lee & Winterton (eds), *Australian Constitutional Perspectives* 183; Lindell, "Book Review" (1983) 6 *UNSWLJ* 261 at 264-265.

107 The question whether an issue or constitutional provision is non-justiciable is itself a justiciable question: see, eg, Winterton, "The Third Man" (1984) 28(4) *Quadrant* 23 at 26; Aust, Constitutional Commission, Advisory Committee on Executive Government, *Report of the Advisory Committee on Executive Government* 45; Gibb, "Book Review" (1984) 9 *Adel LR* 426 at 428.

108 Barwick, *A Radical Tory* 108. Compare fn71 above.

109 Was it "within [the Governor-General's] constitutional power with the prevailing [11 November 1975] circumstances ... to terminate the ministry's commission and to appoint a caretaker Prime Minister who could obtain supply and would advise a double dissolution"?: Barwick, *A Radical Tory* 291. For the possibility that the "caretaker Prime Minister" may have not been able to "obtain" supply see Sawer, *Federation Under Strain: Australia, 1972-1975* 165-170; Kelly, *November 1975: The Inside Story of Australia's Greatest Political Crisis* 278 (the caretaker Prime Minister "was not in a position to guarantee supply; he secured supply only because [former Prime Minister] Whitlam [did not use] every parliamentary weapon" including Senate procedural motions to delay passage of Supply Bills, House of Representatives motions to rescind previous votes on supply and not conveying Supply Bills to the Governor-General for assent). On the actual and possible manoeuvrings see Kelly, *November 1975: The Inside Story of Australia's Greatest Political Crisis* 262-280.

110 "No court has decided who should be the Crown's adviser": Barwick, *Sir John Did His Duty* 84. But see Winterton, "The Third Man" (1984) 28(4) *Quadrant* 23 at 25 ("cases ... have considered the dismissal of Ministers, including Chief Ministers, in Nigeria, Malaysia and Papua New Guinea"). Those cases are *Adegbenro v Akintola* [1963] AC 614 (PC); *Ningkan v Openg* [1966] 2 MLJ 187 (Borneo HC); *State v Independent Tribunal ex parte Sasakila* [1976] PNGLR 491. "Whether or not a matter is justiciable is itself a justiciable question. [Therefore] [u]ntil such time as the High Court has pronounced a view upon [this question] Sir Garfield has no authority on which to base his view that the matter is non-justiciable": Gibb, "Book Review" (1984) 9 *Adel LR* 426 at 428.

111 Compare and contrast text accompanying fnn102, 103 above.

112 See, generally, fn70 above.

113 Commonwealth legislation can reduce or add to jurisdiction under the *Commonwealth Constitution* ss73, 76. See, eg, on s73 R Lumb & G Moens (eds), *The Constitution of the Commonwealth of Australia Annotated* (Butterworths, Sydney, 5th ed 1995) 377-384; *Smith Kline & French Laboratories (Australia) Ltd v Commonwealth* (1991) 173 CLR 194 (Commonwealth legislation precluding s73 appeals to High Court unless the Court granted special leave was a valid legislative regulation of the Court's appellate jurisdiction).

114 *Commonwealth Constitution* s72(ii). See, generally, Lindell, "The Justiciability of Political Questions: Recent Developments" in Lee & Winterton (eds), *Australian Constitutional Perspectives* 233-239. See also Barwick, *A Radical Tory* 226.

115 *Commonwealth Constitution* s72(i). See, generally, Thomson, "Appointing Australian High Court Justices: Some Constitutional Conundrums" in Lee &

Winterton (eds), *Australian Constitutional Perspectives* 251 at 273 fn141. In this context, compare Barwick's contrasting attitudes to his own and Murphy's appointments: Barwick, *A Radical Tory* 208-215, 231-233. Barwick in August 1958 declined the offer of appointment as a Justice: Barwick, *A Radical Tory* 111-112.

116 Barwick, *A Radical Tory* 227-228 (unsuccessful attempts by Barwick to have the High Court control the obtaining, budgeting and expenditure of its funds). See, generally, *High Court of Australia Act* 1979 (Cth) ss35-44; Gibbs, "The High Court as a Separate Entity" in G Moloney (ed), *Seminar on Constitutional and Administrative Responsibilities for the Administration of Justice: The Partnership of Judiciary and Executive, 10-11 August 1985* (Australian Institute of Judicial Administration Inc, Canberra 1986) 101-102.

117 Compare (non)enforcement of US Supreme Court orders: see, eg, Thomson, "Executive Power, Scope and Limitations: Some Notes from a Comparative Perspective" (1983) 62 *Tex L Rev* 559 at 562 fn12 (examples and references).

118 Is the High Court created by the *Commonwealth Constitution* or legislation? One view suggests that "[t]he High Court is created by s71 [of the Constitution] itself": Lane, *Lane's Commentary on The Australian Constitution* 351. For the view that the Commonwealth Parliament must, because of s71, take action to bring the High Court into existence see J Quick & R Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, Sydney 1901) 723-724. A more tentative view is that "[t]he Constitution does not create any federal courts, and ... the policing of the Constitution could and should be left to the [state courts] ... However, a majority in the first Parliament ultimately concurred with the view ... that the High Court of Australia envisaged in the Constitution should be brought into existence; hence the Judiciary Act was assented to on 25 August 1903": Sawer, *Australian Federalism in the Courts* 20-21. See also fn52 above. For debate on the Judiciary Bills see Bennett, *Keystone of the Federal Arch: A Historical Memoir of the High Court of Australia to 1980* 12-20; Galligan, *Politics of the High Court* 72-77.

119 But see *Smith Kline & French Laboratories (Australia) Ltd v Commonwealth* (1991) 173 CLR 194 (Commonwealth legislation regulating High Court's appellate jurisdiction under s73 of the *Commonwealth Constitution*). An analogous American example is *Ex parte McCardle* (1869) 74 US 506 (congressional legislation repealing an aspect of the Supreme Court's appellate jurisdiction). See, generally, C Fairman, *Reconstruction and Reunion, 1864-88* (Macmillan, New York 1971 (Vol 6 of Oliver Wendell Holmes Devise History)) 433-514; D Currie, *The Constitution in the Supreme Court: The First Hundred Years* (University of Chicago Press, Chicago 1985) 304-307. See, generally, Thomson, "State Constitutional Law: American Lessons for Australian Adventures" (1985) 63 *Tex L Rev* 1225 at 1253-1258 (jurisdictional impairment and vulnerability of courts).

120 See also exceptions to judicial review in Lindell, "The Justiciability of Political Questions: Recent Developments" in Lee & Winterton (eds), *Australian Constitutional Perspectives* 229-239.

121 For suggestions that *WA v Commonwealth* (1975) 134 CLR 201 (Commonwealth legislation providing for Territorial Senators held constitutionally valid, Barwick CJ dissenting) was a "pivotal event" in the 1975

crisis, see Marr, *Barwick* 256-257; Kelly, *November 1975: The Inside Story of Australia's Greatest Political Crisis* 109-115.

122 See, generally, Kelly, *November 1975: The Inside Story of Australia's Greatest Political Crisis*; R Eggleston & E St John, *Constitutional Seminar* (New South Wales University Press, Kensington, NSW 1977) 63-68 (bibliography).

123 For the events and missed parliamentary strategies for Whitlam to have "ruined" Governor-General Kerr's "stratagem", see Kelly, *November 1975: The Inside Story of Australia's Greatest Political Crisis* 264-280. Specifically on the failure to institute judicial proceedings see Thomson, "Non-Justiciability and the High Court" (paper presented to The Constitution and Australian Democracy Conference, Canberra 10 November 1995).

124 For tentative inquiries see Thomson, "An Australian Bill of Rights: Glorious Promises, Concealed Dangers" (1994) 19 *MULR* 1020 at 1063 fn279.

125 One of "Barwick's ... main weaknesses is that he is less effective when briefed by governments to defend official action [eg, *Communist Party Case* (1951) 83 CLR 1], than when briefed to attack governments [eg, *Bank Nationalisation Case* (1948) 76 CLR 1 (High Court) (1949) 79 CLR 497 (Privy Council)]": Sawer, "Absolutely Free Man" 45 *Nation*, 4 June 1960 at 10.

126 See fn26 above (divergent interpretative approaches, doctrines and results).

127 Compare, for example, the text accompanying fn101 above (Governor-General maintains the Constitution) and fn103 above (High Court is the guardian of the Constitution).