civilisation. Whether the new relationship between the black and white cultures is created on a statutory basis or not, Mr Harris clearly makes the point that the exercise of major consultation on all matters affecting the relationship between the two cultures is well overdue and, although difficult, it is a subject that has already been traversed in other countries having a similar white culture and indeed has been anticipated in those countries by well over 100 years.

DARYL GUNTER*

Barwick by DAVID MARR. (George Allen & Unwin Australia, 1980), pp. i-x, 1-330. Cloth, recommended retail price $16.95 (ISBN: 0 86861 058 5).

All history is biography, said Emerson, and this is exemplified by David Marr's biography of Sir Garfield Barwick. The book provides many insights into the world of the legal profession, the judiciary, politics and diplomacy in Australia over the last half century. Such works are not common in this country and it is interesting that another of very high quality—*Mediator* by Blanche D'Alpuget—also chose to study recent history through a legal prism, in that case Sir Richard Kirby.

It is a tribute to the book that there are many aspects of it on which a reviewer might wish to focus. In choosing to look chiefly at Barwick's role as Chief Justice, I am influenced by the fact that most of the reviews of the book in the popular press have emphasised his role as an advocate and as a politician, including his intervention in the political process in November 1975. It is also true to say, in my view, that Barwick's judicial impact is not as well discussed in the book as his other activities. The difficulties of making issues of federal constitutional law comprehensible to the general reader should not be underestimated but Barwick's sixteen years as Chief Justice do need analysis, most particularly in the context of the Commonwealth Constitution.

The most striking feature of Barwick's judgments over these years is the absence of any coherent philosophy in his construction of the Constitution. It can presumably be taken for granted that no one would seriously argue today that an approach of "strict and complete legalism"[1] could be used in the construction of a written constitution. There is any number of cases (of which the *Territorial Senators* case[2] is a good example in recent times) which demonstrate that whichever of two or more results is arrived at depends upon the choice of a starting premise. It should be added that, given the narrow and unrepresentative section of the legal profession from which almost all High Court Justices have

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[1] Address of Sir Owen Dixon on taking the oath of office as Chief Justice (1952) 85 C.L.R. xi, xiv.

[2] *Western Australia* v. *The Commonwealth* (1975) 134 C.L.R. 201.

been drawn in the post-war years, the criticism made of Barwick could be levelled generally at the Court. Ironically the most influential proponent of "strict and complete legalism", Barwick's predecessor, Sir Owen Dixon, had a more coherent view of the Constitution than almost any of his colleagues. For much of the time, however, Dixon chose to disguise this fact. Only occasionally did he forthrightly declare his premises.[3]

The barren quality of Barwick's constitutional construction can be no better demonstrated than by reference to his judgments on section 92, with which he had such a long involvement, first as advocate, and then as judge. In what was, at the time of writing, the most recent decision by the Court on section 92, the legislation under challenge underpinned the Commonwealth/State stabilisation scheme for wheat produced in Australia.[4] In the course of his judgment the Chief Justice suggested that the question that must be asked in connection with legislation that has been challenged on the ground that it offends against section 92 is

> . . . whether, in operation, it does no more than accommodate each man's freedom in the relevant respect to that of his neighbour in a society in which, in the relevant sense, each remains free in his trade, commerce or intercourse after the law has fully operated.[5]

Elsewhere in his judgment, the Chief Justice suggested the following approach:

> The major problem to which the section has given rise is the accommodation of the concept of freedom with restraints in a civilized and ordered society which in themselves do not in truth impair the guaranteed freedom. After a chequered course of judicial expression, it was finally resolved in the *Bank* case that that accommodation is to be effected by allowing as valid what can properly be determined as in its nature no more than such regulation of interstate trade, commerce and intercourse as does not impair the guaranteed freedom.[6]

The circular nature of these tests is obvious. The net result of this failure to define the character of the freedom envisaged by section 92 was a willingness on Barwick's part to hold invalid a wide range of State and federal economic regulation, with the result that legislative vacuums have been created when a majority of the Court has come to a similar conclusion.[7] (It is important to note here the word "conclusion", as during Barwick's period at the Court there were not only many 4/3 or

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[3] See *e.g. Melbourne Corporation* v. *The Commonwealth* (1947) 74 C.L.R. 31, 80-82.

[4] *Uebergang* v. *Australian Wheat Board* (1980) 32 A.L.R. 1. This case was undertaken by the plaintiff as a challenge to the decision in *Clark King Co. Pty Ltd* v. *Australian Wheat Board* (1978) 52 A.L.J.R. 670 in which the Court by a majority of 3/2 upheld the validity of the wheat stabilisation scheme. *Uebergang* went off on procedural questions and so the substantive issue decided in *Clark King* was not considered.

[5] (1980) 32 A.L.R. 1, 9.

[6] *Id.* 7.

[7] See *e.g. Boyd* v. *Carah Coaches Pty Ltd* (1980) 54 A.L.J.R. 33.

3/2 decisions in constitutional cases but within the majority or minority in those cases there was often sharply disparate reasoning.)[8]

In the case of section 92, Barwick's decisions had (and also would have had, if he had been more consistently in the majority) the effect of curtailing State legislative powers as much as, if not more than, the powers of the federal Parliament. With respect to several other sections of the Constitution, however, Barwick took a narrow view of specific federal legislative powers. In interpreting section 51(xxxv) of the Constitution he consistently gave a narrow construction to the term "industrial disputes" so as to exclude from the jurisdiction of the Conciliation and Arbitration Commission issues that may have been the subject of lengthy strike action.[9] He has also construed the term "industry" in the Conciliation and Arbitration Act 1904 (Cth) to exclude entire classes of employees from the federal industrial relations system.[10]

Another federal legislative power that has received a narrow construction from the Chief Justice is the territories power contained in section 122 of the Constitution. In the *Territorial Senators* case[11] he was one of the minority who held that legislation providing for representation of the Australian Capital Territory and the Northern Territory in the Senate could not be authorised by section 122 when it stated that the Parliament "may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit". In a 1976 decision[12] he took the view (again as part of the minority) that legislation authorising the intrastate carriage of passengers between Perth and Port Hedland (both in Western Australia) by Trans Australia Airlines flights en route to Darwin in the Northern Territory was beyond the scope of section 122.

The appropriations power is a further example of this approach. In the *AAP* case[13] the Chief Justice (together with two of his colleagues, the Court being evenly divided on this question with one judge not deciding) considered that the words "purposes of the Commonwealth" in section 81 allowed the Parliament to appropriate money only towards those purposes enumerated in section 51 of the Constitution.[14] In the event the Australian Assistance Plan survived the challenge by the Victorian Government by a 4/3 majority, with one judge deciding the matter on what he considered the plaintiff's lack of standing.

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[8] See *e.g. S.O.S. (Mowbray) Pty Ltd* v. *Mead* (1972) 124 C.L.R. 529.

[9] See *e.g. R.* v. *Commonwealth Conciliation and Arbitration Commission; ex parte Melbourne and Metropolitan Tramways Board* (1966) 115 C.L.R. 443.

[10] See *e.g. Pitfield* v. *Franki* (1970) 123 C.L.R. 448. The requirement that employees seeking registration as an organization under the Conciliation and Arbitration Act 1904 be "in or in connexion with any industry" is found in s. 132(1)(b) of the Act. The term "industry" is defined in s. 4(1) of the Act.

[11] (1975) 134 C.L.R. 201. This issue was reheard in *Queensland* v. *The Commonwealth* (1977) 139 C.L.R. 585.

[12] *Attorney-General of the State of Western Australia (At the relation of Ansett Transport Industries (Operations) Proprietary Limited)* v. *Australian National Airlines Commission* (1976) 138 C.L.R. 492.

[13] *Victoria* v. *The Commonwealth* (1975) 134 C.L.R. 338.

[14] *Id.* 360-361.

In contrast to this pattern, Barwick has favoured the expansion of federal power in other areas. In the case of section 51(xx) of the Constitution the Court's construction of the expression "trading or financial corporations formed within the limits of the Commonwealth" will essentially determine the ambit of the corporations power. In the only decisions to date, which have turned on the question of whether the corporation in question is a "trading corporation", the Chief Justice, in contrast to some of his fellow Justices, has focussed on the day-to-day activities of corporations rather than on how the corporations might describe themselves in their memorandums and articles.[15] The result of this approach has been to broaden the class of corporations to which federal legislation, such as the Trade Practices Act 1974 (Cth), may apply; in the most recent decision the Chief Justice was in a majority on this question (the Court being again divided 4/3).[16]

Similarly, on the question of the meaning of "excise" in section 90 of the Constitution, Barwick consistently favoured a broad meaning of this expression. The consequence of such a view would be that most forms of indirect taxation would become the exclusive power of the federal Parliament and be denied to State Parliaments.[17] Such is the confusion of the Court's judgments in this area during the last two decades, however, that it is impossible to suggest that any view of the section has prevailed.

It must be obvious from the divisions in the Court that have been referred to above that Barwick was unable to impose any unity on the Court during his tenure as Chief Justice. In the absence of any coherent philosophy of his own, it was obviously unlikely that he would be able to influence significantly other members of the Court. It must be conceded, however, that the administrative style of the High Court tends against such a result in any case. David Marr's book deals in some detail with this administrative aspect and explains how the absence of any conferences and the tradition of separate opinions both contribute to the size and opacity of the Commonwealth Law Reports. On the question of the internal workings of the Court, it is possible that Marr overestimates (pages 222-223) the amount of bargaining in relation to judgments that occurs between the Justices. It is highly unlikely, in my view, that Marr is correct in suggesting (page 224) that the Chief Justice would make unsolicited alterations to judgments of the other Justices. At this point there might have been greater emphasis on the time-consuming and generally uninformative nature of oral argument before the Court in contrast with the written briefs that are mandatory in all United States federal appellate jurisdictions.

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[15] *R.* v. *Trade Practices Tribunal; ex parte St George County Council* (1974) 130 C.L.R. 533; *In re Adamson; ex parte Western Australian National Football League (Incorporated) and West Perth Football Club (Incorporated)* (1979) 53 A.L.J.R. 273.

[16] *In re Adamson; ex parte Western Australian National Football League (Incorporated) and West Perth Football Club (Incorporated)* (1979) 53 A.L.J.R. 273.

[17] See *e.g. Dickenson's Arcade Pty Ltd* v. *Tasmania* (1974) 130 C.L.R. 177, 185.

It should be emphasised again in conclusion that this book is a graceful and significant addition to modern Australian history. It deserves a wide readership by lawyers and non-lawyers alike.

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