ended by expressing his 'heavy sorrow' at dissenting from the majority.

He showed learning and common sense in the case of *Nelan v Downes* (1917). A Catholic widow bequeathed £50 to the parish priest of Colac, Victoria, for masses to be said for the souls of her deceased husband and herself. The Supreme Court of Victoria declared the bequest void on the grounds that the law of England (where Anglicanism was the established church) did not recognise such practices, so that the gift could not be described as charitable. Barton led Isaacs and Powers in overturning the Victorian decision, on the grounds that English law did not necessarily apply in the states of Australia, where all religious faiths stood on an equal footing. The verdict was received appreciatively by the Catholic community; it also showed Barton's unwillingness to be strictly bound by English practice.

In a case in which a Perth newspaper proprietor sought to appeal against an award to the Australian Journalists' Association, Barton delivered the Court's decision in what Clem Lloyd has described as a judgment of 'majestic simplicity': 'These **orders** ***nisi*** will be discharged. There will be no order as to **costs**. The Court does not think fit to make any further observations' (*R v Commonwealth Court of Conciliation and Arbitration; Ex parte Daily News* (1919)).

Griffith resigned in June 1919, six months after the Commonwealth Parliament finally legislated to award him a pension at half salary. Barton had not unrealistic expectations that he would be offered the vacant position. Higgins and Powers supported his claim; and Isaacs, Gavan Duffy and Rich agreed that it would be intolerable if an 'outsider' were appointed. Griffith, however, was active at this point in lobbying for Knox. Barton's poor health suggested the risk of an untimely death, which might allow Labor to replace him with a sympathetic Chief Justice such as Isaacs or Higgins. Griffith's thoughts were conveyed to the Governor-General, Munro Ferguson, who agreed to communicate them to Hughes. Ultimately, when Barton intimated his interest in the position to Hughes through Ferguson, it was too late. Cabinet had decided on Knox.

When Barton died in 1920 he was given a state funeral at St Andrew's Cathedral in Sydney. His immediate judicial legacy, like that of Griffith, was coming to an end. The Isaacs-inspired decision in the ***Engineers Case*** (1920) swept aside two of the doctrines that the members of the first Court had laboured so hard to defend. But the enduring legacy of Barton was as a nation builder, a task he performed in both Parliament and Court.

Geoffrey Bolton
John Williams

***Further Reading***

Geoffrey Bolton, *Edmund Barton* (2000)
John Reynolds, *Edmund Barton* (1948)
Martha Rutledge, *Edmund Barton* (1974)

**Barwick, Garfield Edward John** (*b* 22 June 1903; *d* 13 July 1997; Chief Justice 1964–81), longest-serving **Chief Justice** of the High Court, achieved unrivalled pre-eminence as a barrister, but was less successful as a Commonwealth minister and as Chief Justice.

Born in Sydney, the son of Methodists Jabez Edward Barwick, a printer and former journalist, and Lily Grace Ellicott, Barwick attended St John's Parish School, Darlinghurst, and then state schools: Bourke Street Primary, Cleveland Street High and Fort Street High.

Barwick was not successful at sport, being slight in stature and considerably younger than his classmates. His Leaving Certificate results earned him a bursary to the University of Sydney, from which he graduated BA (1922) and LLB (1925) with honours and the University medal (shared). While studying law, Barwick served articles of clerkship with a Sydney solicitor, HW Waddell, but went to the Bar, being admitted in 1927. Legal practice had been an ambition from 'very early boyhood'.

Barwick married Norma Mountier Symons in 1929, a happy marriage that produced a son and a daughter. He first appeared in the High Court as early as 1929, but was initially reluctant to develop a practice in that court, apparently finding its Darlinghurst location inconvenient for a busy Supreme Court practice. Early High Court appearances included such non-constitutional cases as *Johnson v Buttress* (1936) and *Southwell v Roberts* (1940).

Taking silk in 1942, Barwick rapidly established an extensive High Court practice after the sudden death of Ernest Meyer Mitchell KC in April 1943. Mitchell had a large **constitutional law** practice, specialising in section 92 of the Constitution, and Barwick's practice developed similarly (see **Interstate trade and commerce**). Significant early High Court appearances include *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938); *Colvin v Bradley Bros* (1943); *Reid v Sinderberry* (1944); *de Mestre v Chisholm* (1944); and *Gratwick v Johnson* (1945).

Barwick continued also to appear in the Supreme Court: a well-known case from this period was his (unsuccessful) challenge to the award of the 1943 Archibald Prize to William Dobell, in which he appeared against **Kitto** (*A-G (NSW) v Trustees of National Art Gallery of NSW* (1944)).

Barwick represented the plaintiffs in challenges to some of the Chifley Labor government's most important legislation: *Australian National Airways v Commonwealth* (1945), which invalidated essential aspects of airline nationalisation; the ***Melbourne Corporation Case*** (1947), which invalidated section 48 of the *Banking Act* 1945 (Cth), which effectively prohibited the states and their agencies from banking with private banks; and, most spectacularly, the ***Bank Nationalisation Case*** (1948), which struck down the nationalisation of private banks by the *Banking Act* 1947 (Cth). In that case, Barwick led the teams of leading **counsel** in both the High Court (1948) and the **Privy Council** (1949), while the Commonwealth was represented by Attorney-General **Evatt**. The tables were turned in their next encounter, when Evatt succeeded in having the *Communist Party Dissolution Act* 1950 (Cth) declared invalid (***Communist Party Case*** (1951)).

Barwick's success in the *Bank Nationalisation Case* established his pre-eminence at the Australian Bar; for the next decade he appeared extensively, in both the High Court and the Privy Council, in virtually every significant constitutional case originating outside Victoria. High Court appearances include *Grace Bros v Commonwealth* (1946), *Nelungaloo v Common-*

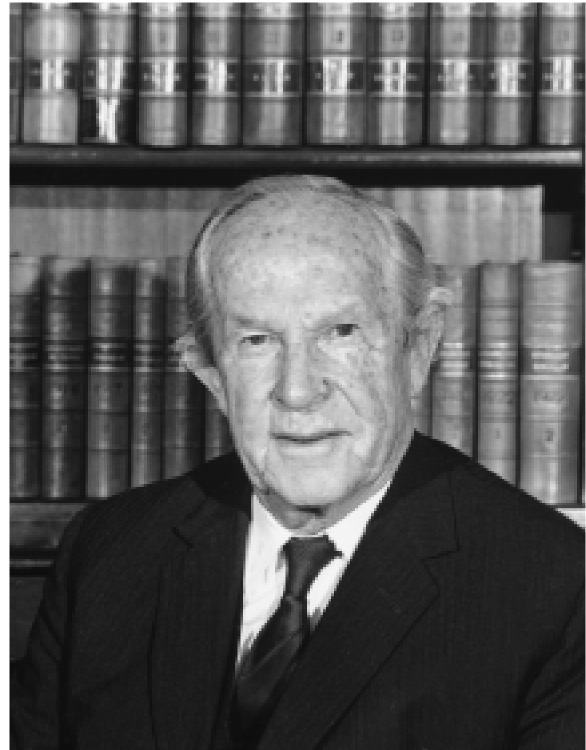
*wealth* (1948), *Koon Wing Lau v Calwell* (1949), *Magennis v Commonwealth* (1949), *Wilcox Mofflin v NSW* (1952), *Wragg v NSW* (1953), *O'Sullivan v Noarlunga Meat* (1954), *Grannall v Kellaway* (1955), *Grannall v Marrickville Margarine* (1955), *Antill Ranger v Commissioner for Motor Transport* (1955), *Pioneer Express v SA* (1957), the *Second* ***Uniform Tax Case*** (1957) and *Browns Transport v Kropp* (1958). Privy Council appearances include *Nelungaloo* (1950), *Grace Bros v Commonwealth* (1950), *Hughes & Vale v NSW* (1954), *Antill Ranger* (1956) and *Noarlunga Meat* (1956).

In virtually all these cases, Barwick appeared for parties challenging the validity of state or Commonwealth legislation (the latter in cases before 1950, with the exception of the *Second Uniform Tax Case*). Frequently, the challenges relied on section 92. Attacking legislation was more congenial to Barwick than defence. His argument in the *Communist Party Case*, a rare example of the latter, was considered by Chief Justice **Latham** to be the worst he had heard from Barwick—a judgment with which Barwick concurred (see also **Dixon diaries**).

Barwick employed few notes in **argument** and sought dialogue between counsel and Bench, a practice he continued as a judge. He admitted to being a poor cross-examiner but was a superlative appellate advocate. Barwick conceded that over his career 'there would be many more losses than successes', but several of the latter were of great constitutional significance: *Australian National Airways*, *Melbourne Corporation*, *Bank Nationalisation* and *Hughes & Vale*. Barwick's final appearance as counsel was in 1961 as Commonwealth **Attorney-General** before the Privy Council in ***Dennis Hotels v Victoria***.

Barwick was knighted (Knight Bachelor) in 1953, a signal honour for a barrister at a time when only three of the seven High Court Justices had knighthoods (though not unprecedented: Edward Mitchell KC of the Victorian Bar had been knighted (KCMG) in 1918). Barwick represented the Australian Security Intelligence Organisation before the Royal Commission on Espionage (1954–55).

With the encouragement of **Prime Minister** Robert **Menzies**, Barwick was elected to the House of Representatives in March 1958 as the Liberal Party member for Parramatta. He was appointed as Commonwealth Attorney-General that December, an office he held until December 1963. His most notable achievements in that office were the *Matrimonial Causes Act* 1959 (Cth), which allowed divorce on the ground of irretrievable breakdown of marriage with separation for five years, and preparation of anti-trust legislation based on the **corporations power**, ultimately enacted in amended form after he left the ministry. Indeed, Barwick believed that Menzies removed him from that portfolio under pressure from business interests opposed to strong **trade practices law**. From December 1961 to April 1964, when he became Chief Justice, Barwick was also Minister for External Affairs. Barwick claimed that Menzies pressed him to accept that ministry, but his successor, Paul Hasluck, reports Menzies' complaint that Barwick had strongly sought the office, for which he was unsuited. Hasluck remarked that Barwick 'knew law but not history' and 'had a poor understanding of international relations'. Barwick's most significant achievement in external affairs was to foster Australia's relationship with Indonesia, especially by pressing his colleagues to support



Garfield Barwick, Chief Justice 1964–81

Indonesia's claim to Irian Jaya, though President Sukarno disliked his adversarial style of diplomacy. The Australian Ambassador reported that Barwick had 'lectured, cross-examined and quoted documents to prove Sukarno wrong without giving Sukarno a chance to state his own case'.

It was widely assumed that Barwick had entered federal politics with a view to succeeding Menzies as Prime Minister; indeed, Barwick recorded that Menzies had alluded to that possibility when urging him to stand for Parliament. But, although one of the most competent ministers, Barwick was a poor politician, as he himself conceded. Hasluck noted that 'it soon became apparent' that Barwick was unsuited for parliamentary leadership. Barwick remarked that he 'had no burning ambition for the prime ministership … though I would have been more than pleased to have assumed it'. He stated that he would not have challenged Harold Holt for the leadership, though he doubted Holt's competence and may have entertained hope of succeeding Holt.

Barwick had secured Menzies' assurance that entering Parliament would not foreclose appointment to the judiciary, and he clearly hoped to succeed **Dixon** as Chief Justice, having declined to express interest in the **puisne Justiceship**, which went to **Windeyer** in September 1958. But Barwick's plans were disrupted by Dixon's decision to retire on grounds of failing health in April 1964, a decision from which Barwick (through Menzies) was unable to deflect him. Barwick was forced into a premature choice between gambling on the Prime Ministership (from which Menzies retired less than two years later) or the certainty of the Chief Justiceship. He chose the latter.

Barwick joined the High Court at the time of its transition to the apex of the Australian judicial system. Appeals to the Privy Council in federal matters were abolished in 1968 and appeals from the High Court in 1975, developments Barwick supported. He acknowledged the High Court's duty to 'declare the **common law** … for Australia', noting that it 'will not necessarily be identical with [that] of England' (*MLC v Evatt* (1968)). As the 'final arbiter of … the common law of Australia', the High Court bore a 'very heavy responsibility' to conduct 'its own close, critical and independent examination' to 'decide for itself upon principle what is the common law' (*R v O'Connor* (1980)). Regarding **precedent**, Barwick distinguished somewhat sophistically between correcting an earlier decision that was 'erroneous when made', which lay within the Court's power, and overturning accepted precedent, which must be left to parliament (*State Government Insurance Commission v Trigwell* (1979)).

Barwick contributed significantly to the development of Australian common law, especially in **criminal law**, in which his insistence that all elements of the offence be proved (influenced, possibly, by his general antipathy to the power of the state) led to surprising solicitude for defendants (*Croton v The Queen* (1967); *Ryan v The Queen* (1967); *R v Ireland* (1970); *Pemble v The Queen* (1971); *O'Connor*).

In constitutional matters, Barwick was moderately pro-Commonwealth. He construed the Commonwealth's **corporations power** liberally (*Strickland v Rocla Concrete Pipes* (1971); *Adamson's Case* (1979)), but would have invalidated the Whitlam government's more adventurous legislation (*PMA Case* (1975); ***AAP Case*** (1975); ***Territory Senators Cases*** (1975 and 1977); *Russell v Russell* (1976); *A-G (WA); Ex rel Ansett Transport Industries v Australian National Airlines* (1976); see **Whitlam era**). Barwick advocated an almost *laissez-faire* interpretation of section 92; his pressure for an extremely wide view of the 'freedom' of interstate trade and commerce eventually caused the Court to split (*Uebergang v Australian Wheat Board* (1980)), so that, ironically, Barwick's approach became the catalyst for ***Cole v Whitfield*** (1988), which he later condemned as 'terrible tosh'. He claimed to interpret the Constitution legalistically, but his approach was far more pragmatic and ideological than that of Dixon or Kitto.

Barwick, the archetypal self-made man, was a fervent believer in free enterprise, which required 'effective competition', and favoured small business. He rejected *laissez-faire*, believing in 'restraint of the exuberance of the marketplace'. He described himself as a modern liberal conservative. Barwick denied any moral duty to pay tax, the only obligation being legal. Tax *avoidance* was lawful, though *evasion* was not. A 1983 study concluded that Barwick demonstrated an 'exceptionally strong tendency … to find for the taxpayer', deciding against the Commissioner to a greater degree than virtually any other Justice (see **Taxation law**).

Barwick held an exalted view of the High Court and of the position of Chief Justice, considering that Court 'the most important institution in the Australian federation'. He was instrumental in establishing a permanent **seat** for the Court with its own **building** in **Canberra**, serving on the panel judging architectural plans and supervising construction. However, his endeavours to terminate **sittings** in the state capitals were overridden by his colleagues (see **Circuit system**), who also insisted that the Court's **administration** be vested in the Court as a whole, unlike the much larger **Federal Court** and the Family Court of Australia, which are administered by their Chief Justices. Barwick supported the establishment of the Federal Court to relieve the High Court from trial work, but opposed the abolition of appeals to the High Court as of right. He disapproved of the appointment of **Murphy** to the Court, and thereafter recommended **appointment** of judges by a commission chaired by the relevant Chief Justice.

Barwick twice tendered extra-judicial advice to the Governor-General. He advised Lord Casey on the appropriate course when Prime Minister Holt disappeared in December 1967 and, far more controversially, advised John Kerr on 10 November 1975 that Kerr had power to dismiss the Prime Minister on the ground that the Senate had denied Supply to his government (see **Dismissal of 1975**). Barwick defended both his advice and the propriety of giving it at the National Press Club the following year and in subsequent writings, maintaining that the issue could never have come before the Court. However, that is questionable; at the least, the question whether an issue is **justiciable** is itself justiciable.

Barwick served as judge *ad hoc* of the International Court of Justice in the *Nuclear Tests Cases* (1973–74), and occasionally sat on the Judicial Committee of the Privy Council (see, for example, *Frazer v Walker* (1966)). He persuaded the Privy Council to change its existing practice and to publish dissenting opinions.

Barwick retired in February 1981 aged 77, citing failing eyesight caused by diabetes, from which he had suffered since 1956, but had not previously publicly disclosed. He prided himself on being 'decisive' and possessed ferocious self-assurance. Hasluck, an astute observer, detected 'rapacity' and 'little generosity of mind'. He portrayed Barwick's intellectual sharpness memorably: 'He looks like a lawyer. This alertness, combined with his erect carriage and shortness of stature … give an impression of an eager fox terrier who has come out to see what is going on.'

Barwick was a highly competent, though not great, judge. Ironically, the very qualities which contributed to his success at the Bar—self-assurance, combativeness and ability to identify the nub of an issue—detracted from his performance as a judge, making him appear insufficiently impartial and his judgments on occasion too simplistic or dogmatic. He had great technical mastery of the law and wrote clearly, though inelegantly. He was accurately described as 'very clever, but not deep'. Hasluck, again, expressed it well: 'He is far inferior to Owen Dixon in loftiness of intellect, depth of understanding and scope of humane studies … He is inventive rather than creative.'

George Winterton

***Further Reading***

Garfield Barwick, *Sir John Did His Duty* (1983)

Garfield Barwick, *A Radical Tory* (1995)

Paul Hasluck, *The Chance of Politics* (1997), 93–99, 132–33

David Marr, *Barwick* (1980)

George Winterton, 'Barwick the Judge' (1998) 21 *UNSWLJ* 109