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Effective appellate advocacy: the ideal and the reality – explored through the advocacy of Sir Garfield Barwick in constitutional law cases

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Abstract

This thesis involves an examination of the elements of effective appellate advocacy in terms of the ideal and the reality in the context of Sir Garfield Barwick’s advocacy in constitutional law cases, particularly, the Bank Nationalisation Case and the Communist Party Case. The fundamental question which the thesis aims to answer is: whether Sir Garfield Barwick’s reputation as one of Australia’s greatest appellate advocates, especially in constitutional law cases, was justified. The analysis of Barwick’s advocacy in these two cases also examines whether the ideals of appellate advocacy are achievable.

To be in a position to determine whether Barwick’s reputation as a great appellate advocate was justified, it is necessary to establish a framework of appellate advocacy through which to conduct such an assessment. The framework or methodology established is the result of a critical exploration of the elements of appellate advocacy as well as the ideals of appellate advocacy and this is then contrasted to appellate advocacy in reality. The elements are divided into three categories, namely: preparation, presentation and personation. Throughout the thesis, the assessment of Barwick’s advocacy occurs against the elements and ideals of appellate advocacy, referred to as the ‘three category analysis’. A significant part of this thesis is dedicated to undertaking a critical exploration of the elements and ideals of appellate advocacy.

This methodology is then used to assess Barwick’s approach to each category generally before being extended to assess Barwick’s appellate advocacy in reality in the context of the Bank Nationalisation Case and the Communist Party Case.

The thesis concludes that Barwick’s reputation as one of Australia’s greatest appellate advocates was justified following the Bank Nationalisation Case and despite the result in the Communist Party Case.
Preface

The inspiration for this thesis was a burning desire to understand why Sir Garfield Barwick became known as one of Australia’s greatest appellate advocates. It was a question that no one had previously attempted to answer or analyse in any substantive or comprehensive way. How is it that someone can apparently excel in the field of appellate advocacy yet we know little about how they earned this reputation and whether it was justified?

Gaining an understanding of whether Barwick’s reputation as a great appellate advocate was justified would also reveal the key elements and ideals of appellate advocacy. These are important to identify for the purposes of assessing Barwick’s appellate advocacy as well as understanding modern day appellate advocacy in that they continue to apply to appellate advocacy today despite the different environment in which such advocacy is conducted.

The thesis commences by examining the origins of advocacy and the differences between trial advocacy and appellate advocacy. It then progresses to examining Barwick’s early years at the Bar before embarking on a critical exploration of the elements and ideals of appellate advocacy based on three categories, namely, preparation, presentation and personation. At this point, this methodology is then used to assess Barwick’s approach to each category before being extended to assess appellate advocacy in reality by examining Barwick’s appellate advocacy in the Bank Nationalisation Case before the High Court and Privy Council as well as his appellate advocacy in the Communist Party Case.

The critical exploration of the elements and ideals of appellate advocacy within each category draws upon material from judges, former judges, barristers, academics and legal commentators (including interviews with judges, former judges and renowned barristers undertaken with ethics approval) as well as the author’s own views, and synthesises this material for the purposes of both identifying and formulating the elements and ideals of appellate advocacy. The observations made by such persons also assisted in terms of analysing Barwick’s appellate advocacy generally and his appellate advocacy in the relevant cases.

The thesis is my own original work.
Acknowledgments

This thesis, like all of them I'm sure, has been a journey. John Lennon famously said that 'life is what happens to you while you are busy making other plans'. I would revise this to 'life is what happens to you while you are busy completing a PhD'.

I am indebted to my parents for their endless sacrifice and enduring love and support without which none of what I have achieved would have been possible. I can never repay you. To my wife, you have allowed me to pursue this dream of mine to the end and showed great patience, love and understanding throughout. You may now have a great problem on your hands – me with a little more "free" time. To my daughter and soon to be born second child, without realising, you have both inspired me and given me the steely determination to complete my thesis.

I am grateful to the inspiration of my earlier supervisor, Professor George Winterton. His enthusiasm for the topic of my thesis gave me confidence and energised me. I cherished each of our consultation sessions which I found enlightening and informative. I always emerged after each such session with a renewed sense of passion and enthusiasm. His knowledge astonished me. His bravery and courage was inspiring. I am sure he would be proud of the final product.

To Professor Helen Irving, who inherited the supervision of me and my incomplete thesis and helped guide me through the difficulties that inevitably one encounters when attempting to grapple with such a novel and unique thesis topic. I appreciate your time and patience together with your willingness to read successive draft after draft. You helped shape the thesis into what it should be to ensure it makes a valuable contribution to knowledge. I also mention Professor Anne Twomey who also played a role in supervising my thesis and thank her for her efforts.

Finally, I thank Sir Garfield Barwick who provided the inspiration for this thesis and whose advocacy was responsible for my enduring interest.
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Chapter 1: Introduction

"The law is a mystery and those that have mastered its intricacy have indeed great power in their hands and great responsibility."

Sir Garfield Barwick, 1995

Your Honour, Barwick for the appellant.

From the 1930s and until the 1950s this was a common phrase heard in the High Court of Australia. During this period, Garfield Edward John Barwick appeared regularly in the High Court and established himself as the leading advocate during his time at the Bar. Throughout the 1940s and 50s, Barwick appeared almost exclusively in both the High Court and the Privy Council.

Sir Garfield Barwick was renowned as Australia’s leading appellate advocate when he was in practice at the Bar. He was a leading advocate in many of the historically significant constitutional cases that have been before the High Court such as the Bank Nationalisation Case and the Communist Party Case. Barwick then turned his attention to politics and was the federal member for Parramatta from 1958 until 1964. During this time, he was the Attorney-General in the Liberal/Country Party Coalition government led by Prime Minister, Robert Menzies, and was responsible for many major reforms including, amongst others, significant reforms to the law of marriage and divorce using a previously unused constitutional power (s 51(xxii)), as well as trade practices reform and companies legislation.

He later served as Minister for External Affairs.

In 1964, Barwick was appointed Chief Justice of the High Court. He became Australia’s longest serving Chief Justice, retiring in 1981. During this time, he delivered judgments in more than 1,000 cases.

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3 During Barwick’s time at the Bar, the Federal Court of Australia, the Federal Magistrates Court, the Family Court and other specialist courts and tribunals did not exist so the High Court would hear a greater range of cases than it does today. Also, with the High Court sitting in Sydney or Melbourne in those times, the appearances were dominated by barristers from the Sydney and Melbourne Bars respectively. Since the opening of the High Court in Canberra in 1980, it now sits predominantly in Canberra but does have sitting weeks in the major capital cities around Australia as well as conducting special leave applications by video link. It should also be noted that when Barwick was at the Bar, there were fewer barristers at the Bar comparatively, including Senior Counsel, and therefore less competition for work (the volume of work was also less).
4 This refers to both Bank of New South Wales v Commonwealth (1948) 76 CLR 1 (High Court) and Commonwealth v Bank of New South Wales (1949) 79 CLR 497; [1950] AC 235 (Privy Council).
5 Australian Communist Party v Commonwealth (1951) 83 CLR 1.
6 Later Sir Robert Menzies.
cases, many of which shaped the Australian Constitution and the Australian legal system generally. In 1975, during his period as Chief Justice, Barwick was embroiled in controversy following the constitutional advice he provided to Sir John Kerr, the then Governor-General, with respect to the difficulties faced by the Whitlam Labor Government in obtaining supply. 8

Barwick’s career can be neatly divided into three stages: barrister, politician and judge. 9

This thesis focuses solely on Barwick’s career as a barrister up to and including his appearance in the Communist Party Case. It was during this time that he established his reputation as one of Australia’s greatest appellate advocates.

The fundamental question which this thesis aims to answer is: whether Sir Garfield Barwick’s reputation as one of Australia’s greatest appellate advocates, especially in constitutional law cases, was justified.

The approach and methodology that will be developed to answer this question are outlined in the next section.

1.1 Approach and Methodology

To address this question will require an examination of the elements of effective appellate advocacy in terms of the ideal and the reality and an examination of Barwick’s advocacy.

The starting point is that Barwick was, as far as is known, universally regarded as one of Australia’s greatest appellate advocates. 10 The two major constitutional law cases in which Barwick appeared were the Bank Nationalisation Case (both in the High Court and the Privy Council) and the Communist Party Case. Both will be examined in this thesis. The focus in this thesis will be on Barwick’s advocacy in constitutional cases, given the paucity of material available on his advocacy in other cases, and the fact that constitutional law cases are conducted before a multi-member court.

To determine whether Barwick’s reputation as a great appellate advocate was justified, it is necessary to establish a framework through which to conduct such an assessment. The framework or methodology that will be established is the result of a critical exploration of the elements and

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9 Former Justice Michael Kirby recalls that he once heard Barwick describe his life as divisible, almost neatly into four different phases – the barrister, the politician, the minister and the judge: see Jocelynne A. Scutt (ed), Lionel Murphy: A Radical Judge, (1987), McCulloch Publishing Pty Ltd, Melbourne, p.7 (Foreword by Michael Kirby, 17 March 1987).
ideals of appellate advocacy and these will then be contrasted to appellate advocacy in reality. A significant part of this thesis is therefore dedicated to undertaking a critical exploration of the elements and ideals of appellate advocacy. Since the question relates to Barwick's reputation as a leading appellate advocate, the elements of appellate advocacy are analysed and not (except where relevant) the elements of trial advocacy (any future reference to 'advocate' is thus a reference to an 'appellate advocate' unless otherwise stated).

The classification of 'elements' is designed to encompass the qualities, skills and techniques of appellate advocacy. To develop the analysis further, the elements are then divided into three categories, namely: preparation, presentation and personation. Whilst the first two categories are self-explanatory, the term 'personation' has been coined by the authors for the purposes of describing the elements that relate to the advocate's personal qualities or dimensions such as courage, emotion, voice and so forth. Throughout this thesis, the assessment of Barwick's advocacy occurs against these elements and ideals of appellate advocacy and will be referred to as the 'three category analysis'.

The elements of appellate advocacy that are identified include some basic or even obvious aspects. However, the manner in which these elements are applied, employed or adhered to can differ markedly. For example, preparation is an important element of appellate advocacy. However, advocates can engage in a basic or minimal preparation but can also engage in a comprehensive and detailed preparation. Whilst the fundamental element of appellate advocacy is preparation, the manner in which preparation is undertaken is highly relevant. Therefore, the critical exploration of the elements of appellate advocacy and the three category analysis encompass the basic and fundamental principles of appellate advocacy as well as the ability to apply, employ or adhere to those principles in a manner that exhibit standards of perfection or excellence. The principles in the latter category are described as the 'ideals of appellate advocacy' or exemplary appellate advocacy. Whilst the discussion will refer to the basic elements of appellate advocacy, the focus in this thesis will be the 'ideals of appellate advocacy'.

The ideals of appellate advocacy will be contrasted with appellate advocacy in practice or reality. The discussion of appellate advocacy in reality will highlight circumstances and examples where the application of the elements of appellate advocacy did or did not meet the ideals of appellate advocacy.

10 For example, Anthony Mason stated that: 'Barwick was certainly the greatest advocate I ever saw or heard' (Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 February 2006)). Ellicott agreed that Barwick was the leading appellate advocate of all the appellate advocates that he knew (Interview with Hon. Robert Ellicott QC (Sydney, 8 August 2006)). Porter agreed that Barwick was the best appellant advocate during Barwick's time at the Bar (Interview with Chester Porter QC (Sydney, 2 April 2006)). See further support for Barwick's status as one of the greatest appellate advocates based on comments made at the time of his death in Appendix A.
advocacy. This discussion is then extended for the purposes of conducting an assessment of Barwick’s advocacy and contrasting this to the ideals of appellate advocacy. Primarily, this is undertaken by using the Bank Nationalisation Case in both the High Court and Privy Council as well as the Communist Party Case.

Any reference to ‘effective appellate advocacy’ in this thesis relates to the ability to apply, employ or adhere to the elements of appellate advocacy in reality in such a manner that approximates the ideals of appellate advocacy or typifies exemplary appellate advocacy to the extent possible. However, while success in persuading an appellate court is clearly the objective for every advocate, effective appellate advocacy does not necessarily mean succeeding in a case by obtaining a favourable outcome. There are various reasons for this; namely, the opposing advocate may be equally skilled or adept, the case may be inherently difficult to win or the court disinclined to find in favour of a particular outcome.

The critical exploration of the elements of appellate advocacy, including the ideals of appellate advocacy, together with the three category analysis, will provide a methodology for assessing appellate advocacy. This methodology will then be applied to assessing Barwick’s advocacy in constitutional law cases leading up to, and including, the Bank Nationalisation Case and the Communist Party Case.

Such a methodology has not previously been developed for the purposes of assessing appellate advocacy (or even trial advocacy). Whilst judges, former judges, barristers, academics and legal commentators have discussed appellate advocacy in a range of contexts,11 there has not been an

attempt to unify the commentary on appellate advocacy in a comprehensive manner by undertaking a critical exploration of the elements.

Secondly, there has been no attempt at systematically assessing the advocacy of any individual appellate advocate, let alone assessing the advocacy of a leading appellate advocate against the elements of appellate advocacy or against any methodology generally.

Thirdly, there has been no systematic examination or assessment of Barwick's advocacy. The closest attempts were a biography of Barwick and his own autobiography. The biography by David Marr focused on Barwick's career generally, with a particular emphasis on his role in the Whitlam dismissal in 1975. Despite this initial narrow objective, this biography became a broader examination of Barwick's life and career beyond that which Marr had anticipated. This suggests that Barwick's extensive career and the important role he played in Australia's legal and political history could not be ignored. Barwick himself penned an autobiography entitled 'A Radical Tory' which provided an insight into various aspects of his life, including his time at the Bar. Whilst both books discuss Barwick's advocacy and his success at the Bar as well as provide valuable information and insights that contribute to the assessment undertaken in this thesis, as they are biographical and autobiographical works respectively, they understandably fall short of assessing Barwick's advocacy with the completeness or rigour that is proposed in this thesis. In neither book is a methodology for assessing appellate advocacy developed.

This thesis aims to make a significant contribution to knowledge in four key areas, namely, by:

1. establishing a methodology for assessing appellate advocacy following the critical exploration of the elements of appellate advocacy and the identification of the ideals of appellate advocacy;
2. employing the methodology for the purposes of assessing the appellate advocacy of a leading appellate advocate and contrasting the ideals of appellate advocacy to appellate advocacy in reality;
3. providing an insight into Barwick's advocacy in the lead-up to, and in, the Bank Nationalisation Case; and
4. providing an insight into Barwick's advocacy in the lead-up to, and in, the Communist Party Case.

\[12\] Marr, above n 8.

\[13\] For example, Marr stated that: 'I began to write Sir Garfield Barwick's life with a single purpose: to pin on the man his responsibility for the crimes of 11 November, 1975. Along the way this book grew into something else - perhaps something more': ibid, p.xi.

\[14\] Barwick, A Radical Tory: Garfield Barwick's Reflections & Recollections, above n 1.
One may ask why an understanding of appellate advocacy is important. In the common law system where notions of fairness, justice and consistency are key values, appellate advocates assist an appellate court to uphold these values. In the common law system, an appellate court relies heavily on advocates to advance arguments that it uses as the basis for formulating its decision. For this reason, appellate advocates are in a position to influence the decisions made by appellate courts and therefore the administration of justice generally. Sir Owen Dixon once remarked:

For my part, I have never wavered in the view that the honourable practice of the profession of advocacy affords the greatest opportunity of contributing to the administering of justice according to law. There is no work in the law that admits of a greater contribution.

Members of society, as key stakeholders in the administration of justice and the common law system, therefore have a vested interest in appellate advocates performing their functions and discharging their duties, in an efficient, effective and ethical manner.

In modern times, the nature of appellate advocacy is changing with the introduction of time limits for oral advocacy, the greater reliance on written submissions and the introduction of technology. An understanding of the elements of appellate advocacy, as well as the ideals of appellate advocacy, may also assist with the development of possible reforms with respect to the manner in which appellate advocacy is conducted. For example, the use of video link technology in courts has impacted on the style of appellate advocacy adopted; the elements of appellate advocacy may assist to guide and inform the discussion of such developments.

Despite the fact that Barwick was regarded as one of Australia’s leading appellate advocates, there is relatively little examination of Barwick’s advocacy, especially in two of the most significant constitutional law cases in Australia’s history, the Bank Nationalisation Case and the Communist Party Case, in which Barwick played such a critical role. Little academic attention has been given to the analysis or examination of the importance of the role played by leading advocates in some of history’s most significant cases and this thesis provides the opportunity to make a positive contribution in this regard.

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15 It is important to note at this point that the discussion in this thesis centres around appellate advocacy and does not presuppose anything about the justice or fairness of the law or any outcome referred to.
16 Sir Owen Dixon was admitted to practice as a barrister in 1910 and appointed silk in 1922. He was appointed as a High Court Justice in 1929 and served as Chief Justice from 1952 to 1964. He was also Australia’s Minister (Ambassador) to the United States from 1942 to 1944.
This thesis draws upon various key sources in developing the methodology for assessing appellate advocacy as well as assessing Barwick’s advocacy using the three category analysis. The autobiographical and biographical accounts of Barwick’s life, including his career as an advocate, provide useful background information and insights which have been incorporated into the analysis at various stages.

In assessing Barwick’s advocacy, a significant amount of primary material is used, including transcripts of the Bank Nationalisation Case from both the High Court and the Privy Council, transcript of the Communist Party Case, interview material from judges, former judges and prominent appellate advocates as well as archival material related to Barwick, the Bank Nationalisation Case and the Communist Party Case. The judgments of the High Court and the Privy Council in the Bank Nationalisation Case as well as the High Court’s judgment in the Communist Party Case are also important for the purposes of this analysis. In addition, secondary sources are used, as well as insights gained from books and articles by constitutional law academics and commentators. In addition, there is considerable reliance upon interview material from interviews conducted by various persons with Barwick - some of which have not been reviewed previously.¹⁹

From these sources emerge a number of elements of appellate advocacy and a number of ideals. The most revealing aspect of the research is the almost universal acknowledgment of the elements and the ideals by judges, former judges, barristers and legal commentators based on their respective research, experiences, observations and anecdotes. It is this confluence of thought and commonality of perspectives that this thesis seeks to capture and codify.

1.2 Outline

The first part of the thesis is dedicated to identifying the elements and ideals of appellate advocacy by adopting the ‘three category analysis’, namely, preparation, presentation and personation. The second part of the thesis examines Barwick’s appellate advocacy in the Bank Nationalisation Case and the Communist Party Case, two seminal constitutional law cases, to assess the manner in which the ideals of appellate advocacy have functioned in reality. The analysis of Barwick’s advocacy in these two cases will also examine whether the ideals of appellate advocacy are achievable.

The first part of the ‘three category analysis’ is preparation which is discussed in Chapter 3. One of the elements and ideals of appellate advocacy is preparation itself. This includes ‘thinking about the case’ and ‘identifying the strengths and weaknesses’ of the advocate’s case. Preparation also plays a vital part in terms of anticipating judicial questions. Often the extent of an advocate’s preparation is evident in their presentation. This is apparent from Barwick’s presentation in the Bank Nationalisation Case and the Communist Party Case as the discussion in Chapters 7, 8 and 9 reveals. In the former case, it appears that Barwick’s preparation was detailed and comprehensive such that it met the ideal, whereas, in the latter case, aspects of his presentation suggest that it was not as effective as in the former. Barwick was renowned for his ‘ground up’ approach to preparation which is discussed in Chapter 3. He spent considerable time thinking about the case and formulating key propositions during the preparation stage. Barwick’s preparation was also aided by his strong work ethic which is also discussed in Chapter 3. Generally, Barwick’s preparation accorded with the ideal. However, the reality of appellate advocacy is that, on occasions, there may be less than a comprehensive preparation undertaken for many reasons, including the time constraints associated with a busy practice. Barwick experienced this on occasions as will be discussed. It was also easier in some respects to adopt a ‘ground up’ approach in Barwick’s times when there were fewer cases to review in relation to each area of law, especially constitutional law.

Knowledge of the law relevant to a particular case as well as knowledge of the procedure of the particular court in which an advocate is appearing also falls within the category of preparation. This is discussed in Chapter 3. Barwick derived considerable confidence from his comprehensive preparation, particularly in relation to the relevant law and procedure. As will be seen, however, this resulted in him being prone to bouts of arrogance. This assessment is supported by those who knew him during his time at the Bar as discussed in Chapter 6. His knowledge of the law (specifically, section 92 of the Constitution) was particularly apparent in the Bank Nationalisation Case, courtesy of his involvement in several section 92 cases in the lead up to this case, whereas it was probably not at the same comparative level in the Communist Party Case despite his earlier challenges to various wartime regulations.

Knowing the court, including knowing the attitudes of the individual judges, is also critical to preparation. This assists an advocate in terms of their submissions. Barwick attributed considerable importance to knowing the court and the judges who comprised the court; this is discussed in Chapter 3. This is also apparent from an examination of Barwick’s preparation in the Bank Nationalisation Case discussed in Chapter 7 and 8. This was a feature of his overall preparation and

20 Hayne, ‘Advocacy and Special Leave Applications in the High Court of Australia’, above n 11, p.2.
21 Ibid, p.5.
was also assisted by his practice of employing a 'ground up' preparation. In the Bank Nationalisation Case, Barwick analysed the likely approach of each judge and decided that he would target Chief Justice Latham as the judge least likely to find the legislation invalid. Whilst this strategy may have been sound based on the existing case law, he did not succeed in convincing Chief Justice Latham (or Justice McTiernan) although he was able to convince the other judges. The reason for this will be explored in Chapter 7. However, in the Communist Party Case, Barwick misjudged the attitudes of the individual judges and particularly the influence of Justice Dixon at the time. This was an example of Barwick’s failure in terms of both preparation and presentation and represented a failure to adhere consistently to the ideals of appellate advocacy. This is discussed in Chapter 9.

The second aspect of the ‘three category analysis’ is presentation which is discussed in Chapter 4. Conceptualising the case and its relevance include elements and ideals that fall within the category of presentation. One of Barwick’s strengths as an advocate was his ability to reduce his submissions to simple and concise statements as well as to identify the key issues and arguments that were relevant. This is supported by many who knew him during his time at the Bar as discussed in Chapter 6. However, in reality, Barwick’s ability to do so proved a weakness in his early days before the High Court which considered his submissions too brief. Barwick’s later presentation, as evident in the two critical constitutional cases, seems to accord with this ideal of appellate advocacy. Barwick often used his opening to inject humour into the proceedings or summarise and outline his arguments in a memorable way. On occasions, Barwick’s reply involved ‘trailing his coat’ when he was acting for the appellant or plaintiff, withholding aspects of his submissions to allow his opponent to address these issues before he did so in reply. Barwick’s reply featured more prominently in the Bank Nationalisation Case than the Communist Party Case. However, in the Communist Party Case, at one point, Barwick’s tactics in reply were the subject of complaint by his opponent as will be discussed in Chapter 9. Barwick’s approach to the opening and the reply is discussed in Chapter 6.

Watching the bench and dealing with judicial questions are key ideals of appellate advocacy within the category of presentation. Observing a judge’s reactions and listening carefully to their comments or questions, provides an advocate with an insight into their thinking enabling the advocate to modify their submissions accordingly. The advocates who are most effective at watching the bench are those who engage in dialogue with the individual members of the court. Judicial questions are particularly important as they provide invaluable information about the attitudes of the members of the court but the reality is that it is not possible to anticipate all judicial questions or answer all such questions. Barwick’s engagement with the bench was one of his great strengths as observed by those who knew him and discussed in Chapter 6. As will be seen in Chapters 7, 8 and 9, Barwick’s approach to judicial questioning in the two seminal constitutional law cases differed. In the Bank Nationalisation Case, he welcomed judicial questions and used his answers to convey his submissions
whereas in the *Communist Party Case*, as discussed in Chapter 9, he seemed to consider judicial questions as interruptions which led him to become frustrated and irritated as is evident in his responses. In the latter case, he also failed to listen to the bench effectively and ignored a possible argument offered by Justice Dixon that may have ultimately succeeded. The analysis of presentation in both cases will reveal that Barwick largely achieved this ideal of appellate advocacy in the *Bank Nationalisation Case* but fell short of doing so in the *Communist Party Case*.

Barwick focused heavily on the substance of his submissions both in preparation and presentation. In saying this, as will be seen in Chapter 9, the substance of his submissions in the *Communist Party Case* may have benefited from less focus on the policy implications and more attention to the legal arguments in support of the legislation based on the Commonwealth's powers under the Constitution. In terms of elegance, Barwick was not considered a particularly elegant advocate as discussed in Chapter 6.

Flexibility, discretion and tact are ideals of appellate advocacy. Barwick's ability to deal with the court was one of his great strengths according to those who knew him during his time at the Bar as discussed in Chapter 6. His approach in the *Bank Nationalisation Case* epitomised the ideals of flexibility, discretion and tact to a large extent as will be seen in Chapters 7, 8 and 9. However, in the *Communist Party Case*, he became more obstinate as well as frustrated and irritated at times, especially when dealing with the persistent questions from the bench, and failed consistently to meet these ideals.

The ability to explain policy and principle is another ideal of appellate advocacy. The principle and policy behind a law are relevant to an appellate court. Barwick outlined the policy implications of upholding the nationalisation of the banking industry in the *Bank Nationalisation Case* during the course of his submissions. He also did likewise in the *Communist Party Case* by alluding to the consequences of not upholding the validity of the legislation as will be seen in Chapter 9; however, he may have focused on this aspect too heavily in this case.

Citing authority with care is also an ideal of appellate advocacy. This refers to using authority to support an argument rather than as a substitute and ensuring that the relevance of each authority is explained. Barwick did this effectively in both cases. However, at one point during the *Communist Party Case*, Barwick referred to an authority and misquoted its application which was detected by Justice Dixon. Whilst this was an isolated instance, it does represent a failure to adhere to this ideal and may have impacted on Barwick's credibility.

The third part of the 'three category analysis' is personation, discussed in Chapter 5. Personation includes courage as an ideal of appellate advocacy. Advocates are required to maintain their submissions, within reason and where appropriate to do so. Courage needs to be balanced against
other ideals such as flexibility, discretion and tact. Barwick was renowned for demonstrating great courage and maintaining his arguments in the face of often robust judicial questioning. Whilst this is generally respected, in circumstances where it may not be appropriate, it may be counterproductive. Barwick’s ‘courage’, on occasions, led to him becoming arrogant and possibly discourteous when addressing an appellate court, as several persons recalled. This is discussed in Chapter 6. There does not appear to have been any evidence of these negative features in the Bank Nationalisation Case as will be seen in Chapters 7 and 8, although there were times in the Communist Party Case where Barwick’s attempts to be courageous may have led him to becoming frustrated and discourteous, as discussed in Chapter 9.

Honesty, respect and candour are also ideals of appellate advocacy in the context of personation. This is discussed generally in Chapter 6 and specifically in the context of the Communist Party Case in Chapter 9.

The effective expression of emotion is an ideal of appellate advocacy. The advocate may use emotion to assist their client’s cause but this can also lead to a lack of objectivity. There is also the need to keep emotions under control and avoid losing one’s temper. There is little evidence of Barwick’s use of emotion in appellate advocacy, as discussed in Chapter 6. However, Barwick’s performance in the Bank Nationalisation Case (discussed in Chapters 7 and 8) may have been enhanced by the fact that his arguments reflected his personal values. However, in the Communist Party Case, Barwick’s arguments apparently accorded with his beliefs, yet he was unsuccessful. This is discussed in Chapter 9. Barwick did not achieve the ideal in this case.

The ‘extras’ are aspects of presentation that increase the persuasive effect of an advocate’s presentation and represent ideals of appellate advocacy. They are: voice, words, wit, presence and memory. A general discussion of these can be found in Chapter 6, including the observations of those who knew and observed Barwick during his time at the Bar. Barwick’s choice of language in both cases was exceptional; it demonstrated considerable preparation and thought. It also enhanced the persuasive effect of his submissions. During both cases, Barwick used humour and wit to provide some light-hearted relief and did so appropriately, one clear example is discussed in Chapter 8.

Barwick’s memory was exceptional and there are countless examples in the transcript of both cases where he was able to respond immediately to questions by recalling principles from other cases or comments by judges in other cases. This also reflects a thorough preparation. While it is difficult to assess voice or presence in the transcript, generally Barwick appears to have achieved the ideals of appellate advocacy in terms of the ‘extras’.
1.3 The Purpose of Advocacy

It is undeniable that the objective of advocacy is to persuade. In a legal context, an advocate’s role is to persuade a decision-maker, namely, a judge or group of judges. Professor George Hampel, a former leading Victorian barrister and judge, has described advocacy as follows: ‘Advocacy – or persuasion – involves creating or changing perceptions to influence the result ... Great advocates are not necessarily better lawyers than others – they are better communicators’.

From a psychologist’s perspective, it has been suggested that: ‘The art of persuasion requires empathy as well as a deep understanding of human psychology and the complex emotional and intellectual processes that result in perception and attitude change.

Persuasion can only be achieved through effective communication. Communication is the means through which the ultimate objective of advocacy is achieved. Communication facilitates both the exchange of ideas and information generally between the advocate and the decision maker. This interaction is critical to advocacy. The current Chief Justice of the High Court, Robert French, has stated that ‘advocacy is the human art of communication and persuasion’.

An advocate’s

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22 Former Justice of the High Court, Michael Kirby, stated that:

The central aim of advocacy – being to persuade a decision maker – has remained the same throughout history. It will remain the aim of advocates in the future. The need for advocates to be able to communicate complex ideas and arguments will always constitute the touchstone by which an advocate is judged.


27 Robert Shenton French was appointed Chief Justice of the High Court of Australia in September 2008. At the time of his appointment he was a judge of the Federal Court of Australia, having been appointed to that office in November 1986. He was admitted in 1972 and practised as a barrister and solicitor in Western Australia until 1983 when he went to the Western Australian Bar. From 1994 to 1998 he was President of the National Native Title Tribunal. At the time of his appointment he was an additional member of the Supreme Court of the Australian Capital Territory and a member of the Supreme Court of Fiji. He was also a Deputy President of the Australian Competition Tribunal and a part-time member of the Australian Law Reform Commission. He was highly regarded for his superlative appellate advocacy and art of persuasion according to WA Solicitor-General, Robert Meadows QC: ‘Much more than black-letter law’, Australian Financial Review (Sydney), 1 August 2008, 52.

28 Kate Gibbs, ‘Chief Justice scrutinises personality and justice’, above n 11, 1.
demeanour must be conducive to such communication and requires both respect and an even temperament.  

Aristotle and Rhetoric

The origins of advocacy can be traced to Ancient Greece and through to Ancient Rome. From these times, it was identified that the objective of advocacy was persuasion and this has remained constant since that time. The study of advocacy and persuasiveness began in Ancient Greece, and observations related to advocacy still remain relevant today. In many respects, the elements and ideals of appellate advocacy that apply today (and which are identified and critically analysed in this thesis) are an extension or expansion of these early observations. For example, Aristotle’s seminal work on rhetoric from Ancient Greece reveals the connection between rhetoric and advocacy.

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Aristotle identified three kinds of persuasion, namely:

1. *ethos* – the character of the speaker;
2. *pathos* – the disposition of the audience; that is, putting the audience into a certain frame of mind; and
3. *logos* – the speech itself, that is, the logic or the words of the speech itself.

In relation to the first, Aristotle suggested that character facilitates persuasiveness – that is, if a speech is delivered in such a way that the speaker appears worthy of credence then the speaker will be more persuasive. This is based on the notion that someone of good character is more likely to be believed than someone of bad character. However, evidence of the speaker’s character should become apparent during the course of his or her speech and not through the speaker being believed to be of a certain character in advance.

Aristotle believed that the second kind of persuasion could be achieved by altering the disposition of an audience such that the audience is induced by the speech into an emotional state. Individuals who give judgments in disputes do so in different ways depending on whether they are pleased or aggrieved, sympathetic or repelled and so forth. Speeches that stir the emotions of the audience are more likely to be persuasive.

Aristotle suggested that the third kind of persuasion can be achieved through the speech itself – that is, by demonstrating ‘a real or an apparent persuasive aspect of each particular matter’. That is, the inherent logic of the speech itself will be persuasive.

Aristotle believed therefore that persuasion will be achieved by people who can understand character, the virtues and emotions, and how to employ these to great effect, as well as those who can master the syllogism (that is, reason logically).

According to Aristotle, there are three reasons why speakers will be inherently persuasive, namely: ‘common sense, virtue and goodwill’. These factors inspire confidence in the speaker’s own

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31 This is also referred to as the “three corners of persuasion” in Peter Thompson, ‘The Art of Persuasion in Business, Negotiation and the Media’ (Autumn 1999) The Sydney Papers 11, 13. See also Rosenberg and Huberman, above n 11, pp.48-49; Michael Hyam, Advocacy Skills, (1990), Blackstone Press Ltd, London, UK, p.145.


33 Aristotle, *The Art of Rhetoric*, above n 32, pp.74-75; Thompson, above n 31, 13; see Eidenmuller, above n 32.

34 Ibid. See also Donovan, above n 11, p.9.


36 Ibid; see Eidenmuller, above n 32.

37 Ibid. See also Donovan, above n 11, p.6.
character and encourage an audience to believe the speaker irrespective of any evidence to substantiate what the speaker is saying.

Although Aristotle focuses on the importance of emotions and character in persuasion, he was also concerned with aspects of the speech itself, such as style and composition. According to Aristotle, style consists of clarity, frigidity, simile, purity, amplitude, propriety, rhythm, syntax, wit and metaphor, vividness and suitability to genre. These are all factors that will impact on the speech itself and the manner in which it is delivered thereby impacting upon its persuasiveness. In terms of composition, the following features are important: narration, proof, introduction, prejudice, refutation, altercation and the epilogue. It is easy to see why the structure of a speech may aid its persuasive effect.

The kinds of persuasion to which Aristotle referred, together with the other important elements of persuasion, are evident in the elements and ideals of appellate advocacy. Also, there are clear parallels between Aristotle’s three kinds of persuasion and the elements and ideals of appellate advocacy. For example, one of the elements of personation is that an advocate should display honesty and candour at all times; otherwise, this will damage the advocate’s credibility and will ultimately diminish the persuasive effect of the advocate’s other arguments. This mirrors Aristotle’s emphasis on character as one of the three kinds of persuasion.

Another example can be found in Aristotle’s statement: ‘The fool tells me his reasons. The wise man persuades me with my own’. In this statement, Aristotle is emphasising the importance of advocates tailoring their submissions to the judge hearing the case. A judge’s thinking is often revealed through judicial questions. Aristotle’s statement reflects a number of the elements and ideals of appellate advocacy, including: an advocate undertaking a comprehensive preparation to anticipate likely judicial questions, becoming familiar with the previous decisions of the individual judges of the court and using this knowledge when responding to judicial questions.

**Advocacy, Persuasion and the Administration of Justice**

The goal of advocacy is persuasion and this is achieved through, among other things, the communication of information. Informing and persuading are inextricably linked. An appellate court ‘shares with counsel a common interest in the advocate’s effective performance of his double-

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38 See generally Aristotle, *The Art of Rhetoric*, above n 32. Also, see Thompson, above n 31, 16 who refers to five principles fundamental to the "three corners of persuasion", namely: invention (identifying the key question that has to be answered); arrangement (the structure of the argument); the style or choice of persuasive language; memory (the ability to accurately recall arguments); delivery (the use of voice and body language).

39 As quoted in Thompson, above n 31, 13.
barrelled task of informing and persuading'. Former Justice of the High Court of Australia, Michael Kirby, believes that ‘[t]he need for advocates to be able to communicate complex ideas and arguments will always constitute the touchstone by which an advocate is judged’. Without sufficient information, an appellate court may not be aware of all of the relevant issues or applicable law and may therefore not be in a position to make a fully informed decision which is fair and just in all the circumstances. For this reason, an appellate court (just like other courts) relies on the advocates to provide the necessary information to enable the judges to make a fully informed decision.

It is widely accepted that the adversarial system is based on the fundamental principle that justice is more likely to be achieved when opposing parties utilise professional advocates, who possess the necessary knowledge of the law and operate within the responsibilities and parameters of an organised legal profession. The members of the legal profession owe a duty to their clients but ultimately owe an overriding duty to the court. In such a system, the central role of the advocate is to present their client’s case to its best advantage, to refute the opponent’s case and ‘to endeavour by all legitimate means to persuade the tribunal to a view of the facts and the law most likely to result in a decision in favour of the client’. An advocate’s task is essential to the proper performance of the court’s work. As Justice Kenneth Hayne of the High Court remarked, those ‘who must decide the cases look for as much help as we can get in performing our task’. During his time as Chief Justice of the High Court of Australia, Barwick acknowledged this in commenting on a suggestion to increase the size of the judiciary:

40 Godbold, above n 11, 807. This thesis will, from time to time, draw upon and refer to, the literature on advocacy and appellate advocacy found in overseas jurisdictions such as the United Kingdom, United States of America and Canada. Whilst it is recognised that appellate advocacy in each of these jurisdictions must be understood in their respective contexts, they do contain fundamental elements of advocacy and appellate advocacy that transcend jurisdictional issues. For this reason, any reliance upon such literature can be assumed to occur in instances where the author believes that the principles discussed or espoused have general and widespread application as well as particular relevance unless otherwise stated.

41 Michael Kirby was a judge of the High Court of Australia between 1996 and 2009. Prior to this, he was the Deputy President of the Australian Conciliation and Arbitration Commission, a tribunal which adjudicated labour disputes, from 1975 until 1983. From 1983 to 1984, he was a judge in the Federal Court of Australia before being appointed as President of the New South Wales Court of Appeal until his appointment to the High Court of Australia in February 1996.


44 Justice Kenneth Hayne joined the Victorian Bar in 1971, and was appointed a Queen’s Counsel in 1984. He was appointed as a judge of the Supreme Court of Victoria in 1992. From 7 June 1995 he sat in the Court of Appeals division of the Supreme Court of Victoria and was appointed as one of its foundation judges. Hayne was appointed as a judge of the High Court of Australia in September 1997.

45 Hayne, ‘Advocacy and Special Leave Applications in the High Court of Australia’, above n 11, p.9.
...better preparation and presentation of cases by counsel can greatly contribute to the efficient disposal of cases and a better use of available judicial time. The rapport and understanding between Bench and Bar should greatly contribute to the economical use of that time.46

Barwick went on to state:

More thorough preparation and a more selective approach to the matters on which reliance is placed should lead to greater economy in the use of judicial time. Basically, it is the skill and sense of responsibility of the practising profession which will obviate the undue and unnecessary increase in the workload of the judiciary by the grant and use of aid.47

However, when advocates do not perform their functions effectively, the court system and the administration of justice are adversely affected. That is, ‘[t]he court system also suffers from poor advocacy because it is much harder to conduct cases and run an efficient system when they are receiving insufficient assistance from a barrister and other advocates’.48 It is essential that an advocate should understand the task that they are required to perform for the court, namely, to inform and to persuade within the parameters of their overriding duty to the court. The great advocate and former Chief Justice of the High Court, Sir Owen Dixon, however ‘regarded advocacy as the soul of the law, [but] did not believe that the arguments of counsel should be the primary factor in the final judgment of the Court’.50 This can be contrasted with the comments by Sir Anthony Mason51 and Sir Harry Gibbs.52 During his time as a judge on the High Court, Mason observed that advocates would often become distracted and lose sight of their objective: ‘We do not always see counsel as we should, that is, as a legal representative whose primary function is that of persuading

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47 Ibid. During his time as Chief Justice, Barwick also suggested that:

If you are committed to the adversary system, the function of the advocate in administration of the law is quite central and is becoming more so ...

The advocate when drawn from the Bar is constantly with you. There are several relevant aspects of that fact. First of all as a judge you are able to rely upon him. You know him and he has to continue to work with you. You know whether he is likely to be right up-to-date with what he wants to say. You know whether or not he will respect the obligation he has to help you as a judge. He also comes to know you and to understand your manner of handling a case.

‘Barwick’ (30 May 1980), 12 Justinian 9, 9.


49 The author has chosen to use ‘they’ in circumstances where the singular could be used in an effort to adopt gender neutral language and avoid the cluttering effect of ‘he or she’.


51 Sir Anthony Mason was a Justice of the High Court of Australia between 1972 and 1987 and the Chief Justice of the High Court between 1987 and 1995. He was admitted to the NSW Bar in 1951 and appointed as Queen’s Counsel in 1964. He was the Commonwealth Solicitor-General between 1964 and 1969 and a Judge of the NSW Court of Appeal between 1969 and 1972.

52 Sir Harry Talbot Gibbs, GCMG, AC, KBE, QC (17 February 1917 - 25 June 2005) was Chief Justice of the High Court of Australia from 1981 to 1987 after serving as a member of the High Court between 1970 and 1981.
the Court to accept his client’s case’.\textsuperscript{53} While Chief Justice of the High Court, Gibbs indicated that an appellate advocate must do more than merely persuade in terms of their arguments alone – they must persuade the appellate tribunal to take a particular course of action.\textsuperscript{54}

This discussion leads to a broader issue of the general competence and ability of advocates, including appellate advocates. Whilst this thesis is concerned with the ideals and the reality of appellate advocacy, it must not be overlooked that courts and the administration of justice require that advocates meet certain minimum competencies to ensure that judges are able to discharge their duties and responsibilities effectively. These minimum competencies represent many of the elements of effective appellate advocacy. However, once these minimum standards are achieved, the manner in which appellate advocates apply and employ the elements of appellate advocacy will differ. It is this latter theme that this thesis seeks to explore.

\section*{1.4 Appellate Advocacy Versus Trial Advocacy}

Appellate advocacy occurs before courts comprising more than one judge and without a jury. Traditionally, in common law jurisdictions, trial advocacy occurs before a single judge or single judge and jury. Whilst appellate advocacy includes an appeal to a multi-member court from a lower court, this kind of advocacy is also particularly relevant in the context of matters relating to the Australian Constitution heard before the High Court of Australia.

Constitutional law cases are usually dealt with before a full bench of the High Court comprising five or seven judges.\textsuperscript{55} The in-depth analysis of Barwick’s advocacy in constitutional law cases is essentially an analysis of appellate advocacy. The record of Barwick’s appearances in key constitutional cases provides a unique opportunity to test his reputation against the ideals of effective appellate advocacy.

The literature on trial advocacy and appellate advocacy from overseas jurisdictions such as the United Kingdom, United States of America and Canada has some general application and relevance to Australia, as there are common features of each type of advocacy. In each such jurisdiction, advocacy occurs in an adversarial setting in circumstances where the role of an advocate is similar and where there is generally a heavy reliance on oral advocacy and an increasing reliance on written submissions. In addition, appellate advocacy in each jurisdiction occurs before multi-member courts.

\begin{flushleft}
\textsuperscript{53} Mason, ‘The Role of Counsel and Appellate Advocacy’, above n 11, 546.  
\textsuperscript{54} Harry Gibbs, ‘Appellate Advocacy’, above n 11, 496.  
\textsuperscript{55} However, a Full Court may be constituted by as few as two or more Justices of the High Court sitting together (see section 19, \textit{Judiciary Act 1903} (Cth)).
\end{flushleft}
For this reason, this literature is useful in drawing both comparisons and contrasts between both forms of advocacy.

One common feature of both trial advocacy and appellate advocacy is that the main objective is persuasion.\(^5\) Whilst there are qualities, skills and techniques of effective advocacy that are equally applicable to both trial and appellate advocacy, certain qualities, skills and techniques are only applicable to appellate advocacy. This is particularly the case where trial advocacy involves a jury as opposed to a judge-alone trial. The difference was explained by Leander Shaw Jr, a former judge of the Florida Supreme Court, as follows:

there is a difference between the skills needed in litigating a case before trial and appellate court. Trial litigation – focusing on jury trials – requires jury arguments that are generally structured to lead ordinary people to decide something based on compelling emotional arguments ... In appellate advocacy, however, the emphasis switches and the attorney must stress the application of law to facts – keeping in mind the appellate court’s concern for uniformity of the law and doing justice. Thus, the ability to present thoroughly researched legal arguments and to present them in a very orderly and logical manner becomes more important.\(^5\)

A former Judge of the Supreme Court of Ontario, Alvin B. Rosenberg, believes that an advocate ‘should appreciate the unique nature, aims and processes of appellate advocacy’.\(^5\) For example, he notes that an appellate court ‘is motivated by a desire to do justice and to deal with each case fairly and expeditiously, making effective use of its time’.\(^5\)

A court comprised of more than one judge presents unique and inherent challenges for an appellate advocate. The members of the court may not necessarily be of a single mindset; they may have differing views in relation to the case before them. One of the challenges that an appellate advocate encounters is advancing and tailoring submissions that will appeal to, and persuade, a majority of the members of the court. An appellate advocate must ascertain the likely views of each individual judge as well as assess and gauge judicial temperament and personality.

Each member of the court will receive an advocate’s submission differently. One member of the court may receive it with scepticism or even hostility, while another member may find the same submission attractive.\(^6\) An appellate advocate must be prepared for this eventuality.

\(^5\) Glissan, above n 11, p.190; Rosenberg and Huberman, above n 11, in Foreword by Michel Proulx, Justice of the Court of Appeal of Québec; Jennifer S. Carroll, ‘Appellate Specialization and the Art of Appellate Advocacy’ (June, 2000) The Florida Bar Journal 107, 107; Nathanson, above n 11; Glissan, above n 11, p.190.


\(^5\) Rosenberg and Huberman, above n 11, in Foreword by Michel Proulx, Justice of the Court of Appeal of Québec, p.xiv.

\(^5\) Ibid.

An appellate court is not bound by the decisions of lower courts although generally it will consider itself bound by its own decisions. The High Court stands at the apex of the Australian judicial system and is therefore not bound by the decisions of any other court in Australia although it may consider itself bound by its earlier decisions for the purposes of maintaining consistency - provided that it believes that these earlier decisions are correct. This is relevant for appellate advocates. Since 1984, special leave is required before the High Court will hear an appeal from a decision of a Supreme Court of a state. Although this did not apply during Barwick’s time at the Bar, special leave applications provide their own unique challenges in terms of appellate advocacy. Due to the time limits applicable to special leave applications, some of the elements of appellate advocacy explored in this thesis assume greater significance.

Developments in Appellate Advocacy before the High Court

There have been a number of important developments in terms of practice and procedure in appellate proceedings, particularly in the High Court, since Barwick’s time at the Bar. Kirby has stated that: ‘Over the past decade significant changes have occurred to the environment in which appellate advocates, in particular, must work.’

The two major changes that have occurred since Barwick’s time at the Bar, to which Kirby refers, are the increasing use of written submissions and the introduction of time limits for oral submissions.

61 Ibid.

62 This is the position since the Judiciary Amendment Act (No 2) 1984 (Cth) was introduced in 1984 which amended the Judiciary Act 1903 (Cth) (see s 35(2) of the Judiciary Act 1903 (Cth)). This occurred during the time that Sir Harry Gibbs was Chief Justice. Section 35A outlines the criteria for granting special leave to appeal. See Joan Priest, Sir Harry Gibbs: Without Fear or Favour (1995), Scribblers Publishing, Gold Coast, p.103. See also Anthony Mason, ‘Judiciary Act’ in Tony Blackshield, Michael Coper & George Williams (eds), The Oxford Companion to the High Court of Australia, (2001), Oxford University Press, South Melbourne, p.380; David Jackson, ‘Leave to appeal’ in Tony Blackshield, Michael Coper & George Williams (eds), The Oxford Companion to the High Court of Australia, (2001), Oxford University Press, South Melbourne, p.425; Jackson,‘Practice in the High Court of Australia’, above n 62, 189; Sir Anthony Mason, ‘The Regulation of Appeals to the High Court of Australia: The Jurisdiction to Grant Special Leave to Appeal’ (1996) 15 University of Tasmania Law Review 1; David Solomon, ‘Controlling the High Court’s Agenda’ (1993) 23 University of Western Australia Law Review 33.


64 In relation to written submissions generally see Glissan, above n 11, pp.194-197; The Hon. Justice K.M. Hayne, ‘Written Advocacy’ (Paper presented as part of the Continuing Legal Education Program of the Victorian Bar, 5 & 26 March 2007). Former Chief Justice Murray Gleeson noted that, since Barwick’s day, the major change has been the requirement for advocates to submit a written summary of their argument which wasn’t the case in the High Court in Barwick’s day but was the case in the Privy Council: see Interview with Murray Gleeson, Chief Justice of the High Court of Australia (Sydney, 14 August 2006).
Kirby suggests that '[t]hese changes [have] had a significant impact on appellate advocacy.' These changes stem from the growing workload of appellate courts as well as the increased focus on efficiency. The High Court has embraced such changes.

For present purposes, it is important to identify these changes for two reasons. First, they reveal in an indirect way the environment in which Barwick operated when appearing before the High Court during his time at the Bar and they help provide some context for High Court practice and procedure during that time. Secondly, they provide an insight into the manner in which appellate proceedings are presently conducted in the High Court and highlight the continued relevance of the elements and ideals of appellate advocacy - many of which may assume greater significance in the current climate.

Prior to 1982, the High Court relied almost entirely on oral argument. After 1982, the parties had to submit a written outline of their arguments prior to commencing oral submissions. After 1984, the parties also had to submit a written list of authorities. From 1997, parties have been required to file more detailed written submissions covering all main arguments. The High Court Rules 2004, which commenced in January 2005, also placed further emphasis on the importance of written

65 Kirby, ‘Appellate Advocacy – New Challenges’, above n 11, pp.10–11. Kirby, ‘The future of appellate advocacy’, above n 11, 142. During the time that Barwick was Chief Justice of the High Court, he suggested that ‘[t]his Court, I may say, in the disposal of matters before it has favoured the hearing of oral argument and discussion with counsel of the points involved without the imposition of formal time limits’: Sir Garfield Barwick, ‘Ceremony to Commemorate 75th Anniversary of Opening in 1903’ (Speech delivered at the High Court of Australia, Melbourne, 6 October 1978). See also Garfield Barwick, ‘Chief Justice Barwick: Speeches 1973-1981’, High Court of Australia Library, Canberra. This speech was also published in Sir Garfield Barwick, ‘The Seventy-Fifth Anniversary of the Opening of the High Court of Australia: Commemorative Address’ (1979) 53 Australian Law Journal 36.


submissions.\textsuperscript{70} All Australian appellate courts now require written submissions prior to the commencement of oral arguments.\textsuperscript{71}

Written submissions have affected the manner in which an appellate advocate approaches oral advocacy. Appellate advocates cannot simply repeat their written submissions in oral argument nor can they merely read aloud their written submissions. In this context, oral argument is used to complement the advocate’s written submissions. It also affords the advocate the opportunity to direct the court’s attention to the critical aspects of the case and to clarify any matters that may be troubling the judges.\textsuperscript{72}

Oral submissions allow an advocate’s case to be tested by an appellate court in a manner that is not available when there is reliance upon written submissions. Whilst greater analysis of this issue is beyond the scope of this thesis, further analysis of effective appellate advocacy will provide insights that are relevant to this issue generally.\textsuperscript{73} Also, since 1984, an appeal to the High Court from other courts does not exist as of right but ‘special leave’ to appeal from the High Court must be obtained.\textsuperscript{74}

In applications for special leave, written summaries of argument are required and any oral arguments are limited to 20 minutes for each side with the applicant being granted 5 minutes in reply. The time limit was imposed in 1994.\textsuperscript{75} Kirby observed in relation to time limits for oral argument:

\begin{quote}
A good advocate ordinarily uses oral argument to complement and strengthen written submissions, and not just to state them again in a slightly different way. More discerning advocates will keep in mind that some judges may not have had time to read the submissions carefully. In the particular case, some will be out of their familiar legal territory. Even in the age of written arguments, the advocate must tread a delicate path between keeping the interests of those judges who are ‘hot’ and ‘have mastered the written materials’ and those who are not and are not really focusing on what the case is about. It is quite a tall order. It is increased by the trend towards written argument.
\end{quote}


\textsuperscript{72} Kirby, ‘The future of appellate advocacy’, above n 11, 145. At 145-146, former Justice of the High Court, Michael Kirby, observed that:

\begin{quote}
A good advocate ordinarily uses oral argument to complement and strengthen written submissions, and not just to state them again in a slightly different way. More discerning advocates will keep in mind that some judges may not have had time to read the submissions carefully. In the particular case, some will be out of their familiar legal territory. Even in the age of written arguments, the advocate must tread a delicate path between keeping the interests of those judges who are ‘hot’ and ‘have mastered the written materials’ and those who are not and are not really focusing on what the case is about. It is quite a tall order. It is increased by the trend towards written argument.
\end{quote}

\textsuperscript{73} The issue that arises from this discussion is whether the move away from oral submissions to a greater reliance on written submissions is desirable from an administration of justice perspective. While there is efficiency associated with a heavier reliance on written submissions and less court time occupied with oral submissions, the question remains whether the trend away from oral submissions is ideal from the perspective of fairness and justice. It is here where the tension lies.

\textsuperscript{74} See \textit{Judiciary Amendment Act (No 2) 1984} (Cth). The criteria for special leave are located in section 35A of the \textit{Judiciary Act 1903} (Cth) and the formal procedure is outlined in Order 69A of the \textit{High Court Rules 2004}. See Jackson, ‘Leave to appeal’, above n 62, p.426; Jackson, ‘Practice in the High Court of Australia’, above n 62; Jackson, ‘Appellate Advocacy’, above n 71. See also Murray Gleeson, ‘Australia’s contribution to the common law’ (2008) 82 \textit{Australian Law Journal} 247, 258.

They require a concentration of mind and focus of advocacy in a way that open-ended time does not. The time limits also demonstrate that most cases are susceptible to efficient presentation, so that their importance in legal and factual terms can be explained to experienced decision-makers in twenty minutes. The need to do this ensures that advocates usually now go directly to the very heart of their case.\textsuperscript{76}.

Although strict time limits are not imposed in cases heard by the High Court of Australia at present, the duration of oral argument is significantly shorter than in the past. In most complex cases, the oral argument will span one day with very few stretching into the second day or beyond. The \textit{Bank Nationalisation Case} which ran for 39 days in the High Court in 1948 is still the longest running High Court case, closely followed by the \textit{Communist Party Case} in 1950 at 24 days. It is unlikely that any future High Court cases will even approach, let alone exceed, the length of these cases due to the requirement that parties file and serve a summary of arguments and written submissions.\textsuperscript{77} In recent times, one of the longest running High Court hearings was the challenge by various states to the Federal government's workplace relations law - the \textit{Work Choices Case}.\textsuperscript{78} The hearing in May 2006 lasted 6 days which is lengthy by modern day standards. The tendency towards shorter oral arguments is the result of the increasing reliance on written submissions.\textsuperscript{79}

These developments are important for two main reasons. First, the context in which Barwick appeared as an appellate advocate has changed\textsuperscript{80} and his ability as an appellate advocate needs to be examined in the context in which he appeared.\textsuperscript{81} However, the elements and ideals of appellate

\textsuperscript{76} Kirby, 'Appellate Advocacy – New Challenges', above n 11, p.17. See also Kirby, 'The future of appellate advocacy', above n 11.


\textsuperscript{78} \textit{NSW v Commonwealth of Australia; Western Australia v Commonwealth of Australia} (2006) 229 CLR 1. The High Court's judgment was delivered on 14 November 2006.

\textsuperscript{79} Kirby, 'The future of appellate advocacy', above n 11; Jackson, 'Appellate Advocacy', above n 11, p.18.

\textsuperscript{80} This was noted by David Jackson QC where he stated that:

\textit{in the days when [Barwick] was appearing in the High Court, when he was counsel, and also at the Privy Council in the constitutional cases there, there were some differences. It was for practical purposes all oral advocacy. It was not until, when I think maybe he was Chief Justice, they even introduced skeleton argument, Outlines of Argument, we used to call them, there were no written submissions and that had a significant effect of course, because the oral advocacy now is ... more directed and a lot shorter than it was in his day.}

Interview with David Jackson QC (Sydney, 2 August 2006). David Jackson QC also noted that Barwick had appeared in 'a lot of cases' and 'had probably more experience in constitutional matters than most other people to that point'. He also noted that the Bars, including the NSW Bar, were very small by comparison to the current size of the NSW Bar. However, David Jackson QC noted that 'Barwick was outstanding, but there is a sort of relativity in all this: 'You[ve] got to take people as they are, in the milieu of their day'.

\textsuperscript{81} For example, the ranks of the NSW Bar were depleted due to World War II. This was acknowledged by former Chief Justice Murray Gleeson in his interview with the author (see Interview with Murray Gleeson, Chief Justice of the High Court of Australia (Sydney, 14 August 2006)) and also by Gough Whitlam in his 1997 book,
advocacy that are discussed are equally applicable to appellate advocacy in the High Court in the present and likely to be in the future. With the shorter time allowed for oral argument, it is now more important for an appellate advocate to arrive at the heart of the case, focus on the most critical aspects of the case, and discard the irrelevant points, particularly in an application for special leave to the High Court. This discussion inevitably leads to the question: would Barwick’s ability as an appellate advocate have ensured success in the present day environment? In my view, the question can be answered in the affirmative. Many of the strengths and features of his advocacy that will become apparent from the analysis undertaken in this thesis would still be regarded as relevant and important although he would have had to adapt his style in the current environment where there is an increasing reliance on written submissions.

From time to time, appellate advocates will face further challenges which will inevitably influence the way that appellate advocacy is conducted. One example is the increasing use of technology. Appellate advocates will need to apply and adapt the elements and ideals of appellate advocacy to suit the prevailing environment. Despite this, the fundamental objective of advocacy - persuasion - remains constant. Advocacy ‘is not only an ancient, honourable profession, venerable with tradition, it is a dynamic, adaptive art and vocation’.

‘Abiding Interests’ where he stated that ‘[t]here was still resentment that Barwick had surged ahead at the bar while his potential rivals were engaged in war service, such as Gordon Wallace, a Duntroon graduate, and Victor Windyger, in command at Tobruk’ (Gough Whitlam, Abiding Interests, (1997), University of Queensland Press, Queensland, p.15).

Former Chief Justice Gleeson agrees:

don’t forget that nowadays a lot more advocacy is in writing ... but that capacity to go directly to the issue is even more important now where we give people limited time. We very rarely permit a case to last more than a day and that capacity of directness is of course most important in special leave applications where you only get 20 minutes. So if you can’t go quickly to the point – you’ve had it.

Interview with Murray Gleeson, Chief Justice of the High Court of Australia (Sydney, 14 August 2006). He also believed that imagination (in terms of creative arguments), which was one of Barwick’s great strengths, remains an important quality and that advocates who used their imagination to recognise and address the consequences of particular arguments, in terms of their impact on future cases, were likely to get a good reception. Also, he believed that engaging the bench is now more important for an advocate in light of the limited timeframe and that the key to this is preparation.


1.5 The Elements and Ideals of Appellate Advocacy

As noted, this thesis seeks to undertake a critical exploration of the elements and ideals of appellate advocacy and then use this as a framework to assess appellate advocacy in practice by examining, specifically, Barwick’s advocacy in two constitutional law cases. This will be undertaken using the ‘three category analysis’ discussed earlier.

From the outset, it should be borne in mind that a critical exploration of the elements and ideals of appellate advocacy will encompass elements that can also be readily described as qualities, skills or techniques.86

Underlying the qualities, skills and techniques of appellate advocacy is the fundamental purpose, and ultimate objective, of advocacy – persuasion. The principles, skills and techniques of appellate advocacy are the means to achieving that end. Chief Justice French, when asked to name the qualities that best define the leading barristers to have appeared before him, stated: ‘calm, reflective, well thought out and well-prepared presentations, where counsel can engage with the court in a real dialogue, is the most persuasive’.87 He added that ‘of course, [if] counsel can underpin their legal propositions with a little bit of moral edge, that also helps ... Can counsel persuade you that it is not just the law, but justice that is on his or her side?’ The qualities that French effectively describes as key aspects of appellate advocacy can be traced back to the three categories, namely, preparation, presentation and personation. His statement also supports the view that the key elements and ideals of appellate advocacy remain relevant in the present day.

Although some advocates may possess what might be thought of as an innate ability or an aptitude for advocacy which gives them a decided advantage,88 such an advantage is quickly eroded without

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86 For the purposes of this thesis, the author defines these terms as follows:
1. qualities – refers to a characteristic or attribute;
2. skills – refers to the ability, based on one’s knowledge, practice, aptitude and so forth, to do something well, as well as the proficiency and facility that is acquired or developed through training or experience;
3. techniques – refers to a practical method applied to some particular task, the manner and ability with which a person employs the technical skills of a particular field of endeavour and the body of specialised procedures and methods used in any specific field as well as the ability to apply the procedures or methods so as to effect a desired result.


88 Kirby, stated that:
Talent in advocacy has traditionally been viewed as a natural gift rather than a skill to be developed. Good advocates were thought to be born, not made. I do not deny that there may be a gene or two in the 36,000 genes on the human genome that is labelled ‘top advocate’ – ‘skills of communication and persuasion’. Such talents may indeed be inherited, at least to some extent.

application, practice and experience. Irrespective of an advocate’s natural ability, it can be improved by refining the principles, skills and techniques through hard work:

Advocacy is the art of persuasion. Advocacy is the technique of persuasion. Some of us have a natural talent for advocacy, some of us do not. Whatever the level of our talent and our innate ability in the art of advocacy, it can be improved, frequently vastly improved, by proper foundation and technique. The technique is something which we can all use. No advocate, no matter how talented, is good all the time.90

Although advocacy can be taught, the relevant qualities, skills and techniques cannot be acquired by study alone. They are acquired and developed through practice, experience and observation. Gibbs stated:

Advocacy is an art or a skill. Success as an advocate may come from the development of innate abilities, particularly by practice and experience, or by observing, and perhaps imitating, those who are expert, but it is not achieved, in my opinion, by study or instruction. Of course the appellate advocate must have acquired, by study or otherwise, a sufficient knowledge of the law to enable him to attempt his task, but that necessary precondition has little to do with the quality of advocacy. There are, it is true, certain general principles, mostly rather trite, of which anyone who aspires to be an advocate ought to be aware.91

In explaining why advocacy is described as an art, prominent barrister, Tom Hughes, stated: ‘because it is a use of a variety of skills based upon knowledge and experience, developed and deployed with imagination and initiative’.92 Whilst advocacy is an art, it is one which is inherently personal - it requires individual preparation, presentation and personation. Consequently, it has been suggested that:

... if not a lost art, advocacy is an exacting one. When he rises to speak at the bar, the advocate stands intellectually naked and alone. Habits of thought and speech cannot be borrowed like garments for the event. What an advocate gives to a case is himself; he can bring to the bar only what is within him. A part written for him will never be convincing.93

Hughes described advocacy as ‘the deployment of a power to persuade: the projection of the advocate’s personality into the presentation of a case is therefore a key factor’.94 Mason agreed that

90 Kirby, stated that: ‘in recent decades it has increasingly been recognised that advocacy skills can be improved and sharpened’ (Kirby, ‘The ‘rules’ of appellate advocacy’, above n 24, p.13).
91 Donovan, above n 11, p.1. A similar view was expressed in Rosenberg and Huberman, above n 11, in the Preface by The Honourable Charles Leonard Dubin, Chief Justice of Ontario.
93 Jackson, ‘Advocacy before the United States Supreme Court’, above n 11, 14.
94 Hughes, above n 92, p.5.
an advocate’s style is heavily influenced by personality.\textsuperscript{95} Chief Justice French also believes that an advocate’s personality, can properly inform an individual’s advocacy.\textsuperscript{96}

Mason also stated:

One thing you’ve got to bear in mind about advocacy is that the qualities that make one advocate very successful aren’t necessarily the qualities that are going to make another advocate very successful. It’s rather like these things – lists of qualities you’re looking for in a judge – you end up with about 20 qualities. If any one person had them all he’d be a paragon of all the virtues and I’ve never encountered anyone who did. It’s rather like that with advocates. What made Barwick a great advocate is not what made somebody like Kitto or Douglas Menzies a great advocate.\textsuperscript{97}

Mason identified some of the important elements of appellate advocacy but emphasised that it is critical as to how these are deployed:

... you can’t succeed unless you’re intelligent, unless you’ve got a good knowledge of the law, unless you present an ordered argument and unless you deal with questions, but that said, how you go about it rather depends on the qualities that you are deploying.\textsuperscript{98}

The inference from these statements is that, whilst a critical exploration will reveal the key elements and ideals of appellate advocacy, these are applied by appellate advocates in differing ways in line with their individual personality and style. Therefore, whilst this thesis will assess Barwick’s advocacy in constitutional law cases against the elements of effective appellate advocacy, it cannot be concluded that Barwick’s application provides the only path to achieve effective appellate advocacy, but rather that Barwick was able to employ certain elements of appellate advocacy in a particularly effective manner, and was consistently recognised by others as doing so.

\textsuperscript{95} Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 February 2006).

\textsuperscript{96} Kate Gibbs, ‘Chief Justice scrutinises personality and justice’, above n 11, 1.

\textsuperscript{97} Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 February 2006).

\textsuperscript{98} Ibid.
Chapter 2: Barwick’s Early Years at the Bar

“Now, my years connected with the law – they now span well over fifty years. Divided up, as I think of it, it is roughly four periods. There is a period when I was a junior barrister ... I was roughly 13 years or 14 years a junior counsel and then about 6 years a senior counsel in practice, and then for approximately six years in government, something which I much enjoyed. And then I have been here almost 17 years [as Chief Justice].

... [If] I had to answer which of those periods I liked the best, I think I would say, the first; when I was young, making my way; learning the art of advocacy; learning the art of presenting an argument clearly and succinctly and learning how to persuade the minds of others to come to your point of view. I think that was the nicest part of those four periods.”

Sir Garfield Barwick, 1981

This chapter focuses on Barwick’s formative years at the Bar. It will provide an insight into the manner in which Barwick developed and acquired an understanding of the elements and ideals of appellate advocacy. It will provide a foundation for analysing Barwick’s advocacy in later chapters and for conducting an in-depth analysis of Barwick’s advocacy in the Bank Nationalisation Case and the Communist Party Case.

When Barwick was asked in an interview in 1989 to identify the skills and qualities required to be a good advocate, he stated:

An advocate must have very quick cerebration. He must have acute appreciation of the relevance of what he hears or sees. And of course, he has to have a very quick recall of whatever he has heard or read. They are qualities which may be improved if you’ve got the basis for them but you cannot, I think, grow them or engineer them.  

Barwick acknowledged that the elements of advocacy can be improved and developed but that advocates need to possess them to begin with. This, it can be inferred, reflected his perception of his own qualities.

100 Molomby & Donohoe, above n 19, 9.
2.1 Going to the Bar

Barwick was born on 22 June 1903. He attended Bourke Street Primary, Cleveland Street High and Fort Street High in Sydney. He recalled that '[a]t the end of my schooldays I remained committed to following the law'. He graduated from the University of Sydney in 1922 after completing a Bachelor of Arts and in 1925 after completing a Bachelor of Laws with Honours. He completed his articles of clerkship with a Sydney solicitor, HW Waddell, and was called to the Bar in 1927.

Barwick's early years at the Bar were difficult and he struggled to earn a living. This was not helped by the fact that he did not have the family or social connections that so often assist during the early years at the Bar. Nevertheless, his ability to meet these challenges and cope with the demands was greatly assisted by his passion for the law.

In his early days at the Bar, Barwick acknowledged that his success would depend on his own ability, including his ability to master the art of advocacy: ‘The great adventure that was beginning had its obvious perils. I was to rely solely on my own abilities, attempting to master the art of advocacy, and then attract the attention of solicitors and their litigating clients’.

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101 Barwick, A Radical Tory: Garfield Barwick's Reflections & Recollections, above n 1, p.8. See also National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 1. See also Senator George Brandis SC, ‘The Lawyer’s Duty To Public Life’ (Speech delivered at the Inaugural Sir Garfield Barwick Address to the Legal Practitioners’ Professional Branch of the New South Wales Division of the Liberal Party, Sydney, 28 June 2010).

102 Winterton, ‘Barwick, Garfield Edward John’, above n 2, p.56. HW Waddell’s father was Tom Waddell, the Colonial Treasurer, and his cousin was George Waddell who had been at the Bar and was a partner at Minter Simpson’s (see National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 8-9). According to Barwick, he received ‘very good grounding in legal principle with the Law School plus the articles and the very great responsibility that I carried in that office’ (see National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 12). See also Brandis, above n 101; Mark Speakman SC, ‘Introduction’ (Speech delivered at the Inaugural Sir Garfield Barwick Address to the Legal Practitioners’ Professional Branch of the New South Wales Division of the Liberal Party, Sydney, 28 June 2010).

103 According to Barwick’s son, Ross Barwick, during his early years at the Bar:

> I think it's fair to say that he starved. In social terms he was caught on the wrong side of the tracks. The Bar at the time was dominated by wealthier families, old families, many of whom really had no need to work at all ... And I think in his early years he was probably ostracised if not isolated in his own profession because of his social background, and his economic background.

See Interview with Ross Barwick (Sydney, 4 October 2006).

104 Barwick described his passion for the law as follows:

> From my very early boyhood I wanted to become a lawyer. The desire to practise the law has been the leitmotif of my life, a childhood dream that remained with me and gave me the stimulus to apply myself to study. It would be true to say that the law, its practice and administration have dominated my life; throughout my practising days as a barrister, I never contemplated following any other occupation.

Part of Barwick’s training consisted of sitting in courts and observing whenever he had spare time and ‘devilling’ for other junior barristers. In doing so, he worked his way into favour with solicitors.\(^{106}\)

According to his son, Ross Barwick,\(^ {107}\)

> in terms of his advocacy, I think that that period of watching and learning, sitting in the backs of courts and hanging around other barristers and doing his best to ... work his way into practice, I think though they were clearly very formative years.\(^{108}\)

This was confirmed by Barwick in an interview in 1989 where he was asked what the important things were to get a grasp of when a barrister was starting at the Bar. He responded:

I think if I were beginning again I would want to go and sit to begin with in a courtroom and listen and observe ...

So I’d go and sit in the court and listen and watch, particularly during a jury trial.

I’d watch how my contemporaries or those who are older than myself handle witnesses and build up facts, how they deal with the judge, their approach to the judge, and I’d watch the judge’s reaction to what they did and said

... whenever I did have spare moments I didn’t spend them playing dominos. I’d go over and watch and listen, choosing a case I’d know from rumour or the lists, a case from which I’d profit by observing.\(^{109}\)

This demonstrates Barwick’s keenness to learn at every opportunity. Whilst Barwick referred specifically to jury trials, as he acknowledged, he also saw advocates engaging with judges and learnt the importance of watching the bench.

Whilst at the Bar, Barwick was aware of, and well-acquainted with, his own skills and abilities but was also conscious of his own constraints. He realised relatively early that he was more suited to appellate advocacy than trial advocacy.\(^ {110}\) History would suggest that although Barwick was regarded

\(^{106}\) Interview with Ross Barwick (Sydney, 4 October 2006).

\(^{107}\) Ross Garfield Barwick was the eldest child of Sir Garfield Barwick and his wife Lady Norma Barwick. He was a Solicitor in NSW and a partner of Barwick Dechnicz & Boitano before being struck off the Roll of Legal Practitioners on 29 April 2002 for professional misconduct.

\(^{108}\) Interview with Ross Barwick (Sydney, 4 October 2006).

\(^{109}\) Molomby & Donohoe, above n 19, 9.

\(^{110}\) According to Barwick, this stemmed from the fact that he could not employ the necessary drama and rhetoric required for trial advocacy:

> During my articled clerk days, the advocates at common law, or at least some prominent among them, were of a theatrical kind given to rhetoric, seeking thereby to influence the jury. I fear that at times they treated the jury much as some politicians treat the electors – as if they were only swayed by emotive considerations and unable by the exercise of common sense to form reasonable judgments. I realised early that I had little use for rhetoric, chiefly because it was somewhat beyond my talents.


Upon reflection, in relation to his ability as a trial advocate, Barwick conceded that he never fully mastered the art of cross examination: ‘Cross-examination is an art I do not think I ever fully mastered, certainly not to the degree attained by others’ (Barwick, *A Radical Tory: Garfield Barwick’s Reflections & Recollections*, above n 1,
as a leading advocate during his time at the Bar, his reputation arose out of his exploits as an appellate advocate rather than as a trial advocate.

Following this realisation, Barwick sought to master the art of advocacy and develop his own style of advocacy based on his own abilities as well as his strengths and weaknesses. Barwick described the style of advocacy that he adopted in the context of jury trials in a manner that has some parallels with the style he employed as an appellate advocate:

I came to think that as an advocate I should adopt a quiet presentation, leaving room for raising the voice and for gesture when emphasis was needed, but concentrating on reducing to simple terms the issues to be decided and the principles of law to be applied. ... I thought that my task would be to persuade them by logic and good sense.\(^{111}\)

One of the common features of Barwick's trial advocacy and appellate advocacy, as will be discussed later, was his ability to reduce difficult concepts to simple terms. Inherent in the above statement is that Barwick was conscious that his primary task as an advocate was to persuade, and he never lost sight of this fundamental objective.

During his time at the Bar, Barwick practised both in common law and in equity. He intentionally accepted a wide array of briefs involving diverse areas of the law to gain vital advocacy experience and increase his familiarity with various courts:

... my practice in this respect was part of my overall desire to be an all-rounder, to prepare myself as a senior counsel to handle the law in any of its aspects, and to do so with equal efficiency. In this fashion, I began to be at home in the courtroom, no matter which courtroom it was and no matter which aspect of the law was being administered.\(^{112}\)

According to Robert Ellicott QC\(^ {113}\), it was:

\(^{111}\)Barwick, A Radical Tory: Garfield Barwick's Reflections & Recollections, above n 1, p.19.

\(^{112}\)Ibid, p.29. Barwick stated that: ... the Depression gave me a chance because the financial stringency, there was always a group who wanted to get out of the contract, or even in the mortgagee-mortgagor struggle, one had to use one's wits, so I got a great opportunity for taking points, working things out, and it suited my particular make-up, and that brought me a good deal of work and prominence. Then also, because of this work in the office, I was able to handle real property work, I was able to handle equity work and common law work, too, I had had experience with them all, and so I grew up fairly quickly, plus I think a capacity for long hours of work'.

National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 14.

\(^{113}\)Robert James "Bob" Ellicott QC was called to the Bar in 1950 and appointed a Queen's Counsel in 1964. He was the Commonwealth Solicitor-General from 1969 to 1973. He was the Member for Wentworth in 1974 until 1981 and was the Attorney-General in the Fraser Ministry from 1975 to 1977. He was the Minister for Home Affairs and Minister for Capital Territory between 1977 and 1980 and was Minister for Home Affairs and the Environment from November 1980 until his resignation on 17 February 1981 to become a judge of the Federal
testimony to the breadth of his advocacy [that] he could appear across the board. I don’t think he did a tremendous lot of criminal work but apart from that in all aspects of the common law, constitutional law obviously, commercial law, equity, he was at home in almost every branch of advocacy, and I go back to the nature of his mind, quick, able to [attack] a subject and command it fairly quickly.114

This approach to advocacy ensured that Barwick acquired a broad knowledge of the law generally as well as the procedure in various jurisdictions.

Barwick, as noted, recalled that the happiest times of his life were when he was a young barrister – dashing from court to court, learning his craft and getting into the mind of the judge through persuasion and advocacy.115 In relation to Barwick’s early years at the Bar, Sir John Kerr described him as a young man ‘at the Bar doing very well handling big work’.116

2.2 Taking Silk

As time went on, Barwick attracted the leading junior work with Alan Taylor and Jack Shand. Barwick was appointed a King’s Counsel in 1941 after 14 years at the Bar.117 He then began to receive briefs from the prestigious firms of solicitors in Sydney to which he previously did not have access.118

Sir Maurice Byers119 recalled an occasion in 1942 or 1943, during the time when he was an Associate to Justice Kenneth Street, when he saw Barwick in action. He described Barwick as follows:

Court of Australia. He resigned from the court in February 1983 and returned to practice at the private Bar. He is a prominent advocate who has in excess of 50 years experience practising as a barrister in NSW, Australia and in the Privy Council in the UK.

114 Interview with Hon. Robert Ellicott QC (Sydney, 8 August 2006).
115 Scutt (ed), above n 9, p.7 (Foreword by Michael Kirby, 17 March 1987).
117 Also known as taking silk. In 1940, a number of solicitors who regularly briefed Barwick suggested to him that he consider applying to be appointed a King’s Counsel. At this time, Barwick declined for unknown reasons.
118 Barwick had suggested to both Taylor and Shand that they all apply for silk together. However, they refused in light of the fact that at the time silks were not getting as much work as the leading juniors. Leading juniors like Barwick, Taylor and Shand were doing a disproportionate amount of work and were earning as much as a silk. Taylor and Shand remained reluctant. See Winterton, ‘Barwick, Garfield Edward John’, above n 2, p.56. Following his success, Taylor and Shand sought silk and were granted it 2 years later: see Barwick, A Radical Tory: Garfield Barwick’s Reflections & Recollections, above n 1, pp.30-31; Marr, above n 8, p.35. Whilst there is reference to Barwick taking silk in 1942, it appears that he in fact took silk in 1941 (see National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 14). See also Brandis, above n 101; High Court of Australia, Justices, <http://www.hcourt.gov.au/justices_02.html> at 28 November 2011.
119 He was admitted to the Bar in 1944, and made a QC in 1960. He was Solicitor-General of Australia from 1973 to 1983.
I remember as if it was yesterday, the face vibrant with life and vitality, the restless brown eyes, the questioning, slightly amused face and, above all, the powerful, winning and magnetic personality. While the details of that case are long forgotten, I do recall him arguing the invalidity of a price-fixing order before the Full Court. His fertility of illustration was unrivalled. His ability to support his own argument, or to ridicule his opponent's by apt and telling examples, enabled him to present his case in its most seductive garb. When to this was added the force and charm of his personality, his power as an appellant advocate at this time was unrivalled in Australia.120

By the early 1940s, Barwick had begun to develop into a fine advocate. He had the ability to guide a court through the intricacies and complexities of legislation with relative ease. He was able to grasp complex and difficult concepts and convey them to the court in simple terms and in a manner that was easily comprehensible. George Amsberg121, a former District Court judge, recalled his:

gift of making the binomial theorem sound like the alphabet. He could make the dullest judge understand. It was always lightly done. Once when he argued before me, he made a submission which switched me right round. I don’t know what it was, but he suddenly showed me the way as plain as blazing daylight.122

Barwick appeared with regularity in the District Court and Supreme Court and had occasional cases before the High Court.123 The latter were mostly appeals resulting from cases which he had earlier conducted in the Supreme Court.124 Whilst he was later to appear in the High Court regularly, he appeared 'only lightly in the earlier years'.125 After 15 years at the Bar, he was ideally placed to increase his constitutional law practice which, up until being appointed a senior counsel, had consisted of only one case before the High Court.126 After Barwick had made several appearances in

121 George Amsberg QC was appointed as a judge of the District Court on 15 October 1952. He was admitted to the Bar in 1928 and was appointed a Queens Counsel in 1951 (see ‘Mr. Amsberg, Q.C., Appointed To District Court’, Sydney Morning Herald (Sydney), 16 October 1952, 2). Interestingly, George Amsberg shared the University Medal with Barwick: see Interview with Ross Barwick (Sydney, 4 October 2006) and Winterton, ‘Barwick, Garfield Edward John’, above n 2, p.56.
122 Marr, above n 8, p.37.
123 He also appeared with regularity in the Supreme Court of Victoria: see National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 14.
124 Woolworths Ltd v Crotty [1942] HCA 35; (1942) 66 CLR 603 (17 December 1942); White v Australian & New Zealand Theatres Ltd [1943] HCA 6; (1943) 67 CLR 266 (29 April 1943); Hume v Monro (No 2) [1943] HCA 7; (1943) 67 CLR 461 (6 May 1943); Federal Commissioner of Taxation v Royal Sydney Golf Club [1943] HCA 26; (1943) 67 CLR 599 (30 September 1943); R v Daigety & Co Ltd Suppliant [1944] HCA 2; (1944) 69 CLR 18 (2 March 1944); Minister of State for the Army v Parbury Henty & Company Pty Ltd [1945] HCA 52; (1945) 70 CLR 459 (10 August 1945).
125 Transcript of Proceedings in the High Court of Australia at Sydney on Friday 1st May 1964 on the occasion of the Swearing In of Sir Garfield Barwick as Chief Justice of Australia, p.9; See also Garfield Barwick, 'Chief Justice Barwick: Speeches 1964-1972', High Court of Australia Library, Canberra.
126 In fact, the first case where Barwick appeared in the High Court of Australia was as junior counsel led by Flannery KC in Wolfson v Registrar-General (NSW) [1934] HCA 29; (1934) 51 CLR 300 (7 August 1934). Before
the High Court, a senior member of the Bar informed him that it was his understanding that the Justices were impressed by Barwick’s work but thought he was too brief in his presentations. Although this surprised Barwick, he later stated:

I had a habit of condensing my submissions and no doubt expected them to be picked up quickly. Apparently I had to learn to elaborate my propositions and perhaps sometimes to repeat them, maybe in different form and tailored to catch the eye of a particular judge. But despite this encouraging message, for which I was grateful, I did not seek to build a practice in that court.

Apparently, Barwick responded to the senior member of the Bar: ‘if they don’t understand what I say, that’s their business’. This statement suggests some arrogance on Barwick’s part. However, he did concede that ‘I had to alter my ways a little’.

Following the sudden death of Edward Mitchell KC, Barwick was briefed with cases that would have ordinarily been directed to Mitchell. Barwick’s High Court practice grew considerably and quickly into what he described as ‘almost unmanageable proportions’. Within a few months of Mitchell’s death, Barwick recalled that he ‘had a flood on my table’ and that then he was ‘overworked in the High Court’.

Barwick appeared in 173 cases in the High Court between the 51st volume of the Commonwealth Law Reports and the 106th volume. It has been said of Barwick that ‘[i]n the late 1940’s and early 1950’s he dominated the Australian legal profession in a way that has never been equalled’.

taking silk, Barwick appeared in eight cases in the High Court of Australia with only one involving constitutional law issues, namely, *The King v Federal Court of Bankruptcy; Ex parte Lowenstein* (1937) 59 CLR 556 which is discussed later. See generally Tony Blackshield, Michael Coper & George Williams (eds), The Oxford Companion to the High Court of Australia, (2001), Oxford University Press, South Melbourne, pp.164-165. A leading barrister practising in the High Court at the time, Edward Mitchell KC, suggested that Barwick should attempt to practise more regularly in the High Court. Despite this suggestion, and for unknown reasons, Barwick still made no effort to do so. He may have been comfortable with the current state of his practice.


Edward Mitchell established himself at the Bar at the same time as Isaac Isaacs (later Chief Justice of the High Court of Australia) as ‘an eminent constitutional and equity lawyer’: see Max Gordon, *Sir Isaac Isaacs: A Life of Service*, (1963), Heinemann, Melbourne, p.37.


Of advocates who later became judges of the High Court, only Sir Owen Dixon (with 175 appearances) and Sir Hayden Starke (with 211 appearances) have recorded more. See Tony Blackshield, Michael Coper, Graham Fricke and Troy Simpson, ‘Counsel, notable’ in Tony Blackshield, Michael Coper & George Williams (eds), The Oxford Companion to the High Court of Australia, (2001), Oxford University Press, South Melbourne, pp.164-165.

Barwick conceded that over his career 'there would be many more losses than successes'¹³⁵, but several of the latter were of great constitutional significance: *Airlines Case*,¹³⁶ *Melbourne Corporation Case*¹³⁷ and the *Bank Nationalisation Case*.¹³⁸ Barwick's final appearance as counsel was in 1961 as Commonwealth Attorney-General before the Privy Council in *Dennis Hotels v Victoria*.¹³⁹ According to former Chief Justice Murray Gleeson,¹⁴⁰ Barwick was the first Australian advocate to appear regularly in the Privy Council.¹⁴¹

¹³⁵ Barwick, *A Radical Tory: Garfield Barwick's Reflections & Recollections*, above n 1, p.48. It is difficult to obtain statistics in relation to Barwick's win/loss record so as to give an accurate overall picture as some cases he was involved in were not reported. It would be possible to compile such statistics in relation to High Court and Privy Council cases but this would give a result in relation to a narrow sample of cases.

¹³⁶ *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29.

¹³⁷ *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 (also referred to as the "State Banking Case").

¹³⁸ *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 (High Court); *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497; [1950] AC 235 (Privy Council). One notable loss was the *Communist Party Case*.


¹⁴⁰ Anthony Murray Gleeson appeared frequently in the High Court of Australia as well as the Privy Council and was recognised as 'perhaps the finest appellate advocate in the British Commonwealth': T. Cole, 'People in the Law: Hon AM Gleeson AC, QC' (2008) 82 *Australian Law Journal* 684. He was called to the Bar in 1963 and appointed a Queen's Counsel in 1974. He also appeared for the appellant in the last case that ever went from the High Court to the Privy Council. He was Chief Justice of the High Court of Australia between 1998 and 2008. Before this, he was Chief Justice of the Supreme Court of NSW between 1988 and 1998.

¹⁴¹ Interview with Murray Gleeson, Chief Justice of the High Court of Australia (Sydney, 14 August 2006).
2.3 Early Constitutional Law Cases

Barwick’s first reported constitutional case before the High Court, *Ex parte Lowenstein*\(^{142}\), was heard in 1937. Barwick was not led by a senior counsel and argued the case himself. He was briefed to appear for Lowenstein, a bankrupt hairdresser, who had been charged under section 209(g) of the *Bankruptcy Act 1924-1933* (Cth) for failing ‘to keep such books of account as are usual and proper’.

Section 217 allowed a court, in circumstances where a bankrupt had committed an offence under the Act, to charge the bankrupt with an offence and try him summarily or commit him for trial before a court of competent jurisdiction. Barwick argued, on behalf of Lowenstein, that the particular sections of the *Bankruptcy Act* were unconstitutional.\(^{143}\)

The majority of the High Court (comprising four judges)\(^ {144}\) rejected Barwick’s submissions.\(^ {145}\) However, Barwick was able to achieve a joint dissent from Dixon and Evatt JJ. They stated that:

We do not think that a legislative power to create courts, to invest them with jurisdiction and to make laws upon all matters incidental to the exercise of the judicial power extends to the kind of power which sec.217 ... attempt[s] to give.\(^ {146}\)

Despite the *Lowenstein* result, Barwick’s reputation as an advocate flourished. The *Lowenstein* case was a ‘very respectable defeat’\(^ {147}\) as it was a case that was not considered winnable from

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\(^{142}\) *The King v Federal Court of Bankruptcy; Ex parte Lowenstein* (1937) 59 CLR 556.


\(^{144}\) Latham CJ, Rich, Starke and McTiernan JJ.

\(^{145}\) In the High Court, Barwick made two main submissions:

1. that the section establishing the charge (section 209(g)) was ultra vires, that is beyond the powers of the Constitution (s 51 (xvii));

2. there was an improper interference between executive and judicial power in the Court since, under the *Bankruptcy Act*, the Court would act as both the prosecutor and the judge of the particular offence.

The case was argued before the High Court in Sydney on 22-23 November 1937 before Latham CJ, Rich, Starke, Dixon, Evatt and McTiernan JJ. The judgment was delivered by the High Court sitting in Melbourne on 7 March 1938. Barwick’s first submission was rejected. The High Court unanimously held that in enacting section 209(g), the Commonwealth Parliament had not acted beyond its constitutional power. However, in relation to the second submission, the Court was required to determine whether it was a proper exercise of judicial power for a court to charge a bankrupt with failing to keep proper books of account under section 217 of the *Bankruptcy Act*. Barwick argued that the section purported to divest the executive of executive power (as those words exist in section 61 of the Constitution) and invest a court with a non-judicial function inconsistent with its judicial function with respect to the same subject matter. Barwick submitted that it was for the executive government to determine whether such a charge would be brought against a particular individual and that it was not a function of the judiciary for a judge to be in the position that they are a party to the proceeding and also the judge presiding in the proceedings.

Lowenstein’s perspective (although the dissenting judgments may suggest that this was not the case) and it was testament to Barwick’s ability as an advocate that he came so close to doing so.

Another early constitutional case in which Barwick was involved was Colvin v Bradley Brothers Pty Ltd (1943). Colvin, the informant, was an inspector under the Factories and Shops Act 1912-1936 (NSW) ("the FSA"). He initiated a prosecution against Bradley Brothers Pty Ltd, the occupier of a factory which employed females in work with machinery, including milling machinery in contravention of an order made under the FSA. The prosecution was dismissed by the Magistrate and Colvin appealed to the High Court. Barwick was briefed to appear on behalf of Colvin. Barwick submitted that the award did not produce an inconsistency with the State legislation (the FSA) and that it did not evince or evidence an intention to displace State legislation under section 109 of the Constitution. Despite Barwick’s creative submissions, the High Court unanimously held that the order was inconsistent with the award, and therefore by virtue of section 109 of the Constitution, it was invalid.

Challenges to the Wartime Regulations

During World War II, the Parliament enacted various regulations to control civilian life. These regulations were authorised by statute and were based on the Commonwealth’s defence power (s 51(vi)) of the Constitution. The scope of the defence power was greatly expanded during the war. Many citizens objected to various regulations and litigation resulted. In relation to the defence power, Barwick stated that:

It was very important in the interests of personal freedom to confine the executive government within those limits. To recognise and express such limits called for much legal expertise and, on

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147 Marr, above n 8, p.29; Sawer, Australian Federal Politics and Law (1929-1949), above n 143, p.121.
148 68 CLR 151.
149 An order was made pursuant to section 41 of the Factories and Shops Act 1912-1936 (NSW) prohibiting the employment of females on a milling machine. However, an award of the Commonwealth Court of Conciliation and Arbitration provided that the employment of females on work, which included work on a milling machine, was permitted unless such work was declared by a Board of Reference to be unsuitable. There had been no such declaration by a Board of Reference.
150 This case was heard in the High Court at Sydney on 26 November 1943 before Latham CJ, Rich, Starke, McTiernan and Williams JJ with judgment delivered on 20 December 1943.
151 Due to the fact that Gordon Wallace KC was on military duties.
152 Further, Barwick submitted that the award did not deal with the term ‘machinery’ but related to occupations rather than to machines. That is, the award provided not that females may be employed at milling machines but that they may be employed at a particular task. The effect of the alteration to the award, he submitted, was to give an extended permission to employ females in the industry, as prior to that provision in the award, females were not allowed to be employed generally in the industry.
153 At 160 (per Latham CJ); at 162 (per Starke J); at 164 (per Williams J).
the part of the judiciary, judgment and courage. I had many briefs for citizens to test the validity of the regulations. In some instances, clients were successful, in others not.\textsuperscript{154}

At the beginning of the war, Barwick was involved in numerous challenges to the wartime regulations.\textsuperscript{155}

Barwick appeared to regard the wartime regulations with contempt. He stated that ‘one of the things that I devoted myself to quite consciously and quite largely was the maintenance of the individual’s right as far as possible by attacking these bureaucratically drawn National Security regulations’.\textsuperscript{156} According to Marr, he had become a:

- self-made and dedicated free enterprise man. His new beliefs were few but powerfully held: that competition produced excellence and rewarded it, and that men and women had a right to the rewards of their work.\textsuperscript{157}

Mason noted that Barwick ‘had his great success in attacking the National Security Regulations during the Second World War’\textsuperscript{158} and Marr stated that Barwick ‘attacked the regulations with brilliant intensity’.\textsuperscript{159} Former Supreme Court Justice, John Slattery AO QC, suggested that Barwick’s ‘successful challenges to the validity of the National Security Regulations brought him into prominence’.\textsuperscript{160} Barwick noted that these challenges took him ‘to the High Court quite a bit’.\textsuperscript{161} He added:

- I appeared in the High Court in notable cases connected with the National Security Regulations, and then towards the end of the life of the Labor Government, I entered a period where I was getting decisions that the power had gone, that the regulations could no longer be supported’.\textsuperscript{162}

In challenging these regulations with such vigour, Barwick brought to his work ‘an extra degree of ingenuity and perseverance, and an ideological passion for a free economy’.\textsuperscript{163} He channelled his energy and effort into mounting arguments that were based on sound reasoning and logic,

\textsuperscript{154} Barwick, A Radical Tory: Garfield Barwick’s Reflections & Recollections, above n 1, p.31.
\textsuperscript{155} Ross Barwick recalled with reference to his father that ‘[d]uring the war years, in particular, he did a lot of work in wartime regulations’. See Interview with Ross Barwick (Sydney, 4 October 2006).
\textsuperscript{156} National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 15.
\textsuperscript{157} Marr, above n 8, p.34.
\textsuperscript{158} Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 February 2006).
\textsuperscript{159} Marr, above n 8, p.33.
\textsuperscript{161} National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 15.
\textsuperscript{162} Ibid, 15-16. Barwick also said that ‘one of the weaknesses of that Labor administration, I always thought, was that they wanted to keep going with this control, and they held it for too long and it went against them politically’ (at 16).
supported by case law. As will be discussed later, the use of emotion can result in a lack of objectivity and a loss of composure, although this does not seem to have affected Barwick who was able to employ his 'ideological passion' to enhance his submissions.

Barwick acknowledged that the challenges to these regulations gave him a 'good deal of work in the High Court'. Barwick recalled that the High Court was always:

held in a certain amount of terror by the young because it doesn’t, as do the other Courts, sit and just listen, it actively participates, asks questions, and expresses tentative views, a dialectical approach which I enjoyed and from which I profited.

As will be seen, Barwick preferred to engage in dialogue with an appellate court and his style of advocacy reflected this. Barwick found appearing before the Privy Council in the special leave application in the Bank Nationalisation Case very uncomfortable initially because the judges did not engage in dialogue with him. Barwick's style of advocacy relied on being able to respond to judicial questions and tailor his submissions based on judicial comments. He found himself deprived of the opportunity to do so when appearing before a less interventionist appellate court.

Barwick appeared on behalf of Maurice de Mestre in early 1944 in one of many challenges to the wartime regulations. This case involved the provisions of regulation 45(1) and (1A) of the National Security (Supplementary) Regulations 1942 (Cth). Mr de Mestre, who operated the Railway Hotel in Parramatta, was charged with failing to open to the public, and keep every bar open on the licensed premises, for the sale of liquor on 3 April 1943. In the Court of Petty Sessions, Mr de Mestre was convicted. Eventually, the matter was referred to the High Court. The issue was whether the regulations were valid as being within the defence power of the Constitution.

Before the High Court on 28 March 1944, Barwick argued that, although some aspects of the liquor trade can be regulated within the defence power, there are some aspects which cannot. He

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164 National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 16.
165 Ibid.
166 The Premier of NSW made an Order pursuant to the regulations that required licensees to keep open to the public every bar on the licensed premises between 2pm and 6pm. These regulations empowered the Premier of a State to make an order requiring a licensee of licensed premises to open, and keep open, to the public during specified hours, every bar on the premises.
167 He obtained an order nisi from the Supreme Court calling upon the sergeant of police, who attended on the relevant day, and the Magistrate to show cause why a common law writ of prohibition should not be issued to each of them restraining them from proceeding further upon or in respect of the conviction. When the order nisi was returnable before the Full Court of the Supreme Court, it was decided that there was an issue in relation to the limits inter se of the Constitutional powers of the Commonwealth and the State of NSW. As a result, the case was referred to the High Court. See Tony Blackshield, 'Inter se questions' in Tony Blackshield, Michael Coper & George Williams (eds), The Oxford Companion to the High Court of Australia, (2001), Oxford University Press, South Melbourne, p.350; Sir Gerard Brennan, ‘The Privy Council and the Constitution’ in H.P. Lee & George Winterton (eds), Australian Constitutional Landmarks, (2003), Cambridge University Press, Melbourne, 312, 312-319.
submitted that the Order was based not only on the assumption that the control of the sale of liquor was within the defence power, but also on the assumption that the control of licensed premises and the obligation to keep them open, as distinct from the selling of liquor, were also within the power. He submitted that regulation 45(1) and (1A) were beyond the powers conferred by the National Security Act 1939-1940 (Cth) ("the NSA").

Barwick's submissions were rejected by the majority of the High Court (Starke J dissenting) when they delivered judgment on 20 April 1944. The majority of the High Court held that regulation 45(1) and (1A) were authorised by section 5(1) of the NSA and were within the defence power of the Commonwealth. However, Barwick's submissions provoked a strong dissent by Starke J who found that the regulations were not within the defence power and his judgment echoed the essence of the submissions made by Barwick.

Whilst Barwick's submissions were of only limited persuasiveness, his lack of success in this case may have been symptomatic of the Court's broad interpretation of the defence power during wartime rather than any weakness or deficiency in Barwick's advocacy. Despite his lack of success in his early constitutional law cases, by 1944, Barwick was beginning to establish a reputation as a formidable advocate in constitutional cases in the High Court.

According to Marr, Barwick's first case 'of real constitutional importance' was Reid v Sinderberry in 1944. Sinderberry's case centred on the National Security (Man Power) Regulations which were enacted pursuant to the NSA to ensure Australia had adequate provision of labour during wartime.

Further, Barwick submitted that, even though intoxicating liquor in some respects may have something to do with defence, not every limitation, restriction and control that may be exercised in relation to intoxicating liquor has some connection with defence and therefore regulation 45(1) and (1A) were too widely expressed. Barwick argued that, upon its true construction, sub-regulation (1A) was a power to delegate to the Premier aspects which had nothing to do with defence — the limit of the defence power, so far as intoxicating liquor was concerned, was to restrict or control its sale so far as that related to defence.

De Mestre v Chisholm (1944) 69 CLR 51, per Latham CJ, Rich, McTiernan and Williams JJ (Starke J dissenting). Starke J stated (at 62): 'The decisions of the Court in connection with the defence power of the Commonwealth are such that I have abandoned the hope of deciding any case upon grounds that are intelligible, satisfactory or convincing'. Starke J continued (at 63):

So what is the connection ... between the Order and the defence of the Commonwealth? Counsel suggested that the purpose of the Order and the defence of the Commonwealth was to make what is called "black marketing" unprofitable or else to provide a resting lounge for weary citizens or soldiers, but this is mere assumption ... And in this case, I would add, so obviously absurd. But members of the Court came to the aid of counsel and suggested that the economic effect of the Order might convenience the public and might also, having regard to the business instincts of licensees, have some effect upon the sale and distribution of liquor. At best this is a very tenuous connection with defence and, in my opinion, mere conjecture and guesswork ....

The Order, as it seems to me, is one of those irritating orders and restrictions upon freedom of action which is arbitrary and capricious, serves no useful purpose, and has no connection whatever with defence.

Marr, above n 8, p.37.

Reid v Sinderberry (1944) 68 CLR 504.

National Security Act 1939-1943 (Cth).
wartime. In early 1944, William Sinderberry, a salesman at Cash Order Amalgamated ("COA") (later known as Waltons), was ordered to leave his employer and report for work as a factory hand in the establishment of the Kellogg (Australia) Pty Ltd factory. Sinderberry was being ordered from one civilian occupation to another and that was the essence of COA's objections to the regulations. Sinderberry was charged by the informant, Reid, with contravening regulation 15 by failing to comply with a direction made and was fined £1 in the Court of Petty Sessions. COA, on behalf of Sinderberry, briefed Barwick to appear in the appeal in the Full Court of the Supreme Court. In a unanimous decision, the Court held that regulation 15 was wholly ultra vires. Reid appealed to the High Court and the case commenced on 1 June 1944. In his characteristic manner, Barwick conceptualised the case on appeal succinctly and concisely as follows:

The question is whether the Man Power Regulations, having regard to their ambit and their plain intent, come within the class of regulations requiring persons to place themselves at the disposal of the Commonwealth for securing the public safety or the defence of the Commonwealth.

Barwick identified the consequences of the High Court reversing the Supreme Court's decision and, in so doing, indirectly alluded to the policy implications of finding the regulations to be valid. He submitted:

The employer is bound to employ the person directed, whether he has work for him to do or not, and the employee is bound to work for that employer, whether he is solvent or not. The regulation is not in substance a provision for marshalling man power into defence channels, but is an endeavour to control all employment — to redistribute labour throughout the community — on some theory, no doubt, that the community will be made more efficient and this in some way will aid the war effort. There is not a sufficiently specific connection to support the regulation.

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174 Ex parte Sinderberry; Re Reid and Ex parte McGrath; Re Reid (1944) 61(NSW) WN 139. Regulation 13 provided that employers could not seek to engage, or engage, a person without obtaining a permit from either the Director-General of Man Power, from an officer authorised by the Director-General or through a National Service Office. Regulation 15 provided that the Director-General may direct any person resident in Australia to engage in employment under the direction and control of the employer specified in the direction, or to perform work or services (whether for a specified employer or not) specified in the direction.

175 Sinderberry had been an employee of COA prior to the war and was unfit for military service.

176 COA believed that such a redirection of staff was wilful and that employees such as Sinderberry could not be used to their maximum potential by their new employers.

177 In the judgment, Jordan CJ stated that:

Regulations 13 and 15, read according to their natural construction, would, if valid, reduce the population of Australia to a state of serfdom more abject than any which obtained in the Middle Ages. No one may employ anyone to do anything except by permission of a Government Official.

Ex parte Sinderberry; Re Reid and Ex parte McGrath; Re Reid (1944) 61(NSW) WN 139 at 141.

178 'HIGH COURT BEGINS HEARING OF MANPOWER CASE', The Argus (Melbourne), 2 June 1944, 5.

179 Reid v Sinderberry (1944) 68 CLR 504 at 506.

180 Ibid at 507. See also Geoffrey Sawer, Cases on The Constitution of the Commonwealth of Australia, (1948), The Law Book Co. of Australasia Pty Ltd, Sydney, p.245.
In his submissions, Barwick also employed the use of powerful and emotive language to describe the regulations as a form of ‘industrial conscription’.

Ultimately, the High Court unanimously upheld the appeal and found that regulation 15 of the National Security (Man Power) Regulations was within the ambit of the defence power under the Constitution. Despite his best efforts, Barwick was yet again unsuccessful.

In his judgment, Williams J acknowledged and addressed a key issue raised by Barwick. Barwick raised the possibility that if an employee was compelled to work for a private employer, the employer might become bankrupt and the employee, despite the preferential provisions of bankruptcy legislation, might not be paid. The fact that Williams J felt compelled to address this submission indicates that it was sufficiently thought-provoking and warranted both a direct response and rebuttal. Williams J also noted that ‘Mr Barwick was careful to point out the far-reaching operation of the regulation’.

Although Barwick was unsuccessful in this case, his submissions clearly demonstrate that he employed and applied some of the elements of appellate advocacy during the course of his submissions. For example, Barwick considered the policy arguments which purportedly justified the regulation, and referred to the inequity and injustice of the regulation by suggesting that it was ‘industrial conscription’. He used this term to indicate what he considered to be the disastrous consequences of the Court upholding the validity of the regulations. This illustrates the importance of language in an advocate’s armoury. The phrase ‘industrial conscription’ is powerful and conveys to the Court a sense of injustice.

It is difficult to gauge whether Barwick’s lack of success in this and other cases involving challenges to the wartime regulations was attributable to the Court’s broad interpretation of the defence power

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181 Reid v Sinderberry (1944) 68 CLR 504 at 507.
182 Latham CJ and McTiernan J stated:

A starving and disordered army cannot fight. A starving and disordered civilian population cannot supply or support any army. In a war in which all our resources are engaged, the Government which has the responsibility of protecting those resources has also the responsibility and should be held to have the power of organizing and controlling them. Thus the general control of the man power of the Australian people is a subject which falls within the power of the Commonwealth Parliament to make laws with respect to defence.

183 Williams J addressed this possibility by stating that:

But supposing this might happen, it would not be the first bad debt that had ever been contracted, and the risk of the loss of payment in this way would be small compared to the risk of the loss of his life by a member of the armed forces.

184 Ibid at 521.
during wartime or any weakness or deficiency in his advocacy. In any event, Barwick's skills as an advocate were developing.
Chapter 3: Preparation

"The work of the advocate demands a precise knowledge of the law and a thorough grasp of its principles. He or she must be able to recognise quickly which of its principles is relevant to his or her case and make use of it to his or her client's profit."

Sir Garfield Barwick, 1995

Preparation in appellate advocacy has many facets. As a category, it extends beyond merely preparing for a case by reviewing the relevant material that comprises an advocate's brief. It encompasses other features such as obtaining a thorough knowledge of the law relating to the case at hand and the procedure applicable in a court as well as the process of acquiring knowledge about the members of the court. This chapter is dedicated to undertaking a critical exploration of the elements and ideals of appellate advocacy within the category of preparation. This will provide the first part of the framework that will be used to assess Barwick's advocacy in accordance with the 'three category analysis'. As Professor George Hampel has acknowledged, '[j]udges are constantly reporting cases of barristers showing insufficient preparation, legal research, knowledge of basic case law, legislation and advocacy skills'. As will be evident from this chapter, preparation is a critical element of effective appellate advocacy.

3.1 The Power of Preparation

The first and elementary rule of advocacy is to be prepared. It has been suggested by a former judge of the Federal Court, Ronald Sackville, that '[a]ppellate advocacy, no less than other forms of...
advocacy, depends in large measure for its success upon meticulous preparation’. The two main reasons for this can be found in the inherent nature of appellate advocacy. First, appellate advocacy features a multi-member court where judicial questioning can be intense, rigorous and rapid. Secondly, appellate advocacy involves the determination of complex legal issues and, therefore, it requires of appellate advocates a comprehensive and in-depth knowledge of the law that is relevant to the case, including the accompanying case law.

Preparation in the context of appellate advocacy extends beyond an advocate simply reviewing the documents that are relevant to the case – it involves what Hampel describes as ‘preparation for performance’. In the context of the ‘three category analysis’, performance is analogous to presentation. Hampel’s expression should also be described as ‘preparation for presentation’. The preparation undertaken must facilitate the ease and effectiveness of the presentation.

‘Preparation for presentation’ results in arguments and submissions that are well-structured as well as logical and sequential. Such arguments are easier to follow and are therefore more conducive to being accepted by the court. Well-ordered, structured submissions are more likely to follow after undertaking a comprehensive preparation. A methodical and systematic approach to preparation lays the foundations for a comprehensive preparation. Such preparation requires the advocate to invest a significant amount of time.

Thinking About the Case

According to Hayne, one of two basic propositions to remember when preparing for a case is to:

‘Think about the case’.

chronology of events related to the present litigation. Such documents or items are useful tools when presenting a case to an appellate court. Preparing a chronology of events is one way for the advocate to master the facts during the preparation phase and this document also aids and assists an advocate’s submissions.

Justice Ronald Sackville was a Judge of the Federal Court of Australia from 1994 until 2008. He is currently an Acting Judge of Appeal of the Court of Appeal of the Supreme Court of NSW.

Sackville, ‘Appellate Advocacy’, above n 60, 102. Success in this context refers to attaining levels of exemplary advocacy rather than success in terms of winning as a result of the judges finding in the advocate’s favour.

See also Donovan, above n 11, p.14. Glissan describes this as ‘performance preparation’ (see Glissan, above n 11, p.22).

See generally Glissan, above n 11, p.12.

David Pannick, ‘And let that be a lesson to you ...’, The Times, 6 May 2008 <http://business.timesonline.co.uk/tol/business/law/article3859034.ece?print=yes&rand...> at 26 May 2008.

Hayne, ‘Advocacy and Special Leave Applications in the High Court of Australia’, above n 11, p.2.
Thinking about the case underlies every aspect of preparation. There are various techniques that are employed when thinking about the case to aid preparation. For example, a well prepared advocate identifies all relevant points in advance, including those against their argument, so they are prepared to deal with the latter if they are the subject of questions. Alternatively, as David Jackson\(^{\text{195}}\) suggests, they can confront these points ‘up-front’.\(^{\text{196}}\) Jackson states that it is important:

...to avoid being “caught out” by judicial questions ... if a point occurs to the leader/junior/solicitor as potentially material when preparing an argument, there is a reasonable prospect that the same point will occur to a member of the court. You need to be able to deal with it if it is raised. Sometimes it is better to mention it first in your written or oral argument in order to deal with it in your own way, to “head it off at the pass”.\(^{\text{197}}\)

In some respects, the second advantage may be seen as an attempt to manipulate the members of the court rather than persuade, but confronting an issue ‘up-front’ can be effectively used to address an issue that will inevitably be raised by a member of the court in order to avoid criticism at a later stage. Any failure to raise the issue with the members of the court at an early stage may cause them to infer that it had not occurred to the advocate or the advocate was avoiding this issue. This may damage the advocate’s credibility in the eyes of the court.

Arguments before the High Court should place less reliance on previous decisions and greater significance on an advocate conveying to the court their view of the relevant principle. Such articulation requires constant thought and refinement and will take considerable time. In so doing, advocates benefit from discussing these propositions with others according to Hayne.\(^{\text{198}}\) Discussing concepts and possible submissions with colleagues also allows the advocate to verbalise thoughts and refine aspects of the argument. Colleagues may raise an issue the advocate had not considered or may demonstrate a difficulty in understanding a proposition. This may be a salutary exercise as members of the court may also face the same difficulty in understanding the proposition.

Some advocates use rehearsal as part of their preparation.\(^{\text{199}}\) This affords the advocate the opportunity to practise their presentation skills in addition to becoming more familiar with the content of their argument. Rehearsing gives the advocate confidence when delivering submissions and allows an advocate to verbalise their thoughts, obtain feedback from colleagues and refine any aspects of their argument. As will be discussed later, Barwick rehearsed his arguments in the Bank

\(^{\text{195}}\) David Jackson QC is recognised as one of Australia’s best Silks - Australia’s Best Lawyers 2009 & Australia’s Best Lawyers 2008. He was admitted as a barrister in 1964 and appointed a Queen’s Counsel in 1976. He currently practices from Seven Wentworth, Barristers’ Chambers in Sydney.


\(^{\text{198}}\) Hayne, ‘Advocacy and Special Leave Applications in the High Court of Australia’, above n 11, pp.5-6.

\(^{\text{199}}\) Jackson, ‘Advocacy before the United States Supreme Court’, above n 11, 7.
Nationalisation Case before making submissions to the Privy Council. This allowed him and the team of counsel briefed on behalf of the banks to coordinate their strategy and refine their submissions accordingly.

The great American appellate advocate, John W. Davis, suggested that another useful technique to adopt in preparation is for advocates arguing an appeal to change places mentally with the judges on the bench. He would say to himself, '[i]f you were up there and had a job to do deciding this case and wanted to do the best job you could, what would you want to hear from counsel?'

During his time as a barrister between 1910 and 1929, Dixon was regarded as an outstanding advocate. As a junior barrister, one of Dixon’s pupils was Robert Menzies. Menzies recalled Dixon’s approach to preparation upon receipt of a constitutional brief. The brief would arrive from the instructing solicitor with notes and references to related cases but Dixon would remove all pages and put them aside leaving only the statement of facts at the front of the brief. He would say to Menzies:

it’s a great mistake to allow yourself to be side-tracked by what may turn out to be judicial errors. Our job is to interpret the Constitution, not to interpret other people’s interpretation. Let us now read the Constitution and interpret it as a comprehensive statute. Let us pay particular attention to the basic structure of the Constitution and to every section which may bear upon our problem, and see if we can reach a conclusion. When we have reached one, we shall then turn to the decided cases. If they support our conclusion, we may take it that we are right. If they don’t, we must examine them to see whether they can be distinguished from our case successfully. If they are indistinguishable, we shall have to decide that our client be advised to attack them as wrongly decided, or advise him that our opinion is AB, but the decisions make it clear that the High Court will decide against that opinion, and that he should act accordingly.

Menzies developed great skills of preparation himself; it was said that ‘[h]is arguments were based on a careful preparation of his cases’. He also became renowned for his successful challenge of prior High Court authority in the Engineer’s Case.

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200 Friedman and Lacavora, above n 29, p.209.
204 Cameron Hazlehurst, Menzies Observed, (1979), George Allen & Unwin Australia Pty Ltd, Hornsby, p.37.
205 Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineer’s Case) (1920) 28 CLR 129. See also R. Menzies, Central Power in the Australian Commonwealth, (1967), Cassell Australia Ltd, Melbourne.
In the preparation phase, effective appellate advocates are renowned for spending considerable time thinking about the case and formulating the key propositions. The Victorian advocate, Sir Henry Winneke, was renowned for doing this and condensing his case into a few key propositions:

He would say, "I think I've got to point out to the court that this was wrong", and he'd bring up some point he'd uncovered. And it would be a point of some substance; ... He would worry and worry about his argument in a case, especially in the High Court or Privy Council, until he could get it down to roughly three propositions.

Formulating the key propositions requires a familiarity with the facts, the relevant law and procedure. This preparation phase also provides an insight and an indication as to the likely nature or course of judicial questioning. Mastering the facts and the law allows the advocate to formulate the most effective strategy for persuading the court. The strategy remains in place and is only altered when it is imperative to do so.

As will be discussed later, Barwick was renowned for spending an enormous amount of time on formulating his arguments; they would constantly change until they crystallised in his mind shortly before a case commenced.

**Identifying Strengths and Weaknesses**

According to Hayne, during the preparation phase, the relative strengths and weaknesses of an advocate's case become apparent thereby revealing the relative strengths and weaknesses of the opponent's case. Understanding the weaknesses in an advocate's case is important for two reasons. First, it ensures that there is adequate planning to deal with them (including in response to judicial questions) and secondly, the weaknesses are also likely to reflect the strengths of the opponent's case. It also allows the advocate to pre-empt submissions from an opponent. Justice Heydon of the High Court, has commented on the 'need for effective advocacy to come to grips with opposing arguments, [and] not merely to rest in emphatic presentation of one's own primary case'. He suggested that it was not sufficient for an advocate to fervently present arguments which advance the advocate's case, without also considering the arguments that will be raised by an opponent.

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206 This applies irrespective of jurisdiction or the relevant procedure in a particular court, for example, even if there is a heavy reliance on written submissions as opposed to oral submissions and so forth.
208 Glissan, above n 11, pp.2, 4; see also Pannick, above n 193.
209 Hayne, 'Advocacy and Special Leave Applications in the High Court of Australia', above n 11, p.5.
210 Glissan, above n 11, p.11.
211 Geoff Lindsay, ‘Heydon on advocacy’ (March, 2003) 23(2) *Australian Bar Review* 134, 134.
opposing advocate – this should be done during the preparation phase. There is a suggestion by a barrister, James Glissan, that an advocate should prepare their opponent’s case at an early stage in the context of their own preparation.212

An understanding of the weaknesses of an opponent’s case was one of the features of the advocacy of Tom Hughes who has been described as ‘one of the greatest barristers the Australian legal profession has produced’.213 A former Judge of the High Court, Michael McHugh214, recalled this aspect of his advocacy when reflecting on the occasions where he appeared against Hughes:

Over the years, I had many cases against him and three with him. Appearing against him was a continuing forensic education. Whatever the cause of action and whoever heard it, Tom Hughes was always in complete control of his case and well aware of the weaknesses in your case. He gave no quarter and asked for none.215

A thoroughly prepared advocate will also earn the trust and respect of the court. It is readily apparent when an advocate has thoroughly prepared their case (including an awareness of its strengths and weaknesses), particularly to an astute bench. It is equally apparent when an advocate is under-prepared. The extent of an advocate’s preparation is often evident in the delivery of their submissions, the nature of their arguments, the advocate’s use of analogy or examples and their responses to judicial questioning.216 However, as former Commonwealth Solicitor-General, David Bennett, observed that ‘[t]he most important thing in the High Court is how you answer the questions you are asked, and that should be a function of preparation’.217

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212 Glissan, above n 11, p.12.
214 Was admitted to the NSW Bar 1961 and appointed a QC in 1973. He was a Judge of the Court of Appeal and Supreme Court NSW (1984-1989) and a Judge of the High Court of Australia between 1989 and 2005. He was the President of the NSW Bar Association (1981-1983) and President of the Australian Bar Association (1983-1984).
215 Address by Justice Michael McHugh, ‘Tom Hughes AO QC’ above n 214, 67. This was also a feature of the advocacy of Murray Gleeson. It was said that ‘Gleeson’s great talent has been his ability to process ideas so that in the nanosecond from conception to utterance they emerge as tight, taut and economic words that are able to skewer the weakness of his opponent’s case’: ‘Final Verdict’, the (sydney) magazine (Sydney), July 2008, 54 at 58. In relation to preparation, former Justice Robert Jackson of the US Supreme Court stated that:

   The first step in preparation for all exigencies of argument is to become filled with your case – to know every detail of the evidence and findings, to weigh fairly every contention of your adversary, and to review not only the rule of law applicable to the specific issue but the body of law in its general field. You never know when some collateral or tangential issue will suddenly come up.

Jackson, ‘Advocacy before the United States Supreme Court’, above n 11, 7.
216 See David Ross, Advocacy, (2005), Cambridge University Press, Cambridge, p.3. In addition, it is important for an advocate to have contemplated and appreciated the likely response of a judge to particular lines of argument: ‘Extra-Judicial Notes’, above n 43, 11.
217 ‘Putting words to music in the constitution’s case’, Australian Financial Review (Sydney), 26 September 2008, 47.
The Importance of Preparation to Judicial Questioning

Judicial questioning will inevitably focus on the various issues that are relevant to the advocate’s case, including the purpose and justification for each action the advocate has undertaken and for each omission made in their presentation, according to David Jackson. An advocate needs to consider this in the preparation phase; otherwise, judicial questioning may expose an advocate who advances a submission without having considered the justification for doing so. Ultimately, this may damage the advocate’s prospects of succeeding with that particular submission (as well as other submissions). This may also adversely affect the advocate’s credibility, which may have far-reaching consequences for the advocate’s case generally. Similarly, where the advocate does not have a robust justification for any omission, this may adversely affect the advocate’s credibility in the event that a member of the court considers that the issue should have been raised rather than omitted.

According to Robert Jackson, the sequence of an argument together with the manner in which it is advanced, are important in terms of the comprehension of the argument. However, many arguments do not go according to plan due to the interjections from members of the court. Despite this, an advocate who has undertaken a thorough preparation is more likely to pursue their arguments in the face of rigorous judicial questioning. That is, a well-prepared advocate is in a position to incorporate their submissions into their answers to judicial questions.

The ability to steer proceedings in the direction in which the client’s case will be viewed more favourably by the court, especially whilst responding to judicial questions, is a particularly useful technique. It requires thorough preparation as well as a consideration and conceptualisation of the relevant issues. It also requires flexibility and adaptability. An advocate who has thoroughly prepared their case can make appropriate concessions and pursue certain submissions whilst abandoning others in an attempt to present their client’s case in the most favourable manner. Such flexibility is not possible without adequate preparation.

219 Robert Houghwout Jackson (February 13, 1892 – October 9, 1954) was United States Attorney General (1940–1941) and an Associate Justice of the United States Supreme Court (1941–1954). He was also the chief United States prosecutor at the Nuremberg Trials.
220 Jackson, ‘Advocacy before the United States Supreme Court’, above n 11, 6.
221 Robert Jackson, reflecting on his time as an advocate in the US, recalled that he made three arguments in every case:

First came the one that I planned – as I thought, logical, coherent, complete. Second was the one actually presented – interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night.

Jackson, ‘Advocacy before the United States Supreme Court’, above n 11, 9; Hayne, ‘Advocacy and Special Leave Applications in the High Court of Australia’, above n 11, p.2.
As will be discussed later, one of Barwick’s strengths as an advocate was his ability to engage in
dialogue with the members of the court and respond to judicial questions in a manner that
incorporated his submissions. In doing so, he was able to steer the proceedings in a direction that
was favourable to his client (although that did not necessarily translate into success in each and
every case). He was also able to achieve this by adopting a flexible approach to the presentation of
his arguments.

A thorough preparation is considered to equip the advocate with the necessary confidence to
present a case in the best possible manner - such confidence is crucial when one is attempting to be
persuasive. Tom Hughes and David Jackson both agreed that, as an advocate, confidence is gained
from a thorough and meticulous preparation.

3.2 Knowing the law, knowing the procedure

Knowledge of the law

An integral part of the preparation phase, in addition to acquiring a detailed knowledge of the
relevant facts of the case, is for an appellate advocate to have thoroughly researched the applicable
law that is relevant to the issues in the proceedings. According to Ellicott, one of the key elements
of appellate advocacy is to ‘definitely know your brief, [and] know the line of cases that are relevant’.

An appellate advocate who fails to possess a commanding knowledge of the relevant law may be
exposed by judicial questioning, risking loss of credibility and the confidence of the court – both of
which are extremely difficult to subsequently restore. In circumstances where an appellate advocate
does not have sufficient knowledge of the relevant law, the individual judges of the court will be
forced to conduct their own research to ascertain the relevant law. This is a direct result of the
appellate advocate’s failure to provide the court with the assistance that is both required and
expected. Dixon is reported as having said, ‘it is a fundamental ethical obligation of every barrister

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223 See Glissan, above n 11, p.9. The English advocate, Henry Cecil, observed that: ‘I went to bed very late and
occasionally had to work right through the night. I learned from experience that, although one might be tired
during a case, it was vital to know every aspect of it thoroughly’: Henry Cecil, Just Within the law, (1975),
224 Interview with Hon. Tom Hughes AO QC (Sydney, 2 August 2006) and Interview with David Jackson QC
(Sydney, 2 August 2006).
225 Interview with Hon. Robert Ellicott QC (Sydney, 8 August 2006).
226 Kirby, ‘Ten Rules of Appellate Advocacy’, above n 11, 968-9; See also Interview with Chester Porter QC
(Sydney, 2 April 2006).
to have a sound working knowledge of the law'. During his time as Chief Justice of the High Court, Barwick stated that:

In our system of administering the law, which I would hope remains, the Bar has the duty of aggregating the relevant knowledge of the law and the analysis of the facts for presentation to the judge for his consideration. And I would hope that judges would insist on the Bar performing that function properly, requiring counsel to come fully prepared to present the case in court, having theretofore given such close consideration to the matter as has enabled the identification and isolation of the critical points for decision ... and I remain convinced that good advocacy is not merely for display in trials but is advantageous both to litigant and judge in the sphere of appellate work.

Despite this observation being made whilst Chief Justice, it provides an insight into Barwick's approach to preparation generally, including the importance of acquiring a detailed knowledge of the law.

In appellate advocacy, the members of the court generally have an excellent grasp of the law and may have previously encountered the same or similar legal issues in an earlier case. Therefore, in many instances, the appellate advocate needs to acquire a detailed knowledge of the law just to be on par with the court on certain issues, let alone to be in a position to respond to difficult and penetrating judicial questions.

During his time as a barrister, Dixon was renowned for his meticulous and thorough preparation, including becoming familiar with all the relevant law in the area. On one occasion, Grattan Gunson who was being led by Dixon in a particular case brought to Dixon's attention a case from the 1840s but Dixon was already aware of it. Menzies described Dixon as a 'supreme' appellate advocate and stated that:

One reason for this was that his singular mastery of the law was well known to and greatly respected by the judges before whom he appeared. His arguments therefore invariably carried great weight; they were not to be lightly brushed aside.

Equally, one of the hallmarks of the appellate advocacy of Sir Isaac Isaacs was his 'deep knowledge of the law'. This resulted from 'the detailed attention which he gave to the preparation and the

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227 'Extra-Judicial Notes', above n 43, 9.
228 Barwick, 'The State of the Australian Judiciary', above n 46, 199.
229 Grattan Gunson, a Melbourne barrister, was led by Dixon in a particular case in the early part of the 1900s. He was attempting to locate a relevant authority which was proving to be difficult. Upon locating a supporting authority from the 1840s, Gunson brought it to Dixon's attention only to find that he was already aware of it and commented that he always thought that the dissenting judgment was correct.
230 See Ayres, above n 50, p.25. Based on written communication from Richard Searby with Philip Ayres, April 2000.
231 Menzies, The Measure of the Years, above n 203, p.235.
advocacy of cases'. Apparently, Isaacs 'would never go into court unless he was fully satisfied that his grasp of a brief was perfect, and that he had exhausted every point of law for and against his case that was likely to be brought into argument'.

Knowledge of procedure

It is crucial that an appellate advocate also knows the basic procedural rules which govern the proceedings in the particular courts in which they appear. An advocate who is unaware of the procedural rules of the court may lose the trust and respect of the bench. This may taint their submissions. It has been suggested that:

- It is essential for [an appellate advocate] to have a thorough knowledge of the law of evidence and procedure ... Much of this knowledge should and will become almost instinctive, but it is, of course, necessary to have a thorough working knowledge of even the more unusual points of evidence and procedure.

In reflecting upon the trends in modern day advocacy, Justice Young of the Supreme Court of NSW emphasised the importance of knowing the law and procedure but also of not appearing smug in this knowledge:

- ... two new styles of advocacy are now becoming more noticeable ... First, there is a confident advocate who is so confident that he or she gives the judge the distinct impression that the judge is thought to be an ignoramus and quite an inferior lawyer to the advocate ... However, while judges consider confidence a virtue, they consider that greater virtues are competence and knowledge of law and procedure.

Barwick may have suffered from such smugness. He was accused of displaying arrogance in his advocacy on occasions, particularly in the Communist Party Case. An overzealous approach to the application of the ideal can, in reality, have a negative impact.

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231 Later Justice of the High Court of Australia (1906-1930) and Chief Justice of the High Court of Australia (1930-1931).
232 Gordon, above n 130, p.37.
233 Ibid.
234 Hyam, above n 31, p.10.
3.3 Knowing the court - gauging support

Knowing the Court

The composition of the court may affect the prospects of an appellate advocate’s arguments and therefore ultimately the prospects of their case generally. Appellate advocates need to be aware of:

‘the general predilections, philosophy and attitude of the judges assigned to the case. Presupposition about judicial opinions, based upon result-oriented analysis may be dashed in a particular case’.236

According to Kirby, many appeals are determined by a combination of three factors: legal authority, legal principle and legal policy. Different members of the court will have different legal interests and distinct approaches to these three factors.237 As both a former Judge of the High Court and former President of the New South Wales Court of Appeal,238 Kirby’s observation is based on many years of experience.

While some members of the court may place considerable importance on legal authority or legal principle, others may be more influenced by legal policy. A good advocate’s preparation takes into account ‘the practical necessity of having to prepare an approach to be taken to not one, but many judges, who may have differing approaches or emphases’.239 It should be noted at this point that Barwick may not have done this as effectively as he might in the Bank Nationalisation Case in his choice to target Chief Justice Latham specifically. This will be discussed later.

A critical part of the preparation phase requires an appellate advocate to locate earlier relevant judgments (especially, recent judgments) delivered by the judges assigned to the present case.240 This enables the appellate advocate to ascertain, in advance, the previously held views of the judges in relation to the issues in the present case. It also indicates the manner in which particular judges may decide the current case based on their judgments in previous cases where similar issues have arisen. By tailoring their submissions to take into account a judge’s previous decisions, an advocate is more likely to be persuasive and their submissions are more likely to be accepted. However, it should be noted that ‘[n]ot everything that someone said in the past is necessarily, something they’re bound by forever’.241 Whilst not everything that could be said by a judge is capable of being

237 Ibid.
238 Each for approximately 13 years.
239 Glissan, above n 11, pp.191-192.
240 Kirby, ‘Ten Rules of Appellate Advocacy’, above n 11, 967. See also Interview with Chester Porter QC (Sydney, 2 April 2006).
241 Interview with David Jackson QC (Sydney, 2 August 2006). In this interview, David Jackson QC noted that:
anticipated, an advocate can be prepared by being familiar with, not only a judge’s previous decisions, but any extra-curial writings, interviews, articles and so forth that may provide insight into the judge’s current thinking.

A necessary ingredient of ‘knowing the court’ requires an appellate advocate to be aware of the nature of their audience. For example, there are crucial differences between an intermediate court of appeal and a final appellate court. It has been said that ‘argument in the High Court may require some differences in technique from argument in other appellate tribunals in Australia’. These differences relate to the fact that the High Court may be comprised of anywhere between three and seven judges whereas an intermediate court of appeal usually comprises three judges and the fact that submissions related to policy implications are likely to feature more prominently in final appellate courts. A genuine consideration for a final appellate court is that the decision made, with all its ramifications, is final and that it cannot be corrected or altered by any other court. There may also be other procedural-type differences. Good advocates take these factors into account when preparing and advancing their submissions. For example, it has been observed that arguments advanced by Robert Menzies were based on a careful preparation and ‘presented in a form appropriate to the particular tribunal’.

According to Hayne, the second of two basic propositions when preparing a case is to: ‘Remember what court you are in’. If a case is to be heard in the High Court, an advocate must show awareness, when reading passages from judgments of intermediate courts of appeal or trial judges, that the High Court is not bound by such decisions. Similarly, whilst the High Court is not bound by decisions in foreign courts, it may consider the manner in which other jurisdictions have dealt with or determined a particular issue. An advocate must also be prepared for the possibility that one or more members of an appellate court may have had occasion, in an earlier case, to consider the same

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242 Harry Gibbs, ‘Appellate Advocacy’, above n 11, 496. See also H. Selby, G Blank and Dr M Nolan, ‘Introduction’ (2007) 9(10) ADR 181 in relation to the importance of an advocate knowing their audience and connecting with them.

243 Hazlehust, above n 204, p.37. There are other factors which need to be taken into account also, particularly in relation to judges who may have common or similar approaches or viewpoints. For example, it was suggested that during the time that Chief Justice Gleeson presided over the High Court of Australia (1998-2008) a block of three judges dominated the court, namely Chief Justice Gleeson, Justice Gummow and Justice Hayne. Therefore, ‘what you’ll find as a barrister appearing before those judges, is that if the Chief Justice, Justice Gummow (sic) and Justice Hayne don’t agree with you, almost certainly you’ve lost the case’: ABC, ‘Retiring Chief Justice Murray Gleeson’, Law Report, 19 August 2008, <http://www.abc.net.au/rn/lawreport/stories/2008/2338639.htm> at 1 September 2008.

244 Hayne, ‘Advocacy and Special Leave Applications in the High Court of Australia’, above n 11, p.2.

245 Ibid, pp.2-3.
(or similar) issue confronting them in this case. Consequently, Hayne notes it is possible that one or more members of an appellate court will raise an issue which the advocate may not have previously considered. Therefore, a well-prepared advocate considers cases and authorities where similar issues may have arisen, especially where members of the court were involved as judges or counsel in those cases. If an appellate advocate is aware that an appellate court has not previously accepted a certain line of argument then that court is unlikely to accept a similar line of argument in a later case, unless it can be established that it can be distinguished from previous authority.

Knowing the Judges

The principle of knowing the court extends to knowing the individual judges who comprise the court. This knowledge includes an understanding and awareness of the character and general attitude of each individual judge. Whilst this can generally be gleaned from the earlier decisions of particular judges as well as prior encounters or experiences with a particular judge, it can also be ascertained from extra-curial comments and speeches. Such knowledge will assist the advocate in achieving the ultimate objective of persuading the court. According to Sackville:

Part of the advocate’s art is to understand, so far as he or she can, the temperament and judicial personality of each member of the court ... Arguments that are received with scepticism or downright hostility by one member of the court may be attractive (or even, by that very response, become attractive) to another.

This knowledge will also assist in identifying the most appropriate way to respond to judicial questions as well as tailor and deliver a submission. It will enhance the persuasive ability of an advocate, as: ‘[t]he understanding an astute advocate acquires of the personality and philosophical standpoint of each of the judges constitutes an invaluable aid to presentation’. Hughes observed that:

No-one ... will advance very far in the profession of advocacy without acquiring and putting to effective use an ability to diagnose the character and discern the motivations of those with whom one has to deal on all levels of professional activity – not only clients and witnesses; but judges, jurors and opponents.

One of the first things Robert Menzies observed as the pupil of Dixon in 1918 was Dixon’s ‘close knowledge of the forensic qualities and methods of his leading opponents, and of the judicial

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246 Ibid, p.4.
248 Ibid, 104.
249 Hughes, above n 92, p.3.
strengths and weaknesses of the judges before whom he appeared'. Dixon used this knowledge to his advantage as the following example demonstrates. On one occasion, Dixon appeared before Judge Moule in the County Court of Victoria. He knew that Judge Moule, who was an elderly man, was a passionate cricket enthusiast. Dixon arranged for his young male witness to describe his first sighting of the car that knocked him down in a cricketing context. Rather than the boy saying ‘20 to 25 yards away’, a distance that could have easily been contested, the boy described the distance as: ‘It was about the length of a cricket pitch, sir’. Upon hearing this, Judge Moule leant forward and, in an animated and interested manner, asked the boy where he played cricket, whether he was a batsman or a bowler and so forth. Judge Moule concluded that if the boy described the distance as the length of a cricket pitch then it must be correct. If this anecdote is correct, it illustrates the persuasive power of conveying information to a judge in terms that he or she can readily identify with based on an understanding of their character or personality. It also highlights the effective application of the ideal in reality – in other circumstances, an application of this ideal may not be so successful.

Interchanges between advocates and members of the court provide the advocate with the opportunity to learn more about the personality, attitudes and predilections of the judges as well as gain an insight into their thinking and approach. According to Sackville:

> Judicial questioning provides an opportunity to ascertain what points are troubling the court, or, alternatively, which points appear to be finding favour ... The advocate should be able to respond convincingly to questioning, for example by pointing to the differences between the facts of the case and those of an authority referred to by the questioner.252

An appellate advocate who knows an appellate court to such an extent that a rapport has been established with it or its individual judges as a result of long association or experience, is more likely to have significant persuasive power and the ‘danger [to an opposing advocate] of such an opponent lies in the close understanding of the predilections and habits of thought of the tribunal’.253 Such rapport frequently gives rise to confidence, trust and respect.

An important aspect of knowing the composition of an appellate court is determining which member of the court the advocate should focus their attention. It is not uncommon in appellate advocacy for one particular judge to have a more detailed knowledge of the case and the issues at hand than the other judges presiding over the case. Some appellate courts intentionally assign one particular judge

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250 Menzies, The Measure of the Years, above n 203, p.235; Ayres, above n 50, p.24.

251 Ayres, above n 50, p.24. Based on information from Richard Searby, who, according to Ayres, had it direct from Dixon.


the task of obtaining the most detailed knowledge of a case to ease the burden on the other judges. A well prepared advocate knows how the court operates and focuses their effort and attention on convincing the judge with the most knowledge of the case of the merits of the advocate’s submissions. This judge may exert considerable influence over the other judges. If, however, that particular judge does not appear receptive to the advocate’s submissions, according to Kirby, an effective advocate will redirect their attention towards the other judges, with a view to supplementing their knowledge and persuading them.254

When appearing in an unfamiliar court, some advocates, as part of their preparation attend the court prior to their case to become familiar with the surroundings and to develop an understanding of the personalities of the judges. Dixon engaged in this practice and attended a sitting of the Privy Council on more than one occasion prior to his own case to simply ‘establish a feel for the men who would hear his case’.255

Appellate advocates who know the court are better placed to anticipate what the judges will want to know, in what order and in what manner.256 They are also better prepared to answer questions. Justice Peter Young of the NSW Supreme Court lamented the lack of what he described as ‘judicial targeting’. He stated that:

The great appellate advocates of the past had the ability to work out quickly which of the appellate judges were on side and what were the probable reasons for resistance from the others. They would then work on those others or at least some of them to secure a majority result. The judges that were worked on were usually those not known to have a “rat trap mind” or who had hobby horses which could be ridden in the direction that the advocate desired.257

255 Ayres, above n 50, pp.41-42. See also Freidman and Lacavora, above n 29, p.209. Another element of ‘knowing the court’ is for an appellate advocate to possess a sound knowledge of the operation of the particular court in which they are appearing, including the extra-legal or contextual features of its processes, practices and procedures.
256 Godbold, above n 11, 809 referring to Davis, The Argument of an Appeal, In Advocacy and the King’s English, 216 (G Rossman ed. 1960).
257 Young, ‘Current issues: Appellate advocacy’, above n 11, 145.
Chapter 4: Presentation

"I early found that I liked talking to a judge and I liked him to talk to me. It is not given to every judge to do that. It is perhaps not given to every barrister to talk to the judge. But it suited me. And I came to think that the silent judge, the chap who would not speak to me, was almost anathema. I had to devise means of making him talk. I may have succeeded in that. No one has ever had to stretch himself much to make me talk, I am afraid, and no one has had to work very hard to find out what the tendency of my mind may be, and some that may have disturbed. I am sorry if it has."

Sir Garfield Barwick, 1981

Presentation in appellate advocacy refers to the act and manner of advancing arguments to an appellate court and includes the necessary interaction between the members of the court and the appellate advocate. It is critical in terms of achieving the ultimate objective of advocacy - persuasion. Presentation has been identified as the second category in the elements and ideals of appellate advocacy.

This chapter will analyse the elements of presentation which include: conceptualising the case; using the opening and the reply; watching the members of the court; substance rather than elegance; flexibility, tact and discretion; explaining policy and principle as well as citing authority with care. These comprise the elements and ideals of appellate advocacy that contribute to the effectiveness of an appellate advocate’s presentation. This analysis will provide the second part of the framework to assess Barwick’s advocacy in accordance with the ‘three category analysis’. As will become evident, presentation is a broad category comprising a diverse set of elements and ideals that are vital if the advocacy is to be effective.

4.1 Conceptualise the Case and the Relevance Base

Conceptualising the case refers to an advocate’s ability to distil, identify and articulate the critical issues as well as structure their submissions in a manner that clearly emphasises these issues from the outset. Ideally, the submissions advanced in support of the argument should allow these critical issues to be properly comprehended and appreciated through the use of sound legal argument and justification. The arrangement of the sequence of an advocate’s argument as well as any documents or authority to which the advocate will refer is extremely important and ‘will test the skill of the most
experienced craftsman'.\textsuperscript{259} According to Byers, ‘the isolation of the matter [for decision] is a most demanding and the most essential of all legal skills. Presenting it clearly, concisely and attractively is the summit of oral advocacy’.\textsuperscript{260} In Ancient Greece, it was said that an important element of persuasiveness was clarity and an objective that was clearly envisaged.\textsuperscript{261} Advocates need to have clear in their mind the direction and purpose of each submission or argument. This ensures that an advocate never loses sight of the ‘big picture’ and that their submissions remain relevant and ‘on-track’.

The most succinct description of conceptualising the case is by Gibbs:

Fundamental to success in appellate advocacy is the ability to perceive the point or points on which the resolution of the appeal will depend and to cut a path directly to those points, without meandering to explore side issues, however interesting, or worse still, entangling the court in a thicket of irrelevancies of fact or law.\textsuperscript{262}

Ideally, an advocate conveys to the court, as early as possible, the essence of the case so that the court is promptly made aware of the relevant issues. By arriving at the essence of the case quickly, the advocate does not risk losing the attention of the members of the court who have not yet formed, or begun to form, conclusions.

Conceptualising the case allows the appellate court to focus on the relevant issues for determination. Irrelevant or unimportant issues only serve to irritate the appellate court and may damage an advocate’s reputation. Notably, the merits of a case are, for reasons of fairness and justice, extremely important to an appellate court.\textsuperscript{264} As such, part of the skill associated with conceptualising a case is to weave into any conceptualisation of the case the merits of the case and communicate these to the appellate court.

\textsuperscript{259} Jackson, ‘Advocacy before the United States Supreme Court’, above n 11, 6.

\textsuperscript{260} Maurice Byers, ‘From the other side of the Bar Table: an advocate’s view of the judiciary’ (1987) 10 UNSW Law Journal 179, 180. See also Godbold, above n 11, 811.

\textsuperscript{261} See generally Aristotle, \textit{The Art of Rhetoric}, above n 32. Also, see Thompson, above n 31, 16 who refers to five principles fundamental to the “three corners of persuasion”, namely: invention (identifying the key question that has to be answered); arrangement (the structure of the argument); the style or choice of persuasive language; memory (the ability to accurately recall arguments); delivery (the use of voice and body language). See also Justice John H Phillips, ‘Practical Advocacy: “Crito, we owe a cock to Aesculapius” Socrates’ (August, 1998) 72(8) Australian Law Journal 586, 586.

\textsuperscript{262} Harry Gibbs, ‘Appellate Advocacy’, above n 11, 497-498; Justice James Douglas, ‘Oral Advocacy’ in Blank & Selby (eds), above n 11, p.181; Priest, above n 62, p.68. See also Interview with Chester Porter QC (Sydney, 2 April 2006).

\textsuperscript{263} Of course, during Barwick’s time at the Bar, the volume of cases heard by the High Court was less than it is today and therefore the High Court had more time to consider lengthier submissions in cases. See Bennett, ‘Argument before the Court’, above n 67, pp.31-32.

\textsuperscript{264} Kirby, ‘Ten Rules of Appellate Advocacy’, above n 11, 971.
In the current era of appellate advocacy, there is an emphasis on reducing the length of court hearings. As previously discussed, limits are imposed on oral arguments in applications for special leave before the High Court and High Court cases generally last no more than one day, with an emphasis on written submissions. In this climate, Hampel has suggested that it is important for advocates to have the necessary training to ensure that they meet the expectations of the courts for 'a greater emphasis on focus and efficiency of presentation'. That is, advocates will not be able to canvass every issue and will need to identify their key points to the court quickly. Kirby, also refers to the need for 'efficient presentation'.

One of the features of many of the constitutional cases in which Barwick appeared is their extraordinary length. For example, the Bank Nationalisation Case which ran for 39 days in the High Court in 1948 is still the longest running High Court case, closely followed by the Communist Party Case in 1950 at 24 days. The presentation in both cases will be considered at length later in this thesis, but it is worth noting that it does not appear that 'efficiency of presentation' was achieved. However, there were numerous examples in these cases of Barwick efficiently conceptualising the case in identifying the relevant issues and simplifying these issues for the benefit of the court.

Consistent with conceptualising the case, when engaging in oral argument, many commentators believe it is imperative for an advocate to 'go at once to the heart of the matter'. An advocate should, according to Mason, attempt to get to the main thrust of their argument as quickly as possible. Hughes describes getting to the heart of the case as 'essential' and 'the art of good advocacy'. With the imposition of time limits, this assumes greater significance. This principle,
important during Barwick's time at the Bar, has achieved renewed importance in the current climate in which appellate advocacy is conducted.

An integral part of getting to the heart of a matter as quickly as possible is, according to Gibbs, the 'need for brevity and compression'.\(^{271}\) Despite the complexity of matters that come before appellate courts, advocates who are able to outline the main issues relatively quickly without labouring the point and without reading long passages from previous authority will benefit from doing so.

According to John Phillips\(^{272}\), Gleeson, has a favourite saying: 'economical advocacy is, by definition, good advocacy'.\(^{273}\) However, it is important that substance is not sacrificed or dealt with in a cursory manner merely for the sake of brevity and compression. Hughes suggests that it is important for an advocate to 'cultivate the art of brevity and the art of clarity and that requires a lot of work'.\(^{274}\)

By all accounts, appellate courts appreciate simplicity; this is also a key feature of conceptualising the case. Accordingly, an effective appellate advocate reduces their case to its 'bare essentials, i.e. those few core points which will determine the outcome of the case and can be presented in just a few minutes'.\(^{275}\)

One of Barwick's strengths as an advocate, as already noted and which will become more apparent, was his unique ability to simplify complex concepts and propositions. This added considerable weight to their persuasive effect. His advocacy was often characterised by one simple conceptualisation or a series of simple propositions.

To achieve simplicity, focus and discipline are required, the first in terms of concentrating on the issues in the case, and the second and third in relation to the arguments advanced. This discipline, to a large extent, is gained from devoting considerable time to thinking through the issues in the preparation stage and exercising discretion when deciding which arguments to put to a court.

court, in interlocutory proceedings and at the final hearing. He then sets about selling his vision': Address by Justice RV Gyles, 'The Hon. RJ Ellicott QC: 50 years at the Bar' (Summer 2000/01) NSW Bar News 39, 41.

\(^{271}\) Harry Gibbs, 'Appellate Advocacy', above n 11, 499.

\(^{272}\) The Hon. John Harber Phillips (1933 - 2009) was the Chief Justice of Victoria between 1991 and 2003.


\(^{274}\) Interview with Hon. Tom Hughes AO QC (Sydney, 2 August 2006). In fact, Tom Hughes QC stated that he adopted the following approach to assist him to achieve brevity and clarity:

I'm not ashamed to admit that in advance of doing a Special Leave Application, I will write out in full what I want to say. I won't necessarily say it in that form, but it's a great discipline for achieving clarity and conciseness, a quality upon which all courts place great stress.

\(^{275}\) Carroll, n 56, 108. In relation to 'bare essentials', this was yet another great strength of Sir Henry Winneke, it was said that:

He possessed a widely recognised genius for reducing arguments to their essentials; and he was just as widely acknowledged for being helpful and scrupulously fair in his dealings with other counsel, witnesses and people accused of crimes.

See Coleman, above n 207, p.168.
The main issue is relevance. Gibbs was ‘regarded as a top advocate – reasonable, measured, well prepared, and possessed of a fine memory and a high sense of relevance’. According to Gibbs, a ‘sense of relevance’ is extremely important:

> [G]iven the necessary equipment which any counsel who appears in an appellate court ought to have – a requisite knowledge of the law, an ability to marshal facts and a clarity of expression – in my opinion, the two qualities most necessary for success in appellate advocacy are a sense of relevance and tact.

Sir John Young, a former pupil of Sir Henry Winneke, observed similarly that Winneke’s greatest quality was ‘relevance’. He was known for: ‘his flair for quickly sizing up the facts of the case, eliminating superfluous material and arguing the main points with clarity and persuasiveness’.

Byers was also renowned for identifying the essential issues and not being distracted by irrelevant considerations. According to Gibbs, Byers identified:

> the point or points on which the decision will rest and advance[d] clearly and strongly, but without undue repetition, the arguments directed to those points, keeping to the main road and not wandering off into side tracks and blind alleys, however attractive they may seem from a distance.

It requires courage to discard irrelevant or unimportant details so as ‘to avoid becoming entangled in interesting or hotly contested questions which do not go to the result’. According to Kirby, an experienced appellate court judge, when judges are confronted with mountains of information and voluminous documents:

> a groan can sometimes be heard begging for the return of the days when one of the true skills of the advocate was discernment: the decision to cut away irrelevant or insignificant materials unlikely to help the decision-maker to come to the desired outcome.

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276 Priest, above n 62, pp.67-68.
278 Sir John Young was Chief Justice of the Supreme Court of Victoria between 1974 and 1991 and succeeded Sir Henry Winneke.
279 According to Sir John Young:

> He would say, “Let’s get rid of all this rubbish. What this thing really is about is so-and-so. Now let’s concentrate on that ... That was his great power, I think – a very incisive mind. He got right down to the things that mattered – the brass tacks ... I think he was one of the best advocates we had.

Coleman, above n 207, pp.152-153.
280 Coleman, above n 207, p.83. It was said of Peter Hely that ‘[h]is genius lay in the capacity to reduce complexity and disorder to simplicity – to identify the point, to marshal the factual and legal materials bearing on it, and to analyse them imaginatively, lucidly, precisely and above all, concisely’ (see Justice J D Heydon, ‘Obituary: Peter Graham Hely’ (2006) 80 Australian Law Journal 541, 541).
282 Jackson, ‘Advocacy before the United States Supreme Court’, above n 11, p.6.
Irrelevant material has the capacity to irritate the appellate court. Reflecting on the lessons he learnt during his time as an associate to Sir William Owen, then a judge of the Supreme Court of NSW, Hughes referred to the importance of selectivity and discarding the irrelevant issues. He stated that the ‘selection of the good and the discarding of the bad points of a case are crucial to success in advocacy’.284

According to Judge Joel Dubina, discarding irrelevant material results in a discerning approach, where only the strongest arguments of the case are conveyed.285 It is counter-productive for an advocate to present every possible argument available in relation to a particular issue. To advance a weak argument when the advocate has at their disposal a strong argument has been described as ‘the essence of bad advocacy’.286 An advocate who presents every possible argument may cause their strongest arguments to be lost amidst a series of weaker arguments, thus lessening the impact and effect of the stronger arguments.287 Also, ‘there is nothing to be gained from adopting absolutely untenable positions’.288 Advancing untenable arguments: ‘also runs a risk of damaging the credibility of an advocate’s overall case’,289 and may damage the reputation and credibility of the advocate. Effective advocacy demands that advocates have (or develop) the ability, during the preparation phase, to determine when an argument is weak or a position is untenable.

An effective advocate will present their strongest argument early. This tactic has been described as ‘following the path of least resistance’.290 An advocate should capitalise on the court being likely to be at the height of its attentiveness early and should advance their strongest argument at this point.

284 Hughes, above n 92, p.20. The full quote appears below. Sir William Owen was later appointed a judge of the High Court of Australia (1961-1972). Tom Hughes stated that:

He taught me much that otherwise I would not have learned: first and foremost to try to select at the outset of a case the significant issues and discard the inessential or unwinnable—two adjectives that really mean the same thing.

...The selection of the good and the discarding of the bad points of a case are crucial to success in advocacy. An ability to do so can be acquired with practice and by watching one’s elders or betters in action. It is, in my view, the hallmark of real achievement.

Hughes, above n 92, p.20.


286 Harry Gibbs, ‘Appellate Advocacy’, above n 11, 498. Chester Porter QC suggests that an advocate should use their best arguments first and that ‘[g]ood advocacy picks out the best one or two arguments or one of three arguments and puts those forward’: see Interview with Chester Porter QC (Sydney, 2 April 2006).

287 ‘A storm of arguments—good, bad, and indifferent—can convince the judges that there is no merit to the case, even if buried in the deluge is a winning nugget’ (Laurence H Silberman, ‘From the Bench: Plain Talk on Appellate Advocacy’ (Spring, 1994) 20(3) Litigation 3, 4).


This will increase the persuasive effect of the advocate's argument. It is this theme that is developed in the next section in the context of the opening.

4.2 The Opening

Mason relates that, in his experience:

'all too often counsel failed to take advantage of the unique opportunity presented by the opening – to make an impact on the minds of the judges before they begin to move forward on their inexorable journey to a conclusion. There is no need for a ritual incantation of the history of the litigation. The Court is aware of it. Better to begin with a statement of the issues, unless the case lends itself to an exhilarating or humorous introduction.'

The opening provides the advocate with an opportunity to convey to the court the advocate's approach as well as their strongest arguments upfront, with the full attention of the members of the court.292 According to Stuesser, the advocate should seize this opportunity to create a lasting impression in the minds of the judges:

The opening of the case is an occasion of crucial importance and needs to be prepared and presented with great care, skill and deliberation; it informs the judge about the case and at the same time points to the strengths of the plaintiff's case and the weakness of the defendant's case.293

Barwick recognised the importance of his opening and seized the opportunity to leave an impression on the appellate court. For example, as will be seen, he utilised the opening in the Bank Nationalisation Case to outline and summarise his five broad attacks on the legislation.

An advocate appearing on behalf of an appellate or plaintiff has a distinct advantage, namely, the opportunity to make submissions first. This enables the advocate to dictate the direction of the argument. For this reason, there is an advantage in an advocate advancing their main argument as early as possible.294 In constitutional law cases, usually the party attacking the validity of the law is required to open. However, this practice has been departed from in circumstances where 'it is more convenient for those upholding the validity of the law to go first'.295 For example, Barwick appearing

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291 Mason, 'The Role of Counsel and Appellate Advocacy', above n 11, 542.
292 'The court is freshest, at its most receptive and most interested at the beginning of the advocate's argument. The first argument will make the deepest and most long lasting impression': Freidman and Lacavora, above n 29, p.211.
294 Jackson, 'Appellate Advocacy', above n 71, 250.
on behalf of the Commonwealth and seeking to uphold the validity of the Communist Party Dissolution Act 1950 (Cth) presented his arguments first in the Communist Party Case.\textsuperscript{296}

Advocates may squander the opportunity that is afforded to them at the opening of their argument. Former Justice of the High Court, Michael McHugh, recalls the type of introductions that caused irritation:

Nothing used to annoy Justice Kirby and myself more than counsel getting up and we were eagerly awaiting to hear what the answer was to the appellant’s case and the counsel for the respondent would say: ‘Now I want to take your honours to page 17 of my submissions, footnote 4 it should be 77 rather than 74’.\textsuperscript{297}

In presenting an opening, discretion and selectivity are important. Kirby suggests that during preparation, considerable time and thought should be devoted to the opening words of argument:

The opening is generally the one moment when the advocate plunges straight into reading a tedious extract from legislation or a lengthy citation of authority. The opening [however] is the headline. It is the chance to communicate the advocate’s basic point of view. First impressions are often important. The good advocate will therefore give a lot of thought to the opening words of argument and to the strategy of explaining the case to the decision-makers.\textsuperscript{298}

The most effective openings it appears are those which capture the attention of the court by encapsulating and summarising the case in a brief yet interesting way, or by utilising a powerful metaphor that is particularly apt. A powerful or interesting opening can leave a lasting impression in the minds of the members of the court. An example of a memorable opening is attributed to Walter Sofronoff QC\textsuperscript{299} who appeared for the Wik Peoples in the Wik Case.\textsuperscript{300} This example of skilful rhetoric is remembered by two members of the High Court at the time, Justice McHugh and Justice Kirby. Kirby recalled that Sofronoff ‘did not squander that historic moment’\textsuperscript{301} and that:

His submissions commenced, as I recall, with a vivid description of the beauty of the Wik country in the northern part of Queensland. On 1 April 1915, in that country, he said, the Wik people were going about


\textsuperscript{297} Marcus Priest, ‘Eloquence has left the court, your honour’, Australian Financial Review (Sydney), Friday 24 August 2007, 57.


\textsuperscript{299} Currently the Solicitor-General of Queensland.


\textsuperscript{301} Justice Michael Kirby, ‘Introduction: The Rise (and Fall?) of the Barrister Class’ (Speech delivered at the NSW Bar Association Rhetoric Series: Rise (and Fall?) of the Barrister Class, Sydney, 20 August 2007), p.6; See also Justice James Douglas, ‘Oral Advocacy’ in Blank & Selby (eds), above n 11, p.181.
their daily lives as they and their ancestors had done for aeons. The men were getting their bark boats ready to fish because it was a clear day. The women were sitting with the children, teaching them about their traditions. Some older children were running off into the bush. At the very same moment, in the Land Titles Registry in Brisbane, the representatives of the Mitchelton Pastoral Holding were registering a pastoral lease under the Queensland Act. In the old measurements, it laid claim to an area of 535 square miles, approximately 1385 square kilometres.  

Kirby described it as ‘... a powerful, indeed electric moment’ and that ‘his appeal to seeing the picture of the legal problem in that context left an indelible memory on my mind’.

During the opening, reciting a succinct history of the case, summarising the main arguments, following those arguments with a careful recitation of significant facts and concluding submissions by addressing the relevant law, will afford the advocate the best possible opportunity for an ‘uninterrupted interlude’. Former judges have confirmed that the court is only interested in the arguments that will advance the advocate’s case and the relevant facts and questions of law which are likely to arise. Whilst, the opening of the case should not be used for reciting the entire history of the litigation, advocates should not over-estimate the knowledge that the members of the court have about their particular case. They may not be as familiar with the relevant issues of the case as the advocates would be.

According to Mason, an advocate should find an ‘exhilarating or humorous’ way to capture the attention of the court from the outset if the case is conducive to such an introduction. In Kirby’s view, an opening that is more likely to grab the attention of the members of the court includes

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303 Priest, ‘Eloquence has left the court, your honour’, above n 297, 57.

304 Ibid.

305 Jackson, ‘Advocacy before the United States Supreme Court’, above n 11, 6.


307 For this reason, according to Kirby, in their opening, it is imperative that the advocate outline the principal facts and the relevant issues in the case to provide the court with a clear picture. This should be undertaken despite judicial resistance — that is, in the form of negative comments or questions from members of the court. However, once it becomes apparent that all the members of the court have an understanding of the relevant facts and issues, the advocate should not persist in the face of continued judicial discouragement as this is likely to be counter-productive: see Kirby, ‘Ten Rules of Appellate Advocacy’, above n 11, 970-971.


309 Ibid. In one instance, an advocate that was about to commence their submissions in the face of a hostile and aggressive Court of Appeal, responded to an initial barrage by stating: ‘Before your honours drop the guillotine, let me make just two points …’. This caused laughter amongst the judges and bought the advocate some valuable time ‘to mount a persuasive, well thought out and almost compelling argument’: see Justice James Douglas, ‘Oral Advocacy’ in Blank & Selby (eds), above n 11, p.181.
references to the particular merits or justice of the case, an interesting issue of legal policy, a clear requirement of legal authority\(^{310}\) or some other interesting yet important aspect of the case. David Jackson QC, a leading constitutional barrister has a different view: ‘I have always found it better to eschew the exhilarating or humorous introduction. Witty observations which blossomed in chambers tend to wilt in the more acid rain of the courtroom’.\(^{311}\)

### 4.3 The Reply

The reply is also a powerful tool and provides the advocate with the final opportunity to persuade the members of the court and leave them with a lasting impression. Generally, the reply is only available to the appellant in an appeal. The use of ‘the reply to mount a deadly counterattack’\(^{312}\) is an art and is difficult to master. However, it can be a very effective tactic. According to Mason:

> effectively the reply is deconstructing the opponent’s argument. In reply, you can’t just advance the argument that you advanced in opening the case ... What you’ve got to do is hone in on something that is being presented by your opponent and destroy that.\(^{313}\)

Barwick was renowned for his ability to use the reply very effectively and often employed the technique of ‘trailing his coat’, that is, deliberately withholding aspects of his submissions on certain issues in his presentation in chief and allowing his opponent to address these issues in their submissions then addressing these issues in his reply.

It is not unusual for an advocate to successfully make their more pertinent points in reply. The contents of the submissions will determine what an advocate can achieve in the reply as will the nature of the arguments that the advocate has deliberately withheld for use in their reply.\(^{314}\) Both aspects are discussed in turn.

As the appellant, the decision whether to reply is heavily influenced by the perceived success of the respondent’s argument. If the advocate is confident that the court would not accept the respondent’s arguments or the court has effectively demolished the respondent’s arguments, then it may be prudent for the advocate to resist exercising their right of reply. By opting not to exercise their right of reply, the advocate deprives the court of the opportunity to subject their arguments to

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\(^{311}\) Jackson, ‘Appellate Advocacy’, above n 71, 250. See Hughes, above n 92, pp.18-19. See also Ross, Advocacy, (2\(^{nd}\) ed), above n 188, p.144.

\(^{312}\) Harry Gibbs, ‘Appellate Advocacy’, above n 11, 499.

\(^{313}\) Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 February 2006).

\(^{314}\) Mason, ‘The Role of Counsel and Appellate Advocacy’, above n 11, 543.
any further scrutiny and potentially damage the advocate’s arguments. However, it may not be necessary for an advocate to exercise their right of reply in circumstances where they have effectively addressed their opponent’s strongest arguments at the outset; that is, where the strategy of a ‘pre-emptive strike’ has been adopted.

The strategy of withholding part of the argument until the reply is considered to be fraught with risk and danger. The reply must be a legitimate reply to issues raised by the respondent and cannot be used to supplement the appellant’s case in chief. If the advocate has failed to raise a particular argument in chief (whether it was intentionally withheld or otherwise), and the respondent has not raised or referred to this argument in their submissions, the appellant is not permitted to raise this argument during the reply.

The reply is not an occasion to repeat previous submissions advanced by the advocate. Rather, it is the opportunity to deal with any issues raised by the respondent during their submissions and to identify any flaws or weaknesses in the respondent’s argument. Sackville considers an appellant fortunate to have the opportunity to do this at the completion of the oral argument, to effectively have the ‘last say’. Just as the opening is a time when the advocate has the undivided attention of the members of the court, the reply is a time when the advocate is able to capture the court’s attention as the oral submissions are coming to an end.

### 4.4 Watch the Bench and Judicial Questions

**Watch the Bench**

Since the time of Ancient Greece, it has been acknowledged that effective advocacy requires that an advocate have a considerable understanding of the persons who constitute the tribunal or bench. That is, an advocate should be aware of the personality, idiosyncrasies and predilections of the members of the court. This valuable information can be used to tailor both the substance of the

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**Footnotes:**

315 An advocate, who does opt to exercise their right of reply, potentially exposes themselves to a myriad of questions as, by this stage, the court has had the benefit of hearing both sides of the argument (see Jackson, ‘Advocacy before the United States Supreme Court’, above n 11, 8).

316 Glissan, above n 11, p.205.


319 Aristotle, *The Art of Rhetoric*, above n 32, p.74; Thompson, above n 31, 13; see Eidenmuller, above n 32; see also Phillips, above n 263, 586.

320 Idiosyncrasies of a non-legal nature may also be relevant. For example, Mr Justice Wynn-Parry (a former judge of the Chancery Division of the High Court in England) publicly rebuked a barrister for appearing before him without wearing a waistcoat: Cecil, above n 224, p.73.
advocate’s submissions and the manner in which those submissions are presented: ‘If you happen to know the mental habits of any particular judge, so much the better. To adapt yourself to his [or her] methods of reasoning is not artful, it is simply elementary psychology.’

An advocate can only understand the individual attributes of the members of the court by ‘knowing the court’ (as discussed in Chapter 3), ‘watching the bench’ during the presentation of their submissions and adopting a high level of awareness. Inherent in doing so is the ability to observe judge’s reactions, including body language and facial expressions, as well as listening carefully to their questions and comments. The advocate can then draw inferences about the judicial attitudes towards their case generally. According to David Jackson ‘[y]ou’ve got to keep your eyes on them [the judges] all the time’ and you should become a ‘very good reader of body language.’ Ellicott remarked that: ‘I know from my own experience that it is very important to keep your eyes on the judges and talk to them all. Go along the bench’. An advocate should look at the court.

The significant forensic advantages available to an advocate from watching the bench provide an incentive to minimising time spent reading aloud or referring to written material. According to Hayne: ‘[c]ounsel who puts his or her head down in order to read a prepared speech, or a slab of judgment, foregoes any opportunity to engage the Court’. An advocate who maintains eye contact, engages the members of the court and does not read from prepared submissions is more likely to have an attentive and receptive court which will concentrate on their arguments. Such an

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323 Interview with David Jackson QC (Sydney, 2 August 2006).

324 Interview with Hon. Robert Ellicott QC (Sydney, 8 August 2006).

325 Ibid.

326 Hayne, ‘Advocacy and Special Leave Applications in the High Court of Australia’, above n 11, p.9; Rosenberg and Huberman, above n 11, p.46. A well-known American judge, Justice Robert Jackson, has commented that:

If one’s oral argument is simply reading his printed brief aloud, he could as well stay at home ... We like to meet the eye of the advocate, and sometimes when one starts reading his argument from a manuscript he will be interrupted, to wean him from his essay ... If you have confidence to address the Court only by reading to it, you really should not argue there.

Jackson, ‘Advocacy before the United States Supreme Court’, above n 11, 9.

327 However, some commentators suggest that an advocate write out their argument in full but leave them behind so as to avoid reading from it during their oral submissions in court. Some counsel prefer to have with them a full text for the ‘comfort’ and ‘security’ it provides: Rosenberg and Huberman, above n 11, p.40; See also Rosenberg and Huberman, above n 11, p.46. See also Gilssan, above n 11, p.7 where it is suggested that the danger with written notes is that ‘they hold the attention of the advocate and distract from the vital tasks of communication and observation’. See also Silberman, above n 287, 59; Nix, Honorable Robert N.C., “The View From the Appellate Bench”, from Purver, Johnathan M, & Taylor, Lawrence E, Handling Criminal Appeals,
advocate is also in a better position to respond to judicial questions. An advocate’s submissions are more likely to be accepted, and the arguments more likely to be persuasive, where the advocate has maintained the interest of the members of the court. Successful advocacy ‘will keep the [judges’] minds on the case, and off the clock’. According to various commentators, the advocates who make the biggest impact and impression on the members of the court it seems, are the advocates who are capable of presenting their submissions without referring to written materials and who can instead ‘engage in a conversation with the Bench’. It was said of Byers that he ‘... epitomised the conversational style of advocacy. He invited the court to engage in a dialogue about the issues in the case’.

Engagement with the members of the court, demonstrates that the advocate is familiar with their case and gives the court confidence that the advocate will be able to provide assistance to the members of the court in attempting to reach a just outcome. By closely monitoring the reactions of the members of the court to the submissions that they advance, an advocate is able to gauge whether to persist (perhaps gently) with a particular argument or issue, or find an alternative method of advancing their argument. However, it is easier to gauge the views of some judges than others despite ‘watching’ them closely.

The benefit of watching the bench and judicial questioning is reflected in an anecdote from South Australian barrister, Jack Elliott, when he was briefed to appear on behalf of a man who had been charged with drink driving for the fourth time as well as failing to stop after an accident and driving without due care. During the special leave application in the High Court, Elliott commenced by attempting to justify the Supreme Court’s dismissal of the Crown’s original appeal. According to Elliott, the following exchange occurred:


328 Rosenberg and Huberman, above n 11, p.46.

329 Jackson, ‘Advocacy before the United States Supreme Court’, above n 11, 11.

330 Kirby, ‘Ten Rules of Appellate Advocacy’, above n 11, 972; Rosenberg and Huberman, above n 11, p.45. See also Jackson, ‘Appellate Advocacy’, above n 71, 252. Clearly, such a tactic is only able to be utilised if the advocate has a general state of awareness, is watching the members of the court and maintaining eye contact.

331 Address by Sir Anthony Mason ‘Opening of Maurice Byers Chambers’ (Summer, 2000/01), NSW Bar News 52.


333 The magistrate had the power under section 4 of the Offenders Probation Act 1913 (SA) to dismiss the complaint even though he believed that the offence had been proven, if the magistrate deemed it expedient to do so on grounds such as character, antecedents, age, health etc. The magistrate exercised his power to do so. The Crown unsuccessfully appealed to the Supreme Court but was successful in its appeal to the Full Court of the Supreme Court. Elliot was instructed to file a special leave application in the High Court.
Barwick CJ: I wouldn’t worry about that, Mr Elliott, I’d deal with your original argument on the magistrate’s powers and discretion.

Elliott: That’s pleasing to hear, Your Honour, up till now I’ve been a voice crying in the wilderness.

Barwick CJ: You, and the magistrate. 334

During his remaining submissions, Elliott observed the five judges of the High Court ‘nodding approval to all of our submissions’. 335 Shortly after, Chief Justice Barwick said: ‘You need say no more, Mr Elliott. Special leave to appeal is granted. The appeal will be heard in the May sittings in Melbourne’. 336 Elliott was ultimately successful in the appeal, with only one judge, Justice McTiernan dissenting. 337

Judicial Questions

The general view of various commentators is that judicial questioning provides the advocate with invaluable information about the thought processes of each member of the court as well as their concerns, reservations and inclinations. 338 According to John Godbold, ‘this opening into the mind of the listener is the most valuable piece of information the persuader can get’. 339 Insight into, or an understanding of, a judge’s inclination provides the advocate with an opportunity to adapt and modify their submissions and approach, with a view to enhancing the persuasiveness of their submissions. 340 An advocate should use this opportunity to their advantage. 341 That is, ‘...[i]t is

335 Ibid.
336 Ibid.
337 Ibid, p.257. Also see Cobiac v Liddy (1969) 119 CLR 257.
338 Silberman, above n 287, 4; Nathanson, above n 11, pp.4-13. Also, Sir Albert Edward Woodward described his approach as a judge as follows:

... I let counsel know my thought processes as the hearing proceeded. I thought it only fair that they should know what they had to deal with. The result tended to produce a dialogue rather than uninterrupted speeches by counsel. While most welcomed this, one or two were reluctant to have their oratorical flow cut short, so they hardly drew breath, giving me very little opportunity to intervene with an observation or question.


339 Godbold, above n 11, 818. This opening into the judicial mind has been referred to as ‘windows of opportunity’ in Glissan, above n 11, p.201. The advocate should ensure that they address what interests the court when responding to questions: Pannick, above n 193.

340 See Glissan, above n 11, p.201.

341 Rosenberg and Huberman, above n 11, p.48. The author states: ‘Use the judges’ reactions, comments and questions during the appellant’s Counsel’s argument to your advantage; they will show what issues the judges feel are important or which require further development’. 
infinitely preferable to have a bench that is prepared to debate the issues with you, than to have a bench which listens with a sphinx-like silence'.

However, an advocate should work with judicial questioning and use this opportunity to their advantage. This was certainly Barwick's approach. It is far easier to persuade a member of the court when they are offering an insight into what they are thinking. For this reason, judicial questions should be encouraged.

Although submissions which are well-presented, well-organised and thorough from the outset tend to discourage judicial questions, such questioning is inevitable and advocates should always be prepared for it. An advocate who has engaged in an extensive preparation will be able to answer most judicial questions adequately and their arguments are more likely to survive judicial interrogation. Therefore, during preparation:

- the advocate's concentration should lie upon endeavouring to look into the mind of the tribunal,
- to anticipate and work out answers for difficulties and objections, spoken or unspoken, to calculate what are likely to be perceived as the strengths and weaknesses of his or her position, to judge what arguments are likely to be found to be of intellectual attraction and what are likely to be regarded as unimportant or counter-productive, and, always, to think ahead of the court.

Judicial questioning tests the thoroughness of the advocate's preparation: 'nothing tests the skill of an advocate or endangers his position more than his answer to questions, and in nothing is experience, poise, and a disciplined mind a greater asset'.

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342 Perry, above n 68, p.6.
343 'Extra-Judicial Notes', above n 43, 12; See also Nathanson, above n 11, pp.4-13; Rosenberg and Huberman, above n 11, pp.44-45. Jackson, 'Advocacy before the United States Supreme Court', above n 11, 12; Rosenberg and Huberman, above n 11, pp.44-45. It has been suggested by John W Davis that an advocate should:

Rejoice when the court asks questions ... If the question does nothing more it gives you assurance that the court is not comatose and that you have awakened at least a vestigial interest. Moreover a question affords you your only chance to penetrate the mind of the court, unless you are an expert in face reading, and to dispel a doubt as soon as it arises.


344 Chief Justice Denison of the Supreme Court of Colorado explained that:

A perfect argument would need no interruption and a perfect Judge would never interrupt it; but we are not perfect ... It is the function of the Court to decide the case and to decide it properly ... The Judge knows where his doubts lie, at which point he wishes to be enlightened; it is he whose mind at last must be made up, no one can do it for him, and he must take his own course of thought to accomplish it. Then he must sometimes interrupt.


345 'Extra-Judicial Notes', above n 43, 12.
346 Jackson, 'Advocacy before the United States Supreme Court', above n 11, 12. As Chief Justice of the High Court, Barwick made the following statement in relation to judicial questioning:

The hearing or argument, even at times poor argument, excites the mind of the judge, making it work on the facts and upon the law as it is brought forward by the barrister and by the references to authority which he gives. Exchange with the Bar, testing, no doubt in a tentative way, the proposition submitted, has its part not only in the clarification of the judge's mind but often in the enlargement of counsel's concept of the matter
However, David Jackson introduces an element of reality and pragmatism about preparing to respond to judicial questions by suggesting that an advocate 'will never be able to answer every question or every question to the satisfaction of the questioner, and particularly so if you are talking about, say, appearing before seven justices in the High Court'.\(^{347}\) Contrast this approach to the statement by Gleeson:

An advocate ought to think out beforehand, what kind of questions the bench are likely to ask, and have an answer prepared for them. It's unforgivable for an advocate to go into a case and be taken by surprise about anything.\(^{348}\)

There appears to be a significant difference of opinion about the extent to which appellate advocates can ready themselves for the judicial questioning that they will face. Whilst it is unrealistic to expect that advocates would be in a position to anticipate all possible questions from the members of the court, good advocates would anticipate a core group of questions in any case or a core set of topics which may be the subject of questions. This goes some way to reconciling the respective views of David Jackson and Gleeson.

Judicial questioning provides the members of the court with the opportunity to test the substance of the advocate's arguments and focus on critical aspects of the advocate's case. The role of judicial questioning is best encapsulated by Hayne:

You cannot expect the Court to remain silent during your argument, whether in a leave application or on the hearing of an appeal. The Court will ask questions of counsel which you must always attempt to answer as clearly and directly as you may. It is inevitable that some of the questions asked will not assist the case you are making. The Court wants to know what consequences follow from adopting particular arguments. It is important to understand the limits of the principle which it is said underpin the argument. Counsel are paid to advocate a particular client's case. The Court is concerned not only to decide a particular case correctly but also to formulate principles properly. It follows that you must be prepared for questions that are designed to show whether your argument is faulty. If you can anticipate the questions and have an answer in mind, so much the better. Your answer will be more direct. Bear in mind, as well, that there are times when questions asked of counsel enable discussion of the matter and, on occasions, prompts new lines of submissions. For that essential stimulation of mind in judge and counsel alike, I can find no substitute for oral argument, well presented by counsel who are well prepared and capable of the exchange of ideas with the bench which is itself capable, not merely of listening, but of working in the presence of counsel.

Barwick, 'The State of the Australian Judiciary', above n 46, 199.

\(^{347}\) Interview with David Jackson QC (Sydney, 2 August 2006). He added that:

The only way I can think of really is that beforehand you try to work out what you want to say, and as you do, you try to put it in paragraphs in your mind or try to write down what you are going to say. At least you know where [you are] going then but as you do that, you come to recognise the sort of questions that might be asked and as that happens you try to have answers ready for them.

Also, Jackson, 'Appellate Advocacy', above n 11, p.18-19.

\(^{348}\) Interview with Murray Gleeson, Chief Justice of the High Court of Australia (Sydney, 14 August 2006).
along the bench. A question which you are asked may be intended to provoke an answer that will reflect upon a line of questioning by another member of the Court.\textsuperscript{349}

Many advocates, particularly inexperienced advocates, dread judicial questioning. This was certainly the experience of former advocate and judge, Sir Albert Edward Woodward,\textsuperscript{350} who stated: 'As a young barrister, I lived in fear of being caught out by a question from the Bench that I was unable to answer, in circumstances when I should have had an answer ready ... '.\textsuperscript{351} If an advocate is unable to deal with any relevant questions,\textsuperscript{352} it is better to concede this by way of a candid admission rather than attempting to respond to the question by hazarding a guess.\textsuperscript{353}

Advocates are often required to deviate from their planned order of submissions to respond to judicial questions. However, effective advocates have developed the ability to weave their planned arguments into their responses to judicial questions.\textsuperscript{354} The ability to move between an advocate’s planned order of submissions whilst simultaneously incorporating their planned arguments into their responses to judicial questions is an important skill and demonstrates an intimate understanding of their case. This increases the confidence in the advocate and may enhance the advocate’s ability to persuade the members of the court.

As an advocate, Dixon welcomed judicial questioning and thrived on it. It was said that ‘[n]ot only did he revel in being cross-examined by High Court judges, he knew how to sway them’.\textsuperscript{355} One of his

\textsuperscript{349} Hayne, ‘Advocacy and Special Leave Applications in the High Court of Australia’, above n 11, p.8.

\textsuperscript{350} Following his career at the Bar, Sir Albert Edward Woodward was appointed to the Commonwealth Industrial Court, the Supreme Courts of the Australian Capital Territory and the Northern Territory, and the Deputy Presidency of the Trade Practices Tribunal: see Woodward, above n 338, p.126.

\textsuperscript{351} Woodward, above n 338, p.53.

\textsuperscript{352} Another suggested option for an advocate who is confronted with a situation where they are unable immediately to deal with an issue raised by a member of the court, is for the advocate to utilise an adjournment to devise an appropriate response and ensure they deal with the issue immediately after the adjournment: Sackville, ‘Appellate Advocacy’, above n 60, 107.

\textsuperscript{353} Jackson, ‘Advocacy before the United States Supreme Court’, above n 11, 12; Rosenberg and Huberman, above n 11, p.45.

\textsuperscript{354} Tom Hughes QC recommends that, when faced with vigorous judicial questioning, an appellate advocate ‘[r]oll with the punches. Don’t get upset. Roll with the punches, with the aim of maintaining the integrity of your essential argument. Don’t get flustered’ (see Interview with Hon. Tom Hughes AO QC (Sydney, 2 August 2006); Carroll, above n 56, 109. David Jackson QC agrees that this is important: see Interview with David Jackson QC (Sydney, 2 August 2006). Geoffrey Sawer, the famous constitutional law academic, described the experience of High Court advocacy in the following way: because of the Court’s inveterate habit of interjecting extensively during argument ... even if counsel come prepared with a reasonably well organized plan, they are constantly thrown off it by questions from justices and often have great difficulty getting back on the intended track, or indeed remembering the point on the track which they had reached before being taken off along some other track preferred by the justices. Counsel cannot safely assume that all the justices will have followed the course dictated by interjections, much less that the more silent justices will be as familiar with the trend of his argument as the interjectors often seem to be. Sawer, \textit{Australian Federalism in the Courts}, above n 295, p.44.

\textsuperscript{355} Ayres, above n 50, p.28.
great strengths was his ability to handle judicial questioning and incorporate into his answers his well-prepared arguments. The same can be said of Barwick, as will be apparent from his responses to questions during the Bank Nationalisation Case and the Communist Party Case discussed in later chapters.

The former Assistant US Attorney General and advocate, Hugh B. Cox, was described as ‘one of the great advocates of his generation in the United States’. His ability to deal with judicial questioning helped forge his reputation:

Under questioning by the Court he could move rapidly and easily from an extremely complex analysis into some simple parallel to illustrate a point, and then guide himself back, with brilliant and masterful insights and without hesitancy, into the main thrust of a conclusion delivered in a strong sonorous voice that carried throughout any courtroom in which he spoke. He had a broad and scholarly knowledge of the law, a prodigious memory, exacting standards of professional performance, a sensitivity to the type of case on which he was engaged and to the Court before which it was to be tried.

Similar qualities are also important in the Australian context.

Advocates, commentators suggest, should answer judicial questions in a direct and accurate manner and not seek to evade them, delay answering or give vague responses. According to Ellicott, ‘[you’re] addressing [the judges] and you’re trying to answer their queries and when somebody asks a question you deal with it’.

However, other approaches to judicial questioning have also been suggested. During his career as a distinguished barrister in the UK (and later Privy Counsellor), Cyril Radcliffe did not tailor his submissions to the court and nor would he respond to questions immediately:

He did not adapt his method of presentation to the tribunal but by putting forward reasonable arguments attempted to persuade. In the House of Lords a Law Lord would frequently interrupt

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358 Dubina, above n 269, 4; Nathanson, above n 11, pp.4-13; Rosenberg and Huberman, above n 11, p.45; Glissan, above n 11, p.198.


360 In 1949, Radcliffe was sworn of the Privy Council, made a Lord of Appeal in Ordinary (law lord) and created a life peer as Baron Radcliffe, of Werneth in the County of Lancaster. He also appeared for the banks in the Bank Nationalisation Case before the Privy Council alongside Barwick and others.
with a question. Radcliffe would not be deflected from his argument by replying to the question immediately but would courteously say that he would deal with the point later in his argument.\textsuperscript{361}

However, an advocate who greets judicial questions with suspicion or cynicism ‘[a]ll too often ... bites the helping hand’.\textsuperscript{362} A question may appear hostile on its face, but:

Questions usually seek to elicit information or to aid in advancing or clarifying the argument. A question argumentative in form should not be attributed to hostility, for oftentimes it is put, not to overbear counsel, but to help [the judge] sharpen [their] position. Now and then, of course, counsel may be caught in a cross-fire of questions between differing Justices, each endeavoring to bring out some point favorable to [their] own view of the law. That tests the agility and diplomacy of counsel.\textsuperscript{363}

Through judicial questioning, an advocate also has an opportunity to clarify any misunderstandings that a member of the court may have and advance their case generally.\textsuperscript{364} According to Robert Jackson:

The wise advocate will eagerly embrace the opportunity to put at rest any misconception or doubt which, if the judge waited to raise it in the conference room, counsel would have no chance and perhaps no one present would have the information to answer.\textsuperscript{365}

It cannot be assumed that a question from a member of the court indicates their final view in relation to an issue or the views of any other members of the court.\textsuperscript{366} There may be many other reasons for the question, for example, to alert the advocate to a flaw in their submissions or an aspect of the advocate’s case that has been previously overlooked. A probing or searching question from a member of the court may not necessarily indicate disagreement; it may simply reflect the judge’s attempt to comprehend the argument or the consequences of accepting a particular argument.\textsuperscript{367} David Jackson observed that: ‘The members of appellate courts do not always look at

\begin{thebibliography}{99}
\bibitem{362}Freidman and Lacavora, above n 29, p.210; Rosenberg and Huberman, above n 11, pp.44-45.
\bibitem{363}Jackson, ‘Advocacy before the United States Supreme Court’, above n 11, 11. See also Nathanson, above n 11, pp.4-13.
\bibitem{364}Jain Ross, above n 289, p.15; Rosenberg and Huberman, above n 11, pp.44-45.
\bibitem{365}Jackson, ‘Advocacy before the United States Supreme Court’, above n 11, 12.
\bibitem{366}According to former Chief Justice Gleeson:

\begin{quote}
you’ve got to understand where the numbers are likely to lie on the bench. The ones who are doing the most talking are not necessarily the ones who are in the majority. Sometimes the ones who do the most talking are commonly in a minority and it would be a bad error to be misled by what they’re saying into thinking that what they’re saying is representative of the way the bench as a whole is thinking.
\end{quote}

Interview with Murray Gleeson, Chief Justice of the High Court of Australia (Sydney, 14 August 2006).
\bibitem{367}Sackville, ‘Appellate Advocacy’, above n 60, 101; Nathanson, above n 11, pp.4-13.
\end{thebibliography}
cases in the same way. Intellectual processes and approaches differ, and that may be reflected in questions asked by the court during the appeal.  

In an appellate court, it is not uncommon for a particular judge to play a more dominant role in intervening during an advocate’s submissions and posing questions. In such a case, it is important that the advocate’s responses to such questions are directed to all members of the court. Focusing one’s attention on one member of the court may give a misleading impression as to the manner in which the argument is affecting the entire court. Former Solicitor-General, David Bennett QC, recalled from the Scientology Case:

in the Scientology case when I was at the bar, Justice [Lionel] Murphy asked me questions which involved an attack on Christianity. Although his questions were intended to support the argument I was putting, I had to be careful not to adopt too much of what he was putting to me, for fear of antagonising the three active Christians on the court.

Ellicott indicated that he often employed overstatement for the purposes of gaining an insight into the minds of the judges and ‘as a means of drawing out the bench ... overstatement ... often ... works to bring a point of view out and you know where the mind is going’.

Some appellate judges, commentators suggest, ask ‘straw man’ questions – that is, questions by judges who have already made up their mind on a particular issue in a way that conflicts with the position adopted by the advocate. The advocate ‘must not allow himself to be lured into wasting valuable time jousting the straw man’. There are also occasions where judicial questions may be

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370 Dr Bennett was the Solicitor-General of the Commonwealth of Australia, appointed for a five-year term in August 1998 and for a second five-year term in August 2003. In August 2008, Dr Bennett returned to private practice. He was called to the NSW Bar in 1967 and was appointed as a Queen’s Counsel in 1979 and practiced in the areas of appellate law generally, constitutional law, administrative law, revenue law, trade practices and competition law, among others. He served as president of the New South Wales Bar Association from November 1995 to November 1997 and President of the Australian Bar Association from November 1995 to February 1997.


372 ‘Putting words to music in the constitution’s case’, above n 217, 47.

373 Interview with Hon. Robert Ellicott QC (Sydney, 8 August 2006). Further, Ellicott indicated:

You mustn’t overstate to the point of not being able to defend the proposition, ... advocacy is an expression of confidence about your case and sometimes overstatement does draw the bench I’ve found. It might draw an acid comment or it might say “that’s ridiculous” or “how can that be” but in the process you know where the point of no return is in relation to the proposition and you can get back to it, so it’s a process of going forward and coming back, it’s a bit like fencing or something like that.

374 Freidman and Lacavora, above n 29, p.211.
asked with an ulterior motive in mind, for example, for the purposes of convincing the other judges on the appellate court. This has been referred to as ‘judicial advocacy’. 375

4.5 Focus on the Substance, Elegance is a Bonus

One of the fundamental elements and ideals of appellate advocacy in presentation is the substance of an advocate’s submissions. For the purposes of this analysis, substance refers to the content of an advocate’s submissions whereas elegance refers to the style or manner in which an advocate’s submissions are delivered. Whilst elegance is an important skill or technique to develop, an advocate’s primary focus should be on substance. In the words of Justice James Douglas 376 of the Supreme Court of Queensland, ‘most judges appreciate effective use of language, simple and clear expression with a real focus on the substance of the argument’. 377

The adversarial system places a heavy burden on the advocates to deliver to the court competing arguments which the judges in an appellate court context can test through judicial questioning and consider carefully before making their determination. The administration of justice in the adversarial system therefore relies heavily on advocates upholding their ethical obligations to the court in terms of frankness and candour as well as achieving a minimum standard of competence. A fundamental aspect of achieving the requisite level of competence, commentators suggest, is advancing arguments which are reasonably available, yet strong and persuasive.

The primary focus should be on the facts of the case and any relevant law or authority that may be applicable. If the submissions are presented with style or elegance, this will further assist the advocate’s cause. 378 Substance also refers to the imperative, as Hayne has stated, for an advocate’s submissions to be ‘intellectually rigorous’ since the reasons given by the judges in any decision should be ‘intellectually rigorous’. 379


‘Every question is not necessarily what it seems. Some appellate judges question counsel to persuade their colleagues on the bench. Such questions are really directed through, not to counsel, and it is through the content of the judge’s question, not the answer, that the interrogating judge intends to assist his slower-witted confreres to see the point of the case. The attorney must be “tuned in” to the question and its real purpose.


376 Justice James S Douglas has been a Judge of the Supreme Court of Queensland since 2003.


379 Hayne, ‘Advocacy and Special Leave Applications in the High Court of Australia’, above n 11, p.4.
Effective appellate advocacy requires a delicate balance between submissions that are concise yet comprehensive and thorough. The greatest temptation, it is said, is to belabour points, engage in repetition or deliver long-winded submissions; this temptation should be avoided. This is linked to the notion of selectivity, namely, the process of identifying the strongest arguments available, the result of which will comprise the substance of an advocate's case. It is generally considered counter-productive to present every argument available or every argument that has been developed or conjured up. An advocate should be discerning about which arguments they choose to present so as to ensure that the better and stronger arguments are not 'deprived of impact by being presented in the middle of a tangle of confused and aberrant argumentation'. According to Sackville, arguments which are unlikely to succeed ‘... are like the thirteenth chime of the clock; not only wrong in themselves but casting doubt on all that has come before.’ Selectivity is also relevant in terms of an advocate gaining credibility and respect in the eyes of the court. For example, the advocate's credibility may depend on whether they have, in previous cases, abandoned arguments that did not prove to be worth pursuing. Such views presuppose that the strongest arguments available in any particular case are readily identifiable and can distinguish themselves from weaker arguments. Whilst this may be the position ideally, there will be occasions where such arguments are not readily identifiable due to the complexity of the law or the novelty of the issues involved in the case. There may also be circumstances where an appellate advocate has been briefed to argue a case and only weak arguments are available. In terms of selectivity, generally, Barwick’s approach relied on using his ‘ground up’ approach to identify the arguments available and he then presented the strongest of those arguments.

Consistent with the focus on the substance of submissions, one effective technique employed is described as ‘priming’ or ‘chaining’. This involves advancing a series of overlapping propositions in
a chain such that the acceptance of one proposition leads inevitably to the next. The objective is for the judges to accept each proposition and move to the next proposition. For this approach to be effective, it is critical to commence with a series of linked premises that a court is likely to accept and lead the court to agree with 'the more controversial premise – the critical request'. This technique, it is said, requires considerable practice and experience in building logical links between the premise and the conclusion in each proposition. It also requires significant preparation and the careful use of language.

Whilst the substance of an advocate's arguments is important, if these arguments can be presented with style, elegance or flair then this, it is said, will further assist the advocate's cause by making the arguments more appealing and, ultimately, more persuasive. It is said that '... style is the accurate expression of clear thought which should be achieved by the use of simple and harmonious words'. Robert Menzies was renowned for presenting his argument, 'so far as he was allowed to do so, in its most attractive way'. As will be apparent from the analysis of Barwick's presentation in the Bank Nationalisation Case and Communist Party Case, Barwick had a unique and engaging style characterised by the ability to deploy simple yet effective language.

The manner in which arguments are presented allows the advocate to inject their own personality into their submissions. This will indirectly assist the advocate's persuasive ability: 'We must never forget the spark of creativity, that inexplicable capacity of some people to sculpt their communication into breathtaking forms'. However, an advocate who presents their case with style or elegance but lacks substance will quickly be exposed by judicial questioning and, ultimately, may fail to persuade the judges.

385 Stanchi, above n 25, 415.
386 Ibid. In fact, the most effective argument chains are those that do not necessarily connect together.
387 Ibid, 417, 423. It has been suggested that an advocate 'must show the audience the path to follow, moving step by step, revealing the argument and the story, but leaving them to fill in the punch line. We persuade by letting them persuade themselves'. When this technique is employed, it is often commenced with a proposition that is uncontroversial and likely to be accepted and move on from there. See also Selby, Blank and Nolan, above n 242, 182.
388 Ibid, 421-422. Byers was a master of this approach. It is said that he would occasionally advance an argument which had five logical steps and would outline the first four steps and then embark on another part of his submissions, only to be interrupted by the judge saying: 'But, Sir Maurice, if you make those four propositions that you have just made, shouldn't this fifth proposition logically follow?' Sir Maurice's standard response was said to be: 'Oh, your honour, I didn't wish to fly too close to the sun!' Byers' response appears ironical, suggesting that he did not have the audacity to assert acceptance of the fifth proposition although the judge had detected that this would naturally follow. The judge, it is said, would often support the propositions that Byers had advanced and the ultimate conclusion: see Justice James Douglas, 'Oral Advocacy' in Blank & Selby (eds), above n 11, p.184.
389 Hyam, above n 31, p.7.
390 Hazlehurst, above n 204, p.42.
391 Selby, Blank and Nolan, above n 242, 182.
Byers was an advocate renowned for his style. Former Attorney-General, Gareth Evans remarked of him that ‘[t]he counter point to brevity, that which sets it off ... is style and that’s a quality that Maurice has in abundance’.392

4.6 Flexibility, Discretion and Tact

Flexibility

Flexibility, discretion and tact are closely associated — they also represent key elements and ideals within presentation. Ellicott identified the following approach to advocacy which incorporates some of the key elements of appellate advocacy, namely, flexibility, tact and discretion:

formulate your, what I call a glide path, that is to say, those propositions that you are going to espouse in getting into the case recognising that in top appellate courts like the High Court, the argument is never going to go the way you think it will. [It]’s more likely than not you are going to be diverted by other points of view and therefore you’ve got to be ready for that and if you are not ready for that, you’re not a good appellate advocate. You’ve got to know the danger points, that is to say, the points of no return where you have to stand your ground and if you depart from those well you’re over the edge, or if you misjudge where you must stand your ground, you can either be put in a dangerous position or alternatively you seem to be arguing needlessly when you could put a lesser proposition so that’s very important. Also courage and speaking with authority[,] they’re all important to a successful advocate.393

Flexibility requires mental agility and that an advocate be ‘nimble on their feet’ — that is, the ability to adapt submissions following comments or reactions from the judges, depart from the planned order of submissions, answer judicial questions and respond to an opponent’s submissions or tactics.394 In doing so, it requires discretion and tact, to guard against anything that may prejudice or adversely influence the case. According to Ellicott, ‘flexibility is ... the essence [of] good advocacy at the appellate level’.395 Former Chief Justice of the Federal Court, Michael Black, stated that: ‘You have to be able to parry as an advocate — I am using a fencing term now. It is not like you march across the field with a musket, you have to be absolutely flexible. That performance is so exciting’.396

393 Interview with Hon. Robert Ellicott QC (Sydney, 8 August 2006).
395 Interview with Hon. Robert Ellicott QC (Sydney, 8 August 2006).
The task confronting an advocate, according to Gibbs, 'is to formulate the argument that is most likely to persuade the court to take the course that he [or she] wishes it to follow and to present that argument as clearly and forcibly (and, preferably, as succinctly) as possible'. \(^{397}\) When, for example, it appears that the judges are not favouring particular arguments, flexibility is required. That is, it may be necessary to discard or alter particular arguments. \(^{398}\)

An illustration of the dangers of an inflexible approach arises in an anecdote recounted by Robert Menzies who appeared as junior to John Latham\(^ {399}\) in an appeal before the High Court in the 1920s. Dixon appeared against them for the appellant. According to Menzies, Latham's weakness as an advocate was that 'his manner and method seemed cold and pedantic' \(^ {400}\) and his 'argument had to be presented to the judge or judges in an inevitable and ordered sequence, with a sort of unspoken suggestion that the listener was being instructed, even on the most elementary principles'. \(^ {401}\) Dixon, Menzies believed, knew of Latham's inflexible approach and sought to exploit it. According to Menzies, Dixon's tactical sense was 'impeccable'. \(^ {402}\)

According to Menzies, Dixon opened and destroyed Latham's weaker arguments. In response to a query from Chief Justice Knox as to whether he was going to address the other arguments, Dixon laughed and said: 'Well, Your Honours, those points, which are somewhat obscure to me, should really be explained by my learned opponent, so that we'll be able to consider them!' \(^ {403}\) Latham 'began to explain them with pedantic care, explaining some propositions of law which were really elementary, just as if the judges needed instruction'. \(^ {404}\) Menzies recalled that the judges' questions became more and more hostile and penetrating as they 'were searching for answers to our winning points'. \(^ {405}\) Latham found himself in a tough battle with the court and ultimately the appeal was lost. \(^ {406}\)

\(^{397}\) Harry Gibbs, 'Appellate Advocacy', above n 11, 497.

\(^{398}\) Ibid; Rosenberg and Huberman, above n 11, p.46.

\(^{399}\) Referred to earlier as Chief Justice Latham as he became the Chief Justice of the High Court of Australia from 1935 to 1952.

\(^{400}\) Menzies, *The Measure of the Years*, above n 203, p.235. Latham was also described as 'an able lawyer, well grounded in the law, extremely hard working and thorough in the preparation of his cases' who 'was much concerned with the logical structure of his arguments, and somewhat prolix as an advocate': see Zelman Cowen, *Sir John Latham And Other Papers*, (1965), Oxford University Press, London, p.31.

\(^{401}\) Menzies, *The Measure of the Years*, above n 203, p.236.

\(^{402}\) Ibid.

\(^{403}\) Ibid. Dixon opened his argument by demolishing the weakest grounds which Latham and Menzies had successfully relied upon in the Supreme Court and then destroyed the second weakest ground. Dixon sat down and Chief Justice Knox asked him whether he was 'going to deal with the other points in the case'.

\(^{404}\) Ibid.

\(^{405}\) Ibid.

\(^{406}\) Ibid, pp.235-236.
As discussed in an earlier section, an advocate must watch the reactions or signals that are coming from the judges and use these to gauge the likely prospect of success of their submissions. The dynamics of appellate advocacy, it is said, inevitably require the rapid exercise of judgment while also demonstrating good judgment and discretion. Arguments that an advocate believes are likely to persuade the court during the preparation of their case may receive a mixed or even hostile reception from the judges. Mason has observed that:

The able appellate counsel, alive to the possibility that he may need to adjust his case in light of the Court’s reaction to his argument, preserves some degree of flexibility in the expression of his submissions, knowing that what attracts one judge may repel another.

Mason has described flexibility as a ‘... virtuous quality, so long as it is subordinated to a principled approach and a structured argument’. That is, an effective advocate will formulate a series of structured arguments to form the basis of their submissions and yet be flexible and willing to depart from these submissions as required.

Whilst some advocates adopt an approach of complete flexibility (that is, without a structured argument) so as to take advantage of any opportunity or opening that arises, the danger with doing so is that the advocate risks being unable to convey to the judges a set of coherent arguments while responding to judicial questioning. An advocate’s inability to adhere to a principled approach within the structure of a meticulously and thoroughly prepared submission, according to Mason, often causes an advocate to lose momentum when confronted with rigorous judicial interrogation.

Without structured and well-prepared submissions, the judges will be required to analyse and consider the advocate’s random responses and extract the advocate’s essential arguments from these responses.

Responding to judicial questions and addressing judicial comments requires that the advocate depart from their planned order of submissions and demonstrate flexibility (also referred to as adaptability) as well as patience at all times. It may also necessitate that an advocate adapt, modify, tailor or refine their submissions. The flexibility required in such circumstances has been described in American literature as ‘controlled flexibility’, that is:

407 Ross, Advocacy, above n 216, p.4.
408 Mason, ‘The Role of Counsel and Appellate Advocacy’, above n 11, 541.
409 Ibid.
410 Ibid.
411 According to Tom Hughes AO QC, ‘adaptability is necessary’: see Hughes, above n 92, p.13.
412 An advocate who adheres to a strict “game plan” in the face of unforeseen developments is unlikely to communicate effectively: Freidman and Lacavora, above n 29, p.211.
a relaxed resilience allowing one to respond to a judge's question, coupled with an internal gyro compass enabling one to return gracefully to a charted course. Mastery of the pair of talents—yielding to the sometimes centrifugal force of a judge's query and returning as soon as possible to one's own centripetal course—is more critical than ever in an era of truncated arguments.

Sackville has suggested that if the advocate has adequately prepared their submissions then they will have a clear view of the direction of their argument and their responses to any questions should not disrupt the structure of their argument. As will be seen later, Barwick's presentation in the Bank Nationalisation Case was characterised by his ability to move effortlessly between his planned submissions and his responses to judicial questions whereas, in the Communist Party Case, Barwick seemed almost to resent judicial questions and did not use his answers as effectively to convey his submissions.

Ellicott has suggested that the ability to tailor submissions according to comments from the bench together with possessing the flexibility and discretion to discard a particular argument is 'so much part of a good advocate's armoury'. This is echoed by Chester Porter QC who believes that 'the secret of persuasive advocacy is to understand how your tribunal is thinking, and to adjust your arguments accordingly'. If, Porter suggests, an advocate is able to steer the judge in a direction that gives the impression that the judge devised an argument independently, this may greatly assist in persuading the judge: '... the most convincing arguments are those which the judge thinks he or she has thought of without the assistance of counsel'. According to Mason, Maurice Byers, subscribed to this view: 'Maurice was not without artifice. He knew that all judges are vain, some more so than others, and that sometimes it is good advocacy to let the judge think that he has discovered the answer himself'.
These comments correspond to the saying by Aristotle that: 'The fool tells me his reasons. The wise man persuades me with my own'. In an effort to respond to the concerns of the judges, however, an advocate should not alter their submissions so as to discard the fundamental tenets of their submissions. This may damage an advocate's credibility and reputation, perhaps even irretrievably. To determine whether an advocate should alter their submissions requires weighing up the benefits to be gained against the extent to which the submissions go to the very heart of the advocate's case. According to Sackville, if an advocate is unable to adapt their submissions to:

... the concerns, express or implicit, of the judges, an important persuasive element in the argument may be missing. Yet this must be balanced against the need to maintain consistency. If flexibility involves abandoning the underpinnings of the argument, it will be achieved at too high a price. Again, preparation is critical. The more fully submissions have been thought through, the better able is counsel to explore convincingly the consequences for other cases and circumstances of accepting the argument, a matter in which most appellate courts display particular interest.

However, it has been suggested by Hughes that an advocate should 'never be afraid to make a concession when your commonsense and sense of reality tell you to do so. Make a concession and work around it. You have to adjust your argument to the realities of the case'.

As Mason has suggested, there are circumstances where one judge may be receptive to a particular submission, whereas it may not attract another judge. This requires flexibility and readiness to adopt an alternative approach. An example offered by Kirby in relation to international law material has broader application:

... advocates contemplating the use of international law material do well to keep in mind the 'rule' of advocacy commending knowledge of the court and of the judges deciding the case. In a multi-member court, including judges who may hold differing views on such topics, discernment is demanded. The advocate must at once secure the agreement of the judge who is interested in, and influenced by, such

named in honour of Sir Maurice. The comments were made in a eulogising setting and may suggest some exaggeration. Nevertheless, they represent and reflect a key aspect of an advocate's power of presentation. In saying that, Tom Hughes AO QC also agrees with this view but describes it as follows:

a capacity to put a point in understated terms, so that it has a chance of maturing in the mind of the person to whom it is addressed rather more as his own idea than as that of the originator. One should cultivate an ability to implant a seed of thought, believing its germination (partly at least to the decision-maker, by whom an idea will be more firmly held, and perhaps better expressed, if he thinks that it is his own).


420 As quoted in Thompson, above n 31, 13.
422 Sackville, ‘Appellate Advocacy’, above n 60, 106.
423 Interview with Hon. Tom Hughes AO QC (Sydney, 2 August 2006).
sources whilst avoiding irritation to the judge who is antagonistic to such materials, regarding them as an invitation to legal heresy.\textsuperscript{425}

However, the fact that one particular judge may feel a certain way about an issue, is not necessarily reflective of the views of the remaining judges.\textsuperscript{426} Other members of the court, Jackson has suggested, may be a little perturbed that one of their fellow judges is occupying significant time with frequent interruptions while the other judges may wish to move on to other issues.\textsuperscript{427} Bennett recalled that Justices Gummow and Heydon asked the most difficult, piercing questions but that:

\begin{quote}
I used to spend most of my time on my feet answering some equally difficult questions from Kirby because he was usually against what I was putting ... There is an interesting question about how you handle that. There is the cynical view, which says that, if you respond by getting stuck into him, you will get all the others on side, because they are all against him. The more correct view is that you should treat the question respectfully and answer it properly, so that in effect you are giving the majority the answer to his propositions.\textsuperscript{428}
\end{quote}

Implicitly, Bennett is suggesting that flexibility, discretion and tact are required to deal with a judge who is playing a dominant role in questioning while also not alienating or irritating the remaining judges. Another example is in the Bank Nationalisation Case, where Chief Justice Latham was very active in his questioning of Barwick yet ultimately, Latham’s views represented the minority in the case. An assessment of Barwick’s performance in the context of flexibility, discretion and tact is undertaken in later chapters.

It is important for an advocate to recognise when it is not possible to convince the non-receptive judge. Such a situation requires the use of tact and discretion to make a quick assessment of whether there is any prospect of convincing the particular judge/s of the merits of the argument or whether to concede on that particular issue. Such a concession may become necessary to avoid persisting with an argument and risk either losing the support of the other judges or frustrating them. Justice Sydney Robins, a former Ontario Court of Appeal judge, described it this way:

\begin{quote}
Counsel should allow some sensitivity to the view of the Court. Where the Court has indicated, or has made it abundantly clear from its comments and questions that it is not interested in a particular point or that it has the point, or that it does not agree with the point, I see little benefit in counsel pursuing the argument on that point. If you have firmly put forth everything that you
\end{quote}

\textsuperscript{425} Kirby, ‘Appellate Advocacy – New Challenges’, above n 11, p.36. As an example, former Justice Kirby referred to the views of McHugh J in Al-Kateb v Godwin (2004) 119 CLR 562 at 589, [63] who declared as ‘heretical’ Kirby’s opinion that the Australian Constitution should now be read in the context of international law.

\textsuperscript{426} See Elliott, above n 334, pp.96-97. See also Interview with Murray Gleeson, Chief Justice of the High Court of Australia (Sydney, 14 August 2006).

\textsuperscript{427} Jackson, ‘Appellate Advocacy’, above n 71, 251-252.

\textsuperscript{428} ‘Putting words to music in the constitution’s case’, above n 217, 47.
can and the judges understand the point, then let it go at that. Do not carry on to the extent of tedious repetition and persistence. 429

**Discretion and Tact**

Tact and discretion, as noted, are inextricably linked to flexibility and need to be employed during the presentation of submissions. 430

In the context of advocacy, tact has been described as ‘an intuitive perception of the right thing to do or say and an adroitness in dealing with persons and circumstances’. 431 Tact needs to be exercised throughout an advocate’s submissions, whether advancing arguments or responding to judicial questions. Dixon described advocacy as ‘tact in action’. 432 Hughes alluded to this in suggesting that, as an advocate, ‘[y]ou’ve got to get the feel of the court and adjust yourself to their inclinations avoiding confrontation’. 433 The concept of discretion is also encapsulated by Hughes, for whom an important element of good appellate advocacy is ‘to throw out the rubbish, don’t flog dead horses ... that requires judgment’. 434

Effective appellate advocacy requires that an advocate keep the judges’ attention on the main issues and their principal arguments, whilst not losing the confidence of the court. The use of tact and discretion is critical. According to Gibbs: ‘Fixing the critical matters in the mind of the judges without losing the sympathy of the court in the process sometimes requires steering a narrow and perilous course’. 435 The peril is to lose the sympathy or support of the court.

Whilst tact and discretion are important in advocacy generally, particular circumstances require that both be deployed more than in others. For example, a judicial suggestion may be made which clearly contradicts the views of the other judges but may assist the advocate’s case. In this situation, the advocate will be required to make a quick decision to either accept or reject the suggestion. By accepting the suggestion, that particular judge may be swayed at the same time risking alienating the other judges. 436 A similar situation may arise where a judicial suggestion may be detrimental to the advocate’s case if accepted; that is, circumstances where ‘[t]he cup of salvation may in truth be the

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429 Rosenberg and Huberman, above n 11, p.44.
431 Hughes, above n 92.
433 Interview with Hon. Tom Hughes AO QC (Sydney, 2 August 2006).
434 Ibid.
436 Ibid.
poisoned chalice'. In either situation, the advocate is required to exercise considerable tact, diplomacy and discretion when addressing the appellate court to reject such judicial suggestions. Another example is when faced with a hostile or unexpected intervention. This requires, Sackville suggests, discretion and the ability to think quickly to respond convincingly and, by doing so, gain an advantage from the confidence it instils in the eyes of the appellate court.

It is important for an advocate to gauge the extent to which the judges know the law relevant to the particular case as this will determine the extent to which it will be necessary for the advocate to outline the relevant law. This requires tact and discretion as a failure to assess this correctly may lead either to offending the judges or losing their collective attention or alternatively, failing to assist the judges with regard to the relevant law.

In some instances, a lack of tact can be rescued by quick wit (discussed in the following chapter). This is illustrated in the following example. Cliff Papayanni was appearing in the High Court on a special leave application:

**Papayanni:** Your Honours, this is an application for Special Leave from a criminal trial in New South Wales. In New South Wales in criminal trials the onus of proof is on the Crown and it is to the standard beyond reasonable doubt.

**Chief Justice:** Really, Mr Papayanni, you don’t have to lecture us on basic legal principles as though we were school children. You can assume we know that.

**Papayanni:** Your Honour, that was the mistake I made in the court below.

This evoked laughter from the judges. Whether or not it made a difference is unknown. We know at least that Mr Papayanni was successful in his application for special leave.

### 4.7 Explain Policy and Principle

In appellate advocacy, the ramifications of an appellate court accepting a particular argument are important and need to be considered before such an argument is advanced. This is particularly relevant to cases before the High Court. David Jackson, observed that: 'Policy considerations ... play
a part in argument, a matter which should not be forgotten. Therefore, if an argument is persuasive and based on solid legal grounds but would result in undesirable public policy consequences if it were to succeed, the argument is unlikely to be accepted by an appellate court. Such implications will strongly impact upon the persuasiveness of certain arguments. As the renowned US trial lawyer, F. Lee Bailey observed: ‘A trial result affects only the parties to the trial, but an appellate result affects everyone in the jurisdiction of that appellate court’.

Kirby suggests that the advocate should give considerable thought to the principle and policy behind the relevant law which arises in the case, whether legislation, the common law or a combination of both. In appellate cases, an advocate will often be propounding the adoption of a new or different interpretation of legislation and/or the extension or rejection of the common law. To do so effectively, the rationale for the relevant law must be understood and identified – although the emphasis on the purpose of the legislation is a more recent development, it was still relevant during Barwick’s time at the Bar. Understanding the rationale for the relevant law during preparation, may allow the advocate to address the various concerns and possible reluctance of the judges to accept the advocate’s arguments.

The consequences of accepting submissions made by an advocate are an important consideration for the judges of an appellate court. Mason stated that courts ‘... are always anxious to discover the consequences which will follow from acceptance of a proposition of law’. The consequences of the decision will inevitably be the subject of judicial enquiry. Accordingly, an advocate should expect judicial questioning in relation to consequences as the judges attempt to ascertain the implications of making a particular decision. Where an advocate has turned their mind to the relevant consequences and is prepared to address these, it is likely to assist the court and, ultimately, will increase the persuasiveness of the advocate’s submissions.

442 Jackson, ‘Appellate Advocacy’, above n 11, p.6; see also Glissan, above n 11, p.191. See also Interview with David Jackson QC (Sydney, 2 August 2006).
443 Rosenberg and Huberman, above n 11, p.xiii.
445 Mason, ‘The Role of Counsel and Appellate Advocacy’, above n 11, 539. Former Chief Justice Gleeson suggests that it is very important for advocates to keep in their minds: ‘what are the implications of deciding in a particular way for similar problems or for coherence in the law generally, [and] if we develop the law in this particular way how will that cut across legal principle in other directions’: Interview with Murray Gleeson, Chief Justice of the High Court of Australia (Sydney, 14 August 2006).
446 Jackson, ‘Appellate Advocacy’, above n 71, 246; Jackson, ‘Appellate Advocacy’, above n 11, p.6. David Jackson QC noted that:

Members of the Court tend to look to the effect of their decisions over a broader area than that covered by the immediate case, and it is important, in preparing an appeal in the High Court, to think of the implications of acceptance, and rejection, of the argument (and of the other side’s argument on the same issue) because that topic will almost certainly be the subject of enquiry from the Court.
However, identifying the policy implications requires considerable thought and imagination. Gleeson stated that:

imagination is also a quality that is still important in advocates, particularly when you are appearing in the High Court because, members of the High Court are always very cautious about the consequences for future cases, of what they say in this case. So if an advocate can recognise those consequences and present an argument that deals with them, that kind of argument is likely to get a good reception. 447

It has been acknowledged that policy considerations now feature more significantly in the High Court’s judgments. 448 This is evidenced by the many judgments that make specific reference to the policy implications of a decision. 449 In certain cases, the policy implications may be the determining factor in a judicial decision. Bennett, stated that, in considering policy, picking the right analogies ‘is a very important part of appellate advocacy’. 450 He elaborated: ‘[o]ne has to pick attractive analogies for one’s cause ... When one is before a court like the High Court, which is concerned about the big picture, it is an important part of persuasion’. 451 In later chapters, there are numerous examples of Barwick selecting an appropriate and persuasive analogy in the analysis of his presentation in the Bank Nationalisation Case and the Communist Party Case.

Submissions made with reference to policy ramifications also serve to build the advocate’s credibility.

4.8 Cite Authority with Care

Appellate advocacy requires advocates to refer to previous legal authority for the purpose of substantiating their arguments, whether it is by direct reference or analogy, or for the purposes of distinguishing their arguments from existing legal authority. However, this should be done selectively.

Citing authority with care also serves a greater purpose of the administration of justice generally, particularly in an adversarial system. The adversarial system relies on advocates advancing arguments to the court for its consideration and determination. These arguments are, by necessity, supported by the decisions in previous cases. The administration of justice in a common law system

447 Interview with Murray Gleeson, Chief Justice of the High Court of Australia (Sydney, 14 August 2006).
448 Mason, ‘The Role of Counsel and Appellate Advocacy’, above n 11, 541.
450 ‘Putting words to music in the constitution’s case’, above n 217, 47.
451 Ibid.
places considerable emphasis on the doctrine of precedent. Advocates play a large part in bringing the previous decisions of courts to the attention of an appellate court.

An advocate who presents an analysis of, and refers to, relevant authorities during their submissions will, it is clear, provide the court with valuable assistance. In a US context, it is said that this may have a significant persuasive effect.\(^{452}\) There is every reason for it to have a similarly persuasive effect in Australia. However, citing copious amounts of authority without the requisite discipline may result in the advocate losing the collective interest of the court and, ultimately, may reduce the advocate’s persuasive ability. If an advocate’s argument requires the close examination of a series of authorities, they will need to take the court through these one at a time and explain their relevance or their distinguishing characteristics.\(^{453}\)

Previous decisions should not be utilised as ‘... a substitute for argument’,\(^{454}\) but ‘should only be used to support, refute or explain a particular proposition’.\(^{455}\) The purpose of citing legal authority is not to supplement an advocate’s arguments or to fill critical gaps in their reasoning. Rather, according to Mason, previous authorities ‘... should be used to authenticate, refute or explain the proposition under debate, and they should not be used as biblical texts or as utterances from the oracle at Delphi’.\(^{456}\) In isolation, passages from previous authorities will not be inherently persuasive: merely highlighting the relevant passages is not sufficient.

According to Hayne, an advocate should draw the court’s attention to any previous decision to be relied upon, explain its relevance, indicate the various principles or passages relied upon for present purposes and indicate the location of any relevant passages before referring to the case at length.\(^{457}\) David Jackson also believes that it is important to emphasise any particular point in a passage to which the advocate wishes to refer.\(^{458}\) Whilst this is a basic element of appellate advocacy rather...
than an ideal of appellate advocacy, the more skilfully that authority is cited and woven into an advocate’s submissions the more likely it is to approach the ideal. For example, Kirby believes that the court will be greatly assisted if the advocate is able to quickly, and with precision, summarise the relevant facts of the case, outline the decision and then recite any significant passages from the case.459

The approach advocated by Kirby will capture the attention of the court more than merely reading out passages from previous cases. This is particularly important in modern times where an enormous body of case law now exists. Hayne states that:

I would say that the reading of slabs from any decided cases is seldom helpful in any argument in the Court. We are all literate. We will all read the references you give us. Tell us therefore what you say the case decides and show us where we find that in the case.460

An advocate may rely on a number of previous decisions when presenting their case and therefore the onus is on the advocate to ensure that the principles distilled from the previous decisions are applicable.461 It is important to understand the context of any decisions or judgments that may be relied upon and, according to Hayne:

... in the end you must be able to answer the most innocent of questions from the bench, “What is the principle that you say applies?” That will require your formulation of the principle in a way that can find accurate and sufficient support in what has gone before in the Court or, if what you propound is new, can be shown to be a logical development from what has gone before.462

Jackson also advises against reading to the court long passages from authorities, evidence or submissions. This is likely to lose the collective attention of the members of the court as well as their individual concentration. It is also tedious and it may irritate the judges.463 Also, reciting long passages prevents the advocate from watching the bench - the perils of which have been discussed earlier.

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459 Kirby, ‘Ten Rules of Appellate Advocacy’, above n 11, 972-973. The practice of simply reciting one case after another and adding explanations as to why each case is or is not relevant to the current proceedings has been described by Robert Jackson as a ‘dismal and fruitless use of time’: Jackson, ‘Advocacy before the United States Supreme Court’, above n 11, 7.
460 Hayne, ‘Advocacy and Special Leave Applications in the High Court of Australia’, above n 11, p.3.
461 Ibid, p.4.
462 Ibid.
Another aspect of citing authority with care is exercising caution when attempting to apply previous
decisions to the facts of the current case by analogy. It is important to consider the application of
the previous decision to the present facts thoroughly before employing this technique. Failing to do
so may either harm or destroy the advocate's argument, or assist the opponent's case, if an
inconsistency or point of differentiation is undetected. In the context of appellate advocacy, it has
been said that '[o]ne of the oldest and yet most sophisticated device is the analogy, applying the
principle being urged on the court to some similar situation where the result would be
devastating.' 464 Most appellate arguments using reported decisions are arguments by analogy. 465
Citing authority with care also extends to the quality of the authorities. 466 Relying upon a series of
precedents that are inappropriate or irrelevant will damage the advocate's credibility and tarnish
their reputation. Relying on a dissenting opinion may do likewise, unless it is supported by later
authority, or is necessary (for example, to demonstrate a relevant policy consideration) or useful in
some other respect. In addition, relying upon a dissenting opinion may associate the advocate's
argument with a dissenting opinion in another case: 'By identifying [the advocate's] contention with
a recent dissent, [it] may close some minds to the rest of [the] argument'. 467
Another element of citing authority with care is to ensure that quotations from previous judgments
are not quoted out of their proper context, or given a strained interpretation for the purposes of
gaining an advantage. This may harm an advocate's credibility and may result in losing the
confidence of the judges. It 'is hard to retrieve the confidence forfeited by seeking such an
advantage'. 468 Also, judges at appellate level are often very familiar with legal authorities and are
likely to become aware of, or detect if, a passage is taken outside of its proper context.
For credibility reasons, it is better for an advocate to address an adverse precedent openly and
attempt to reduce its impact by explaining its limitations or distinguishing characteristics rather than
deliberately avoiding acknowledging its existence. 469 That is:

465 Malcolm L. Edwards, "Selection and Study of the Record" extract from "Briefs on the Merits" in Peter J
Carre, Azike A Ntephe and Helen C Trainor (eds) Appellate Advocacy, (1981), American Bar Association,
Chicago, p.146.
466 For example, Robert Jackson believes that referring to weaker precedents after stronger precedents will
only serve to identify the weaknesses of the advocate's argument. Robert Jackson has suggested that '... if the
first decision cited does not support it, I conclude the lawyer has a blunderbuss mind and rely on him no
further': Jackson, 'Advocacy before the United States Supreme Court', above n 11, 7.
467 Ibid, 8.
468 Ibid; Nix, "The View From the Appellate Bench", above n 327, pp.397-401.
469 It has been said by Robert Nix that:
The presentation of arguments should include positions regarding any known adverse precedents. Evasion of
such precedents by omission is doomed to quick defeat. If opposing counsel fails to use such precedent,
court personnel inevitably notes the omission without the benefit of counsel's distinctions or persuasions of
inapplicability.
If there is adverse authority, do not ignore it. You have an ethical obligation to reveal authority which is adverse to your position. Your opponent will inevitably discover the adverse authority; if you ignore it now, you will have to deal with it later on your opponent’s terms. The worst of all possible worlds is to have the appellate court discover the adverse authority on its own. In these circumstances, you may never have an opportunity to argue against the authority and the court will feel your research is inadequate or your ethics questionable.470


Chapter 5: Personation

"Sir Garfield Barwick, one of the greatest appellate advocates of his age, often used to attribute his success to his power of recall. A gift of that kind is of course particularly useful in enabling counsel to answer a question from the bench with confidence and accuracy, and an apt answer to a question on a crucial matter not infrequently swings the opinion of the judge in favour of counsel's argument. However, given the necessary equipment which any counsel who appears in an appellate court ought to have—a requisite knowledge of the law, an ability to marshal facts and a clarity of expression—in my opinion, the two qualities most necessary for success in appellate advocacy are a sense of relevance and tact."

Sir Harry Gibbs, 1986

The third category of the elements and ideals of appellate advocacy is personation. This expression, coined by the author, describes the personal properties, characteristics or attributes that an individual advocate practising exemplary appellate advocacy may possess, and which aid the persuasiveness of their submissions. This discussion will provide the third part of the framework which will be used to assess Barwick's advocacy in accordance with the 'three category analysis'. The elements of personation include: courage; honesty, respect and candour; emotion; and what the author calls 'the extras', namely, voice, words, wit presence and memory.

5.1 Courage

Court work has been described as 'civilised warfare'. As an advocate, it is crucial to be tenacious and not to 'relinquish a central position without a fight'. This requires courage. Being courageous does not imply aggressiveness—effective advocates can be courageous yet remain civil and courteous. Advocates who demonstrate courage will command respect from the judges provided their position is reasonable and justified. However, if an advocate maintains a position against unanimous disapproval, then respect for the advocate is likely to dissipate and the judges are likely to become irritated and frustrated.

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471 Harry Gibbs, 'Appellate Advocacy', above n 11, 497.
472 Ross, Advocacy, above n 216, p.3.
473 Ibid.
474 Ibid.
When presenting submissions, advocates will often confront judicial discouragement and antagonism. In particular situations, it is important for advocates to persist with their submissions whereas in some circumstances, it may not be wise or prudent to proceed. Where an advocate chooses to continue with their submissions in the face of judicial discouragement and antagonism, strength, courage and resolve are required (as well as tact and discretion, as discussed in Chapter 4).

Constant interruptions from the members of the court are recognised as potentially distracting and frustrating for an advocate. It is at this point that an advocate’s courage may start to wane. However, effective appellate advocates will ‘endure such interruption with good grace and be as helpful as possible’. An effective advocate will draw on their reserves of courage to address any judicial concerns, satisfy any request for information and continue with their submissions.

As discussed in Chapter 5, it is imperative that an advocate be ready to respond to judicial questions although this may require them to depart from their order of submissions. This scenario may require an advocate to demonstrate considerable courage if a question is not capable of being answered at that time, for example, in circumstances where, it may not assist the advocate’s case. Where it is important to continue with their planned order of submissions at the time, the advocate will need to indicate to the court that they will return to this question at a later time.

As discussed, an advocate may face strong judicial interrogation in the course of their submissions. In circumstances where the advocate is encountering considerable opposition from one particular judge and believes that this judge is not capable of being persuaded, the advocate may choose to acknowledge courteously to that particular judge that they understand their view, and then continue with their submissions. Such a response and the ability to persist requires courage. In Kirby’s view, this response may find favour with, and attract the attention of, the other judges who are annoyed at the judge’s approach.

Indeed, it may result in the remaining judges becoming sympathetic to the advocate’s arguments. However, most judges are ‘... quite immune to the wiles of the judicial advocate’, and will often not pay too much attention to a judge who interrogates an advocate and nor are they likely to place any significance upon the interventions.

Robert Jackson suggests that an advocate should not be discouraged in the event that they face opposition from the judges, as ‘[m]ost memorable professional achievements were in the face of

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475 Kirby, ‘Ten Rules of Appellate Advocacy’, above n 11, 974; Glissan, above n 11, p.9, suggests that persistence is essential but it must be distinguished from doggedness and that repetition does not equate to persistence.


478 Ibid, 974.

479 Mason, ‘The Role of Counsel and Appellate Advocacy’, above n 11, 543.
opposition, abuse, even ridicule'. However, whilst courage is important, it can be counter-productive if it results in the failure to detect the key signals and signs from the court which would ordinarily require the advocate to be flexible and adapt their submissions. This is an important balancing exercise.

Determination, an attribute closely aligned with courage, enhances the persuasive effect of an advocate’s submissions, it is said, as it demonstrates that an advocate believes wholeheartedly in their submissions:

[A] good advocate is always determined. You should not retreat from your questioning or submissions if you consider they are worthy ... If you perceive lack of response you should not retreat from your position or be deterred from your original objectives.  

However, there is a fine line between an advocate exhibiting determination and an advocate displaying stubbornness.

An advocate may find it difficult to stay determined and maintain their composure in certain situations, particularly when faced with a barrage of questions from the judges. When the members of the court appear to be unresponsive, it is important that an advocate does not become ‘confrontational or combative’. Confrontational behaviour is likely to receive an unfavourable response from the judges. Determination ‘... is a real test of character [whereas] [p]ersonal traits such as anger, frustration, confusion or distress should not seep into your presentation’. Hughes suggests that ‘[r]udeness is a “no no” and if you have to take a stand you can do so within the limits of courtesy’.  

As will be apparent in later chapters, Barwick was well known for being a tough and courageous advocate. However, in certain circumstances, this trait became a disadvantage when it interfered with his ability to register the reactions of the appellate court.

McHugh has suggested that courage is the answer to the decline in eloquence and colourful advocacy at the Bar: ‘What it [advocacy] requires more than anything is courage; courage to stand up to judges and tell them that you are going to put your client’s case ... Done firmly and well mannered, that is what counts’. McHugh laments the lack of eloquence and style in arguments which he attributes to the disinclination of advocates to assert themselves when faced with judicial opposition.

\[480\] Jackson, ‘Advocacy before the United States Supreme Court’, above n 11, 15.
\[481\] Keith, above n 476, 25.
\[482\] Ibid.
\[483\] Ibid.
\[484\] Interview with Hon. Tom Hughes AO QC (Sydney, 2 August 2006).
\[485\] Priest, ‘Eloquence has left the court, your honour’, above n 297, 57.
In his view, if advocates demonstrated more courage, an increase in the standard of advocacy would follow. Perhaps the trend in modern advocacy, due to the pressures on time when presenting submissions in many jurisdictions does not easily lend itself to demonstrating such courage and disagreeing with members of the court. Also, the increased reliance on written submissions and the decrease in oral advocacy may be responsible for this decline as there are fewer opportunities to develop and improve the skills associated with oral advocacy.

5.2 Honesty, Respect and Candour

Honesty

An important element of appellate advocacy is that an advocate demonstrates honesty or candour at all times. This, among other things, will maintain the respect of the members of the court and will increase the persuasive effect of the advocate's arguments. It was said of Robert Menzies that 'he was one who appreciated the strength which candour always lends to an argument'.

It is also important to recognise that advocates, as officers of the court, have an overriding obligation and duty to be honest with the court under all circumstances. Should an advocate knowingly fail to refer to a relevant fact, authority or legislative provision or be dishonest in any way, this is likely to damage the advocate's credibility. An advocate must be able to convey their submissions in a manner that is most favourable to their client but within the confines of honesty and accuracy. An advocate '... who is inaccurate or less than candid interferes with the objective of persuasion'.

According to David Jackson, a court is likely to be 'more attuned or favourable to the person who has been able to' go to the heart of the case and, at the same time, accurately state their case.

During his time as a High Court Judge, Kirby stated that the advocate's most priceless possession is their reputation; being honest contributes greatly to maintaining and enhancing it. An advocate's reputation is indicative of their credibility.

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486 Hazlehurst, above n 204, p.37.
487 For example, practice as a barrister in NSW is subject to the *NSW Barristers' Rules* (section 81, *Legal Profession Act 2004* (NSW)). The Advocacy Rules are contained in Rules 6-72. Rules 21-31 specifically refer to "Frankness in court". The Advocacy Rules also apply to legal practitioners when acting as advocates as the Advocacy Rules are incorporated into the *Revised Professional Conduct and Practice Rules 1995*. The *Revised Professional Conduct and Practice Rules 1995* were made by the Council of the Law Society of New South Wales, pursuant to its power under section 57B of the *Legal Profession Act 1987* (NSW), on 24 August, 1995. These Rules, are deemed, by virtue of Schedule 9 clause 24 of the *Legal Profession Act 2004* (NSW) to have been made under the 2004 Act.
488 Godbold, above n 11, 816.
489 Interview with David Jackson QC (Sydney, 2 August 2006).
While it is difficult to identify examples where advocates have been unsuccessful due to their lack of honesty or candour, the opinions of former appellate court judges suggest that a lack of honesty and candour does tarnish an advocate’s reputation and credibility and this has an indirect impact on their submissions: ‘the absence of candour can prove to be an Achilles heel’.\footnote{492}

An effective advocate will formulate their submissions in a manner that is favourable to their client but an advocate ‘... should not sacrifice accuracy of expression on the altar of expediency, for rejection of counsel’s version of the issues may entail rejection of the argument’.\footnote{493} In advancing submissions favourable to their client, an advocate must ensure that their submissions are accurate and do not misrepresent the position. There is a fine line between passionate and forceful advocacy as opposed to over-zealous and potentially damaging advocacy. Professional sincerity ensures that the advocate earn the respect and confidence of the court. The ‘most persuasive quality in the advocate is professional sincerity’.\footnote{494} Advocates can still present their submissions with vigour and ‘partisan zeal’,\footnote{495} so as to afford their client the best possible chance of succeeding, while demonstrating professional sincerity. An advocate should ‘[p]ersuade through sincerity, plausibility and simplicity’.\footnote{496}

Honesty is appreciated and respected by the courts. In addition, the court may also offer the advocate assistance in this regard.\footnote{497} During his time as Chief Justice of the High Court, Gibbs noted that:

Nothing can be more destructive to an argument than for a court which has viewed it with favour to discover, when opposing counsel comes to address, or when the court retires to consider the matter, that counsel who was putting the argument has failed to refer to some fact, statutory provision or decision that seems to present an insuperable obstacle to the acceptance of his argument. On the other hand, nothing is more effective than to direct the court’s attention to what seems to be one’s opponent’s strong point and to reveal its hidden weakness before the opponent can fortify his position.

\footnote{491}{In relation to credibility it has been suggested that: \ldots credibility, [is] the earned respect of the court for the advocate’s candor [sic] in presenting the whole of his case, defects and all. The first time such an advocate comes to a court’s attention, he establishes his credibility; thereafter, his reputation precedes him into the courtroom and constitutes an unspoken but palpable advocacy.}

Coffin, “A Term of Court”, above n 413, p.226.

\footnote{492}{Harry Gibbs, ‘Appellate Advocacy’, above n 11, 498. Also, Rosenberg and Huberman, above n 11, in the Preface by The Honourable Charles Leonard Dubin, Chief Justice of Ontario, p.47. See also Ross, Advocacy, (2nd ed), above n 188, p.4. One example where misstating evidence may have contributed to an advocate losing credibility can be found in Gale v Gale (1952) 86 CLR 378. See Elliott, above n 334, pp.118-119.}

\footnote{493}{Mason, ‘The Role of Counsel and Appellate Advocacy’, above n 11, 541.}

\footnote{494}{Jackson, ‘Advocacy before the United States Supreme Court’, above n 11, 15.}

\footnote{495}{Ibid.}

\footnote{496}{Stuesser, above n 293, p.4.}

\footnote{497}{Kirby, ‘Ten Rules of Appellate Advocacy’, above n 11, 973.}
It is pleasing that ethical requirements and pragmatism coincide in this respect and that virtue can be its own reward.498

As Gibbs suggested, bringing a persuasive yet contradictory precedent to the attention of the court provides the advocate with the opportunity to transform a seemingly destructive authority, which may initially appear to hamper the advocate's cause, into a forensic advantage. The advocate can address the earlier authority at length and either attempt to identify the weaknesses of the authority or distinguish it from the present case. Overall, this serves to demonstrate the advocate's honesty as well as their extensive preparation. As David Jackson says 'honesty is a useful thing as a tool of advocacy'.499

An advocate should also identify any weaknesses in their case. According to Robert Jackson, these weaknesses should be dealt with as early as practicable, as '[t]o delay meeting these issues is improvident; to attempt evasion of them is fatal'.500 By choosing to avoid the weaknesses, the court may infer that the advocate perceives these to be fatal to their case. It may also lead to a perception that the advocate has not thoroughly prepared their case and, has either not identified the weaknesses or has simply not turned their mind to such weaknesses. An advocate, Gibbs notes, can also refer to their opponent's strong point as an indirect means of identifying its weaknesses.501 This approach, in addition to enhancing the advocate's credibility, is likely to increase the persuasive effect of the advocate's arguments.

Weaknesses are likely to become the subject of judicial questioning in any event. An advocate who identifies the weaknesses early in their case or their opponent's case then seeks to address and negate them, engages in what has been described as a 'pre-emptive strike' in an advocacy context.502 This technique has the ability to effectively negate and then neutralise both an advocate's weakest arguments and their opponent's strongest arguments. The ability to identify weaknesses in their case or their opponent's case also requires the advocate to undertake an extensive preparation.

499 Interview with David Jackson QC (Sydney, 2 August 2006).
500 Jackson, 'Advocacy before the United States Supreme Court', above n 11, 5. Also, Pannick, above n 193.
502 This is also referred to as "going for the jugular" — that is:
It is not pleasant to concentrate on the weakest part of one's case, but when the advocate knows what it is, acknowledges the appearance or actuality of weakness, and then, with as much forcefulness as the issue permits, shows the appearance to be misleading or the weakness to be counter-balanced by other strengths, it becomes known as one who goes for the jugular — the advocate's highest accolade.

Respect and Candour

Ellicott suggests that one of the key elements of appellate advocacy is ‘looking at the court, not fiercely but with humility’. An essential element of appellate advocacy is respect. Advocates show respect to the court by demonstrating, among other things, courtesy and patience. An advocate should present their submissions in a respectful way and without arrogance. Effective appellate advocates deal with judicial questioning and comments generally in a polite and courteous manner. Whilst it is acknowledged that it can be disrespectful to the court which advocate is faced with constant and relentless questioning, failing to do so will result in showing disrespect to the court which will be counter-productive when the ultimate aim is to persuade.

Anecdotal evidence and writings by former judges indicates that disrespect can harm an advocate’s reputation and credibility and ultimately, their prospects in the case.

Whilst it is important for an advocate to be respectful, advocates must also show self-respect and not belittle or demean themselves, nor compliment or praise any of the judges. Robert Jackson advises: ‘Be respectful, of course, but also be self-respectful, and neither disparage yourself nor flatter the Justices. We think well enough of ourselves already.’ An advocate should not appear to grovel. An advocate who grovels will do themselves and their case a disservice; they may lose

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503 Interview with Hon. Robert Ellicott QC (Sydney, 8 August 2006).

504 For example:

Remind yourself that the members of the appellate court, as well as yourself and the other counsel, are furthering the cause of justice and the administration of justice ... Never talk down to the court; it is inappropriate and it is definitely not helpful to your client’s case.


505 The importance of respect and the dangers from failing to display respect are apparent from this next example. In the UK, solicitor-advocate Mark Clough QC received a rebuke from a judge in the Sony v HM Revenue & Customs case (see Sony Computer Entertainment Europe Limited v Commissioners for Her Majesty’s Revenue And Customs [2006] EWCA Civ 772 (at http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2006/772.html&query=sony&method=boolean)). When Clough suggested that a judge had ‘deliberately misinterpreted’ part of a previous decision, the presiding judge Lord Justice Chadwick, took offence and remarked that: ‘Fearless advocacy is one thing; intemperate advocacy is another’. Chadwick LJ then proceeded to criticise Mr Clough’s skeleton argument for Sony as being of ‘inordinate length ... [and a] frequent and unnecessary resort to hyperbole’. Sony’s counsel was the subject of a public rebuke and the advocate’s style of advocacy would have ensured that he had not endeared himself to the judge in either this case or future cases (see Kirby, ‘In-temper advocacy’, above n 88, 26 at p.26. See also Ben Moshinsky, ‘Chadwick LJ condemns Addleshaw Goddard QC’ (2006) http://www.thelawyer.com/cgi-bin/item.cgi?id=120635&d=122&h=24446f46 at 10 December 2008).

506 Jackson, ‘Advocacy before the United States Supreme Court’, above n 11, 4.


508 Jackson, ‘Appellate Advocacy’, above n 71, 252. See also Interview with David Jackson QC (Sydney, 2 August 2006); Rosenberg and Huberman, above n 11, in the Preface by The Honourable Charles Leonard Dubin, Chief Justice of Ontario, p.11 where the authors referred to a statement by former Justice of the US Supreme Court,
credibility and in doing so may affect the likelihood of a judge accepting their arguments, as well as damaging the advocate's reputation and credibility.

Effective appellate advocates develop their own style of advocacy; nevertheless, this should include honesty, respect and candour at all times. The '[p]ersonal styles of advocates vary, but the competent advocate has developed a presentation which adds to the perception of their reliability'. The effective appellate advocates are 'concerned, thoughtful, responsive, polite and at all times aware of the duty owed to the client and as an officer of the Court'. This can be a difficult and delicate balance to achieve. These elements of personation are critical to an advocate's reputation and credibility, while ultimately adding weight to the persuasiveness of their submissions as well as playing a crucial role in presentation.

5.3 Emotion

An advocate must not fear using their emotions to assist their client's case. Ellicott suggests that an advocate should not 'be afraid to be emotional ... in an appropriate way. It goes with advocacy'. The use of emotion by an advocate demonstrates to the court the advocate's passion and belief in their arguments. This can lend weight to the persuasiveness of the advocate's arguments.

Although it can be beneficial to incorporate emotion into an advocate's submissions, too much emotion can also be detrimental to the advocate's cause if it results in a loss of objectivity. Objectivity is an enormous asset for an advocate and a 'calm and detached appreciation of the strengths and weaknesses of an advocate's own case is essential to the ability to present that case to its best advantage'. Porter remarked that 'to be a good advocate it is necessary to remain...

Justice Lewis D. Brandeis, where he succinctly stated (Lewis D. Brandeis, 1912, quoted in Alfred Lief (ed), The Brandeis Guide to the Modern World, (1941), Little, Brown and Company, Boston, p.166): "If we desire respect for the law, we must first make the law respectable". According to the authors:

If you realize the truth of these words, you will be assisted in forming your attitude towards the court and your opponent. You will not enter into personal disputes with your opponent and you will find the entire process easier, less nerve-racking, and more satisfying. You will argue with courtesy and respect but not with subservience. You will be prepared to face the court and hold your position in the face of questions and challenges by the judges.

509 Keith, above n 476, 24.
510 Ibid.
511 Ross, Advocacy, above n 216, p.2; Ross, Advocacy, (2nd ed), above n 188, p.7. It has been suggested that, to be appealing, the argument should have both logical and emotional appeal: Nathanson, above n 11, pp.i-iii.
512 Interview with Hon. Robert Ellicott QC (Sydney, 8 August 2006).
513 Although it is acknowledged that emotion is more likely to play a role in trial advocacy as opposed to appellate advocacy.
514 See Judicial Notes', above n 4, 11.
By demonstrating that the advocate is able to present their client’s case in an objective and balanced manner, the advocate will gain the trust and respect of the court. This will assist in attempting to persuade the court.

An effective advocate will therefore need to strike a balance between being passionate and convincing and at the same time not being too emotionally involved:

If you allow yourself to become too emotionally involved in the cause of your client, too enmeshed in the client’s troubles, too caught up in the sense of grievance the client is experiencing, the danger will be that you are no longer able to provide objective counsel to your client. 516

It is said that there is a direct relationship between objectivity and effectiveness. A former president of the American College of Trial Lawyers, Joseph A Ball, commented: ‘The more I become involved emotionally in my client’s cause the less I am able to (do) for him’. 517

It is essential that an advocate identify the issues in a case, drawing on their common sense and experience whilst adopting, according to Godbold, a ‘dispassionate and detached mind’. 518 Advocates achieve a sense of perspective if they are capable of remaining objective and distant from the case that they are presenting. 519 This allows the advocate to view their case critically and on its merits, and make an honest and objective assessment of the prospects of success of their client’s case, as well as identify the strengths and weaknesses of the case.

In Godbold’s view, when an advocate becomes too emotional, they may not provide the court with as much guidance and assistance as it requires. 520 In this case, the advocate may stumble at the first hurdle of advocacy, namely, to inform. The members of the court will be persuaded by a meritorious case which is grounded upon sound legal principles and they are not likely to make decisions capriciously or in an arbitrary manner. For this reason, arguments which degenerate into pleas of emotion are not likely to find favour with a member of the court. Despite the view that emotion can assist, it is generally acknowledged that the court will be willing to consider arguments involving the merits of the case based on accurate and relevant legal principles rather than emotion. 521

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517 Ibid, 18.
519 Iain Ross, above n 289, p.16.
520 Godbold, above n 11, 808.
In an interview in 2009, Chief Justice French alluded to the dangers of an advocate becoming too emotionally involved in a case:

There are some advocates who have a strong belief in the justice of the case in which they appear because it reflects their personal values. That of itself is not necessarily a bad thing although it can be an impediment to critical judgment. But there is a small subset of such advocates who seem to think it is enough to be on the side of the angels and that rigorous consideration of the law is a black letter approach, which somehow pollutes the moral purity of their case. They are seldom of much help to anyone.\(^{522}\)

This statement should be borne in mind during the analysis of Barwick’s performance in the *Bank Nationalisation Case* where his advocacy was said by some to be enhanced by virtue of the fact that his arguments reflected his personal values about the freedom of the individual. This should be compared to his presentation in the *Communist Party Case* where his arguments seemed to accord with his beliefs (although there is some conjecture in relation to this) yet were not as effective.

Notwithstanding these reservations, in certain cases, the use of emotion may increase the persuasiveness of the submissions. Discretion is required to determine when it may be appropriate to utilise emotion. In some instances, in Sackville’s view, it will be more effective to focus entirely on the principles that arise from legal arguments rather than on the particular facts of the case\(^{523}\) or the converse may apply. Poor judgment in this regard can have an adverse effect on the advocate’s submissions.

At the very least, it will assist an advocate if they are able to empathise with, and feel compassion for, their client. This allows an advocate to be an effective and convincing mouthpiece for the client. However, an effective advocate ought to always remain in control of their emotions and exercise discipline so as not to allow their client’s plight to influence their submissions in an adverse manner:

the sadness or injustice of the circumstances of your client and the impact those matters have upon you as an advocate must be kept in proper check. Your most important function is to provide your client with an objective, unemotional and professional source of advice ...

\(^{524}\)

Whilst emotion is more likely to affect someone acting for an individual rather than a corporation or government entity, it can play a part in constitutional cases, especially where important issues of policy are at stake.

An effective advocate should avoid losing control or exhibiting other emotions which will be detrimental to their case.\(^{525}\) Porter states that as an advocate ‘you must never lose your temper’.\(^{526}\)

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\(^{522}\) Kate Gibbs, ‘Chief Justice scrutinises personality and justice’, above n 11, 1.

\(^{523}\) Sackville, ‘Appellate Advocacy’, above n 60, 104.

Any loss of control will result in the loss of respect and confidence, thus causing damage to the advocate's credibility and reputation. The advocate also risks offending the members of the court or causing anger and irritation which may irreparably damage the advocate's case. Advocates who engage in '[s]elf-indulgent displays of sarcasm, anger or indignation ... which are often at the client's expense, are unprofessional and unforgivable.' There is nothing to be gained by advocates displaying these types of emotions whereas there is everything to lose. Generally, it is when subjected to judicial questioning that advocates are more susceptible to losing control of their emotions. However, effective appellate advocates maintain their composure even in the face of relentless judicial questioning as any displays of 'anger or irritation are indulgences that an advocate can ill afford.'

One of the underlying messages about the use of emotion in advocacy is that an advocate should not argue a case for any purpose other than to persuade the members of the court. Arguing a case for some other purpose is likely to distract from the task at hand. An advocate should note that 'the case that is argued to please a client, impress a following in the audience, or attract notice from the press, will not often make a favorable [sic] impression on the bench. An argument is not a spectacle'. Barwick made reference to this specifically in his recollection of the opening day of the Bank Nationalisation Case where he addressed the High Court before an overflowing courtroom. He highlighted the importance of not being distracted by the overwhelming interest such that it altered the manner in which he presented his client's arguments.

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525 See Elliott, above n 334, p.328.
526 Interview with Chester Porter QC (Sydney, 2 April 2006). See also Porter, Walking on Water: A Life in the Law, above n 417, p.306 where Chester Porter QC stated that when he was young he had to watch his temper in court. He stated that as he grew older he 'learned the golden rule that an advocate may appear to be angry, but one's temper must never be lost. One must always be in full control'.
527 It has been suggested that:
   While the argument must be argumentative, it cannot be strident. The audience, appellate judges, will be offended by an unrestrained appeal to emotion. Yet, your argument must in a restrained way appeal to the feelings and values of the appellate court judges.
Edwards, "Selection and Study of the Record", above n 465, p.143. Also, it has been stated that 'the appellate lawyer's function is primarily intellectual. Too much emotionalism can be counterproductive, in bad taste, and downright offensive': Freidman and Lacavora, above n 29, p.208.
528 'Extra-Judicial Notes', above n 43, 11.
529 Iain Ross, above n 289, p.15. It has been suggested that: 'ill-temper or petulance, arrogance or ignorance or self-indulgence on the part of a judge will be met by calm, courteous but unyielding insistence by the barrister that such judicial conduct be rectified' (Address by Sir Gerard Brennan, above n 281, 38). See also Glissan, above n 11, p.7 and Porter, The Gentle Art of Persuasion, above n 11, pp.65, 208.
530 Jackson, 'Advocacy before the United States Supreme Court', above n 11, 10.
531 Barwick, A Radical Tory: Garfield Barwick's Reflections & Recollections, above n 1, p.66.
5.4 The Extras: Voice, Words, Wit, Presence and Memory

There are a number of ‘extras’ to an advocate’s presentation which are also relevant and which may increase the persuasive effect of the advocate’s submissions: voice, words, wit, presence and memory. They are all relevant to effective appellate advocacy (although many, being innate, may only be improved to a limited extent by practice and/or experience).

Voice

An advocate’s voice is the means through which they deliver their arguments. Speaking in a manner that is easy to listen to facilitates the court following the advocate’s arguments.532 According to Glissan, a ‘clear, distinct and interesting voice is more than an asset to an advocate: it is essential’.533 The manner in which the advocate uses their voice is as important as tone or inflection. This requires constant monitoring by the advocate:

If your voice is low, it burdens the hearing, and parts of what you say may be missed. On the other hand, no judge likes to be shouted at as if he were an ox. I know of nothing you can do except to bear the difficulty in mind, watch the bench, and adapt your delivery to avoid causing apparent strain.534

It is important that an advocate demonstrate, through the projection of their voice, a courteous and respectful demeanour at all times.535 A failure to do this and the advocate may find that members of the court are less receptive to their submissions: an ‘... improper tone is a self-created impediment’.536 For example, it is possible for an advocate to patronise the members of the court

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532 See Rosenberg and Huberman, above n 11, in the Preface by The Honourable Charles Leonard Dubin, Chief Justice of Ontario, p.46 where it was said that an advocate should ‘[s]peak so that the judges can hear you, clearly and at a speed with which they can comfortably keep pace’.

533 Glissan, above n 11, p.8.

534 Jackson, ‘Advocacy before the United States Supreme Court’, above n 11, 10. Jack Elliott stated, in relation to voice, that:

It is necessary to be heard. You need to speak loudly and clearly. If you consciously raise the volume of your voice when you first go into court it will soon become second nature to you. What you say has to be absorbed and understood, so you must not gabble or rush your words. The thing is to speak in an unhurried and measured tempo.

Elliott, above n 334, p.311. It has been suggested that the ‘loud braying monotone may be understood, but it loses the attention of the judge ... very quickly’: Glissan, above n 11, p.8; see also Porter, The Gentle Art of Persuasion, above n 11, p.113.

535 That is, do not use a tone that is ‘combative or belligerent’: Rosenberg and Huberman, above n 11, in the Preface by The Honourable Charles Leonard Dubin, Chief Justice of Ontario, p.47. Also, P. Young, ‘Current issues’ (2008) 82 Australian Law Journal 149, 149.

536 Godbold, above n 11, 817.
through the tone of their voice.\textsuperscript{537} Altering tone at key stages and varying voice ‘volume or modulation for emphasis and effect ... are all acceptable tools of efficient advocacy’.\textsuperscript{538}

One of the most common and difficult flaws to correct is an advocate’s propensity to rush when they speak.\textsuperscript{539} Clearly, an advocate who speaks too quickly will not make it easy for the court to understand or comprehend their submissions and this is likely to hamper an advocate’s ability to persuade: ‘speed of delivery is ... an important consideration’.\textsuperscript{540}

An advocate’s voice may also attract adverse attention. For example, commenting on the advocacy of Sir John Kerr,\textsuperscript{541} Woodward described his voice as his only weakness: ‘His only disadvantage as a barrister and public speaker was a high-pitched and rather nasal delivery’.\textsuperscript{542} The following description of the voice of Dr Herbert Vere Evatt,\textsuperscript{543} one of the leaders at the NSW Bar in the 1920s, suggests that his voice may have also been a weakness:

\begin{quote}
Evatt was an unattractive speaker. His weak-bodied, high-pitched voice had a broad, nasally cadence. He retained an unmodulated delivery, seemingly the wilful cultivation of rural, ‘labor’ roots ... A lack of natural projection complemented flat, dry oratory, his scholarly monotone rarely pitched to a verbal distinction that was likely to induce rhythmic captivation between orator and audience.\textsuperscript{544}
\end{quote}

Of, Winneke, in contrast:

\begin{quote}
It was said by some that his ‘Oxford’ accent became more pronounced when he was on his feet in court ... He was very much the actor – a real performer. His voice took on a different tone once he was ‘on the set’.\textsuperscript{545}
\end{quote}

\textsuperscript{537} In relation to tone, it has been suggested that:

\begin{quote}
While not wishing to encourage emotionalism in oral argument, I must stress that the persuasive appellate advocate should communicate in bearing, tone of voice, and general attitude a strong feeling of the innate justice of the cause.
\end{quote}

Freidman and Lacavora, above n 29, p.211. It has also been suggested that tone should be used ‘... to convey a feeling of the justice of your client’s case and a little restrained righteous indignation can help in that regard’: Rosenberg and Huberman, above n 11, in the Preface by The Honourable Charles Leonard Dubin, Chief Justice of Ontario, p.46.

\textsuperscript{538} Glissan, above n 11, p.8.

\textsuperscript{539} Keith, above n 476, 25; Ross, Advocacy, (2\textsuperscript{nd} ed), above n 188, p.8.

\textsuperscript{540} Glissan, above n 11, p.8. Also, it has been suggested that ‘[y]ou must be attentive to the audience to ensure that you are going slowly enough to drive your point home and yet not so slowly as to be tedious’: Glissan, above n 11, p.8. See also Porter, The Gentle Art of Persuasion, above n 11, pp.114-115.

\textsuperscript{541} Later to become Chief Justice of the Supreme Court of NSW (1972-74) and Governor-General (1974-77).

\textsuperscript{542} Woodward, above n 338, p.87.

\textsuperscript{543} Commonly referred to as “Doc Evatt” or “Doc” and referred to as such in later parts of this thesis. He was a Justice of the High Court of Australia (1930-40); Attorney-General and Minister for External Affairs (1941-49); Leader of the Australian Labor Party (1951-60); Chief Justice of the Supreme Court of NSW (1960-62). See generally Peter Crockett, Evatt: A Life, (1993), Oxford University Press, Melbourne, Victoria.

\textsuperscript{544} Crockett, above n 543, pp.10-11.

\textsuperscript{545} Coleman, above n 207, p.174.
Despite their respective voices, both Kerr and Evatt had successful careers at the Bar; while voice may be considered an ideal for the purposes of exemplary appellate advocacy it is not a necessity or a significant matter in reality. In relation to Barwick, Mason described Barwick's voice as 'strong and it had a timbre to it' and that he 'made good use of inflection' but that it wasn't 'an attractive voice' or 'a rich voice'. 546 Porter described it as 'a most interesting voice with lively inflection'. 547 Ellicott stated that Barwick talked quietly but that 'his voice was not necessarily part of his armoury whereas it is with a lot of people. It wasn't a booming voice or it wasn't necessarily crisp'. 548 This is discussed in detail in the next chapter.

Language

It has been suggested by Ross that the language employed by an advocate is more important than the level of the advocate's voice. 549 Effective appellate advocates present their submissions clearly and articulately. As discussed earlier, it is a distinct advantage to be able to explain complicated arguments in a simple, clear and concise manner without being superficial. 550 This requires the advocate to utilise appropriate language to suit the context. According to David Jackson, the choice of language 'does involve thinking about it beforehand' - that is, during the preparation stage - and 'some people are quicker in response to others'. 551

Words are the tools that an advocate employs to persuade the members of the court. 552 An advocate should use words that are appropriate and ensure that the words employed do not result in any ambiguity.

546 Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 February 2006).
547 Interview with Chester Porter QC (Sydney, 2 April 2006).
548 Interview with Hon. Robert Ellicott QC (Sydney, 8 August 2006).
549 Ross, Advocacy, above n 216, p.3. See also Rosenberg and Huberman, above n 11, in the Preface by The Honourable Charles Leonard Dubin, Chief Justice of Ontario, p.46. It is suggested that advocates should learn the 'weight and edge' of words: Hyam, above n 31, p.7.
550 Ross, Advocacy, above n 216, p.3; Glissan, above n 11, p.204; Porter, The Gentle Art of Persuasion, above n 11, pp.154-155.
551 Interview with David Jackson QC (Sydney, 2 August 2006).
552 According to Melissa Perry QC:

It is trite to say of our profession that words are our tools of trade. The most effective oral advocates who I have had the pleasure to watch and to learn from are those who have had a wide vocabulary, and mastery of the meaning of words.

Perry, above n 68, p.5. Further, it has been suggested by Tom Hughes QC that:

An advocate must aspire to be a master of his native tongue; and in this connexion it is useful to store up a variety of pungent or colourful expressions which can be deployed (but only with discrimination and not too often) on suitable occasions. How often has one thought of an appropriate retort only after the occasion which calls for it has passed? To avoid the discomfiture of a delayed reaction, keep some verbal stock on a mental shelf, ready for instant use.
The advocate’s ability to persuade is greatly influenced by the tools at the advocate’s disposal. The power of language should not be underestimated in this context. It has been suggested that:

... the essential tools of the advocate remain the same wherever the advocate practices. In the end, the advocate has only two tools – the English language and the thought that that language is intended to convey. The art of the advocate lies in the way in which he or she uses those tools.  

Winneke was renowned for his ‘mastery of the language’. When Len Flanagan QC, a former Crown Counsel for Victoria, first met Winneke in 1963 he found that:

... what impressed me most at that first meeting was the economy of his language. He didn’t waste a lot of time with peripheral material; he went directly to the point. He could be very colourful when he wanted to, and very quick in answering questions.

Wit

Being quick-witted is a useful skill for an advocate to possess. The use of humour selectively and appropriately can have great effect. Hughes believes that ‘a bit of humour goes so long as it’s not misplaced’. An advocate must be cautious however, in the manner in which they use their wit.

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Hughes, above n 92, pp.17-18; Glisan, above n 11, p.8.

Hayne, ‘Advocacy and Special Leave Applications in the High Court of Australia’, above n 11, p.9. It has also been suggested that an advocate should be fastidious in their choice of language to ensure that they express exactly what they mean: Hyam, above n 31, p.151.

Coleman, above n 207, p.x.

Ibid. The renowned barrister Albert Edward Woodward was critical of the language used by former Prime Minister of Australia, Bob Hawke, during his time as a union advocate:

The only fault I found with him as an advocate was his frequent and distracting use of extreme language to make a point. For example, his opponents’ arguments were often described as not merely wrong, but ‘grotesque’ or ‘repulsive’. This, combined with his frequent use of other colourful exaggerations, detracted from the quality of his argument

Woodward, above n 338, p.85. Hawke, nevertheless, was highly successful.

Ross, Advocacy, above n 216, p.3. It has been suggested that, to avoid bitterness, wit and humour can be used to make a point rather than invective and experience is a useful guide as to when the use of wit and humour is appropriate. It is also suggested that an advocate should employ genuine humour and avoid flippancy: Hyam, above n 31, p.36. Former Chief Justice Murray Gleeson stated that the use of humour is ‘a question of taste really, provided its well aimed its fine but it’s easily overdone’: Interview with Murray Gleeson, Chief Justice of the High Court of Australia (Sydney, 14 August 2006).

Interview with Hon. Tom Hughes AO QC (Sydney, 2 August 2006). Throughout his time at the Bar, Sir Owen Dixon was known to burst into laughter during the weakest points of his opponent’s arguments. On one occasion, Edmund Herring complained to Justice Lowe that Dixon was laughing at his argument. Justice Lowe cautioned ‘I will have you know, Mr Dixon, that laughter is no argument in my court’. Dixon replied, still laughing, ‘I know, Your Honour, that’s the trouble!’: Communication from James Merralls to Phillip Ayres in Ayres, above n 50, p.26.

One commentator has suggested that because humour is a very dangerous weapon, it should be avoided other than in exceptional circumstances: Pannick, above n 193. Another reason why humour should be used cautiously is that it can be misunderstood by clients and can create the ‘unfortunate perception that people aren’t taking the matter as seriously as they should’: ABC, ‘Retiring Chief Justice Murray Gleeson’, above n 243.
Robert Jackson noted an example of wit by a British barrister that is likely to have offended the judge:

The Judge said: “I have been listening to you now for four hours and I am bound to say I am none the wiser.”

The barrister replied: “Oh, I know that, my Lord, but I had hoped you would be better informed.”

Whilst the barrister’s retort was witty, it failed to address the judge’s fundamental concern. The retort was also likely to have been considered offensive compounding the judge’s frustration and irritation.

Wit should not be employed in a manner that offends the court. In one further situation related by Jackson:

[T]he judge said: There is nothing to your proposition – just nothing to it.

The [advocate] said: Your Honor (sic), I have worked on this case for six weeks and you have not heard of it twenty minutes. Now, Judge, you are a lot smarter man than I am, but there is not that much difference between us.

Although this retort by the advocate may have been witty, it failed to address the judge’s comments.

Humour is a two-edged sword in the context of appellate advocacy – used effectively, it can be a potential persuasive weapon. However, used inappropriately, it may damage an advocate’s case.

**Presence**

Effective appellate advocates generally possess what can be described as a ‘presence’. According to Ross, presence, in this context, generally stems from confidence. A confident advocate is more likely to capture the attention of the court and is also more engaging. Confidence is also linked to preparation. An advocate ‘must endeavour to take centre stage in the courtroom. If properly prepared, [the advocate] will assume the authority needed to fulfil [their] duty’.

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559 Jackson, ‘Advocacy before the United States Supreme Court’, above n 11, 11.

560 Ibid. Please note that all future references to “Honor” rather than “Honour” is due to the spelling in the quotation and will not be succeeded by ‘(sic)”.

561 Ross, *Advocacy*, above n 216, p.3. It was said of Gordon Samuels, that [h]is commanding presence, high intelligence, beautiful voice and forensic skills quickly won him an enormous practice’: Michael Kirby, ‘Obituaries: Hon Gordon Samuels AC, CVO QC’ (2008) 82 *Australian Law Journal* 285. Gordon Samuels was an eminent barrister, a Judge of the Supreme Court of NSW, a Court of Appeal Judge and later the Governor of NSW.

562 Keith, above n 476, 24.
An advocate who has undertaken a meticulous and thorough preparation will derive confidence from the knowledge that they are thoroughly prepared. That is, at least in the ideal, there is no judicial question that can be asked to which they cannot respond and there is no submission that could be advanced by the opposition that they have not considered. An advocate can also develop confidence from both practice and experience. There ‘... is a sharp learning curve that results from feeling foolish, bewildered or upset by your presentation’. Presence may also derive from other factors such as competence and eloquence.

According to David Jackson, the secret to presence is as follows:

I think you have to carry yourself in a sense, you’re the leader and you’ve got your troops, you’ve got to know what you’re doing. If you know what you’re doing, you’re in charge and you don’t let yourself be flustered by juniors who are saying “say this, say that”. Keep the puppies quiet.

Presence does not equate to height. Some of the greatest advocates in Australia were short (including Barwick and Byers).

**Memory**

As already mentioned, an advocate with a good memory has a distinct advantage or, as David Jackson suggests, ‘it’s a help’. A good memory often allows an advocate to respond to a question from the court with confidence and precision. It is not unusual for the opinions of judges to be swayed by an advocate providing an appropriate answer to a question on a critical issue. A good memory provides the advocate with an abundance of information which is easily and instantly accessible as required. Dixon was renowned as an advocate for, among other things, his:

> phenomenal memory of reported cases ... [He] ... never had any problem, when responding to unexpected arguments of opposing counsel, in citing, extempore, cases he had not previously considered in relation to the matter at hand.

Although it is not desirable for an advocate to memorise their submissions as it often results in inflexibility coupled with a stiff and uneasy demeanour, the other extreme is also not desirable:

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563 See generally Glissan, above n 11, p.9.
564 Keith, above n 476, 24.
565 Interview with David Jackson QC (Sydney, 2 August 2006).
566 Ibid.
568 Communication from James Merralls to Phillip Ayres in Ayres, above n 50, p.26.
569 It has been suggested that memorising your argument will result in your argument lacking 'spontaneity and life, and will not be effective': Rosenberg and Huberman, above n 11, in the Preface by The Honourable Charles Leonard Dubin, Chief Justice of Ontario, p.46.
'e]qually objectionable is ... an unorganized, rambling discourse, relying on the inspiration of the moment'. This calls for a balance between an advocate employing their memory to remember key aspects of their submissions whilst also relying on pre-prepared notes to ensure that their submissions follow a logical structure. This is likely to lead to more coherent and organised submissions while at the same time allowing engagement with the members of the court, by being able to recall key aspects of their submissions in response to judicial questions.

The manner in which an advocate delivers their submissions must accord with their abilities and disposition. An advocate must deliver their submissions in a manner which seems natural. Some advocates will need to rely on more comprehensive written notes than others. There are very few advocates who have the rare ability, in terms of their memory and composure, to argue a case without reference to any written notes.

An example of an extremely successful barrister who possessed a number of 'the extras' was Robert Menzies. He had 'a commanding appearance, a strong and clear voice, logical almost to a fault, a master of lucid expression and obviously well prepared in every way'.

One of the themes that emerges from this chapter is that, notwithstanding the widely accepted elements and ideals identified, an effective appellate advocate will develop their own style based on their own ability, including their own strengths and weaknesses, and which individually incorporates the relevant elements and ideals. As an advocate, one 'should be able to analyse those personal strengths which make you persuasive or credible and develop a style amenable to your own needs'.

570 Jackson, 'Advocacy before the United States Supreme Court', above n 11, 9.
571 Ibid.
572 Ibid. For example, David Jackson QC stated that:

I endeavour to have for each case, a note of what I want to say in short paragraphs. It is not possible to stick with it all the time because you have the judges asking you questions, but I find it useful to have as an aide memoire of what you want to say, what you are going to refer to, all this sort of thing. Other people have different views on this, but that is the way I do it. Writing it out also puts you in a situation where you have thought through the implications of what you’re saying.

See Interview with David Jackson QC (Sydney, 2 August 2006).
573 Hazlehurst, above n 204, p.41.
574 Keith, above n 476, 25.
Chapter 6: Barwick’s Approach to Preparation, Presentation and Personation

"The period of argument in court is an opportunity for the meeting of minds in the search for truth in relation to the matter in hand. It must reflect, in the quality of its use, the degree of devotion and skill that has been applied to the preparation of the argument, to the identification of the significant, to the elimination of the irrelevant and to the avoidance of barren repetition".

Sir Garfield Barwick, 1964

The exploration of the elements of preparation, presentation and personation in the context of appellate advocacy which was undertaken in the previous three chapters, was directed towards establishing a framework to enable an assessment of Barwick’s ability to achieve these ideals. The purpose is to subject conclusions about the ideals of appellate advocacy to an examination of the reality by exploring the performance of an advocate, Barwick, who had the reputation as being one of the greatest appellate advocates. The emphasis in Chapters 7, 8 and 9 will be Barwick’s advocacy in the Bank Nationalisation Case and the Communist Party Case.

Before undertaking this analysis, Barwick’s approach to preparation, presentation and personation generally needs to be considered in terms of the ideals of appellate advocacy within each of these categories. This chapter analyses Barwick’s own observations, the observations of his contemporaries and others who knew him as well as commentary available in relation to Barwick’s advocacy. The chapter also provides an introduction to enable a more detailed examination of the ideals in the context of a discussion of specific constitutional law cases in the following three chapters.

6.1 Barwick’s Approach to Preparation

As suggested by Sackville, success in appellate advocacy depends largely on a meticulous preparation. However, success in this context refers to attaining levels of exemplary advocacy rather than success in terms of winning. Undoubtedly, a thorough preparation was instrumental to Barwick’s success as an advocate. Chester Porter who worked with Barwick on preparing an address

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575 Transcript of Proceedings in the High Court of Australia at Sydney on Friday 1st May 1964 on the occasion of the Swearing In of Sir Garfield Barwick as Chief Justice of Australia, p.10.
to the Legislative Assembly on industrial relations legislation, described Barwick’s preparation in that instance as ‘meticulous’.  

Barwick’s ‘Ground Up’ Approach

A key aspect of Barwick’s preparation was what will be described, for the purposes of this thesis, as his ‘ground up’ approach. This is based on Barwick’s description of his approach to preparation. He would, he writes, ‘always work from the ground up’.  

His approach was to commence his preparation by examining the fundamental principle of law that was at the centre of a particular case. This involved referring to the original sources of the law. He would immerse himself in the case and work his way to the point where he understood the present state of the law and then developed his arguments accordingly. Barwick outlined his approach in his autobiography as follows:

... in working on a case I would always work from the ground up. I would examine closely the relevant accepted wisdom of the day but not take it for gospel; I would verify it from original sources. In this way, in later days, I often found a principle which was misunderstood in its current application, or one that had been forgotten or overlooked. Following this course, I sometimes achieved results that in themselves appeared novel but which were simply built on the fundamentals of the law.  

Self-evaluation, often relying on subsequent events or developments and the benefit of hindsight, needs to be critically examined and independently verified, however, Barwick’s description has been corroborated by a number of different sources. Porter reflected on his time as a junior counsel when he had numerous conferences with Barwick and confirmed Barwick’s ‘ground up’ approach. He stated that Barwick:

... went to the fundamental text of a statute or the fundamental principles of common law and he drew his own inferences ... regardless of any authority beneath that of the House of Lords or the High Court. And the interesting thing is that he was right most of the time ... [H]e was a man who went straight to basic principles and hardly cited a single authority.  

Ellicott also confirmed Barwick’s ‘ground up’ approach: ‘I remember that he would say well of course such and such a case [referring to authorities] and he’d go back to the 19th century and develop it through. He had it all there at his fingertips because it was kept in his mind’.  

576 Interview with Chester Porter QC (Sydney, 2 April 2006).
577 Barwick, A Radical Tory: Garfield Barwick’s Reflections & Recollections, above n 1, p.19.
578 Ibid.
579 Interview with Chester Porter QC (Sydney, 2 April 2006).
580 Interview with Hon. Robert Ellicott QC (Sydney, 8 August 2006).
In response to a question about section 92 of the Constitution and whether Barwick would trace the case law back to the early decisions on the section, Barwick's son, Ross, stated:

Oh certainly it was a brick building exercise. Always. Always a brick building exercise. Indeed if I've learnt anything from him in the law, he'd always say, "start at the beginning, what does the statute say, what do the cases say", .... "Look at the law and the facts will look after themselves".  

Barwick's ‘ground up’ approach to preparation provided him with a great opportunity to develop a larger and more diverse practice which, together with his success, helped him earn a reputation as a leading advocate:

From here on [the late 1930s] my practice steadily broadened and I was regularly briefed in all the jurisdictions of the court. Cases which produced an unexpected result, particularly by the application of the law, tended to increase my practice. I began to build a reputation as a lawyer as well as an advocate. An ability to deploy the principles of the law in a practical way was appreciated. I became a leading junior. Often I was given a junior to assist me in the more complicated cases.

Many of the ‘unexpected results’ Barwick referred to were obtained by employing his ‘ground up’ approach, which often resulted in the discovery of a principle of law which had been applied and relied upon without ever being questioned or disputed as to its foundation or origins. This approach would, on occasions, result in Barwick challenging the application of a principle of law and thereby seeking to overturn previously established principles. Barwick’s challenges to the wartime regulations were an example. His approach contributed to his growing reputation as an advocate. He had a demonstrated ability to grasp legal concepts quickly and comprehend them in such a way that he could apply them to factual scenarios with relative ease.

Barwick’s preparation and his ‘ground up’ approach also aided other aspects of his advocacy. It provided him with confidence in his presentation and enhanced his presentation generally. In this

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581 This is significant because Barwick appeared in numerous cases involving s 92, including the Airlines Case and the Bank Nationalisation Case.

582 Interview with Ross Barwick (Sydney, 4 October 2006).

583 Barwick, A Radical Tory: Garfield Barwick’s Reflections & Recollections, above n 1, p.30.

584 Discussed earlier, for example, De Mestre v Chisholm (1944) 69 CLR 51, Reid v Sinderberry (1944) 68 CLR 504, Ex parte Sinderberry; Re Reid and Ex parte McGrath; Re Reid (1944) 61(NSW) WN 139.

585 In fact, Barwick maintained his ‘ground up’ approach even during his time as Chief Justice of the High Court. Barwick recalled a case (Viro v R [1978] HCA 9; (1978) 141 CLR 88 (11 April 1978)) that was argued before the High Court during his time as Chief Justice concerning whether a drunk man could form criminal intent in circumstances where previously the Privy Council had found that he could and the High Court had found otherwise. Barwick indicated that the case turned largely on how a particular expression was read in one of the cases and that it was ‘a case where if you had that to argue you’d have to go and have a close look at the root of the whole thing and see that it had been misunderstood, that the emphasis had been misplaced, you see’. See Molomby & Donohoe, above n 19, 14.
way, his approach was geared towards ‘preparation for performance’ as described by Hampel in a previous chapter, and referred to for the purposes of this thesis, as ‘preparation for presentation’.

Ellicott’s description of Barwick’s approach to preparation adds weight to the suggestion that Barwick’s approach was governed by the ‘preparation for presentation’ concept:

His preparation would have been to find the most attractive way in which to present his argument consistent with winning the case. I think he would have considered whether he could put it shortly, sit down, get the other side up facing a strong argument that he’d put and then deal with them in reply in a more lengthy way coming back to the significance of the points he’d made.\footnote{\textit{Interview with Hon. Robert Ellicott QC (Sydney, 8 August 2006).}}

Barwick’s ‘ground up’ approach was also relevant to his preparation in the context of trial advocacy.\footnote{\textit{Barwick described his approach to preparing for a case as follows: I tried to get to the bottom of the facts of the case. The first thing to know is what facts you’ve got available, what facts you expect to prove. Then you next go through how you are going to prove them. But you must see the relevance of those facts to the legal cause of action that you are asked to present and succeed. That’s why I emphasised a while ago the idea of relevance, you’ve got to pick up the relevant facts and material relevant to a cause of action, the proposition which is the backbone of the case.}} However, his emphasis on relevance was an important part of his ‘preparation for presentation’ and presentation generally, as will be seen in later chapters. Barwick had the ability to identify the relevant law and issues quickly and discard irrelevant or immaterial information.

Barwick’s ‘ground up’ approach also assisted him with judicial questioning. By effectively tracing the origins of the relevant law, Barwick became very familiar with the current legal issues in dispute as well as the history of these issues. As a result, he was in an ideal position to answer any judicial questions with respect to those issues. This is also apparent when analysing Barwick’s advocacy using the transcript of his presentation in the \textit{Bank Nationalisation Case} and \textit{Communist Party Case} as will become evident.

Barwick’s ability to respond skilfully to judicial questions was supported by Ellicott:

I can only recall in the Privy Council and in the High Court in \textit{Keighery’s} that he would always throw up a simple and plausible solution to the question. He was not one for backtracking. In other words, his thought processes as uttered represented a mind that had gone through the problems.\footnote{\textit{Interview with Hon. Robert Ellicott QC (Sydney, 8 August 2006).}}

\footnote{\textit{Molomby & Donohoe, above n 19, 10.}}

\footnote{\textit{Interview with Hon. Robert Ellicott QC (Sydney, 8 August 2006). The reference to \textit{Keighery’s} case is a reference to \textit{W P Keighery Pty Ltd v Federal Commissioner of Taxation} [1957] HCA 2; (1957) 100 CLR 66 (19 December 1957).}}
Ellicott agreed that this ability to respond to judicial questions suggested that Barwick had anticipated the nature of the questions as a result of his comprehensive preparation.589

The importance that Barwick attributed to preparation is evident from an instance that he recounted where he was briefed at short notice to act on behalf of a defendant in a jury trial in the Supreme Court of NSW. Upon being asked to take over this brief, Barwick recalled that ‘unabashed by the brevity of the time for detailed preparation, I agreed to do so’.590 This statement illustrates that he understood and appreciated both the value and importance of a detailed preparation. However, it also demonstrates the reality associated with preparation in practice: often a detailed or comprehensive preparation is simply not possible. While this may not be problematic in some cases, in others it may impact upon an advocate’s performance and, ultimately, the result of the case. The complexity of the case will also be relevant.

A discussion with Mitchell prior to his death also reveals the importance that Barwick attributed to preparation. At one point, Mitchell suggested to Barwick that he should practice more in the High Court. Barwick responded that he had as much as he could do in the Supreme Court and that it was ‘hard work’. Mitchell replied that he was used to hard work, to which Barwick agreed, adding ‘but it takes a lot of preparation’.591

Subsequently, Barwick's High Court practice grew significantly and Barwick recalled: ‘I remember an occasion when I appeared in every case in the list for the sittings except one, a situation which placed a considerable strain on my capacity to prepare myself adequately for each case’.592 Whilst recognising the importance that Barwick assigned to a comprehensive and detailed preparation, this also indicates his concern that it was becoming increasingly difficult to undertake such a preparation in the circumstances. It is possible that there were occasions where Barwick did not prepare adequately owing to the rapidly expanding nature of his practice. Barwick reported that Justice Starke of the High Court believed that he did too much and therefore did not have sufficient time for preparation: Barwick recalled that ‘[i]n order to get through the work, I always tried to be brief’.593

It has been suggested by Porter that ‘on one occasion [Barwick] was actually reading his brief while the other side was arguing before the High Court’.594 This is consistent with Barwick’s recollection of

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589 Interview with Hon. Robert Ellicott QC (Sydney, 8 August 2006).
590 Barwick, A Radical Tory: Garfield Barwick's Reflections & Recollections, above n 1, p.23.
591 National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 17.
592 Barwick, A Radical Tory: Garfield Barwick's Reflections & Recollections, above n 1, p.33. See National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 17-18. In his interview with J.O.B. Miller, Barwick stated that on this occasion he had every case in the list except for one and that this amounted to 17 cases. Barwick recalled that Chief Justice Latham would refer to it as the “Barwick Session” (at 18).
593 National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 17.
594 Interview with Chester Porter QC (Sydney, 2 April 2006).
the time where he had every case in the High Court except for one, conceding that 'you can't prepare them all, so I developed the capacity of listening to my opponent and working on the next case'.

The difficulties Barwick encountered in undertaking a comprehensive preparation were attributable to his rapidly growing practice rather than any belief that such a preparation was not necessary. This also reflects the reality of appellate advocacy in practice. Barwick had the advantage of a prodigious memory and the ability to absorb information quickly which assisted him greatly when faced with a small 'window of opportunity' to prepare a case. Ellicott emphasised the importance Barwick attributed to preparation together with his ability to absorb detail quickly:

> my experience of him would be that he had a strong view that you had to know your brief and, unless you did, you hadn't passed the first test in advocacy. It's the basis of his advocacy, but because he could command a knowledge of it fairly quickly he could move from one case to another fairly easily, work heavily and my recollection is of a person moving from one case to another.

These anecdotes and recollections reflect the reality that the demands of running a busy practice often impacted on the time Barwick could dedicate to such a preparation. Barwick developed the ability to undertake as comprehensive preparation as possible in the minimum time available and to the extent necessary, based on the complexity of the particular case. It follows that there may have been some instances where Barwick did not adequately prepare some cases. This also leaves open the possibility that some of Barwick's unsuccessful results may have been the product of a lack of preparation, although no single explanation can be given.

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595 National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 18. Barwick suggested that he developed this ability whilst at school: 'The only place where I could do my homework for quite a while was in the room where they [his parents and relatives] played cards, and so I was able to absolutely isolate myself, today you could let off guns around me, and if I wanted to do something it wouldn't make any difference' (at 18). According to Mason, Barwick had:

> ... this power of concentration. One of the stories he used to tell was that in his early days when he was a boy - I've forgotten what his father use to do - but his father used to have a lot of people in the house and Barwick would be working in the same room as a school boy. These men would be there talking and I imagine drinking, maybe they were card players or something like that, and he had to learn to concentrate with this noise going on around him.

In an interview in 1989, Barwick identified concentration as one of the qualities that can be improved:

> The would-be advocate can improve his powers of concentration. He can get himself into the situation where the world disappears and he has just something in the focus of his mind or sight. I'm sure you can improve your powers of concentration ... I think you can improve your concentration by concentrating and learning to concentrate in the midst of music or something that's making a noise or if it's somebody talking you can get yourself to the point of view I think by exercising what powers of concentration you have. You can isolate or insulate yourself and thus I think you can improve your capacity in that respect.

596 Interview with Hon. Robert Ellicott QC (Sydney, 8 August 2006).
As previously discussed, effective appellate advocates spend a considerable amount of time thinking about the case and formulating the key propositions. This requires a familiarity with the facts, the relevant law and procedure. This accords with Mason's recollection of Barwick's preparation. Mason was Barwick's junior in many High Court cases and had ample opportunity to observe Barwick's method of preparation:

... my abiding recollection of [Barwick] was that he was always thinking about the case and he had a livewire mind ... you find him refining these propositions constantly. You began to wonder whether they were ever going to find static form, because he was always thinking of slight improvements.

A direct result of this approach, together with completing a thorough and 'ground up' preparation, was that Barwick was able to formulate often creative or novel arguments. As Gleeson noted, based on comments he recalled:

The other great capacity [Barwick] had, according to everything I heard in the profession, was that he was a very imaginative advocate. He could think up points that would never have occurred to anybody else. And he was the sort of advocate who was always thinking ahead. He was always two steps ahead of everybody else.

Another aspect of preparation in appellate advocacy arises from the need, as Justice Heydon put it, to come to grips with the opposing arguments. Barwick adhered to this principle. His approach included examining his opponent's arguments. Mason made the following observation:

... two central features in his preparation of the argument of the case [included] the amount of time that he actually devoted to formulating the submissions and propositions he was going to put in the case. In other words, it was essential to come up with propositions that you could defend, that you were confident that you could defend, rather than propositions that had some flaw or hole in them because a valid point made against your propositions early on was extremely

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597 Mason was referred to as Barwick's 'favourite junior counsel' in Kristen Walker, 'Mason, Anthony Frank' in Tony Blackshield, Michael Coper & George Williams (eds), *The Oxford Companion to the High Court of Australia*, (2001). Oxford University Press, South Melbourne, p.459. It has been difficult to ascertain the origins of this comment or any reported cases where Mason was Barwick's junior (except for *Nelungaloo Pty Limited v Commonwealth (No.4)* (1953) 88 CLR 529). When Mason was asked about the origins of this comment he stated: 'It is likely that this remark was made during Barwick's early years on the High Court when he was reflecting back on his advocacy experience' (Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 February 2006)).

598 Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 February 2006).

599 Interview with Murray Gleeson, Chief Justice of the High Court of Australia (Sydney, 14 August 2006).

600 Lindsay, above n 211, 134.
detrimental to the argument. And the other point was what was the opposing case? How was the opposing case going to be presented?\footnote{Evidence.}

In addition, Barwick’s preparation would also result in him looking ‘to see how the case could be put differently from a legal aspect, a legal point of view, using some other legal principle than the one that you are favouring in your approach’.\footnote{Molomby & Donohoe, above n 19, 10.}

**Barwick’s Work Ethic**

Another factor which assisted Barwick’s preparation was his appetite and capacity for hard work. This allowed Barwick to acquire as well as master the application of the elements of appellate advocacy. This is particularly apparent in his comprehensive preparation which often incorporated his ‘ground up’ approach. Barwick’s work ethic can be attributed both to his parents and his upbringing.\footnote{According to Tom Hughes, Barwick’s: ‘many outstanding qualities were the product of his upbringing; they reflected and exemplified a concentration by his parents and by him on the value of hard work and self-reliance as the means of attaining goals in circumstances not always auspicious’ (S. E. K. Hulme et al, ‘High Court Centenary: Reminiscences and reflections’ (2003) 77 Australian Law Journal 653, 666).}

Mason recounted:

> My impression of Barwick ..., as an advocate, was that Barwick was really prepared to do it all himself. He expected the junior to work and to discuss things with him and to provide ideas, but his history I think in the law had been that he did his own work anyhow.\footnote{Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 February 2006).}

According to Mason, one quality that distinguished Barwick from other advocates was his stamina:

> One quality I should mention ... [was] stamina! Physical and mental stamina. That was amazing. How he could remain alert and on the ball for so long after a busy day in the High Court, a demanding day in the High Court – he’d come back to chambers, conduct conferences and he’d always be on the ball. He had this ability to switch his mind from one topic to another. Underline stamina, because I’ve often thought in the law that you encounter various people with a high level of intelligence, what really marks out the individual who is very successful, outstandingly successful from the others, generally you’ll find its stamina. He or she’s got the physical and intellectual strength.\footnote{Ibid.}
These comments support the proposition that one can learn and acquire the elements of appellate advocacy yet to achieve excellence requires attributes, such as stamina, which cannot necessarily be developed, acquired or controlled.

Ross Barwick confirmed that his father would be in court most days until 4.30pm, attend conferences for a couple of hours, go home, have dinner and socialise with the family then adjourn to the study until the early hours of the morning.\footnote{Interview with Ross Barwick (Sydney, 4 October 2006). Ross Barwick also commented about his father’s physical energy and the fact that he could ‘get by with comparatively little sleep’. He would sleep for 3-4 hours every night and, in later years, he would cat nap for 10-15 minutes but ‘always he had this driving energy’. According to Ross Barwick: What marked the man was this confluence of physical energy and intellect. They were brought together. I mean you’d find a University Professor who has the intellect and some athlete who’s got the energy, you know. He was all in one package. It was an extraordinary thing to observe, and of course none of us could keep up with him in that sense.} Also, on Sundays, junior barristers or solicitors would attend conferences at Barwick’s house.\footnote{Ibid. Ross Barwick even recalls a story where Barwick took an urgent phone call from a solicitor late at night whilst he was at a function. The solicitor had something on the next day and needed Barwick’s assistance. Barwick met the solicitor at his chambers and had a look at the issue. Barwick then identified the point and said to the solicitor: “This is the point here, yes we can deal with that tomorrow. It won’t take very long. Can I go back to my party now?” (see Interview with Ross Barwick (Sydney, 4 October 2006)).}

According to Barwick, an ‘advocate has got to be a hard worker … You’ve got to be prepared to devote yourself to the particular task you’ve got in hand, this case’.\footnote{Molomby & Donohoe, above n 19, 10.} This:

- means you’ve got nothing else to do with your mind but to do the client’s case and to work at it in the sense that it doesn’t matter whether it takes you until midnight or later to master its facts and the relevant law.\footnote{Ibid.}

**Barwick’s knowledge of the law and relevant procedure**

Another important element in preparation is knowing the law and the relevant procedure. According to Porter, this was critical to Barwick’s success as an advocate:

I think if you wanted the secret of his advocacy in the High Court he had a tremendous knowledge of the law generally. What I would call a knowledge of basic legal principles, particularly basic constitutional principles, but he wasn’t one of these people who went before the High Court and just aimlessly read long decisions to them in great length. He was a person who went before them and he would have the principle of the case and he would always be back to the fundamental words of the statute and then he would have an almost unanswerable logic derived from the principle or the statute as the case may be.\footnote{Interview with Chester Porter QC (Sydney, 2 April 2006).}
This is also consistent with Barwick’s ‘ground up’ approach.

While every lawyer and advocate is expected to ‘know the law’, knowledge of the law refers here to the acquisition of a comprehensive knowledge of the applicable law in the proceedings before the appellate court, including all relevant case law and legislation pertaining to that area.

Barwick himself recognised the importance of knowing the law. In an interview in 1989, he was asked to identify the most important things for a barrister beginning at the Bar to get a grasp of. He identified knowing the law:

I assume that I have learned my law – I mean that I have learned my law. I have learned the principles of it and I’ve got it clear in my mind and I understand it. That is a prerequisite pre-eminent of the advocate, he has to feel himself quite secure in his own knowledge of the relevant law, whatever the nature of the case that he has to handle.

If he hasn’t got it from recollection, he must acquire it by study, as it were, ad hoc for the purpose of the case.\textsuperscript{611}

Barwick acknowledged that, as an advocate, one must acquire a detailed knowledge of the law and the relevant legal principles:

The work of the advocate demands a precise knowledge of the law and a thorough grasp of its principles. He must be able to recognise quickly which of its principles is relevant to his case and make use of it to his client’s profit. Several of my cases illustrate both these points and emphasise the place of the advocate in the protection of the citizen.\textsuperscript{612}

Ellicott stated that ‘[y]ou can assume that preparation, both of law and fact, would have been well and truly part of his armoury’.\textsuperscript{613}

Barwick also focused on knowing a court’s procedure during his preparation. As time went on, this was aided significantly by his experience in appearing in different courts and different jurisdictions as well as his experience in appearing regularly in the High Court. Porter suggested that Barwick ‘knew High Court procedure backwards’.\textsuperscript{614} Ross Barwick suggested that his father ‘was always ready by virtue of his circumstances to move around anywhere and everywhere. There was no court which he wouldn’t appear in’.\textsuperscript{615} According to former Supreme Court Justice, John Slattery, Barwick was ‘a most persuasive counsel who appeared in all Courts and all jurisdictions from Courts of Petty

\textsuperscript{611} Molomby & Donohoe, above n 19, 9.

\textsuperscript{612} Barwick, \textit{A Radical Tory: Garfield Barwick’s Reflections & Recollections}, above n 1, p.34.

\textsuperscript{613} Interview with Hon. Robert Ellicott QC (Sydney, 8 August 2006).

\textsuperscript{614} Interview with Chester Porter QC (Sydney, 2 April 2006).

\textsuperscript{615} Interview with Ross Barwick (Sydney, 4 October 2006).
Sessions (now Local Courts) to the Privy Council’. However, in reality, appearing in many jurisdictions would have made it more difficult to become familiar with the rules pertaining to each particular court.

This experience instilled Barwick with confidence, and this confidence was evident in his advocacy. According to Mason, Barwick had ‘great confidence’ and ‘he really believed that he knew more about the law and had a power of analysis that was superior to anyone else so he had that confidence. A lot of advocates don’t have that degree of confidence’.

While Mason confirmed that Barwick was a confident advocate, he also indirectly alluded to a possible weakness with Barwick’s advocacy: Barwick’s belief that he knew more about the law than anyone else. The danger with this may be over-confidence, complacency, and even arrogance. Barwick has been criticised for arrogance in the Communist Party Case, as will be discussed in Chapter 9.

The suggestion that Barwick’s advocacy was affected by occasional arrogance is also supported by some of those who knew him during his time at the Bar. Mason conceded that Barwick’s confidence ‘probably did border on arrogance’ but, in terms of his advocacy, Mason saw it as ‘an exhibition of his confidence, his tenacity and his courage’. Porter echoed these comments by recalling a case where Barwick appeared before a Magistrate who at one point told Barwick to have ‘a little more respect for the court’. According to Porter, this inferred that Barwick was ‘a very arrogant man’ but, Porter added, ‘so far as Barwick was concerned he had a lot to be arrogant about’.

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616 Slattery, above n 160, 416.
617 Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 February 2006).
618 Ayres, above n 50, pp.220-222. See also Owen Dixon, Diary, 14-15 December 1950, Owen Dixon, Personal Papers. Chief Justice Latham, while still in office, once told Barwick that his argument in the Communist Party Case was the worst he had heard from him. At the time of writing his autobiography, Barwick indicated that he did not disagree: ‘I have no reason to question his judgment’ (Barwick, A Radical Tory: Garfield Barwick’s Reflections & Recollections, above n 1, p.48).
619 Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 February 2006).
620 Interview with Chester Porter QC (Sydney, 2 April 2006). For example, Chester Porter indicated that:

Someone would say to him “well what about this authority, isn’t this against it”, “yes we’ll challenge that in the High Court”, Barwick would say and he’d probably be right, that’s the fascinating thing about it, “we’ll change that in the High Court” he would say about it.

Also, Chester Porter QC described Barwick as ‘an arrogant man in inferior courts and then in his attitude towards inferior courts’.
Ellicott described Barwick as ‘a punchy sort of person, very confident, strong ego’. Ellicott conceded that Barwick did have a level of ‘intellectual arrogance’ stemming from an ‘assurance of mind that he was right’.

The reality, reflected in these comments, is that an extensive preparation or knowledge of the law and procedure (or extensive experience) may lead to over-confidence and the danger is of an appearance of lack of respect for the court.

**Barwick’s knowledge of the court**

Knowing the court is another important element in preparation in appellate advocacy. Barwick certainly embodied this. In the early stages of his career, Barwick realised that ‘advocacy called for charm and cunning as well as a grasp of the law’. The importance that Barwick attributed to ‘knowing the court’ is encapsulated in his statement that ‘[t]he important thing in life is to know the judge’. Evatt was of the view that judges were swayed only by sound argument whereas Barwick ‘exercised the arts of persuasion’.

Barwick was conscious that he needed to tailor his submissions to particular judges of the High Court as this would greatly enhance the persuasive effect of his submissions. As discussed earlier, in the late 1930s, a senior member of the Bar told him that the High Court judges thought that his submissions were often too brief. Barwick stated that ‘[a]pparently I had to learn to elaborate my propositions and perhaps sometimes to repeat them, maybe in different form and tailored to catch the eye of a particular judge’. Implicitly, Barwick was acknowledging (albeit the choice of the word ‘apparently’ suggests perhaps reluctantly or sceptically) the importance of knowing the judges, watching them to gauge their individual reactions and flexibility in tailoring his submissions to the respective judges. Barwick’s ability to recall this advice so many years later also suggests that he learnt this at an early stage.

Barwick’s knowledge of the individual judges and the court generally derived from his comprehensive preparation and his ‘ground up’ approach to appellate advocacy. Ross Barwick recalled an instance where his father was in the billiard room at home and had laid out 25-30 volumes of the

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621 Interview with Hon. Robert Ellicott QC (Sydney, 8 August 2006). Ellicott also noted that Barwick was ‘extremely compassionate’ and referred to the ‘well-known story about his going into bankruptcy to protect his brother, and that’s a pretty significant event, that took a bit of courage there too’.

622 Ibid.

623 Marr, above n 8, p.19.

624 Ibid.

625 Ibid.

Commonwealth Law Reports on the billiard table. Ross Barwick was a law student at the time and recounted as follows:

He said to me ... “I’ll show you something about Dixon” and he went through these decisions to demonstrate how Dixon had been inconsistent and he knew them all backwards. He said “I’ll show you what Dixon said here”, “just have a look at that passage” and then he’d go to another passage, “this is only a year apart or something you know”. The most extraordinary demonstration of what I thought was an almost mathematical analysis of these decisions. 627

This is indicative of the level of analysis that Barwick would undertake for the purposes of tracing the reasoning of particular judges in previous cases. It also explains how Barwick became so familiar with the decisions of particular judges. He approached this exercise in an almost scientific manner.

As Ross Barwick suggested, this allowed his father, for example, to lead Dixon along a particular line of authorities and then submit: ‘of course your Honour has always taken this view, perhaps your Honour might have a look at this one’. 628

This anecdote also reveals the potential gulf between exemplary advocacy and advocacy in practice. Knowledge of the previous decisions of judges is an important part of achieving exemplary advocacy but it is only effective in practice if judges are consistent in their approach to similar issues.

A further illustration of Barwick’s knowledge of the judges of the High Court in the 1930s and 1940s can be seen from the following response by Barwick when asked to make a few comments about some of the eminent judges of the High Court before whom he appeared or with whom he associated:

Fullagar had a very perceptive mind and, if he intervened, it was usually a pretty pungent sort of intervention. He was very pleasant to appear before, as Dixon was. Latham ... was quite different. He tended to be talkative and tried to do everything by syllogistic logic; but he ran the Court very well, and I liked him very much and thought he was a really fair-minded man. Sir Hayden Starke didn’t like indirection and tended to dominate the scene by keeping you to the points he thought were central. Consequently, you had to learn a particular skill to let him know you would be able to deal with this point, but in your own time. It wasn’t always easy. But he was very much his own man and first-class.

Sir George Rich had a very good pen and a good sense of humour. His judgments were beautifully composed. That court was a nice court in which to work, once you had them talking to you. 629

Porter acknowledged that Barwick ‘personally knew all the High Court judges well and he personally knew the judges of the Full Court which later became the Court of Appeal’. 630

627 Interview with Ross Barwick (Sydney, 4 October 2006).
628 Ibid.
629 Bailey, above n 19, 1309.
Mason confirmed Barwick’s knowledge of the personality of the judges: ‘he knew what they were like’. For example, Barwick thought that Justice Starke ‘was a black and white person’ and ‘that Starke didn’t like an argument where the argument was disturbing his sort of vision of what was black and what was white’. Ellicott agreed and he said that ‘it was quite clear that [Barwick] studied the bench, whether it was Williams or Dixon or the like’.

Ross Barwick suggested that his father’s knowledge of the judges on the Supreme Court or High Court derived ‘partly [from] his own insight with people. He did not socialise a lot with them in order to know them well’. While exemplary advocacy requires knowledge of both the law and the judges, knowledge of the judges can occur through reading their previous decisions, and general insight, as well as through other means, such as social situations.

Barwick himself acknowledged his knowledge of the individual members of the High Court in an interview in 1977: ‘I have known this Court because I practised in it from a very early time in my professional days, I knew its personalities, I [was] quite close to them’.

The importance that Barwick ascribed to knowing the court, and the particular judges, is illustrated by the following anecdote from Barwick’s early years at the Bar. When Barwick was a junior at the Bar, he received a brief to appear with Evatt leading. At one stage, Barwick strongly suggested to Evatt to make a particular submission based on a previous decision by one of the judges before whom they were to appear. Evatt dismissed this suggestion. In Court, the judge referred Evatt to that particular case and asked inquisitively as to why he was not formulating an argument based on this case. Evatt then turned to Barwick and said in a loud voice: ‘It’s a great pity you couldn’t find

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630 Interview with Chester Porter QC (Sydney, 2 April 2006). Tom Hughes QC had appeared as junior counsel with Barwick in the 1950s. According to Hughes, Barwick had no reticence about imparting to his juniors his personal views about judges before whom he appeared: see Hulme, above n 603, 664-665. Hughes recalls on one occasion, when working with Barwick in October 1955 in his London apartment overlooking the Thames on the special leave application in Antill Ranger & Co. Pty Ltd v Commissioner for Motor Transport (1955) 93 CLR 83; Commissioner for Motor Transport v Antill Ranger & Co. Pty Ltd (1956) AC 527, Sir Frank Kitto’s name came up in conversation. Tom Hughes recalls Barwick speaking dismissively of him, describing his role in the Bank Nationalisation Case as that of an “equity draughtsman”. This was confirmed by Tom Hughes QC in his interview with the author: see Interview with Hon. Tom Hughes AO QC (Sydney, 2 August 2006). In fact, Chester Porter QC suggested that Barwick could be spiteful. For example, he described Gordon Wallace as ‘overrated’ at a Bar Association Dinner: see Interview with Chester Porter QC (Sydney, 2 April 2006).

631 Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 February 2006).

632 Ibid. See also Molomby & Donohoe, above n 19, 12.

633 Interview with Hon. Robert Ellicott QC (Sydney, 8 August 2006).

634 Interview with Ross Barwick (Sydney, 4 October 2006). Barwick recommended that young barristers should not ‘lose the opportunity of meeting the judge socially if he can’: Molomby & Donohoe, above n 19, 15.

635 National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 108.

636 It also adds to the interesting background surrounding both the Bank Nationalisation Case and the Communist Party Case.
these books for me!' Barwick recalled being infuriated and acknowledged that he was short-tempered when he retorted that: 'You can go to buggery' and then walked out of the court. According to Barwick, Evatt never forgot this. The reaction of the judge to this incident is unknown.

Many observations can be made as a result of this incident. It illustrates the differences between the advocacy of Evatt and Barwick and the relative importance they ascribed to knowing the members of the Court and tailoring submissions accordingly. It also reveals Barwick's failure to control his emotions and show respect - key elements in the category of personation. This incident also reveals the difference between exemplary advocacy or the ideals of advocacy which requires calmness, flexibility and respect, and advocacy in practice.

An example of where Barwick's submissions benefited from his knowledge of the court, and the particular judges, is found in an anecdote of an appearance by Barwick in the Privy Council. Barwick appeared for a young woman who had lent a married man a substantial sum of money after they formed a friendship and he signed promissory notes in her favour. Upon his death, the man's Will provided that all his personal effects were left to his widow and the equity in his house to the young woman whom he appointed his executrix. The High Court allowed an appeal from his widow under the Testator Family Maintenance Act entitling her to his entire estate and ordering the young woman to pay all the legal costs of the proceedings. The Privy Council found in favour of Barwick's client by allowing the appeal and the High Court's orders were set aside. Barwick deliberately referred to a controversial passage from the High Court's judgment which appeared to suggest that the relationship between the married man and the young woman disentitled her to be repaid the debt. Barwick revealed later, in his autobiography, that he was also aware that one of the Lords had a mistress and therefore this case would be significant for this particular Lord.

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637 National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 26. According to Marr, in response to the comment from the bench as to why Evatt was not formulating an argument based on this previous case, Evatt stated, 'I am afraid my junior did not draw it to my attention' and then Barwick retorted 'Go to buggery' and left the court. Marr, above n 8, p.19. In any event, the general substance of this anecdote was also confirmed by Murray Gleeson: Interview with Murray Gleeson, Chief Justice of the High Court of Australia (Sydney, 14 August 2006).

638 Ellis v Leeder [1951] HCA 44; (1951) 82 CLR 645 (3 August 1951); Interview with Murray Gleeson, Chief Justice of the High Court of Australia (Sydney, 14 August 2006).

639 Leeder v Ellis (1952) 86 CLR 64 (8 October 1952); Interview with Murray Gleeson, Chief Justice of the High Court of Australia (Sydney 14 August 2006); Barwick, A Radical Tory: Garfield Barwick's Reflections & Recollections, above n 1, p.60. Barwick indicated to the Privy Council that there was no specific allegation of adultery at the hearing and nor was the validity of the promissory notes challenged.

640 Barwick, A Radical Tory: Garfield Barwick's Reflections & Recollections, above n 1, pp.58-60; Interview with Murray Gleeson, Chief Justice of the High Court of Australia (Sydney, 14 August 2006).

641 Barwick, A Radical Tory: Garfield Barwick's Reflections & Recollections, above n 1, pp.58-60. Apparently, the Law Lord about whose personal affairs Barwick knew said "What a prig" in reference to Justice Dixon: Interview with Murray Gleeson, Chief Justice of the High Court of Australia (Sydney, 14 August 2006). At one point during
6.2 Barwick's Approach to Presentation

According to Barwick, one thing he learnt as a barrister was how to present what he wanted to say as attractively as he could.642

Barwick's Ability to Conceptualise the Case

There is, it appears, universal acknowledgment that one of Barwick's greatest strengths was his ability to conceptualise a case in simple terms, including the simplicity with which he conveyed often complex propositions. This ability greatly contributed to his establishing a reputation as one of the leading appellate advocates. Porter believes that 'the real key to his success as an advocate, [was] I would say ... the ability to reduce complication to simplicity and argue as though there was no possible other interpretation except his.'643

At the Bar, Barwick practised and adopted the technique of advancing succinct and relevant arguments and conceptualising a case in simple terms. This, however, did not always result in simplicity. Mason observed that:

I always thought that he had the idea that you had to be able to express every relevant thought within the framework of one sentence, and that rather explains why he has all these rather long, involved sentences.644

According to Slattery:

He possessed the great ability to present succinct submissions in Court in a pleasant conversational style which seemed to appeal to judges. He was never verbose in his presentations to the Court. He always came quickly to his main points and when he was satisfied the Court had understood his submissions he resumed his seat.645

the appeal, one of the Lords asked Barwick whether adultery had been an issue. Barwick responded that it had not. Further, Barwick was asked whether there was any evidence of adultery and Barwick responded with words to the effect that 'the cynical could say so because the lady went to the man's house almost every weekend over a period of years'. The Lord then stated that such a matter had to be charged as well as proved and added: 'By the way, is it the law that if I lend my mistress £100 I can never recover it'. Barwick responded that he had no doubt that it was not the law but 'the contrary would appear from what I read in the High Court's judgment'.

642 National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 37.
643 Interview with Chester Porter QC (Sydney, 2 April 2006).
644 Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 February 2006).
645 Slattery, above n 160, 416.
Slattery’s description of Barwick as possessing a ‘pleasant conversational style’ is supported by the comments of many of the appellate judges at the time and his contemporaries. Slattery’s comment is also supported by the analysis of Barwick’s argument in the *Bank Nationalisation Case* and, to a lesser extent, the *Communist Party Case*. It appears that while a ‘pleasant conversational style’ was Barwick’s prevailing style, there were occasions where his submissions and his dialogue with appellate judges were clouded by bouts of arrogance (this is discussed later in the context of both constitutional cases).

Barwick’s style in conceptualising a case was the direct result of his early influences at the Bar. In his early years at the Bar, Barwick was briefed to appear with George Flannery KC. Flannery has been described as ‘the master of succinct argument at the Sydney Bar’.\(^\text{646}\) According to Marr, Flannery was renowned for only arguing points that he believed he could win and as a result, the courts were always attentive to his submissions knowing that he would not waste their time with irrelevant arguments. In a critical appeal, Flannery was known to have addressed the High Court for only 10 minutes and won comfortably. As an advocate, Barwick did not consciously imitate or attempt to replicate Flannery’s restraint but ‘his style of succinct argument influenced the young barrister’.\(^\text{647}\) It is said that Flannery was one of the very few advocates whom Barwick admired.\(^\text{648}\)

During his time at the Bar, Barwick developed the ability to conceptualise a case quickly and effortlessly. This was a useful skill which also assisted him in advancing submissions which were simple, logical and easy to follow - a key element and ideal of appellate advocacy. Many of Barwick’s fellow barristers working on his floor were impressed by:

... the man’s exceptional forensic cunning – he saw to the heart of problems at a glance, upended them, shook them, broke them down to first principles to answer the only question that aroused his lawyer’s curiosity: how do I win?\(^\text{649}\)

The references to ‘forensic cunning’ and ‘how do I win’ may however also suggest that Barwick’s primary focus was on success in any given case. While success is clearly the ultimate objective for every advocate, appellate advocacy needs to be undertaken within the parameters of the ethical obligations owed by barristers to the court. However, within these parameters, there is scope to employ strategy and tactical measures to assist an advocate in their attempts to persuade an appellate court. Ultimately, the adversarial system and the administration of justice rely on a contest of competing arguments with each side seeking to persuade the decision-makers. Therefore, to seek

\(^{646}\) Marr, above n 8, p.18.
\(^{647}\) Ibid.
\(^{648}\) Ibid.
\(^{649}\) Ibid, p.30.
to identify the crux of the problem quickly and employ it in submissions with the aim of persuading the appellate court and ‘winning’ is an obvious and inevitable by-product of the adversarial system.

However, as discussed earlier, attaining levels of exemplary advocacy does not necessarily equate to success in terms of the judges finding in the advocate’s favour for a variety of reasons.

Hughes also recalled Barwick’s ability to get to the heart of a case and distil it down to its core as well as his approach to preparation. He stated that:

[Barwick] developed and applied to the practice of the forensic art qualities of pellucid thought in both the formulation and expression of argument; he had a highly developed ability to discard irrelevancies and get to the heart of a case. As one of the very few present members of the Bar who worked as his junior I can testify to aspects of his conduct which made an abiding impression on me. He would write out in his own hand the main propositions upon which his argument was to depend. He believed that writing down the essential points was a necessary discipline. This was long before the days of compulsory written outlines.

Porter suggested that ‘one of the reasons why a court liked Barwick was that he would come to the point quickly and he wouldn’t waste time ... and when you get to the High Court, what they want is quality, they don’t like their time being wasted’. Kirby has suggested that ‘[d]irectness in an advocate is a great strength’. Gleeson also confirmed that Barwick had the reputation of being able to simplify matters – an important aspect of conceptualising the case: ‘Some people would accuse him on an occasion of over simplification but he had a great capacity to go to the heart of an issue and ... reduce the issue to its essentials’. Gleeson’s comment supports the overwhelming view that Barwick had an impressive ability to identify the heart of an issue and convey that to a court, but it also identifies a potential weakness in his advocacy - the problem of over-simplification. On occasions, Barwick could over-simplify certain issues in an effort to strip them of their complexity, yet, by doing so, he may not have accurately conveyed the totality of the issue at stake. This weakness also reflects on his experience during his early years at the Bar where his submissions were often considered ‘too brief’ as discussed in

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650 Interview with Hon. Tom Hughes AO QC (Sydney, 2 August 2006).
651 Thomas Hughes, ‘The Rt Hon Sir Garfield Barwick AK GCMG’ (Speech delivered at the Memorial Service, Sydney, 11 September 1997) provided by Tom Hughes on 2 August 2006.
652 Interview with Chester Porter QC (Sydney, 2 April 2006).
654 Interview with Murray Gleeson, Chief Justice of the High Court of Australia (Sydney, 14 August 2006).
Chapter 2. In his autobiography, Barwick acknowledged that ‘I had a habit of condensing my submissions’. 655

Marr described Barwick’s advocacy in the following way:

‘Mr Barwick! You are simplifying the position’ came the frequent cry from the bench. It was the cry, more often than not, of a judge in confusion, sensing a flaw in Barwick’s argument but attracted to it nevertheless. Barwick loved to steal a win, to draw the court from a reasonable beginning by strange, usually imperceptible steps to an apparently unavoidable conclusion. It was considered unwise to give judgment in Barwick’s favour without first sleeping on it. 656

Simplicity and brevity were clearly Barwick’s strong point. However, these can easily be transformed into a weakness.

The description of Barwick’s advocacy by Marr seems to suggest that Barwick employed almost hypnotic charm to mesmerise judges with his advocacy and that he managed to steer, or lure, the judge to adopt a conclusion that Barwick wanted the judge to reach. Gleeson recalled:

According to what I heard when I first came to the Bar, there were some judges who were very cautious about Barwick because they thought that he might over simplify issues in a way that they didn’t have the capacity themselves to recognise and deal with at the time. I am not talking about the High Court in that regard. 657

Gleeson also alluded to the belief of some judges (not High Court judges) that Barwick had a tendency to over-simplify issues and propositions to make them attractive or persuasive to them personally. Such judges would exercise caution and take time to consider them in more detail at a later stage rather than ruling on issues immediately. 658

Ross Barwick agreed that his father had the ability to advance a proposition that ‘would be mounted in a simple and compelling form and then elaborated upon according to the facts of the case’. 659 A demonstration of Barwick’s ability to reduce complex propositions into simple ones is evident from a story recounted by Hughes. In 1954, Hughes was briefed as junior counsel to Bruce Macfarlan QC to

655 Barwick, A Radical Tory: Garfield Barwick’s Reflections & Recollections, above n 1, pp.32-33.
656 Marr, above n 8, p.37.
657 Interview with Murray Gleeson, Chief Justice of the High Court of Australia (Sydney, 14 August 2006).
658 Ellicott described Barwick as follows:
Barwick was the greatest advocate I saw. He was simple, straight forward, emotive where necessary and able to charm judges. In fact, some of the judges used to say, ‘Don’t give an ex-tempore judgement, because you need to get off the bench to see things in the clear light of day’. I think that is how Barwick was – immensely convincing. I saw him in all courts, right up to the Privy Council.
Address by Justice RV Gyles, above n 272, 43.
659 Interview with Ross Barwick (Sydney, 4 October 2006).
appear for Antill Ranger Pty Limited, an interstate transport operator, to recover moneys paid as road tax under State legislation that was declared invalid by the Privy Council in *Hughes & Vale Pty Limited v NSW*. The High Court unanimously held that the State could not bar such a claim under section 92 of the Constitution. Barwick appeared on behalf of Edmund T. Lennon Proprietary Limited in a case heard at the same time. The High Court's decision was the subject of a special leave application to the Privy Council. Hughes was briefed as junior to Barwick alongside Robert Gatehouse of the English Bar. Hughes recollects being present in Barwick's chambers when Barwick formulated, in what he describes as barely legible handwriting, the cardinal proposition upon which the case turned. Hughes states that its 'stark simplicity was alluring'. The proposition was as follows:

The State is unable to remove all legal remedy for conduct by itself and its officials which by virtue of the Commonwealth Constitution it may not authorize or justify. That submission may be a narrow statement of a wider proposition that the State may not under any guise validate its own legislative acts which are beyond its competence or validate administrative acts done in pursuance of such invalid legislation.

The Privy Council granted special leave but dismissed the appeal in 1956. The essence of the decision echoed the proposition Barwick had formulated and conveyed to the others in his chambers.

Porter suggested that, for Barwick:

the law was perfectly clear and simple and it was a simple matter where he had a new problem of devising the answer to that problem from the established principles or from the text of the statute itself. He was very much one for coming back to the text rather than dredging up every possible decision that had ever been made on the text.

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661 (1954) 93 CLR 1.
663 Later a judge of the Queen's Bench Division.
664 Ibid, above n 603, 662-663.
665 Ibid.
666 94 CLR 177.
667 Ibid, above n 603, 663.
668 Interview with Chester Porter QC (Sydney, 2 April 2006).
David Jackson believed that a ‘lot of things [Barwick] did on the bench I think mirrored the way in which he had been an advocate and I don’t mean that in any bad sense’.

Ellicott indicated that ‘[o]ne of his gifts ... was to be able to reduce [a] proposition to an example. I can recall him doing it and again it’s quite a gift, not everybody can do it.’ There is evidence of Barwick doing this in both the Bank Nationalisation Case and the Communist Party Case.

Barwick’s ability to transform the most complex and difficult concepts and issues into very basic propositions was the key to his success. As Marr stated: ‘This power to simplify and illuminate was Barwick’s greatest tool of persuasion. He was the master of it, of the perfect exercise of insight, ingenuity and unobtrusive eloquence.’

**Barwick’s use of the Opening and the Reply**

Barwick often used his opening to outline his conceptualisation of the case. According to Mason, Barwick would seek to identify and conceptualise the main issue in the case and formulate it in a way that was favourable to his client:

> There isn’t any doubt that in terms of the opening he’d be concentrating on what the crucial issue in the case is. And he would be putting everything in a context which would be designed to ensure that the outcome – the answer to that issue – would be favourable to his client.

Gleeson suggested that Barwick was able to balance the desire to present his client’s case in the most favourable light with the notion of justice to ensure that he retained the confidence of the court:

> Barwick must also have had, from everything I’ve heard, ... a very keen sense of justice. In other words, he must have known how to present a case in its best light. And you can only present a case in its best light if you understand where the merits of the case lie. After all, what you are ultimately trying to do is persuade the court that the outcome for which you are contending is fair. That’s an elementary proposition. If an advocate loses sight of that, you can be as clever as you like but you are not likely to make much of an impression on the bench.
In reply, Barwick ‘had a very clear idea of what was permissible’. According to Mason, Barwick would:

... be on his feet when he was the respondent and an opponent was going beyond the bounds in reply. And he’d be saying “that’s not permissible”, “that’s outside the scope of reply”, and objecting to what his opponent was saying. Sometimes the Court would say “oh well, look it’s really new matter and we’ll give you the opportunity to reply” but very often they’d say “no, it is outside the scope.”

When Barwick was the respondent, he would seek to limit his opponent’s reply, yet when he appeared for an appellant he would seek to push the boundaries in his reply, often by advancing submissions that appeared tenuously based on arguments in chief or by introducing material that had not been alluded to in his argument in chief - often referred to as ‘trailing your coat’.

According to Porter, Barwick was renowned for ‘trailing his coat’:

... “trailing his coat” means that he gave a very brief opening as counsel for the appellant and then brought forward his major arguments in reply, and the other poor bugger didn’t have a chance to answer them. A tactic I don’t think would be permitted today. But he got away with it, and the story goes that on one occasion he “trailed his coat” and then viewing the opponent’s arguments, spent his time reading his brief for the first time.

If Porter’s anecdote is correct, it suggests that Barwick did not engage in a comprehensive preparation at all times. Apparently, after ‘trailing his coat’, Barwick would come ‘in strongly in reply’. Hughes recalls that this ‘was a favourite tactic’ employed by Barwick. Ellicott agreed, and suggested that Barwick would ‘put the clever point, trail the old coat as Chester says, let the opposition get up and then lambast them in reply, and use the reply as the basis upon which to come in and wrap up the case’. Hughes also recalled that: ‘Barwick was great in reply. He would perhaps treat a point fairly lightly in chief so that it was there and in play, but put the real emphasis of his argument as regards that point in his reply’. Ellicott acknowledged that Barwick adopted this

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675 Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 February 2006).
676 Ibid.
677 Interview with Chester Porter QC (Sydney, 2 April 2006).
678 Ibid.
679 Interview with Hon. Tom Hughes AO QC (Sydney, 2 August 2006). David Jackson suggested that even now when one advocate attempts to introduce new material after the other side has had their turn, the comment likely to be heard is that “you are trying to do a Barwick reply”: see Interview with David Jackson QC (Sydney, 2 August 2006).
680 Interview with Hon. Robert Ellicott QC (Sydney, 8 August 2006).
681 Interview with Hon. Tom Hughes AO QC (Sydney, 2 August 2006). According to Gibbs, Barwick was accustomed to using ‘the reply to mount a deadly counterattack’ with great advantage: Harry Gibbs, ‘Appellate Advocacy’, above n 11, 499.
tactic but that it was not something that everyone could do. Barwick also employed a technique of ‘concentrating in [his] reply on pointing out the submissions to which the other side has not replied’. Barwick acknowledged that the use of the reply requires judgment; it ‘has great risks because your court may have formed its view before you reply on the thing you want to reply on’. Barwick stated that:

it’s a technique that’s got to be very selectively used. I did use it selectively. But where the case clearly – I could put my point of view without trenching on the defence, the opposition to my point of view, then I could leave the reply to the opposing point of view to a reply which is its proper function and that gives the impression very often that you divided the case up and kept the best back, but it can be very effective because you can then deal with a thing that your opponent has said and which, as a rule, he can’t touch any more.

However, as is evident from Barwick’s approach to preparation and presentation, including in reply, he was a strategist. As Ellicott indicated:

He was a tactician - much more of a tactician than your average barrister because most barristers I think just say well what are the points I want to put and get up and put them and sit down and do a short reply. Get on with the next case. You don’t see too many tacticians around.

There are two ways of approaching Barwick’s tactics in ‘trailing his coat’. As Ellicott suggested, Barwick was a tactician and used this in his advocacy, particularly when he was in a position to do so in the context of advancing a reply. The alternative approach is to regard ‘trailing your coat’ as unethical or, at the very least, outside the spirit of appellate advocacy, as it seeks to gain an advantage over an opponent in circumstances where they are unable to respond further. The tension between these perspectives has not been resolved.

Porter suggested that ‘trailing your coat’ would not be permitted today. It is probably more relevant to ask whether it is in fact possible. The answer is probably not. This is largely due to the fact that, with the introduction of the requirement to submit a written outline of arguments and/or written submissions in all appellate courts in Australia, all arguments are effectively foreshadowed in written form before the oral advocacy commences. As a result, it is easier to identify which arguments are

682 Interview with Hon. Robert Ellicott QC (Sydney, 8 August 2006).
683 Interview with Hon. Tom Hughes AO QC (Sydney, 2 August 2006).
684 Molomby & Donohoe, above n 19, 15.
685 Ibid. See the example of Barwick’s use of the reply in Bank of New South Wales v Laing as discussed in Molomby & Donohoe, above n 19, 15. See Laing v Bank of New South Wales (1952), 69 WN (H. Ct. NSW) 318 and Bank of New South Wales v Laing [1954] AC 135.
686 Interview with Hon. Tom Hughes AO QC (Sydney, 2 August 2006).
being sought to be introduced for the first time in reply. Therefore, Barwick’s ability to employ the tactic of ‘trailing your coat’ would be significantly curtailed in modern day appellate advocacy such that any advantage that he derived from this tactic (which is difficult to measure) would no longer exist. It does not, in any case, appear to have damaged his reputation.

Barwick’s Engagement with the Bench

In his advocacy generally, Barwick employed few notes and preferred dialogue between counsel and Bench (a practice he continued as a judge). According to Barwick:

> From my point of view as a practising counsel, the important thing was to have (the judges) talking to you so that you had the benefit of what they were thinking, what angles of the matter were attractive to them. The hardest judge to work with is a fellow who never says a word. 687

Barwick thrived on the dialogue between himself and the members of the Bench. This, as he remarked, provided him with an insight into the minds of the judges; it allowed him to tailor his submissions and clarify any misconceptions. Consequently, he did not like to appear before those judges who did not engage in dialogue with him as will be apparent in the examination of Barwick’s early advocacy in the Bank Nationalisation Case before the Privy Council. Barwick made the following revealing comment about Chief Justice Dixon: ‘He was difficult to argue before because he didn’t often enter into any exchange with you’. 688

In Porter’s words: ‘If you can use the boxing analogy, [Barwick] was very quick on his feet ... and he was very adroit at taking the judicial comment and moulding it his way’. 689 Porter added that Barwick ‘could think up a very quick answer and a very good answer just immediately’. 690 Ellicott agreed and suggested that it was Barwick’s ‘quickness of mind, his command of the brief, his agility of words’ which allowed him to deal with judicial questions effectively. 691

Mason stated that Barwick ‘had the rare capacity, founded on a mastery of his case, to take advantage of the hostile question by using it as a vehicle for the further elaboration of his argument’. 692 He suggested that Barwick:

> more than anyone else made ground off questions that were asked - even questions that were designed to be hostile questions. A lot of counsel will tell you that they welcome questions from

687 Bailey, above n 19, 1309.
688 Ibid.
689 Interview with Chester Porter QC (Sydney, 2 April 2006).
690 Ibid.
691 Interview with Hon. Robert Ellicott QC (Sydney, 8 August 2006).
the bench. Now, in some cases I don’t think that’s an entirely accurate statement. But in his case it was a very accurate statement. He enjoyed dealing with questions and he regarded them as vehicles which would enable him to make a point effectively.693

Gleeson agreed with this:

Barwick’s great ability – this was widely known in the profession ... was to engage the bench in discussion with him. Most other advocates in Barwick’s time used to just address the court. They didn’t welcome interruption. They were often not very good at handling interruption. Barwick, on the other hand, consciously set out to engage the bench in dialogue ... But Barwick’s style of advocacy welcomed, and as I say encouraged, dialogue.694

**Barwick’s Substance over Elegance**

As discussed previously, a key element and ideal of appellate advocacy is focusing on the substantive aspects of an advocate’s submissions although there are also benefits associated with delivering the submissions in an elegant manner. Barwick’s emphasis was on the substance of his submissions, including his comprehensive preparation and ‘ground up’ approach; it appears that he did not generally avail himself of the benefits associated with delivering his submissions in an elegant manner. Mason believed that ‘[t]here was nothing elegant about’ Barwick.695 Gleeson agreed: ‘From what I heard about him, I doubt that he was an elegant advocate. I think in certain circumstances he might even have been a fairly truculent advocate’.696

Contrast the views of Mason and Gleeson with those of Byers. When Byers came to the Bar in 1944, he recalled that:

... Barwick was every junior’s first choice. He was, I think, a better lawyer than Sir Frank Kitto ...

But the difference was marginal and Barwick was incomparably the more spectacular and attractive advocate ... At this stage, his vanity was kept within normal bounds and his conversation was both instructive and interesting.697

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693 Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 February 2006).
694 Interview with Murray Gleeson, Chief Justice of the High Court of Australia (Sydney, 14 August 2006).
695 Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 February 2006). According to Sir Anthony Mason, Alan Taylor, Douglas Menzies and Robert Menzies were advocates who displayed great elegance.
696 Interview with Murray Gleeson, Chief Justice of the High Court of Australia (Sydney, 14 August 2006).
697 Byers, ‘Obituary: the Right Hon Sir Garfield Barwick AK, GCMG, QC’, above n 120, 723.
This does not necessarily suggest that Barwick was an elegant advocate. However, the reference to Barwick's vanity, infers that at some later stage, it exceeded 'normal' bounds. This is discussed further in the section on 'Personation'.

*Barwick's Flexibility, Discretion and Tact*

Barwick's approach of employing few notes and engaging in dialogue with the bench was, according to Mason, also designed to ensure that Barwick remained flexible. Mason stated:

I am inclined to think that was part of another strategy and that was you wanted to keep your mind as flexible as possible. You wanted to see how the argument went after you started to present it, and therefore you didn’t want to get yourself tied to a rigid presentation. 698

This allowed Barwick to engage the bench effectively in discourse and respond to judicial questions while also noting the comments and observing the reactions of the judges. He was then able to tailor his submissions. Mason suggested that this:

... was also a key to his advocacy ... He had an extremely flexible mind and if he saw that the case was sort of moving one way, he'd be prepared to depart from a proposition and to amend a proposition to take advantage of some new thought or some new situation that had developed. He wasn’t like a General on the Western front in the Second World War sticking to a plan of attack, and sort of trench line warfare. With him it certainly wasn’t trench line warfare. 699

Flexibility, discretion and tact, as we have seen, are key elements and ideals of appellate advocacy. Barwick’s approach to judicial dialogue assisted him greatly in remaining flexible. According to some,700 it is this flexibility, together with his failure to respond to judicial comments that evaded him during his presentation in the *Communist Party Case* (discussed in Chapter 9).

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698 Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 February 2006).

699 Ibid. According to Barwick, during the years that Chief Justices Latham and Dixon respectively presided over the High Court, any advocate appearing before the High Court would have become accustomed to engaging in a dialogue with the Bench and would have benefited from it. Whilst Dixon personally did not like engaging in dialogue with advocates, many of the other judges on the High Court did. However, Barwick noted that not all Australian advocates enjoyed such interrogation:

I remember when later presiding over the High Court, [one] counsel protesting when asked a question, and saying that he preferred to present his argument without interruption. To my mind, dialogue rather than speeches heard in silence is to be preferred. For one thing, such exchanges are more likely to promote sound judgment. At any rate, during the *Banks* case I answered many questions and I think by answering them, made my argument clearer to my listeners.


700 Ayres, above n 50, pp.220-222. See also Owen Dixon, Diary, 14-15 December 1950, Owen Dixon, Personal Papers. See also n 620.
Barwick was acutely aware of the important role that discretion played in ensuring he was focusing on the relevant issues and discarding the irrelevant ones. As an advocate, ‘Barwick always stressed the importance of distinguishing between relevant and irrelevant facts and considerations and the need to isolate the essential issues in a legal problem’. While being relevant to discretion, relevance is also closely associated with conceptualising the case as a key element of effective appellate advocacy.

In an interview in 1983, Barwick was asked what the most important skills of a trial lawyer are. In response, he stated:

I thought about this ... and came up with the answer that it was to see quickly what was relevant and what was not and to be able to apply it. That goes not only for the major issues, but also right through the whole court process, including cross-examination. It means being able to perceive the relevance of what’s said or done related quickly to the issues and either bring it out or push it aside. You must have speed, I suppose good cerebration, and, as well as I can phrase it, quick perception of relevance.

The skills Barwick identified are equally applicable to appellate advocacy and represent key elements and ideals of appellate advocacy. In a follow up question as to whether these skills can be obtained from books, Barwick responded: ‘Oh no. You need practice at it and need to have the courage to discard irrelevance’.

When asked about the temptation to include everything, Barwick responded: ‘Yes ... being prepared to throw overboard all the things that look to be advantageous but are irrelevant and may obscure the real issues. Matters that do no more than lengthen proceedings are in the long run really minus quantities’.

Mason stated that Barwick would ‘recognise that a proposition was untenable, or I think more importantly in terms of High Court advocacy, he had the ability to realise when a proposition ought to be discarded’. Whilst Mason suggested that this ability was ‘intuitive’ he added: ‘no doubt intuition is partly borne of experience and if you have appeared before a Court, you know the reaction of judges, you can tell that a proposition isn’t going to go down’.

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702 Bailey, above n 19, 1305.

703 Ibid.

704 Ibid. In an interview during his time as Chief Justice, Barwick stated that an ‘advocate must be able to abandon a point that has been answered rather than flog a dead horse’: ‘Barwick’, above n 47, 10.

705 Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 February 2006).

706 Ibid.
As an advocate, Barwick understood the combined importance of watching the bench, remaining flexible, using his discretion to discard irrelevant arguments and tact. The following anecdote demonstrates Barwick’s ability to employ these particular elements and ideals of appellate advocacy in practice. Barwick (with Jack Smyth as his junior) was briefed to appear on behalf of a publican who was charged with refusing to supply, on demand, beer at the regulation price. A government inspector who attended the premises and was initially told there was no beer, located some in the cellar, paid for a bottle, then left.\textsuperscript{707} It had been suggested by Smyth that technically the government inspector did not fail to get his beer in light of the fact that he obtained it in the cellar. Barwick did not seriously consider this point and submitted a range of complex legal arguments to the Full Court.\textsuperscript{708} However, he recalled watching the bench closely and noticing that there was not a positive response to these arguments. As a result, Smyth whispered: ‘Why don’t you try the other point?’ Barwick agreed and submitted that, on the facts, the accused had not failed to provide the beer. In response, Barwick recalled that Justice Rogers then said to me: ‘Why did you keep your best point to the last? That’s not like you’. Consequently, the publican was acquitted by a majority due to this ‘other point’. Barwick stated that it; ‘... shows that sometimes in litigation it is not wise to abandon any point’.\textsuperscript{709}

This example demonstrates, from an advocate’s perspective, the importance of watching the bench to gauge the reactions to their submissions and flexibility in adapting their submissions as required. This example also illustrates the reason that advocates should be selective in the arguments they advance and must gauge the reaction of the judges to determine whether to resort to alternative or ‘back-up-type’ arguments.

The comment by Justice Rogers also suggests that Barwick had a reputation for submitting his best points first. When answering a question as to how he achieved his great success in the law, Barwick referred to this anecdote in the context of advancing a ‘doubtful one’ – that is to say, a possible but not necessarily strong argument. In so doing, Barwick indirectly refers to his various strengths as an advocate. These correspond with the elements and ideals of appellate advocacy; namely, conceptualising the case, relevance, flexibility, tact and discretion as well as courage. Barwick stated:

Well, I can work hard, and I’ve had good health, but I have had a quick sight and could see the point quickly, well ahead of many of my fellows, and that’s an advantage. And I think a degree of courage, not to worry about the irrelevant and to concentrate on the essentials. After all, most

\textsuperscript{707} Barwick, \textit{A Radical Tory: Garfield Barwick’s Reflections & Recollections}, above n 1, pp.44-45.

\textsuperscript{708} Which comprised Jordan CJ, Rogers and Street JJ.

\textsuperscript{709} Barwick, \textit{A Radical Tory: Garfield Barwick’s Reflections & Recollections}, above n 1, pp.44-45.
things have only one or two points that are worth pushing. Sometimes you have to press a
doubtful one.\textsuperscript{710}

In terms of discretion and judgment, Barwick suggested that you could ‘improve your judgment by
learning by your mistakes and not make the same mistake twice but you must have some native
capacity of judgment’.\textsuperscript{711}

Mason confirmed that Barwick did on occasion succeed with arguments ‘which were dubious’ and stated:

Now, I don’t know that I’d say he ever put an argument to a Court knowing it was a wrong
argument, I think the arguments he’d be putting are arguments that he always regarded as
arguable. But the thing about him was that arguments that might not have been arguable in the
hands of another Counsel were arguable in his hands.\textsuperscript{712}

The anecdote above also demonstrates the different perspectives associated with a particular
argument - whilst Barwick considered the successful argument to be a weaker argument, Justice
Rogers thought that it was his strongest argument. It also illustrates that an advocate’s discretion to
discard irrelevant arguments is to some extent a subjective matter.

The anecdote also supports Mason’s view of Barwick, namely, that he did not regard Barwick as a
tactful man. Mason suggested that ‘[w]hen you’re the best and you consider yourself to be the best,
tact isn’t a very important quality’.\textsuperscript{713} Mason implies that it was Barwick’s arrogance that resulted in
tact becoming less important. This is also relevant to the analysis of Barwick’s performance in the
Communist Party Case (discussed later). Barwick’s arrogance may have, on occasions, impacted his
ability to exhibit other elements of appellate advocacy, and achieve the ideals of appellate advocacy.

\textbf{Barwick’s Approach to Citing Authority}

Barwick was always concerned with ensuring that he cited authority with care and identifying
relevant authorities was an important part of his preparation. Mason recalled that:

\textsuperscript{710} Bailey, above n 19, 1313
\textsuperscript{711} Molomby & Donohoe, above n 19, 10.
\textsuperscript{712} Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 February
2006). In fact, Sir Anthony Mason recalled a comment from a case in which he appeared, namely, \textit{Television
Corporation Ltd v Commonwealth} [1963] HCA 30; (1963) 109 CLR 59 (28 August 1963). At one stage, Sir John
Kerr was advancing an argument and John Holmes QC said to Sir Anthony Mason, referring to the argument,
that ‘this is a Barwick argument but the problem is it’s not being presented by Barwick’. Sir Anthony Mason
recalled: ‘And I think he was right. I don’t recall the details of the argument but it had all the ring of a Barwick
argument, but it wasn’t being presented with that confidence and skill that Barwick would have presented the
argument himself’.

\textsuperscript{713} Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 February
2006).
He was very good ... in distinguishing authorities in the course of argument, very good indeed, and that was an important point in the preparation of the case. You need to look at the authorities that the other side would be relying on and you need to be able to distinguish them, put them in their appropriate context. I remember one experience I had with him very early on, this was in *Nelungaloo*, this was an interlocutory application in *Nelungaloo* if I remember rightly.  

Mason recalled that, after the Privy Council had handed down its decision in *Nelungaloo v Pty Ltd v The Commonwealth* (1950), another action was started and the question arose whether this other action could continue in light of the Privy Council’s decision and the question was whether it was going to be removed into the High Court. Mason stated:

> Now, I remember during the course of the preparation of the case, I drew his attention to something that Dixon had said in an earlier case. It had something in it that was favourable to us but it also had something in it that wasn’t as favourable. His attitude, I can remember him saying to me on that occasion “well young fellow, this is an authority that’s got spots on it. You never cite an authority that’s got spots on it”. In other words, what he was saying was, unless the thing really is clearly in your favour, forget about it.

Mason added that:

> And of course, see, don’t forget we were dealing with a judgment, I’d drawn his attention to a judgment of Dixon’s, and of course he was still on the court and therefore he was aware of Dixon’s antagonism and antagonism in relation to the issues in this case. Therefore, it was more likely to do us damage than to be of advantage to us.

Barwick always believed that he would be able to persuade the judges of the High Court to depart from precedent in appropriate circumstances provided that he advanced compelling arguments. That is, they were not ‘slaves to precedent’. His ‘ground up’ approach often provided him with the necessary compelling arguments to do so.

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714 Ibid.

715 *Nelungaloo Pty Ltd v The Commonwealth* (1950) 81 CLR 144 (27 July 1950).

716 See *Nelungaloo Pty Ltd v Commonwealth (No 4.)* (1953) 88 CLR 529 (8 December 1953).

717 Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 February 2006).

718 Ibid.

6.3 Barwick’s Approach to Personation

Barwick’s Courage

In the previous chapter, the importance of courage in advocacy was considered. Barwick was courageous as an advocate and stood up to judges on countless occasions. Mason described Barwick as ‘tough, courageous and tenacious’. Ellicott described Barwick as ‘fearless’ in life and claimed that this came through in his advocacy. He said that Barwick was associated with ‘excellence ... courage and conviction’. Barwick often engaged in fiery exchanges with judges in an attempt to convince them of the merits of his submissions. According to Marr, as an advocate, Barwick was:

- most effective in attack and his growing ascendancy over New South Wales judges was in no small part due to the terrifying fights he was willing to have with the bench when his tactics demanded it. The courts, too, were coming to respect the man.

Marr’s statement raises a tension that exists with exhibiting courage. Courage is respected and admired only if it is used appropriately. Therefore, an advocate who maintains their position or stance on an issue in circumstances where it would be illogical to do so or in the face of considerable judicial discouragement is more likely to be viewed as obstinate, obnoxious or arrogant. This may also lead to the advocate becoming discourteous and disrespectful – or perceived as such – in certain instances. Marr’s statement implies that Barwick’s battles with the bench were ferocious which, Marr suggests, led to the courts respecting Barwick. However, these ‘terrifying fights’ may have also resulted in a negative impression of Barwick.

Marr’s statement refers to Barwick’s ferocious fights with the bench when his ‘tactics demanded it’. This appears to suggest Barwick’s unwillingness to retreat or compromise on certain issues or submissions that he considered central to his case. This is integral to effective appellate advocacy; the ‘terrifying fights’ that Barwick engaged in may have been justified. The question left unanswered is whether in these ‘fights’ Barwick demonstrated the necessary courtesy and respect. This is examined in more detail in the context of the Bank Nationalisation Case and the Communist Party Case.

According to Mason, Barwick remained respectful to the judiciary despite being ‘forceful’ in his views. However, he believed that one of Barwick’s weaknesses as an advocate was that, as a person who is naturally combative, he did not ‘display particular sensitivity to comments coming from the

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720 Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 February 2006).
721 Interview with Hon. Robert Ellicott QC (Sydney, 8 August 2006).
722 Marr, above n 8, p.30.
Mason suggested that there was 'an element in his mind – I’m a winner. There’s an argument – I’m going to win the argument.'

Porter also believed that one of Barwick’s weaknesses was arrogance and that it was possible that, as Dixon suggested in the Communist Party Case, Barwick ‘would be so tied up with his own argument that he wasn’t prepared to take a tip from the bench’. Hughes agreed that Barwick was arrogant but suggested that 'he had a lot to be arrogant about'. However, he also believed that another of Barwick’s weaknesses was his ‘unduly harsh judgment of others at times’.

Ross Barwick suggested that there were moments in his father’s advocacy where, after ‘having taken command [he] could sort of go over the top a bit and he could be very ... acerbic’. This will be explored in the context of the Bank Nationalisation Case and Communist Party Case. He also suggested that if his father ‘was inclined to be a little arrogant, it was not because he was uninformed, it was really superiority of intellect.

In contrast, Ellicott did not describe Barwick as arrogant. Instead, he stated that Barwick had an ‘assurance of mind that he was right’. He suggested that Barwick ‘was very convinced he was right ... [l]f he had a firm view that the propositions he was putting were right, he, you know, that’s it’. He described Barwick as ‘a strong personality who [spoke] with authority’ and was a ‘commander of people’.

The prevailing view of Barwick was that he was self-assured and confident which on occasions may have led him to being perceived as arrogant. His self-assuredness and confidence underscored his courage – a key element and ideal of appellate advocacy. However, in reality, if such courage was

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723 Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 February 2006).
724 Ibid.
725 Interview with Chester Porter QC (Sydney, 2 April 2006). Chester Porter QC suggested that ‘if Barwick ever had a disaster, I have no doubt he did have disasters in courts, over-confidence would have been a contributing factor’.
726 Interview with Hon. Tom Hughes AO QC (Sydney, 2 August 2006).
727 Ibid.
728 Interview with Ross Barwick (Sydney, 4 October 2006). For example, in a particular case where Justice Rogers of the Supreme Court was presiding, His Honour suggested just before the luncheon adjournment that the parties use the adjournment to attempt to resolve the case. His Honour said to the parties “so gentleman perhaps during the adjournment you might like to reflect”. Barwick said “well, your Honour it would be for my friend to reflect. In my case, I shine”.
729 Interview with Ross Barwick (Sydney, 4 October 2006).
730 Interview with Hon. Robert Ellicott QC (Sydney, 8 August 2006).
731 Ibid.
732 Ibid.
733 Ibid.
infected by bouts of arrogance or discourtesy then excellence in his advocacy may have been compromised.

**Honesty, respect and candour in Barwick’s Advocacy**

Honesty, respect and candour are all regarded as important elements and ideals of appellate advocacy in the context of personation. In common with most advocates, Barwick believed that it was important to be honest with the court, particularly in circumstances where an advocate was attempting to persuade the court to depart from established precedent. Barwick suggested that:

> The first thing you must have is complete frankness. You tell them what you are going to do, and be frank that you’re going to ask them to overrule it, depart from it, and you’re going to give them reasons why they should, not that they’re going to remake the law but they are going to expose the fault that’s already been made.\(^{734}\)

Barwick also knew the value of showing respect and due deference to a judge by, for instance, allowing a judge to believe that he or she had discovered a relevant point or reference, that is, he understood the importance of occasionally pandering to the judge. For example, Barwick learnt from George Flannery of one Supreme Court judge who prided himself on being able to read quickly. According to Barwick, if Flannery:

> wanted to educate that judge and read him a certain passage in a case he would not read him that passage. He would read a page or two beforehand and he’d read slowly and the judge would suddenly find the passage and the judge would say: “Oh, Mr Flannery, you need this passage” and of course he had found it for himself. Vanity is not unknown amongst judges.

> If Flannery had read the relevant passage directly to him there would possibly have been a certain antipathy whereas if the judge found it for himself it became acceptable – I saw George do that, I've done that, read the wrong page sometimes. That is only illustrative of the infinite variety of reactions that you are likely to arouse or induce in the appellate judge.\(^{735}\)

Whilst Barwick understood the need to be respectful to the court, this example reveals the manner in which respect can be used as technique to aid persuasion. This technique may, however, be viewed in a cynical way. Whilst respect is a key element and ideal of appellate advocacy, in reality, it

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734 Molomby & Donohoe, above n 19, 14.
735 Ibid, 12. However, Barwick suggested that it was often important to guard against circumstances where a member of the bench understands a proposition too soon:

> Well, if you've got on the bench a very acute mind that can start and deal with your proposition before you've put it which he could do and he could predispose his companions long before you got there. That depends on the line up. I wouldn't give, in some cases, Dixon a chance to get ahead of me like that, because he was a powerful man with his colleagues.

Molomby & Donohoe, above n 19, 15.
can be employed in a manner whereby an advocate seeks to derive an advantage. The quest to persuade judges can lead advocates even to the point where they attempt to manipulate the judges under the guise of showing respect.

Barwick was competitive and motivated by the desire to win. Mason described him as a ‘very argumentative character’ and ‘a combative character’. Mason described his father as ‘highly competitive’. He utilised his comprehension of the complexities and intricacies of the law to explore the various avenues of victory. According to Marr, this pursuit of victory made Barwick ‘one of the great brawlers of Phillip Street’. Once again, Marr’s comment implies that Barwick was a ‘fighter’ who had many arguments and suggests that Barwick did at times verge on a lack of respect and courtesy.

Barwick noted the importance of attempting to control the judicial dialogue without being discourteous and disrespectful. In reference to Dixon, he stated:

I’d watch very carefully in chief that I gave him no chance to cut in on it, if I could, and suggest some line that I wasn’t putting, as he sometimes did. That’s not easy because you can’t be rude and the task of diverting attention away is not easy.

However, there were occasions where Barwick lost his composure and was disrespectful to the court. He recalled an occasion where a judge said something to him and Barwick recounted that ‘before I could clip my tongue I said something that I oughtn’t have said’.

Based on the views of commentators and advocates, honesty, respect and candour are regarded as key elements and ideals of appellate advocacy. In reality, honesty and candour are easier to achieve as they coincide with an advocate’s ethical obligations, whereas respect can be compromised in the ‘heat of battle’ or whilst attempting to demonstrate courage – another key element and ideal of appellate advocacy.

*Barwick’s Use of Emotion*

As discussed earlier, emotion can be powerful in aid of persuasion if employed effectively but also has the capacity to cloud objectivity. Barwick considered himself to understand the importance of not getting emotionally involved in a case. He stated: ‘I think that’s [a] mistake that counsel wants to

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736 Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 February 2006).
737 Interview with Ross Barwick (Sydney, 4 October 2006).
738 Marr, above n 8, p.30.
739 Molomby & Donohoe, above n 19, 15.
740 National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 31.
avoid, to get emotionally involved at all in a case. That’s not always easy.\textsuperscript{741} He referred to \textit{Leeder v Ellis} (discussed earlier) as an example where he ‘was angry about what I thought was an injustice’.\textsuperscript{742} Consequently, he ‘appeared before the Privy Council for no fee to put it right’.\textsuperscript{743}

Generally, it has been difficult to identify evidence of Barwick’s use of emotion in appellate advocacy. His voice, however, was thought to be capable of conveying emotion, as suggested by Ellicott.\textsuperscript{744} Whilst an examination of the transcript in the \textit{Bank Nationalisation Case} and the \textit{Communist Party Case} does assist in identifying Barwick’s approach in practice, there are a few instances where it appears emotions have played a part in Barwick’s advocacy. However, in the examples referred to below, one reveals an instance where Barwick lost his temper in the courtroom and the other where he caused his opponent to become angry to his advantage. Previously, reference was made to the disagreement between Evatt and Barwick where Evatt had dismissed Barwick’s suggestion to advance a submission based on a particular decision and then suggested that Barwick had not brought it to his attention. In response, Barwick told Evatt to ‘go to buggery’ and left the court.\textsuperscript{745} Whilst this anecdote reveals Evatt’s failure to be honest with the court, it also illustrates Barwick’s occasional inability to control his temper in court.

Barwick also used emotion to his advantage in his advocacy, as illustrated, in the following anecdote. Whether this tactic was appropriate remains questionable. Byers recalled an instance where he observed Barwick’s advocacy in a trial relating to a minor libel action. He observed:

\begin{quote}
It was a very minor libel but one which had obviously aroused the passions of those involved. A notoriously short-tempered silk with his nondescript junior were for the plaintiff and Barwick and his junior represented the defendant. [Barwick] so badgered the short-tempered silk with sotto voce remarks and objections of one sort and another that the short-tempered silk completely lost control of himself and of his case. He was non-suited as a result. I doubt that this behaviour would be tolerated today, but the rules then were different and advocacy was more ruthless.\textsuperscript{746}
\end{quote}

Although Barwick’s tactics were questionable, it appears that his opponent was susceptible to these tactics and Barwick was seeking to take advantage of this fact. It may be inappropriate for an advocate to treat another advocate in this manner; however, it may also reflect the fact that advocacy in those days was conducted in a more robust environment and such behaviour was tolerated. Often, acceptable standards and practices reflect the context and times in which they

\textsuperscript{741} Molomby & Donohoe, above n 19, 13. \textsuperscript{742} Ibid. Discussed earlier in this chapter. \textsuperscript{743} Ibid. \textsuperscript{744} Interview with Hon. Robert Ellicott QC (Sydney, 8 August 2006). \textsuperscript{745} Marr, above n 8, p.19. This anecdote was also repeated and confirmed by former Chief Justice Murray Gleeson: Interview with Murray Gleeson, Chief Justice of the High Court of Australia (Sydney, 14 August 2006). \textsuperscript{746} Byers, ‘Obituary: the Right Hon Sir Garfield Barwick AK, GCMG, QC’, above n 120, 723.
occur. As we have seen, Byers stated that he doubted whether Barwick's behaviour would be tolerated today; Barwick's badgering would be likely to attract the attention of a judge who would instruct the advocate to cease, as together with any futile objections, such behaviour is likely to be considered disrespectful.

Nevertheless, the tactics employed by Barwick demonstrate his competitive nature and his ability to take advantage of his opponent's weaknesses. His tactics caused the opposing advocate to lose control and ultimately lose the case. This anecdote also serves as a reminder of the importance of an advocate controlling their emotions. It appears that Barwick employed a similar tactic of badgering in the Bank Nationalisation Case (discussed in the next chapter).

Emotion is a key element and ideal of appellate advocacy although may not be as relevant in circumstances where an advocate is appearing in a constitutional case. In saying this, particular constitutional cases may be more conducive to the use of emotion (because the fate of individuals is more at stake); for example, a native title matter or immigration matter. However, in reality, emotion can also be a disadvantage if it causes an advocate to lose control of their temper, lose their objectivity or their ability to rationally present their submissions.

Barwick and 'The Extras'

The other aspects of an advocate's presentation that may increase the persuasive effect of their submissions are 'the extras', namely, voice, words, wit, presence and memory. However, it is acknowledged that many of these cannot simply be acquired.

Mason suggested that Barwick's voice 'was strong and it had a timbre to it' and he 'made good use of inflection and so forth' but that it wasn't 'an attractive voice' or 'a rich voice'.\(^{747}\) Porter described it as 'a most interesting voice with lively inflection, you would never go to sleep during his address, you would never be bored by it'.\(^{748}\) He suggested that Barwick could make areas of law often considered uninteresting 'sound fascinating and he had a most attractive voice, he put sentences together very well and the occasional touch of wit, he was always bright and alert'.\(^{749}\)

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\(^{747}\)`Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 February 2006).`

\(^{748}\)`Interview with Chester Porter QC (Sydney, 2 April 2006).`

\(^{749}\)`Ibid. Chester Porter QC also described his voice in the following way: 'It was a voice, I would suppose you would say a rather witty, ingenious, and voice of pure enjoyable reason - that's how I would describe the voice'.`
Ellicott described Barwick’s voice in the following way:

I recall him as talking quietly and not bombastically in the court, sufficiently to be heard and to get his message across, ... [H]e didn’t have the voice of a well-tuned actor but he obviously could act in the sense of every barrister who is worth his chips can act, but his voice was not necessarily part of his armoury whereas it is with a lot of people. It wasn’t a booming voice or it wasn’t necessarily crisp, but the tongue could be an acid tongue, it could certainly be emotional.  

Ellicott’s comments echo Ross Barwick’s earlier comments that Barwick was capable of employing language that could be critical and biting. In addition, Ellicott’s comments also suggest that Barwick’s voice could become emotional at times: Barwick himself suggested that becoming emotionally involved in a case should be avoided, although provided that an advocate does not get too emotionally involved, employing emotional language appropriately can add weight to the persuasive effect of submissions. As we have seen, Ross Barwick stated that his father ‘could be very sort of acid and acerbic’.

According to Ellicott, Barwick had the ability to ‘coin a phrase’ and:

in the course of preparation he would have used his mind to get the best way to express the matter. I think he gave a lot of thought to his advocacy, as distinct from just mastering the subject, and how he would formulate it and express it.

Ellicott referred to Barwick’s use of language by suggesting: ‘I’m sure he thought of the phrases that he might use which might give colour to the case, a sort of expression of merit and whatever, I’m sure he did that’. He also stated that Barwick ‘had a good command of the English language’. Ellicott suggests that Barwick’s choice of language did not necessarily occur spontaneously and that Barwick spent considerable time during the preparation stage on the manner in which he would express his submissions.

Mason stated that Barwick ‘was very good with language’ and had ‘a great understanding of the nuances of words’. Porter suggested that it was ‘the elegance of his language’ that made Barwick’s submissions interesting. Hughes agreed that Barwick had a ‘great vocabulary’. Barwick’s use of language was also assisted by the fact that he was ‘a very quick man’.

750 Interview with Hon. Robert Ellicott QC (Sydney, 8 August 2006).
751 Molomby & Donohoe, above n 19, 13.
752 Interview with Ross Barwick (Sydney, 4 October 2006).
753 Interview with Hon. Robert Ellicott QC (Sydney, 8 August 2006).
754 Ibid.
755 Ibid.
756 Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 February 2006).
757 Interview with Chester Porter QC (Sydney, 2 April 2006).
In an interview in 1989, Barwick suggested that one of the essential qualities of an advocate was quick wittedness which he described as follows: ‘the wit which can recognise the relevance of what you’ve just heard, how it relates to the task you have in hand, its relevance to the issue to be determined in the trial or the appeal’. Perhaps unsurprisingly, essential qualities as outlined by Barwick himself reflect many of the strengths attributed to Barwick as an advocate. These are the qualities he worked hard to develop or enhance in his own advocacy.

Porter, who attended numerous conferences with Barwick, referred to Barwick’s wit observing that as ‘an advocate in court he was never dull – sometimes he was very witty’.

Porter recalls Barwick’s wit during an occasion in 1954 where Barwick appeared on behalf of Doyle Mallett at the Royal Commission into the liquor laws conducted by Justice Victor Maxwell. Barwick stated: ‘You might well think that the only resemblance between this Commission and a court of justice began and ended with the furniture in the courtroom in which the Commissioner sat’. This also demonstrated his acid and acerbic tongue, and may also be perceived as exhibiting a lack of respect for the Royal Commission. It also suggests that Barwick may have reached a stage in his career where his over-confidence as an advocate affected his judgment in terms of demonstrating respect. By contrast, and consistent with this observation, Mason did not regard Barwick as a witty person - he ‘was much more given to using sarcasm as a weapon’. Hughes recalled that Barwick usually employed ‘a sense of irony ... he was a master of irony’ and he also employed ‘a bit of sarcasm’.

Mason described Barwick’s presence as having ‘a dynamism about him’ which stemmed from his confidence, and his charisma. Porter recalled that Barwick ‘had a presence when I knew him ... [H]is enormous prestige went with him and his entry into a court room you know ... I mean a court was honoured to have him appear before them, even the High Court’. Hughes also agreed that Barwick had a presence and stated that ‘[t]here are intangible qualities not easy to enumerate which

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758 Interview with Hon. Tom Hughes AO QC (Sydney, 2 August 2006).
759 Interview with David Jackson QC (Sydney, 2 August 2006).
760 Molomby & Donohoe, above n 19, 9.
761 Porter, Walking on Water: A Life in the Law, above n 417, p.115. See Interview with Chester Porter QC (Sydney, 2 April 2006).
762 Sir Anthony Mason, ‘Supreme Court of New South Wales: Opening of law terms judges’ dinner’ (2008) 82 Australian Law Journal 839, 842. See also Interview with Chester Porter QC (Sydney, 2 April 2006).
763 Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 February 2006). According to Mason, Alan Taylor made very effective use of his wit and Barwick ‘really wasn’t able to match him in that respect’.
764 Interview with Hon. Tom Hughes AO QC (Sydney, 2 August 2006).
765 Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 February 2006).
766 Interview with Chester Porter QC (Sydney, 2 April 2006).
make for that quality called presence but he had it.' It is not easy to identify the features that contribute to presence. However, commentators appear to agree that an advocate with a presence has a sense of confidence, gravitas and polite assertiveness that accompany their submissions and which can aid their persuasiveness.

Ellicott recalled that he observed Barwick's presence on many occasions and that 'there are some people who can enter a room and command it and lots of small men can do that - he was one of them.' As this suggests, Barwick's presence did not derive from his physical stature but rather the confidence he exuded which was built on a thorough preparation as well as the sheer energy and dynamism which many say he possessed. Over time, his presence also increased as a result of his growing reputation.

One of the keys to Barwick's success was that he possessed an extraordinary memory. Mason described his memory as 'prodigious'. Gibbs said that 'his power to recall detail and then to speak of it with simplicity represented his greatest skills as an advocate'. Porter recalled that Barwick 'had a good memory for fundamental principles ... [H]e had a pretty good memory of case law ... a very good memory of events that he was describing ... [and] a ready memory for every important constitutional case in Australia'. Hughes described Barwick's memory as 'elephantine'.

A good memory is a valuable asset and an important attribute for an appellate advocate. It allows the advocate to speak freely and to engage the bench in such a manner that allows easier adaptation of the advocate's submissions in response to judicial reactions or judicial body language.

Ellicott described Barwick as 'a person who could master subjects, he had a massive memory and had great recall of events and incidents and conversations which I suspect helped him a great deal in

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767 Interview with Hon. Tom Hughes AO QC (Sydney, 2 August 2006).
768 Interview with Hon. Robert Ellicott QC (Sydney, 8 August 2006). Barwick placed considerable importance on appearance which also contributed to his presence. In response to a question about court dress, Barwick stated: 'I think nothing looks so poor as the advocate showing a sagging pair of trousers and a coloured shirt with a gown hanging on some part of his shoulders': see Bailey, above n 19, 1312.
769 Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 February 2006).
770 Harry Gibbs, 'Appellate Advocacy', above n 11, 497. See also Kirby, 'Ten Rules of Appellate Advocacy', above n 11, 965.
771 Interview with Chester Porter QC (Sydney, 2 April 2006).
772 Interview with Hon. Tom Hughes AO QC (Sydney, 2 August 2006). David Jackson QC did note that, during Barwick's years as an advocate, 'there were a lot fewer cases in those days so it was easier to remember the major ones and I just don't think there is quite that ability these days': Interview with David Jackson QC (Sydney, 2 August 2006).
cross-examination. He also suggested that Barwick would employ his memory to great effect in the following way:

... he would take much more interest in what the bench was saying than the average barrister. I wouldn't say he'd go away and dwell on it, but he'd remember it and it would be part of his armoury in dealing with that particular judge whether he was a lord of appeal or whether he was a High Court judge or some other judge.

773 Interview with Hon. Robert Ellicott QC (Sydney, 8 August 2006). Robert Ellicott QC recalls an instance where he was appearing in the Privy Council with Barwick in 1958. The previous day, Barwick had argued Newton v Federal Commissioner of Taxation (1958) 98 CLR 1 (7 July 1958). Ellicott recalled:

It wasn't a complex case, on the other hand he had to master it. I probably spent in all an hour and a half late one afternoon, the day before the case, in his flat in St James in London in discussion of the case. I picked him up the next morning at his flat and we walked over to the Privy Council. He was obviously on top of the case. It was about whether a grazier had retained an interest in a grazing property because he remained a partner I think, that was the situation, and if he did retain an interest and even though he'd given it to his children it was deemed to be part of his estate. Anyhow, it was a well travelled part of the law and he was obviously completely in charge of it.

Further, Ellicott recalled:

Just as an instance, it's perhaps an unusual example, but on the way to the Privy Council I think he must have named every flower by species between St James and the Privy Council. He'd walk through St James Park and he said "Bobby look at that", or "look at that", or whatever, you know, tell me the name, to me it was remarkable.

774 Interview with Hon. Robert Ellicott QC (Sydney, 8 August 2006).
Chapter 7: Barwick and the Bank Nationalisation Case in the High Court

"Many of the cases which arrive in this Court for decision, most for ultimate decision, have their complexities, to which the very fact of judicial differences of opinion at earlier points of their history, bear witness. Thus, much painstaking effort is required to ensure that no false assumptions are made, that the facts understood aright [sic], that no relevant circumstance or argument or legal principle is overlooked. This casts on the Bench a great responsibility which it accepts and which it performs, but that does not lessen, indeed rather it heightens, the imperative need on the part of the legal profession for most assiduous preparation of cases, and for great refinement and precision of argument. Just as the judge must work out of court during and after a hearing, so must the practising man work before and during the presentation of a case."

Sir Garfield Barwick, 1964

"This was of course, a great case. The idea of a Government being unable to do these things is foreign to most people, the use of 92 for this purpose was strange, and we had quite a few decisions that would have favoured what the Government was doing."

Sir Garfield Barwick, 1977

The exploration of the elements and ideals of appellate advocacy in terms of preparation, presentation and personation in Chapters 3, 4 and 5, has established a framework to enable an assessment of Barwick’s advocacy in accordance with the ‘three category analysis’. In the last chapter, an assessment of Barwick’s advocacy against the ideals of appellate advocacy in terms of preparation, presentation and personation generally was undertaken. The emphasis in this chapter will be on Barwick’s advocacy in relation to these three categories in the context of one of the most significant constitutional law cases, namely, the Bank Nationalisation Case.

This analysis draws upon observations and commentary relevant to Barwick, and also involves an examination of primary material available with respect to this case, including the transcript of Barwick’s argument.

775 Transcript of Proceedings in the High Court of Australia at Sydney on Friday 1st May 1964 on the occasion of the Swearing In of Sir Garfield Barwick as Chief Justice of Australia, p.10.
776 National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 21.
7.1 Preparation for the Bank Nationalisation Case

The Bank Nationalisation Case is one of the most significant constitutional cases heard in the High Court and remains the longest running constitutional law case in Australia's history. It represents 'one of the greatest political and legal battles in Australia's history'. It has also been suggested that the 'attempt to nationalize the private trading banks was probably the most controversial move by any Australian government in the history of the Commonwealth'.

Barwick was briefed to appear on behalf of the banks in the Bank Nationalisation Case. To understand and appreciate the significance of this case, it is important to understand the events that led to this case coming before the High Court. The historical context also reveals Barwick's early involvement and provides the necessary context to allow an in-depth examination of Barwick's advocacy in this case.

Background to the Bank Nationalisation Case

On 13 August 1947, the High Court delivered its judgment in the Melbourne Corporation Case. By majority, the High Court held that section 48 of the Banking Act 1945 (Cth) which, in effect, prohibited a bank from conducting any banking business for a State or for any authority of a State, including a local governing authority except at the will of the Commonwealth Treasurer, was invalid because it discriminated against the States (Latham CJ, Dixon and Williams JJ) or that it violated an essential function of the States (Rich, Starke and Williams JJ).

The question of whether the federal parliament had the power to nationalise the banking industry was not in issue in the Melbourne Corporation Case. However, one can extrapolate from the

779 Melbourne Corporation v Commonwealth (1947) 74 CLR 31 which is known as the Melbourne Corporation Case as well as the State Banking Case.
780 Latham CJ, Rich, Starke, Dixon, and Williams JJ (McTiernan J dissenting).
reasoning of the respective judges that Rich, Starke and Williams JJ had adopted a position that would probably preclude bank nationalisation; if the States had a sovereign right to use the facilities of private banks, then by implication, the Commonwealth could not abolish the private banks. However, Latham CJ and Dixon J left the particular question open while McTiernan J’s reasoning could easily be extended to allow bank nationalisation.\footnote{For example, at 84, per Dixon J; at 85-96, per McTiernan J. See also Galligan, above n 781, p.169. There was some suggestion that in this decision the High Court brought back a modified version of the doctrine of implied immunity that was ruled not to apply in the Engineer’s Case (Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 29).} The Labor government sought to take advantage of the unique opportunity the \textit{Melbourne Corporation Case} presented to give effect to its policy of nationalising key industries.\footnote{G Blainey and G Hutton, Gold and Paper (1858–1982), A History of the National Bank of Australasia Ltd, 1983, pp.229-230. Barwick, A Radical Tory: Garfield Barwick’s Reflections & Recollections, above n 1, p.57; Peter Johnston, ‘The Bank Nationalisation Cases: The Defeat of Labor’s Most Controversial Economic Initiative’ in H.P. Lee & George Winterton (eds), \textit{Australian Constitutional Landmarks}, (2003), Cambridge University Press, Melbourne, 85, 89; L.F.Crisp, Ben Chifley: A Political Biography, (1961), Longmans, Green & Co. Limited, Sydney, pp.326–327; May, above n 778, p.12; Ian Hancock, \textit{John Gorton: He Did It His Way}, (2002), Hodder Headline Australia Pty Ltd, Sydney, p.49; Holder, above n 781, p.816. It has been suggested that, the nationalisation of the banks, was motivated, at least in part, by the fact that the government had been unsuccessful in the \textit{Melbourne Corporation Case}. Despite this decision, the government believed, incorrectly as it turned out, that its power with respect to banking would support a law prohibiting private banking: Crispin Hull, \textit{The High Court of Australia: Celebrating the Centenary 1903 – 2003}, (2003), Lawbook Co., Sydney, p.25; Weerasooria, above n 777, 78–79.} Barwick appeared for the City of Melbourne in this case. Barwick became well acquainted with the case law relating to the banking power in s 51(xiii) of the Constitution as well as the law with respect to the intergovernmental immunities implied by the federal system. His knowledge of the banking power, combined with his knowledge of section 92, which was gained primarily from the \textit{Airlines Case} was later deployed in the \textit{Bank Nationalisation Case}. The \textit{Melbourne Corporation Case} represented an important victory for Barwick and ideal preparation for his next challenge in the \textit{Bank Nationalisation Case}.\footnote{\textit{Australian National Airways Pty Limited v Commonwealth} (1945) 71 CLR 29. This case arose following the Chifley government’s attempt to nationalise interstate and territorial airlines and to establish an airline owned by the Commonwealth government. The High Court held that the trade and commerce power under s 51(i) of the Constitution authorised the Commonwealth to operate an airline but the legislation was invalid under section 92 to the extent that it attempted to confer on the Australian National Airways Commission a monopoly in respect of airline services between states and to create the offences in s 49. At 31; 62-64, 69 (per Latham CJ); 71-72 (per Rich J); 79 (per Starke J); 83-85 (per Dixon J); 102-103 (per Williams J). More detailed discussion of this case can be found in Chapter 7.}
On 14 August 1947, following a Cabinet meeting, Chifley recommended nationalisation and each Minister agreed with Chifley. When Chifley subsequently presented the bank nationalisation legislation, it was endorsed by caucus within 20 minutes. See Crisp, Ben Chifley: A Political Biography, above n 783, p.327; Kylie Tennant, Famous Australians – Evatt: Politics and Justice, (1970), Angus & Robertson Publishers, Sydney, p.217; 'Bank Decision Community: Millions Involved', above n 786; 'Govt. Plan To Nationalise Banks: To Cost £100 Million', above n 786; 'Judgments Flow To Canberra', The Canberra Times (Canberra), 14 August 1947, 1; 'Judgments Flow To Canberra', The Sydney Morning Herald (Sydney), 14 August 1947, 1.

786 During the brief Cabinet meeting, Chifley proposed nationalisation and each Minister agreed with Chifley. When Chifley subsequently presented the bank nationalisation legislation, it was endorsed by caucus within 20 minutes. See Crisp, Ben Chifley: A Political Biography, above n 783, p.327; Kylie Tennant, Famous Australians – Evatt: Politics and Justice, (1970), Angus & Robertson Publishers, Sydney, p.217; 'Bank Decision Community: Millions Involved', above n 786; 'Govt. Plan To Nationalise Banks: To Cost £100 Million', above n 786; 'Judgments Flow To Canberra', The Canberra Times (Canberra), 14 August 1947, 1; 'Judgments Flow To Canberra', The Sydney Morning Herald (Sydney), 14 August 1947, 1.

787 On the same day, Prime Minister Chifley issued a 42-word press statement which suggested that his government would nationalise the private trading banks. See Crisp, Ben Chifley: A Political Biography, above n 783, pp.325-328, 331; May, above n 778, pp.11-12. See also Hull, above n 783, p.25; Weerasooria, above n 777, 78–79; May, above n 778, pp.11, 13-14; Holder, above n 781, p.884; 'Socialised Banking', The Mercury (Hobart), 18 August 1947, 3; 'Public Demands For Referendum', Cairns Post (Cairns), 29 October 1947, 1; Galligan, above n 781, p.170; Johnston, above n 783, 89-103.

788 Evatt, the Attorney General in the Chifley government, had the primary responsibility for advising the government on the constitutional prospects of the legislation. He recognised that the constitutional validity would depend on the High Court's approach to section 92 of the Constitution which had already prevented the nationalisation of the airlines and whether it would be extended to prevent the nationalisation of the private banks. See Tennant, Famous Australians – Evatt: Politics and Justice, above n 786, p.217; Crisp, Ben Chifley: A Political Biography, above n 783, p.329; May, above n 778, p.65; L. Zines, 'Mr Justice Evatt and the Constitution' (1969) 3 Federal Law Review 153, 175-186.


791 Blainey and Hutton, above n 783, p.230. Mr McConnan, Chairman of the Associated Banks, indicated that the banks would fight the policy of nationalisation to the end. The majority of staff of the National Bank, as well as the staff from the other banks, quickly mobilised and launched a campaign against nationalisation which included cheering an informal speech by McConnan in Melbourne on 26 August and sending a telegram of protest to Prime Minister Chifley. The General Managers of the Australian banks met in Melbourne and decided to oppose nationalisation. See also Crisp, Ben Chifley: A Political Biography, above n 783, pp.328-332.
of the most significant constitutional cases in Australia's history. Opponents of the Labor Party suggested that bank nationalisation was a tactic of socialist dictatorship and it caused outrage amongst business leaders. The banking industry, including both banks and their staff, mobilised and used their resources to oppose nationalisation through many protests and public meetings as well as a concerted publicity campaign.

Upon the announcement by Chifley of the government's intention to nationalise the banking system, a group of barristers was assembled. Barwick was briefed by Sir Norman Cowper of Allen Allen & Hemsley, on behalf of the Bank of NSW, and was told by that firm that he was to be the leader of the Australian barristers. The banks immediately retained Barwick as a result of his successful arguments in the Airlines Case and the Melbourne Corporation Case. Barwick was also one of the leading appellate advocates and constitutional law barristers at the time. This assessment is supported by Gieeson who stated that, 'Barwick got the brief - the brief to lead the Australian team for the Banks in the Bank case - because Barwick was regarded in the profession as the best advocate in Australia at the time'.


Bank of New South Wales & Ors v Commonwealth (1948) 76 CLR 1 (High Court), affirmed (1949) 79 CLR 497 (Privy Council).

Weerasooria, above n 777, 78. It is also the longest running case in the High Court's history at 39 days.

Galligan, above n 781, pp.169-172; May, above n 778, pp.14-15. Menzies, the opposition leader of the newly formed Liberal Party, positioned the party to be the advocate of establishment values and traditional Australian liberal democracy and as such opposed bank nationalisation. Menzies labelled bank nationalisation as 'the most far-reaching, revolutionary, unwarranted and un-Australian measure introduced in the history of the parliament' and a 'tremendous step towards the servile state'. See Sawyer, Australian Federal Politics and Law (1929-1949), above n 143, p.197; Johnston, above n 783, 89; Menzies, Central Power in the Australian Commonwealth, above n 205, p.145; 'Driving On With The Bank Bill', The Sydney Morning Herald (Sydney), 13 November 1947, 2; 'Socialisation The Issue', The Sydney Morning Herald (Sydney), 26 August 1947, 2; 'Socialist Threat In Bank Bill', The Sydney Morning Herald (Sydney), 29 October 1947, 1.

See 'BANK DECISIONS COMMUNITY: Millions Involved', The Sydney Morning Herald (Sydney), 16 August 1947, 1; 'Bank Managers To Fight Plans For Nationalisation', The Canberra Times (Canberra), 23 August 1947, 4. See also Weerasooria, above n 777, 78; May, above n 778, pp.15-46; Holder, above n 781, p.886.

Sir Norman Cowper was admitted as a solicitor of the Supreme Court of NSW on 6 June 1923. He practised as a solicitor for more than 50 years with Allen Allen & Hemsley where he was a partner from 1935 and senior partner from 1951 until he retired in 1975. See Alfred James, 'Sir Norman Cowper' (2000) 86(1) Journal of the Royal Australian Historical Society 74, 77, 81; Valerie Lawson, The Allocens Affair, (1995), Pan Macmillan Australia, Sydney, p.59.

Barwick, A Radical Tory: Garfield Barwick's Reflections & Recollections, above n 1, p.62; Holder, above n 781, p.886. The author undertook various searches with the assistance of Allen Arthur Robinson (formerly Allen Allen & Hemsley) of its archives in relation to the Bank of NSW and its retainers in the Bank Nationalisation Case. However, due to the passage of time, very few records were in existence. The only material in existence relating to the Bank of NSW were advices in matters unrelated to the Bank Nationalisation Case.

Galligan, above n 781, p.173; 'Banks Muster Legal Forces', Sydney Morning Herald (Sydney), Tuesday 19 August 1947, 1.

Interview with Murray Gieeson, Chief Justice of the High Court of Australia (Sydney, 14 August 2006). The suggestion that Barwick made his name in the Bank Nationalisation Case has been raised elsewhere, for
As Marr stated, this brief was very suited to Barwick:

It demanded a man who could handle litigation that was huge, complex and dry. Yet at stake were principles to which he felt a passionate attachment. He fought best when he believed in what he was fighting for. It gave his attack extra cunning and stamina. Few great advocates have the opportunity to devote themselves for any length of time to a cause for which they feel the commitment Barwick felt for the banks and their struggle with Chifley.  

Marr’s suggestion that Barwick ‘fought best when he believed in what he was fighting for’ will be examined later in this chapter, particularly when examining the transcript of the argument.

The team led by Barwick included Alan Taylor KC (who reportedly admired Barwick’s blunt aggression), Kitto KC, Dr Coppel KC, Adam, and Smith. Kitto reportedly ‘masterminded some of the most important strategies in that campaign’.

The fact that the banks retained so many counsel even before the legislation was passed by Parliament was testament to the importance of the looming legal challenge. It also allowed Barwick, as well as the other counsel, to commence their preparations early for the inevitable High Court challenge. This additional time would have been useful in the context of the complex and difficult legal issues that were anticipated.

On 15 October 1947, the Banking Bill was introduced into Federal Parliament. Chifley delivered the Second Reading Speech outlining the case for the policy and provided an outline of the provisions of the Bill. He stated that the Bill aimed ‘to empower the Commonwealth Bank to take over the example, in May, above n 778, p.79. It has been suggested that, at the time of the Bank Nationalisation Case, ‘Barwick’s name was only then being made’. See also National Library of Australia, Miller, interview with Sir Garfield Barwick, above n 19, 15.

800 Marr, above n 8, p.58. It has been suggested that Barwick’s background ‘inclined him philosophically to the banks’ cause’: Johnston, above n 783, 93.


802 In 1943, at the age of 41, Taylor was appointed senior counsel. Taylor made his first High Court appearance in 1934; and between 1934 and 1943 he averaged two appearances a year. After this, he began to appear before the High Court three or four times a year. In 1947, he made ten appearances in the High Court. Later Sir Alan Taylor was appointed a judge of the High Court of Australia.

803 Also, it was said that Taylor shared Barwick’s distaste for the single mannered approach of the Melbourne Bar: ‘They scratch every hair on the dog’s back except the one that matters’ (Marr, above n 8, p.234).

804 Later Justice Frank Kitto, a judge of the High Court of Australia from 1950 to 1970. See Kirby, ‘Kitto and the High Court of Australia’, above n 186.

805 Or Elias Godfrey Coppel KC was a Victorian barrister who later served as an Acting Judge of the Supreme Court of Victoria after being appointed in 1950. He also achieved a Doctor of Laws.

806 Alistair Adam was a Victorian barrister who later served as a Judge of the Supreme Court of Victoria.

807 Thomas Weetman Smith was a Victorian barrister who later served as a Judge of the Supreme Court of Victoria. He replaced Justice Wilfred Fullaghar who was appointed to the High Court in 1950.

808 Fricke, above n 801, Melbourne, p.171.
banking business at present conducted in Australia by private banks'. The introduction of the Bill provoked considerable debate in parliament.

After days of impassioned debate, Chifley ensured the passage of the Bill through parliament on 26 November 1947 and the Banking Act 1947 (Cth) ("the Act") was granted Royal Assent the following day. It came into effect upon being given Royal Assent – 106 days after the High Court’s decision in the Melbourne Corporation Case was delivered.

The legislation allowed the Treasurer, by notice in the Gazette, to vest the shares in the private banks in the Commonwealth Bank and to authorise the compulsory acquisition of all the assets and liabilities as well as the management of the private banks. It also allowed the Commonwealth Treasurer to prohibit the conduct of banking business in Australia by any private bank. The legislation has been described as ‘the most controversial in the history of federal legislation ... [it] convulsed the political life of the country in the State as well as the federal sphere’.

Preliminary litigation in the Bank Nationalisation Case

Kitto recommended that an injunction be obtained from the High Court before the Bill received Royal Assent to prevent the government from implementing the Act. Barwick supported the injunction and steps were taken to prepare the injunction application. However, the application to the High Court became unnecessary as a result of negotiations between the parties whereby the government provided an undertaking that it would not implement the Act until its validity was determined. In any event, it was agreed that the banks would persist with their application for an injunction to

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809 Commonwealth, Parliamentary Debates, House of Representatives, 15 October 1947, 748, 796-798, (Ben Chifley, Prime Minister); May, above n 778, p.68; Holder, above n 781, p.885; Blainey and Hutton, above n 783, pp.230-231.

810 ‘BANKING BILL BEFORE HOUSE’, The Sydney Morning Herald (Sydney), 16 October 1947, 1; ‘BITTER FIGHT BEGINS IN PARLIAMENT ON BANKING BILL’, The Canberra Times (Canberra), 16 October 1947, 1; ‘BANK ACQUISITION PLAN REVEALED’, The Argus (Melbourne), 16 October 1947, 1; May, above n 778, pp.65-67, 68-69, 75; Sawyer, Australian Federal Politics and Law (1929-1949), above n 143, pp.196-197; Crisp, Ben Chifley: A Political Biography, above n 783, p.329; Marr, above n 8, p.59; Holder, above n 781, pp.885-886; Galligan, above n 781, p.172; Blainey and Hutton, above n 783, pp.230-231; Barwick, A Radical Tory: Garfield Barwick’s Reflections & Recollections, above n 1, p.64; May, above n 778, p.59; ‘States’ Case Against Banking Bill’, The Sydney Morning Herald (Sydney), 26 November 1947, 3.

811 ‘BANK BILL NOW LAW’, The Sydney Morning Herald (Sydney), 28 November 1947, 1; ‘ROYAL ASSENT TO BANKING NATIONALISATION’, The Canberra Times (Canberra), 28 November 1947, 1; May, above n 778, p.76; Galligan, above n 781, p.173; Weerasooria, above n 777, 78-79; Hancock, above n 783, p.49; Holder, above n 781, p.886.

812 See section 46, Banking Act 1947 (Cth). Some of the key provisions of the Act are summarised in Appendix B.

ensure that no aspect of the Act could be implemented.\textsuperscript{814} Once the Act received Royal Assent, the banks filed the necessary writs instituting legal proceedings in the High Court as had been agreed with the Commonwealth.\textsuperscript{815}

On 15 December 1947, Dixon J granted an interlocutory injunction restraining the government from further action until the Act’s constitutional validity could be determined by the High Court.\textsuperscript{816}

As preparations for the legal challenge to the Act before the High Court continued in earnest, the banking industry marshalled its resources to campaign against the Commonwealth.\textsuperscript{817} The Barwick team ‘embarked on a campaign that had the precision of military strategy’.\textsuperscript{818}

The large team of lawyers that had assembled to act on behalf of the various banks split into committees to examine various parts of the Constitution which they were to rely upon in challenging the validity of the Act. Barwick was the chairman of the committee which examined section 92 of

\textsuperscript{814} ‘Government Restrained from Implementing’, The Canberra Times (Canberra), 16 December 1947; ‘Injunction By Court In Banking Case’, The Sydney Morning Herald (Sydney), 16 December 1947, 1; ‘Trading Banks And States Get Injunction Until Final Court Judgment’, The Sydney Morning Herald (Sydney), 16 December 1947, 7; May, above n 778, pp.77-78; Barwick, A Radical Tory: Garfield Barwick’s Reflections & Recollections, above n 1, p.62; Galligan, above n 781, p.173; Marr, above n 8, p.62; Johnston, above n 783, 92; Holder, above n 781, p.886.

\textsuperscript{815} On 28 November 1947, the banks sought the injunction from the High Court to prevent the legislation from coming into effect until its constitutional validity could be determined by the High Court. See ‘Banks And Two States To Stop Immediate Nationalisation Of Banks’, The Sydney Morning Herald (Sydney), 29 November 1947, 1; May, above n 778, pp.77-78; Galligan, above n 781, p.173; Weerasooria, above n 777, 78-79.

\textsuperscript{816} Following this, the writs were to be referred to the Full Bench of the High Court on 15 January 1948 provided that the affidavits of both parties were satisfactory. On 15 January 1948, Dixon J heard arguments on the affidavits and announced that the hearing would commence before the Full Court in Melbourne on 9 February 1948. On 17 January 1948, for reasons unknown, the Commonwealth filed a Notice of Motion seeking an early hearing beginning on 19 January 1948. This application was refused by the Full Bench. See ‘Bank Case In High Court On February 9’, The Sydney Morning Herald (Sydney), 16 January 1948, 2; ‘FULL HIGH COURT TO HEAR BANK CASE ON FEB. 9’, The Canberra Times (Canberra), 16 January 1948, 4; ‘HEARING OF BANK ACT CHALLENGE’, The Argus (Melbourne), 16 January 1948, 4; May, above n 778, pp.77-79; Galligan, above n 781, p.173; Weerasooria, above n 777, 78-79; Holder, above n 781, p.887.

\textsuperscript{817} According to the banking industry, the nationalisation of banks would affect 20,000 bank staff and eliminate eight Australian private banks, three English banks and three other foreign banks. Customers of all the banks received material regarding the consequences of nationalisation and bank staff delivered leaflets into letter boxes across the country. The banking industry also organised a comprehensive media campaign which involved advertising in the print media and on radio. It has been suggested that ‘[t]he banking industry was determined not only to defeat the proposed legislation but the Government that was behind it’ : Weerasooria, above n 777, 79.

\textsuperscript{818} Fricke, above n 801, p.170. In the course of the preparations, in a different case, a pea-merchant sought to challenge the constitutional validity of Tasmanian legislation with respect to section 92 of the Constitution. Taylor had been briefed to defend the Tasmanian legislation but decided not to appear as it might have been detrimental to the overall strategy in the Bank Nationalisation Case; in that the issues on which the Barwick team was so diligently working might be prematurely resolved in this other case and secondly, because Taylor would be arguing in support of the Tasmanian legislation: see Fricke, above n 801, p.170; Marr, above n 8, p.61. The Field Peas Case was the shorthand title for the following case: Clements and Marshall Pty Ltd v Field Peas Marketing Board (Tas) (1947) 76 CLR 401 (Williams J); Field Peas Marketing Board (Tas) v Clement and Marshall Pty Ltd (1948) 76 CLR 414 (Latham CJ, Starke, Dixon and McTiernan JJ).
the Constitution. It has been suggested that Barwick’s treatment of section 92 involved defining ‘freedom according to precedent’.

The case before the High Court was listed to commence in Melbourne at the beginning of February 1948. Prior to the case, there was a fortnight of conferences between counsel and solicitors in Melbourne. During these conferences, there was discussion about the ‘Transport Cases’ and the ‘Marketing Cases’ and their effect on the argument to be put in the Bank Nationalisation Case. Barwick however, thought ‘these decisions irrelevant to the result of the present case and had reasons for not attacking them’. In many respects, as will be seen later, Barwick’s assessment was correct although, for example, Latham CJ’s judgment states that to find that the Act was invalid based on section 92 would result in the need to overrule a number of the ‘Transport Cases’ and ‘Marketing Cases’.

For the purposes of these conferences, the banks with English headquarters sent out to Australia, Kenneth Diplock, then a leading junior at the English Bar and Emrys Lloyd, a partner in Farrers, a

819 Marr, above n 8, p.60.
820 Johnston, above n 783, 93.
822 The Transport Cases, which were heard in the 1930’s, allowed the States to restrict interstate trucking, and in some instances, ban interstate trucking completely, in order to protect their railways from competition. The High Court allowed such restrictions and/or bans. They included: Willard v Rawson (1933) 48 CLR 316; R v Vizzard; Ex parte Hill (1933) 50 CLR 30; O Gilpin Ltd v Commissioner for Road Transport & Tramways (NSW) (1935) 52 CLR 189; Riverina Transport Pty Ltd v Victoria (1937) 57 CLR 327. One of the earliest “Marketing Cases” was New South Wales v Commonwealth (1915) 20 CLR 54, also known as the Wheat Case. In this case, the High Court unanimously held that NSW legislation passed during the war which authorised the compulsory acquisition of wheat by the government, subject to compensation, did not contravene section 92. See also the cases involving Mr James, including James v South Australia (1927) 40 CLR 1, James v Commonwealth (1928) 41 CLR 442, James v Cowan (1930) 43 CLR 386, James v Cowan [1932] AC 542; (1932) 47 CLR 386, James v Commonwealth (1935) 52 CLR 570 and James v Commonwealth (1936) 55 CLR 1. Other “Marketing Cases” included: Peanut Board v Rockhampton Harbour Board (1933) 48 CLR 266, Milk Board (NSW) v Metropolitan Cream Pty Ltd (1939) 62 CLR 116. Generally, the “Marketing Cases” concerned statutory marketing schemes for primary produce. See Sawyer, Cases on The Constitution of the Commonwealth of Australia, (3rd ed), above n 781, p.168; Michael Coper, Freedom of Interstate Trade under the Australian Constitution, (1983), Butterworths Pty Ltd, North Ryde, p.13; Zines, The High Court and the Constitution, (5th ed), above n 182, pp.142-144 and p.187; P.E. Nygh, ‘The Concept of Freedom in Interstate Trade’ (1967) 5 University of Queensland Law Journal 317, 335; Coper, Encounters with the Australian Constitution, above n 781, p.267.
823 Barwick, A Radical Tory: Garfield Barwick’s Reflections & Recollections, above n 1, pp.64-65.
824 Ibid, p.65.
825 Bank of New South Wales & Ors v Commonwealth (1948) 76 CLR 1 at 239, per Latham CJ.
826 Kenneth Diplock became a Lord of Appeal in Ordinary in 1968 and was elevated as a life peer with the title Baron Diplock, of Wansford in the County of Huntingdonshire to the House of Lords.
firm of solicitors from London. At these conferences, the English lawyers offered their views in terms of how the case might be conducted. 827

Whilst the banks had assembled a formidable legal team led by Barwick, the Commonwealth was to be represented by Evatt, the Attorney-General, who had left the bench of the High Court to enter Commonwealth Parliament in 1940. 828 Farquharson, the chief legal officer of the Bank of New South Wales, commented at one point that "[i]t was becoming evident that the banks had not been astray in their choice of counsel." 829

Section 92 and the existing authorities

Section 92 of the Constitution provides:

On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

The judicial approaches to section 92 have, in the past, stemmed largely from the judicial response to the fundamental question:

does the freedom of which s 92 speaks take its meaning from the philosophy of individualism and liberalism or from the economic theory of free trade or (to use a more modern and more embracing concept) a common market? 830

The early case law reflected confusion about which approach applied to the interpretation of section 92. 831 Most of the decisions with respect to section 92 until the 1940s generally fell into two categories: challenges to the regulation of state transport (the 'Transport Cases') or challenges to statutory marketing schemes for primary produce (the 'Marketing Cases').

Barwick, on behalf of the banks, had to demonstrate that section 92 of the Constitution guaranteed the freedom of each individual bank to trade across State borders and that the Act impinged on this freedom of which s 92 speaks. 827

827 Barwick, A Radical Tory: Garfield Barwick's Reflections & Recollections, above n 1, p.65.
828 Coper, Freedom of Interstate Trade under the Australian Constitution, above n 822, p.92; Hull, above n 783, p.26; Coper, Encounters with the Australian Constitution, above n 781, p.273.
829 Fricke, above n 801, p.170.
830 Zines, The High Court and the Constitution, (5th ed), above n 182, p.139. Also, Nygh, above n 822, 333.
831 Zines, The High Court and the Constitution, (5th ed), above n 182, pp.139-147. The cases involving section 92 between the late 1920s and until the early 1940s 'concerned either statutory marketing schemes for primary produce or the regulation of transport which had the aim of preventing newly developed road transport from bankrupting the State railways': Zines, The High Court and the Constitution, (5th ed), above n 182, p.142. In the 19th century, the major premise of 'laissez faire' economics was the freedom of the individual. Any interference with an individual's freedom had to be justified on the ground of social necessity, that is, to prevent interference with the rights of others. However, the language adopted in section 92 suggested that the freedom referred to was the economic doctrine of free trade, that is, the freedom to move goods or persons from one State another.
constitutional freedom. The difficulty was attempting to reconcile the myriad of cases relating to section 92.

Barwick commenced preparing in his characteristic meticulous manner. As we have seen, he attributed considerable importance to preparation and in this case, due to its size and complexity, a comprehensive and thorough preparation was crucial. From the time he was briefed and for the remainder of 1947, Barwick recalled that he did 'preparatory work for the presentation of argument on behalf of the banks'.

Essentially, there were to be five broad grounds of attack upon the Act:

1. It falls under no head of legislative power. That is, it is not;
   a. a law on the subject of banking within section 51(xiii) of the Constitution;
   b. within section 51(xx) (corporations power) of the Constitution;
   c. acquisition on just terms for a purpose of Commonwealth power and is not within section 51(xxxi) of the Constitution; and
   d. within section 51(xxxix) (incidental matters) of the Constitution.

2. The acquisition provisions, the management provisions and the prohibition provisions are contrary to section 92 of the Constitution.

3. In so far as otherwise the acquisition might be justified, it is bad because it is not on just terms.

4. It invades the constitutional integrity of the States.

5. It is inconsistent with the Financial Agreement and section 105A of the Constitution.

However, amongst these grounds, Barwick believed that section 92 was likely to be the main basis for the contention that the Act was completely invalid. Numerous cases involving section 92 had come before the High Court since Federation and Barwick acknowledged that, during the course of the section 92 decisions, the judges had 'expressed themselves in various ways'. According to Barwick, Dixon J 'was the consistent supporter of the application of s 92, though as a rule he was in the minority'. This is interesting in light of Barwick's 'billiard table' exercise (coined by the author referring to Ross Barwick's anecdote recounted earlier) which suggested that Dixon was not

832 Barwick, A Radical Tory: Garfield Barwick’s Reflections & Recollections, above n 1, p.63.
833 Ibid, p.66. See also Marr, above n 8, p.64; Johnston, above n 783, 92.
834 Barwick, A Radical Tory: Garfield Barwick’s Reflections & Recollections, above n 1, p.63.
835 Ibid. For example Willard v Rawson (1933) 48 CLR 316; R v Vizzard; Ex parte Hill (1933) 50 CLR 30; O Gilpin Ltd v Commissioner for Road Transport & Tramways (NSW) (1935) 52 CLR 189; Hartley v Walsh (1937) 57 CLR 372.
consistent when analysing similar legal issues in different cases. Further, in light of the unsettled law on section 92, Johnston has suggested that ‘Barwick perceived this tactically [and realised] that the inherent contradictions in the earlier cases opened the way for developing the individual right theory’. 836 According to Coper, the Bank Nationalisation Case represented ‘the great watershed in the struggle between the individual right theory of s 92 and the abstract theory of free trade in the economic sense’. 837

According to Marr, it was the Privy Council decision in James v Cowan (1932) 838 which held promise for Barwick in the Bank Nationalisation Case as it suggested that section 92 was not only guaranteeing free trade across the States’ borders but also free enterprise generally. 839 James was one of many cases that held promise for Barwick: starting from W & A McArthur v Queensland Metropolitan Council (1920) 840, and including Peanut Board v Rockhampton Harbour Board (1933) 841, Milk Board (NSW) v Metropolitan Cream Pty Ltd (1939) 842, Gratwick v Johnson (1945) 843 and the Airlines Case. 844

836 Johnston, above n 783, 98.
837 Coper, Freedom of Interstate Trade under the Australian Constitution, above n 822, p.92.
838 47 CLR 386. The events that led to James v Cowan commenced with the South Australian Dried Fruits Board compulsorily acquiring Mr James’ 1927 crop to achieve the purposes of its marketing scheme. As a result, almost all of Mr James’ dried fruits were seized between March and August 1927 and he commenced an action in the High Court. In James v Cowan (1930) 43 CLR 386, the High Court held (Isaacs J dissenting) that the compulsory acquisition did not infringe section 92. However, on appeal, the Privy Council reversed the decision in James v Cowan (1932) 47 CLR 386. See Zines, The High Court and the Constitution, (5th ed), above n 182, pp.142-146; Sawer, Cases on The Constitution of the Commonwealth of Australia, above n 180, pp.141-146; Sawer, Cases on The Constitution of the Commonwealth of Australia, (3rd ed), above n 781, pp.158-162, 171-172. See also Coper, Freedom of Interstate Trade under the Australian Constitution, above n 822, p.34; Sawer, Australian Federalism in the Courts, above n 295, p.181.
839 Marr, above n 8, p.61.
840 28 CLR 530. This case involved a Queensland Act which provided for the fixing of the maximum price at which goods could be sold in Queensland. A majority of the High Court held (Knox CJ, Isaacs, Starke, Rich and Higgins JJ with Gavan Duffy J dissenting) that the Queensland Act was invalid as it contravened section 92 to the extent that it applied to interstate trade. See Sawer, Cases on The Constitution of the Commonwealth of Australia, (3rd ed), above n 781, p.169; Coper, Freedom of Interstate Trade under the Australian Constitution, above n 822, pp.19-20; Zines, The High Court and the Constitution, (5th ed), above n 182, pp.141-143; see also Nygh, above n 822, 336; Coper, Encounters with the Australian Constitution, above n 781, p.268; Sawer, Australian Federalism in the Courts, above n 295, p.179.
841 48 CLR 266. This case arose after Queensland established a Peanut Board to compulsorily acquire all peanuts in Queensland and to take over marketing the peanuts. Growers were reimbursed from the proceeds of sale, peanuts had to be delivered to the Board and dealings other than with the Board were prohibited. By majority (Gavan Duffy CJ, Rich, Starke, Dixon and McTiernan JJ with Evatt J dissenting), the High Court held that the marketing scheme contravened section 92. See generally Coper, Freedom of Interstate Trade under the Australian Constitution, above n 822, p.41; Sawer, Cases on The Constitution of the Commonwealth of Australia, above n 180, pp.146-151; Coper, Encounters with the Australian Constitution, above n 781, pp.270-271; Sawer, Australian Federalism in the Courts, above n 295, p.181; Geoffrey Sawer, ‘The Privy Council, The High Court and Section 92’ (1947) 1 Res Judicatae 155, 155; Brennan, ‘The Privy Council and the Constitution’, above n 167, 321; Sawer, Australian Federal and Politics and Law (1929-1949), above n 143, pp.66-67.
842 62 CLR 116 (“the Milk Board Case”). In 1939, a majority (Latham CJ, Rich, Evatt and McTiernan JJ, Starke J dissenting) of the High Court decided that the milk marketing scheme did not infringe section 92 mainly due to its social purposes. See below n 850 for further details.
Barwick's Preparation of Argument

Barwick’s knowledge of the individual judges and his ability to tailor his submissions accordingly were considered earlier. Barwick applied this key element and ideal of appellate advocacy on numerous occasions to great effect. He was, in particular, acutely aware of the importance of understanding each individual judge’s approach to the application of section 92 of the Constitution as this would be a key factor in determining whether the banks’ arguments would succeed. Barwick was personally familiar with the series of section 92 cases: ‘I had myself conducted or been engaged in some of these cases and of necessity was familiar with all of them and consequently with the attitudes of the individual judges towards the operation of s 92’. 845

According to Barwick, the High Court had ‘never adopted the correct attitude to the application of s 92’ and he had formed his own view of how the section ought to be applied. 846 From a strategic perspective, Barwick contemplated whether he should attempt to convince the High Court that they should adopt his personal view as to how the section should be applied. This was a critical decision. Barwick acknowledged his quandary and the fact that, as an appellate advocate, he was required to make a forensic decision: ‘[t]he problem in point of advocacy was whether an attempt should be made to have that view accepted by the High Court’. 847

Barwick summarised the decided cases in relation to section 92 as follows:

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843 70 CLR 1. Dulcie Johnson, a young woman, who travelled by rail from South Australia to Western Australia to visit her fiancé without a permit was charged with an offence under the National Security Act 1939-1943 (Cth) as a result of contravening paragraph 3 of the Restriction of Interstate Passenger Transport Order made pursuant to the National Security (Land Transport) Regulations which was in turn made pursuant to the National Security Act 1939-1943 (Cth). The Commonwealth prosecuted the charge before a Magistrate in Perth who dismissed the complaint and the Commonwealth appealed to the High Court. In a unanimous decision (Latham CJ, Rich, Starke, Dixon and McTiernan JJ), the High Court held that paragraph 3(a) of the Restriction of Interstate Passenger Transport Order made pursuant to the National Security (Land Transport) Regulations was a direct interference with the freedom of intercourse among the States conferred by section 92 of the Constitution, and was therefore invalid. Barwick also recounted Evatt’s belief that Barwick had arranged for Johnson to travel to Western Australia which Barwick denied (see National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 19). See generally Coper, Freedom of Interstate Trade under the Australian Constitution, above n 822, pp.89-90; Coper, Encounters with the Australian Constitution, above n 781, pp.257-258; Sawer, Australian Federal Politics and Law (1929-1949), above n 143, p.179; Marr, above n 8, p.48; Sawer, Cases on The Constitution of the Commonwealth of Australia, above n 180, pp.208-217; Geoffrey Sawer, Cases On The Constitution Of The Commonwealth Of Australia, (2nd ed), (1957), The Law Book Co of Australia Pty Ltd, Sydney, pp.168-175; PH Lane, A Digest of Australian Constitutional Cases, (5th ed), (1996), The Law Book Company Limited, North Ryde, pp.348-349.

844 Australian National Airways Pty Limited v Commonwealth (1945) 71 CLR 29. See above n 784.

845 Barwick, A Radical Tory: Garfield Barwick’s Reflections & Recollections, above n 1, p.63.

846 Ibid.

847 Ibid.
The judges had variously decided cases involving the application of the section, sometimes on the basis of the subject-matter of the legislation, sometimes on the parliamentary motivation in its passage, and sometimes on the nature of the legislation, that is, whether it was regulatory or prohibitive. There was a general tendency to seek to define what the section required trade etc to be free from rather than to consider what a prescription of absolute freedom required. Barwick adopted his customary 'ground up' approach to ensure that he was familiar with the history of the decided cases on section 92. During his preparation, he considered the appropriate strategy to employ. He 'did not think the argument in the High Court was one in which [he] should attempt to secure from the judges acceptance of so radical a change from what had already been decided'. He thought that it 'would be wise to accept the propriety of what had been decided by them and be content to rely on the absolute nature of the prohibition imposed by the banking legislation'. Therefore, Barwick made the critical decision to opt for an approach which fell within the ambit of the existing decisions; he would argue that the Act imposed an absolute prohibition and went beyond mere regulation. This was an application of the test that Latham CJ had outlined in the Milk Board Case and which he also applied in his judgment in the Airlines Case.

848 Ibid.

849 Ibid, pp.63-65. Barwick regarded the Banking Act as creating a government monopoly by virtue of its absolute prohibition of private banking. In contrast, for example, the legislation at the centre of the 'Transport Cases' provided for a regulatory system of licensing of private transport operations supported by a prohibition of unlicensed operations. In Barwick's view, the legislation in those cases attempted to effect a regime of regulation as opposed to complete prohibition. Therefore, Latham CJ's support for these cases might have been reconciled with the acceptance of the proposition that a complete prohibition of interstate banking, as opposed to its regulation, was invalid. As a result, Barwick's argument in attacking the validity of the Banking Act did not need to interfere with the existing 'Transport Cases' and 'Marketing Cases' whilst also not explicitly conceding that these decisions were correct. This carefully considered approach was formulated by Barwick following his comprehensive preparation.

850 62 CLR 116. In 1939, a majority (Latham CJ, Rich, Evatt and McTiernan JJ (Starke J dissenting)) of the High Court decided that the milk marketing scheme did not infringe section 92 mainly due to its social purposes. The milk marketing scheme had two purposes, social and commercial. The social purpose related to ensuring the quality and purity of the milk, the regularity of its supply and a reasonable price. The commercial purpose was to guarantee producers a reasonable and stable price for their product. The Milk Act 1931-1936 (NSW) gave the Milk Board comprehensive control over the distribution of milk in Sydney and Newcastle. The defendant was selling in Sydney cream purchased in Victoria and transported to Sydney without the Board's consent. The Board succeeded in obtaining an injunction to restrain the defendant from doing so. All judges agreed that the defendant was engaged in interstate trade and the issue was whether the milk marketing scheme was consistent with section 92. Relevantly, Latham CJ relied on James v Cowan (1932) (1932) AC 542; 47 CLR 386 to conclude that the milk marketing scheme was not 'directed against' interstate trade and its 'real object' was not to interfere with interstate trade (at 132-133). Latham CJ (at 127) outlined a test which he also applied in the Airlines Case:

One proposition which I regard as established is that simple legislative prohibition (Federal or State), as distinct from regulation, of interstate trade and commerce is invalid. Further, a law which is 'directed against interstate trade and commerce' is invalid. Such a law does not regulate such trade, it merely prevents it. But a law prescribing rules as to the manner in which trade (including transport) is to be conducted is not a mere prohibition and may be valid in its application to interstate trade notwithstanding s 92.

See Coper, Freedom of Interstate Trade under the Australian Constitution, above n 822, pp.83-85, 90; Zines, The High Court and the Constitution, (5th ed), above n 182, pp.146-147; 150-152; Sawer, Australian Federal Politics
Barwick assessed his prospects of convincing each individual judge of the merits of his case on behalf of the banks and, by doing so, demonstrated the importance of knowing the Court. He recalled that:

I made my own assessment of the likely attitudes of the various judges to nationalising the banks. I considered that Rich, Starke, Dixon, Williams and Fullagar JJ [sic] would be disposed to find invalidity on one or more grounds and that my task would be to aid them towards such a conclusion. Latham CJ I thought would be disposed to support the legislation, and if he did so, McTiernan J would follow him. It was therefore important that we convince Latham.851

In Barwick’s view, the extent of the operation of the Act was critical and needed to be understood. He stated that:

My argument before the High Court reflected my knowledge of its members and my estimate of their likely reaction to the legislation. Thus, some things could be taken for granted. But it was critically important that the full operation of the legislation should be appreciated; consequently I spent a deal of time expounding this. The legislation raised many questions about legislative power and acquisition of property, as well as the operation of s 92. The argument on these topics was distributed among the counsel for the bank.852

Barwick’s view that Latham CJ was the least likely to find the legislation invalid were, it appears, based on Latham CJ’s approach to section 92 in the Milk Board Case in which he outlined a test which he also applied in Gratwick v Johnson (1945)853 and the Airlines Case. According to Latham CJ, prohibition of interstate trade and commerce was invalid whereas mere regulation was permissible under section 92. Despite Barwick’s belief that the remaining judges would agree with this argument, one explanation for his desire to convince Latham CJ specifically could lie in Latham’s ability to influence the other judges. Barwick may also have been motivated by a desire to unify the Court in its approach to section 92 - perhaps more aligned with his own view of section 92. The decision to target Latham CJ was nevertheless curious in many respects, particularly given Barwick’s assessment of the position of the other four judges.

From an appellate advocacy perspective, the risk of attempting to convince one judge in particular is that the advocate may neglect the others, thus risk alienating them and possibly failing to convince


851 Barwick, A Radical Tory: Garfield Barwick’s Reflections & Recollections, above n 1, p.64. Note that the reference to Fullagar J is incorrect as he was not appointed to the High Court until 1950 and therefore the author suspects that this should be a reference to Webb J instead. This may also raise questions in terms of the accuracy of this statement generally.

852 Ibid.

853 70 CLR 1.
them as anticipated. However, Barwick did suggest\(^{854}\) that the other judges would be disposed to finding invalidity on one or more grounds and his task was to assist them to reach that conclusion. This indicates that he would not focus his submissions on Latham CJ exclusively but would dedicate sufficient time to assisting the other judges reach the conclusion that he anticipated they would reach. The manner in which Barwick achieved this will be examined later in this chapter.

Barwick acknowledged that he would have 'to think out a new approach entirely to [s]ection 92, and I did'.\(^{855}\) He requested that the banks' solicitors engage Richard Eggleston\(^ {856}\) to assist him in developing his argument on section 92. Barwick did not simply rely on his own ability but sought assistance which is consistent with effective appellate advocacy in terms of undertaking a comprehensive preparation. By contrast, in the *Communist Party Case*, it does not appear that Barwick sought any assistance with preparation which may have been attributable to the short preparation time or other factors. According to Barwick, he wanted to prepare a proposition on section 92 which was consistent with what Latham CJ had previously decided in the *Milk Board Case*, *Gratwick v Johnson* and the *Airlines Case* such that Latham CJ would have difficulty rejecting such a proposition.\(^ {857}\) As a result, Barwick with Eggleston devised a specific proposition which they believed Latham CJ could not dispute. The proposition was as follows:

> On the decided cases as they stand, at least the proposition is correct that s 92 is infringed whenever an individual or a corporation is engaged in inter-State trade, commerce or intercourse and, either by direct prohibition, or by acquisition with the object, purpose or motive of effecting such a prohibition, the carrying on of such business by him or it is forbidden. It is the individual's freedom to move from place to place and to conduct his business across State lines that is protected or guaranteed by s 92 ... \(^ {858}\)

Barwick believed that he would have 'little difficulty in being able to convince the court that banking is part of trade etc and that interstate banking, although dealing with the transmission of intangibles,
is part of that interstate trade etc which had the protection of s 92'. Whilst Barwick's suggestion proved to be correct for the majority, the dissenting judges (Latham CJ and McTiernan J) did not reach this conclusion. They held that banking was not itself 'trade and commerce' which was characterised by the sale and transportation of goods or the movement of people across a State border. It is in this manner that Latham CJ addressed the proposition formulated by Barwick and Eggleston. Barwick had failed to convince Latham CJ and McTiernan J of even such a preliminary matter for the purposes of his argument. Latham CJ held that the Act did not infringe section 92, but not for the reasons that Barwick had anticipated. Did Barwick spend so much time focusing on his fundamental proposition to Latham CJ on the broader section 92 issue that he failed to spend sufficient time satisfying Latham CJ of the fundamentals, including the preliminary question whether 'banking' could be characterised as 'trade and commerce'? In the analysis of Barwick's presentation, it will be evident that Barwick dedicated considerable time to the issue of 'banking', including numerous references to US and Canadian authorities, which, it turned out, Latham CJ did not find of any great assistance.

Barwick anticipated Latham CJ's conclusion, but failed to convince him and failed to anticipate his reasons. However, whilst his preparation was consistent with, and applied, the elements of effective appellate advocacy, it is once again a reminder that even exemplary advocacy does not necessarily result in a successful outcome in any particular case with a particular judge. Barwick managed to convince four of the remaining six judges, however, his inability to convince the two others may

859 Barwick, A Radical Tory: Garfield Barwick's Reflections & Recollections, above n 1, p.64.
862 Bank of New South Wales & Ors v Commonwealth (1948) 76 CLR 1 at 231, per Latham CJ.
863 Whilst the majority of the Court accepted Barwick's submission on the appropriate interpretation of section 92 of the Constitution, Latham CJ and McTiernan J did not. Based on the Court's reasoning, Latham CJ seems to be the least consistent with his approach to section 92 – in the Airlines Case he held that the legislation nationalising the airlines was unconstitutional whilst in this case he held that the legislation nationalising the banks was constitutional. This inconsistency appears to result from his characterisation approach. Effectively, Latham CJ was able to find that the Banking Act 1947 (Cth) was not 'directed against' interstate trade because of his view that banking itself was not trade and commerce (at 233-237, 240). McTiernan J agreed entirely with Latham CJ's reasons (at 297-398). See Galligan, above n 781, p.176. In fact, upon his retirement, Chief Justice Latham stated that 'when I die, Section 92 will be found written on my heart'. This reflected the frequency with which this section of the Constitution occupied his attention during his years on the High Court: see Cowen, Sir John Latham And Other Papers, above n 400, p.48 (see also Zelman Cowen, 'Latham, John Greig' in Tony Blackshield, Michael Coper & George Williams (eds), The Oxford Companion to the High Court of Australia, (2001), Oxford University Press, South Melbourne, p.421). See generally Coper, Freedom of Interstate Trade under the Australian Constitution, above n 822, p.94.
864 Bank of New South Wales & Ors v Commonwealth (1948) 76 CLR 1 at 233-235, per Latham CJ.
reflect the fact that the judges' views were unmoveable, or may be attributable to the quality of the presentation of the case. This will be examined in the next few sections. Whichever it was, the result also serves to emphasise the differences between exemplary advocacy and advocacy in practice.

Overall, Barwick's assessment of the likely attitudes of the individual judges to the bank nationalisation legislation was accurate as evidenced by the Court's decision. A majority, namely, Rich, Starke, Dixon and Williams JJ, found the Act unconstitutional on one or more grounds, whilst Latham CJ and McTiernan J found that the Act was valid.

7.2 Presentation and Personation in Chief in the Bank Nationalisation Case

In February 1948, the scene was set for the eagerly anticipated hearing in the Bank Nationalisation Case. After the considerable preparation undertaken by Barwick from August 1947, he was ready for the case to commence. The Act, as we have seen, had attracted considerable controversy and the case had generated unprecedented interest.

The constitutional challenge brought by the banks, in relation to the validity of the Act, commenced before the Full Bench of the High Court on 9 February 1948. The banks were also joined by the three non-Labor State governments, namely Victoria, South Australia and Western Australia. The case would become the longest running case in the history of the High Court and would span 39 days.

The case comprised five actions which were brought against the Commonwealth, its Treasurer, the Commonwealth Bank and its Governor. Barwick led the submissions as the leading counsel for the plaintiffs. The decision that Evatt should lead the case on behalf of the Commonwealth aroused considerable controversy for two main reasons. First, he had been a member of the High Court

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865 Latham CJ, Rich, Starke, Dixon, McTiernan and Williams JJ. Webb J was absent as he was the President of the International War Crimes Tribunal in Tokyo at the time (see 'Judges of the High Court', Sydney Morning Herald (Sydney), 12 August 1948, 1.


867 See Transcript of Proceedings, The Bank of New South Wales and Ors v The Commonwealth of Australia (High Court of Australia, Latham CJ, Rich, Starke, Dixon, McTiernan, Williams JJ, 9 February 1948 to 15 April 1948), pp 1-3; Barwick, A Radical Tory: Garfield Barwick's Reflections & Recollections, above n 1, p.66. A full list of Counsel who appeared can be found in Appendix C.

868 In light of the fact that the case was being heard in Melbourne and would be lengthy, Dr Evatt, who was leading for the Commonwealth, arranged accommodation for himself and his wife at The Windsor Hotel. He ordered management to bring to their room a grand piano for his wife to play (see Ayres, above n 50, pp.187-188).
between 1930 and 1940. Secondly, he was the Attorney-General at the time in the Chifley Labor government and as such, he was responsible for drafting the Act.  

This was by far Barwick's biggest case to date. The atmosphere in the courtroom was tense - there was ill feeling between the opposing barristers as well as amongst members of the Court. Barwick's advocacy was characterised by his unique style and his application of the elements and ideals of appellate advocacy. This, it is suggested, contributed greatly to the persuasiveness of his submissions in this case.

In terms of his style, a number of key aspects were critical to his advocacy in this case. Barwick outlined his approach for the court in clear terms initially and then periodically referred the court to the outline of his submissions. As he moved between his two broad areas of attack and moved between his arguments within each broad area, he indicated to the Court where each argument fit in the overall context of his general submissions. He also indicated when he was leaving one particular argument or submission to progress to the next. This added to, and allowed the Court to follow, the logical structure of his submissions. At the start of each sitting day when he resumed making his submissions, Barwick summarised the proposition that he was advancing the previous sitting day effectively to 'set the scene' again for the benefit of the Court. His advocacy was characterised by his ability to utilise answers to judicial questions as a means of conveying his arguments and his submissions, and he appeared to move effortlessly between his submissions and answering judicial questions. He also employed the use of examples and analogy to great effect to support his arguments or to respond to judicial questions. He often used different arguments to support the same proposition.

7.3 Barwick's Opening

Barwick recalled that, on the opening day, the Court was crowded with Melbourne society as well as journalists. However, Barwick was focused on adhering to legal argument and claimed to avoid being distracted by the occasion. His focus was on persuading the members of the Court:

869 Priest and Williams, above n 77, p.53; Ayres, above n 50, pp.187-188.
870 For example, McTiernan and Starke JJ were not talking to each other. See Ayres, above n 50, pp.187-188. Interestingly, it has been reported that Dixon J apparently disliked Barwick: see Peter Young, 'Melbourne Gentleman of the 30s: Owen Dixon - Book Review' in 'High Court Centenary: Sir Owen Dixon' (2003) 77 Australian Law Journal 682, 685. On the first day of the proceedings, after the appearances were announced, Evatt objected to Starke and Williams JJ hearing the case due to their interests in the various banks both in terms of Starke J's wife holding some shares in the National Australia Bank and the fact that they each held accounts with various banks. However, Latham CJ did not support the objection and said that both judges were entitled to hear the case, and ruled that these circumstances would not affect a fair and impartial trial: see Transcript of Proceedings, The Bank of New South Wales and Ors v The Commonwealth of Australia, above n 867, pp.1-7; Marr, above n 8, p.64; Priest and Williams, above n 77, p.53.
I was ... determined to keep the argument to legal principle and to ignore the political overtones. There was to be no more than a dry legal debate. So I am afraid I disappointed my audience. I opened the case in a matter-of-fact way: no rhetoric of any kind, no generalities or throwaway lines. The dull approach was, I am sure, disappointing, and it was not long before I lost my audience.  

Barwick recalled that the presence of journalists suggested that they were waiting for a specific quote or statement that they could use for a headline. The journalists present were anticipating controversy but were disappointed. One reporter wrote that Barwick had 'made the case sound like a minor contest between citizens'.  

One of the underlying messages about the use of emotion in advocacy is that an advocate should not argue a case with any other purpose in mind than to persuade the members of the court. Apart from being contrary to ethical standards, arguing a case with any other purpose in mind is likely to distract the advocate from the task at hand. Barwick made reference to this principle specifically in his recollection of the opening day of the Bank Nationalisation Case. He highlighted the importance of not being distracted by the overwhelming interest such that it altered the manner in which he presented his client's arguments.

Barwick utilised the opening of the case to outline and summarise the five main arguments on behalf of the plaintiffs. These were the five broad grounds of attack outlined earlier in this chapter.

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871 Barwick, A Radical Tory: Garfield Barwick's Reflections & Recollections, above n 1, p.66.

872 Ibid. See also Virtue, above n 857, 24.

873 Barwick, A Radical Tory: Garfield Barwick's Reflections & Recollections, above n 1, p.66.

874 Transcript of Proceedings, The Bank of New South Wales and Ors v The Commonwealth of Australia, above n 867, pp.10–11. In this way, Barwick conceptualised the plaintiffs' case into five general issues:

The first attack is that the Act is not authorised by any of the Heads of power, by none of the paragraphs of section 51 of the Constitution. Probably the four that we envisage are most concerned are paragraphs 13, 20, 31 and 39. [The relevant powers are: banking, corporations power, the acquisition of property power and the incidental power].

... in particular it is not a law on the subject of banking at all, and that it could not be said to be a law on any of the other three subjects that I indicated by reference to section 51.

... The second broad line of attack is that in three radical provisions of it the Act is obnoxious to section 92 of the Constitution, and there are three broad sections of the Act – I do not mean this in the sense of paragraphs, but of divisions of its operation – that we say are obnoxious to section 92. In the first place, its acquisition provisions; secondly, its management provisions – that is to say those provisions which provide for management of the banks; and, thirdly, its prohibition provisions.

The third broad line of attack, in some part covered by the first but not wholly, is that insofar as the Act is justified under paragraph 31 – that is, the acquisition of property – it does not provide just terms.

The fourth broad attack is that the Act is an invasion of the constitutional integrity of the States. [The fifth broad-line of attack is that] ... the Act is inconsistent with Section 105A of the Constitution and the financial agreements made thereunder.
plaintiffs' counsel. Barwick indicated that he would make submissions with respect to the plaintiffs' arguments in relation to the first two issues: 'it has fallen to myself to present the argument on the first attack, that is insofar as it affects paragraph 13 [the banking power] and Section 92'. The focus in this chapter is therefore on Barwick's advocacy regarding the banking power and section 92.

As Barwick was unable to convince a majority of the Court that the legislation was not a law with respect to banking (s 51 (xiii)) but was able to convince a majority that the acquisition provisions, the management provisions and the prohibition provisions were contrary to section 92, this case provides a useful contrast between his successful attack and unsuccessful attack. It is an opportunity to assess the effectiveness of his advocacy in terms of presentation and personation.

By a 4-2 majority, the High Court declared that most of the Act was invalid. Rich, Starke, Dixon and Williams JJ formed the majority whilst Latham CJ and McTiernan J comprised the minority. Rich and Williams JJ held that the Act was unconstitutional on every ground that they addressed. They did not find it necessary to determine whether it violated the constitutional integrity of the States. Latham CJ and McTiernan J found that the Act was valid on every ground except that it infringed section 51(xxxi) in that it amounted to an acquisition of property that was not on 'just terms' in some parts. Dixon and Starke JJ agreed with Latham CJ and McTiernan J in relation to all issues except the extent of the infringement of just terms and the critical question of section 92. Essentially, Dixon and Starke JJ held that large parts of the Act were invalid on the basis that they violated the principle of acquisition on 'just terms' but that this was not irreparable, by amendment of the legislation. As a result, the decisive issue in relation to the invalidity of the Act was the majority's (namely Dixon, Starke, Rich and Williams JJ) ruling on section 92. Importantly, all members of the majority held

875 Dr Coppel would deal with section 51(xxxi) whilst counsel for the plaintiffs in the second action (Kitto, Taylor and Dean) would deal with grounds 1-3 to the extent they would deem it necessary as well as grounds 4 and 5, whilst counsel representing the States in the third, fourth and fifth actions would deal with grounds 4 and 5 only: see Transcript of Proceedings, The Bank of New South Wales and Ors v The Commonwealth of Australia, above n 867, p.11.

876 ibid; Marr, above n 8, p.64.

877 Only Rich and Williams JJ agreed with Barwick.


879 Johnston, above n 783, 95; Galligan, above n 781, p.174. See also Hull, above n 783, pp.26-27; see also Ayres, above n 50, pp.189-190.
that section 46 of the Act contravened section 92 of the Constitution and that the section was not severable.

Barwick indicated to the Court that the most appropriate course was that he ‘should first, as it were, open the Act – take the Court through the Act and show its precise operation and the inter-relationship of its parts’. That is, it would be necessary for him to outline each individual section of the Act.

Ordinarily, such an approach may be viewed by advocates and commentators alike (as discussed in section 4.1) as a failure to effectively conceptualise the case or demonstrate a lack of discretion and selectivity. It could cause irritation and frustration amongst the judges. However, according to Johnston:

Barwick ... spent considerable time subjecting the particulars of the legislation to microscopic examination. He carefully explained the details including what might happen to employees’ pension funds, which division of the Commonwealth Bank might purchase the banks’ shares, and how interstate transmission of bank funds could be affected. These were analysed in a way that was calculated to arouse the justices’ condemnation of the Act’s intrusiveness into the affairs of those bastions of private enterprise, the banks. Barwick’s subtle dissection of its provisions also underscored the uncertainty affecting persons subject to the Act, including the banks’ customers, shareholders and traders.

As Johnston suggests, this gave Barwick an opportunity to employ language skilfully to effectively provide a ‘running commentary’ on the various provisions of the legislation and attempt to influence the judges from the outset. Barwick used a combination of sarcasm, exaggeration and humour to great effect and, at one point, he addressed the fact that the legislation applied to Australian assets that were situated, or deemed by law to be situated, in Australia. Barwick suggested that the legislation could only apply to Australian assets in Australia as such legislation would not be applicable if it was not referable to Australian subject matter. He submitted: ‘I say it would be outside power simply to authorise a distinct business to [be] set-up by the Commonwealth Bank in paraguay (sic) having nothing whatever to do with Australia’.

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881 Transcript of Proceedings, The Bank of New South Wales and Ors v The Commonwealth of Australia, above n 867, p.12. ‘If I might go through the Act, I think it will be convenient to deal with it relevant section by relevant section, to see its operation’: Transcript of Proceedings, The Bank of New South Wales and Ors v The Commonwealth of Australia, above n 867, p.15.

882 Johnston, above n 783, 94.

883 Section 5.

7.4 Barwick’s Submissions on Characterisation

Barwick conceptualised in succinct terms the characterisation test that he believed should be applied to determine whether the Act fell within a relevant power of the Constitution, namely:

The real test is as to whether or not the Act is within power, in pith and substance and direct operation, as distinct from consequential or remote operation of the purpose and so-called object, whether “object” used in the loose sense is irrelevant. It is a question of determining (sic) what is the substantive operation of the law. Therefore, it is necessary to examine and scrutinise what in fact it authorises and does.885

Barwick argued that the legislation attempted to enlist the support of a head of Commonwealth power simply by mentioning some aspect of the subject matter although it was not in ‘pith and in substance’ a law with respect to that subject matter.886 He referred to sections 22 and 24 to further emphasise that the head of power under section 51(xiii) of the Constitution related to ‘banking’ and not banks per se.889

In his reply, Barwick referred again to the test that he had propounded, namely, the ‘true nature and character’ test versus the ‘touch and concern’ test advocated by Evatt.890 He employed Evatt’s terminology in a slightly humorous way to indicate that the law is not a law with respect to banking, even based on Evatt’s test:

The first step is to keep clearly in mind the policy behind a valid law and the question of what you consider when you come to consider the true nature and character. This is related very closely to the submission of the Attorney-General that the right test for determining the validity of Commonwealth legislation is mere relevance - does it touch or concern? At one stage, it did not have a tangible touch. I suppose that is an extremely light touch; and it is asserted by the Attorney-General that that is different from the true nature and substance test which the Privy Council has laid down. He says that it is a different test because he proceeds to deny that the true nature and substance is the right test.891

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885 Ibid, p.15.
886 Ibid, p.66.
887 Barwick stated that section 22, which granted a power to the Treasurer to select any one bank for the purposes of being taken over by the Commonwealth Bank, was not necessarily supported by the banking power in section 51(xiii) of the Constitution: see Transcript of Proceedings, The Bank of New South Wales and Drs v The Commonwealth of Australia, above n 867, p.53A.
888 Barwick referred to section 24 which provided the Commonwealth Bank with the power to require the vesting in the Commonwealth Bank of any foreign assets. He suggested that such a provision was not relevant to banking or banking in Australia.
He took the opportunity to provide the Court with some examples of his argument which would increase the persuasive effect of his submission. These examples were intended to highlight the inadequacy and width of the test proposed by Evatt and point to Barwick's alternative:

On this touch and concern test, this would be a good law about banking – that all cheques and drafts and all insurance policies and proposals should be printed on paper manufactured by the Tasmanian Newsprint Pty Limited. That would touch and concern banking and insurance and it would be a good law on the touch and concern test. It would be impossible on that test to deny that that is a good law. I suppose, if you harked back to another part of the argument, you would say that was merely selecting what instruments may be used in banking. That cannot be so, and why not so? – only because you must look to the substance of it and determine what is the substance and the true nature of the law.

What of a law that only members of some particular organisation should be entitled to get interest on deposits? You could only resolve that as not being a law with respect to banking by looking at its true nature, finding out whether there was anything germane to the topic.892

Barwick foreshadowed the increase in the scope of Commonwealth power that would result if such a test were adopted, thereby referring the Court to the policy implications associated with accepting his opponent's argument. In this way, he also sought to demonstrate that the test he proposed was the appropriate test to employ to determine the validity of legislation under the Constitution with respect to a particular subject matter.

Barwick continued his submissions with respect to the test that should be adopted in relation to this legislation.893 Following a series of questions from Latham CJ aimed at testing Barwick's submission, Barwick took the opportunity to reaffirm his main proposition. This was a common tactic he employed – that is, repeating his submissions under different guises, with the intention of reinforcing his submission without appearing to be repetitious.894

Considerable time in reply was devoted to the relevant test to determine whether the legislation was within the subject matter of the Commonwealth's powers. Barwick relied heavily on Huddart Parker895 for the proposition he was propounding. In doing so, he cited authority with care in the following submission:

894 Whilst doing so, Barwick suggested that to the extent that the US case of Hammer v Dagenhart contradicted the true nature and character of the law test, it cannot be applied. In his view, the decision relied upon by the defendants was not appropriate in the context of the Australian Constitution and therefore this case: see Transcript of Proceedings, The Bank of New South Wales and Ors v The Commonwealth of Australia, above n 867, p.1992.
895 Huddart Parker Ltd v Commonwealth (1931) 44 CLR 492.
The two principal judgments in it both bear the strongest trace of the view I am putting, particularly the judgment of Mr Justice Evatt. There is evidence of these two ideas, (1) that you take the true nature and character of the law notwithstanding earlier passages to the contrary, and (2), that there may be criteria adopted which will put the law outside Commonwealth subject matter.\textsuperscript{896}  

Barwick referred to Evatt’s comment as a Justice of the High Court in \textit{Huddart Parker} that ‘[y]ou must look at the true nature and character of the law’.\textsuperscript{897} The reference had the benefit of demonstrating the inconsistency between Evatt’s ‘objective’ approach as a judge and his ‘subjective’ approach in his role as the defendants’ counsel in the present case. Barwick used this technique regularly throughout the case to illustrate the inconsistencies in Evatt’s approach, seeking indirectly to discredit Evatt’s arguments, suggesting that, independently, he did not agree with his own arguments in the present case. Barwick thus increased the persuasive effect of his own arguments. This was a carefully contrived and, it turned out, effective strategy.  

Barwick then took further steps to discredit Evatt’s argument in relation to the \textit{Huddart Parker} case by suggesting that Evatt’s ‘mere relevance test’ was not consistent with decisions from the Privy Council or with other decisions of the High Court.\textsuperscript{898}  

Barwick devoted a considerable amount of time in his submissions to outlining what he believed was the correct test to apply to the issue of characterisation and discrediting Evatt’s submissions on this issue. He seemed to belabour the point and his submissions became repetitious. It is evident that Latham CJ became frustrated with Barwick’s repetition: ‘I think you have made your point on it, Mr Barwick. I think you have expressed it . . . ’\textsuperscript{899} Barwick reacted to the clear signal from Latham CJ and, rather than risking the ire of the Court, used tact and discretion, and moved to another submission.  

In his judgment, Latham CJ acknowledged that the phrase ‘pith and substance’ was frequently used by previous authorities, yet he did not believe that it solved any difficulties.\textsuperscript{900} However, he also

\textsuperscript{899} Ibid, p.2006.  
\textsuperscript{900} His view was that:  

when a question arises as to the validity of legislation it is the duty of the Court to determine what is the actual operation of the law in question in creating, changing, regulating or abolishing rights, duties, powers or privileges, and then to consider whether that which the enactment does falls in substance within the relevant authorized subject matter, or whether it touches it only incidentally, or whether it is really an endeavour, by purporting to use one power, to make a law upon a subject which is beyond power.  

\textit{Bank of New South Wales v Commonwealth} (1948) 76 CLR 1 at 187, per Latham CJ.
added that there would be ‘grave difficulties’\textsuperscript{901} in accepting the Commonwealth's position that a law which ‘touches and concerns’ an authorised subject matter is valid unless it contravenes some express prohibition in the Constitution. Latham CJ outlined his characterisation test:

In determining the validity of a law it is in the first place obviously necessary to construe the law and to determine its operation and effect (that is, to decide what the Act actually does), and in the second place to determine the relation of that which the Act does to a subject matter in respect of which it is contended that the relevant Parliament has power to make laws. A power to make laws with respect to a subject matter is a power to make laws which in reality and substance are laws upon the subject matter. It is not enough that a law should refer to the subject matter or apply to the subject matter ...\textsuperscript{902}

This test is not dissimilar to the characterisation test proposed by Barwick and contains traces of Barwick’s conceptualisation. Latham CJ also indirectly agreed with Barwick’s submission that ‘you do not get subject matter by merely mentioning the subject matter’.

Rich and Williams JJ accepted Barwick’s formulation, based on the authorities, that you are to look at the true nature and character of the legislation, that is, ‘the pith and substance of the legislation’.

Starke J also agreed.\textsuperscript{904} Dixon J and McTiernan J did not specifically address this issue. Therefore, Barwick’s conceptualisation of the relevant characterisation test seemed to find favour with several members of the Court.\textsuperscript{905}

Approximately half way through day two of the proceedings, Barwick had concluded his outline of the Act. At this point, an issue arose in relation to the reading and tendering of various affidavits. Barwick insisted that the Commonwealth should read their affidavits immediately after the plaintiffs had read theirs and not during the course of the Commonwealth’s submissions as the Commonwealth had requested. Presumably, Barwick sought to have the affidavits read at this juncture for the purposes of disconnecting the Commonwealth’s evidence from its submissions and being able to address the relevant issues raised in the Commonwealth’s evidence in his submissions in chief.

\textsuperscript{901} Ibid at 183, per Latham CJ.
\textsuperscript{902} Ibid at 186, per Latham CJ.
\textsuperscript{903} Ibid at 254, per Rich and Williams JJ.
\textsuperscript{904} Ibid at 304 and 311, per Starke J.
\textsuperscript{905} As an aside, after dealing with this issue and before outlining the questions they proposed to deal with, Rich and Williams JJ commented that the ‘cases have been argued at great length and with great care on behalf of the plaintiffs and of the defendants’. Whilst the use of the word ‘care’ suggests that both Rich and Williams JJ thought the submissions were well formulated and deeply considered, the reference to the ‘length’ of the submissions may suggest that, in their view, the submissions were unnecessarily lengthy.
Barwick's knowledge of both practice and procedure in the High Court and in trials generally, together with his courage and his tact are illustrated in the following exchange related to the reading of affidavits:

Starke J: I suppose, strictly speaking, you are not entitled to these documents of the Attorney-General's yet. They should be read in his case. If you are leading evidence, as on a trial, your business is to put your case.

Barwick: This is a trial, Your Honor, in which I have a right of opening, which I exercise.

Starke J: In a trial you put in all your evidence, but you do not put in the defendant's evidence.

Barwick: I do not argue the merits until I have heard all the evidence.

Starke J: You do not read all the evidence put in for the Crown. When the Attorney-General opens his argument and reads his affidavit, then you would object. That is the time to determine it, really.

Barwick: With great respect, is not this the situation: this being a trial, before one argues questions as to what should be done, the evidence must be closed. To close the evidence I should read my affidavits and then the Crown read their affidavits, and on the conclusion of the evidence I should then argue on the case.

Starke J: He might move to non-suit you.

Barwick: He might. However, that is the time to do it, when the evidence is closed, and my proposal is, with respect, that the evidence should be concluded before the argument finally proceeds. As a matter of convenience, I think it will ultimately prove to be the most convenient course.906

Barwick succeeded in his quest to have all affidavits read at the same time.907 Interestingly, in this exchange, Barwick used Starke J's analogy in relation to 'trial' and made it work in his favour.


907 Latham CJ ruled as follows:

There are some advantages and some objections in either of the courses proposed. We think that on the whole the more satisfactory course, at least at this stage, is that counsel shall be allowed to read all the evidence subject to objection. When objection is raised it will be for the Court to determine as to whether it will then rule upon it or regard the objection as involving matters of substance and so not determinable at that stage.

... After hearing what has been said, we determine that all the evidence may be read. It is all admitted subject to objection ...

It was a small but important victory for Barwick, one that illustrated his knowledge of practice and procedure as well as his ability to deal effectively with judicial questions, particularly in the face of early resistance.

7.5 Barwick’s First Attack – What is Banking?

After the process of reading the affidavits was completed, Barwick commenced his principal submissions. He used a combination of humour and mild sarcasm to break the monotony following the long and tedious reading of the affidavits and to capture the attention of the judges from the outset prior to commencing his principal submissions. Barwick stated:

After reading the affidavits it is almost a pleasant reaction to come back to more mundane matters of the actual legal characteristics and the transactions with which we have to deal and with which this Act is really concerned.\[908\]

Barwick then outlined the relevance of the affidavits to his two grounds of attack, section 51(xiii) and section 92.\[909\] He suggested that the affidavits did not seem to have ‘much bearing’ on the first matter but were relevant to the second matter, namely, the arguments with respect to section 92. According to Barwick, they demonstrated that the plaintiffs’ business involved ‘trade and commerce’ and highlighted that a banker’s business involved the movement of funds across State lines.\[910\] At this point, it became apparent why Barwick had fought so hard to have the defendants’ affidavits read immediately after the plaintiffs’ affidavits – it allowed him to make direct comparisons between the parties’ respective evidence in relation to his section 92 argument. By doing so, Barwick attempted to damage the defendants’ defence of the validity of the legislation with respect to

\[908\] Ibid, p.120.

\[909\] Barwick started by outlining conceptualised versions of his two main arguments that formed the basis of his submissions:

After all, so far as the arguments I want to present are concerned there are two principal matters. The first is a question of power; that is to say: Is there a subject matter under Section 51 of the Constitution upon which this is in reality and in substance legislation?

The second principal matter is: Whether there is any prohibition in the Constitution against such law – if it proves to be a law on the subject matter – and the only relevant section there is Section 92. That is so as far as I am concerned; others will deal with other sections.

Transcript of Proceedings, The Bank of New South Wales and Ors v The Commonwealth of Australia, above n 887, p.120.

\[910\] Ibid, pp.120-121. However, Barwick suggested that the only use of the defendants’ affidavits was to confirm that the fundamental characteristic of the banker’s business was, in relation to the interstate element, to effect the movement of something tangible or intangible from one place to another. He noted that the defendants referred to this as the movement of ‘credit’ or ‘bank credit’ whilst the plaintiffs referred to it this as the movement of ‘funds’.
section 92 from the outset. Marr suggested that Barwick opened the third day ‘with a characteristically daring attempt to knock the Commonwealth right out of the ring’.  

Barwick proceeded to deal with the validity of the various sections of the Act and suggested that there was an obvious legislative purpose or motive. He was careful, particularly in the face of judicial questioning from Starke J, to ensure that the Court understood that his argument was not that the particular bank nationalisation scheme was invalid but that various parts of the Act were invalid. 

From a tactical perspective, this was a carefully considered strategy and approach. If Barwick were unsuccessful in showing that the entire scheme underpinning the Act was invalid, then the entire Act would be declared valid. However, the benefit of his approach was that, if he were successful with respect to particular sections of the Act but unsuccessful in relation to others, he would have at least made significant inroads into the validity of the Act. The valid provisions could not be implemented but nor could they be severed as they were in some way dependent or reliant upon the provisions of the Act which were held to be invalid.

Barwick outlined his strategy and approach carefully and clearly. This allowed the Court to understand the manner in which he would challenge the validity of the various provisions of the Act. His strategy provides strong evidence that he had considered the issues in this case at considerable length. He outlined his approach as follows:

The way I wanted to argue it was to take [the sections] separately in the first place as a series of separate and quite independent schemes in operation, test each one of them for pith and substance as to what it was, and show that each fail, sometimes for one reason and sometimes for different reasons ...

Barwick submitted that the word ‘banking’ in section 51(xiii) of the Constitution restricted the banking power to the ‘incorporation of banks’ and excluded the idea of incorporating and empowering banks to do something. This was consistent with his fundamental ‘ground up’ approach.

Essentially, Barwick sought to illustrate that the empowering of a bank to buy a share in a bank is not a law with respect to banking. Barwick submitted that ‘banking’ for the purposes of section 51(xiii) ‘authorises laws which really and substantially bear upon transactions or operations characteristic of

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911 Marr, above n 8, p.65.
913 Barwick’s approach can be encapsulated by adopting a war analogy. Barwick believed that it was far better to try to put numerous holes in the hull of the ship with smaller missiles, as some are bound to strike the hull of the ship causing it to sink eventually, rather than have one shot at the ship with a larger missile.
banker and customer’. 915 To further emphasise the point that ‘banking’ involved transactions which gave rise to the relationship of banker and customer, Barwick reminded the Court that in the *Melbourne Corporation Case* one year earlier, all present members of the Court had ‘used the expression that banking was the business of a banker’916 and he emphasised that the head of power was not ‘business of banking’ but ‘banking’. Barwick then sought to establish that the expression ‘business of banking’ was to be understood in terms of the carrying out of the operation of banking and the performing of transactions. He proceeded to quote passages from each of their judgments to demonstrate this and suggested that he did not intend to quarrel with this expression.917 He sought, in this way, to unite the judges on the meaning of this expression from the outset.

This technique was shrewd. It reminded all judges of the manner in which they had interpreted the expression ‘banking’ in a case involving similar issues only one year earlier, and appealed to their desire to maintain consistency and to achieve fairness and justice. It was also a subtle way of citing authority with care.

Barwick employed various examples to illustrate the scope of the banking power. He submitted that the term ‘banking’ meant that ‘there has been an impact upon the characteristic operation of the bank and the customer. If that is absent, then of course it is not a law with respect to banking’.918 Barwick submitted that a central bank, such as the Commonwealth Bank, may engage in banking in certain instances, such as where it regulates the lending policy of the banks as this affects the relationship of a banker and its customer. Further, he submitted that although the purpose or policy related to central banking, this did not necessarily make the subject matter central banking as the subject matter was actually banking.919

Barwick did not simply read aloud passages from previous cases but indicated to the Court the relevance of each case for present purposes. He was also selective and utilised the case law for the purposes of substantiating his submissions, not as a substitute for argument. Barwick would refer to the central proposition that he sought to establish, namely, the meaning of ‘banking’ and then the various cases which supported his proposition:

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915 Ibid, p.131.
916 Ibid, pp.131, 135.
917 Ibid, pp.135–136. Barwick noted that each judge in the *Melbourne Corporation Case* had suggested that the “business of banking” involved ‘the idea of the carrying out, the operation of banking, doing transactions’.
918 Ibid, p.133.
919 Barwick submitted that another example is where a central bank controls interest rates. This regulated how much interest a banker may charge a customer and therefore this is classified as banking despite the fact that the policy or purpose relates to central banking: see Transcript of Proceedings, *The Bank of New South Wales and Ors v The Commonwealth of Australia*, above n 867, p.132.
Wherever you find in the reports any reference to banking you always find it as reference to a transaction or an operation or a business in the sense of the carrying out of transactions. There are a number of cases in our own reports where you find some reference and I will give them to the Court at this point.

First of all, there is Tennant and the Union Bank (1894 Appeal Cases, 46). In Walsh and Johnson (37 CLR at p.81), one finds Mr. Justice Isaacs saying it is the “operations of banking”.

In the case of the Attorney General for Canada against the Attorney General for the Province of Quebec (1947 Appeal Cases, pp. 41 and 42), you have a confirmation of Tennant’s case and the use of the same language. His Honor Mr. Justice Dixon in Stenhouse and Coleman (69 CLR at 471) speaks of “transactions” in relation to banking ...

The Privy Council — as were the Courts below — were satisfied it was deposits in certain banks that were the real subject matter of the law. At p.44 this is what the Privy Council says — and this is the crux of the case in my opinion:

“...Their lordships cannot but think .... essentially part of the business of banking”.

It was because there was this characteristic of banking present that a law with respect to unclaimed moneys passed out of the area of civil rights and was ‘banking’.

Barwick’s strategy of citing various passages from the Melbourne Corporation Case also illustrated his familiarity with the attitudes of the judges to issues that also arose in the present case. He was able to adapt and respond quickly to the enquiries of the various judges. In Marr’s words:

He could play on the idiosyncrasies of the court like the conductor of an orchestra. He would humour Latham, talk to Rich with patient understanding, and turn the feud between Starke and McTiernan to advantage. It was all skilful, unobtrusive and charming. As McTiernan put a question, Starke would cut rudely across him with one of his own. Barwick would defer to Starke, and then come back to McTiernan's query with a careful show of attention.

At one point, there was a rapid exchange between Latham CJ and Barwick over whether the power of a bank to buy shares fell within the definition of banking:

Latham CJ: In other words, the power to buy shares, is the power of which a bank is to have assets of various kinds to be able to lend money. Is not that within your own definition of banking?

Barwick: No, of course the power to do it would come under “The Incorporation of Banks”.

921 Marr, above n 8, p.65.
Latham CJ: It may come under that as well. Do not think that I am making an assertion. I am asking you if such a provision has not a bearing on the banking business in relation to customers.

Barwick: One would have to make some reference to what test you would have to use in determining the proximity of the bearing. Otherwise, you would have defined in pith and substance that that was what it was for. The consequential result of relationship would not do. And of course a bank could engage as a tourist agent, and it might develop that side too much. It may ultimately effect (sic) some relationship.

It appears that Barwick maintained his composure throughout this exchange. Following this exchange, there is a reference by Latham CJ to section 12 of the Act which allows the Commonwealth Bank to purchase shares in private banks. Barwick responded to Latham CJ’s questioning by offering two contrasting examples. This appeared to have been an effective response since Latham CJ made no further enquiries on this issue. This demonstrates the importance of an advocate responding to judicial questioning patiently and courteously. It also demonstrates Barwick’s ability to be both flexible and tactful. Despite the rigorous questioning of Barwick, in his judgment, Latham CJ agreed that the acquisition of a share in a bank by any person (whether a bank or not) is not itself a banking operation nor is the purchase by any person (whether a bank or not) of assets from a bank. This example also demonstrates that judicial comments or questions may not necessarily indicate a judge’s final position on an issue.

In responding to judicial questions, Barwick utilised the opportunity to reiterate his main proposition that ‘banking’ referred to banking operations. He adeptly wove his main proposition into his response to judicial questions at every possible opportunity. The exchange between Barwick and Starke J on the meaning of ‘banks’ and ‘banking’ demonstrates Barwick’s technique in operation:

Barwick: I submit there is no support in that judgment for the notion that “State banking” means State banks and that it is correct to read back and say, “Therefore, ‘banking’ means ‘banks’. That is what Your Honor is asking me, whether I would agree to that way of reading it.

Starke J: It does mean banking.

Barwick: Yes, the banking operations.

Starke J: The word “banking” has the same meaning all through.


923 Bank of New South Wales v Commonwealth (1948) 76 CLR 1 at 195.
Barwick: Quite true, Your Honor. It means "operations" throughout the whole.924

Barwick had the ability to employ an example which was both appropriate and persuasive. He frequently used hypothetical factual scenarios not involving banking to demonstrate his point. These analogies were intended to be inherently persuasive:

It is said that a law which authorises one corporation to acquire the business of another corporation is a law with respect to banking. If I paraphrased it for the moment to see its full extent, I would say, "Let us assume a law that authorises Myer’s to acquire the business of Buckley & Nunn’s". Could you say that was a law with respect to merchandising?

I suppose one would almost immediately say, "No". It is true that the change in the relationship will have some bearing upon merchandising, but the law is a law so far as the subject matter goes, in my submission, about companies, or even about particular companies.

So here when you apply the test I suggest of what banking is, calling attention to the activity of banking, then the power to acquire either a share or the business of the other corporation could scarcely be described as a law on the subject of the activity which the particular business carried on.

Of course, if it were otherwise one could not say where you would go because a law which authorised the Commonwealth Bank to take over a pawnbroking business would immediately be said to be either a law about banking or a law about pawnbroking. In very truth, it would be neither. It would not be a law about the activity carried on by either party.925

Barwick’s novel and, to an extent, light-hearted reference to pawnbrokers illustrates his point that a law with respect to banking does not encompass the ability to nationalise the banks.926 Indirectly, he also alluded to the consequences or policy implications of accepting a contrary approach and used forceful language to emphasise this: he stated ‘one could not say where you would go’.

At times, Barwick faced rigorous judicial questioning. Generally, he dealt with such questioning in a courageous, yet not obstinate manner. He also appeared to maintain his control at all times. Faced with a barrage of judicial questions on a particular issue, such as his approach to the interpretation of ‘banking’, he did not alter his position nor did he wilt under pressure. One such example is the following exchange between Starke J and Barwick:

926 See generally Marr, above n 8, p.65.
Starke J: It is not very relevant to the Constitution, but when the Bank of England was nationalised would you not have called that a law relating to banking?

Barwick: No, I would not, with respect.

Starke J: It is not relevant to this matter but would you not call that a law with respect to, or in relation to, banking?

Barwick: No, with respect I would not, Your Honor.927

Barwick was not afraid to correct a judge if he felt his argument had been misunderstood or summarised incorrectly. This shows considerable courage but requires tact. An example is where Latham CJ attempted to encapsulate Barwick’s argument:

Latham CJ: Your argument appears to reduce the power to make laws in respect of banking to a power to deal with banking transactions between a bank and a customer. It assumes the continued existence of banks; it excludes, so far as this is power to legislate on banking, any power to deal with the constitution (sic) or the powers or management of any bank—all of that is outside the conception of banking. Does that clearly state your argument?

Barwick: No, I think Your Honor states it too widely.928

At this point, Latham CJ was foreshadowing his ultimate approach to the banking power which consisted of a broad interpretation as opposed to Barwick’s narrow interpretation. This is discussed further below. However, it may indicate that Barwick was not watching the bench and listening carefully to Latham CJ’s comments in which he was foreshadowing his likely approach. If Barwick had detected this, he may have been able to alter his submissions accordingly to address Latham CJ’s concerns (although it may not have altered Latham CJ’s view). This highlights the difference between exemplary appellate advocacy and appellate advocacy in practice where it is not always possible for an appellate advocate to follow the signals that are being sent from the bench which, with the benefit of hindsight, may be obvious. Of course, it remains possible that Barwick did detect this and chose not to alter his submissions due to the fundamental nature of this submission or his inflexibility.

Barwick used the width of section 12 of the Act, which allowed the Commonwealth Bank to purchase shares in private banks, to illustrate that the law was not a law with respect to the activity of banking. It is yet again another restatement of Barwick’s main argument.929 During submissions,

928 Ibid, p.158.
929 Ibid, p.165. Barwick stated:

The point I was making in relation to Section 12 was that when you add the width of operation to the particular subject matter—that is to say, the power to acquire a share—the submission is that one is not left
Barwick stated that there was no significance to be attached to the fact that it was the Commonwealth Bank that was the bank which could purchase the shares of the private banks and to which control was to be given or whose business it was sought to be expanded.\textsuperscript{930} He illustrated this proposition by stating that, for example, providing a bank with the power to conduct a hire purchase business or a pawnbroking business-could not be classified as banking and therefore merely granting the power to a bank to purchase shares did not suggest that it was a law with respect to banking.\textsuperscript{931}

As much as it is important for an advocate to respond to judicial questioning, an advocate must also be conscious that a particular answer to a judicial question may have implications and ramifications for the advocate's submissions generally. Therefore, it is important to answer a judicial question both honestly and accurately whilst not attempting to evade it. However, it is also important to answer cautiously so as to avert danger. McTiernan J inquired as to the validity of a law reducing the number of banks from 50 to 10. Barwick was not willing to answer such a hypothetical question and he skilfully dealt with it in the following way, knowing that an answer based on pure speculation may be damaging to his case. At the same time, he simultaneously reiterated his key proposition:

\begin{quote}
McTiernan J: What about the law prescribing the reduction of the number of banks from, say, 50 to 10?

Barwick: That is a question which I should not have thought could at any time be answered in the abstract, because one would have to see whether it was in its nature substantially a banking law.\textsuperscript{932}
\end{quote}

Barwick demonstrated courage when faced with rigorous questioning from Latham CJ who clearly disagreed with Barwick in relation to his proposition that the expansion of banking business was not a law on the subject of banking.\textsuperscript{933} Barwick maintained his narrow interpretation of the term 'banking'. Such a narrow interpretation attracted the attention of the members of the High Court. Despite considerable judicial pressure, Barwick did not waver. It has been said that '[c]ourage and determination are wonderful qualities in advocates'.\textsuperscript{934} As Marr states, Barwick 'drew some sharp responses from the bench ... but turned them without flinching'.\textsuperscript{935}

\textsuperscript{930} Ibid, p.165. In addition, Barwick indicated that it is only the trading division of the Commonwealth Bank which is relevant for the purposes of the Act.

\textsuperscript{931} Ibid, p.166.

\textsuperscript{932} Ibid, p.169.

\textsuperscript{933} Ibid, pp.170–171.

\textsuperscript{934} Justice Michael Kirby, 'Ten Rules of Appellate Advocacy II', above n 654.

\textsuperscript{935} Marr, above n 8, p.65.
Specifically referring to section 46 of the Act, which prohibited the carrying on of banking business by private banks, Barwick submitted that on any interpretation of the provision the banking transactions cease to be consensual and therefore fall outside of the banking power.936 Dixon J informed Barwick that he did not quite follow Barwick's point. Barwick understood the implications of this, including that other judges may not have grasped his submission and immediately attempted to rectify this.937

Following this, Barwick attempted to deal with the issues raised by section 46 as well as section 6 of the Act which stated that if any provision was inconsistent with the Constitution then the remaining provisions will operate to the full extent that they could operate consistently with the Constitution. Starke J remarked that Barwick may have obscured his main submission in attempting to do so. In response, Barwick demonstrated discretion and flexibility by opting not to make any further submissions in relation to section 6 of the Act so as to ensure that he did not detract from his previous submissions.938

Barwick then proceeded to deal with the definition of 'banking' by referring to the Canadian case—Attorney-General of Alberta v Attorney-General for Canada.939 In so doing, he quoted a lengthy passage from this case.940 This is rare in terms of Barwick's advocacy. He chose to do so on this occasion because the passage illustrated and encapsulated his submissions in relation to this issue. Whilst this is not consistent with citing authority with care due to the fact that it may cause irritation to the judges or may cause them to lose interest, it does highlight that, on occasions, advocacy in practice will involve a departure from the strict ideals of appellate advocacy. The critical question is whether it is a warranted departure; it is probably justified if quoting a passage at length demonstrates a point more clearly than paraphrasing it.

At this point, Barwick indicated that he would deal with the Commonwealth's affidavits in his reply. He cleverly took the opportunity at this time to criticise the affidavits on the basis that they contained a misconception. Barwick did this to allow the judges to contemplate this criticism during

937 Barwick immediately attempted to rectify this: see Transcript of Proceedings, The Bank of New South Wales and Ors v The Commonwealth of Australia, above n 867, p.264. At this point, Barwick acknowledged that if his submissions in relation to the invalidity of the acquisition sections of the Act succeeded, then it would not be necessary for the prohibition sections of the Act to be found to be invalid. Nevertheless, Barwick attempted to cover all his bases: see Transcript of Proceedings, The Bank of New South Wales and Ors v The Commonwealth of Australia, above n 867, p.265.
938 Barwick was able to assess the situation quickly and understood when he ought not to persist with a particular argument in light of the fact that it may detract from his other arguments. He promptly concluded his attack on the actual sections of the Act: see Transcript of Proceedings, The Bank of New South Wales and Ors v The Commonwealth of Australia, above n 867, p.267.
939 [1943] AC 356.
the Commonwealth’s submissions when the Commonwealth would seek to rely upon these affidavits. In doing so, Barwick sought to sow seeds of doubt in the minds of the judges as to the probative value of the affidavits.\textsuperscript{941}

At this point, Barwick’s argument progressed to section 92 of the Constitution which is discussed later in this chapter.

Evatt’s submissions on behalf of the Commonwealth consumed 17 days of the 39 day hearing and were highly repetitive.\textsuperscript{942} According to Barwick, Evatt was: ‘anything but a born advocate and his delivery was dull and tiresome’.\textsuperscript{943} Barwick’s assessment was scathing.

\section*{7.6 Barwick’s First Attack – In Reply}

The \textit{Bank Nationalisation Case} was already one of the longest running cases in Australia’s history when Barwick rose to address the High Court in reply on day 32. Barwick commenced with a

\begin{itemize}
  \item the Act is within the Commonwealth’s legislative power with respect to banking under section 51(xiii) of the Constitution, with respect to financial corporations under section 51(xx) and with respect to the acquisition of property under section 51(xxxi);
  \item a primary matter dealt with by the \textit{Banking Act 1945} and the \textit{Banking Act 1947} is the selection of those who shall conduct banking business in Australia, and such a measure is plainly a law with respect to banking;
  \item the Act provides machinery for bringing under public ownership or control through the Commonwealth Bank the conduct of all banking business in Australia except banking business conducted by the States, and a law conferring, as this does, on the Commonwealth Bank the necessary powers and functions is within the banking power.
\end{itemize}

Evatt argued that the ability to nationalise the banks and prohibit private banking came within the ambit of the banking power under the Constitution. See Transcript of Proceedings, \textit{The Bank of New South Wales and Ors v The Commonwealth of Australia}, above n 867, pp.684-1707. See also Galligan, above n 781, p.173; Ayres, above n 50, p.189.

\textsuperscript{941} Ibid, p.268.

\textsuperscript{942} On behalf of the Commonwealth, Evatt made the following general submissions in relation to the interpretation of the banking power:

\begin{itemize}
  \item the Act is within the Commonwealth’s legislative power with respect to banking under section 51(xiii) of the Constitution, with respect to financial corporations under section 51(xx) and with respect to the acquisition of property under section 51(xxxi);
  \item a primary matter dealt with by the \textit{Banking Act 1945} and the \textit{Banking Act 1947} is the selection of those who shall conduct banking business in Australia, and such a measure is plainly a law with respect to banking;
  \item the Act provides machinery for bringing under public ownership or control through the Commonwealth Bank the conduct of all banking business in Australia except banking business conducted by the States, and a law conferring, as this does, on the Commonwealth Bank the necessary powers and functions is within the banking power.
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Evatt argued that the ability to nationalise the banks and prohibit private banking came within the ambit of the banking power under the Constitution. See Transcript of Proceedings, \textit{The Bank of New South Wales and Ors v The Commonwealth of Australia}, above n 867, pp.684-1707. See also Galligan, above n 781, p.173; Ayres, above n 50, p.189.

\textsuperscript{943} Barwick, \textit{A Radical Tory: Garfield Barwick’s Reflections & Recollections}, above n 1, p.66. Evatt’s advocacy was in stark contrast to Barwick’s – Evatt had not practised at the Bar for a considerable period of time prior to this case. In fact, he had not argued a case before the High Court for 17 years at the time of this case. Interestingly, Dixon J disliked Evatt and had told his Associate, Ian Spry, that he considered Evatt to be dishonest. Despite this, Evatt targeted his submissions at Dixon J believing that he had the ability to exert the most influence on other members of the court: see Peter Young, above n 870, 685; Ayres, above n 50, pp.187-189. Ellicott recalled attending the \textit{Bank Nationalisation Case} as a student in Sydney and stated that: ‘when I went Dr Evatt was addressing the Court and he seemed to be just quoting from constitutional text’: interview with Hon. Robert Ellicott QC (Sydney, 8 August 2006). It was said that Evatt ‘introduced into the record every possible argument’: Tennant, \textit{Famous Australians – Evatt: Politics and Justice}, above n 786, p.228. Ross Barwick recalled that his father ‘treated Evatt with great disdain during the course of the Bank case ... There was a lot of jocularity about Evatt’s performance in the Bank case’: Interview with Ross Barwick (Sydney, 4 October 2006). Whilst there is no suggestion that Barwick showed disrespect to Evatt before the Court, the references to ‘disdain’ and ‘jocularity’ suggest that may have also affected their interaction inside the Court. Respect between advocates is a key value of advocacy and the legal profession generally.
humorous introduction by indirectly referring to the length of the hearing. His use of humour offered the Court a light-hearted moment, and his reference to the length of the hearing no doubt resonated with the thoughts of many of the judges. It also ensured that Barwick captured the Court’s attention from the outset of his reply:

If the Court pleases: After the length of the hearing I suppose the last speaker is at least received with some pleasure. I hope that the time which the last speaker has to devote to answering the case put by the other side will not wear out his welcome.  

Barwick’s reference to the fact that he might require considerable time effectively, but subtly, forewarned the Court that his reply would not be short.

After capturing the Court’s attention, Barwick outlined from the outset the structure of his reply and, in the course of doing so, he criticised the defendants’ arguments with some specifically chosen language:

There is a great number of matters to be dealt with in answering a very long, but not always coherent, argument put by the defendants. I do not propose to go through the transcript to find all the contradictions in the argument. It would not be hard to do. Nor do I propose to deal with assertions rather than argument, assertions which only have to be heard, and certainly only have to be read, to be denied.

Barwick summarised the defendants’ arguments and reduced them to their simplest form whilst capturing their essence. This is another example of Barwick’s great strength - his ability to conceptualise the defendants’ arguments in such a simple manner. This provided Barwick with the opportunity to illustrate to the Court the consequences of accepting the defendants’ arguments:

Of course the argument for the defendant was a very strong endeavour to increase, beyond anything probably that any of us has ever heard suggested, Commonwealth power. It was done by an attempt to widen the rules of interpreting the constitution; denying that there are any implications from the Federal structure of it; suggesting that the power was plenary, and using that word or placard in the sense that there were no bounds to the power; denying that you could find any limitation in the particular paragraphs of Section 51; denying that there was an inter-action between the paragraphs, although at a later stage suggesting that there were inter-acting paragraphs; and, having got the meaning of the paragraphs, then attempting to widen the application of the law by denying that the real and substantial nature of the law need by (sic) looked at ...

Barwick's suggestion that the interpretation of Commonwealth power that the defendants were proposing was more extreme than anyone was likely to have heard before, was an attempt to, through the use of language, introduce the 'fear factor' and associate accepting the defendants' submissions with venturing into unknown territory thereby also referring to the policy implications associated with the Commonwealth's position.

The approach Barwick adopted in the early stages of his reply was indicative of a greater emphasis on the policy implications associated with accepting the Commonwealth's submissions. It appears that he deliberately chose this at this stage rather than in chief as the Court had now heard the Commonwealth's arguments. At this point, it was much easier for Barwick to paint a picture of the consequences of accepting the Commonwealth's submissions. It also allowed him to do so without the defendant being in a position to respond - giving him the 'last say' advantage. It also illustrates his acknowledgment of the importance of addressing the policy implications of accepting a particular argument, or set of arguments, and that this is likely to be a strong consideration for the members of any appellate court. Barwick stated:

The noticeable thing about the defendants' argument was a complete refusal to face the operation of this Act, a preference to resort to generalities. In particular, there was never a facing up to what conclusions flow from giving to the Treasurer the unlimited discretion he has in the operation of the various sections.

There was no endeavour to face up to what I call the minimum operation of the Act. There was no endeavour to face up to what will be the operation of this Act in the future and in changed circumstances. There was an endeavour to determine the validity of this Act by reference to the effects that happen to be here at present.\(^{947}\)

Barwick sought to alert the Court to the dangerous consequences of providing the Treasurer with unlimited discretion under various sections of the Act and the possibility that this discretion could be abused by a future government. He specifically alluded to the operation of section 46(4) of the Act.\(^{948}\)

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\(^{947}\) Ibid, p.1856.

\(^{948}\) Barwick submitted:

Section 46(4) is a law which enables [the Treasurer] to choose which bank shall be prohibited and when you see that he may use it concurrently or alternatively to the other parts of the Act, the real nature of his discretion is disclosed. He can say, for example, "As to Bank A and Bank B, I have some reason to prefer them. It has nothing to do with banking. They are all the same as far as banks are concerned. There is no banking reason that would differentiate one from the other, but I like the directors of Bank A and I think that the shareholders are more meritorious, so I will acquire them and they will get compensation. I do not like the other people. They have not been kindly towards me, so I will simply prohibit them".

Barwick was critical of the defendants' submission that section 46 was capable of standing alone, that is, the other provisions of the Act could be severed from it. He highlighted the adverse policy implications that would flow from accepting this submission. This issue was the focus of the Commonwealth's appeal to the Privy Council which is discussed in the next chapter.

The severability of section 46 from the remainder of the Act was a constant issue during the early stages of Barwick's reply. The following extract illustrates Evatt's attempts to prevent Barwick from addressing the Court further on this issue:

Evatt: I would refer the Court to p.46 of the transcript about the way it was put in chief [referring to section 46].

Barwick: There is no doubt about the way I put it in chief. I avowedly said in chief that I was going to treat them as severable because of the presence of Section 46, in order to enable presentation of the matter. I submitted — and it was submitted by others as well as by myself — that it was inseverable. I am now pointing out that the defendants never faced up to the difficulties.

This example illustrates the difficulty associated with the reply; a plaintiff's advocate can only raise issues which arise from the defendant's submissions and is not able to make fresh submissions so as to bolster their submissions in chief. Barwick was aware of the parameters of a reply and, in response to this suggestion, he was quick to indicate that he was not departing from his earlier submissions but simply identifying problems associated with the defendants' submissions. In this way, Barwick was able to continue with his submissions and also surreptitiously expand upon his submissions in chief. This is an example of Barwick 'trailing his coat'. As discussed earlier, this is viewed by many as a questionable technique, and it provides a useful contrast between the ideals of appellate advocacy and appellate advocacy in practice. Barwick occasionally employed techniques and strategies that were available to provide him with a competitive advantage.

949 Barwick submitted as follows:

The other noticeable feature was that there was a desire to maintain Section 46 as an independent provision at all costs... That is a very peculiar thing when you look into it; because if the whole of this Act were to go and only Section 46 were left you would have such an extraordinary result; you would have no provision for the salvage of the bank or the customer or the staff or the assets of the banks; and yet there is a very determined endeavour to support Section 46 as an independent and permanent section, when it could never be put to any use that one can think of as a proper kind.

It could be used as a very dangerous bargaining weapon to force people into a sale, or to play one bank off against another; but it could have no relation to anything else in this Act as it now stands.


950 Ibid, p.1870. The suggestion by the defendants that the valid provisions of the Act could be severed from the invalid provisions as stated in section 6 met with opposition by Barwick.

951 Ibid.
Through the use of analogy, Barwick attempted to illustrate the policy implications if one were to accept the defendants' 'fallacy', namely, there would be no limit on the Commonwealth's power and the Commonwealth could slowly encroach upon other areas:

That is the fundamental fallacy that has been present in all that has been said by the defendant, Your Honor. These are the steps by which you could slip into such a fallacy: the bank of NSW has a tourist agency. The Commonwealth Bank can be given power to be as good as the Bank of NSW. If it can be given power to be as good, I suppose it can be given power to be better, so instead of having a tourist agency it could have a tourist steamer, and when it has a tourist steamer it is in shipping – and then it can take all the ships. There is no limit to it.

Of course, the answer is "Do not be logical" (sic). But that is a very poor answer, even from the defendant. 952

Here we find an example of Barwick's 'acid tongue' which could be observed from time to time. Images of chaos and anarchy were also evoked when Barwick employed powerful language to describe the situation that would arise if the Court accepted the defendants' submissions and prohibited the carrying on of banking business by private banks in Australia:

It does not, I submit, need very much imagination to see what chaos would be caused by the exercise of powers under such a law because then there would be no provision, for example, for the customers to deal with their current transactions – I suppose all the cheques would have to be dishonored (sic), there would be no provision of the Commonwealth Bank to get the records of the other bank if the customer desired to shift his account; there would be no provision for staffs, no provision in respect of assets and you would have chaos. 953

Shortly after, in response to a question by Williams J, Barwick repeated his point:

Williams J: If all the banks were closed down at once under Section 46(4), it would become impossible for the Commonwealth Bank to handle the business?

Barwick: Quite. There would be chaos. 954

Barwick used every opportunity to remind the Court of the 'chaos' that would result if the defendants' submissions were accepted, including in his responses to judicial questions or comments. Barwick employed strong language 955 and repetition effectively to emphasise a point, not

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952 ibid, p.1872.
955 Sometime later in his submissions, Barwick once again raised the policy implications of the legislation in an indirect way by employing an analogy. Barwick referred to these policy implications by using powerful
in a deliberately repetitive way but in what appears an almost subliminal way. This technique may have had an inherently persuasive effect. For example, at one point in his judgment, Justice Starke refers to trade and commerce being reduced to ‘chaos’ if section 46 was allowed to operate.956

In his reply, Barwick summarised his submission in chief in relation to the banking power and then addressed the issues raised by the defendant. At one point, Starke J made a humorous remark to Latham CJ. Barwick continued temporarily with a humorous tone to participate in the light-hearted moment among his serious submissions:

| Latham CJ:       | And there is a great deal of talk about cheques being as good as bank notes. |
|                 | Everybody knows that they are not.                                         |
| Starke J:       | They are often better!                                                      |
| Barwick:        | They might be, too; it depends where they are drawn.957                      |

Following on from this, Barwick posed a question for the members of the Court designed to provoke thought and, in doing so, to convey the relevant test which, according to him, should be applied in this case:

Can a law which gives that discretion be said to be a law with respect to banking, if the real test is the true nature and character of the law and not, as is suggested by the Attorney-General, a law that merely touches upon or incidentally concerns the topic of banking?958

He outlined two classes of American decisions with which he would be dealing. The first class, Barwick suggested, would demonstrate the width of the banking power of the Commonwealth and the second class related to the issue of a law on the subject matter.959 Barwick sought to demonstrate that the first class of cases relied upon by the defendants was ‘not founded upon any matter of banking, as banking law or banking power’,960 but was founded on an incidental power and therefore was not relevant to the present case.961 On several occasions, Dixon J indicated that he was having difficulty understanding Barwick’s argument. Barwick responded to this judicial concern immediately and summarised his argument for Dixon J’s benefit. It is clear that Barwick recognised the importance of addressing any difficulties or concerns faced by any member of the Court.962


956 Bank of New South Wales v Commonwealth (1948) 76 CLR 1 at 324, per Starke J.


959 Ibid.

960 Ibid.

961 Ibid.

Following a comment, this time by Starke J that he did not understand part of Barwick’s argument, as well as concerns expressed by Latham CJ about Barwick’s argument, Barwick demonstrated both honesty and candour by suggesting that he had not expressed himself in a manner that the Court could understand. At one point, Barwick stated '[t]hat is the argument, Your Honor, but evidently I have not made something plain'.g63 Whilst advocates might routinely make such admissions generally, it is worth noting that Barwick was prepared to do so also.

Barwick continued to encounter difficulties with respect to his arguments on the first class of American cases. He appeared to realise this as he promptly concluded his submissions on this issue stating: ‘I do not wish to say any more about that group of cases’.g64 Persisting may have caused the justices to become frustrated and irritated. Whilst this demonstrates Barwick’s flexibility, discretion and tact, it may also reflect his inability to effectively convey his submissions regarding these cases to the Court.

Barwick proceeded to make submissions with respect to section 51(xiii) of the Constitution, namely the banking power. Latham CJg65 and Starke Jg66 separately questioned Barwick on his submissions. At one point, Latham CJ described Barwick’s argument as ‘far fetched’.g67 This put Barwick under considerable pressure. He held his ground:

Barwick: So Government participation under “banking” cannot be a banking reason, in my submission, because of the presence in paragraph (xiii) of “incorporation of banks”.

In the trade and commerce power the Court was able to say in the Airlines Case that the incorporation of a body giving it power to trade was trade and commerce. But you could not say that the incorporation of a bank and the giving to it power to trade was banking, because you have “incorporation of banks” in the paragraph.

Latham CJ: You would be able to say it was incorporation of a bank and then you would say, I presume, “These banks have already been incorporated, so this Act cannot apply to them”. Is not the argument you are presenting now rather far fetched?

Barwick: No, Your Honor. The “incorporation of banks” being expressed in paragraph (xiii), notwithstanding what was said by the Attorney-General he simply “put the telescope to Nelson’s eye” so far as those words were concerned.

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g64 Ibid, p.1978.
There may be overlapping sometimes but when you have the express provision in that form, then it goes outside "banking". What was done in the Airlines Case with respect to banking would have to be done under "incorporation of banks". Therefore the bringing of the Government into the field is not banking within the meaning of the first word in paragraph (xiii). It is within the whole paragraph, but because it comes within the other words. I mention that particularly in answer to His Honor Mr Justice Dixon. 968

Nevertheless, the comments from Latham CJ should have caused Barwick some concern about the prospects of his submissions on this issue. As it turned out, such concern would have been justified.

Shortly thereafter, Barwick moved to address the Court on the final issue submitted by the defendants in relation to section 46 and the definition of ‘banking’. 969 From the outset, Barwick utilised his ability to conceptualise the case in simple terms by summarising both the plaintiff’s and defendants’ competing views as follows:

First of all, the plaintiff says “You cannot prohibit”, and, on the other hand, “You must look at the true nature and character of the law”, and there is no criterion at all specified for the operation of Section 46(4).

If there is, it is Section 3, and that has nothing to do with banking as the plaintiff suggests it should be defined. So the plaintiff, as a sort of last step in his argument, has resort in the attack on Section 46 to the definition of “banking”.

Looking at it from the defendant’s point of view, the defendant says, “We can prohibit for any reason or no reason”, and he uses the American and Canadian cases and the various things I have dealt with. On the other hand, as a second line of defence, the defendant says, “If we have to have a banking reason, we have one, and the banking reason is Section 3(a). That is to say, Government participation and not private profit.” 970

Barwick emphasised the contrast between the plaintiff’s approach to the definition of ‘banking’ and the defendants’ approach. He presented the plaintiff’s approach as simple and robust, as opposed to the defendants’ approach which was flexible and broad to the point that it almost did not provide any indication or any assistance as to what ‘banking’ meant. Barwick suggested that the defendants’ used whichever definition of ‘banking’ suited them, and that their approach was illogical and laughable. Barwick added cynicism and contempt to discredit the defendants’ approach:

The defendant’s answer to that follows these steps broadly, without going into detail for the moment: he says that banking is whatever bankers do, and he does not stop to give us any clue as

968 Ibid.
969 Ibid, p.2052.
970 Ibid, pp.2052–2053.
to what is a banker. It immediately leaps to mind that that statement does not tell us anything. But he does not stop there. He says that banking is whatever bankers do provided it is not too remote from banking, never having bothered to tell us what banking is. We have no test as to how to find out whether it is too remote. He says that it includes everything that is auxiliary to banking. We still cannot tell what is auxiliary until we know what is banking.971

Barwick continued his attack employing a metaphor to great effect to further discredit the defendants' approach:

What the defendant proffers is a complete circle. You just run around like the dog chasing its tail; you never find out what banking is. The very use of the word must mean that there is something characteristic. There must be some means by which you can determine who is a banker.972

Barwick then referred to the Memorandum titled 'Banking' handed up to the Court which outlined the defendants' position on the issue of 'banking'. He indicated that he would like to go through this document with the Court 'to show the Court what I have been putting and to show the fallacy of what is put by the defendant'.973 Latham CJ was confused as to whether the other Memorandum titled 'Functions of Banking' belonged to the plaintiffs or the defendants. The following exchange illustrates Latham CJ's use of humour as well as Barwick's wit in his reply, which suggested that it was patently obvious that the Memorandum belonged to the defendants from merely reading it, such was the weak nature of the defendants' argument:

Latham CJ: The memoranda of one side should be printed in red ink and that of the other in green ink so that we should be able to distinguish between the gospel and the false writings!

Barwick: It would not rest with me to say it, Your Honor, but I would attempt to say that one only has to read them to see which side they come from. The next sentence in this document is perhaps a symptom of it.974

Barwick read various extracts from the Memorandum and then commented: 'One has only to stop to see how foolish that is';975 'That is a statement of somebody who is living in a world of fantasy'; 'There is not the slightest shred of evidence of all this';976 and '[t]hat is just too absurd for words'.977

971 Ibid, p.2054.
972 Ibid, p.2055.
973 Ibid, p.2056.
974 Ibid.
975 Ibid, p.2063.
977 Ibid, p.2065.
He then concluded his submissions in reply with respect to section 46 and took the opportunity to summarise his submissions.  

7.7 The High Court’s View on Banking

While Starke, Rich and Williams JJ agreed with Barwick’s formulation for determining whether a law was ‘with respect to’ a particular topic for the purposes of section 51 of the Constitution and Latham CJ provided tacit support (Dixon J and McTiernan J did not specifically address this issue), only Rich and Williams JJ were convinced by Barwick’s argument that the Act was not a law with respect to banking. The remaining judges rejected Barwick’s submissions on this issue.

Latham CJ accepted the defendants’ submission that ‘banking’ included central banking and, although accepting Barwick’s submissions that the banking power allows the Commonwealth to make laws with respect to transactions between banker and customer, he did not believe that it was limited to these matters alone. The differing approaches can be traced back to an exchange between Latham CJ and Barwick during the hearing. It could be suggested that Barwick’s failure to detect Latham CJ’s reservations with his approach is attributable to a failure to listen carefully to Latham CJ’s comments or possibly even the result of arrogance or over-confidence. If detected, Barwick would have had to address Latham CJ’s concerns within the broad parameters of his own approach.

However, Latham CJ did not agree with the defendants’ contention that the creation, expansion and contraction of credit constituted the essence of banking. While Latham CJ agreed with Barwick’s submission that the acquisition of a share in a bank or the purchase of assets from a bank by any person (whether a bank or not) were not of themselves banking operations and that the taking over of the business of another bank probably would not be described as a banking transaction, he stated that a law which controlled such matters was a law dealing with the business of banking ‘because such matters affect the conduct and control of the business and are things which may be done from time to time in the course of the business of banking, although they are not banking transactions

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978 Barwick stated:

That completes what I want to say about 46 viewed as a separate enactment. I have endeavoured to cover the various answers that were made by the Attorney-General to our propositions, and I have referred to what little use was made of his definition of “banking” in the argument with respect to 46, but if there is some use of it which is possible to be made that I have not discovered, then my submission is that it is not a definition at all; it is of no aid; it suffers several confusions of thought and the Court cannot derive any benefit in particular from this memorandum that is put in about banking.


979 Bank of New South Wales & Ors v Commonwealth (1948) 76 CLR 1 at 194, per Latham CJ.
between a banker and a customer'. 980 He added that a law dealing with the management and staffing of banks would be a law relating to essential elements in the business of banking though not dealing with any transactions between any bank and any customer'. 981 This view was shared by Starke, Dixon and McTiernan JJ. 982

The approach adopted by Rich and Williams JJ was heavily influenced by the text of section 51(xiii). 983 Rich and Williams JJ concluded that: 'Laws with respect to banking are not therefore laws which deal with the incorporation, regulations and winding up of banks, but are laws with respect to the conduct of the business carried on by banks'. 984 They added that: 'Laws with respect to the conduct of the business of banking are laws which operate on persons and corporations while engaged in that business'. 985

The references in the conclusion reached by Rich and Williams JJ to the 'conduct of the business', as outlined in these statements, can be traced back to Barwick's submission that the term 'banking' means that 'there has been an impact upon the characteristic operation of the bank and the customer'; 986 and that the expression 'business of banking', as used by all the judges in the *Melbourne Corporation Case*, was to be understood in terms of the carrying out of the operation of banking and the performing of transactions. 987

7.8 Barwick's Second Attack – Section 92 to the Rescue

On day six, Barwick turned his attention to his argument with respect to section 92 of the Constitution. Barwick had led the successful section 92 arguments in the *Airlines Case* and the

980 Ibid at 195, per Latham CJ.
981 Ibid.
982 Ibid at 302, per Starke J; at 334, per Dixon J; at 393, per McTiernan J; Sawer, 'Bank of NSW v Commonwealth', above n 860, 214.
983 Namely, the Commonwealth has the power to make laws with respect to: 'Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money'.
984 *Bank of New South Wales & Ors v Commonwealth* (1948) 76 CLR 1 at 258, per Rich and Williams JJ.
985 Ibid at 260, per Rich and Williams JJ.
987 Rich and Williams JJ placed considerable emphasis on the text of the Constitution in relation to s 51(xiii) as Barwick had done in his submissions which involved developing arguments based on the text of the Constitution itself. However, in their reasoning, Rich and Williams JJ placed greater reliance on an analysis of the interpretation of 'State banking' to extrapolate from this an approach to apply to the interpretation of 'banking' generally whereas Barwick relied on the fact that the word 'banking' in section 51(xiii) of the Constitution restricted the banking power to the consensual relationship between bank and customer and the incorporation of banks' such that it excluded the idea of incorporating and empowering banks to do something.
Melbourne Corporation Case and recognised the potential to use section 92 to strike down crucial parts of the legislation in the Bank Nationalisation Case. As explained in the context of Barwick's preparation, Barwick sought to operate within the existing decisions recognising that any radical departure was not likely to be accepted by the High Court. His argument would hinge on the proposition that the Act imposed an absolute prohibition on banking and went beyond mere regulation.

Barwick would proceed on the basis that the 'Transport Cases' and the 'Marketing Cases' were irrelevant to the result of the present case and therefore he had reasons for not attacking them. It appears that one of the primary reasons for not attacking the 'Transport Cases' and the 'Marketing Cases' was a strategy to distinguish the present case from those cases. In this way, Barwick would avoid the apparently irreconcilable reasoning in those cases being applied to the present case. Also, it appears that it was Barwick's view that attacking the 'Transport Cases' and the 'Marketing Cases' was more likely to lead to a more uncertain result than that which would arise if his proposed approach was successful. In this way, Barwick would also avoid, to the extent possible, embroiling the present case in the section 92 quagmire that existed following these cases. Instead, his approach rested on 'developing strands from earlier judgments, to advance a view of the 'individual right' of a trader to engage in interstate commerce unrestrained by undue government interference'.

Barwick indicated the sections that in his view were obnoxious to section 92. He indicated that he would present the argument on two alternative bases in the event that the Court had a different view of the application of section 92. He submitted:

The first basis is on the assumption, which I will deal with as a separate topic, that a banker who engages in the business of banking is engaged in inter-State trade and commerce and intercourse.

Division 4 of Part IV in relation to the taking over of the business of the private banks, section 46 in relation to the prohibition of banking business by private banks, sections 13-21 in relation to the acquisition of assets and Division 3 of Part IV in relation to the management of private banks. From the outset, Barwick identified the limitations in relation to the application of section 92 but indicated that such problems did not arise in the context of this case:

A number of problems that can arise in connection with the application of Section 92 do not, of course, in my submission arise in this case – questions as to whether or not any given law goes to the extent of burdening or hindering rather than regulating trade and commerce or intercourse. That question does not arise here, because in each of those sections or parts to which I have referred on analysis, there is a direct prohibition; and it is mere prohibition, or it is acquisition with a view to prohibition, or it is management with a view to complete control.

Granted that view there would be in my submission no need to canvass or consider or suggest a disturbance of any of the decisions on Section 92.

I want to present in the alternative and shortly an argument that if a banker carrying on a business is said not to be engaged in trade and commerce and intercourse, yet these provisions are obnoxious to Section 92 because their necessary effect is to render the trade of inter-State traders—persons dealing in goods strictly—unfree.991

The attack was supported in two ways: first, on the view that in carrying on banking business the banker is engaged in trade, commerce and intercourse and that the Act prevents them from doing so; secondly, on the view that a banker’s customers, as traders in goods, were deprived of their freedom because they were compelled by government authority to use only the government facilities.

Barwick then proceeded to ‘go to the simple and direct approach to the problem on the first point’.992 He attempted to suggest that the Commonwealth Parliament was motivated by its desire to prevent private banks from carrying on banking business. This raised the evident ire of Starke J who suggested that it was the operation of the legislation that was relevant and not the object or purpose. While Barwick did not disagree, he suggested that if the object was relevant then it would be in relation to his arguments on section 92.993 Despite the rebuke Barwick received from Starke J, he continued with this line of argument and showed courage in doing so.994

He also foreshadowed the crucial role that the Airlines Case was to play in his submissions:

Barwick: Once determined that the business of banking (that is the most important thing) is trade, commerce and intercourse and that those who are engaged in it are engaged in trade, commerce and intercourse, and these things I am saying will lead ultimately to the Airlines case which will be, in my submission, decisive of the matter — if it is decided that the banker in carrying on the business of banking is engaged in interstate trade and commerce.995

Barwick’s approach was simple — establish that a banker, in carrying on the business of banking, was engaged in interstate trade and commerce for the purposes of section 92 and then rely on the principle in the Airlines Case. The Airlines Case involved nationalisation and therefore had obvious application to the Bank Nationalisation Case.

991 Ibid, p.279.
992 Ibid.
993 Ibid, p.280.
994 Ibid.
The Airlines Case

In 1945, the Chifley government had introduced the Australian National Airlines Act 1945 (Cth) ("the ANA Act") which attempted to nationalise the interstate and territorial airlines as well as establish an airline owned by the Commonwealth government. The legislation was challenged.

In what became known as the Airlines Case, the Commonwealth relied on the 'Transport Cases' as the basis for the survival of the airline nationalisation plans. The 'Transport Cases', which were heard in the 1930s, had allowed the States to restrict interstate trucking, and in some instances, ban interstate trucking completely, in order to protect their railways from competition. The High Court upheld such restrictions and/or bans.

Australian National Airways Pty Ltd retained Barwick to challenge the validity of the ANA Act. It was apparent to Barwick that the principal basis for any such challenge rested with section 92 of the Constitution. This case began a long-standing affiliation between Barwick and section 92. As Marr says, he 'was to become the great advocate of the hidden and extraordinary powers of those words [referring to the words in section 92], the patron of section 92'. Barwick had already had some experience with the scope of this section due to his involvement in the preparation of one of the 'Transport Cases'.

996 It provided for all other interstate and territorial airlines to be subject to a licensing regime which was at the discretion of the government. Prime Minister Chifley had indicated that it was the intention that eventually the licences of all private airlines would be withheld and the government airline would then effectively have a monopoly in the market. To achieve its aim of a monopoly over interstate airline services, the government relied on a regulation under the Air Navigation Act 1920-1936 as well as the introduction of the ANA Act. Trans Australia Airlines (TAA) was the government-owned airline: see Coper, Freedom of Interstate Trade under the Australian Constitution, above n 822, p.90. See also Barwick, A Radical Tory: Garfield Barwick's Reflections & Recollections, above n 1, p.51; Sawer, Australian Federal Politics and Law (1929-1949), above n 143, pp.160, 168. According to Sawer, it was the socialist side of Labor policy which was reflected in its decision to establish a government airline. See also Menzies, The Measure of the Years, above n 203, pp.137-138.

998 Willard v Rawson (1933) 48 CLR 316; R v Vizzard; Ex parte Hill (1933) 50 CLR 30; O Gilpin Ltd v Commissioner for Road Transport & Tramways (NSW) (1935) 52 CLR 189; Riverina Transport Pty Ltd v Victoria (1937) 57 CLR 327.

999 Marr, above n 8, p.46.

1000 Ibid, p.45. Barwick was approached by Jerry Walsh, a partner in Malleson Stewart (a firm of solicitors in Melbourne) to provide a written opinion on the validity of the ANA Act. In the initial conversation with the partner from the firm, Barwick was surprised that the firm was seeking an opinion as it was his view that the ANA Act was clearly invalid: see Barwick, A Radical Tory: Garfield Barwick's Reflections & Recollections, above n 1, p.52; National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 18-19. Mr Walsh stated that he had 30 opinions that did not agree with Barwick's view that nationalisation was prohibited to which Barwick responded 'I can't help that'. Barwick believed that it was because he had been so firm about it he was given the leading brief in the Airlines Case (see National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 19).

1001 Barwick worked with Percy Spender in the preparation of Duncan v Vizzard; Green Star Trading Co Pty Ltd v Vizzard (1935) 53 CLR 493 although he did not appear in the case. See Barwick, A Radical Tory: Garfield Barwick's Reflections & Recollections, above n 1, p.51.
In essence, the High Court held that, in relation to airline services between States, the ANA Act in general was a law with respect to trade and commerce among the States, within the meaning of section 51(i) of the Constitution.\(^{1002}\) That is, the trade and commerce power authorised the Commonwealth itself to carry on trade and commerce, including establishing an airline.\(^{1003}\) However, in purporting to confer on the Australian National Airlines Commission a monopoly in respect of services between States and to create the offences mentioned in section 49 of the ANA Act, the High Court held that the ANA Act contravened section 92 of the Constitution. Therefore, section 46(1) and sections 47 and 49 of the ANA Act (to the extent that they refer to airline services between the States) were invalid but severable. In addition, the High Court held that the Commonwealth could operate a territory-States airline service under section 122 of the Constitution.\(^{1004}\)

Barwick's first submission failed; the Commonwealth could establish an airline. However, the Court unanimously agreed with his second submission in relation to section 92.\(^{1005}\) Starke J, who had never really accepted the 'Transport Cases',\(^{1006}\) reflected the essence of Barwick's submissions in his judgment:

> The object of s. 92 is to maintain freedom of inter-State competition – the open and not the closed door – absolute freedom of inter-State trade and commerce. An Act which is entirely restrictive of any freedom of action on the part of traders and which operates to prevent them

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\(^{1002}\) The Airlines Case involved two major constitutional questions, namely: did the section 51(i) power in relation to interstate trade and commerce allow the government to establish an airline providing interstate air transport; and by prohibiting private competition, did the ANA Act contravene section 92. The High Court unanimously answered both questions in the affirmative. See Galligan, above n 781, p.160; See also Menzies, The Measure of the Years, above n 203, pp.137-138.

\(^{1003}\) Barwick recalled that Holyman wanted to challenge this aspect of the decision in the Privy Council but Barwick thought it would be 'a waste of time' (see National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 19).

\(^{1004}\) Bank of New South Wales & Ors v Commonwealth (1948) 76 CLR 1 at 31; 62-64, 69 (per Latham CJ); 71-72 (per Rich J); 79 (per Starke J); 83-85 (per Dixon J); 102-103 (per Williams J); Sawer, Australian Federalism in the Courts, above n 295, p.78.

\(^{1005}\) Australian National Airways Pty Limited v Commonwealth (1945) 71 CLR 29. See also Sawer, Australian Federal Politics and Law (1929-1949), above n 143, p.179. Latham CJ found that the exclusion of competition was not regulation but prohibition and was 'directed against' interstate trade. He applied the test from the Milk Board Case. See Coper, Freedom of Interstate Trade under the Australian Constitution, above n 822, p.90; Zines, The High Court and the Constitution, (5th ed), above n 182, pp.150-152; Sawer, Cases on The Constitution of the Commonwealth of Australia, above n 180, pp.217-234; Sawer, Cases on The Constitution of the Commonwealth of Australia, (3rd ed), above n 781, pp.180-194.

engaging their commodities in any trade, inter- or intra-State, is, in my opinion, necessarily obnoxious to s. 92. 1007

Dixon J distinguished the 'Transport Cases' from the present case. 1008

As the ANA Act effectively prevented every person but the Commission from engaging in the relevant interstate trade, the majority of private competition and they believed that such private competition extended to the provision of airline services. This was the most important constitutional law case of Barwick's career at the time and his reputation was greatly enhanced by this case. Barwick had developed a 'keen sense of judicial attitudes that were then current on the High Court bench' following the cases he appeared in before the High Court opposing the Commonwealth's wartime national security regulations. 1012 This knowledge was employed to its full effect in the Airlines Case. Barwick's knowledge of the attitudes, personalities and other characteristics of the various members of the High Court also provided him


1008 Dixon J, whilst accepting the authority of the 'Transport Cases' for the purposes of this case, distinguished those cases from the present case on the ground that the 'Transport Cases' involved the means or implements of trade whilst the present case addressed actual trade. He then referred to the 'freedom at the frontier' test laid down by Lord Wright in James v The Commonwealth (1936) 55 CLR 1 and stated that, if that test is applied, it is 'because the business involves crossing the frontier that it is eliminated' (at 90). That is, because it prohibited only those air services which crossed state boundaries. Dixon J referred to the fact that transport was regulated on a non-discriminatory basis in the 'Transport Cases' whereas in the present case the very basis of prohibition was an interstate journey. Williams J relied on Isaacs J in James v Cowan (1930) 43 CLR 386 in concluding that the right of interstate trade and commerce protected by s 92 is a personal right attaching to the individual and that to 'say to an individual that he may not engage in the business of inter-State air carriage is a direct negation of that right' (at 110). He effectively regarded the 'Transport Cases' as based on State ownership of roads and railways. See also Coper, Freedom of Interstate Trade under the Australian Constitution, above n 822, p.90; Galligan, above n 781, p.161; Zines, The High Court and the Constitution, (5th ed), above n 182, pp.139-147; Sawer, Cases on The Constitution of the Commonwealth of Australia, (3rd ed), above n 781, pp.180-194; Geoffrey Sawer, 'The Privy Council, The High Court and Section 92', above n 841, 156.

1009 Galligan, above n 781, p.161. Barwick stated 'one of the things that I devoted myself to quite consciously and quite largely was the maintenance of the individual's right as far as possible by attacking these bureaucratically drawn National Security regulations' (see National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 15).


1011 Coper, Freedom of Interstate Trade under the Australian Constitution, above n 822, pp.90-91.

1012 Galligan, above n 781, p.161 referring to Chapter 6 of David Marr's book.
with a distinct advantage when preparing and advancing his submissions and in his general dialogue with the members of the Court. It is this knowledge that he sought to rely upon when developing and then presenting his section 92 arguments in the Bank Nationalisation Case.

Before Barwick attempted to establish that a banker, in carrying on the business of banking, was engaged in interstate trade and commerce for the purposes of section 92 so as to then invoke the Airlines Case, he turned his attention to convincing the Court that section 92 guaranteed the freedom of the individual to engage in interstate trade and commerce.

**Barwick’s ‘Individual Rights’ Argument**

Marr has suggested that underpinning Barwick’s submissions was his belief in the freedom and liberty of the individual as well as freedom of enterprise.\(^{1013}\) This is confirmed by comments made by Barwick in his autobiography 47 years later, where he indicated his preference for capitalism over socialism.\(^{1014}\) However, it is difficult to gauge whether the fact that Barwick’s personal beliefs coincided with the underlying basis for his submissions contributed to the persuasive effect of his submissions in any way. Emotion and passion can assist the persuasive effect of an advocate’s submissions, but can also be counterproductive, if the result is a loss of control or objectivity. An analysis of the transcript of the Bank Nationalisation Case suggests that, whilst Barwick’s submissions were forceful, they did not appear to suffer from these disadvantages.

Barwick outlined his fundamental proposition, namely, that section 92 guaranteed an individual freedom of interstate trade and commerce. He went to considerable lengths to demonstrate that section 92 provided this guarantee.\(^{1015}\) Referring to the above, he succinctly encapsulated his submission:

> The next step I take from that general proposition is to say that section 92 is a constitutional guarantee to the people or, to put it in another way, that it advances a right or an immunity to the individual. Let there be no misconception in my use of the word “right” ... I use the expression to call attention to the fact that it is the individual’s freedom to move from place to place, the individual’s right to conduct his business across State lines, which is protected by the section.\(^{1016}\)

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\(^{1013}\) Marr, above n 8, p.65.

\(^{1014}\) Barwick, A Radical Tory: Garfield Barwick’s Reflections & Recollections, above n 1, p.100.

\(^{1015}\) The ‘individual rights’ view of section 92 was overturned in Cole v Whitfield ("Tasmanian Lobster Case") (1988) 165 CLR 360 (2 May 1988).

Following this, Barwick then adopted a clever technique to substantiate his general proposition that section 92 provided an individual with a constitutional guarantee of freedom of interstate trade and commerce: 'I wish to give the Court a series of references to show that every member of this Court both past and present has on some occasion subscribed to that view.' He then referred the Court to various cases in which each judge comprising the present Court, as well as previous judges of the Court, had agreed with this proposition. This is an example of Barwick's meticulous preparation as well as his citing authority with care to support, rather than supplement an argument.

This technique allowed each judge to reacquaint himself with his earlier views as well as those of previous High Court judges with respect to section 92. In this way, Barwick was suggesting, in an indirect way, that the Court should adopt a consistent approach. Such a technique would have had a significant persuasive effect, and may have militated against disagreement. To ensure consistency as well as fairness and justice, each judge would be more likely to agree with their previously expressed view unless, of course, they could distinguish the previous case from the present in some way.

Barwick submitted as follows: 'I read the passages to the Court to show that all the Justices have laid emphasis on this right in the individual.' For example, Barwick cited the judgments of Justices Dixon and McTiernan in *Peanut Board v Rockhampton Harbour Board*. Barwick also conveyed to the Court the views of former Justice Evatt on this issue. This reference was useful, as Evatt was in an invidious position, as leading counsel for the Commonwealth in the present case. This was a clever tactical manoeuvre. Barwick made the most of this rare situation. It simultaneously had the effect of demonstrating what Barwick implied was the 'actual' view of the leading counsel for the Commonwealth, in contrast to the view that Evatt was now propounding.

Barwick submitted as follows:

... in *Riverina Transport v Victoria*, 57 CLR, beginning at page 237, there is a passage at page 367, in the judgment of Mr Justice Evatt. He said, -

"It would be a strange thing if the Parliament of the Commonwealth which for sixteen years has sought to confer upon itself an entire immunity from the declaration of freedom in sec. 92, were made the sole protector of the citizens against infringement of the Section by hostile discrimination on the part of the executive or administrative organs of the State".

1017 Ibid.
This is another example of the difference between exemplary advocacy and advocacy in practice. In practice, certain unpredictable opportunities may present themselves, and Barwick was sufficiently canny to take advantage of such an opportunity, combining it with citing authority with care, to add to the persuasiveness of his submissions.

Barwick continued to outline the views of both past and present members of the High Court indicating their support spanning cases from the earliest years to the *James*’ cases and then to the *Airlines Case* for the proposition that section 92 provided a constitutional guarantee to individuals of the freedom of interstate trade.

He stated his submission in simple terms: ‘It is for the benefit of the people, and therefore it necessarily follows that a law which forbids a person from engaging in his business of interstate trade and commerce is obnoxious to Section 92.’

In response, Latham CJ referred Barwick to the ‘Transport Cases’. In accordance with his strategy, Barwick had been careful to distinguish his submissions from the principles derived from the ‘Transport Cases’ so as to ensure that those principles were not inconsistent with the present case. Consistent with his earlier submissions, Barwick maintained the suggestion that the current case was more analogous to the *Airlines Case* and therefore the same principles were applicable. He used discretion and tact to do so as evidenced by the following exchange:

<table>
<thead>
<tr>
<th>Latham CJ:</th>
<th>Does that principle go so far as to apply to any licensing system? You remember the transport cases?</th>
</tr>
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<tbody>
<tr>
<td>Barwick:</td>
<td>That, Your Honor, involves a question which I submit does not arise here and which is perhaps the fundamental question of the transport cases — as to whether on the true analysis of those acts they did burden interstate trade or whether they did not. The Court took one view. That is not necessarily, perhaps, the only view. Nothing I say need disturb any question in connection with the transport cases, because in this particular case you have a direct prohibition of the carrying on of the business. If the banker is carrying on interstate trade, this is precisely covered by the <em>Airlines Case</em>. There the Court decided that a person carrying goods and passengers as a business could not be forbidden. The business of a banker is, I shall suggest, fundamentally the business of moving money about; that is his fundamental business. If I want to pay a man a debt and he lived in another part of Melbourne,</td>
</tr>
</tbody>
</table>

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1021 Marr, above n 8, p.65.
1023 Ibid, p.287.
I draw a cheque and send it to him, and my banker effects the movement of money. It saves my walking around with it in my pocket.

If that be a right analysis, when the banker transmits or transfers – whatever word you use ... when he does any of those things he moves something, whether it is tangible or intangible and he becomes exactly in the situation of a carrier.

Barwick’s response to Latham CJ also demonstrated his thorough and extensive preparation. He was aware of the existing legal authorities on section 92 and the fundamental principles that arose from these cases. He was able to adopt a strategy that was consistent with these authorities and pitch his submissions in a manner that did not disturb the principles outlined in the ‘Transport Cases’ at the same time as attempting to illustrate the similarities between the present case and the Airlines Case.

Barwick persisted with his submission that the present case was similar to the Airlines Case. Strategically, Barwick relied heavily on the judgments of Dixon J when outlining the relevant authorities on section 92 but avoided references to the ‘Transport Cases’ – a tactic he also adopted in the Airlines Case.

**Barwick’s Argument that ‘Banking’ was ‘Trade and Commerce’**

Barwick informed the Court that he would next turn his attention to the issue of whether a banker is carrying on ‘trade and commerce’ for the purposes of section 92. These regular announcements by Barwick of the direction of his submissions allowed the Court to see how they fitted into the tapestry of his overall argument.

Barwick referred to the definition of ‘trade and commerce’ which had previously been adopted in various cases, quoting only the relevant passages regarding the concept of ‘trade, commerce and intercourse’. He cited the relevant legal authorities selectively and with care, and avoided reading out long passages. He stated, for example:

> I should like to give four references .... First of all, there is the case of Swift v. the United States, 196 US Reports, beginning at p.375. ... At p.398 this is what is said: “Commerce among the States is not a technical legal conception but a practical one drawn from the course of business.”

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1024 Ibid.
1026 Marr, above n 8, p.65.
1027 Consistent with the logical nature of Barwick’s submissions, he stated that: ‘The first step is that the concept of trade, commerce and intercourse is a practical one – not to be confined to legal conceptions, but to be a practical one, developed having regard to the course of business’. See Transcript of Proceedings, *The Bank of New South Wales and Ors v The Commonwealth of Australia*, above n 867, pp.290–291.
Barwick then returned to his earlier strategy of reminding the judges of their previously stated views on the definition of ‘trade and commerce’ under section 92. In particular, he selectively cited various passages from the *Airlines Case*.\textsuperscript{1029}

Barwick also referred to non-legal sources to illustrate that banking was considered to be ‘trade’ for the purposes of section 92. In addition to demonstrating his thorough preparation, it also added weight to his argument that section 92 was relevant to this case since banking could be categorised as a ‘trade’. Barwick was also seeking to demonstrate that there was support for the proposition that banking was considered ‘trade’ from a broader policy perspective. In this way, he addressed any policy concerns or reservations the Court may have had in reaching this conclusion. For example, Barwick referred to the 19th century English barrister and journalist, Walter Bagehot’s influential book, *Lombard Street: A Description of the Money Market*, (1873) and quoted from page 98: ‘Nothing can be truer in theory than the economical principle that banking is a trade and only a trade’.\textsuperscript{1030}

To support this submission further, Barwick referred to a case from the Privy Council called *Trinidad Lake Asphalt Co Limited v Commissioners of Income Tax for Trinidad and Tobago* [1945].\textsuperscript{1031} He referred to this case at some length to demonstrate that banking involved the transmission or movement of money and was therefore to be regarded as ‘trade’.\textsuperscript{1032}

It was questionable whether this technique of simply referring to selected references in support of his submission was resonating with the judges. Barwick was selective in the references he chose, but there were a large number of sources, occupying numerous pages of the transcript. The Court permitted Barwick to proceed in this fashion in a largely uninterrupted fashion. However, Starke J made a comment which suggested that he was (and possibly other members of the Court were) losing patience with this approach. Barwick picked up the clear signal that Starke J was sceptical of the utility of reciting various definitions and his response reflected this:

\begin{quote}
Starke J: The only reason why I intervened is that you are giving us a lot of references to definitions of banking and descriptions of their business. It does not appear to me to be particularly important.
\end{quote}

\textsuperscript{1029} Ibid, p.294.

\textsuperscript{1030} Ibid, pp.295–296. Barwick also quoted other non-legal sources such as Gilbart’s “History and Principles of Banking”, McLeod’s “Theory and Practice of Banking” and Marshall’s “Money, Credit and Commerce”.

\textsuperscript{1031} AC 1.

\textsuperscript{1032} Transcript of Proceedings, *The Bank of New South Wales and Ors v The Commonwealth of Australia*, above n 867, p.299. There was also another advantage in Barwick referring to this case in light of the fact that the defendants’ own evidence, from Professor Melville, suggested that banking involved the transmission of money which echoed the proposition from this case.
Barwick: In one sense one can say that what they state is almost obvious, but they are authoritative in their own areas and they do tend to complete this picture that a banker, in carrying on his business, is engaged in trade, commerce and intercourse, and when he has an interstate transaction he is engaged, we submit, in interstate trade, commerce and intercourse. Of course, what is struck at here is his whole business, including that part. 1033

However, in light of Starke J's comment, Barwick adapted his submissions accordingly. He ceased referring purely to the definition of 'trade' and 'banking' from various sources and instead he referred to definitions in authorities. In doing so, he demonstrated his flexibility and discretion as well as his ability to respond to judicial comments. His attempt to convince Starke J that the various references to the definitions of 'banking' were important was clear. 1034

Shortly before lunch on day six, Justice Dixon referred Barwick to an article which Barwick conceded he had not seen thus demonstrating Barwick's candour. 1035 Justice Dixon then relayed to Barwick two observations contained in the article. Shortly after lunch, Barwick summarised the morning's submissions, as he characteristically did, and then stated 'I shall come later to the United States cases and to the article mentioned by His Honor Mr Justice Dixon'. 1036 This suggested that, during the luncheon adjournment, Barwick had reviewed the article. While Barwick clearly made an effort to review the article and address the Court on it, his unfamiliarity with this article may also imply a surprising gap in his preparation, particularly given that he was planning to refer to US cases and the definition of 'banking' in the US Constitution. While exemplary advocacy requires a comprehensive preparation, in practice, it may not be possible to review every relevant case or article.

A rapid exchange between Barwick and several members of the Court then took place on the issue of the movement or transmission of money, arising from Barwick's reference to United States v South-Eastern Underwriters Association [1944]. 1037 Barwick seemed to handle the judicial questions comfortably, responding effectively to each question put to him and appearing to address the judges' concerns:

Latham CJ: In all those instances [in United States v South-Eastern Underwriters Association] there is actual transportation of something.

Barwick: Not necessarily of money – a message.

Latham CJ: There is a movement across a State line.

1033 Ibid, p.304.
1034 Ibid.
1035 Ibid, p.305.
1037 USSC 116; (1944) 322 US 533 (88 Law Ed 1440).
When he [referring to Justice Black] says he sends the premiums to New York, he sends a cheque across the State line.

When you speak about a movement across a State line, a movement of what?

I would say substantially a movement of the funds, the money, but it certainly involves the sending of a cheque – the movement of a cheque.

But a movement of what – that is only movement of credit?

One can deal in credit as well as one can deal in goods. But what movement – the movement of documents or a movement as the result of documents?

I do not think he was concerned to distinguish; either would have been sufficient for his purpose. When he says “sends money” I suppose that is sends a credit which will result in the payment of money. That is what he means by “sends money”.

Yes. If the company in New York sends money to New Jersey it sends a document. Such as a telegraphic transmission of authority.

Barwick relied on various US cases to identify the elements he regarded as important in determining the existence of interstate trade and commerce, particularly cases where it was held that the sending of telegraphic messages was a business and was interstate commerce. He then attempted to demonstrate, by analogy, that banking was commerce. According to Ayres, Dixon J found Barwick’s examination of the US cases ‘ineffective’. This illustrates that, in practice, even the most careful presentation of authorities may be unpersuasive with some judges at least.

On occasions, Barwick employed humour but did so selectively. An example occurred just after Starke J had referred to an argument by an advocate in a US case:

Barwick: When he [referring to Justice Black] says he sends the premiums to New York, he sends a cheque across the State line.

Starke J: When you speak about a movement across a State line, a movement of what?

Barwick: I would say substantially a movement of the funds, the money, but it certainly involves the sending of a cheque – the movement of a cheque.

Starke J: But a movement of what – that is only movement of credit?

Barwick: One can deal in credit as well as one can deal in goods. But what movement – the movement of documents or a movement as the result of documents?

Starke J: When he says “sends money” I suppose that is sends a credit which will result in the payment of money. That is what he means by “sends money”.

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Starke J: When he says “sends money” I suppose that is sends a credit which will result in the payment of money. That is what he means by “sends money”.

Barwick: Yes. If the company in New York sends money to New Jersey it sends a document. Such as a telegraphic transmission of authority.

Barwick: Yes ...


1039 Ibid, p.311. Barwick continued referring to US cases where it was stated, for example, that ‘[i]nterstate communication of a business nature, whatever the means employed, is interstate commerce subject to regulation’ (such as Associated Press v National Labour Relations Board 301 US at p.103). To demonstrate and emphasise his proposition, Barwick described in detail the manner in which banking was conducted to illustrate that it involved interstate communication. Barwick also referred to a series of insurance cases to identify the similarities between insurance and banking and therefore prove that banking was a form of interstate commerce (See Transcript of Proceedings, The Bank of New South Wales and Ors v The Commonwealth of Australia, above n 867, pp.315–316).

1040 Ayres, above n 50, p.189 and Owen Dixon Diary, 24 and 31 March 1948, Owen Dixon, Personal Papers.
Starke J: I see he also had a large collection of Counsel with him.

Barwick: It is good to know that the Americans have no monopoly in that, Your Honor.  

The moment of light heartedness allowed the Court to relax briefly and then re-focus their attention on the submissions.

After concluding his submissions on the relevant interpretation of section 92, including that banking was 'trade and commerce' for the purposes of section 92 and that section 92 guaranteed the freedom of the individual to engage in interstate trade and commerce, Barwick then applied his arguments to particular provisions of the legislation.

Section 92 and the Banking Act

Barwick addressed the manner in which, in his submissions, Division 3, Part IV violated section 92. He employed an appropriate and useful example to illustrate this:

The submission is that just as much offends Sections 96 and 92 in the case of the company engaged in interstate trade and commerce as an outright acquisition or a prohibition. If I were an interstate (sic) trader and people came into my business and said: "We are going to take over the whole management so that you cannot manage the business yourself; we will run it; we can sell your business if we like; we will supersede your own instruments under which you are constituted to the necessary extent" – in that case, it would be impossible to say that the trader remained free in his trade, in my submission.

Barwick then proceeded to demonstrate the 'individual rights' aspect of his section 92 argument by attempting to show how the Act impinged upon the ability to trade freely.

Early on day seven, Barwick came under a barrage of questioning over the phrase 'whether by means of internal carriage or ocean navigation' in section 92. He demonstrated his courage and composure by maintaining his position and not succumbing to the pressure exerted, particularly by Latham CJ.  

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1042 Ibid, p.324.
1043 Ibid, p.327. At the conclusion of day six, Barwick took the opportunity to summarise his position and once again reaffirmed his argument that this case was analogous to the Airlines Case (Transcript of Proceedings, The Bank of New South Wales and Ors v The Commonwealth of Australia, above n 867, p.329).
1044 During his submissions, Barwick was subject to intense questioning by Latham CJ in relation to the meaning of the phrase ‘whether by means of internal carriage or ocean navigation’ in section 92 of the Constitution. The suggestion that inter-State banking was not trade, commerce and intercourse within the meaning of section 92 because that section contains the words ‘whether by means of internal carriage or ocean navigation’ was dismissed by Rich and Williams J and Barwick's responses to Latham CJ vindicated (Bank of New South
Latham CJ: Would you say that the trade, commerce or intercourse of a banker was by means of internal carriage or ocean navigation, and which?

Barwick: It would not matter whether it was one or the other.

Latham CJ: Which is it?

Barwick: It may be neither. Those are not words which mean you can only have that sort of trade within Section 92.

Latham CJ: Do you allow those words to mean anything or are you submitting they could mean nothing?

Barwick: I think they are in the nature of mere precaution or words of emphasis. I do not think they have any limiting significance. The word “navigation” might have some expansive significance but I would not think very much.

Latham CJ: Is the trade and commerce the trade and commerce which is carried on by certain means; and the means mentioned are two – internal carriage and ocean navigation?

Barwick: I dispute the suggestion that the words “whether by means of internal carriage” are words which limit the nature of the trade, commerce or intercourse.

Latham CJ: What do they do?

Barwick: They are put in as a precaution so that nobody should think that some one particular form of trade, commerce or intercourse is excluded.¹⁰⁴⁵

Barwick’s Alternative Submission Relating to Section 92

Immediately following this exchange, Barwick managed to divert attention from this issue, to outline the argument that he intended to present on day seven, namely, his alternative submission in the event that banking was not considered ‘trade and commerce’ for the purposes of section 92:

This argument which I propose to put involves a submission that the real test of whether or not a law is obnoxious to Section 92 depends upon its necessary operation and effect, and not in any sense upon its subject matter.¹⁰⁴⁶

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¹⁰⁴⁶ Ibid, pp.332–333.
By reference to his alternative submission, Barwick attempted to highlight the similarities between the present case and the *Airlines Case* and cleverly referred to Dixon J’s comments in the latter. In the *Airlines Case*, Justice Dixon stated:

> If ... the answer is offered that the transmutation of the business into a government undertaking means that the function is still freely carried on, it is met by the proposition, so often enunciated by Isaacs J, that in s. 92 ‘free’ means free from governmental restriction or obstruction, whether legislative or executive.\(^\text{1047}\)

Notwithstanding his careful argument,\(^\text{1048}\) Barwick also came under intense questioning on his alternative submission, particularly in relation to the relevance of the legislature’s motive or purpose. Again, he showed tenacity and courage, maintaining his position and composure in the face of considerable pressure. This is evident from the following exchange, particularly taking into account Latham CJ’s second question which suggests that he could not believe or comprehend Barwick’s response:

<table>
<thead>
<tr>
<th>Starke J:</th>
<th>If you gave the Minister power to regulate the crossing of cattle from Victoria into New South Wales, in accord (sic) with your view he might do it for a perfectly legitimate purpose or an unlawful purpose of restraining trade?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Barwick:</td>
<td>No.</td>
</tr>
<tr>
<td>Starke J:</td>
<td>Would that be bad, too?</td>
</tr>
<tr>
<td>Barwick:</td>
<td>If it were expressed as regulating the passage, I would say it was bad, but it might be possible to give to a Minister power to make some laws or orders, and you might have to determine whether any given order had progressed to the point where it was a burden on interstate trade and commerce.</td>
</tr>
<tr>
<td>Latham CJ:</td>
<td>Are you replying by saying that it is impossible for any legislature in Australia to pass a law saying that diseased cattle shall not cross the frontier?</td>
</tr>
</tbody>
</table>

\(^{1047}\) *Australian National Airways Proprietary Limited & Ors v Commonwealth & Ors* (1945) 71 CLR 29 at 91. See Transcript of Proceedings, *The Bank of New South Wales and Ors v The Commonwealth of Australia*, above n 867, pp.334–335. The last paragraph encapsulated one of three propositions Barwick put forward in relation to his alternative submission with respect to section 92. Barwick then outlined the remaining two propositions in relation to this alternative submission, namely: ‘The second proposition is that where the law takes the form of an authority to the Executive to do an act or acts, it will be invalid if it authorises acts which have that effect. That harks back to the first proposition. The third proposition is to cover incidental effects’ (Transcript of Proceedings, *The Bank of New South Wales and Ors v The Commonwealth of Australia*, above n 867, p.335).

\(^{1048}\) Barwick outlined the process that he considered the Court should follow when considering whether the legislation infringed section 92 of the Constitution. This is clear evidence of his considerable preparation and an example of his ability to conceptualise a case. This was a persuasive technique designed to make the judges’ task easier when considering the validity of the legislation and ultimately when preparing their respective judgments (see Transcript of Proceedings, *The Bank of New South Wales and Ors v The Commonwealth of Australia*, above n 867, pp.339–340).
Barwick: Yes, Your Honor.

Latham CJ: You are making that reply?

Barwick: Yes, and with respect, I think I have the support of the Privy Council if one looks closely at what they did with Tasmania v. Victoria [Tasmania v. Victoria (1935) HCA 4; (1935) 52 CLR 157 and Nelson's Case [Ex parte Nelson (No 1) (1928) HCA 33; (1928) 42 CLR 209].

Barwick's definitive response demonstrates considerable confidence in his position. While this may also appear not to leave Barwick with room to refine his submissions later if it became necessary, it must be counterbalanced by the persuasiveness and attractiveness associated with such positive responses. Since the majority took the view that the activity of banking was 'trade and commerce' for the purposes of section 92 of the Constitution, Barwick's alternative submission was not considered and therefore it is difficult to gauge whether this technique was successful.

Barwick's submissions in chief concluded after seven days, at which point Dr Coppel KC and Kitto KC then commenced their submissions on behalf of the banks.

According to Justice Dixon, on 23 February 1948 (day ten of the hearing), Latham CJ indicated which way he was likely to decide the case. On this particular day, Kitto KC completed, in what Dixon described, his 'clear and acute' argument for the Bank of Australasia. Taylor KC completed his argument for the same plaintiff and Hudson KC commenced his argument for Victoria. Barwick's performance during the Bank Nationalisation Case attracted little comment in Dixon's diary. This,

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1051 Shortly before concluding his submissions, Barwick restated his alternative proposition and conceptualised his submission then applied his alternative submission to the facts of the case (Transcript of Proceedings, The Bank of New South Wales and Ors v The Commonwealth of Australia, above n 867, pp.352-353).
1052 Dr Coppel KC addressed the Court in relation to section 6 of the Act and section 51(xxxi) of the Constitution with respect to the acquisition of property on just terms. Kitto KC, on behalf of the three English banks, made submissions in relation to various sections of the Act, namely, sections 24, 46(4) – (8), Part VIII and 56 as well as section 51(xiii) of the Constitution: Transcript of Proceedings, The Bank of New South Wales and Ors v The Commonwealth of Australia, above n 867, pp.354 and 476-477. Taylor KC made submissions in relation to the validity of various provisions of the Act under section 51(xxxi) of the Constitution and also in relation to section 75 of the Constitution. Hudson KC relied upon the five grounds of attack submitted by Barwick at the opening of the case and his arguments in relation to section 92 of the Constitution. However, he made submissions in relation to sections 51(xiii) and (xxxi). Hannan KC made submissions in relation to section 105A of the Constitution: Transcript of Proceedings, The Bank of New South Wales and Ors v The Commonwealth of Australia, above n 867, pp.539 and 573. See also Barwick, A Radical Tory: Garfield Barwick's Reflections & Recollections, above n 1, p.66.
1053 Ayres, above n 50, p.188.
given Dixon's comments in other cases suggests Barwick may either not have impressed Dixon with his advocacy or that he was not so unimpressive so as to warrant an entry. It contrasts with his diary entry on Barwick's advocacy in the Communist Party Case discussed in Chapter 9. Dixon did, however, record that he noticed that Barwick 'got under Evatt's skin through ridicule.' According to Ayres, Barwick's 'psychological warfare was impressive'; Barwick employed his acidic tongue as well as his propensity for sarcasm to effectively distract Evatt and cause him to lose focus.

On behalf of the Commonwealth, in relation to the interpretation and application of section 92, Evatt submitted that the purpose of section 92 was to ensure that trade and commerce itself remained free and not that every person in Australia and every corporation had a constitutional right to engage in interstate commerce. In Barwick's reply he did not address the Court further on his arguments with respect to section 92. Barwick had demonstrated his ability to present an argument, however complex, clearly, forcibly and succinctly. Marr described his submissions as follows:

His exposition was lucid, and pitched with almost conversational ease. His voice at times suggested the faint sing-song of a preacher's but his delivery followed naturally the shifting progression of his argument. He gave the court the sense of having the subject surely in his grip, not through dramatic display but by an unfailing grasp of language and by taking pains to see the bench realised at all times the direction in which his huge argument was moving.

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1055 Ibid.
1056 Apparently, Evatt complained to Clyne that Barwick was a 'larrkin bringing the police court to the HCA [High Court of Australia]': see Ayres, above n 50, p.189 and Owen Dixon Diary, 24 and 31 March 1948, Owen Dixon, Personal Papers.
1057 Marr, above n 8, p.66. See Transcript of Proceedings, The Bank of New South Wales and Ors v The Commonwealth of Australia, above n 867, pp.684-1707. Evatt attempted to convince the Court to return to his view of section 92 as he had outlined in R v Vizzard; Ex parte Hill (1933) 50 CLR 30 and which seemed to have been accepted in James v Commonwealth (1935) 52 CLR 570, namely, the 'free trade' view, where the free trade guarantee was directed at ensuring that the absolute volume of trade between the States was not obstructed or hampered by government restriction (see Johnston, above n 783, 94). Evatt relied on James v Cowan (1932) 47 CLR 386; [1932] AC 542; James v Commonwealth (1936) 55 CLR 1 and the Privy Council's decision in James v Commonwealth (1936) AC 578; 55 CLR 1 which he submitted established that the Act does not in any way impair the freedom of interstate trade, commerce or intercourse. During the hearing, Evatt provided to the Court a Memorandum on Banking. This was heavily criticised by Barwick. It was described as 'more a lesson in banking and political economy than anything else' and 'not a lawyer's statement but some sort of quasi-political document' (see The Sydney Morning Herald, 2 April 1948, referred to in Galligan, above n 781, p.173). Many thought Evatt, as a former member of the High Court, should not be appearing before it. According to Dixon, his advocacy was 'bad'. His poor advocacy could have been attributed to the fact that he was ill or that he had not appeared as an advocate for a considerable period of time. Also, although he was an able lawyer, Evatt was regarded by some as a poor advocate (see Ayres, above n 50, pp.187-188).
1058 Marr, above n 8, p.66.
Marr's description refers to the many elements and ideals of appellate advocacy that Barwick employed during the course of his submissions which have been identified and analysed. However, Barwick's advocacy also contained other features such as 'trailing his coat' and making use of references to Evatt's judgments. Together, they contributed greatly to the persuasiveness of his submissions. As discussed earlier, these features also highlight the contrast between the ideals of appellate advocacy and appellate advocacy in practice. Barwick's advocacy did suffer from some deficiencies; he belaboured certain points at times and was disparaging of his opponent on occasions. He engaged in what has been described as 'psychological warfare'. These tactics may have been manipulative or underhanded, employed to gain an advantage. However, as discussed earlier, the adversarial nature of appellate advocacy is such that advocates will inevitably seek to make use of the advantages available to them within the bounds of the 'ethical obligations' (it remains however, questionable whether such tactics were (or are) ethical). It appears that advocacy in Barwick's time was conducted in a more robust environment and such behaviour was tolerated whereas, in modern day appellate advocacy, this is less likely.

7.9 The High Court's View on Section 92

Section 92 became the decisive issue in the Bank Nationalisation Case. While Rich and Williams JJ held that the Act was unconstitutional on every ground that they addressed, Dixon and Starke JJ agreed with Latham CJ and McTernan J in relation to all issues except the extent of the infringement of 'just terms' and the critical question of section 92. Latham CJ and McTernan J found that the Act was valid on every ground except that it infringed section 51(xxxi) in that it amounted to an acquisition of property that was not on 'just terms' in some parts. Dixon and Starke JJ held that many parts of the Act were invalid on similar grounds but concluded that this was not irreparable. As a result, the decisive issue in relation to the invalidity of the Act was the majority's (namely Dixon, Starke, Rich and Williams JJ) ruling on section 92. Importantly, all members of the majority held that section 46 of the Act contravened section 92.

The majority held that section 46 infringed the guarantee of freedom of interstate trade in section 92 of the Constitution. Essentially, the banks operated a business which was, in material respects,
interstate in character, and the prohibition of this business, although not on the basis that it was interstate, was invalid. According to Sawer, the decision 'carried further the implications of the Airlines Case, and the revival of the 'free enterprise' theory of James v Cowan, and disregarded the contrary implications of the 'Transport Cases' and James v Commonwealth'.

This had been Barwick's intention. Also, this was the only aspect of the decision that the parliament could not overcome by amendments to the Act.

The majority adopted the 'individual rights' approach to the interpretation of section 92. In doing so, they relied on those cases which supported this approach, such as the Peanut Board v Rockhampton Harbour Board (1933). Whilst the interpretation of section 92 that was adopted by Starke J echoed the submissions made by Barwick, the approach adopted by Rich and Williams JJ closely resembled Barwick's 'individual rights' approach, namely, that section 92 was based on a personal right of the individual to freely engage in interstate trade. Rich and Williams JJ stated that 'the freedom guaranteed by section 92 is a personal right attaching to the individual'. The authorities they relied upon corresponded with the various authorities that Barwick quoted during his submissions in support of this proposition, and which he introduced by stating: 'I wish to give the Court a series of references to show that every member of this Court both past and present has on some occasion subscribed to that view'.

The majority took the view that the activity of banking was 'trade and commerce' for the purposes of section 92 of the Constitution. Rich and Williams JJ stated that 'a banker who carries on business

regulation of some other subject will not collide with s. 92 simply because inter-State trade or commerce may be affected consequentially and indirectly. The freedom of inter-State trade, commerce and intercourse which s. 92 assures supposes an ordered society where the mutual relations of man and man and man and government are regulated by law.

This is once again a veiled reference to the 'direct prohibition' versus 'incidental prohibition' dichotomy referred to earlier. See Hull, above n 783, p.27.


48 CLR 266; Coper, Freedom of Interstate Trade under the Australian Constitution, above n 822, p.94.

Bank of New South Wales & Ors v Commonwealth (1948) 76 CLR 1 at 283. See generally Nygh, above n 822, 341.

Bank of New South Wales and Ors v Commonwealth (1948) 76 CLR 1 at 283; see also Hull, above n 783, p.27.

Transcript of Proceedings, The Bank of New South Wales and Ors v The Commonwealth of Australia, above n 867, p.282. One such authority that Rich and Williams JJ relied upon was the statement by Dixon J in O.Gilpin Limited v Commissioner for Road Transport and Tramways (New South Wales) (1935) 52 CLR 189 where Dixon J stated: 'The object of s 92 is to enable individuals to conduct their commercial dealings and their personal intercourse with one another independently of State boundaries' (at 211). This was referred to by Barwick during his submissions (Transcript of Proceedings, The Bank of New South Wales and Ors v The Commonwealth of Australia, above n 867, p.284). See Galligan, above n 781, p.175; Sawer, Cases on The Constitution of the Commonwealth of Australia, (3rd ed), above n 781, pp.195-228.

Bank of New South Wales & Ors v Commonwealth (1948) 76 CLR 1 at 284-290 (Rich and Williams JJ), 305-309 (Starke J), 380-383 (Dixon J). See generally Coper, Freedom of Interstate Trade under the Australian
in more than one State is engaged in trade, commerce and intercourse among the States''

1070 Barwick had referred to Trinidad Lake Asphalt Co Limited v Commissioners of Income Tax for Trinidad and Tobago [1945] at some length to demonstrate that banking involved the transmission or movement of money and is therefore to be regarded as 'trade'. Rich and Williams JJ agreed. They also referred to this case at great length and relied on Lord Wright's comments in this case together with the evidence in the present case.  

According to Rich and Williams JJ, 'legislation Commonwealth or State infringes s. 92 where it operates directly and not merely incidentally to burden, hinder or prevent persons or corporations engaging wholly or partially in trade or commerce across State boundaries'. This statement is a reflection of the 'direct prohibition' versus ‘incidental prohibition’ dichotomy that began to emerge in relation to the section 92 case law. Barwick's strategy of drawing parallels between this case and the Airlines Case seemed to influence both Rich and Williams JJ who believed that the defendants' contention contradicted the decision in the Airlines Case.  

Starke J also subscribed to the 'individual rights' theory of section 92. He cited with approval Justice Dixon's statement in O.Gilpin to which Barwick had referred during the course of his
submissions. Starke J dismissed any suggestion that section 92 'only applied to the passage of goods or visible tangible things and persons across the borders of the States and is wholly inapplicable to intangible things or commercial intercourse across State borders'.

Starke J relied on United States v South-Eastern Underwriters Association [1944] referred to by Barwick to support his conclusion that the business of banking was considered to be commerce. However, he concluded that the ‘Transport Cases’ were wrongly decided even though Barwick had made no reference to these cases in his submissions. In reaching his decision, Starke J relied heavily on the cases he referred to above which Barwick emphasised in his submissions, particularly, the Airlines Case.

Starke, Rich and Williams JJ all interpreted section 92 as severely restricting the government’s regulation of trade and commerce.

Whilst an alleged lack of fondness for the Labor government on behalf of Starke and Rich JJ may have contributed to Barwick’s success in this case, their respective judgments reflect a level of reliance on Barwick’s submissions. While it cannot be definitively concluded that they reached their conclusions due to Barwick’s advocacy, there are significant traces of Barwick’s influence and submissions in their respective judgments. For example, Barwick’s strategy to avoid references to the ‘Transport Cases’ seemed to find favour with Rich and Williams JJ (Starke J referred to them only to suggest they were wrongly decided). Further, Barwick’s approach of identifying the parallels with the Airlines Case to demonstrate that the present case was similar was critical as was the technique

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1077 Bank of New South Wales & Ors v Commonwealth (1948) 76 CLR 1 at 305. Starke J also stated that (at 305):

> Trade, commerce and intercourse among the States includes, in my opinion, not only the sale of tangibles but also of intangibles by a person in one State to a person in another State and also the transportation from one State to another of goods or persons and commercial intercourse whether by air, telegraph, telephone, wireless or other means.

1078 USSC 116.

1079 Bank of New South Wales & Ors v Commonwealth (1948) 76 CLR 1 at 307-308.

1080 Ibid at 311; See generally Coper, Freedom of Interstate Trade under the Australian Constitution, above n 822, p.94; Sawer, ‘Bank of NSW v Commonwealth’, above n 860, 215.

1081 Starke J also stated that interstate trade (at 309):

> must be free from all restraints, hindrances, obstructions, interferences and devices of every kind employed to interfere with that freedom. Those restraints, hindrances and interferences may take many forms such as customs and border duties, prohibitions of every kind, compulsory acquisitions of property directed against inter-State trade, compulsory marketing schemes entirely restrictive of freedom of action on the part of producers and the elimination of the business of inter-State transportation as such in favour of a State undertaking and so forth (James v Cowan (1932) 47 CLR 386; James v The Commonwealth [(1936) AC 578; 55 CLR 1]; Peanut Board v Rockhampton Harbour Board [(1933) 48 CLR 266]; Australian National Airways Pty Ltd v The Commonwealth [(1945) HCA 41; (1945) 71 CLR 29]).

1082 Such was their lack of fondness for the Commonwealth Labor governments that it has been suggested that both judges delayed their retirement until a conservative government came into power: see Fricke, above n 801, p.106.
of referring the judges to their earlier comments and mounting a formidable argument by pulling together the strands from these relevant cases.

Dixon J stated that trade and commerce covered the movement of intangibles as well as the movement of goods and persons and 'to confine the subject matter to physical things and persons would be quite out of keeping with all modern developments'. On appeal, as discussed in Chapter 8, the Privy Council agreed.

According to Dixon J, the relevant test in relation to section 92 was outlined in *James v Commonwealth* (1936) was as follows:

> the constitutional guarantee of freedom contained in s. 92 amounts to freedom of what constitutes trade, commerce and intercourse to pass from one State to another. It is described as freedom as at the frontier or border, the crucial point in inter-State trade. But that freedom may be impaired by a prohibition, restriction or burden, the application of which is not at the border but at some prior or subsequent stage in the course of inter-State trade, commerce and intercourse.

Dixon J stated that 'I cannot see how to close up every bank but a government bank leaves inter-State banking free'. According to Zines, Justice Dixon's views 'were to prove dominant'.

The fact that Dixon J did not refer to the 'Transport Cases' may also reflect Barwick's deliberate strategy not to refer to these cases in his submissions. This is a decision that seems to have found favour with a number of judges, including Dixon J. It also appears to have caused the judges to focus on other cases instead, particularly the *Airlines Case*. Dixon J's interpretation of section 92 was

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1085 55 CLR 1.

1086 *Bank of New South Wales & Ors v Commonwealth* (1948) 76 CLR 1 at 384.

1087 Ibid at 388. Dixon J went on to say that (at 389):

> It has appeared to me that to say that a given branch of inter-state commerce can be carried on only by government, so that it may be under governmental control, is inconsistent with the proposition, which I understand to be established, that inter-State trade shall be free of governmental prohibitions, restrictions and burdens whether they be legislative or executive in character.

1088 *Zines, The High Court and the Constitution*, (5th ed), above n 182, p.152. Zines stated, in reference to Dixon, that he: 'expounded the individual right interpretation and did not refer to any of the transport cases or indeed to any High Court decisions since McArthur's case, apart from one case decided by himself alone: *James v Commonwealth* (1939) 62 CLR 339 at 361, 362'.
similar to the approach adopted by Starke J. His interpretation was underpinned by the concept of the free market.

Earlier in this chapter, reference was made to Barwick’s belief during his preparation for the Bank Nationalisation Case that he would have ‘little difficulty in being able to convince the court that banking is part of trade etc and that interstate banking, although dealing with the transmission of intangibles, is part of that interstate trade etc which had the protection of s 92’. Whilst Barwick’s suggestion proved to be correct in relation to the majority who took the view that the activity of banking was ‘trade and commerce’ for the purposes of section 92 of the Constitution, the dissenting judges (Latham CJ and McTiernan J) did not reach this conclusion. Barwick later stated that ‘[i]n the long run we succeeded, except with Latham who for some reason or other went the other way. That, of course, created a bit of a furore for a while’. This suggests that Barwick could not understand why Latham CJ did not find in his client’s favour, but certainly does not suggest that Barwick believed it was attributable in any way to his advocacy.

Whilst Barwick’s prediction that McTiernan J would follow Latham CJ proved to be correct, his prediction that Latham CJ was the least likely to find the legislation invalid under section 92 also proved correct. As noted, Latham CJ and McTiernan J found that the Act was valid on every ground except that it infringed section 51(xxxi) in some parts, although this was capable of being remedied by legislative amendment. Barwick had failed to convince them that the activity of banking was ‘trade and commerce’ for the purposes of section 92 of the Constitution; a preliminary matter in triggering the application of section 92.

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1090 Dixon J stated that s 92 (at 388): ‘assumes that without governmental interference trade, commerce and intercourse would be carried on by the people of Australia across State lines, and its purpose is to disable the governments from preventing or hampering that activity’. However, Dixon J made the following observation (at 385):

> What, as it seems to me, the judgment in James v. The Commonwealth [1936] UKPCHCA 6; (1936) AC 578; 55 CLR 1 has corrected is the error of applying the conception of freedom where there was no real burden upon and no real obstruction to passing from one State to another or dealing across State lines and in addition the failure to recognize that regulation of trade, commerce and intercourse is compatible with freedom of Interstate passage or converse.

See also Hull, above n 783, p.27; see generally Coper, Freedom of Interstate Trade under the Australian Constitution, above n 822, p.95; Nygh, above n 822, 341.

1091 Barwick, A Radical Tory: Garfield Barwick’s Reflections & Recollections, above n 1, p.64.


1093 National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 21.
Latham CJ and McTiernan J held that banking was not itself trade and commerce and suggested that, to be characterised as such, there was a need for the sale and transportation of goods or the movement of people across a State border. It is clear that Latham CJ in particular was not convinced by Barwick's submissions on this issue, including his reliance on various authorities. Latham CJ was able to find that the Act was not 'directed against' interstate trade because of his view that banking itself was not itself trade and commerce. McTiernan J agreed entirely with Latham CJ's reasons.

The risk with Barwick's strategy of focusing on Latham CJ is that in attempting to convince one judge he may neglect the other judges. However, an analysis of Barwick's submissions does not reveal that he focused on Latham CJ to the extent that he failed to engage the entire bench; this is particularly evidenced by the technique of referring individual judges to their views in earlier cases (of course, there is also a risk that a judge may depart from their views in earlier cases). However, while Barwick managed to secure the support of the majority for his proposition on the application of section 92, his strategy could have proven fatal if he had not been able to achieve the appropriate balance.

Latham CJ seemed to be the least consistent with his approach to section 92. In the Airlines Case he had held that the legislation nationalising the airlines was unconstitutional, while in this case he held that the legislation nationalising the banks was constitutional.

Barwick, as we have seen, dedicated considerable time to demonstrating that 'banking' was 'trade and commerce' for the purposes of section 92, including numerous references to US and Canadian authorities which Latham CJ did not find of any great assistance. Latham CJ also rejected


1095 Latham CJ also dismissed Barwick's reliance on Trinidad Lake Asphalt Operating Co. Ltd v Commissioners of Income Tax for Trinidad and Tobago (1945) AC 1 and stated that 'the decision has no bearing whatever upon the question whether such a transaction is trade or commerce or whether banking is trade or commerce' (at 235).

1096 Bank of New South Wales & Ors v Commonwealth (1948) 76 CLR 1 at 233-237, 240. See generally Coper, Freedom of Interstate Trade under the Australian Constitution, above n 822, p.94.

1097 Bank of New South Wales & Ors v Commonwealth (1948) 76 CLR 1 at 297-398. See generally Coper, Freedom of Interstate Trade under the Australian Constitution, above n 822, p.94.

1098 This inconsistency appears to result from his characterisation approach. In the Airlines Case, Latham CJ held that the ANA Act was unconstitutional as it contravened s 92 on the basis that it was a law 'directed against' competing interstate services. In contrast, in this case, he held that the Banking Act 1947 (Cth) was valid because it was a banking law and therefore, was not part of the interstate trade and commerce protected by section 92. The characterisation approach adopted by Latham CJ has been criticised as it effectively provided him with the discretion to determine whether the particular legislation was constitutional as he saw fit, for example, his decisions in the Airlines Case and this case could be reversed without disturbing Latham CJ's reasoning: see Galligan, above n 781, p.176.

1099 Bank of New South Wales & Ors v Commonwealth (1948) 76 CLR 1 at 233-235, per Latham CJ. For example, Latham CJ stated that (at 233):
Barwick's alternate submission - in the event that banking was not considered 'trade and commerce' for the purposes of section 92 of the Constitution.\textsuperscript{1100}

Whilst Latham CJ acknowledged that a 'law which was directed against the use of such facilities in inter-State trade and commerce, which had the 'real object' of restricting such trade and commerce, would be obnoxious to s. 92\textsuperscript{1101} based on James v Cowan (1932)\textsuperscript{1102} and James v Commonwealth (1936),\textsuperscript{1103} he rejected any suggestion that the Act was such a law.\textsuperscript{1104}

The approach of Latham CJ differed markedly from his earlier jurisprudence and it is perhaps understandable that Barwick believed that Latham CJ had fundamentally misunderstood his proposition: 'In the course of his judgment Latham completely misquoted the proposition that had been put to the Court and then demolished the English representation'.\textsuperscript{1105} However, Latham CJ's approach may have been due to Barwick's failure to persuade. Alternatively, it may be that Latham CJ was not susceptible to being persuaded in this case as he had fairly fixed views. Justice Dixon's contemporaneous account of the case in his diary tends to suggest the latter:

Latham seemed openly to espouse the Govt. & met every contention of the Bank with initial disfavour. It is not easy to understand; perhaps due to settling down upon his habitual bias for the

\textsuperscript{1100} The authorities in other courts to which reference was made do not give much assistance in the endeavour to answer the question whether banking is itself "trade or commerce" as used in the Commonwealth Constitution.

Latham CJ stated that the 'cases in the United States in which reference is made to banking do not include any considered decision of the question whether banking is trade or commerce' (at 233). In addition, he stated that, whilst the provision with respect to banking in the Canadian Constitution is 'much the same' (at 233) as that contained in the Australian Constitution, the decision in the In Reference re Albert Statutes (1938) SCR (Can) 100 case 'does not contain any clear decision that banking is trade or commerce' (at 233). Latham CJ rejected Barwick's suggestion that banking was interstate trade and commerce because interstate banking transactions involved large use of the postal and telegraph systems (at 234-235).

\textsuperscript{1101} Latham CJ stated as follows (at 236):

Section 92 is infringed whenever an individual or corporation is engaged in inter-State trade, commerce or intercourse, and, either by a direction, prohibition or acquisition, with the object or purpose of effecting such a prohibition, the carrying on of such a business by him or it is forbidden.

\textsuperscript{1102} Bank of New South Wales & Ors v Commonwealth (1948) 76 CLR 1 at 236.

\textsuperscript{1104} Bank of New South Wales & Ors v Commonwealth (1948) 76 CLR 1 at 236-237. Latham CJ concluded this section of his judgment by stating that (at 240):

For these reasons I am of opinion that the provisions of the Banking Act 1947 do not infringe s. 92 of the Commonwealth Constitution. In my opinion banking is not itself trade or commerce. It is an instrument used by trade and commerce. The legislative control introduced by the Act is a control which is not directed against any inter-State element in banking. It is a general provision for the control of banking and is as valid as a general money-lending law. In my opinion the objections based on s. 92 fail.

\textsuperscript{1105} Barwick, A Radical Tory: Garfield Barwick's Reflections & Recollections, above n 1, p.66. Interestingly, Barwick was of the view as he expressed in private correspondence that Chief Justice Latham 'made a first rate Chief Justice' (see Letter from Sir Garfield Barwick to Sir Walter Monckton, 19 December 1950 (Papers of Sir Garfield Barwick, Personal correspondence [2.0cm], Series No: M3923 (M3923/1), Control Symbol: 14, National Archives of Australia, Sydney)).
Govt & antipathy to what he regards as the bias of Starke & Wms [Williams]. Most of the points were disputable but he gave bad answers even to the good ones & before they had been formulated.1106

McTiernan J’s judgment was the shortest of the judgments.1107 In relation to section 92, he stated that he agreed entirely with Latham CJ’s reasons and adopted them. He dismissed the plaintiffs’ arguments by simply stating that if the principles in James v Commonwealth (1936)1108 were applied then ‘the argument for the plaintiffs on this question must be rejected’.1109 McTiernan J did not consider banking to be ‘trade or commerce’ for the purposes of section 92 but rather something that aids ‘trade or commerce’.1110 Whilst he acknowledged that section 92 would ‘nullify any legislative restriction on banking depending for its operation on the relation of any banking transaction to trade, commerce and intercourse among the States’,1111 he believed that credit was transmitted across a State border only in a figurative sense, as it was not ‘a commodity or a physical thing’;1112 it relied on postal services or other means of communication. Therefore, it did not attract the application of section 92.

Neither Latham CJ nor McTiernan J, relied on Evatt’s interpretation of section 92 but, in Galligan’s words, on ‘an artificial severance of banking from interstate trade and commerce’.1113 That is, banking was not considered interstate trade and commerce for the purposes of section 92.

In his submissions, Evatt maintained that section 92 safeguarded ‘trade, commerce and intercourse among the States, not the trade exercised by an individual’.1114 It was an approach he had...

1106 Ayres, above n 50, p.188.
1107 Bank of New South Wales & Ors v Commonwealth (1948) 76 CLR 1 at 391-398.
1108 55 CLR 1.
1109 Bank of New South Wales & Ors v Commonwealth (1948) 76 CLR 1 at 397.
1110 Ibid at 398.
1111 Ibid.
1112 Ibid.
1113 Galligan, above n 781, p.173.
1114 Bank of New South Wales and Ors v Commonwealth (1948) 76 CLR 1, at 84. In terms of the Commonwealth’s submissions, Evatt’s major arguments in relation to section 92 were not accepted by any of the judges. The Commonwealth’s main argument was that trade and commerce was left absolutely free by bank nationalisation. According to the Commonwealth, it was simply exercising its right to select who would be entitled to carry on the business of banking by transferring the ownership of banks from private to public and that the business of banking would continue and be enhanced. This reflected Evatt’s theory of section 92 when he was on the High Court - the notion of trade and commerce as a whole and the denial of an individual right to engage in interstate trade (see Coper, Freedom of Interstate Trade under the Australian Constitution, above n 822, p.93). However, according to Coper, Evatt’s argument should have been based on the prevailing doctrine at the time such that he had to show that the Banking Act 1947 (Cth) was not ‘directed against’ interstate trade (as per the test in the James v Cowan (1932) [1932] AC 542; 47 CLR 386 and Milk Board (NSW) v Metropolitan Cream Pty Ltd (1939) 62 CLR 116) and that it did not interfere with ‘freedom as at the frontier’ (as per the test in James v Commonwealth (1936) 55 CLR 1) (see Coper, Freedom of Interstate Trade under the Australian Constitution, above n 822, p.93).
expounded during his time on the High Court, but which departed from the view of the majority in the Airlines Case. To maintain this was both poor strategy and poor advocacy on Evatt’s part. It departed from two fundamental elements and ideals of appellate advocacy, namely, knowing the law (in terms of framing arguments based on the existing law rather than a personal opinion of what the law ought to be) and knowing the court. In contrast, the interpretation of section 92 that Barwick advanced on behalf of the banks, although not universally accepted, became the preferred interpretation. Essentially, Barwick submitted that section 92 guaranteed ‘the individual’s freedom to move from place to place and to conduct his business across State lines’ such that any direct prohibition or acquisition of such business by the State was prohibited.\footnote{Bank of New South Wales and Ors v Commonwealth (1948) 76 CLR 1 at 22; Galligan, above n 781, p.174.} As we have seen, the majority of the Court accepted Barwick’s submission.

The interpretation of section 92 was critical in this case but also had wider political and policy ramifications. It spelt the end of the Commonwealth Labor government’s policy of nationalisation of industry. The High Court had suggested that the Commonwealth could operate its own airline or bank ‘but it could not prohibit others from engaging in that interstate enterprise’.\footnote{Hull, above n 783, pp.26-27. Prime Minister Chifley attempted to put a positive ‘spin’ on the defeat by suggesting that, other than the majority decision in relation to section 92, the legislation was a valid exercise of the banking power subject to some minor amendments: see Galligan, above n 781, p.176. Chifley’s view was valid to some extent in the sense that the majority of the High Court found that the scope of the Commonwealth’s banking power was wide enough to allow the government to acquire private banks. Also, although four of the six judges held that the compensation offered to shareholders for acquisition of their shares under the Banking Act was not on just terms, this part of the legislation was capable of being remedied by subsequent legislation (see Crisp, Ben Chif/ey: A Political Biography, above n 783, pp.336-337; Marr, above n 8, p.69).}

After 39 days of argument beginning on 9 February 1948, the High Court delivered its long-awaited judgment in Sydney on 11 August 1948 declaring, before a capacity crowd, that most of the Act was invalid.\footnote{The decision has been criticised. For example, in Justice Ronald Sackville, ‘Continuity and Judicial Creativity – Some Observations’, above n 879, 165 it was stated that: The broad approach taken by the [High] Court to constitutional prohibitions can be illustrated by the Bank of New South Wales v The Commonwealth (the Bank Nationalisation Case) ... There can scarcely be a more striking example of the Court overriding the judgment of the elected Parliament on a matter of great economic, social and politically importance. One of the grounds on which the Labor Party bank nationalisation program was overturned was at Part VII of the Banking Act 1947 (Cth), which prohibited private banks from carrying on banking business, infringe the freedom of trade guaranteed by s. 92 of the Constitution. See also Lane, A Digest of Australian Constitutional Cases, (5th ed), above n 843, p.344. In Michael Kirby, ‘Sir Edward McTiernan: A Centenary Reflection’, above n 879, 178, former Justice Kirby described McTiernan J’s decisions as ‘the least “pro laissez faire” in cases under s 92 of the constitution’.} The views of the judges are summarised in the table in Appendix D. The decision caused celebrations around the country.\footnote{Johnston, above n 783, 85; May, above n 778, p.88.} Robert Menzies, the leader of the relatively recently-formed
Liberal Party, hailed the victory, in Johnston’s words, as a triumph of the Constitution over the socialist program of the Chifley Labor Government.\(^{1119}\)

On the morning following the judgment, the Chairman of the National Bank and the Associated Banks, Leslie McConnan was cheered by hundreds of bank employees as he walked to his office, ‘as if the judgment of the High Court was his personal triumph’.\(^{1120}\) The decision made front-page headlines and was the cause for great celebration by the private banks and their supporters, both in Australia and overseas.\(^{1121}\) The *Sydney Morning Herald* carried numerous articles under the headline ‘BANK NATIONALISATION RULED OUT’ on the front page and four of the first five pages were dedicated to the decision.\(^{1122}\) As May describes the reception, a large crowd gathered in Sydney’s Martin Place to celebrate and speeches by banking executives were met with rapturous applause in banking chambers.\(^{1123}\)

Barwick’s advocacy was credited for the success, and he emerged following this case with a greatly enhanced reputation. Barwick’s advocacy demonstrated a close (albeit not flawless) adherence to the elements and ideals of appellate advocacy. It was characterised notably by his ability to handle judicial questions and utilise his answers as a means of conveying his submissions. In doing so, he also employed the use of examples and analogy to great effect. Barwick himself acknowledged that ‘during the Banks case I answered many questions and I think by answering them, made my argument clearer to my listeners’.\(^{1124}\)


\(^{1120}\) Blainey and Hutton, above n 783, p.232. It was said that whilst Barwick, and the other counsel for the banks, were confident of a favourable outcome, Leslie McConnan, the Chief Manager of the National Bank who led the opposition to nationalisation on behalf of the banks, was also hopeful but was reserved by what he described as ‘somewhat extreme Scottish caution’.

\(^{1121}\) See ‘Bank Nationalisation Ruled Out’, *The Sydney Morning Herald* (Sydney), 12 August 1948, 1; ‘News Received with Joy – Parties at Banks’; *The Sydney Morning Herald* (Sydney), 12 August 1948, 1; ‘Bank Judgment Labour’s Reversal Of Policy Since 1941’, *The Mercury*, (Hobart), 12 August 1948, 1; ‘High Court Rules Against Bank Nationalisation’ (Canberra), 12 August 1948, 1; ‘Bank Act Invalid: Cabinet Move Awaited’, *The Argus* (Melbourne), 12 August 1948, 1; Priest and Williams, above n 77, p.53.

\(^{1122}\) See ‘Bank Nationalisation Ruled Out’, *Sydney Morning Herald* (Sydney), 12 August 1948, 1.

\(^{1123}\) May, above n 778, p.88.

\(^{1124}\) Barwick, *A Radical Tory: Garfield Barwick’s Reflections & Recollections*, above n 1, p.77.
Chapter 8: Barwick and the Bank Nationalisation Case in the Privy Council

"I hear from time to time that people think I came forward, as it were, only at the time of the constitutional cases but I had been practising at the High Court, not at the Privy Council, but in the High Court for a very considerable time before the Bank case and had gathered a good deal of prominence in the profession."

Sir Garfield Barwick, 1977

After the victory in the Bank Nationalisation Case in the High Court, speculation began immediately as to whether the Chifley Government would appeal the decision to the Privy Council. Two days after the decision, the Government announced that it would. Barwick was once again called upon by the banks to appear on their behalf before the Privy Council. This chapter is dedicated to assessing Barwick's advocacy in the Bank Nationalisation Case appeal before the Privy Council against the elements and ideals of appellate advocacy.

8.1 Preparation for the Special Leave Application

The Chifley government was disappointed with the High Court's decision and the fact that the High Court had hindered its nationalisation agenda. On 13 August 1948 - just two days after the High Court's decision - the Chifley government announced that it would appeal to the Privy Council. It was the government's last resort. It immediately sought special leave to appeal, specifically, with respect to the decision that section 46 infringed section 92 of the Constitution. The Labor governments of New South Wales and Queensland joined the appeal. Evatt would once again appear

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1125 National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 15.
1126 'High Court Decision Seen As Worst Rebuff Government Has Received', Sydney Morning Herald (Sydney), 12 August 1948, 1.
1127 May, above n 778, pp.88-89; Crisp, Ben Chifley: A Political Biography, above n 783, pp.336-337; Marr, above n 8, p.69; Galligan, above n 781, p.177. According to Whitlam, Evatt made a mistake by advising the Chifley Government that it should appeal the High Court decision to the Privy Council otherwise, in Whitlam's opinion, this would not have been an issue at the 1949 election (see Whitlam, above n 81, p.303). Sawer, Bailey and others doubted whether such an appeal would be possible due to section 74 of the Constitution but Evatt was of the view that a partial appeal to the Privy Council was possible based on previous High Court decisions. It was on this basis that Evatt received conditional leave to appeal and the section 92 issue was argued before the Privy Council (see Tennant, Famous Australians – Evatt: Politics and Justice, above n 786, p.229).
1128 Blainey and Hutton, above n 783, p.232.
on behalf of the Commonwealth.\textsuperscript{1129} Initially, Barwick declined the brief to appear in London to oppose the application for special leave but was pressed to accept by the banks.\textsuperscript{1130} This was to be Barwick's first appearance before the Privy Council.\textsuperscript{1131}

Barwick prepared for the special leave application and held meetings with the English counsel and solicitors led by Sir Cyril Radcliffe KC.\textsuperscript{1132} The first meeting of counsel occurred on 13 October 1948.\textsuperscript{1133}

It was Barwick's view that, in light of the fact that the High Court's decision was not unanimous, the Privy Council would not refuse the Commonwealth an opportunity to appeal against the decision, particularly since the case concerned an important constitutional power, that is, the banking power as well as section 92. However, Radcliffe believed that there was a possibility of persuading the Privy Council to reject the Commonwealth's application.\textsuperscript{1134}

\textsuperscript{1129} The other members of the Commonwealth team included: which included Kenneth Bailey, Geoffrey Sawer, D. N. Pritt KC, P. D. Phillips K.C., Frank Gahan, H.L. Parker and C.I.Menhennit.

\textsuperscript{1130} Barwick, A Radical Tory: Garfield Barwick's Reflections & Recollections, above n 1, pp.66-67. Barwick's concern with leaving to go to London was the fact that he had to leave his practice. Barwick stated that McConnan, the Chairman of the National Bank, insisted that he went and they attempted to convince Barwick's wife. They also booked him and his wife the vice regal suite on the Stratheden, one of the great ships of its time, so he eventually agreed to go (see National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 21-22). Sir Norman Cowper and Barwick travelled together and reached London on the Stratheden in October 1948 where they stayed for 9 months (see Alfred James, 'Sir Norman Cowper' (2000) 86(1) Journal of the Royal Australian Historical Society 74, 81). Barwick recalled that it was 'the job of Cowper to make sure I got to England safely': Valerie Lawson, The Aliens Affair, 1995, Pan Macmillan Australia, Sydney, p.63. According to Norma Barwick's diary, the couple left Sydney on 11 September 1948 and arrived in England on 12 October 1948: see Travel Diary -1948 of Norma M. Barwick, 'Sir Garfield Barwick's diaries and other personal books, Series No: M3943/2, Control Symbol: 27, National Archives of Australia, Sydney.

\textsuperscript{1131} Letter from J. Emrys-Lioyd to Sir Garfield Barwick, 12 October 1948 (Papers of Sir Garfield Barwick, Personal correspondence [2.0cm], Series No: M3923 (M3923/1), Control Symbol: 9, National Archives of Australia, Sydney). As well as the brief for the banks, Barwick was also briefed to appear before the Privy Council in two other applications for special leave to appeal. In the first application, he appeared on behalf of Grace Bros in relation to a case concerning the acquisition by the Commonwealth of the Grace Building in King and York Streets, Sydney (see Grace Bros Pty Ltd v Commonwealth (1946) 72 CLR 269). The second application related to the price to be paid for wheat compulsorily acquired under the Wartime Wheat Pool (see Nelungalo Pty Ltd v Commonwealth (1947) 75 CLR 495 and Nelungalo Pty Ltd v Commonwealth (1950) 81 CLR 144). See Barwick, A Radical Tory: Garfield Barwick's Reflections & Recollections, above n 1, p.68.

\textsuperscript{1132} Sir Cyril Radcliffe KC, Sir Walter Monckton KC, Sir Valentine Holmes KC and Kenneth Diplock were the senior English counsel and Brian McKenna (later Sir Brian McKenna, judge of the English High Court) was the only junior. Sir David Fyfe KC was briefed for the State of Victoria; with Albert Hannan KC and Douglas Menzies together with Mr Barrington were briefed for the States of South Australia and Western Australia. Sir David Maxwell Fyfe was a British Conservative Party politician, lawyer and judge. See Commonwealth v Bank of New South Wales (1949) 79 CLR 497 (26 October 1949) and also Barwick, A Radical Tory: Garfield Barwick's Reflections & Recollections, above n 1, p.69.

\textsuperscript{1133} Letter from Sir Garfield Barwick to Crowther, 12 May 1949 (Papers of Sir Garfield Barwick, London file no. 3 - personal correspondence [3.0cm], Series No: M3923 (M3923/1), Control Symbol: 9, National Archives of Australia, Sydney).

\textsuperscript{1134} Barwick, A Radical Tory: Garfield Barwick's Reflections & Recollections, above n 1, p.69.
It was decided that Radcliffe should lead the banks' opposition against the Commonwealth's application. Barwick believed that Radcliffe should lead as he was 'the outstanding English advocate of the day'\textsuperscript{1135}, and he also thought the Commonwealth's application might possibly be defeated whereas Barwick was not of the same view.\textsuperscript{1136} Barwick stated that his main objective at the time was to eliminate the influence that Latham CJ would have on the Privy Council by weakening Latham CJ's dissent.\textsuperscript{1137} He believed that this would be advantageous in opposing the application.\textsuperscript{1138} He stated: 'I have only one desire, I want to destroy Latham and take his vote out of this business'.\textsuperscript{1139} He then added: 'What Latham had done was, he had attributed to me an argument I didn't put and then knocked it down. Now I hadn’t disclosed that but that is what happened'.\textsuperscript{1140} The language adopted by Barwick in this interview almost 30 years later suggests that he was angry with Latham CJ and would seek to remedy this in the Privy Council. If exhibiting such emotion were to manifest in his advocacy, it could have proved counterproductive, with potential loss of objectivity or a loss of control.

8.2 Presentation and Personation for the Special Leave Application

The application to the Judicial Committee of the Privy Council commenced on 25 October 1948.\textsuperscript{1141} The orders from which the Petitioners sought leave to appeal were the declarations of the High Court that section 46 of the Act was invalid.\textsuperscript{1142}

\textsuperscript{1135} Ibid. See also National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 22. Barwick also believed that, whilst he had the right to open as the Bank of NSW's petition was first on the list, 'as the local lads were confident on discretion, I thought it better to send one of them in to bat, and in the long run I think my decision was right'.

\textsuperscript{1136} Barwick, A Radical Tory: Garfield Barwick's Reflections & Recollections, above n 1, p.69.

\textsuperscript{1137} Ibid.

\textsuperscript{1138} Ibid.

\textsuperscript{1139} National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 22.

\textsuperscript{1140} Ibid.

\textsuperscript{1141} There were five Petitions for Special Leave to Appeal. In each of the five petitions, the Petitioners were the Commonwealth of Australia, the Treasurer of the Commonwealth, Commonwealth Bank of Australia, and the Governor of the Commonwealth Bank and the Respondents were broadly the 11 private banks named in Parts 1 and 2 of the First Schedule to the Banking Act 1947. In addition to those 11 private banks who were Respondents in the first two Petitions, there were three other Petitions which affected three of the States, Victoria, South Australia and Western Australia and their respective Attorney-Generals were Respondents in those applications. The petitions were before Lord Wright, Lord Simonds, Lord Uthwatt, Lord Oaksey and Lord Morton of Henryton. Interestingly, Lord Wright delivered the leading opinion in James v Commonwealth (1936) 55 CLR 1. See 'Hearing of Banking Application', Sydney Morning Herald (Sydney), 26 October 1948, 1 and 'Banking Act Appeal, Sydney Morning Herald (Sydney), 26 October 1948, 3. A full list of Counsel who appeared in relation to the special leave application can be found in Appendix C.

\textsuperscript{1142} Transcript of Proceedings, the Commonwealth of Australia and Others v Bank of New South Wales and Others (Privy Council, Lord Wright, Lord Simonds, Lord Uthwatt, Lord Oaksey and Lord Morton of Henryton, Monday 25 October 1948, p.3.
Evatt opened on behalf of the Commonwealth. He commenced by referring the Privy Council to the decision in the High Court. He emphasised that the case raised issues ‘not merely of great importance to the immediate subject of banking’ but issues in relation to section 92 generally. He argued that if the majority of the High Court was correct, then the transport legislation of the states was also invalid under section 92. He argued that the decision regarding section 92 was wrong, being contrary to previous judgments of the High Court and Privy Council, and denying the Commonwealth Parliament legislative power to an extent which could not reasonably be regarded as flowing from the Constitution.

Radcliffe for the Respondents indicated that the first question he wanted to address was whether the appeal, in the form proposed, could take place at all. He also addressed the issue of the wording of section 74 of the Constitution. Barwick described Radcliffe as ‘an outstanding advocate and a brilliant lawyer. This day he gave a polished performance; his language was clear and concise and his delivery easy’. This assessment of Radcliffe’s performance provided an insight into the elements and ideals of appellate advocacy that Barwick considered important; namely, clear and concise language as well as presentation.

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1143 Evatt submitted that:

the legal question raised by the Petition is of outstanding importance; it goes far beyond the Banking Act. I shall submit to your Lordships that the reasoning of the majority of the Court in relation to section 92, probably does not, de-validate a great deal of the legislation, if it is accepted, which the Privy Council, in James v. The Commonwealth, clearly regarded as valid.


1145 Ibid.

1146 Radcliffe addressed the Privy Council on behalf of the Respondents and in relation to the first Petition with Barwick addressing them on behalf of the Respondents to the second Petition, the English banks, and Sir David Maxwell Fyfe, who appeared on behalf of all the three states, would address the Privy Council in relation to the remaining three Petitions. See Transcript of Proceedings, the Commonwealth of Australia and Others v Bank of New South Wales and Others (Privy Council, Monday 25 October 1948), above n 1142, p.24.

1147 Ibid, p.25.

1148 Ibid, pp.34-36.

1149 Barwick, A Radical Tory: Garfield Barwick’s Reflections & Recollections, above n 1, p.69; May, above n 778, pp.90-91. He stated that ‘Cyril Radcliffe was a magnificent advocate with a wonderful gift of language’ (see National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 22.). Barwick stated that Radcliffe was ‘extremely smooth and competent’ although noted that English counsel ‘have nothing to show us in the way of courage and reserve’: Letter from Sir Garfield Barwick to Bruce MacFarlane, 10 December 1948 (Papers of Sir Garfield Barwick, London file no. 3 – personal correspondence [3.0cm], Series No: M3923 (M3923/1), Control Symbol: 8, National Archives of Australia, Sydney). This illustrates that Barwick agreed that courage was an important element of appellate advocacy. Barwick also added that Radcliffe had left him with ‘a dreadful job in following him. He had been very well taken, and he had of necessity covered much of my ground’: Letter from Sir Garfield Barwick to Bruce MacFarlane, 10 December 1948 (Papers of Sir Garfield Barwick, London file no. 3 – personal correspondence [3.0cm], Series No: M3923 (M3923/1), Control Symbol: 8, National Archives of Australia, Sydney).
Barwick succeeded Radcliffe in opposing the special leave application on behalf of the banks. He recalled:

It was in the middle of the afternoon that I had to begin, and I must confess that after the English voices and the very splendid exhibition that Radcliffe gave, I felt a little like a shaggy dog. However, I got the feel of them and those on the side-line seemed quite satisfied.

As evidenced by this recollection, Barwick felt uncomfortable from the outset. He had never argued from a lectern before a bench that was sitting at the same level as he was standing. On the first day, he folded his arms and rested them on the lectern which he later conceded was a mistake, as he was unable to make a gesture or emphasise any point: this posture had the effect of almost leaving him 'tongue-tied'. According to Barwick, the experience was agonising and one of the worst that he had experienced. He stated that he 'had never felt so ineffective'. This illustrates the importance of an advocate being both familiar and comfortable with their surroundings. Despite Barwick's extensive experience, the fact that the layout of the Court and the courtroom environment was slightly different was disconcerting.

Barwick's discomfort and perceived ineffectiveness were exacerbated by the fact that the judges did not ask him any questions. As a result, he was unable to use judicial questions to glean or infer the judges' thoughts but was left to speculate. This was something to which Barwick was not accustomed and he found it difficult. He commented that 'the polite silence of my hearers only made matters worse'. This also demonstrates that Barwick's style of advocacy relied heavily on judicial dialogue, and that he was perhaps less effective without it.

The following day, Barwick did not repeat his mistake of folding his arms when making his submissions. He presented to the Privy Council 'without script or notes'. It was testament to his exceptional memory.

Barwick continued his submissions on day three by posing an alternative construction for section 74 of the Constitution. Section 74 states that no appeal is permitted to the Privy Council on any inter se
question unless the High Court has certified that the question is one which ought to be determined by the Privy Council. The Commonwealth had not sought a section 74 certificate from the High Court. Barwick’s approach to the interpretation of section 74 prompted various questions from the Board of the Privy Council and his submissions on the inter se question occupied a significant amount of day three.1157

Following this, Barwick sought to address Evatt’s submission that the decision in this case was ‘of far-reaching effect and calls in question a large amount of legislation; that it, as it were, flies in the face of the Privy Council’s own decision in James v. The Commonwealth’.1158 In response to this, the following exchange ensued where Barwick demonstrated courage to maintain his position:

Lord Wright: That is a very serious point.
Barwick: Quite. I want to deal with that, and deal with it as shortly as I can, because I submit the very contrary. This decision [in the Bank Nationalisation Case] was in a very narrow compass, and when analysed does not in any sense contravene anything that was said in the case of James v. The Commonwealth or James v. Cowan.
Lord Wright: You cannot say that of the various reasons.
Barwick: I think I could, my Lord; but I do not want to go into the whole merits of it. What I want to do is to show what the actual decision did.1159

After approximately 20 minutes, Lord Uthwatt directed a comment to Barwick who responded in a humorous manner. According to Barwick, this changed the atmosphere of the courtroom and he broke ‘through a barrier and gathered strength with the Privy Council thereafter.’1160 If this assessment is correct, it illustrates the effectiveness of humour and wit when used appropriately. In this instance, it had the effect of altering the atmosphere of the courtroom significantly.

This turning point, based on Barwick's recollection, refers to the following exchange:

Lord Uthwatt: The point you are on is that you are not fighting about a live matter; you are not fighting about a dead body; you are fighting about one which is buried?

1158 Ibid, p.12.
1160 Barwick, A Radical Tory: Garfield Barwick’s Reflections & Recollections, above n 1, p.70; National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 22. According to Barwick, Uthwatt made a remark that he ‘facetiously capped, and Valentine Holmes always told me that was one of the remarkable moments of his life, he saw everything changed by that bit of humour’ (see National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 22).
Barwick: Yes; and more than that, my Lord, if one looks to clause 24 in this petition. It is suggested that I am fighting about the gentleman who was buried, and the argument for the Commonwealth is: Well, you do not know whether the gentleman who was buried ought to be revived or not, unless you see what clothes he is to be put in. They say: We are not going to put him in the clothes he was in before, but we are going to put him in a new suit; you do not know what the new suit is, and they agree it is essential you know the suit if you are able to determine the question of whether he ought to be revived ....

Lord Wright: That is simply an argument on section 92.

Barwick: The point I desire to make is this. They say that section 92 does not affect section 46 because the Act in which it was, was an Act of a particular kind.

Lord Wright: That is treating section 46 as a somehow standing by itself and alive.

Barwick: And in an Act that is otherwise dead.

[Barwick proceeded to outline provisions of the Petition]

Lord Uthwatt: You say they have to provide a new coffin before they can deal with the old body?

Lord Wright: You have to get, not a body, but a new infant.

Barwick: The argument put against me on this point is that you have to say: What is the object of the Act in which you find the section? They say: You find the object from the Act that is dead, although we are going to put it in another Act.

... 

Barwick: Not on this point. That is what I want to point out.1161

Barwick’s recollection of the special leave application was as follows:

I remember the first half hour I spent on the opposition to the grant of special leave. I followed Cyril Radcliffe who had been arguing in front of me. He really was tops. The general attitude of those (seven of them) on the other side of the table was: “Why have we got to listen to you?” They had heard England’s best. You know, it was very patent. The next morning I got going and Valentine Holmes, who was a good advocate, a very good advocate, always said to me, “You know, I’ve only seen a few magical moments but”, he said “the moment you cracked a joke with Andrew Uthwatt that morning was magic.” He said: “It completely changed their attitude to you.”

... I can’t remember [the joke] but I know it happened. Val always said that was a magical moment, it loosened everything. The Bank case was fairly difficult. I don’t think I ever had as difficult an argument.\footnote{1162}

In his submissions, Barwick attempted to demonstrate the manner in which Latham CJ’s judgment had transformed the proposition which he had submitted at the original hearing. Barwick outlined the original proposition he had submitted to the High Court and compared it to the proposition that Latham CJ had outlined in his judgment.\footnote{1163} According to Barwick, Latham CJ had misquoted the original proposition and then demolished the misquoted proposition.\footnote{1164}

Barwick proceeded to refer to various aspects of Chief Justice Latham’s judgments, including in the \textit{Airlines Case}.\footnote{1165} He reacted to a comment by Lord Wright that he did not know enough about the \textit{Airlines Case} and stated that if he ‘might read the head note it will put your Lordships in possession of the whole case’.\footnote{1166} He then proceeded to read the entire head note. This is an example of Barwick employing flexibility in the delivery of his submissions. Barwick continued to refer to the Chief Justice’s comments in the \textit{Airlines Case}.\footnote{1167}

Barwick’s emphasis on Chief Justice Latham’s reasoning was designed to reduce or eliminate the possible influence that the Privy Council might place upon it. He suggested that had Chief Justice Latham overcome the first hurdle by finding that banking was ‘trade or commerce’ for the purposes of section 92 then he would have also found that the Act contravened section 92 of the Constitution.

Following Barwick’s references to the \textit{Airlines Case} as well \textit{James v The Commonwealth} (1936),\footnote{1168} Lord Wright stated ‘I can understand this much better than I could before’.\footnote{1169} It is clear from this

\begin{itemize}
\item \footnote{1162} Molomby & Donohoe, above n 19, 17. Even Barwick’s wife recalled on Wednesday 27 October 1948 that Barwick ‘was right on top’; see Travel Diary -1948 of Norma M. Barwick, ‘Sir Garfield Barwick’s diaries and other personal books, Series No: M3943/2, Control Symbol: 27, National Archives of Australia, Sydney.
\item \footnote{1163} Barwick, \textit{A Radical Tory: Garfield Barwick’s Reflections & Recollections}, above n 1, p.70.
\item \footnote{1164} Virtue, above n 857, 24. According to Barwick, he ‘managed to destroy Latham’ (see National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 22-23).
\item \footnote{1165} The exchange proceeded as follows:
\begin{quote}
\textbf{Barwick:} He proceeds to consider something else which the majority did not consider, and I want to say something shortly about that in a moment; but may I just point this out, that from that passage you would infer that had he come to the conclusion that banking was trade and commerce, he would have been of the same opinion as the majority, that this section 46 was bad as being a direct and absolute prohibition of trade and commerce.
\textbf{Lord Wright:} I do not know that that matters very much. Where is a passage upon which you base that? Would you just give the reference? Most of us have read these judgments.
\end{quote}
\item Transcript of Proceedings, the \textit{Commonwealth of Australia and Others v Bank of New South Wales and Others} (Privy Council, Wednesday 27 October 1948), above n 1157, p.16.
\item \footnote{1166} Ibid.
\item \footnote{1167} Ibid, pp.17-18.
\item \footnote{1168} 55 CLR 1.
\end{itemize}
comment that Barwick had successfully informed Lord Wright, and in all likelihood the other members of the Board, of Chief Justice Latham’s position in the Bank Nationalisation Case and the Airlines Case.

Barwick recalled that his submissions relating to Chief Justice Latham’s judgment caused some consternation amongst the Commonwealth’s legal team and eventually prompted Evatt to request a copy of the transcript of the argument in the High Court as a matter of urgency, only to find that Barwick was correct. Although it is difficult to assess, Barwick may have achieved his aim of reducing, if not eliminating, the Chief Justice’s influence in the special leave application. Again, Barwick demonstrated his ability to outline clearly and concisely certain propositions as well as the importance of a thorough preparation and a clearly defined strategy. Barwick was focused on his objective, namely, to reduce the potential influence of the Chief Justice’s dissenting judgment and he set out to achieve this objective. This also illustrates the importance he attributed to knowing the court; he realised that, in determining whether to grant special leave, the Privy Council may place considerable weight upon the decision of the Chief Justice.

Shortly prior to concluding his submissions, Barwick succinctly encapsulated his opposition to the Petition for Special Leave. During this, Barwick foreshadowed for the Board the policy implications associated with accepting or indeed providing an advisory opinion in this context.

Barwick then concluded by stating:

Nobody throughout the whole long course of discussion of this section has ever expressed doubt that a direct and absolute prohibition of a portion of trade does not leave trade free. That is all that this decision actually did. For these reasons, my Lords, I submit leave should not be granted.  

Writing to Barwick soon after, Cowper’s assessment of Barwick’s performance was as follows:

I have never heard you to better advantage, and can’t imagine that anyone could have done better ... Your success was due to admirable advocacy, which combined clarity, care, pungency, and resourcefulness; and we all know to what extent your brilliant argument was based on learning, hard work, and intense thought. 

1169 Transcript of Proceedings, the Commonwealth of Australia and Others v Bank of New South Wales and Others (Privy Council, Wednesday 27 October 1948), above n 1157, p.23.
1170 Barwick, A Radical Tory: Garfield Barwick’s Reflections & Recollections, above n 1, p.70.
1171 Transcript of Proceedings, the Commonwealth of Australia and Others v Bank of New South Wales and Others (Privy Council, Wednesday 27 October 1948), above n 1157, p.25.
1172 Ibid.
1173 Letter from Norman Cowper to Sir Garfield Barwick, 27 October 1948 (Papers of Sir Garfield Barwick, London file no. 3 – personal correspondence [3.0cm], Series No: M3923 (M3923/1), Control Symbol: 9, National Archives of Australia, Sydney).
Having given Barwick the brief, Cowper appears to have thought his choice well vindicated.

At the conclusion of Barwick's submissions towards the end of day three, Fyfe on behalf of Victoria, South Australia and Western Australia, addressed the Board in relation to the Petition for Special Leave. Fyfe suggested that he could not add anything to the way in which the issue of regulation was dealt with by Barwick, because, in his view, 'it does not need it'.\(^ {1174}\) This was an indirect acknowledgement of the comprehensive nature of Barwick's arguments and testament to Barwick's advocacy.

Despite the efforts of Radcliffe and Barwick, special leave to appeal was granted to the Commonwealth at the conclusion of the submissions on 11 November 1948.\(^ {1175}\) The reality of advocacy in practice is that even though Barwick was impressed by Radcliffe's performance, as was Cowper with Barwick, excellent advocacy on its own does not guarantee success. The Privy Council hearing was set down for 14 March 1949. However, although the Privy Council granted special leave, it indicated that:

> It shall be reserved to the Respondents to raise as a preliminary point the plea that the appeal does not lie without a certificate of the High Court of Australia and if this preliminary point should be decided against the Respondents they shall be at liberty to raise all such constitutional points as they think fit.\(^ {1176}\)

As a result, whilst special leave to appeal was granted, the banks still had available to them the argument that no appeal to the Privy Council was available under section 74. One of the issues the Privy Council had to consider was whether the appeal involved limits *inter se* of the Constitutional powers of the Commonwealth and of the States. In such instances, the Commonwealth could not

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\(^ {1174}\) Transcript of Proceedings, the *Commonwealth of Australia and Others v Bank of New South Wales and Others* (Privy Council, Wednesday 27 October 1948), above n 1157, pp.33-34.

\(^ {1175}\) H.S. Nicholas, 'The Banking Act and the Privy Council', (1949), 23 *Australian Law Journal* 387, 387; Barwick, *A Radical Tory: Garfield Barwick's Reflections & Recollections*, above n 1, p.70; see also Galligan, above n 781, p.177. According to Barwick, this was unsurprising (see National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 23). Barwick also believed that refusing leave in this case on grounds of discretion would be 'most impolitic': see Letter from Sir Garfield Barwick to David Maughan KC, 3 January 1949 (Papers of Sir Garfield Barwick, London file no. 3 – personal correspondence [3.0cm], Series No: M3923 (M3923/1), Control Symbol: 9, National Archives of Australia, Sydney). Interestingly, apparently Lord Simonds said 'pleasant things' about the advocacy in relation to the special leave application in a letter sent from Lord Simonds to David Maughan: see Letter from David Maughan KC to Sir Garfield Barwick, 4 February 1949 (Papers of Sir Garfield Barwick, London file no. 3 – personal correspondence [3.0cm], Series No: M3923 (M3923/1), Control Symbol: 9, National Archives of Australia, Sydney). Norma Barwick records that special leave was granted on Wednesday 10 November 1948: see Travel Diary -1948 of Norma M. Barwick, 'Sir Garfield Barwick's diaries and other personal books, Series No: M3943/2, Control Symbol: 27, National Archives of Australia, Sydney.

\(^ {1176}\) Nicholas, above n 1175, 387; May, above n 778, p.90.
seek special leave to appeal without obtaining a certificate from the High Court. As noted, the Commonwealth had not sought such a certificate from the High Court.\textsuperscript{1177}

The appeal to the Privy Council was to be restricted to the validity of section 46 of the Act and the application of section 92 of the Constitution. Although this section did not involve any \textit{inter se} issues, the banks attempted to introduce it as an issue to prevent the Privy Council from hearing the appeal. The banks argued that the scope of the banking power might introduce \textit{inter se} issues. The Privy Council was undecided and postponed its decision until the start of the hearing.\textsuperscript{1178}

\section*{8.3 Preparation for the \textit{Bank Nationalisation Case in the Privy Council}}

The hearing before the Privy Council began on 14 March 1949, almost five months after special leave was granted. In addition to becoming the longest case in the High Court’s history, the appeal became one of the longest hearings in the history of the Privy Council. The Privy Council granted NSW and Queensland leave to intervene to support the Commonwealth.

A Federal election was due before the end of 1949 and, irrespective of the result of the appeal before the Privy Council, the Chifley government would not be able to nationalise the banks before the election. McConnan turned his attention to campaigning against the Chifley government at the upcoming election. The Liberal Party, led by Opposition Leader Robert Menzies, recognised that the bank nationalisation issue might help defeat the Chifley government at the election. However, Menzies acknowledged the difficulty in maintaining the bank nationalisation issue in the minds of voters until the federal election, especially if the Privy Council rejected the Chifley government’s appeal.\textsuperscript{1179}

Barwick remained in London to prepare for the hearing of the appeal. It was decided that, for the purposes of the hearing before the Privy Council, one of the English counsel (ultimately, Radcliffe)


\textsuperscript{1178} Marr, above n 8, p.70; Nicholas, above n 1175, 387. At the same time, in late 1948, work commenced on drafting an amending Bill to address the non-vital objections to the Banking Act 1947 (Cth) based on Latham CJ’s judgment in the High Court in anticipation of a possible victory in the Privy Council: see Crisp, Ben Chifley: A Political Biography, above n 783, pp.336-337; May, above n 778, pp.90-91.

\textsuperscript{1179} Blainey and Hutton, above n 783, pp.232-233; Galligan, above n 781, p.177. The Federal election was held on 10 December 1949; Holder, above n 781, p.887.
should deal with the question of jurisdiction under section 74 and the question of the banking power under section 51 and Barwick should handle the section 92 argument.\footnote{1180}

According to Barwick, the proper approach to adopt on the application of section 92 was:

To establish the operation of the statute upon interstate trade and commerce and, having done so, to ask whether such operation left the trade, etc, free. In other words was the impact of that operation on interstate trade compatible with the concept of freedom of the individual in a civilised and complex society? That there are restraints which may be imposed in such a society which do not deny the individual's freedom, must be conceded. The problem is to develop a criterion by which such acceptable restraints may be identified.\footnote{1181}

In Barwick's view, the High Court had decided the effect of section 92 correctly by acknowledging that the concept of freedom of interstate trade and commerce encompassed the freedom of the individual to engage in such interstate trade and commerce.\footnote{1182}

Barwick thought it advisable to provide the Privy Council with a general discussion of the meaning and operation of section 92, including the restraints or burdens that the section theoretically permitted beyond merely describing the distinction between 'prohibition' and 'regulation'.\footnote{1183}

Formulating a universally applicable criterion of freedom would be difficult, as it would depend on the facts and circumstances of each case. Therefore, the banks adopted a concept of 'regulation' without defining the permissible restraints upon freedom.\footnote{1184}

Barwick and Kitto were responsible for the preparation of the case book in relation to section 92 of the Constitution.\footnote{1185 It was later to be included with other summaries of argument in a case book to

\footnote{1180} Letter from Norman Cowper to G. S. Reichenbach, 3 January 1949 (Papers of Sir Garfield Barwick, London file no. 3 – personal correspondence [3.0cm], Series No: M3923 (M3923/1), Control Symbol: 9, National Archives of Australia, Sydney).

\footnote{1181} Barwick, A Radical Tory: Garfield Barwick's Reflections & Recollections, above n 1, p.72.

\footnote{1182} Ibid.

\footnote{1183} Ibid, pp.72-73.

\footnote{1184} Ibid, above n 1, p.73. Barwick contended that the legislature could regulate but not prohibit interstate trade and commerce. In response, Evatt mocked this submission by suggesting that 'if the impediment is a little one it is only a regulation, but if it is a bigger one then it is a burden'. See also Coper, Freedom of Interstate Trade under the Australian Constitution, above n 822, p.105; Coper, Encounters with the Australian Constitution, above n 781, p.277; Commonwealth v Bank of New South Wales (1949) 79 CLR 497 (26 October 1949) at 556 at 600.

\footnote{1185} The respondents' case book was divided into seven sections. The first section comprised the provisions of the Act and summarised the result from the High Court. The second section outlined the respondents' argument on section 74 of the Constitution. The third section was dedicated to a summary of the evidence. The fourth section addressed the issue of section 46 of the Banking Act 1947 being beyond power of the Commonwealth Parliament. The fifth section was dedicated to section 92 of the Constitution, including addressing the important cases involving this section as well as the opinions of the judges in the High Court in relation to the current actions. The sixth section addressed the inconsistency of section 46 with the constitutional integrity of the States and with s 105A of the Constitution. The last section contained the
be filed and exchanged with the other parties. According to Barwick, he provided the ideas for the case book and Kitto drafted it. Barwick recalled that their case book ‘was praised, the English bar said they had never seen as good a case book, and it was a good case book.’

Kitto and Barwick discussed the preparation of the case book on a daily basis and they had a clear understanding of the direction that the argument should take. In preparing the case book, Barwick spent some time considering the opponent’s case and the possible arguments that they may raise – an important aspect of preparation in appellate advocacy. Barwick stated that: ‘This made us very conscious of the risk that would arise if different Counsel expressed views on the s 92 question’. But I had no power to keep the argument in our own hands’.

Reflecting on Barwick’s approach, Mason stated:

Now in some cases, in those days you didn’t have written argument in the High Court, but in the Privy Council, you did have written case books. And he used to put a lot of effort into the written case book with a view to identifying the question at issue in a way that would result in a favourable outcome. He put a lot of effort into that. That indicates what his approach to oral presentation in an appeal was.

Former Chief Justice Gleeson agreed: ‘Barwick’s reputation was that he took enormous trouble about the preparation of those printed cases in the Privy Council. They were very highly polished pieces of work.’

Barwick reflected on the preparation for the Privy Council appeal:

\[\text{Conclusion. It is clear from the case book that it was the result of considerable time and effort. It was succinct yet comprehensive and formed the basis for the respondents’, including Barwick’s, oral submissions.}\]

1186 Barwick, A Radical Tory: Garfield Barwick’s Reflections & Recollections, above n 1, p.71. See also Kirby, ‘Kitto and the High Court of Australia’, above n 186, 135.

1187 National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 23.

1188 Letter from Norman Cowper to G. S. Reichenbach, 3 January 1949 (Papers of Sir Garfield Barwick, London file no. 3 – personal correspondence [3.0cm], Series No: M3923 [M3923/1], Control Symbol: 9, National Archives of Australia, Sydney). Barwick and Kitto were living in the same apartment since 16 November 1948 and constantly discussed the case with each other: see Travel Diary -1948 of Norma M. Barwick, ‘Sir Garfield Barwick’s diaries and other personal books, Series No: M3943/2, Control Symbol: 27, National Archives of Australia, Sydney. See also Kirby, ‘Kitto and the High Court of Australia’, above n 186, 135 and People In Government, ‘The Right Hon Sir Frank Kitto KBE’ (October, 1968), Management Newsletter 6. According to Kirby, Barwick and Kitto had a constructive working relationship. Barwick later paid tribute to Kitto’s contributions to the banks’ arguments. He stated that Kitto:

\[\text{showed outstanding skill in the choice of expressions. The need not to go against the interests of the supporting States had its influence both on the expression of the argument in the case-book and in due course in its presentation.}\]


1189 Barwick, A Radical Tory: Garfield Barwick’s Reflections & Recollections, above n 1, p.73.

1190 Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 February 2006).

1191 Interview with Murray Gleeson, Chief Justice of the High Court of Australia (Sydney, 14 August 2006).
I think that was a very difficult task to have to put together the necessary argument. I think that was more difficult in my case as I had never worked off a transcript of an argument, I had rarely put an argument down in writing and I very rarely had many notes. I might have a heading or two but not much else so I had to venture myself on a very long argument in a new atmosphere, a very new atmosphere, before people whom I didn’t know and who didn’t know me.  

Barwick thus had to adjust to a written argument as well as a new atmosphere. His reflection confirms that he generally relied heavily on his prodigious memory during his advocacy and rarely on notes.

The case book was considered by Diplock KC initially then submitted to the other counsel to review individually before discussing it together. The case book was an important part of Barwick’s preparation for the case before the Privy Council. His familiarity with its contents was evident from his observation: ‘We have been through the Case again and again. I think I can now recite it and I believe in its final form it is quite good.’

Following the case book’s preparation, several of the counsel, particularly some English counsel, requested a copy of the submission that Barwick was to advance before the Privy Council. Barwick indicated that he never operated from written submissions and that he only had few, if any, notes. According to Barwick, this caused some anxiety amongst the counsel and, in response, Barwick offered to gather all of them together one evening to outline the argument he intended to advance to the Privy Council. This approach was consistent with Barwick’s conversational style of advocacy – that is, not reading from any notes but instead, engaging in a constant dialogue with the bench, watching the judges intently, answering their questions and maintaining eye contact. It also typified his confidence and his exceptional memory.

Although Barwick was an experienced advocate, he could still see the benefits in effectively having a ‘practice run’ of his argument in front of the other counsel. This is consistent with the elements and ideals of appellate advocacy. The opportunity to verbalise his thoughts in front of such eminent advocates would have allowed him effectively to practice his submissions, deal with any comments or thoughts and also allay any concerns of the other counsel. Rehearsal is an important technique in terms of preparation. However, it appears that the ‘practice run’ in this instance was a response to

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1192 Molomby & Donohoe, above n 19, 17.
1193 Letter from Norman Cowper to G. S. Reichenbach, 3 January 1949 (Papers of Sir Garfield Barwick, London file no. 3 – personal correspondence [3.0cm], Series No: M3923 (M3923/1), Control Symbol: 9, National Archives of Australia, Sydney).
1194 Letter from Sir Garfield Barwick to G. S. Reichenbach (n.d.) (Papers of Sir Garfield Barwick, London file no. 3 – personal correspondence [3.0cm], Series No: M3923 (M3923/1), Control Symbol: 9, National Archives of Australia, Sydney).
1195 Barwick, A Radical Tory: Garfield Barwick’s Reflections & Recollections, above n 1, p.74.
1196 Ibid.
the other counsel who sought to understand Barwick’s proposed submissions, rather than any desire by Barwick to ‘practice’ his submissions. 1197

Douglas Menzies, on behalf of Victoria, expressed concern that he could not support Barwick’s argument as it would destroy the ‘Transport Cases’ and ‘Marketing Cases’. Despite this, Barwick had a strategy which allowed him to argue the case successfully without attacking these cases. He proposed that if Menzies, Fyfe, and Hannan would agree to adopt Barwick’s argument that the Act contained an absolute prohibition, then he would undertake not to attack the ‘Transport Cases’ and ‘Marketing Cases’, unless necessary – something which Barwick recalled he did not foresee as likely. 1198 This strategy would allow the States’ position to be protected and the ‘Transport Cases’ and ‘Marketing Cases’ treated as no more than ‘permissibly regulatory’. 1199 That is, the relevant State legislation that was the subject of both the ‘Transport Cases’ and ‘Marketing Cases’ would be protected under section 92 of the Constitution.

According to Barwick, both Menzies and Hannan agreed to this proposal. He was able to secure the support of the two States while ensuring that there would be no separate submissions on section 92 presented on their behalf. Barwick realised that the strategy imposed upon him a restraint but he recalled that he was confident that he could effectively advance the banks’ case without the Privy Council focusing on the relationship between his argument and the ‘Transport Cases’ and ‘Marketing Cases’. In any event, the deal struck between him and the respective counsel for the States demonstrated his strategic thinking, tactical nous and negotiating skills during the preparation of this case.

Whilst Barwick was unable to prevent the English counsel from presenting their own submissions on section 92, 1200 he reported that Monckton commented to him that his presentation of the case so far had been a ‘tour de force’ and that he would not be making any submissions of his own and nor would any other English counsel. 1201 This was confirmed by Hughes:

The late Sir Walter Monckton, who appeared for the English Banks alongside him in the Privy Council in the Bank Case, said that he had never heard anything to equal Barwick’s 6 day address on behalf of the Australian Banks. 1202

Consequently, Barwick presented the only section 92 argument 1203 and both Fyfe and Hannan adopted his argument that the Act imposed an absolute prohibition. 1204

1197 Ibid.
1198 Ibid, pp.74-75.
1199 Ibid.
1200 Ibid, p.75.
1201 Ibid.
1202 Hughes, ‘The Rt Hon Sir Garfield Barwick AK GCMG’, above n 651.
8.4 Presentation and Personation in the Bank Nationalisation Case in the Privy Council

The case commenced on 14 March 1949 before Lords Porter, Simonds, Du Parcq, Normand, Morton of Henryton, Uthwatt and MacDermott. The Board adjourned over Easter and during this time, Lords Du Parcq and Uthwatt unexpectedly died. Following the recess, the case continued before the remaining five Law Lords. According to several commentators, Lords Du Parcq and Uthwatt were the two Lords most likely to support Evatt’s position. This illustrates that, on occasions, events outside an advocate’s control can affect the likelihood of the advocate’s success.

Evatt appeared on behalf of the Commonwealth and addressed the Board initially for 14 days and then in his reply for 8 days. It has been suggested by Galligan that Evatt’s political judgment in insisting on the appeal was deficient. That is, he failed to appreciate that the composition and traditions of the Judicial Committee of the Privy Council meant that it was likely that the constitutional validity of the Act would be decided in a technical and legalistic manner.

Evatt commenced by making submissions concerning the Privy Council’s jurisdiction; it is said by Tennant (Evatt’s biographer) that when he began, his ‘voice was so quiet and flat that it could hardly be heard in the far part of the room’. On the 14th day of Evatt’s submissions ‘he was still

1205 Barwick was pleased with this situation and stated whilst he would: ‘... own up to great pleasure on receiving such a compliment, particularly from one who was himself a great advocate, [he] was better pleased to know that there was no risk of a discordant voice in connection with s 92’ (Barwick, A Radical Tory: Garfield Barwick’s Reflections & Recollections, above n 1, p.75).
1206 Ibid.
1208 Evatt conducted this appeal at the same time as he was President of the United Nations General Assembly (see Guy, above n 146, 90). See Transcript of Proceedings, the Commonwealth of Australia and Others v Bank of New South Wales and Others (Privy Council, Lord Porter, Lord Simonds, Lord Uthwatt, Lord Du Parcq, Lord Normand, Lord Morton of Henryton and Lord MacDermott, 26 April 1949), pp.3-4 and Transcript of Proceedings, the Commonwealth of Australia and Others v Bank of New South Wales and Others (Privy Council, Lord Porter, Lord Simonds, Lord Uthwatt, Lord Du Parcq, Lord Normand, Lord Morton of Henryton and Lord MacDermott, Thursday 28 April 1949), p.1. A full list of Counsel who appeared can be found in Appendix C.
1209 Galligan, above n 781, pp.177-178; see also Tennant, Evatt: Politics and Justice, above n 1207, p.243.
1210 Tennant, Famous Australians – Evatt: Politics and Justice, above n 786, p.242. See also Barwick, A Radical Tory: Garfield Barwick’s Reflections & Recollections, above n 1, p.69; May, above n 778, pp.90-91.
outwardly fresh, but the law lords were noticeably wilting'. \(1211^{1}\) He spoke for 22 days in total. Barwick commenced the following week in early April 1949 and addressed the Privy Council for 9 days. \(1212^{1}\) The hearing concluded on Tuesday 10 May 1949 after 28 sitting days.

It is suggested by Tennant that Evatt 'resolved to have read into the transcript every possible precedent, because some day this appeal might form the basis for a different judgment'. \(1213^{1}\) During Evatt's submissions, he read to the Board the dissenting judgments of Dixon J in the 'Transport Cases' and 'Marketing Cases'. \(1214^{1}\) Barwick stated that he formed the opinion at the time that Evatt had:

- destroyed Dixon as a reliable authority. Indeed, I thought him so successful in this respect that I resolved not to rely during my own argument on anything Dixon had written; and as well as I recall, I did not do so. \(1215^{1}\)

Barwick's observation smacks of sarcasm and suggests that Evatt, through his poor advocacy, damaged the prospect of Dixon being used as a credible authority.

In Evatt's submission, whether section 46 violated section 92 of the Constitution was not a question of limits \textit{inter se} such that a section 74 certificate was required and the test that should be applied in relation to section 92 was Lord Wright's 'freedom as at the frontier' test as outlined in \textit{James v Commonwealth} (1936). \(1216^{1}\) In any event, Barwick submitted that the business of banking was not a thing which in itself moves so as to attract the application of section 92. \(1217^{1}\)

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\(1212^{1}\) Crisp, Ben Chifley: \textit{A Political Biography}, above n 783, p.337; Marr, above n 8, p.71; Priest and Williams, above n 77, p.53; Fricke, above n 801, pp.105-106.

\(1213^{1}\) Tennant, \textit{Famous Australians – Evatt: Politics and Justice}, above n 786, p.242. Referring to Evatt, Chester Porter QC stated:

> I mean when he argued the famous Bank case, the High Court and the Privy Council had no trouble listening to him [Barwick] but when it came to Doc Evatt he just droned on reading case after case to the Privy Councillors. ... I haven't heard Doc Evatt in court, as an advocate, but I have heard him address the United Nations Association one time and he had the misfortune to have a terribly dull and unpleasant voice. He droned on and on. The Privy Council earned their money when they listened to him for over a fortnight in the Bank case. \(1218^{1}\)

Interview with Chester Porter QC (Sydney, 2 April 2006).


\(1215^{1}\) Barwick, \textit{A Radical Tory: Garfield Barwick's Reflections & Recollections}, above n 1, p.76. Barwick repeated this in correspondence where he stated that 'one clever thing which Evatt did do was to destroy Dixon to a large extent, and I really think Dixon suffered a little in loss of standing in several connections': Letter from Sir Garfield Barwick to Richard Ashburner, n.d. (Papers of Sir Garfield Barwick, London file no. 3 – personal correspondence [3.0cm], Series No: M3923 (M3923/1), Control Symbol: 9, National Archives of Australia, Sydney).

\(1216^{1}\) \textit{55 CLR} 1.

\(1217^{1}\) The key aspects of Evatt's submissions were as follows:

1) a section 74 certificate was not required as the substance of the matter made it plain that the appeal is not from any decision of the High Court upon an \textit{inter se} question;
After Evatt's argument had concluded, Barwick recalled that he considered the relative strengths of both the Commonwealth's case and the banks' case. According to him, the Commonwealth had a distinct advantage in that they were arguing before English lawyers who had become accustomed to the power of a Westminster Parliament and were naturally disinclined to support restraints upon its legislative powers, particularly a restraint as wide-ranging as the Banks were claiming s 92 to be. However, in Barwick's view, the banks had the advantage of being able to rely on the High Court's judgments.

Shortly after Evatt's submissions, Pritt KC addressed the Board on behalf of the Commonwealth until Tuesday 5 April 1949. At this point, Radcliffe opened the case on behalf of the Respondents and commenced on the issue of section 74. Radcliffe dealt with issues in relation to power, compensation and jurisdiction, and based his argument on section 74 of the Constitution. Barwick later stated that 'I thought it better that Radcliffe should deal with Section 74, and he did it very well'. He added that 'I am quite unconvinced of it myself and I do not think that it will really run'. This demonstrated Barwick's scepticism about the prospects of the section 74 argument succeeding, and may also suggest that Barwick preferred to argue causes in which he believed, allowing him to channel his emotion and passion into his submissions.

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2) the only question that the appellants seek to raise is whether s 46 of the Banking Act 1947 offends section 92 of the Constitution and that is not a question of limits inter se;
3) James v Commonwealth (1936) 55 CLR 1 answers every question of principle that arises in the present case and that the true test is the 'freedom as at the frontier' as per Lord Wright;
4) section 92 does not have the wide ambit which was sought to be given to it in McArthur's case and which Starke and Dixon JJ sought to give it in the 'Transport Cases'. It has a narrower ambit – the ambit is fixed at the border. It is not as wide as the field of inter-State commerce and it is a much narrower area; when you come to ask what restrictions are forbidden and what prohibitions are denied to the legislature, they must be prohibitions and restrictions as the frontier or in respect of goods passing into or out of the State;
5) section 92 is concerned with the flow of trade and banking as well as the business of banking is not a thing which in itself moves – it provides facilities, and the course of a banking business moneys are remitted, but the essence of banking is the relationship which is brought into existence at the time of the deposit;
6) section 46 of the Banking Act 1947 can operate independently of any of the other provisions which have been held invalid.

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1218 Barwick, A Radical Tory: Garfield Barwick's Reflections & Recollections, above n 1, p.76.
1219 Ibid.
1220 Denis Nowell Pritt (usually known as D.N. Pritt) was a British barrister and Labour Party politician.
1222 Ibid.
1223 Letter from Sir Garfield Barwick to Crowther, 12 May 1949 (Papers of Sir Garfield Barwick, London file no. 3 – personal correspondence [3.0cm], Series No: M3923 (M3923/1), Control Symbol: 9, National Archives of Australia, Sydney).
1224 Ibid.
Towards the end of day 16, Radcliffe handed over to Barwick to continue the Respondents' submissions on section 92. Radcliffe would later address the Court on section 51.

**Barwick’s Opening**

In his characteristic manner, Barwick used the opening to outline the structure of his submissions, to give the Board clear guidance from the outset:

The course I propose to take with your lordships' permission is this. I propose to say what, as I see it, is the problem in this particular case, to set out what, as I see it, is a proposition of the appellant, to say with as much certainty as possible our submission and what we deny and what we concede before I develop our argument in support of those propositions. I thought I should do that in this case particularly for this reason. The appellant has very largely addressed itself to a proposition which the respondent has never put, very largely indeed. The appellant has suggested that a number of results follow from the judgments of the majority of the court which in our submission do not follow.

Barwick then neatly conceptualised the fundamental difference between the two parties on section 92, as 'the meaning to attribute to the expression “directed at” as it occurs in James and Cowan and as used by Lord Atkin and whether “James and The Commonwealth resolve[d] the suggested contradiction between Section 51(1) and Section 92, that being the proposal in McArthur’s Case'.

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1225 During the hearing before the Privy Council, the Appellants' prepared detailed documents summarising Barwick’s submissions on section 92 and Radcliffe's arguments on section 74, as well as their proposed response to these submissions. These documents summarised the main arguments and provided proposed answers on behalf of the Appellants. Various members of the Appellants' team commented on Barwick's argument on section 92 in separate notes although unfortunately, for the purposes of this thesis, the notes concerned the substance of Barwick's arguments rather than making any comments or observations in relation to his advocacy [see Banking Case – comments [Section 92 – pre-Easter – [Banking Act 1947 – Bank of New South Wales and others v Commonwealth of Australia and others - on appeal to the Privy Council – Barwick’s arguments on Section 92], Series No: M1506, Control Symbol: 5/13, National Archives of Australia, Canberra; Banking Case – daily summaries [Section 92] – Pre-Easter [Banking Act 1947 – Bank of New South Wales and others v Commonwealth of Australia and other – on appeal to the Privy Council – Barwick’s argument on Section 92 – Radcliffe’s argument on Section 74], Series No: M1506, Control Symbol: 5/18, National Archives of Australia, Canberra; Banking Case – Barwick’s argument – [Banking Act 1947 – Bank of New South Wales and others v Commonwealth of Australia and others – on appeal to the Privy Council – alphabetical guide to argument put to Privy Council by Barwick KC], Series No: M1506, Control Symbol: 5/23, National Archives of Australia, Canberra; Banking Case – [Section] 92 – comments, conclusions – [Banking Act 1947 –Bank of New South Wales and others v Commonwealth of Australia and others – on appeal to the Privy Council – comments on Barwick's arguments], Series No: M1506, Control Symbol: 5/24, National Archives of Australia, Canberra].

1226 Transcript of Proceedings, the Commonwealth of Australia and Others v Bank of New South Wales and Others (Privy Council, Tuesday 5 April 1949), above n 1221, p.54.

1227 Ibid, pp.54-55.

1228 Ibid, p.56.

1229 Ibid.
Barwick established his argument based primarily on the decisions of the Privy Council, with particular reference to *James v Cowan* (1932). He maintained that 'in operating their banking business the Banks were engaged in interstate trade and commerce', he then outlined the submission as per the case book, and suggested that it was the:

operation of the statute rather than its subject-matter, its purpose, or motivation [which] was the critical fact. What did it do to the individual's capacity to engage in interstate trade etc? Having answered that question, was the trade etc and the individual's capacity to engage in it absolutely free? The absolute prohibition of private banking clearly provided a negative answer.

Barwick submitted that the 'directed against' test from *James v Cowan* (1932) had crept into use following *McArthur's Case* as a result of the subject-matter approach required by that case. However, he suggested that *James v Commonwealth* (1936) had rejected the subject-matter approach and the 'directed against' test was now understood to require some criterion of purpose. Ultimately, the Privy Council accepted Barwick's submission that 'directed against' could only mean 'operates upon to prevent' and therefore, the earlier cases on section 92 which required a legislative purpose were thrown into question.

Barwick then proceeded to address aspects of section 46 in detail. At this point, he identified the problem with the operation of the section: 'the problem here is one of straight out, direct and absolute prohibition'. He then suggested that the problem could be presented in 3 parts:

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1230 47 CLR 386.
1231 Barwick, *A Radical Tory: Garfield Barwick's Reflections & Recollections*, above n 1, p.76.
1232 Ibid, pp.76-77.
1233 47 CLR 386.
1234 *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497 (26 October 1949) at 556. See also Coper, *Freedom of Interstate Trade under the Australian Constitution*, above n 822, p.99.
1235 55 CLR 1.
1236 *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497 (26 October 1949) at 558. See also Coper, *Freedom of Interstate Trade under the Australian Constitution*, above n 822, p.100.
1238 Transcript of Proceedings, the *Commonwealth of Australia and Others v Bank of New South Wales and Others* (Privy Council, Tuesday 5 April 1949), above n 1221, pp.57-58.
1239 Ibid, p.60. The following day, Barwick continued:

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One thing that *James v The Commonwealth* most certainly said was that Section 92 did not mean that the individual could disregard all the regulatory laws, Commonwealth or State, and the Respondents have never said that at any stage in this litigation. What the Respondents have said is this, that the exclusion of persons from participation in trade infringes Section 92 unless in exceptional cases their exclusion, the exclusion of an individual or individuals, proves to be no more than a regulation of the activity, that word "regulation" being used in the sense in which I used it a moment or so ago.

1. is the exclusion of all individuals from an activity of interstate trade, commerce and intercourse compatible with the absolute freedom of interstate trade, commerce and intercourse?

2. is the exclusion of an individual carrying on an interstate activity of trade, commerce or intercourse for no reason touching himself or the manner of his carrying on that activity compatible with that freedom?

3. is the subjection of a step which is essential to the sale of goods interstate to the arbitrary control of the Executive Government compatible with that freedom?

Before the Privy Council, Barwick had to adapt his advocacy since he was often in the position where his submissions went uninterrupted, or largely uninterrupted, for significant periods of time in contrast to his experience in the Bank Nationalisation Case in the High Court, and the judicial dialogue to which he had become accustomed.

When questions did arise, Barwick demonstrated his ability both to watch the bench and employ a flexible approach to his submissions. In the following exchange, he also employed a useful analogy:

Lord Porter: What is troubling me is this. Supposing it had been said, and said honestly and with some ground, that the only way to prevent reasonable activities within the Commonwealth of Australia is to prevent persons crossing the border, and supposing that were a reasonable consideration to have. Would you say that was bad?

Barwick: I would answer that in this way. It would be very like an illustration my Lord Normand gave to the Appellant of some disease in an animal which there was only one way to handle, and that was to keep the animal out. If that is the true view in fact, not in the opinion of the legislator merely, I would concede that the law would be good.

Lord Porter: I want to carry that one step further. Suppose that was a reasonable anticipation in the minds of all men, if you like, that is to say, abstractly a reasonable anticipation, but suppose that in practice it proved to be wrong. What then?

Barwick: I would say, first of all, that if the only method you had of telling whether it was likely to happen or not was to take the view of all men, my answer would be the same as in the first case. All men can be wrong, and that is just the infirmity of the decision of the matter; one cannot have perfect material. But I want to guard against any concession that it rests with any Parliament to say: “In our opinion this is likely”. There is a big difference. I will deal with it in a little more detail later.

Lord Porter: It is the answer which you gave to me before: the Court must decide.

Barwick: Yes, and I want to say something as to why that is in a moment.\textsuperscript{1241}

Barwick's practice was to respond to questions immediately. This conveyed to the court a sense of confidence and also demonstrated a detailed preparation. He later recollected, in reference to an early question from Lord Morton, that: 'I managed to answer the question straight away and felt that I had gone at least some distance in satisfying His Lordship's concern.'\textsuperscript{1242} According to Barwick, the 'feature that distinguished the Australian advocates from both the English and the Canadians was our ability and willingness to respond forthwith to questioning.'\textsuperscript{1243}

\textit{Barwick's Submissions on the James' Cases – Part 1}

Barwick's submissions on the various James' cases provided a succinct encapsulation of the relevance of the cases to the banks' arguments.\textsuperscript{1244} This was also an example of citing authority with care by grouping together the relevant principles from each case and conveying them in a simple and easily digestible manner. A useful illustration was provided to emphasise his submission:

Barwick: ... I think [it] does come from \textit{James and Cowan}, that an acquisition, a taking, maybe colourless. May I give an illustration. Assume a man has a garage right at the border and he is engaged in interstate transport. In that garage he garages his vehicles. Let me suppose it is the only suitable land in the district, but the State Government want the land for a Courthouse. They come along and take the land for a Courthouse. It is true that the effect will be that this man who is in interstate trade will lose his garage and he may have to go out of business. That, my Lords, in the Respondents' submission, is an illustration of the consequence of the law. That is not part of the law's operation. Now let me suppose the same illustration and the State Government want to take the garage to put their own vehicles in it to run in competition with this man. Now their taking has got another colour, because it is inevitable that they are taking it from him not to use it themselves merely but to prevent him using it. They are using their power of acquisition as a means of affecting — — and if it affects it to the necessary extent it may be bad — — the interstate trade ...\textsuperscript{1245}

\textsuperscript{1241} Ibid, pp.15-16.
\textsuperscript{1242} Barwick, \textit{A Radical Tory: Garfield Barwick's Reflections & Recollections}, above n 1, p.77.
\textsuperscript{1243} Ibid.
\textsuperscript{1244} See Transcript of Proceedings, the \textit{Commonwealth of Australia and Others v Bank of New South Wales and Others} (Privy Council, Wednesday 6 April 1949), above n 1239, pp.18-19.
\textsuperscript{1245} Ibid, pp.24-26.
At around this time in the proceedings, as Marr reports, a telegram was sent from Britain to Sydney stating as follows: 'Barwick has been doing splendidly, and clear propositions and precise answers to questions have been appreciated by [the] Board which has given his argument keenly attentive hearing.'

Soon after, Barwick discussed the background of section 92, including the influence of the American model and made reference to a number of American decisions. His submissions in this regard were largely uninterrupted and Barwick adapted his usual style of conveying his submissions in a conversational style to doing so in an uninterrupted narrative.

Barwick addressed the Board at some length on *James v South Australia* (1927) and *James v Cowan* (1932), in support of his submission that this latter case 'decided that the section does protect individuals, that there is no need for discrimination and the motive or purpose or policy of the law cannot be called in aid to validate it'.

Shortly after, the following exchange occurred; Barwick demonstrated his courage and his preparedness to disagree for the purposes of maintaining key aspects of his arguments:

Lord Du Parcq: I am not saying it is this case, but you may have a case where something like a monopoly is established in banking by a series of amalgamations, and you might have a condition of affairs in which it was said, I am not saying it is this case: The public are not being fairly treated, trade is being affected, now the Government is going to step in and take it over.

Barwick: I think the answer to it would not be along those lines. In some sense it is so much a matter of method. The legislature I would concede can say this to the bankers: Now look, you are not to amalgamate without public consent, because that is only a regulation of your particular trade in the colony. If we find you grouping together to the detriment of all, well, it is part of the conception of a community that we can protect ourselves, not by cutting our heads off, that is when the remedy has gone too far, but what you can say is: You stop it, you stop it.

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1246 Britain to Head Office, 6 April 1949 referred to in Marr, above n 8, p.71.
1247 Transcript of Proceedings, the *Commonwealth of Australia and Others v Bank of New South Wales and Others* (Privy Council, Wednesday 6 April 1949), above n 1239, pp.30-41.
1248 40 CLR 1.
1249 47 CLR 386.
Barwick summarised the decision in *James v Cowan* (1932)\(^{1252}\) in clear and succinct terms:

The effect of this decision is that simply to tell a man -- -- I put aside all the qualifications which come in there from *James v. The Commonwealth* with the idea of regulating, co-ordinating and that sort of thing -- -- as part of a marketing scheme where he is to sell his goods, is to infringe the freedom guaranteed. Lord Atkin is emphatic about that; he says to do anything else is to tear the charter up.\(^{1253}\)

He also employed powerful language to describe Lord Atkin’s approach and to add to the persuasive effect of his submissions:

The actual decision of this Board in *James v. Cowan* ... says unmistakeably, I submit, my Lords, that a law which empowers the determination of where and in what quantities an individual may sell his goods, where there is an inter-State market, is bad.\(^{1254}\)

He then referred to the dissenting judgment of Justice Isaacs in *James v Cowan* (1930)\(^{1255}\) and the fact that the outcome of the case was reversed on appeal in *James v Cowan* (1932)\(^{1256}\) with Lord Atkin delivering the unanimous decision, and the Privy Council appearing to prefer Justice Isaac’s dissent. Barwick stated, referring to Justice Isaacs’ judgment, that he had read various extracts:

> to show the very great emphasis on the individual which is present in every line of it. This Judgment, of course, is the one which your Lordships’ Board found to be convincing, and it would be an extraordinary result that your Lordships’ decision should mean that by adopting a convincing Judgment in these terms you were overturning its basic idea and saying: there is no protection of the individual. That would be an extraordinary result to obtain.\(^{1257}\)

He thus appealed to the Board’s notion of consistency and fairness, using the word ‘extraordinary’ on a number of occasions. He also referred to the fact that *James v Cowan* (1932)\(^{1258}\) was followed and applied by the High Court (with Justice Evatt dissenting) in *Peanut Board v Rockhampton Harbour*

\(^{1251}\) Ibid, pp.19-20.

\(^{1252}\) 47 CLR 386.

\(^{1253}\) Transcript of Proceedings, the Commonwealth of Australia and Others v Bank of New South Wales and Others (Privy Council, Thursday 7 April 1949), above n 1250, p.33.

\(^{1254}\) Ibid, p.34.

\(^{1255}\) 43 CLR 386.

\(^{1256}\) 47 CLR 386.

\(^{1257}\) Transcript of Proceedings, the Commonwealth of Australia and Others v Bank of New South Wales and Others (Privy Council, Thursday 7 April 1949), above n 1250, p.40.

\(^{1258}\) 47 CLR 386.
Board (1933). In reference to the principles laid down by the Board in *James v Cowan* (1932), he asked:

What were those principles? The principles were that a law which told a man that he could not market the commodity at all except in a way in which somebody else told him, was in breach in Section 92, and that is precisely what the Peanut legislation did. The argument in the dissenting judgment was that it was doing it from some beneficent motive, was not carrying out a policy or system of restricting hindering or obstructing the marketing of peanuts among other States of the Commonwealth. That is what this argument of the Appellant there really has been all the time. He is trying to suggest that there has to be some overriding harmful intention, policy or motive against inter-State trade.

In this manner, Barwick attempted to build a compelling case as to why *James v Cowan* (1932) should be applied by the Privy Council. Ultimately, in its decision, the Privy Council relied heavily on *James v Cowan* (1932) and *James v The Commonwealth* (1936), suggesting that Barwick’s submissions were persuasive.

The Easter adjournment followed day 18 and on their return, Barwick sought to remind the Board of his submissions. He reminded the Board that section 92 had its origin in the American doctrine which depended upon judicial exposition that there was freedom of interstate commerce, freedom from state invasion, and an individual right of access to every part of the federation. At this point, he indicated that, following general considerations, he would then address the case of *James v South Australia* (1927) as part of the argument to answer the Appellants’ assertion that section 92 does not protect individuals.

Barwick was allowed to make uninterrupted submissions and took the court to a series of relevant section 92 cases, identifying key extracts from the judgments and, where necessary, providing the Privy Council with some context by outlining the facts of the case.

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1259 48 CLR 266.
1260 47 CLR 386.
1261 Transcript of Proceedings, the *Commonwealth of Australia and Others v Bank of New South Wales and Others* (Privy Council, Thursday 7 April 1949), above n 1250, p.52.
1262 47 CLR 386.
1263 47 CLR 386.
1264 55 CLR 1.
1266 40 CLR 1.
1267 See Transcript of Proceedings, the *Commonwealth of Australia and Others v Bank of New South Wales and Others* (Privy Council, Tuesday 26 April 1949), above n 1265, pp.10-11.
Barwick demonstrated honesty and candour, as illustrated by the next exchange in relation to the *James v Cowan* (1932)\textsuperscript{1270} case:

Lord Simonds: What is rather puzzling me is what exactly was the doctrine which was repudiated by Counsel for the State to which reference is made in the middle of page 558.

Barwick: I have not looked at the full argument, but I do not find it in the note.

Lord Simonds: Lord Atkin is saying quite clearly the full doctrine in James and the Commonwealth cannot be accepted. The doctrine that the Crown becomes the owner and do what it pleases with its own and dispose of it inter-State is repudiated. Where the line is drawn one would very much like to know.

Barwick: From my point of view it does not matter in this case.

Lord Simonds: I agree it does not really matter.\textsuperscript{1271}

Barwick also demonstrated courage and tact in disagreeing with a comment from Lord Porter:

Lord Porter: I should have thought what he was saying was this: "You may not prevent or indeed interfere with inter-State trade but you may canalise it". You may canalise it by putting it into a Board or by putting it (as in the present case) into a national bank. That is what he is saying; whether it is right or not is another matter.

Barwick: Even in this case the Chief Justice does not say this, with respect. When I come to his Judgment in this case, if he had found that the banker was a trader he would have been bound on his own decisions and his own expressions in this case [Milk Board (NSW) v Metropolitan Cream Pty Ltd (1939) 62 CLR 116] to say: "This law is bad. You cannot canalise it in that sense at all".\textsuperscript{1272}

Towards the end of day 20, Barwick recapped for the benefit of the Privy Council the status of his arguments.\textsuperscript{1273} He then outlined the manner in which he would proceed for the remainder of the case.\textsuperscript{1274}

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\textsuperscript{1270} 47 CLR 386.

\textsuperscript{1271} Transcript of Proceedings, the Commonwealth of Australia and Others v Bank of New South Wales and Others (Privy Council, Tuesday 26 April 1949), above n 1265, p.26.


\textsuperscript{1273} Ibid, pp.41-42.

\textsuperscript{1274} Barwick stated:

What I propose to do at this point is this. I propose to complete the answer to the appellant on the point of choosing actors, that is to say I want to deal with Huddart Parker's case and deal shortly with Vizzard's case. Then I want to deal with the argument about the passage of goods and the question as to whether a banker is in trade. Although when I do that I would really have answered the whole of what is suggested against the
Barwick needed to exercise considerable caution when advancing his submissions so as not to attack the 'Transport Cases' and 'Marketing Cases' although out of necessity they were referred to in the course of his argument.\textsuperscript{1275} For example, Barwick referred to Willard v Rawson\textsuperscript{1276} then Vizzard's case.\textsuperscript{1277} He then stated that:

The use that was sought to be made of the transport cases I have indicated. It was sought to be said: from them you can extract the principle that the Commonwealth can arbitrarily select the actors in trade. I've endeavoured to show that that cannot be got out of the Judgments, nor out of anything that Lord Wright said about the Judgments in James -v- The Commonwealth.\textsuperscript{1278}

In attempting to illustrate the concept of 'free' in terms of 'freedom of trade', Barwick used both an Australian and an English example to add to the persuasive effect of his submissions and, it would appear, to make it easier for the members of the Privy Council to relate to the proposition. This is an example of knowing the court and tailoring submissions accordingly:

I can illustrate the idea and perhaps in a more dramatic way by looking at two States. Let me suppose that the State of New South Wales decided that there should be a State monopoly in the buying of potatoes, and that only the Government Board in New South Wales could buy potatoes. Then the State of Victoria decided that it would have a Board for the selling of potatoes so that you had one Board in one State and one Board in the other. Would the right conclusion be that the trade interstate in potatoes was free? You could say it was carried on. You could say that neither of the laws were directed to stopping trading in potatoes, but, in my submission, what an abuse of language it would be to say trading in potatoes between the two States was free. I select that as an illustration to show that section 92 is not saying it shall be carried on; it says it shall be free.

Suppose the law was that traffic in Whitehall should be free. Would you say a law which said that only the King's horses could go down to Whitehall left traffic free provided he had enough to fill the street? It is the same sort of illustration. It is not a question of whether it continues, it is not a

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\textsuperscript{1275} Barwick, A Radical Tory: Garfield Barwick's Reflections & Recollections, above n 1, p.77.

\textsuperscript{1276} Transcript of Proceedings, the Commonwealth of Australia and Others v Bank of New South Wales and Others (Privy Council, Thursday 28 April 1949), above n 1205, p.8.

\textsuperscript{1277} Ibid, p.21.

\textsuperscript{1278} Ibid, p.23.
question of its quality or quantity, but is it free? That can only mean, in my submission, are the people free to engage in it? 1279

Barwick’s Submissions on ‘Banking’ and ‘Trade and Commerce’

Barwick then proceeded to address the issue of whether banking was ‘trade, commerce and intercourse’ for the purposes of section 92. He outlined how, if his submission on this issue was correct, the Respondents must succeed:

If this step is correctly taken, the actual resolution of this case can be direct and simple, because if Section 92 does protect individuals and if this is a law which merely excludes the banker from participation in his banking facilities, and if one has not got to find some malevolent motive in the legislature and a banker is in trade, then the case for the respondents is complete in a very short and direct way. It is the Air Lines case again in a simpler form. 1280

Barwick then referred to the Commonwealth’s argument that whilst a banker is engaged in trade it is not engaged in interstate trade. He suggested this was ‘puzzling’ and employed an example to demonstrate this:

The other aspect of it is that when a banker has an inter-State banking transaction nothing moves and because you have no movement you have not got anything inter-State. [This] from a practical point of view is very puzzling. If I take £100 down to a banker and say: “I do not want to carry this in my hip pocket but I’m going to Paris and I would like to have that £100 in Paris”, it is a very odd conception that nothing gets over there when I manage to get the £100 or the equivalent in Paris; it is an odd conception that nothing moves. 1281

Barwick then directly referred to what he considered the policy implications associated with accepting the Appellant’s argument:

I submit, my Lords, it would be impossible and incorrect to say that these words reduced trade, commerce and intercourse in Section 92 to those things which could be carried because one would get to precisely the same absurdity in relation to both intercourse and trade as I have mentioned you would get to in connection with communication, a moment or two ago, namely, that a man could not be prevented from carrying his cow or his stock across the border but you could stop him walking across because the limitation is to those things in trade which can be carried. Such absurdities, my Lords, quickly dispose of the suggestion, I submit. 1282

1280 Ibid, pp.41-42.
1281 Ibid, p.42.
1282 Ibid, p.45.
He submitted that 'trade, commerce and intercourse' means the same thing in section 51(i) and in section 92, and further, that the fact that there was a specific provision in section 51(xiii) of the Constitution with respect to banking did not exclude banking from 'trade, commerce and intercourse'.

Barwick then referred to numerous cases in support of his proposition in largely an uninterrupted submission. Rather than belabour the point in relation to the issue that banking is 'trade, commerce and intercourse', he referred members of the Privy Council to his case book and summarised his argument:

I would submit our contentions without actually reading them, as they are set out in the case book. The case book is full on the point, and I am content to leave it to represent the conclusions which I suggest should be drawn, namely, a banker is in trade; in any case, his transactions are interstate intercourse and it is that which is forbidden.

**Barwick’s Submissions on the James’ Cases – Part 2**

Barwick conceptualised what he regarded as the essential test, which he believed was consistent with *James v Commonwealth* (1936):

It is a question of law in this sense, that you construe the statute, you apply it to the facts and then draw a conclusion which is essentially one of law, but it is in a sense a question of degree and you cannot determine it beforehand by any single test, you will have to look at all the circumstances at the time, and then answer the question: Is this law in its operation a regulation, or is it something which no matter what the object or reason for its passage, be it war or be it health or be it something else, no matter what that background is, does it burden the freedom of the person to go?

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1283 Barwick submitted that:

The evident purpose of putting a special head in for banking was to enable the Commonwealth to have power over the whole of banking whether intra-State or inter-State, whereas its power over trade and commerce was limited to a power over inter-State trade and commerce. That indeed has been pointed out in Australia in *Huddart Parker v The Commonwealth* ... It was pointed out that the presence of section 51(xiii) and like provisions did not cut down the content of section 51(i).

Transcript of Proceedings, the *Commonwealth of Australia and Others v Bank of New South Wales and Others* (Privy Council, Thursday 28 April 1949), above n 1205, p.46.

1284 Ibid, pp.50-53.

1285 Ibid, p.53.

1286 55 CLR 1.

Barwick then referred to *James v The Commonwealth* (1936) and Lord Wright's judgment at considerable length. At times, Barwick read numerous long extracts from previous cases adding to the time taken to present his submissions. This suggests that the citation of authority may not have been as discerning as it otherwise could have been. However, Barwick was primarily concerned to ensure that he adequately acquainted the Board with the section 92 case law and knew that to do so he would need to recite long passages from earlier decisions. He did not enjoy this. He stated that: 'I do not know how I will stand up to educating the boys, particularly if it involves reading long slabs out of the reports, an occupation which I loathe'.

Barwick referred to Justice Dixon's view of *James v The Commonwealth* (1936) as expressed in the High Court's judgment in the Bank Nationalisation Case. This contradicted his earlier suggestion that he would not refer to Justice Dixon's judgments since, in his view, Evatt had destroyed Justice Dixon's credibility. Otherwise, Barwick referred to Justice Dixon rarely throughout his submissions. The strong reliance by the Privy Council in its decision on Justice Dixon's judgment in the High Court suggests that such a Barwick's strategy was ill-conceived.

Barwick completed his citation of relevant portions of *James v The Commonwealth* (1936) and stated:

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55 CLR 1. Before referring to *James v The Commonwealth* (1936) 55 CLR 1 at considerable length, Barwick provided the following conceptualisation of the state of affairs prior to this case:

The problem presented to this board in *James v. The Commonwealth* was really not a problem which is germane to the present case, because before *James v. The Commonwealth* came to be decided your lordships' board had determined those elements which, as I have endeavoured to show, are decisive of this case, at least on the basis that a banker is a trader, because, as I endeavoured to show earlier, *James v. South Australia* as approved in *James v. Cowan*, and *James v. Cowan* as applied in the *Peanut* case, had decided that you could not exclude individuals from participation in interstate trade, that motive did not matter, that discrimination was not necessary, and that you would look to the operation of the law and see what it was doing.

See Transcript of Proceedings, the Commonwealth of Australia and Others v Bank of New South Wales and Others (Privy Council, Friday 29 April 1949), above n 1287, p.9.

1289 Transcript of Proceedings, the Commonwealth of Australia and Others v Bank of New South Wales and Others (Privy Council, Friday 29 April 1949), above n 1287, pp.10-19.

1290 See Transcript of Proceedings, the Commonwealth of Australia and Others v Bank of New South Wales and Others (Privy Council, Friday 29 April 1949), above n 1287.

1291 Letter from Sir Garfield Barwick to Richard Ashburner, 1 March 1949 (Papers of Sir Garfield Barwick, London file no. 3 – personal correspondence [3.0cm], Series No: M3923 (M3923/1), Control Symbol: 8, National Archives of Australia, Sydney).

1292 55 CLR 1.


1294 55 CLR 1.
I have indicated as I went through *James and The Commonwealth* from time to time the solution which I suggested that decision adopted. It adopted the solution of the supposed contradiction, the solution of reducing the scope of the freedom perhaps in two respects, although the respects are very close to each other. You cannot always split them apart. One is, it reduced freedom from all law to freedom from non-regulatory laws, if I may use that phrase, and it added a further qualification, if it be a further qualification, that the law must bear upon the movement, it must affect the interstate transaction. One must never lose sight of the fact that it was to the interstate transaction that the protection was given, not the mere fact that it was a transaction.\(^{265}\)

Barwick’s heavy reliance on *James v The Commonwealth* (1936)\(^{1295}\) in his submissions appears vindicated as the Privy Council adopted the reasoning from this case in its judgment.

**Barwick’s Submissions on the Airlines Case**

Barwick then addressed the members of the Privy Council on the *Airlines Case*.\(^{1297}\) The *Airlines Case*, he argued, was right and properly applied the decisions of the Privy Council in the two cases which had come before it.\(^{1298}\) He cited Chief Justice Latham’s statement in the *Milk Board Case*\(^{1299}\) which he also referred to in the *Airlines Case*, namely:

One proposition which I regard as established is that simple legislative prohibition (Federal or State), as distinct from regulation, of inter-State trade and commerce is invalid. Further, a law which is ‘directed against inter-State trade and commerce’ is invalid. Such a law does not regulate such trade, it merely prevents it. But a law prescribing rules as to the manner in which trade in (including transport) is to be conducted is not a mere prohibition and may be valid in its application to inter-State trade notwithstanding s 92.\(^{1300}\)

In response to a question from Lord Simonds, Barwick highlighted the inherent difficulties of the Appellants’ submission in light of Chief Justice Latham’s approach:

Lord Simonds: Was it admitted by the Appellants that, upon the footing that the activity of the bank is trade, commerce, or intercourse, the Chief Justice could not, consistently with his decision in the *Airways* case, have decided this case in the way he did?

\(^{1295}\) Transcript of Proceedings, the Commonwealth of Australia and Others v Bank of New South Wales and Others (Privy Council, Friday 29 April 1949), above n 1287, pp.26-27.

\(^{1296}\) 55 CLR 1.

\(^{1297}\) Transcript of Proceedings, the Commonwealth of Australia and Others v Bank of New South Wales and Others (Privy Council, Friday 29 April 1949), above n 1287, p.27.

\(^{1298}\) Ibid.

\(^{1299}\) 62 CLR 116.

\(^{1300}\) *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 127, per Latham CJ.
Barwick: They say the opposite, my Lord. There are only one or two points in the Appellants' case to which I want to draw attention. One of those is that they seek to say that the Chief Justice in some way, if he had thought that the banker was in trade, would still have decided against the present Respondent. But when one looks at this case, I submit that is an impossible conclusion.  

Barwick then outlined the position of the other judges in the *Airlines Case*, and concluded as follows:

What I submit with respect to that case is that it is correct that it applies the principles which your lordships have laid down in the two cases, and that the submission which we have made in this case is concerned with it. The steps it takes are these. The man who is in business to carry is engaged in trade irrespective of whether what he carries is an article of trade or a person himself in trade. To arbitrarily exclude him is to infringe the section even though you take steps which may be thought by some, perhaps not by others, to secure that the carrying will still be done by somebody else.

My lords, in this case the simple approach to this present section is to take the same two steps, that a banker is in business, a form of carriage if one likes to take the analogy; he is engaged in interstate trade and commerce and to forbid him carrying on that business is to infringe the section. No distinction can be made between the two cases on the ground that in the one case only an interstate activity was being dealt with, and in the other an interstate activity was being dealt with along with other activities. Your lordships' decisions in the other cases show that that is no ground of distinction.  

During this phase of his submissions, Barwick was intent on demonstrating the similarities between the *Airlines Case* and the current case, and he cited from the judgments with close attention and care.

**Barwick's Concluding Submissions**

Barwick referred to numerous judgments of Chief Justice Latham to demonstrate, that had the Chief Justice found that a banker was engaged in interstate trade, he would also have found that section 92 invalidated the relevant Act.  

Barwick demonstrated this by referring the members of the Privy Council to two paragraphs of Chief Justice Latham's judgment in the *Bank Nationalisation Case: Bank of New South Wales v Commonwealth* (1948).  

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1301 Transcript of Proceedings, the *Commonwealth of Australia and Others v Bank of New South Wales and Others* (Privy Council, Friday 29 April 1949), above n 1287, p.30.

1302 Ibid, pp.31-32.

1303 Ibid, p.33.

1304 Barwick demonstrated this by referring the members of the Privy Council to two paragraphs of Chief Justice Latham's judgment in the *Bank Nationalisation Case: Bank of New South Wales v Commonwealth* (1948).
was not in interstate trade and he did that for the reason that he thought that section 92 only applied to the passage of goods across the border'.

He then made reference to numerous aspects of Chief Justice Latham's judgment in the Bank Nationalisation Case generally. He concluded that the extracts cited were 'the important points of the judgment and I submit it is not an acceptable view, and, indeed, if His Honour had thought that banking was trade and commerce, he would have joined the others'.

It appears that Barwick strategy was to focus on Chief Justice Latham's judgment for two main reasons. Firstly, he considered that the Privy Council would be influenced by the Chief Justice's judgment and, secondly, to demonstrate that, based on previous statements by the Chief Justice, had he found that banking was 'trade and commerce' for the purposes of section 92 then he would have joined the majority in finding the legislation to be invalid.

Towards the end of his submissions, Barwick stated, in plain terms, the manner in which the members of the Privy Council could dispose of this case: 'the case can really be disposed of on a narrow basis like the Airways case: A banker is in trade; individuals can complain if they are excluded, the freedom is theirs and this exclusion of the bankers from participation in inter-State trade is a breach of the section'.

Barwick concluded his submissions on day 22.

Throughout the hearing, Barwick demonstrated his ability to adapt his advocacy in response both to the members of the court and the jurisdiction, despite feeling uncomfortable during his initial presentation in the special leave application, and despite appearing before the Privy Council for the

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76 CLR 1 at 62. See Transcript of Proceedings, the Commonwealth of Australia and Others v Bank of New South Wales and Others (Privy Council, Friday 29 April 1949), above n 1287, pp.35-36.

1305 Transcript of Proceedings, the Commonwealth of Australia and Others v Bank of New South Wales and Others (Privy Council, Friday 29 April 1949), above n 1287, p. 35.


1307 Ibid, p.41.

1308 Barwick, A Radical Tory: Garfield Barwick's Reflections & Recollections, above n 1, p.69.

1309 Transcript of Proceedings, the Commonwealth of Australia and Others v Bank of New South Wales and Others (Privy Council, Friday 29 April 1949), above n 1287, p.42.

1310 Ibid, p.44. That is, on Friday 29 April 1949. See also Travel Diary -1948 of Norma M. Barwick, 'Sir Garfield Barwick's diaries and other personal books, Series No: M3943/2, Control Symbol: 27, National Archives of Australia, Sydney. Following Barwick, Sir David Fyfe KC addressed the Privy Council on the point that there is an implication in the constitution that the Commonwealth cannot pass a law which will make it impossible for the States to function properly as self-governing communities. Hannan KC then presented the argument that section 46 of the Banking Act 1947 was invalid because it was inconsistent with clause 5(9) of the Financial Agreement by reason of section 105A(5). Then Radcliffe addressed the members of the Privy Council on behalf of the Respondent banks on points arising with regard to section 51 of the Constitution in relation to section 46 of the Banking Act 1947. See Respondents' Case Book at pages 57 and 58, paragraphs 140 to 148 and Transcript of Proceedings, the Commonwealth of Australia and Others v Bank of New South Wales and Others (Privy Council, Friday 29 April 1949), above n 1287, p.44.
first time. Generally, he adapted his advocacy quickly and this appears to have greatly assisted the persuasiveness of his arguments. It was said that he had picked up quickly:

the English practice of not asserting and repeating the conclusion of a train of argument, instead leading their Lordships towards the conclusion and then allowing them the pleasure of seeing it for themselves.\footnote{Sawer, ‘Absolutely a Free Man’, above n 164, p.10 referred to in Marr, above n 8, p.71.}

According to Marr, those who witnessed Barwick’s account of section 92, acclaimed it as a ‘magnificent piece of advocacy: easy, flexible and lucid’.\footnote{Marr, above n 8, p.71.} Monckton declared of Barwick’s advocacy: ‘I have been appearing in the appeal courts for 25 years, and I have never heard anything equal to that’.\footnote{Ibid.} Barwick himself felt, after he had finished his argument, that his ‘nose [was] in front’.\footnote{National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 24.}

He stated that:

The Board were extremely nice to me in dealing with 92, and I continue as optimistic of the point as I have always been. Being quite convinced of it myself, perhaps something of that conviction was transmitted to the Board.\footnote{Letter from Sir Garfield Barwick to Crowther, 12 May 1949 (Papers of Sir Garfield Barwick, London file no. 3 – personal correspondence [3.0cm], Series No: M3923 (M3923/1), Control Symbol: 9, National Archives of Australia, Sydney); see also Letter from Sir Garfield Barwick to Richard Ashburner, n.d. (Papers of Sir Garfield Barwick, London file no. 3 – personal correspondence [3.0cm], Series No: M3923 (M3923/1), Control Symbol: 9, National Archives of Australia, Sydney) where Barwick stated that ‘[I] do feel that, barring miracles, we should win, and win I think on 92’.}

This assessment by Barwick provides an insight into what may have contributed to the success of his argument; his personal belief in the merits of the section 92 argument seem to have caused him to convey his submissions with additional fervor to add to the persuasive effect of his submissions. It appears from the analysis of the transcript of the case, to the extent that such matters are capable of being gleaned from the transcript, that Barwick whilst impassioned generally, remained composed throughout his submissions. He enjoyed good fortune as well - an advocate will not always be in the position where their case corresponds with their ideological values or beliefs.

At the conclusion of day 28, the proceedings were adjourned, until no later than Monday 23 May 1949, to allow the Attorney-General of the Commonwealth to reply for the Appellants.\footnote{Day 28 was Tuesday 10 May 1949. The proceedings were adjourned until after Evatt had fulfilled his public responsibilities to the General Assembly of the United Nations in New York: see Transcript of Proceedings, the Commonwealth of Australia and Others v Bank of New South Wales and Others (Privy Council, Lord Porter, Lord Simonds, Lord Uthwatt, Lord Du Parcq, Lord Normand, Lord Morton of Henryton and Lord MacDermott, Tuesday 10 May 1949), p.34.} The Privy Council sat on 23-27, 30, 31 May, and 1 June.
Barwick eagerly anticipated Evatt’s reply and stated: ‘I will be very interested to hear brother Bert’. 1317 He added tellingly, that ‘[e]ven if there was a good argument in reply, I feel sure he is not capable of putting it’. 1318

In reply, Evatt submitted that whilst the test of burden from James v The Commonwealth (1936) 1319 could be applied, the Constitution did not refer to burden or regulation, that section 92 did not guarantee an individual a right to trade interstate, that the Airlines Case had reached an erroneous conclusion and that banking was not ‘trade, commerce and intercourse’. 1320

The contrasting style of the two advocates, Evatt and Barwick, was stark:

Evatt lectured their Lordships for 22 days, glowered at them, read them interminable passages from decisions, and never presented them with a clear theory about section 92. Barwick, who took nine days, followed his High Court technique of careful, patient and amiable explanation, and reduced case-reading to a minimum. 1321

Barwick was later to say that Evatt was ‘grossly repetitive ... [and] had a sort of memory which had to reproduce everything he had learnt about the thing you asked him at the same time’. 1322 He

1317 Letter from Sir Garfield Barwick to Crowther, 12 May 1949 (Papers of Sir Garfield Barwick, London file no. 3 – personal correspondence [3.0cm], Series No: M3923 (M3923/1), Control Symbol: 8, National Archives of Australia, Sydney).
1318 Ibid.
1319 55 CLR 1.
1320 Essentially, Evatt’s submissions in reply were as follows:
1) there is no basis for the Respondents’ suggestion that section 92 was inserted in the Constitution to make applicable the American doctrine of the individual being able to trade from State to State;
2) you can apply to every case the test in James v Commonwealth (1936) 55 CLR 1 but I do not know how a court is to apply the test of burden as distinct from regulation because the Constitution says nothing about a burden or regulation;
3) if the interpretation of section 92 applied in James v Commonwealth (1936) 55 CLR 1 is correct, it follows that, except in respect of the prohibited area of the border, both the Commonwealth Parliament and the State legislatures possess plenary legislative power for peace, order and good government in relation to trade and commerce among the States. The test of detrimental impact upon an individual trader of any law challenged under section 92 is quite irrelevant to that section, even though such impact includes interference with the trader’s operations in interstate trade and may effectually obstruct his liberty to trade interstate;
4) the fallacy of regarding section 92 as affording something in the nature of a guarantee to individuals of a right to trade interstate led to an erroneous conclusion in the Airlines Case. However, the only basis upon which section 46 could be deemed to infringe section 92 is the contention of the Respondents that the section guarantees a positive right in the individual to trade inter-State, and this contention is entirely erroneous;
5) it is not conceded that banking is included in the ‘trade, commerce and intercourse’ which is protected by section 92. It is submitted that it is merely an instrument or concomitant of trade. The banking business cannot as a business be regarded as included in the concept of the movement of trade, commerce and intercourse referred to in section 92.

1321 Sawer, ‘Absolutely Free Man’, above n 164; May, above n 778, p.91.
1322 Ibid.
concluded that Evatt was ‘the worst advocate that ever was’.\textsuperscript{1323} This seems to be a deliberate overstatement as, based on Evatt’s career, this would not be an accurate assessment.

More dispassionately, it has been suggested by Tennant that, in comparison to Evatt, Barwick ‘better judged the temper of the law lords, allowing them to make their own inferences, not underlining’.\textsuperscript{1324}

\subsection*{8.5 The Privy Council’s Decision}

The appeal concluded on 1 June 1949 – after 36 days of argument.\textsuperscript{1325} Judgment was delivered on 26 July 1949.\textsuperscript{1326} The Privy Council dismissed the Commonwealth’s appeal without providing any reasons.\textsuperscript{1327} Barwick and other counsel for the banks waited in one of the bank’s boardrooms for the news. A cable arrived at 7.32pm simply stating ‘Appeal dismissed’.\textsuperscript{1328} The High Court’s judgment was upheld.\textsuperscript{1329}

The Privy Council’s reasons for judgment were released on 26 October 1949,\textsuperscript{1330} shortly before Federal Parliament rose for the general election on 10 December 1949 in which the Chifley Labor government was defeated. The bank nationalisation issue remained at the centre of the public debate throughout the Labor government’s last term in office by virtue of the ongoing appeal.\textsuperscript{1331}

The Privy Council ruled that the case originally raised a direct \textit{inter se} question with respect to the scope of the banking power and that it did not have jurisdiction to hear an \textit{inter se} matter; the case should have concluded at the High Court. Thus, the case was determined on the issue of whether it involved an \textit{inter se} question.\textsuperscript{1332}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{1323} National Library of Australia, Miller, Interview with Sir Garfield Barwick, above n 19, 24.
\item\textsuperscript{1324} Tennant, \textit{Evatt: Politics and Justice}, above n 1207, p.242.
\item\textsuperscript{1325} \textit{Commonwealth v Bank of New South Wales} (1949) 79 CLR 497 (26 October 1949); Nicholas, above n 1175, 387; Priest and Williams, above n 77, p.53.
\item\textsuperscript{1326} Where, in Marr’s words, the Registrar announced:

‘Appeal Judgment, Commonwealth of Australia v. Bank of New South Wales and Ors’ and the chairman of the board then stated that the decision of the board was that the appeal be dismissed, the question of costs would be gone into later and the reasons for the judgment be given next session.

Marr, above n 8, p.72.
\item\textsuperscript{1327} Blainey and Hutton, above n 783, p.233.
\item\textsuperscript{1328} Marr, above n 8, p.73.
\item\textsuperscript{1329} Hull, above n 783, p.28.
\item\textsuperscript{1330} \textit{Commonwealth v Bank of New South Wales and Ors} [1949] UKPCHCA 1; (1949) 79 CLR 497.
\item\textsuperscript{1331} Galligan, above n 781, p.177; Coper, \textit{Encounters with the Australian Constitution}, above n 781, p.273; Sawer, \textit{Australian Federal Politics and Law} (1929-1949), above n 143, p.220.
\item\textsuperscript{1332} \textit{Commonwealth v Bank of New South Wales} (1949) 79 CLR 497 at 629. The Privy Council had rejected Evatt’s argument that the issue as to whether section 92 invalidated the banking power was not primarily an \textit{inter se} dispute, and the Commonwealth did not require a High Court certificate to allow the matter to come before the Privy Council. An \textit{inter se} question is a matter which arises in connection with the federal distribution of powers in Australia: \textit{Dennis Hotels Pty Limited v Victoria} (1961) 104 CLR 621 at 625-6. See also
\end{enumerate}
\end{footnotesize}
Still, the Privy Council reviewed the remaining issues in dispute. It outlined its views in the form of an opinion rather than a judgment, and indicated that it would review the substantive issues since it would have been possible for the High Court to grant a section 74 certificate (although this was highly improbable) and thought 'it right to state their views' on section 92 since it had been so fully argued; and secondly, it sought to correct some misapprehensions in relation to the previous James' decisions.

The Privy Council had only been concerned with section 46 of the Act and no other sections. According to the opinion, this section constituted 'a single indivisible scheme' such that no part of which could be severed from the rest. It found that banking was of itself 'trade and commerce' (and within the trade and commerce power under section 51(i)) and that the prohibition of private banking infringed section 92. The Privy Council affirmed the High Court's reasoning on section 92 and added its own comments, including its views on the operation of this section.

These views were favourable to the banks and accorded with many of Barwick's submissions. However, due to the Privy Council not having jurisdiction to hear the appeal, this decision did not constitute a binding precedent.
The opinion essentially adopted Justice Dixon’s judgment from the High Court’s decision that banking fell within section 92 because of the James’ precedents, which, according to the Privy Council, established that section 92 protected individual freedom. Since the Act restricted the interstate transactions of individual bankers it violated section 92. The Privy Council held that bankers were in an analogous position to the fruit grower, James, who had been afforded protection under section 92 against government interference in private interstate trade. However, bankers were different from transport operators who had been denied such protection in the ‘Transport Cases’. The Privy Council rejected the Commonwealth’s suggestion that interstate trade and commerce was restricted to the movement of tangible commodities from one State to another and that banking, as an intangible instrument of trade and commerce, fell outside of trade and commerce and therefore section 92. This vindicated Barwick’s approach in his submissions to rely heavily on the James’ cases and to minimise references, to the extent possible, to the ‘Transport Cases’.

It is notable that the Privy Council placed considerable reliance on Justice Dixon’s High Court judgment, yet Barwick had resolved earlier, as we saw, not to rely upon Justice Dixon’s judgment. As evidenced by an examination of his submissions, Barwick relied on the judgments of Justice Dixon only rarely. With the benefit of hindsight, Barwick appears to have misjudged the views of the Privy Council when making this decision. He may have been too focused in preparation on reducing the possible influence of Chief Justice Latham and may not have considered that the Board might rely on the judgment of others, including Justice Dixon.

The Privy Council confirmed Justice Dixon’s ‘individual rights’ theory of section 92, therefore, affirming Barwick’s view of section 92, which he propounded during the High Court case. Evatt’s

Blainey and Hutton, above n 783, p.233; Blackshield, ‘inter se questions’, above n 167, p.351; Coper, Encounters with the Australian Constitution, above n 781, p.273.

1342 Commonwealth v Bank of New South Wales and Ors (1949) 79 CLR 497 at 632-633. This has been described as Justice Dixon’s maximalist interpretation of section 92 as a guarantee of the individual citizen’s right to freedom of interstate trade: Ayres, above n 50, pp.189-190; Lane, A Digest of Australian Constitutional Cases, (5th ed), above n 843, p.345; Sawyer, Cases on The Constitution of the Commonwealth of Australia, (3rd ed), above n 781, pp.229-249; Nygh, above n 822, 342; Nicholas, above n 1175, 388; Davis, above n 1177, 108.


1344 Commonwealth v Bank of New South Wales and Ors (1949) 79 CLR 497 at 632-633; Davis, above n 1177, 109; Menzies, Central Power in the Australian Commonwealth, above n 205, p.145.

1345 In correspondence, Barwick stated that ‘one clever thing which Evatt did do was to destroy Dixon to a large extent, and I really think Dixon suffered a little in loss of standing in several connections’: Letter from Sir Garfield Barwick to Richard Ashburner, n.d. (Papers of Sir Garfield Barwick, London file no. 3 – personal correspondence [3.0cm], Series No: M3923 (M3923/1), Control Symbol: 9, National Archives of Australia, Sydney).

1346 Johnston, above n 783, 97; Coper, Freedom of Interstate Trade under the Australian Constitution, above n 822, p.103. Interestingly, in the 35 years following the Privy Council’s decision in Commonwealth v Bank of
view that there was no breach unless trade and commerce themselves were impeded at the border was rejected.\textsuperscript{1348}

The Privy Council sought to formulate its own test to determine the circumstances where legislation would be invalid under section 92 of the Constitution:\textsuperscript{1349}

the test is clear: does the Act, not remotely or incidentally ... but directly, restrict the inter-State business of banking? Beyond doubt it does, since it authorizes in terms the total prohibition of private banking. If so, then in the only sense in which those words can be appropriately used in this case, it is an Act which is aimed at, directed at, and the purpose, object and intention of which is to restrict, inter-State trade commerce and intercourse.\textsuperscript{1350}

Traces of the test proposed can be found in the exchange that occurred between Lord MacDermott and Barwick during submissions and the surrounding discussion.\textsuperscript{1351}

\textit{New South Wales and Ors} (1949) 79 CLR 497, more than 90 High Court cases raised s 92 issues compared with just over 40 cases in the 45 years before the decision: Peter Hanks, Deborah Cass & Jennifer Clarke, \textit{Australian Constitutional Law: Materials and Commentary}, (6\textsuperscript{th} ed), (1999), Reed International Books Australia Pty Ltd, Chatswood, p.813.

\textsuperscript{1347} \textit{Commonwealth v Bank of New South Wales and Ors} (1949) 79 CLR 497 at 635-636. See also Priest and Williams, above n 77, p.53; Sawer, \textit{Australian Federal Politics and Law (1929-1949)}, above n 143, p.213; Zines, \textit{The High Court and the Constitution}, (5\textsuperscript{th} ed), above n 182, pp.152-154. The Privy Council found that s 92 created a personal right in the individual and the direct result of s 46 of the Act was to extinguish the right of an individual to engage in the business of banking. That is, s 46 was ‘aimed at’ or ‘directed at’ the freedom of interstate trade and commerce: see Davis, above n 1177, 110. According to Coper, ‘the individual right theory was endorsed without satisfactory justification’: see Coper, \textit{Freedom of Interstate Trade under the Australian Constitution}, above n 822, p.103.

\textsuperscript{1348} The Privy Council stated: ‘it would be a strange anomaly if a grower of fruit could successfully challenge an unqualified power to interfere with his liberty ... but a banker could be prohibited altogether from carrying on his business’; \textit{Commonwealth v Bank of New South Wales and Ors} (1949) 79 CLR 497 at 635-636. See also Coper, \textit{Freedom of Interstate Trade under the Australian Constitution}, above n 822, p.103; Coper, \textit{Encounters with the Australian Constitution}, above n 781, p.273; Sawer, \textit{Cases on The Constitution of the Commonwealth of Australia}, (3\textsuperscript{rd} ed), above n 781, pp.229-249.

\textsuperscript{1349} The Privy Council dismissed any suggestion that the subjective legislative purpose or intention was relevant by referring to the statement of Isaacs J in \textit{James v Cowan} (1930) 43 CLR 386 at 409. The necessary effect refers to ‘the necessary legal effect, not the ulterior effect economically or socially’ (\textit{Commonwealth v Bank of New South Wales and Ors} (1949) 79 CLR 497 at 637). In this case, it was clear that the necessary legal effect of the \textit{Banking Act 1947 (Cth)} was to restrict interstate trade (see \textit{Commonwealth v Bank of New South Wales and Ors} (1949) 79 CLR 497 at 637). See also Coper, \textit{Freedom of Interstate Trade under the Australian Constitution}, above n 822, p.104; Lane, \textit{A Digest of Australian Constitutional Cases}, (5\textsuperscript{th} ed), above n 843, p.345; Nygh, above n 822, 342.

\textsuperscript{1350} \textit{Commonwealth v Bank of New South Wales and Ors} (1949) 79 CLR 497 at 637. See also Sawer, \textit{Cases on The Constitution of the Commonwealth of Australia}, (3\textsuperscript{rd} ed), above n 781, pp.229-249; Nicholas, above n 1175, 388.

\textsuperscript{1351} Further, the Privy Council stated that:

But it seems that two general propositions may be accepted: (1) that regulation of trade commerce and intercourse among the States is compatible with its absolute freedom and (2) that s. 92 is violated only when a legislative or executive act operates to restrict such trade commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote.
One concept that emerged clearly from the decision by the Privy Council was that ‘simple prohibition is not regulation’\textsuperscript{1352}. Their Lordships relied on the comments by Latham CJ in the *Airlines Case*\textsuperscript{1353} and the *Milk Board Case*\textsuperscript{1354} to support this conclusion. These were the comments that Barwick had thought he could use to persuade Latham CJ during the case before the High Court. The Privy Council also suggested that Latham CJ would have reached a different conclusion in the present case had he decided that the business of banking was trade and commerce.\textsuperscript{1355} The Privy Council’s conclusions thus accorded with, and vindicated, the approach Barwick had taken in the case before the High Court. This also demonstrated that the Board agreed with Barwick’s submission that the only impediment to Latham CJ finding that the legislation was invalid in the High Court was his view that ‘banking’ was not ‘trade and commerce’ for the purposes of section 92.

The Privy Council suggested that the problem to be solved would often not be legal but rather, political, economic or social.\textsuperscript{1356} It outlined two questions to determine validity under section 92: ‘whether the effect of the Act is in a particular respect direct or remote and, secondly, whether in its true character it is regulatory’.\textsuperscript{1357} Therefore, the test that emerged was: does a law affect trade, commerce and intercourse in a way which is direct or remote? If it is direct then it is invalid under section 92. Also, does the law restrict or merely regulate trade, commerce or intercourse among the

\textit{Commonwealth v Bank of New South Wales and Ors} (1949) 79 CLR 497 at 639. See also Johnston, above n 783, 96; Galligan, above n 781, p.179; Coper, *Freedom of Interstate Trade under the Australian Constitution*, above n 822, p.102 and 104; Lane, *A Digest of Australian Constitutional Cases*, (5\textsuperscript{th} ed), above n 843, p.346; Sawer, *Cases on The Constitution of the Commonwealth of Australia*, (3\textsuperscript{rd} ed), above n 781, pp.229-249; Nygh, above n 822, 342; Zines, *The High Court and the Constitution*, (5\textsuperscript{th} ed), above n 182, pp.152-154; Nicholas, above n 1175, 388; Davis, above n 1177, 110.


\textit{Commonwealth v Bank of New South Wales and Ors} (1949) 79 CLR 497 at 640. See also Coper, *Freedom of Interstate Trade under the Australian Constitution*, above n 822, p.104. In the *Airlines Case*, Latham CJ stated (at 61), which has been outlined earlier, that: ‘simple legislative prohibition (Federal or State), as distinct from regulation, of inter-State trade and commerce is invalid. Further, a law which is directed against inter-State trade and commerce is invalid. Such a law does not regulate such trade, it merely prevents it. See also Lane, *A Digest of Australian Constitutional Cases*, (5\textsuperscript{th} ed), above n 843, p.346.

\textit{Commonwealth v Bank of New South Wales and Ors} (1949) 79 CLR 497 at 639. See also Johnston, above n 783, 96; Coper, *Freedom of Interstate Trade under the Australian Constitution*, above n 822, p.105; Coper, *Encounters with the Australian Constitution*, above n 781, p.145; Zines, *The High Court and the Constitution*, (5\textsuperscript{th} ed), above n 182, pp.152-154; Nicholas, above n 1175, 388.

\textit{Commonwealth v Bank of New South Wales and Ors} (1949) 79 CLR 497 at 642.
States? If it restricts then it is invalid under section 92. The Privy Council continued: ‘It appears to their Lordships that if these two tests are applied ... the area of dispute may be considerably narrower. It is beyond hope that it should be eliminated’.

According to Barwick, the Privy Council’s reasons for rejecting the Commonwealth’s appeal were based on its view of the operation of section 92 and, at some later stage, the Board decided to make the fact that the Privy Council did not have jurisdiction to hear the appeal the basis of the judgment. Barwick also noted that the Privy Council’s views on section 92 were obiter dicta at the time but were later converted into precedent when he used them to argue successfully the section 92 position in Hughes and Vale Pty Ltd v New South Wales (1954) which finally overruled the ‘Transport Cases’. Barwick’s success in the Privy Council, as well as the High Court, in the Bank Nationalisation Cases owes much to his ability as an advocate, and his ability to employ and apply the elements of appellate advocacy as well as, at times, achieve the ideals of appellate advocacy. Despite appearing in his first case before the Privy Council and suffering some initial discomfort, Barwick exhibited a close adherence to the elements and ideals of appellate advocacy. In doing so, he demonstrated his ability to adapt his style of appellate advocacy to the Privy Council setting. His advocacy was characterised by his ability both to make uninterrupted submissions, and handle judicial questions;

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1358 The interpretation of s 92 that ended any prospects of nationalisation following the Bank Nationalisation Case, that is, the individual right theory, was eventually overruled forty years later in the Tasmanian Lobster Case. See also Johnston, above n 783, 97. Prior to this decision, judicial opinion differed on the interpretation of section 92. Ironically, the interpretation that ultimately prevailed may have made the nationalisation of some industries easier. However, by this time the Labor Party had abandoned its nationalisation objectives, and along with the Liberal Party, had embraced the privatisation of government-owned businesses: see Hull, above n 783, p.27.

1359 Commonwealth v Bank of New South Wales and Ors (1949) 79 CLR 497 at 642. Whilst the Privy Council effectively concluded that the banks could not be prohibited from carrying on business in 1949, it noted: For their Lordships do not intend to lay it down that in no circumstances could the exclusion of competition so as to create a monopoly either in a State of Commonwealth agency or in some other body be justified. Every case must be judged on its own facts and in its own setting of time and circumstance, and it may be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation and that inter-State trade commerce and intercourse thus prohibited and thus monopolized remained absolutely free.

The Privy Council’s reservation, and this seemingly contradictory statement, caused confusion and some concern remained that the threat of nationalisation had not completely disappeared. Therefore this reservation, to a small extent, clouded Barwick’s success. It has been said that the Privy Council’s reasons ‘which seemed to anticipate a socialist future, read like a riddle, utterly confusing the High Court in regard to their interpretation of section 92’. See Marr, above n 8, p.74; Hull, above n 783, p.28. Ayres, above n 50, pp.189-190; Commonwealth v Bank of New South Wales and ors (1949) 79 CLR 497 at 640-641.

1360 Barwick, A Radical Tory: Garfield Barwick’s Reflections & Recollections, above n 1, p.79.


1362 Coper, Freedom of Interstate Trade under the Australian Constitution, above n 822, p.105; Barwick, A Radical Tory: Garfield Barwick’s Reflections & Recollections, above n 1, p.7; Nygh, above n 822, 343; Zines, The High Court and the Constitution, (5th ed), above n 182, pp.139-145.
he also utilised his answers as a means of further conveying his submissions. He employed examples and analogy to great effect and he demonstrated an extensive preparation, together with courage, flexibility, discretion and tact, as well as appropriate respect and wit.

8.6 The Aftermath

The Chifley government was required to accept its fate on bank nationalisation. During the 1949 election campaign, however, the Opposition continued to raise the issue of bank nationalisation as if it were an immediate threat.

Despite the result in the Privy Council, McConnan did not rest. On 10 December 1949, the government was defeated in the federal election and there is no doubt that the resistance to nationalisation was a major factor in its loss. Barwick, it has been said 'had raised section 92 litigation to the highest pinnacle of legal practice' and that as a result 'there was at hand a whole bevy of barristers, led by Sir Garfield himself, eager to work this lucrative field'. Due to the fact that he was involved in cases frequently challenging the validity of legislation, Barwick it was said, 'left the parliamentary draftsmen endlessly papering over the cracks'.

The failure of the Chifley government's bank nationalisation legislation spurred an increase in litigation challenging government price controls, road freight taxes, State receipt taxes, and

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1363 In fact, McConnan remarked that '[i]t follows that the only real protection is to toss the Socialists out'. See May, above n 778, p.92.
1364 Crisp, Ben Chifley: A Political Biography, above n 783, pp.339-341. The defeat of the Labor Party at the federal election in 1949 was also the result of a desire by the electorate to be free from wartime constraints across a broad spectrum of measures such as food and petrol rationing which Menzies exploited. See also Johnston, above n 783 & 97; Sawyer, Australian Federal Politics and Law (1929-1949), above n 143, p.220; May, above n 778, pp.126-127; Kevin Perkins, Menzies: Last of the Queen's Men, (1968), Rigby Limited, Adelaide; pp.161-162; Hazlehurst, above n 204, p.308. According to Clyde Cameron, a Labor Member of Parliament from 1949 to 1980, it was petrol rationing and 'not bank nationalisation which cost Labor the 1949 election' (see Clyde Cameron, The Cameron Diaries, (1990), Allen & Unwin Australia Pty Limited, North Sydney, p.436).
1366 Galligan, above n 781, p.210. The Bank Nationalisation Case was a major victory for Barwick. Many of the counsel who appeared in that case for the private banks were subsequently appointed to the High Court. Frank Kitto, Alan Taylor and Douglas Menzies were all appointed in the years that followed and, in 1964, Barwick was appointed the Chief Justice of the High Court (See Priest and Williams, above n 77, p.53; Kirby, 'Kitto and the High Court of Australia', above n 186, 135).
1367 Marr, above n 8, p.54.
1368 For example, Wragg v NSW (1953) 88 CLR 353.
1369 For example, Hughes & Vale Pty Ltd v NSW (1954) 93 CLR 1.
1370 For example, Associated Steamships v Western Australia (1969) 120 CLR 92.
marketing controls. In 1976, Barwick acknowledged that section 92 'has given rise to almost continuous litigation on the extent of the limitation on governmental powers which it contains'.

Following his appearance in the Bank Nationalisation Case, Barwick appeared in several appeals to the Privy Council from which he derived great personal satisfaction. As he stated:

- I appeared at times against leading English Counsel and had many opportunities for exercising my persuasive skills as an advocate and demonstrating my knowledge of the law over a wide field.
- From 1948 on I appeared regularly before the Privy Council and became a familiar figure in the Inns of Court, where I made many friends.

Barwick was aware of his own ability to persuade, including in the use made by judges of his submissions as the basis for their judgments. After 1948 and following frequent appearances in the Privy Council, he would, in his own words, put forward specific propositions and the presiding Lord would often say 'at dictation speed'; the Lords would then begin to note down the propositions he advanced. Barwick recollected that it was acknowledged that he was the counsel 'from whom their Lordships took dictation'. This, if accurate, is the ultimate compliment for an advocate. The fact that Barwick's propositions, often involving complex concepts, were expressed simply and eloquently made them attractive and appropriate for direct inclusion in any judgment. In this way, Barwick made the process of writing judgments considerably easier for the Privy Council, and he did not hesitate to affirm this himself.

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1371 For example, North Eastern Dairy Co v Dairy Industries Authority of NSW (1975) 134 CLR 559.

1372 Speech delivered by Sir Garfield Barwick, 'Federation and the Constitution of the Commonwealth', occasion unknown, 1976; Garfield Barwick, 'Chief Justice Barwick: Speeches 1973-1981', High Court of Australia Library, Canberra. The legacy of the Bank Nationalisation Case remains in terms of the definitions and descriptions found in both the High Court and Privy Council judgments about what constitutes 'banking' or 'the business of banking'. These terms remain undefined by legislation. As a result, many still refer to the obiter dicta in the Bank Nationalisation Case to assist with the interpretation of these terms: see Weerasooria, above n 777, 79. For example, it was applied by Newcrest Mining (WA) Ltd v Commonwealth (1997) 190 CLR 513 and Queensland Electricity Commission v Commonwealth (1985) 159 CLR 192; it was approved by Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594; it was followed by Attorney-General (Cth) v T & G Mutual Life Society Ltd (1978) 144 CLR 161, Bartter's Farms Pty Ltd v Todd (1978) 139 CLR 499; it was referred to in Wong v Commonwealth (2009) 236 CLR 573, Betfair Pty Ltd v Western Australia (2008) 234 CLR 418, White v Director of Military Prosecutions (2007) 231 CLR 570, APLA Ltd v Legal Services Commissioner (NSW) (2005) 224 CLR 322.

1373 Barwick, A Radical Tory: Garfield Barwick's Reflections & Recollections, above n 1, p.33.

1374 Ibid, p.77.

1375 However, it should be noted that this is an anecdote from Barwick himself and it has not been independently corroborated.
Chapter 9: Barwick and the Communist Party Case

"My argument about the validity of the Act was unconvincing. Only the Chief Justice was prepared to uphold its validity on the grounds set out in his reasons rather than on my argument. Latham CJ, while still in office, once told me that my argument in the Communist Party Case was the worst he had heard from me. I have no reason to question his judgment."

Sir Garfield Barwick, 1995

Following his success in the Bank Nationalisation Case, Barwick was considered one of the best appellate advocates in Australia, particularly in constitutional law cases. The year after the Privy Council's decision, Barwick was called upon by the Menzies Government to defend in the High Court legislation that it had introduced, banning the Australian Communist Party ("the Communist Party"). This chapter is dedicated to assessing Barwick's advocacy in the High Court in the Communist Party Case against the elements and ideals of appellate advocacy. The Communist Party Case is regarded as one of the High Court's 'most significant and celebrated constitutional decisions'.

In the Communist Party Case, Barwick was required to assume the unusual role of defending the validity of legislation as opposed to his customary role in his constitutional cases of attacking the validity of legislation.

As with the Bank Nationalisation Case in both the High Court and the Privy Council, a comprehensive assessment of Barwick's advocacy in the Communist Party Case requires an assessment of his advocacy in terms of preparation, presentation and personation. This analysis draws upon observations and commentary about Barwick, and also involves an examination of primary material, including the transcript of Barwick's argument.

9.1 Preparation for the Communist Party Case in the High Court

Alongside the Bank Nationalisation Case, the Communist Party Case ranks as one of the most important constitutional law cases heard by the High Court. It also represents Barwick's greatest

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1376 Barwick, A Radical Tory: Garfield Barwick’s Reflections & Recollections, above n 1, p.48.
defeat as an advocate in constitutional law cases. The assessment of Barwick’s advocacy in this case will assist in understanding the reasons behind his defeat.

To understand and appreciate the significance of this case, it is important to understand the events that led to it coming before the High Court. The historical context also reveals Barwick’s early involvement and provides the necessary context to allow an in-depth examination of Barwick’s advocacy in this case.

Chapter 6 examined Barwick’s approach to preparation generally and the early sections of chapters 7 and 8 his preparation in the Bank Nationalisation Case before the High Court and Privy Council respectively. In this section, Barwick’s preparation in the Communist Party Case will be discussed.

Background to the Communist Party Case

After World War II, many governments feared that communism was a threat to democracy. This was a view also held by many in Australia. Community concern intensified as the union movement was thought to be infiltrated by communist elements. A seven-week coal strike in 1949 appeared to highlight the industrial power of the Communist Party.

Menzies led the newly formed Liberal Party and the Country Party to a resounding election victory on 10 December 1949. In the lead up to the election, Menzies had campaigned strongly on the promise

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of suppressing communism and banning the Communist Party.\footnote{1380} In his policy speech, he stated that: ‘Communism in Australia is an alien and destructive pest. If elected, we shall outlaw it’.\footnote{1381}

One of Menzies’ first major actions upon becoming Prime Minister was to introduce into Federal Parliament the \textit{Communist Party Dissolution Bill} on 27 April 1950.\footnote{1382} The Bill, if enacted, would dissolve the Communist Party immediately and its assets would be appropriated. In addition, any person ‘declared’ to be a communist would be dismissed from the defence force, the public service and from a union where the union was in a ‘vital industry’. These declarations would be made by the Governor-General on advice from the Executive Council.\footnote{1383}

Following initial rejection by the House of Representatives of amendments proposed by the Senate, the Bill was reintroduced on 28 September 1950 and passed by Parliament on 19 October 1950 and given royal assent by the Governor-General on 20 October 1950.\footnote{1384} It was the first significant piece of legislation enacted after Menzies became Prime Minister.


\footnote{1383} Winterton, ‘The Communist Party Case’, above n 1379, 108-110; 115-117; Marr, above n 8, p.80. The United Australia Party – Country Party Government led by Menzies, attempted to dissolve the Australian Communist Party on 15 June 1940 under the \textit{National Security (Subversive Associations) Regulations 1940} (Cth) as a body ‘the existence of which the Governor-General ... declares to be, in his opinion, prejudicial to the defence of the Commonwealth or the efficient prosecution of the war’ (reg. 3) as a result of the Australian Communist Party’s opposition to World War 2. However, the regulations were declared invalid by the High Court in \textit{Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth} (1943) 67 CLR 116 (Latham CJ and McTiernan J dissented). See Maher, ‘Downunder McCarthyism: The Struggle Against Australian Communism 1945-1960: Part Two’, above n 1379, 439; Roger Douglas, ‘A Smallish Blow for Liberty? The Significance of the Community Party Case’ (2001) 27 \textit{Monash University Law Review} 253, 258; Winterton, ‘The Significance of the Communist Party Case’, above n 1379, 640.

\footnote{1384} Winterton, ‘The Communist Party Case’, above n 1379, 123-124; Marr, above n 8, pp. 82-83. Dr Evatt, the Deputy Leader of the Opposition was so convinced of the Bill’s invalidity that he suggested to his colleagues that they let it pass through Parliament and let the High Court destroy it (Tennant, \textit{Famous Australians – Evatt: Politics and Justice}, above n 786, p.260). See also Maher, ‘Downunder McCarthyism: The Struggle Against
The Act featured a preamble containing nine recitals. In the recitals, the Federal Government outlined its view of communism and depicted the Communist Party as a danger to Australia. The operative provisions of the Act followed the recitals. Section 4 declared the Communist Party to be an unlawful association; it provided for its dissolution and made provision for the appointment of a receiver to manage its property. Section 5 provided the mechanism for organisations other than the Communist Party (but who supported communism) to be declared unlawful by the Governor-General. A ‘communist’ was defined in section 3(1) of the Act to mean ‘a person who supports or advocates the objectives, policies, teachings, principles or practices of communism, as expounded by Marx and Lenin’. Once an association was declared to be unlawful, it would be dissolved under section 6 and a receiver appointed under section 8. An organisation could be declared unlawful under section 5(2) where:

the Governor-General is satisfied that a body of persons is a body of persons to which this section applies and that the continued existence of that body of persons would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth.

Under section 9(2), the Governor-General could declare any person to be a ‘communist’ or a member of the Communist Party by applying a similar discretion to that outlined in section 5(2). Following such a declaration, under section 10, such person could not hold office in the Commonwealth public service or in industries declared by the Governor-General to be vital to the security and defence of Australia. In the event that a person wanted to contest a declaration by the Governor-General, he or she could do so under section 9(4), although section 9(5) reversed the onus of proof by providing that ‘the burden shall be on him to prove that he is not a person to whom this section applies’.

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1386 This provision targeted bodies that supported or advocated communism, were affiliated with the Communist Party, or whose policies were substantially influenced by members of the Communist Party or by ‘communists’.


Preliminary litigation in the Communist Party Case

The Communist Party, ten unions and several union officials (some of whom were well-known communists) challenged the validity of the Communist Party Dissolution Act 1950 (Cth) ("the Act") almost immediately. On the day that the Act came into effect, eight actions were commenced in the High Court of Australia against the Commonwealth seeking a declaration that the Act was unconstitutional as well as an injunction to defer the operation of the Act until the High Court could determine its validity.¹³⁸⁹

Evatt accepted a brief to appear on behalf of one of the plaintiff unions, the Waterside Workers' Federation, and its communist official, James Healy, in the High Court. This was seen as controversial in light of the fact that Evatt was a former Judge of the High Court and the Deputy Opposition Leader at the time.¹³⁹⁰

Following his success in the Bank Nationalisation Case, Barwick was the pre-eminent leader of the Australian Bar. Barwick and Prime Minister Menzies had discovered at a meeting that they had various interests and values in common.¹³⁹¹ Barwick, it has been said: 'put his skills as an advocate at the service of the new government. Of all the clients he acquired in the aftermath of the Banking Case triumph, Menzies was the greatest'.¹³⁹² In fact, it has been suggested that Barwick disliked communism and it was understood that his support for the Act was 'unofficial but not private'.¹³⁹³

¹³⁸⁹ Williams, 'Communist Party Case', above n 77, p.122. Proceedings were instituted three hours after Royal Assent was given: see 'Anti-Reds Bill Challenge', The Sydney Morning Herald (Sydney), 21 October 1950, 4; An intention to challenge the legislation was announced two days earlier: see 'Reds to Fight New Act', The Sydney Morning Herald (Sydney), 19 October 1950, 1; 'Reds will Challenge Bill in Court', The Sydney Morning Herald (Sydney), 17 October 1950, 4. See Winterton, 'The Significance of the Communist Party Case', above n 1379, 647.

¹³⁹⁰ Evatt was also a staunch anti-communist. See Winterton, 'The Communist Party Case', above n 1379, 108-110; Maher, 'Downunder McCarthyism: The Struggle Against Australian Communism 1945-1960: Part Two', above n 1379, 441.


¹³⁹² Williams, 'Communist Party Case', above n 77, p.122.

¹³⁹³ Ibid, p.79.
Once again, there was to be a clash between Barwick and Evatt in a constitutional contest. However, the roles in this case were effectively reversed from the Bank Nationalisation Case. Barwick now appeared for the Commonwealth in defending the legislation; whilst Evatt appeared for the communist-led Waterside Workers Federation in attacking the constitutional validity of the legislation.\(^\text{1394}\)

On 20 October 1950, writs were filed in the High Court in Melbourne by the Communist Party and six other unions seeking an interim injunction restraining the Commonwealth from implementing the legislation. On Saturday 21 October 1950, Justice Dixon refused to grant a general injunction; instead he granted a limited injunction which prevented the Commonwealth from disposing of any property belonging to the Communist Party or 'declaring' any association or person until the High Court had determined the validity of the legislation.\(^\text{1395}\) However, he declined to ban the raids on the Communist Party. After granting the interim injunction, Justice Dixon stated a case for the Full Court in relation to the various actions as follows:\(^\text{1396}\)

1. (a) Does the decision of the question of the validity or invalidity of the provisions of the Act depend upon a judicial determination or ascertainment of the facts or any of them stated in the fourth, fifth, sixth, seventh, eighth and ninth recitals of the preamble of that Act and denied by the plaintiffs, and

(b) are the plaintiffs entitled to adduce evidence in support of their denial of the facts so stated in order to establish that the Act is outside the legislative power of the Commonwealth?

2. If no to either part of question 1, are the provisions of the Act invalid either in whole or in some part affecting the plaintiffs?

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\(^{1394}\) Hull, above n 783, p.29.


\(^{1396}\) Australian Communist Party v Commonwealth (1951) 83 CLR 1, 9-10; Dixon, McTiernan, Williams, Fullagar and Kitto JJ answered the first question 'no' and the second question 'yes'. Webb J answered both questions 'yes' and Latham CJ dissented and answered both questions 'no'. See also Winterton, 'The Communist Party Case', above n 1379, 124; Ayres, above n 50, pp.219-220; Williams, 'Reading the Judicial Mind: Appellant Argument in the Communist Party Case', above n 18, 5-6; Marr, above n 8, pp. 82-83; Douglas, 'Cold War Justice? Judicial Responses to Communists and Communism, 1945-1955', above n 1379, 55; Winterton, 'The Significance of the Communist Party Case', above n 1379, 647; Anderson, above n 1380, 35; Williams, 'Reading the Judicial Mind: Appellate Argument in the Communist Party Case', above n 18, 5-6.
Commonwealth officers raided the Communist Party headquarters in Sydney, Melbourne, Perth, Hobart and Darwin on 23 October 1950 and seized documents. The Communist Party was dissolved immediately and a receiver was to be appointed to deal with the Party’s property.

The Act purported to be based on section 51(vi) of the Constitution and on section 51(xxxix) read with section 61. The Act sought to justify itself by a series of recited facts in its preamble which comprised statements about Marxism-Leninism, communist parties generally, and their desire to violently overthrow the capitalist system. The validity of the Act was challenged as well as the allegations contained in the recitals.

In his autobiography, Barwick stated that the Communist Party Case was an example of a case which was difficult to win. It cannot be overlooked that Barwick’s recollection might have been coloured by the fact that he did not ‘win’ this case. He also recalled that he was not consulted before being briefed to appear on behalf of the Commonwealth in the High Court. Barwick noted, further, that the Act recited a substantial amount of material of a factual kind but that the High Court could not be bound by these recited facts as if they had been judicially established. He suggested that in the event that those facts had been able to be judicially established, then the decision may have been different.

Given the short turnaround (24 days) between the passage of the legislation and the start of the hearing, Barwick had limited time to familiarise himself with the Act and its issues or to prepare generally. He would have been required to undertake his preparation rapidly while preparing for other matters for which he had already been briefed.

There is limited material available to enable a detailed assessment of Barwick’s preparation for this case. However, various inferences can be made about the quality of his preparation.

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1398 Hull, above n 783, pp.28-29; Maher, ‘Downunder McCarthyism: The Struggle Against Australian Communism 1945-1960: Part Two’, above n 1379, 441; Marr, above n 8, pp. 82-83.
1399 Ayres, above n 50, pp.219-220.
1400 Barwick, A Radical Tory: Garfield Barwick’s Reflections & Recollections, above n 1, p.48.
1401 ibid.
1402 For example, Barwick appeared in several High Court cases at the time including: R v Metal Trades Employers’ Association; Ex parte Amalgamated Engineering Union (1951) 82 CLR 208 and R v Commonwealth Court of Conciliation & Arbitration; Ex parte Federated Gas Employees Industrial Union (1951) 82 CLR 267 which was heard on 18-20, 23-24 October 1950 and 5 March 1951; Federal Commissioner of Taxation v Adelaide Electric Supply Co Ltd (1950) 83 CLR 413 which was heard on 28-29 September 1950 and 30 October 1950; Federal Commissioner of Taxation v Adelaide Electric Supply Co Ltd (1950) 83 CLR 413 which was heard on 25-27 September 1950 and 13 November 1950; Thompson v Armstrong & Royse Pty Ltd (1950) 81 CLR 585 which was heard on 14-16 August and 17 November 1950 and Eastaway v Commonwealth (1951) 84 CLR 328 which was heard on 5-8 September 1950, 2 October 1950, 20 December 1950, 11-12 July 1951 and 8 October 1951.
9.2 Presentation and Personation in the Communist Party Case in the High Court

The constitutional challenge to the Act commenced on 14 November 1950. The anticipation was intense. It attracted widespread interest inside and outside the High Court, and police were required to contain the interested spectators attempting to gain access to the court. The case concluded on 19 December 1950 – after more than 24 sitting days. Barwick led the team on behalf of the Commonwealth and, according to Justice Dixon, he was backed by 'a grotesquely large number of other counsel'. However, only Barwick addressed the High Court in support of the Act.

According to Marr:

Barwick's relations with the High Court Bench in 1950 were excellent. His frequent appearances during World War II and in the first Banking Nationalisation case meant that he had developed a rapport with the Bench. He was liked with a “special fondness” by McTiernan J, had been a close associate of Kitto J and found a sympathy for his political views in the heart of Latham CJ.

Evatt and eleven other counsel appeared on behalf of the communists and the unions.

Early in the proceedings, Barwick made an application to alter the sequence in which the parties would ordinarily make their submissions so that he could address the Court initially as expected, but defer one aspect of his argument until the plaintiffs addressed the Court. Barwick, it appears, employed this strategy for the purposes of obtaining a forensic advantage. It was Barwick's
preference to be in a position to have 'the last say' and he attempted to secure this. This course of action was vigorously objected to by the plaintiffs' counsel. In response to the first question, the plaintiffs sought to adduce evidence to rebut the recitals of the Act to which the Commonwealth objected. Latham CJ decided that the Commonwealth would make submissions on both questions and that if it decided to leave until its reply a significant part of its material upon question 2 (namely, the validity of the Act), the Court would not object although it would protect the plaintiffs' interests by allowing them a reply if the Commonwealth introduced new material in its reply. Therefore, Barwick succeeded in securing the chance to reply but would not be able to 'trail his coat'.

As a result of Chief Justice Latham's ruling, Barwick, as the single representative for the Commonwealth, would address the Court first followed by the plaintiffs. Barwick would have the right of reply, 'but if when he replies matter is introduced as to which it would not be fair not to allow the plaintiffs to have a reply, the court may be relied upon to protect their interests'.

From the outset, Barwick conceptualised his case by outlining the central questions, then provided the Court with a clear and broad outline of the manner in which he proposed to proceed with his submissions:

The course I want to pursue, if the Court pleases, is this: I want to go through the Act to show what the Act does and then to place various submissions before the Court as to the validity of the Act, the basis of validity as the defendants see it; and that should lead me to a discussion of the preamble and its significance and what weight can be given to it; and from there I should be able to pass into submissions as to the sort of issue which the plaintiffs seek to raise so as to show that it is not a relevant issue on any view.

Barwick's principal argument was that 'the Act was an expression of the Parliament's power to make laws for national defence, the limits of which power had to be left to the Parliament not the court to

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1412 Ibid, p.15. See also Williams, 'Reading the Judicial Mind: Appellate Argument in the Communist Party Case', above n 18, 5-6.
1413 Transcript of Proceedings, The Australian Communist Party and Ors v The Commonwealth of Australia, above n 296, p.15 and 1287. See also Lloyd, above n 879, 199. The hearing proceeded as per Latham CJ's ruling except that after the plaintiffs' reply, the Court allowed the Commonwealth a second reply and then allowed the plaintiffs a short reply to the Commonwealth's second reply: Williams, 'Reading the Judicial Mind: Appellate Argument in the Communist Party Case', above n 18, 6.
determine'. However, from the outset, 'it became clear that the Commonwealth would have no easy ride'.

Barwick commenced by outlining the recitals of the Act. He outlined the various purposes of the Act and sought to justify it by denying that it was a time of peace, given the expansion of communist power in Europe and Asia. Dixon's biographer, Phillip Ayres, suggested that his presentation was 'high on dialectics' but low on any local or international evidence of any specific subversive acts.

Barwick insisted that the material in the recitals was not opinion but fact. Nevertheless, he argued, the Act's validity did not depend solely on the truth of the recitals; the recitals were simply Parliament's reasons for legislating, and the validity of the Act rested on the defence power.

It was Barwick's submission that the High Court was required to accept the conclusions in the recitals; namely, that Australia was at war with communism. From this, it was the Commonwealth's contention that the Act was valid under the defence power and all provisions of the Act were therefore justified.

Barwick submitted that the High Court was not privy to the evidence which was used by Parliament for the purposes of justifying the enactment, and that much of the information used would be inadmissible in a court of law since the courts, unlike Parliament, are bound by rules of evidence. He

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1415 Maher, 'Downunder McCarthyism: The Struggle Against Australian Communism 1945-1960: Part Two', above n 1379, 444. From the outset, Barwick summarised the actions:

The actions, as appears from the Case Stated on p.2, fall broadly into two classes. The first is an action by the Australian Communist Party, which is the first on the record, and joined with that Party there are two personal plaintiffs who are members of the Party. In the case of the seven other actions the actions are brought by organisations of which one is not a registered industrial organisation but except for that difference there is no other distinction between the action it brings and the actions of the other parties.

The section that the Australian Communist Party attacks is more particularly Section 4 and the industrial unions and the unregistered industrial body attack other sections of the Act but in the long run they will probably be relying upon some invalidity of Section 4 as well. Then there are individual plaintiffs along with the organisation in the seven actions, these being persons who would have had an interest to impugn probably both Section 5 and Section 9 of the Act, to which I will make reference in a moment.

See Transcript of Proceedings, The Australian Communist Party and Ors v The Commonwealth of Australia, above n 296, pp.4-5.

1416 Kirby, 'HV Evatt, The Anti-Communist Referendum and Liberty in Australia', above n 1380, 103.

1417 Barwick stated:

The first step in my argument is to take the Court through the Act to see precisely what it is and what it characterises as far as we can. The Act is the Communist Party Dissolution Act 1950.

The preamble contains in all nine separate recitals. The first three are recitals as to constitutional power, the first as to paragraph 6 of Section 51, the second as to Section 61 and the third as to paragraph 39 of Section 51. With respect to none of these are any questions submitted but it may be profitable if I read these recitals at the outset.


1418 Ayres, above n 50, pp.220-221.

1419 Ibid.

1420 Marr, above n 8, p.85.
faced increasing questioning from the Court because of the implications associated with attempting to exclude the High Court from determining the validity of the Act.\textsuperscript{1421}

In his habitual manner, Barwick meticulously and methodically outlined and summarised the Act.\textsuperscript{1422} He did so by dissecting it and then analysing individual sections with great care and precision. He adopted this approach to ensure that the Court was familiar with the entire Act and its operation. This also afforded Barwick the opportunity of attributing to the various sections of the Act his own interpretation and then conveying this to the Court.

After he completed his outline of the individual sections of the Act, Barwick summarised the Act with great skill in little more than four paragraphs. He demonstrated his ability to simplify complex matters. Barwick submitted:

\begin{quote}
To characterise the Act I would attempt to sum it up in this way, if the Court pleases. Firstly it disbands the Communist Party, disperses it. It makes provision for the realization of its property and payment of its debts, with incidental provisions for obtaining possession of it and for judicially resolving disputes as to it, and it provides for its forfeiture on, no doubt, the common law notions that persons who became in breach of the law or became unlawful lost the protection of the State as to their property. Secondly it takes steps to prevent re-organization, either covertly or overtly, of the Association — that is by means of Section 7, by direct command under Section 7, and also by dispersal of its funds. That is also a step towards preventing the re-assembly of the Party in some other way.

It then authorises the disbanding of any bodies other than registered Unions which (a) affiliated with the Party or (b) are likely to be controlled or used by members of the Party or by Communists or by others for Communist purposes.

That, I think, sets aside substantial all the qualifications, basically, of Section 5(1).

It provides for the disbanding of any of those bodies who qualify in that way, whose continued existence may be prejudicial, in the view of the Governor General, to security or defence or to the maintenance of the Constitution, and that would satisfy, in my submission, all of Section 5 and what flows from it, putting on one side merely machinery results.

Lastly, it authorises the declaration of persons who are or who have been Communists and who may be thought likely to engage in activity — I use the word "subversive" as a general description of what is in Section 9 — subversive activities, and prevents them from holding office under or making certain contracts with the Commonwealth, and from holding office in industrial organizations which are connected with vital industries. I am not troubled about
\end{quote}

\textsuperscript{1421} Transcript of Proceedings, \textit{The Australian Communist Party and Ors v The Commonwealth of Australia}, above n 296, p.132 referred to in Marr, above n 8, p.85.

\textsuperscript{1422} Transcript of Proceedings, \textit{The Australian Communist Party and Ors v The Commonwealth of Australia}, above n 296, p.18.
the trimmings of that, as to how they are declared, but in summation those are the three things the Act does—it disbands the Communist Party and disperses its members and its funds and takes ancillary steps to prevent it reorganising.\textsuperscript{1423}

Barwick had commenced his submissions in his customary way—designed to seize the attention of the decision-makers.\textsuperscript{1424} His ability to employ an apt analogy was again highlighted in his attempt to demonstrate the Act’s preventative character:

... the Act could only be characterised, in my submission, as a preventative Act. It of course proceeds on the broad theory that you do not have to wait until the contents of the Trojan Horse have been spilled into your city, it acts on the theory that you can burn the horse before the doors open.\textsuperscript{1425}

Barwick also used evocative language to emphasise the dangers of invalidating the Act.

At an early stage, Barwick indicated to the Court that the Commonwealth would rely on the defence power in section 51(vi) of the Constitution to support the main part of the Act as well as the executive power in section 61 together with the incidental power in section 51(xxxix) or powers arising from the Commonwealth’s existence as a body politic.\textsuperscript{1426}

Barwick argued that the Act was valid under the defence power and that there was a rational and/or logical connection between the purpose, namely, the defence of Australia, and the relevant provisions of the Act.\textsuperscript{1427} He relied on \textit{Farey v Burvett} (1916)\textsuperscript{1428} in support of this proposition.\textsuperscript{1429}

\textsuperscript{1423} Ibid, pp.25-26.

\textsuperscript{1424} Marr, above n 8, p.83.

\textsuperscript{1425} Transcript of Proceedings, \textit{The Australian Communist Party and Ors v The Commonwealth of Australia}, above n 296, p.27. The Act is preventative in relation to conduct likely to prejudice the defence of the country, the execution and maintenance of the Constitution and of the laws of the Commonwealth—it is directed to the prevention of an apprehended danger. See also \textit{Australian Communist Party v Commonwealth} (1951) 83 CLR 1 at 18 and 103-104. Barwick relied on \textit{R v Hush; Ex parte Devanny} (1932) 48 CLR 487 at 506 and 509. Barwick employed an excellent analogy to demonstrate his submission that the forfeiture of the property of members of the Communist Party is a preventative measure. He submitted:

Yes, but the reason for adding the taking of the property is not merely to punish, but to prevent. If you find a man selling liquor without a licence and you find in his cellar hundreds of bottles you will not find (sic - fine) him the amount of the value of the bottles, you are going to take them to ensure that he shall not continue the business the next morning.


\textsuperscript{1426} \textit{Australian Communist Party v Commonwealth} (1951) 83 CLR 1 at 19, 103-104 and 107. Barwick relied on \textit{Burns v Ransley} (1949) 79 CLR 101 at 109, 111, 115-116 and 120 and \textit{R v Sharkey} (1949) CLR 121 at 135, 145, 148, 157-158 and 163 to support this proposition. The creation of the Commonwealth with a Constitution and power of law-making necessarily implies a power in the Parliament to pass laws to protect the body politic and its system of laws against actual and apprehended threats to its existence. See also Transcript of Proceedings, \textit{The Australian Communist Party and Ors v The Commonwealth of Australia}, above n 296, pp.28-29; Williams, ‘Reading the Judicial Mind: Appellate Argument in the Communist Party Case’, above n 18, 8.

\textsuperscript{1427} Only a possible logical connection, not factual, connection with defence need be shown: \textit{Australian Communist Party v Commonwealth} (1951) 83 CLR 1 at 24-25. Whilst Barwick used \textit{Australian Woollen Mills Ltd v Commonwealth} (1944) 69 CLR 476 at 490 in support of this proposition, it may not have been as supportive.
This submission resulted in a flurry of questions from the Court. Barwick endured a "barrage of interjections" and, according to Marr, was given a 'rough reception' by the Court. According to Williams, '[i]nterjections from the Bench left Barwick on the back foot'. Initially, Barwick responded well; he did not wilt under the pressure and was stout in the face of attack. However, at the same time, Barwick appeared to show signs of impatience and frustration. As will become apparent, this was the first of many instances throughout this case where Barwick appeared to become uncharacteristically frustrated with questions from members of the Court. This was not typical of Barwick's advocacy. According to Williams:

In order to maintain some semblance of flow in his argument Barwick often found himself replying "quite" instead of delving into the question. Barwick was unable to muster the brilliant advocacy that brought him victory in the Bank Nationalisation cases. He could not

as he thought. According to Williams, this case contradicted Barwick's position (see Australian Woollen Mills Ltd v Commonwealth (1944) 69 CLR 476 at 488 per Latham CJ) and Barwick also ignored several other conflicting High Court decisions from the 1940s which established that a connection needed to be real and substantial so as to attract the defence power, such as, Victoria Commonwealth (1942) 66 CLR 488 at 506-509; Dawson v Commonwealth (1946) 73 CLR 157 at 179; Real Estate Institute of New South Wales v Blair (1946) 73 CLR 213 at 224; Victorian Chamber of Manufacturers v Commonwealth (1943) 67 CLR 413 at 418. See also Williams, 'Reading the Judicial Mind: Appellate Argument in the Communist Party Case', above n 18, 8. 1428 See Transcript of Proceedings, The Australian Communist Party and Ors v The Commonwealth of Australia, above n 296, p.1045. See also Williams, 'Reading the Judicial Mind: Appellate Argument in the Communist Party Case', above n 18, 8.

Barwick submitted that the Act is essentially a defence Act with or without the recitals. However, even without the recitals, based upon what the Court should take judicial knowledge, a sufficiently rational connection exists between the situation and the law to bring it within power: Australian Communist Party v Commonwealth (1951) 83 CLR 1 at 20-22. 1430 Transcript of Proceedings, The Australian Communist Party and Ors v The Commonwealth of Australia, above n 296, pp.29-30.

Marr, above n 8, p.84. 1431 Ibid. 1432 For example, the exchange between Chief Justice Latham and Barwick demonstrated Barwick's ability to think quickly under pressure and respond to judicial questioning:

Latham CJ: Who determines whether it is desirable or necessary, whichever may be the proper question to ask, to have a fortification?

Barwick: Essentially the Executive or the Parliament. That is the necessity in that sense, the need for the fort, the kind of fort, how many of them, and all those things are exclusively for another branch of the Government.

Latham CJ: How far does that principle go? For the Executive or if the Parliament determines that certain acts of defence are necessary, then in what circumstances may a Court say, "We do not think so?"

Barwick: This point is not an easy one - but at a point where the Court can say from its judicial knowledge and nothing more; where it can say, "We can see no rational and no logical connection between defence and this provision"


For example, in the previous exchange, Barwick interrupted Justice McTiernan. See above from Transcript of Proceedings, The Australian Communist Party and Ors v The Commonwealth of Australia, above n 296, pp.29-30.
make the transition from his accustomed role of attacking legislation to the unfamiliar role of defence.\textsuperscript{1436}

It appears that Barwick responded this way to allow himself to return to the order of his planned submissions; this departed from his typical approach which involved engaging in judicial dialogue.

At this point, Barwick introduced one of his fundamental submissions, namely, that the Court was unable to interfere with Parliament’s power to ban the Communist Party if the law is rationally connected with defence.\textsuperscript{1437}

According to Marr, the fundamental issue was the connection between the legislation and the defence power. Barwick needed to draw on all his powers of advocacy to establish this connection:

Barwick was at the nub of the case: it was a matter of connection. Was it enough that the declaration of communists was somehow logically connected to the defence of the nation, or was a more substantial and practical connection needed to bring ‘declarations’ within the defence power? What connection did there have to be between strikes on the Cessnock coalfields and the war in Korea to make the ‘declaration’ of a few miners valid? Barwick argued a bare logical connection was enough and the rest was to be left up to the government. Once the logical connection was there, the court could not interfere. He moved on to try to persuade the court that Australia was at war. It called for all his powers of advocacy. If he won the point everything else would follow for in all the difficult and contradictory cases decided by the High Court during the Second World War (cases many of which he had fought), one principle was clear: when the chips are down the High Court is not going to stand in the way of the war effort.\textsuperscript{1438}

Although his argument rested on the contention that Australia was at war, Barwick cited various authorities in support of his submission that the defence power would support many activities in

\textsuperscript{1436} Williams, ‘Reading the Judicial Mind: Appellate Argument in the Communist Party Case’, above n 18, 9. There are numerous examples of Barwick reply ‘quite’: see for example Transcript of Proceedings, \textit{The Australian Communist Party and Ors v The Commonwealth of Australia}, above n 296, pp. 13, 27, 29, 39, 44, 67, 125, 1034, 1045, 1061.

\textsuperscript{1437} The relevant exchange that occurred proceeded as follows:

\begin{verbatim}
Barwick: ... the Court has a function, the Court can say, “granted that you hold that reason, yet your law is not rationally connected with defence”. It cannot say to Parliament “you did not hold that reason”: It could say, “you stated your ground, your reason for the declaration; we, the Court, have the function of saying whether the law you made is a defence law, and the ground for that is to see whether there is any rational connection between the reason you had held and the thing you have done."

Latham CJ: Are you submitting that the Court could not challenge the bona fides of Parliament by saying that Parliament did not hold -- -

Barwick: -- - the reason. Yes Your Honor.
\end{verbatim}


\textsuperscript{1438} Marr, above n 8, p.84.
times of peace. He again adopted the technique of referring the Court to what particular judges had previously said including that the defence power permitted enactment of legislation in times of peace to prevent future threats from arising.

Barwick requested that the Court take judicial notice of a number of matters relating to the current threat of communism. He submitted that wars do not begin with a formal declaration and that a period of 'uneasy apprehension is all that is needed'. Barwick attempted to persuade the Court that Australia was at war so as to justify the invocation of the defence power and the introduction of the Act.

He then returned to his main submission that the Act was supported by the defence power. Barwick cited various authorities to demonstrate that a law which enables the Governor-General to make a declaration after being satisfied that the continued existence of a body of persons, such as the Communist Party, is prejudicial to the defence and security of the Commonwealth was a law with respect to defence. He referred to the case of Lloyd v Wallach (1915) and Welsbach Light Company of Australasia Ltd v The Commonwealth (1916). However, he misrepresented one of the authorities and this was detected by Justice Dixon. Citing an authority incorrectly can damage an

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1439 Transcript of Proceedings, The Australian Communist Party and Ors v The Commonwealth of Australia, above n 296, pp.36-37.
1441 Transcript of Proceedings, The Australian Communist Party and Ors v The Commonwealth of Australia, above n 296, pp.38-40. There are 20 principal factors in the public situation as at the date of passing the Act of which the Court should take judicial knowledge – such as that it was a period of uneasy apprehension of international conflict, communism is a world movement, communists ‘march together’ and communists sympathise with the aims and ambitions of Soviet Russia: Australian Communist Party v Commonwealth (1951) 83 CLR 1 at 21-22. See also Williams, ‘Reading the Judicial Mind: Appellate Argument in the Communist Party Case’, above n 18, 10.
1442 Marr, above n 8, p.84.
1443 Transcript of Proceedings, The Australian Communist Party and Ors v The Commonwealth of Australia, above n 296, p.39; see also Marr, above n 8, p.85.
1444 Transcript of Proceedings, The Australian Communist Party and Ors v The Commonwealth of Australia, above n 296, p.45. Barwick submitted: ... I submit that in a situation such as that the defence power is certainly wide enough to authorize the disbanding of those associations which may rationally be thought to be a danger to the safety and defence of the country or to the maintenance of the Constitution; and that form of statement by me is the correct way in which it should be approached – might Parliament rationally think that the then state of the country called for the disbanding of the Communist Party, the prevention of communist influencing industrial policy of unions closely associated with the vital industries of the country. That is the third way in which I wanted to put it.
1445 20 CLR 299.
1446 22 CLR 268.
appellant advocate’s credibility, and Barwick moved quickly to correct himself while retaining the reference:

Barwick: In Wellsbach Light Co. of Australasia v The Commonwealth (22 CLR) – it begins at page 268 – there are passages at page 273 where the proclamation in that case is set out in the judgment of the Chief Justice. It was a proclamation whereby the Governor General declared certain bodies “Under the influence or control or carried on for the benefit of persons in enemy countries”.

Dixon J: In that case the proposition was stated in the alternative – the Judge said he could not find different facts.

Barwick: Yes ... I could not claim that the Wellsbach case is directly in the line of the authorities, but it is so close as to warrant the citation.1447

Barwick also attempted to introduce humour into his submissions when referring to the Jehovah’s Witnesses Case.1448 In this case, the High Court had held that the National Security (Subversive Associations) Regulations (Cth) were invalid on the grounds that they could not be justified as an exercise of the defence power:1449

[The] cases you find with respect to Jehovah Witnesses are completely incommensurate and fantastic so far as the consequences are concerned and that serves to show that the thing is not conceived as a law of defence at all ...

I was not thinking for a moment that Your Honor thought Jehovah Witnesses were fantastic.1450

A short time later, Barwick interrupted Justice Dixon, and showed the early signs of impatience, that would plague his submissions throughout the case. Impatience often manifests in a lack of courtesy, and this exchange suggests that he began to experience frustration and failed to keep it under control:

1447 Transcript of Proceedings, The Australian Communist Party and Ors v The Commonwealth of Australia, above n 296, p.47.
1450 Transcript of Proceedings, The Australian Communist Party and Ors v The Commonwealth of Australia, above n 296, p.56.
Dixon J: [referring to Barwick's submission that Walsh v Johnson involved an immigration law and it didn't matter in this case that the operation of the law depended on the Minister's opinion] That did not make it any less immigration; that is why.

Barwick: It was because you had a law on the subject, simply because aliens were the people who could be selected.

Dixon J: If you said in the opinion of the Governor-General the alien was not born in Australia . . .

Barwick: I will come to say something on that in a moment . . .

The Court was clearly troubled by the powers of declaration granted to the Governor-General. The Act did not allow for a Court to make a declaration based on an objective test but instead left this to the satisfaction of the Governor-General. The 'sections represented a denial of the High Court's role as the sole arbiter of the limits of Commonwealth constitutional power and thus challenged the Court's position in Australia's federal structure'. According to Williams it appeared that 'Barwick either did not realise or did not initially wish to recognise that the Act breached the constitutional maxim that a "stream cannot rise above its source"'. Barwick relied on Ex parte Walsh and Johnson; In re Yates (1925) to support his submission that 'once an Act is found to be a defence Act it is valid despite its operation being dependent upon the opinion of the executive'. However, Barwick's ability to encapsulate his submission in simple terms remained, and is evident from the following submission:

The criterion is, is the Governor-General satisfied that the existence of a body is prejudicial to defence. It is a body that is, by its very existence, prejudicial to defence. That surely is, to

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1451 Ibid, p.63.
1452 Williams, 'Reading the Judicial Mind: Appellate Argument in the Communist Party Case', above n 18, 12.
1453 Ibid.
1454 37 CLR 36. Ex parte Walsh and Johnson; In re Yates (1925) 37 CLR 36 affirmed:
1. the legislative power to delegate to the Executive the selection or identification of the bodies or persons upon or with respect to whom a law upon some granted subject matter is to operate; and
2. that if the only connection of the legislation with the granted power is the unexaminable opinion of the Executive as to ambit of the power the Act is invalid. However, the Parliament can validly place in the hands of the Governor-General the determination of the facts upon which depends the identification or selection of the bodies or persons to be affected by the law.

See Australian Communist Party v Commonwealth (1951) 83 CLR 1 at 98-99 and 105-106. Barwick relied on Lloyd v Wallach (1915) 20 CLR 299; Weisbach Light Company of Australasia Ltd v Commonwealth (1916) 22 CLR 268 and Ex parte Walsh (1942) 48 ALR 359. See also Williams, 'Reading the Judicial Mind: Appellate Argument in the Communist Party Case', above n 18, 12. Barwick submitted that the declaration of the Governor-General does not involve an exercise of judicial power - the Governor-General is exercising delegated legislative power not judicial power: Australian Communist Party v Commonwealth (1951) 83 CLR 1 at 111 and 113. Barwick relied upon Waterside Workers' Federation of Australia v J. W. Alexander Ltd (1918) 25 CLR 434.
1455 Williams, 'Reading the Judicial Mind: Appellate Argument in the Communist Party Case', above n 18, 12.
that point, a matter of defence. We will assume that the opinion is rightly and rationally
given. You start with this, that the existence of the body is prejudicial to the welfare of the
country, and what the Parliament does about that is, in my submission, entirely its own affair.
If it says, in its wisdom or unwisdom "We will put that body out of existence . . ."1456

Barwick’s submission was essentially that the Court could not review the Governor-General’s
opinion. This was not met favourably by the Court and Justice Webb in particular, who did not
appear to favour Barwick’s approach of ousting the Court’s involvement.1457

As he made submissions in relation to various sections of the Act, a question from Justice Dixon
forced him to concede that he had not considered a particular issue. Whilst Barwick demonstrated
honesty in making this concession it was quite uncharacteristic and may indicate a lack of
preparation:

Barwick: ... my submission is – and I did not want to develop it very much – that
[recital] 4 is sufficiently bound up with 5 and 9 and that there was enough in
the text to show that 4 was itself a law of defence – that the dissolution of
this Party was for a reason of defence.

Having a recital, I do not need to press that argument very far because I
want to pass to the effect of the recital in relation to that.

Dixon J: Just before you leave 5, you notice that in that Section there is no[t] any
express declaration that it shall be an unlawful association; that is left to the
definition clause.

Barwick: Yes.

Dixon J: And the definition clause says that it has to be declared an unlawful
association. Do you take the operation of 5 and 4 to mean these bodies are
unlawful associations for the purposes of Part IIA of the Crimes Act?

Barwick: I could not answer that offhand, Your Honor. I had not considered that but I
shall. I should have thought offhand that the unlawful associations,
unlawful for this purpose and not for general purposes - - -

1456 Transcript of Proceedings, The Australian Communist Party and Ors v The Commonwealth of Australia,
above n 296, p.74.
1457 Ibid, pp.74-75. At one point, Justice Dixon acknowledged the difficulty of Barwick’s task as well as one of
the inherent difficulties of appellate advocacy:

I am only saying that it is one of the reasons – of course you have certain Judges to deal with and no
doubt each has a different mind on these matters. It was one of the reasons why I was drawing your
attention to the fact that there are three different subjects dealt with in the maintenance of the
Constitution and the enforcement of the law generally.

Transcript of Proceedings, The Australian Communist Party and Ors v The Commonwealth of Australia, above n
296, p.68.
Dixon J: Only for this Act, and it does not generally become an unlawful association for Common Law Constitutions.

Barwick: That is something I had not considered. Barwick then moved to his next submission that, even without the recitals, the Court should take judicial notice that a sufficient rational connection exists between the facts and the legislation to bring it within the defence power.

In response to a comment about recital 9, Barwick employed powerful and emotive language to demonstrate the need for the legislation and the imminent danger.

Well, Your Honor may say that No.9 is a recital of an emergency, but if you have in your midst a body devoted to accelerating revolution, and having a design to overthrow and dislocate the established system of Government, that is hardly characterised by any other language than by saying that you have an emergency, you have a public situation which has to be dealt with.

Barwick's regular use of powerful and emotive language appeared as an attempt to almost 'scare' the Court into upholding the legislation. Although when used sparingly, such language can have great persuasive effect, when used repeatedly, as Barwick seemed to do here, its effect is inevitably diminished. The technique appeared to be overused in this case and may reflect a more fundamental deficiency with Barwick's submissions, namely, a lack of substantive arguments.

Immediately following the exchange, Barwick was asked a question by Justice Dixon that he was unable to answer. It was unusual for Barwick not to be able to respond immediately. Again, this may suggest that Barwick had not prepared in his usual thorough manner. He responded honestly and indicated that he would review this and get back to Justice Dixon the following day:

Dixon J: I do not understand the issue in that case [referring to Re Validity of the Wartime Leasehold Regulations (1950)]. Was it competition between some power in Section 92 and the general overriding power in Section 91, or what?

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1458 Ibid, pp.81-81A.
1459 Barwick summarised his submissions in this regard as follows: In my submission, if the Court takes the step with me that the matters to which I have referred are within judicial knowledge, then, recitals apart, the necessary nexus between this law and the defence of the country is readily seen.

1460 Ibid, p.118.
1461 2 DLR 1.
Barwick: I cannot answer Your Honor offhand, because I do not know the detail of that. I am told that is right, but I do not know it of my own knowledge. I will look at it and answer Your Honor tomorrow as to that, if I may.  

For whatever reason however, Barwick failed to address this question the following day and it remained unanswered. 

Barwick was followed by Laurie, leading for the Communist Party and then the other counsel for the plaintiffs, including Evatt for the Waterside Workers' Federation and the Federated Ironworkers' Association. Whilst Barwick had argued on behalf of the Commonwealth that the law was validly passed under the defence and nationhood powers, in response, Evatt and others powerfully submitted that the Act was invalid due to its derogation of civil liberties and the democratic process. Evatt 'attacked the preamble as a mere series of assertions by which the legislature was endeavouring to 'lift itself by its bootstraps', and dwelling on the unchallengeable aspect of the power given to the Governor-General to sustain the Act'. In his diary, Dixon noted of Evatt: 'I had never heard him to more advantage and he made a considerable impression'. Five days later, however, Dixon wrote: 'Evatt continued. A dreary repetitious argument'.

**Barwick's Reply**

On resuming his submissions, Barwick employed the use of a powerful opening to criticise the plaintiffs' submissions. He also used humour to suggest that the weight of numbers of plaintiff counsel had produced submissions that lacked coherence:

> if the Court pleases, my friends have proffered a great number of arguments and between the arguments – probably rather due to the numerical strength of my friends than anything else – there is very little coherence so far as my task of replying to them is concerned.

> if one were minded to debate the matter with my friends no doubt I could play off one argument of one counsel against arguments of other counsel and cancel a lot of them out.

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1463 On 17 November 1950, Chief Justice Latham repeatedly attacked Laurie. This resulted in Dixon commenting in his diary that the Chief Justice 'displayed an unrestrained hostility that I thought very unwise not to say unjudicial': Dixon Diary, 17 November 1950, Owen Dixon, Personal Papers; See Ayres, above n 50, p.221.
1464 Williams, 'Communist Party Case', above n 77, p.122.
because one cannot help but be impressed by the circumstance that they do not all run in the same direction.

So far as the actual questions are concerned, they all seem — in the main — to have directed themselves principally to the question of the validity of the statute.1467

Barwick outlined, summarised and conceptualised his approach in his reply, albeit with what appears a touch of arrogance:

I propose to address myself in reply to those arguments which appear to us to be the principal arguments placed against us. There are a great number of arguments which in our submission answer themselves and as to those, unless the Court has any difficulty with respect to them, we do not propose to devote very much, if any, time to them.1468

Barwick conceptualised and summarised his submissions into five key propositions (in a similar way to what he did in the Bank Nationalisation Case).1469 An interesting exchange between Justice McTiernan and Barwick followed in which it appears Barwick lost his composure and used sarcasm.

1467 Transcript of Proceedings, The Australian Communist Party and Ors v The Commonwealth of Australia, above n 296, p.1034. Barwick, through the cunning use of language, made a subtle and sarcastic reference to the length of the plaintiffs’ submissions:

May I begin by reminding the Court of the proposition to which the defendant took at the inception. It is a long time since and whilst I do not propose in any sense to repeat an argument in chief, nor to expand it, it is as well that I should remind the Court of the propositions which I presented to the plaintiffs for their treatment, if they felt inclined to treat them.


1469 The five propositions were as follows:

The propositions which the defendant put at the outset I think can be broken up into five propositions so far as they touch the defence power, two so far as Section 51(xxxix) is concerned.

They are these: they first of all submit that the Act in its entirety was upon its face an act within the Defence power, without the aid of recitals and without the circumstances at the time of its passage; that is to say this Act would be a good act whenever passed.

The second submission, which was no more than a slight modification of that proposition, was this: that the whole Act, excluding Section 4, was an Act plainly, obviously, within the Defence power, and that Section 4 with the aid of the recital of the reason for its enactment was an act within the Defence power.

A third submission which perhaps is a further variant of the second — and only a variant of it — is that the entire Act with the recitals — those recitals affording the Parliamentary reason for the enactment and no more — was a defence act, an act within the ambit of Section 51(vi).

The fourth submission, which was different and a departure from the earlier three, was that the Act in the then current circumstances as judicially known was a Defence Act, or within the power of Section 51(vi).

The fifth submission we put was that the Act was valid under Section 51(vi) because there was a Parliamentary assertion that it was enacted for defence, and there was at the very lowest no judicial knowledge which contradicted that assertion or made it appear untenable.

We then put two submissions so far as the Act depended upon Section 51(xxxix); one was that the Act was a valid exercise of power under Section 51(xxxix) because it provided aid to the execution of the powers vested in the Executive by Section 61.

Latham CJ intervened in an apparent attempt to assist Barwick.\textsuperscript{1470} This was a recurring feature of Barwick's advocacy in this case. The exchange arose after Justice McTiernan had outlined his position to Barwick very clearly:

\begin{quote}
McTiernan J: You are asking the Court to take judicial notice of this "public situation" when there is no war existing. How is to be described in order that the Court might be able to say whether a particular measure could reasonably be considered as appropriate to meet that application? Is not it necessary that the Court should have some appreciation of the nature of the application? That is, not simply mentioning the words. That is a vague expression. In order to carry out your criterion, the Court must be able to compare one thing with the other.

I will say frankly that the words "public situation" do not convey very much to me at the moment.

Barwick: If the Executive learn tomorrow that there was an (sic) hostile fleet off the coast of Australia, it would mean something to you?

McTiernan J: Yes, it would.

Barwick: It would not be war?

McTiernan J: That would be a concrete thing.

Latham CJ: Would the Government have to come to this Court and say, "Here is some legislation we have passed: we inform you that there is a hostile fleet within 200 miles of this country; we do not know what it is going to do, and that is why we say this legislation is good?"

Barwick: No. If the other view is right, let us hope that nobody like Guy Fawkes gets busy here, because we would have to wait until after the gunpowder has gone off before we could do anything about it.

McTiernan J: A hostile fleet means something: but what does this statement "public situation" mean?

Barwick: It may be no more than apprehension of the Executive in some instances. If the Executive really thought tomorrow that there was a hostile fleet coming, and they were mistaken, can it be said that they have no increase in their defence power because there is this apprehension?
\end{quote}

\textsuperscript{1470} Ibid, pp.1049-1050.
McTiernan J: I should not think that would be denied for one moment, as far as I am concerned. All I am seeking is some better information as to what is meant by the expressions "public situation" or "public apprehension", or is it war, or what?

Barwick: May we go back to 1938 – Munich.

Latham CJ: Does not your argument involve this, and is not this an answer: that in some domains of constitutional power the opinion of the Executive, which is responsible, is itself a matter of agreement?

Barwick: Yes.

Latham CJ: And do you not have to go as far as this: that it may be in some matters the opinion of the Government may be the foundation for legislation under a power relating to defence?

Barwick: I do.

Latham CJ: Whatever the facts may be?

Barwick: Whatever the true facts may be. I do go that far.1471

Barwick then took the Court to the relevant passages of *Ex parte Walsh and Johnson; In re Yates* (1925)1472 and referred to the relevant passages in great detail.1473 It was authority for the proposition that 'if the constitutionality of a measure depended on the existence of a fact, legislation would be unconstitutional if it purported to justify the taking of that measure on the basis of the Executive's assessment that the fact existed'.1474 Barwick applied the principle of citing authority with care by only referring the Court to the most relevant passages and he explained the relevance of these passages as well as the manner in which these passages supported his submissions.

At one point, Barwick failed to pick up a definite signal from Justice Dixon in relation to the difficulties he was experiencing in understanding a particular submission. Instead of addressing this concern, Barwick ignored it and proceeded to finish his submissions.1475

1471 Ibid, pp.1047-1048.
1472 37 CLR 36.
1475 The exchange proceeded as follows:

Barwick: The relation of that to this problem is this: it was put to me that it would be unusual to regard the Act which gave those powers as valid and unusual to regard the satisfaction of the validity of the declaration as examinable. The way I am putting it is that the right construction – what this Act does is to give power to make a valid declaration, valid qua defence.
It is apparent that Barwick was becoming increasingly frustrated with the constant interruptions to his submissions and was losing patience with the incessant questioning.\(^{1476}\)

Barwick also refused to address certain issues raised by Chief Justice Latham, apparently from a desire to continue with his submissions rather than get distracted by, what were, in his eyes, peripheral matters. This was uncharacteristic of Barwick and does not accord with the ideals of appellate advocacy:

<table>
<thead>
<tr>
<th>Latham CJ</th>
<th>Whenever an intelligent human being makes up his mind that a proposition is true he has to have some idea as to the meaning of the words in the proposition?</th>
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<tr>
<td>Barwick</td>
<td>He has to construe them for himself but he cannot misdirect - -</td>
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<tr>
<td>Latham CJ</td>
<td>Is there any proposition which can be uttered which does not involve a proposition of law?</td>
</tr>
<tr>
<td>Barwick</td>
<td>I do not really want to enter into that. I think I could find a few but that is not what I am on.(^{1477})</td>
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In the exchange with Justice McTiernan which followed, Barwick made a sarcastic comment; sarcasm began to creep into many of his submissions:

<table>
<thead>
<tr>
<th>McTiernan J</th>
<th>You read the section adding the words you think necessary?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Barwick</td>
<td>I would not add a word, I think they are there. It is others who add words, not me.(^{1478})</td>
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</table>

Justice Kitto then offered a suggestion in relation to the manner in which Barwick could express his argument. Instead of being flexible and altering his arguments based on the clear message from a judge, Barwick dismissed the suggestion as too complicated:

<table>
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<tr>
<th>Kitto J</th>
<th>I suppose you could express your argument by saying that sub-section 2 should be construed in the same way as the Legislature has it in Section 9 [referring to section 5(2)], with a new sub-section 1(a) to the effect that the section applies to activities and to conduct constituting of activities...</th>
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<tbody>
<tr>
<td>Dixon J</td>
<td>... Mr Justice Isaacs. I do not feel that I have got a full grasp of what you are saying now, but I do not want you to address yourself to it now if you prefer to go on with Mr Justice Isaacs.</td>
</tr>
<tr>
<td>Barwick</td>
<td>I was contrasting what he said with what Chief Justice Knox said, and I would like to finish it. I would prefer to go on now and just contrast the two.</td>
</tr>
</tbody>
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\(^{1476}\) Ibid, pp.1073-1074.

\(^{1477}\) Ibid, p.1078.

\(^{1478}\) Ibid, p.1084.
prejudicial to security, and the Governor-General is satisfied that the person is likely to engage in activities to which the section applies.

Barwick: Yes. I have thought of switching my argument to 9(1) but I think it would complicate it.

If the person is engaged in activities to which this section applies and there was a definition prescribed in a different sub-section, that would express what I am trying to say.\(^{1479}\)

On one view, Barwick was exhibiting courage by standing by his argument. However, it can also be considered inflexibility and a failure to listen to the Bench.

Barwick then launched an attack against the plaintiffs in relation to the manner in which they applied the propositions that he had just outlined. He adopted this tactic to highlight for the Court the differences in their respective approaches and to discredit the plaintiffs' submissions.\(^{1480}\)

In response, Justice Dixon expressed his concerns about Barwick's submissions; however, Barwick did not address these concerns or attempt to do anything to alleviate them. He further exacerbated his error, by appearing to be discourteous towards Justice Dixon. This is apparent from the following exchange:

Dixon J: I am confused as to how you get your construction out of Section 9(2). You seem ready to concede this proposition which appears to go a long distance against yourself, but I have not a clear idea of how you get out of its application.

Barwick: I would prefer to say I was never in its application. First of all, I just verbally show what is the substitution you have to make in language to get yourself within Walsh and Johnson. You have to say that Section 9(2) means "Is engaged in activities prejudicial" - you must substitute the words "security and defence" - "to matters with respect to which the Parliament has power to make laws under the power to make laws with respect to naval and military defence". You must substitute them to make any sense out of Walsh and Johnson because that is the whole point.

Dixon J: I do not mind Walsh and Johnson; that has introduced a great deal of confusion in many cases and not the least in this. I am anxious to find out what is really intended by Sub-section 2 of Section 9.

\(^{1479}\) Ibid, p.1085.

\(^{1480}\) Ibid, pp.1099-1100.
Barwick: May I proceed, your Honor? My next step is that the Act will not bear any construction such as I suggest the plaintiffs have to put upon it.  

One of the most significant problems for Barwick in the Communist Party Case was that he inadequately addressed the concerns expressed by Justice Dixon. This was exacerbated by responding in what appears to be a discourteous manner. In light of the influence that Justice Dixon held over the High Court during his tenure particularly in the immediate years preceding his elevation to the Chief Justiceship - this was a fundamental error and represented a failure to recognise and appreciate the relevance of the personalities of the Court.

In response to a comment from Justice McTiernan, Barwick's response suggests that arrogance was also creeping into his submissions:

McTiernan J: It is suggested that this question of security and defence refers to a subject matter within the subject matter of the power – that it is not the subject matter of power itself but it is something within the area of the subject matter.

Barwick: That would not hurt me.

On a number of occasions during his submissions, Barwick was forced to concede that he may not have made himself clear. Such concessions were not made or observed in the Bank Nationalisation Case. Here, however, it appears that the members of the Court were continually trying to grapple with Barwick's submissions and were experiencing considerable difficulty in understanding them. This resulted in constant judicial intervention. This may suggest that Barwick's submissions were based on fragile foundations.

At one point, Chief Justice Latham conveyed the difficulty that he was experiencing in understanding a comment made by Barwick. Barwick attempted to explain this again and, this time, demonstrated considerable patience in doing so. Chief Justice Latham referred to it as a 'final effort' suggesting that Barwick had numerous opportunities to clarify the comment and this was effectively his last opportunity.

It is clear that the members of the High Court were finding it difficult to agree with Barwick's submission that the Governor-General's decision was not examinable by the Court. In his reply, Barwick acknowledged the difficulties associated with maintaining his submission based on Ex parte

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1481 Ibid, p.1100.
1482 Ayres, above n 50, pp.221-222.
1484 Ibid, pp.1109-1110.
Walsh and Johnson; In re Yates (1925)\textsuperscript{1486} and ousting the High Court from determining the extent of the federal Parliament's power. In Williams' words, the 'adroitly reshaped his argument to use the case as support for the notion that the Dissolution Act could come within constitutional power where the opinion of the Governor-General was reviewable'.\textsuperscript{1487} He stated that:

Walsh and Johnson does not for one moment suggest that you cannot allow the facts to be determined by the Governor-General, if the facts with which he is to deal — and they are objective facts — really exist and relate to a matter within power.\textsuperscript{1488}

In an effort to salvage his argument, Barwick submitted that the satisfaction of the Governor-General in ss 5(2) and 9(2) could be reviewed where it was irrational, arrived at as a result of self-misdirection or the result of a misconception as to the law.\textsuperscript{1489} The following exchange summarised Barwick's predicament:

Barwick: They [the plaintiffs] first say it is committing to the Governor-General an unexaminable determination of the ambit of power, and the argument falls to pieces.

Williams J: Supposing that is right.

Barwick: Then my argument falls to pieces.\textsuperscript{1490}

According to Williams:

Barwick erred in that he had either underestimated the concerns of the Bench or had failed to realise that the Communist Party Case was not merely about establishing a link between the Act and the defence power. The validity of the Dissolution Act depended upon his ability to convince the Bench that the Act would not compromise the Court's role and, to a lesser extent, would not unduly compromise the civil liberties of the Australian people.\textsuperscript{1491}

Barwick's responses to questions on this point indeed suggest that he may not have anticipated such a response, and this may account for his evident frustration at the raft of questions on this issue.

\textsuperscript{1486} 37 CLR 36.
\textsuperscript{1487} Williams, 'Reading the Judicial Mind: Appellant Argument in the Communist Party Case', above n 18, 12.
\textsuperscript{1488} Transcript of Proceedings, The Australian Communist Party and Ors v The Commonwealth of Australia, above n 296, p.1186. See also Williams, 'Reading the Judicial Mind: Appellate Argument in the Communist Party Case', above n 18, 12.
\textsuperscript{1489} Transcript of Proceedings, The Australian Communist Party and Ors v The Commonwealth of Australia, above n 296, pp.74-76, 1036 and 1078. See also Williams, 'Reading the Judicial Mind: Appellate Argument in the Communist Party Case', above n 18, 13.
\textsuperscript{1490} Transcript of Proceedings, The Australian Communist Party and Ors v The Commonwealth of Australia, above n 296, p.1102. See also Williams, 'Reading the Judicial Mind: Appellate Argument in the Communist Party Case', above n 18, 13.
\textsuperscript{1491} Williams, 'Reading the Judicial Mind: Appellate Argument in the Communist Party Case', above n 18, 13.
Barwick’s account of the possible meanings that could apply to sections 5(2) and 9(2), resulted in another fiery exchange with Justice Dixon. A question from Chief Justice Latham on this issue drew a response that can be construed as either showing courage or arrogance:

Latham CJ: When it says “Provided the Governor-General is satisfied he may make a declaration” but that certain material should be considered by the committee, are you submitting it was the intention of Parliament that that material should be placed before the Court for the purpose of determining that it establishes – if leave is granted – that certain persons were engaged in fact in activities prejudicial?

Barwick: I do not need to put it in that way. All I need say is that Parliament did not intend to give the Governor-General power to make an unlawful declaration, it stipulated conditions precedent to the making of the declaration.

Latham CJ: The other view, and the view which you are not prepared to submit, is that Parliament left the whole matter to the Governor-General?

Barwick: It depends upon what Your Honor means. We are getting at cross purposes when you say “the whole matter”.

During an exchange with Barwick, Justice Dixon outlined the ‘stream cannot be higher than the source’ approach, and then attempted to demonstrate to Barwick that certain arguments would not assist his case. Barwick failed to heed this advice.

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1493 Ibid, p.1124.
1494 The exchange proceeded as follows:

Dixon J: The logic of it is that the law could not raise above the Defence Power.

Barwick: True, but if one steps aside from the constitutional nature of the statutes which are being considered and takes the steps from the Constitution Act itself down through the National Security Regulations, in each point it can be regarded as a question of statutory power and the Governor-General has not been delegated any greater power than the Parliament had under the constitutional statute. When you say “If it were shown that he reasonably was of opinion that the regulation was necessary or expedient for defence purposes” you are really saying, “It is shown that he has not the satisfaction which he was required to have under the delegation because what was submitted to him on the proper construction was a power to be satisfied that the regulations were, within the constitutional power necessary for defence.


1495 The exchange commenced with Barwick conceptualising his approach into a fundamental question:

Barwick: This is what I say it is: “Has the Parliament conferred on the Governor-General a power to make an unlawful declaration, or has it confined him to making a lawful declaration? The answer is ‘yes’ to the latter, it must be examinable.” ... I am not touching any constitutional ground at the moment.
Barwick seemed to be constantly at loggerheads with arguably the most influential member of the High Court at the time. This is evidenced by the following exchange:

Dixon J: 
... Have you any case where you can go behind and Order in Counsel and examine the grounds on which it was made; that is, in any dominion or in England?

Barwick: 
I suppose regulations are made by Order in Council. Ordinary regulations under the National Security Regulations are plain examples.

Dixon J: 
They were attacked not because they were outside constitutional power, but because the process of reasoning used in arriving at them was wrong?

Barwick: 
No, because you have not an example in the power to give to the Executive Council to do something within a limited condition of this kind; that is why you cannot point to it.

I shall go to the case of the Welsbach Light Co. v The Commonwealth, and you will see that it was really conceded by the Justices that the proclamation could be dealt with; that the Governor-General's proclamation could be dealt with for the reason that it was dealing with a matter which the Court might think was beyond trading with the enemy.\(^{1496}\)

At one point, Barwick conceded that he had failed to successfully convey his submission on this issue but would make one last attempt at doing so:

... but I regret that I am completely unable to make this point. It does leave to the Governor-General the question of determining whether in the particular circumstances that which he has seen is conduct prejudicial within the true meaning of those words in the statute, but it does not leave to the Governor General the determination of what is the true meaning of the


\(^{1496}\) Ibid, p.1137.
words in the statute. I have endeavored (sic) to put that, which is no novelty, which is not
something new and which is not something the Court has never seen before." 1497

The apparent failure by the members of the Court to understand his submissions may be attributable
to his submissions being too convoluted or too tenuous or his method of presentation being
ineffective. It may also have been a combination of all these factors.

Ultimately, 'the High Court’s finding that the satisfaction of the Governor-General was not
reviewable was crucial to it holding the Dissolution Act invalid'. 1498

At this point, Barwick contended that the Commonwealth’s power expands in time of war and was
not examinable. 1499 He then employed various illustrations to demonstrate the width of the defence
power. 1500 This submission sparked yet another flurry of judicial questions. 1501

Barwick then employed an aggressive, and possibly arrogant, technique whereby he effectively set
the Court a challenge, as if he were defying the Court to invalidate the legislation:

I am putting this argument ... that is, taking the narrowest view of Lloyd and Wallach; this is
not the view I would advance, but, taking the narrowest view of Lloyd and Wallach, the
circumstances in October of this year were such that the Court could say "We cannot think
Parliament was irrational – had no reasonable view – when it thought that in that situation
legislation on this subject was lawful."

That is the task of the Court; that is what the Court would have to negative; it would have to
say that it could not be thought necessary for the protection of this country in October 1950
to legislate upon the topic ....

To that you add this element: that this is a preventive act; it is trying to prevent the thing
from happening. It is not trying the offence after it has happened. How could the Court really
entertain such an enquiry?

One of the judgments says that the Court is the least fitted of bodies to try questions of that
very sort. 1502

Surprisingly, this technique did not appear to evoke any real reaction from the members of the
Court.

1497 Ibid, p.1144.
1498 Menzies, Central Power in the Australian Commonwealth, above n 205, pp.69-73. See also Williams,
‘Reading the Judicial Mind: Appellate Argument in the Communist Party Case’, above n 18, 13.
1499 Transcript of Proceedings, The Australian Communist Party and Ors v The Commonwealth of Australia,
above n 296, p.1166.
1500 Ibid, pp.1167-1168.
1502 Ibid, pp.1172-1173.
Barwick then compared the Nazi Party in Germany to the Communist Party. This effectively introduced the policy implications of the legislation by default in inviting the Court to consider recent history and the mistakes of the past.1503

At this point, Barwick took the very unusual step of handing up written submissions and then proceeded to outline their contents.1504 Barwick was not an advocate who usually relied on written submissions. Shortly before the adjournment on 12 December 1950, Evatt interjected to lodge his objection to Barwick raising various issues in his written submissions which he did not outline in his opening. Barwick may have been attempting to ‘trail his coat’, the technique he had used so effectively in the past. It was resolved by Chief Justice Latham suggesting to Evatt that he would be able to put his ‘very best feet forward’ in due course.1505

Justice McTiernan then made a comment to which Barwick responded in a manner which appears from the transcript as arrogant and even audacious. Arguably, it epitomised Barwick’s frustration in this case:

McTiernan J: I put to you that the Court, speaking for myself, would feel some difficulty about the evidentiary position when asked to draw the conclusion from other matters outside the Court and say there is this emergency when there is no proclamation from the Governor-General declaring a state of emergency.

Barwick: I put in my five submissions to cover that. If Your Honor knows insufficient, and Your Honor has recital 9, and the Parliament says it is necessary for the defence of the country to make these laws, then I submit that Your Honor has enough.

If Your Honor has nothing to contradict that insufficient opinion, then that recital is Parliament’s statement, clearly and ambiguously and this law is now necessary.1506

Following a question from Justice Dixon as to the extent to which espionage fell within the defence power, Barwick and Justice Dixon once again clashed as Barwick attempted to demonstrate that it was not the Court’s role to interfere with the plenary nature of the defence power:

Barwick: Is not that just usurping the Parliamentary function? It may be that Parliament in a time of what looks like peace, with no hostilities – for instance, we have a rocket range, if Parliament decided that the only thing

1506 Ibid, pp.1195-1196.
to do was to provide that spies in the area were to be executed, one could not say “surely that is going too far”.

Dixon J: Defence does not depend to such an extent on the existing circumstances. If you take the law passed in 1910 for the execution of any person who was suspected of being a German spy without trial, would it be good?

Barwick: In my theory of it, yes, because the topic was within power.

Dixon J: It is a question whether the topic is within power?

Barwick: If the Court said “Spying in time of war is within power and spying in time of peace is not within power” I could understand it, but once say (sic) “Spying is defence” then the Court cannot take the next step and say “We will supervise the sort of spying law you make”. That is really denying the plenary nature of the power. 1507

Barwick attempted to play down the argument that Parliament was attempting to encroach into the sphere of the Court by suggesting that ‘when a man is ‘declared’ and thrown out of his job it was not a punishment, but preventive action’. 1508 In an earlier submission, he deliberately employed the term ‘mild’ to demonstrate that the preventive nature of the Act was such that its impact would be minimal and that any impact was outweighed by the need to protect and defend the country as well as in the interests of national security. 1509

At this point, Justice Dixon made a comment that challenged Barwick’s fundamental submission, suggesting that Barwick had not addressed whether the legislation fell within the defence power.

1507 Ibid, pp.1207-1208.
1508 Marr, above n 8, p.86.
1509 Barwick’s choice of language is deliberate in this context and serves its purpose:

Here is a statute which puts out of organized existence the Communist Party; for the rest it puts out of existence any Communist-dominated bodies whose existence may be thought to be prejudicial to the defence of the country; as to persons, it takes a very mild step. It simply precludes persons from holding very powerful office in industries, which industries are vital to our preparedness. That is a very mild sort of thing to do in the circumstances.

Transcript of Proceedings, The Australian Communist Party and Ors v The Commonwealth of Australia, above n 296, p.1173-1174. In attempting to demonstrate that the Court need not concern itself with whether the legislation is morally correct or incorrect but must understand the circumstances of its introduction, Barwick alluded to the public policy implications of the legislation not being implemented and employed emotive language to do so. He attempted to suggest to the Court that the Court cannot plead ignorance of the circumstances. In doing so, Barwick’s choice of language and expression may have actually insulted the Court:

No one for a moment wants your Honor to decide who is right or wrong about this matter or exactly how imminent the armed conflict may be, nor how remote. They are not things that concern the Court, but on the other hand for your Honor to say that as Judges this Court could say, “We know nothing of what is going on, we know nothing of our own national point of view with respect to it”, is really, your Honor, to engage in the most extreme of cloistered aloofness, to live out of the world and not in it.

This was met with a measure of surprise by Barwick, and was also particularly concerning for Barwick since he had almost concluded his submissions. The exchange proceeded as follows:

Dixon J: ... You begin by saying here is a subject matter within power and Parliament can do anything it likes with it, but the question is whether it is a subject matter within power and you did not deal with that provision.

Barwick: I thought I had dealt with it a number of times. In the Jehovah's Witnesses' case all the Justices who sat said that Regulations 3 and 4 were matters outside power, that Regulation 3 which governed the Governor-General's power to declare a body unlawful was on its face as to a subject that was not within power ... The judgment proceeds on the fact that general subject matter was within power.

Dixon J: What do you mean by the general subject matter?

Barwick: The subversive association and none the less because the choice of that is in the opinion of the Governor-General the Association which was thought to be subversive. I put it and I do not want to go over it again, that conduct prejudicial to defence is a topic. If you can see a connection with defence, as Isaacs J said about the section in Walsh and Johnson ... then that is power on its face — no more. If it is within power on its face the way Parliament deals with it must be entirely a matter for Parliament.\(^{1510}\)

Barwick's remark that 'he did not want to go over it again' suggests a tone of increasing frustration. It was clear that Justice Dixon (and possibly a number of the judges) had not grasped or accepted his submissions even at this late stage. By not repeating his submissions, Barwick failed to respond to the clear signals from the judge. The principle of flexibility suggests he should have presented his submissions in another way to ensure that they were understood.

In relation to the incidental power, Barwick advanced a submission that the constitutional validity of some sections of the Act depended upon the incidental power as well as the defence power. Barwick is questioned in relation to this by Justice Dixon.\(^{1511}\) Barwick's concluding remark in his exchange with Justice Dixon was: 'whether I express it well or not'. This too suggests Barwick's significant frustration in his inability to convey his submissions to the Court with sufficient clarity.

A critical point was reached when Justice Dixon provided Barwick with a line of argument, which would have assisted him. Barwick stated that he had not considered the point and would give it

\(^{1510}\) Ibid, p.1230.

\(^{1511}\) Ibid, pp.1260-1261.
some thought and return to it later. However, although Barwick did address the issue, he failed to adopt Justice Dixon's line of argument:

Dixon J: ... The more you consider that [namely, Executive power for the maintenance of institutions] the more you are driven to the American line of thought and away from the formal method of dealing with it which you have adopted. In the first place you have singled out the Executive as the person protecting the execution, merely because of the reference to the maintenance of the Constitution under Section 61. Institutions are not confined to the Executive and on the recent cases it is suggested that perhaps an attack on the institutions may be used by the Executive and then there might be attacks on other elements of the Constitution, and the Constitution has to be maintained in all its respects. It seemed to me, as I have said in this judgment [Ransley's case], that there is a necessary implication of legislative power to deal with attacks on institutions which were an essential part of the Constitution and the power was to be found in the necessary implication of fundamental characteristics. That may be wrong, but that is the way I reasoned it out. That line of thought makes it a little easier to get rid of this water-tight compartment between the legislative power and so treat the legislature as exercising a power which resolves independently, whether it is external or internal. That may perhaps make it easier to get out of this dilemma which is set by 5(2) and 9(2).

Barwick: I have put the authority for the other view on p.29 but I have not considered it from the point of view Your Honor mentions.

Dixon J: It struck me that the essential feature is to discover where the line is to be drawn between the objective tests of the application of power and tests which are not necessary, being the two extremes. At the one end you must take care of a great number of powers and at the other end there are characteristics of defence power which are not necessary in some circumstances.

Barwick: I had not considered this alternative view of a possible reading in dealing with 5(2) and 9(2). Perhaps I can give it some thought and return to it later on it. I will give it some consideration, your Honor.

Dixon J: I am sorry to take so much time to explain the idea. You cannot exclude from any such test this parallel question of judicial notice because it immediately gets mixed up with it.
In addition to Justice Dixon providing Barwick with an alternative line of argument, Barwick once again conceded that he might not have given this issue 'sufficient thought'. This suggests that Barwick's preparation was not as comprehensive as it might have been.

Realising the importance of Justice Dixon's suggestion, Barwick repeated that he would give some thought to what Justice Dixon had put to him and would return to it later on. He then moved to address the issue of severability. He indicated that Justice Dixon's submission might be relevant to this issue also but that he would proceed nonetheless. The final matter with which Barwick dealt was the 'invasion of State powers' argument put by the plaintiffs.

Following the luncheon adjournment on 14 December 1950, Barwick indicated that he had given some thought to the comments made by Justice Dixon before lunch and sought to address these. He referred to the policy implications associated with the legislation, but still did not develop the line of argument suggested by Justice Dixon, namely, that there is a 'necessary implication of legislative power to deal with attacks on institutions which were an essential part of the Constitution and the power was to be found in the necessary implication of fundamental characteristics'.

Although Dixon acknowledged the general quality of Barwick's advocacy, he was not always impressed. In his diary, Dixon commented that Barwick 'did his case a great deal of harm by his approach, based on impossible constructions to save the Act'. Justice Dixon it seems considered many of Barwick's arguments to be tenuous. On 14 December 1950, he reluctantly offered Barwick a stronger line of reasoning to support the validity of the legislation:

1512 ibid., pp.1277-1278.
1513 Barwick's main submissions in relation to the issue of severability were contained in his written submissions. This argument is directed to whether certain provisions of the Act are capable of being severed from the remainder of the Act in circumstances where certain provisions are found to be constitutionally valid and other provisions are not: see Transcript of Proceedings, The Australian Communist Party and Ors v The Commonwealth of Australia, above n 296, p. 1278.
1514 Ibid.
1515 Barwick dealt with this argument briefly and succinctly:

I deal with that shortly by submitting that the basis of the argument is not there, that the political parties are not part of a Constitutional frame-work of the States. And the second view is that these provisions of course are not dealing with the parties as political parties at all: they are dealing with them for activities which are not the political activities of which my friend spoke.

1516 Ibid, p.1288.
1517 Ibid, p.1277.
I made a feeble attempt during the morning to direct Barwick’s thoughts on the lines of (1) power consisting of implication of legislative authority to repress sedition &c annexed (without destruction) to 51 (vi) as (2) basis of an Act hanging on s 4 & s 5 (1) & 5 (9) (not 5 (2) & 9 (2)). (3) with recitals as decision of a question arising from conflict & emergency. He made no fist of it.  

Dixon’s comment that Barwick ‘made no fist of it’ clearly reflects Dixon’s belief that he had offered Barwick a stronger argument which Barwick had chosen to ignore. This suggests Barwick’s failure to effectively ‘watch the bench’ and might reflect a certain arrogance that his line of argument was superior.

According to Dixon, Evatt’s reply ‘made hay’ of Barwick’s case. On 15 December 1950, Dixon stated: ‘I felt it necessary to say that there was another case than that B[arwick] had argued & the unexpected course he had taken placed us in a position of peculiar responsibility.’ This statement has been described by Ayres as ‘a devastating indictment of the Commonwealth’s leading counsel’. Chief Justice Latham was also unimpressed with Barwick’s advocacy. In fact, Latham had told Barwick that his argument in this case was the worst he had heard from him.

Barwick’s advocacy in this case was not infrequently characterised by frustration. He often appeared to lose patience with the judges and, although he tried at times to engage in dialogue and adopt his usual conversational style, he did not welcome judicial questions but seemed to find them disruptive. The impression is that he resented them. He became irritated and even sarcastic at times – traits that he naturally possessed but which he was generally able to control during his advocacy.

Barwick’s statement to the Court typified this frustration: ‘let us hope that nobody like Guy Fawkes

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1519 Owen Dixon, Diary, 14 December 1950, Owen Dixon, Personal Papers. Note that the reference to “5 (9)” appears to be an error and the reference should instead be “9 (1)”. See Ayres, above n 50, p.221; See also Ayres, ‘Dixon Diaries’, above n 1496, p.224.
1522 Ayres, above n 50, p.221. In fact, in 1952, Dixon revealed his dislike for Barwick in his diary. He stated that Barwick proposed the toast of Bar and Bench:

in terms which threw me off balance. I tried to deal with the offensive undertones or implications of his speech but it did all badly . . .’. I said [to Kitto] I thought [Barwick] was a declared enemy of the Court and of me particularly and said how I hated being a judge for such reasons (19-20 September 1952).


1523 Barwick, A Radical Tory: Garfield Barwick’s Reflections & Recollections, above n 1, p.48.
gets busy here, because we would have to wait until after the gunpowder has gone off before we could do anything about it'.

In this case, Barwick did not exercise his usual discipline and control for which he became renowned. His responses to judicial questions were often short, sharp and even curt. According to Williams:

Barwick found himself bogged in the mire of questioning which, as it progressed, made it increasingly apparent that the Dissolution Act was anything but a simple piece of legislation promoting the defence of Australia. At times, it was only interjections by Latham CJ over the questioning of other judges that enabled Barwick to get back on track.

Williams' observation is correct, but Barwick became increasingly agitated with the incessant questioning generally, including questions from Chief Justice Latham, even though these may have been designed to assist him. As Williams observes: 'Whether Latham CJ's Dorothy Dix questions were designed to enable Barwick to regain his feet or were out of sympathy for Barwick's subject matter, or both, is unclear'. The fact that Latham felt it necessary to intervene to assist Barwick on occasions also suggests that Barwick's advocacy was less than effective. Although Williams does note that 'Latham CJ's interjections occasionally led [Barwick] into difficulty', Latham's intervention required Barwick to explain his submissions further and his responses often attracted the attention of other judges which then frequently resulted in further questions.

Another significant aspect of Barwick's advocacy in this case was his failure to detect key messages from the judges and tailor his submissions accordingly, becoming instead, obstinate and inflexible. The starkest example occurred towards the end of his submissions on 14 December 1950 where he seemed to ignore the alternative line of reasoning offered by Justice Dixon, a fatal error that prompted comment by Justice Dixon in his diary. Also, although Barwick's knowledge of the High Court was significant due to his frequent appearances and the fact that he had practised with various judges during their time at the Bar, he failed to appreciate the influence Justice Dixon exerted over the other members of the Court.

Frequently, during his submissions, Barwick would concede that he had failed to make himself clear. This was unusual and the fact that it occurred regularly was symptomatic of the problems Barwick was having in conveying his case to the Court.

1524 Transcript of Proceedings, The Australian Communist Party and Ors v The Commonwealth of Australia, above n 296, p.1048. See also Williams, 'Reading the Judicial Mind: Appellate Argument in the Communist Party Case', above n 18, 14.

1525 Williams, 'Reading the Judicial Mind: Appellate Argument in the Communist Party Case', above n 18, 9.

1526 Ibid.

1527 Ibid. See, for example, Transcript of Proceedings, The Australian Communist Party and Ors v The Commonwealth of Australia, above n 296, p. 58.
His advocacy in this case reveals a less than thorough preparation and that his presentation at times lacked its usual persuasiveness. At various stages during the case, Barwick did not effectively apply the elements of appellate advocacy and fell short of the ideals of appellate advocacy. This cannot have failed to contribute to his most significant loss in his career as an advocate.

Despite Barwick’s failure at times during this case to achieve exemplary appellate advocacy, he did at other times demonstrate a mastery of some of the elements of effective appellate advocacy. He often conceptualised his case with simplicity and clarity; he referred the Court to the policy implications of invalidating the legislation; he employed powerful language to convey the threat posed by communism and regularly employed useful analogies to demonstrate his point.

As the analysis of the transcript suggests, Barwick’s performance could be described as inconsistent; at times he employed and applied the elements of appellate advocacy in a masterful way (and conformed to the ideals), whereas at other times he failed to do so and even acted inconsistently with these elements. Overall, this case represented a disappointing performance by Barwick.

Barwick later stated that:

My argument about the validity of the Act was unconvincing. Only the Chief Justice was prepared to uphold its validity on the grounds set out in his reasons rather than on my argument. Latham CJ, while still in office, once told me that my argument in the Communist Party Case was the worst he had heard from me. I have no reason to question his judgment.\(^{1528}\)

9.3 The High Court’s Decision

On 9 March 1951, 10 weeks after the 24 day hearing concluded, the High Court handed down its decision to a full court room in Melbourne. Most of the leaders of the Australian Communist movement were in attendance. By a majority (Latham CJ dissenting), the Act was held to be invalid.\(^{1529}\) In effect, the High Court asserted its authority to determine the scope of the defence power. Five members of the majority (namely, Dixon, Fullagar, McTiernan\(^{1530}\), Williams and Kitto\(^{1531}\)


\(^{1529}\) The report in the *Commonwealth Law Reports* runs to 285 pages.

\(^{1530}\) Despite his strong opposition to Communism, Justice McTiernan also declared the Act to be invalid. He stated that (at 206): ‘The Constitution does not allow the judicature to concede the principle that the Parliament can conclusively “recite itself” into power’. He was ‘most relieved’ when he realised that he would not be alone in making such a declaration (see Michael Kirby, ‘McTiernan, Edward Aloysius’ in Tony Blackshield, Michael Coper & George Williams (eds), *The Oxford Companion to the High Court of Australia*, (2001), Oxford University Press, South Melbourne, p.468).

\(^{1531}\) Justice Kitto was fresh from his success as an advocate in defeating the Chifley Labor government’s bank nationalisation legislation. He declared the Act invalid and in doing so ‘demonstrated his allegiance to no political side and no social philosophy – only to his view of the Constitution and the law’. See Kirby, ‘Kitto, Frank Walters’, above n 1187, p.399.
JJ) had agreed that the Act would have been a valid exercise of the defence power had Australia been at war. However, in peace time, it was unconstitutional.\textsuperscript{1532}

Of the six justices who formed the majority, five (Dixon, McTiernan, Williams, Fullagar and Kitto JJ) gave similar reasons. Webb J came closest to upholding the Act on the basis of a considerably limited operation.\textsuperscript{1533} The five justices concluded that the provisions of the Act purporting to declare individuals and bodies to be communists were not supported by the defence power, the incidental power or the implied power. In reference to the two questions posed by Dixon J for the Full Court, the five justices answered 'No' to the first and 'Yes' to the second. Webb J answered 'Yes' to both questions\textsuperscript{1534} and Latham CJ answered 'No' to both questions.\textsuperscript{1535}

\textsuperscript{1532} Justice Dixon accepted the broad definition of the defence power during wartime, following the wartime decisions, and the validity of laws conferring a power on a minister to 'order the detention of persons whom he believes to be disaffected or of hostile associations and whom he believes that it is necessary to detain with a view to preventing their acting in any manner prejudicial to the public safety and the defence of the Commonwealth'. See \textit{Australian Communist Party v Commonwealth} (1951) 83 CLR 1 at 195, per Dixon J. See also at 206 (McTiernan), 227-228 (Williams J), 258 (Fullagar J). See Douglas, 'Cold War Justice? Judicial Responses to Communists and Communism, 1945-1955', above n 1379, 81. Justice Dixon and most of the other judges accepted that the Commonwealth could use other powers in its possession to discriminate against communists and their allies: \textit{Australian Communist Party v Commonwealth} (1951) 83 CLR 1 at 203-204, per Dixon J. See also at 213 (McTiernan), 269-270 (Fullagar J) and 284 (Kitto J). During wartime, the High Court had conceded to Parliament a broader defence power than in times of peace although there were still constraints to such power. In addition, the Act did not address specific acts which were illegal but individuals and bodies whose actions were to be characterised by the Legislature and the Executive: see Anderson, above n 1380, 38; Ayres, above n 50, p.223.

\textsuperscript{1533} Justice Webb considered that, following the \textit{Jehovah's Witnesses Case}, a ban on the Australian Communist Party could be justified if there was evidence that it posed a permanent threat which could not be assumed and no evidence was presented to suggest that it was the case (\textit{Australian Communist Party v Commonwealth} (1951) 83 CLR 1 at 243-245).

\textsuperscript{1534} Justice Webb's reasoning differed from the other members of the majority in that he believed that, following the wartime cases, Parliament and the Executive could take preventive measures based upon their approach to defence policy provided that the facts that support the reasonableness of the policy are either within judicial notice or are proved. His Honour held that the Act was invalid because he would not take judicial notice of the matters contained within the preamble of the Act and the Commonwealth would not undertake to prove them. See \textit{Australian Communist Party v Commonwealth} (1951) 83 CLR 1 at 243-245, per Webb J and Geoffrey Sawyer, 'Defence Power of the Commonwealth in Time of Peace' (1953) 6 Res Judicata 214, 218.

\textsuperscript{1535} Latham was a member of the Lyons Government that attempted to ban communists but was unsuccessful in doing so. See for example \textit{R v Hush; ex parte Devanny} (1932) 48 CLR 487 in which the High Court (including Evatt J) allowed an appeal following the appellant's conviction under s 300 of the \textit{Crimes Act 1914} (Cth) of a charge of soliciting contributions of money for an unlawful association, namely, the Communist Party of Australia. In effect, the High Court rejected the conservative federal government's attempt to ban the Australian Communist Party using the \textit{Crimes Act 1914} (Cth). See Winterton, 'The Communist Party Case', above n 1379, 108; Maher, 'Downunder McCarthyism: The Struggle Against Australian Communism 1945-1960: Part One', above n 1379, 350. In a debate about the \textit{Crimes Bill} in 1936, Latham as Attorney-General stated that the Commonwealth was not able to use a recitation of facts in a preamble to lay claim to powers it would not otherwise have: see Commonwealth, \textit{Parliamentary Debates}, House of Representatives, 28 January 1926, 472 (Latham, Attorney General). In the 1930s, Latham believed that this principle prevented legislation aimed at outlawing the Australian Communist Party (see Latham to Stevens, 6 April 1933 National Archives of Australia: A467 BUNDLE 28/SF10/15). See also Douglas, 'A Smallish Blow for Liberty? The Significance of the Community Party Case', above n 1383, 277-278; Winter.. 'The Significance of the Communist Party Case', above n 1379, 630-631. For a detailed discussion of Latham's involvement in attempts to suppress
The common view of the majority was that there was insufficient judicially noticeable evidence to link the Act with the defence power and the recitals were not of probative value. The majority held that a real or specific rather than logical connection with defence was necessary to support a law under the defence power. Webb J was the only member of the Court to conclude that the Commonwealth had to adduce evidence to prove the accuracy of the recitals. Latham CJ was the only member of the Court to conclude that the Act was valid without proof of the recitals.

Dixon and Fullagar JJ concluded that there was no mechanism for the Governor-General’s decisions to be reviewed. According to Williams, the finding that ss 5(2) and 9(2) ‘gave to the executive an unexaminable ability to extend the reach of the Commonwealth into fields not otherwise within its power’ underpinned Dixon J’s decision. It also mirrored Evatt’s submissions and represented a rejection of Barwick’s approach. McTiernan, Williams and Kitto JJ concluded that ss 5(4) and 9(4) ‘precluded any judicial review of the Governor-General’s decision that a person or body posed a security risk.’

At one point, Barwick argued that the Governor-General’s decision could be reviewed on the grounds of irrationality, misdirection or error of law. Only Webb J accepted the Commonwealth’s submission that the provisions empowering the Governor-General to make declarations did not exceed the defence power as the declaration was not conclusive, and it was open to the declared person or body to challenge the declaration on the basis that they were not engaged in any activities which could attract the operation of the defence power. In addition, Webb J considered that
there was authority to judicially examine the Governor-General’s discretion and that ss 5(4) and 9(4) should be interpreted on the basis that Parliament would have been aware of this. 1545

Dixon, McTiernan, Williams and Kitto JJ did not believe it was necessary to address whether the Act was invalid on other grounds. 1546

The decision, a major victory for Evatt, represented ‘the most significant defeat of Barwick’s distinguished career as a barrister’. 1547 According to Williams, the ‘views expressed by the majority judges during argument, especially when intervening during Barwick’s submissions, were clearly reflected in their separate reasons’. 1548

From the High Court’s perspective, the central issue in the case was one of constitutional interpretation – namely, did the Commonwealth government have the legislative power to enact the legislation? The Court held that it did not. However, the Court held that it determined the ambit of the defence power and not the Commonwealth Parliament. The critical issue was that the legislation did not purport to ban organisations which were in fact a threat to the security of the Commonwealth based on contestable facts but instead simply declared the Communist Party a threat and banned organisations which, in the opinion of the Commonwealth government, were a threat to the security of the Commonwealth. 1549

All judges agreed that the Commonwealth had the legislative power to defend itself from subversion – whether the source of the power was the defence power, the incidental power applying to executive power or, as Dixon and Fullagar JJ suggested, the implied legislative power. 1550 However, Parliament was unable to declare that constitutional facts existed. 1552 Fullagar J stated that ‘a

1545 Australian Communist Party v Commonwealth (1951) 83 CLR 1 at 235-240, per Webb J.
1546 Williams J seems to have assumed that if the Act was supported by the defence power then acquisition of property would have been governed by s 51 (xxxi) of the Constitution (at 214 -232). Fullagar J briefly considered and dismissed the argument that in making this law, the Parliament had usurped the judicial power of the Commonwealth (at 229). See Douglas, ‘Cold War Justice? Judicial Responses to Communists and Communism, 1945-1955’, above n 1379, 60.
1547 Williams, ‘Communist Party Case’, above n 77, p.122.
1549 Hull, above n 783, p.29
1551 Constitutional facts are the facts ‘the existence of which is necessary in law to provide a constitutional basis for the legislation’. In cases involving the defence power, the Court is often confined to taking judicial notice of facts due to the fact that canvassing the facts in open court would prejudice Commonwealth security. See Australian Communist Party v Commonwealth (1951) 83 CLR 1 at 222, per Williams J. See P.H. Lane, ‘Facts in
stream cannot rise higher than its source', and 'Parliament cannot recite itself into a field the gates of which are locked against it'.

Justice Dixon observed:

History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected. In point of constitutional theory the power to legislate for the protection of an existing form of government ought not to be based on a conception, if otherwise adequate, adequate only to assist those holding power to resist or suppress obstruction or opposition or attempts to displace them or the form of government they defend.


1552 Australian Communist Party v Commonwealth (1951) 83 CLR 1 at 193 (per Dixon J), 206 (per McTiernan J), 222, 225, 226 (per Williams J), 258, 263 (per Fullagar J) and 272-275 (per Kitto J). See Winterton, 'The Communist Party Case', above n 1379, 127; Winterton, 'The Significance of the Communist Party Case', above n 1379, 650-651.

1553 Australian Communist Party v Commonwealth (1951) 83 CLR 1 at 258, per Fullagar J. See Winterton, 'The Communist Party Case', above n 1379, 127; Winterton, 'The Significance of the Communist Party Case', above n 1379, 651.

1554 Australian Communist Party v Commonwealth (1951) 83 CLR 1 at 263, per Fullagar J. Anderson, above n 1380, 36. Justice Fullagar stated that:

The validity of a law or of an administrative act done under a law cannot be made to depend on the opinion of the law-maker, or the person who is to do the act, that the law or the consequence of the act is within the constitutional power upon which the law in question itself depends for its validity. A power to make laws with respect to lighthouses does not authorize the making of a law with respect to anything which is, in the opinion of the law-maker, a lighthouse.

Australian Communist Party v Commonwealth (1951) 83 CLR 1 at 141, per Latham CJ. See Winterton, 'The Communist Party Case', above n 1379, 128; Winterton, 'The Significance of the Communist Party Case', above n 1379, 651. In his argument, Evatt stated that this was well-established and recognised since Ex parte Walsh and Johnson; In re Yates (1925) 37 CLR 36, 67-68, 71 per Knox CJ and 96 per Isaacs J; Winterton, 'The Significance of the Communist Party Case', above n 1379, 651; Kirby, 'HV Evatt, The Anti-Communist Referendum and Liberty in Australia', above n 1380, 103; Australian Communist Party v Commonwealth (1951) 83 CLR 1 at 49.

1555 Justice Dixon reached his decision after 'much consideration' (at 199) and commenced his judgment with the observation (at 174-175):

The primary ground upon which [the Act's] validity is attacked is simply that its chief provisions do not relate to matters falling within any legislative power expressly or impliedly given by the Constitution to the Commonwealth Parliament but relate to matters contained within the residue of legislative power belonging to the States.

Justice Dixon began his judgment with an outline of the facts and then proceeded to analyse various sections of the Act (at 186):

Unlike the power conferred by s. 5 of the National Security Act 1939-1943, the present power is administrative and not legislative, it is not directed to the conduct of an existing war, and its exercise is not examinable and is not susceptible of testing by reference to the constitutional power above which it cannot validly rise.

1556 Australian Communist Party v Commonwealth (1951) 83 CLR 1 at 187-188, per Dixon J
Justice Dixon referred to the decisions in *Burns v Ransley* (1949) and *R v Sharkey* (1949). In both cases, it was held that various sedition offences under the *Crimes Act 1914* (Cth) were within the legislative powers of the Commonwealth based on section 51 (xxxix) and section 61 of the Constitution in the former case and sections 51 (xxxix) and 51(xxix) of the Constitution in the latter case or by necessary implication. He then 'savage[d] Barwick’s case by setting out the case he should have made':

As appears from *Burns v Ransley* (1) and *R v Sharkey* (2), I take the view that the power to legislate against subversive conduct has a source in principle that is deeper or wider than a series of combinations of the words of s. 51(xxxx.) with those of other constitutional powers. I prefer the view adopted in the United States, which is stated in Black's American *Constitutional Law* (1910), 2nd ed., s. 153, p.210, as follows: "... it is within the necessary power of the federal government to protect its own existence and the unhindered play of its legitimate activities. And to this end, it may provide for the punishment of treason the suppression of insurrection or rebellion and for the putting down of all individual or concerted attempts to obstruct or interfere with the discharge of the proper business of government ...".

This passage from Justice Dixon’s judgment reflects the alternative line of argument that he had offered Barwick, but which Barwick had chosen to ignore. Recognising where a judge may be giving an advocate a signal and possessing the flexibility to tailor their submissions accordingly are important attributes in appellate advocacy. Ultimately, Barwick’s failure to do either proved fatal. However, the Act as such was flawed in many respects and it is possible that, even if he had followed Justice Dixon’s ‘signal’, the case may still have been lost.

Chief Justice Latham provided the only dissenting opinion – he would have upheld the Act. According to Clem Lloyd, ‘Latham’s judgment synthesised two crucial issues in his long career: his loathing of Communism, and a long-sustained association with the Constitutional defence power’. Generally, Latham ‘was sympathetic to an expansive view of Commonwealth legislative power, especially in the

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1557 *79 CLR 101*.
1558 *79 CLR 121*.
1561 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 188, per Dixon J.
1562 Lloyd, above n 879, 188.
defence context’. The fact that Australian troops were involved in the Korean War and that the Cold War was escalating were critical. This case was to be his last on the High Court. He ‘alone in the Court strenuously maintained the right of the Parliament to ban the Communist Party under the defence power. He failed to carry with him any of his six colleagues on the Bench’.

Chief Justice Latham started from the perspective that defence policy and policy relating to how to deal with an internal enemy was inherently political, and believed it was for the executive and Parliament to resolve these questions.

Latham accepted Barwick’s submissions on the ‘unfettered ability of the Commonwealth to legislate with respect to defence’. However, he rejected the 20 factors Barwick outlined for the purposes of the Court taking judicial notice and stated: ‘The Court can take judicial notice of notorious facts, and one thing which is notorious about what Mr. Barwick has submitted is that the allegations are matters of vigorous dispute’. His Honour also rejected Barwick’s submission that only a rational or logical connection with defence was required for the purposes of an Act being valid under the defence power.

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1564 Ibid.

1565 Australian Communist Party v Commonwealth (1951) 83 CLR 1 at 142, per Latham CJ where he stated: ‘The question is - “By what authority – by Parliament or by a court?”’ Latham CJ also stated (at 152):

> No distinction can be drawn between defence against external attack and defence against internal attack, which is more insidious than direct external attack and in some respects, because it is often secret, more difficult to combat. If Parliament decides that there is an internal danger sufficiently serious to justify legislation, in my opinion the Court has no authority to overrule Parliament upon the ground that Parliament has made a mistake as to "the facts", or that, even if Parliament is right as to the facts, the facts show no real danger to Australia. The Government is responsible to Parliament and Parliament is responsible to the people for such decisions. If Parliament disagrees with the Government, or the people disagree with either the Government or the Parliament, our system of government provides a political means of changing the policy. The courts have nothing whatever to do with such decisions.

Latham CJ believed, as stated in the present case, that the principle of judicial review did not apply as the defence and anti-subversion powers are ‘essentially different in character from most, if not all, of the other legislative powers ... [and] perhaps the most important powers intrusted to the Parliament of the Commonwealth’ (at 141) and the ‘only question for a court, therefore, is whether the provisions of the Act have a real connection with the activities and possibilities which Parliament has said in its opinion do exist and do create a danger to Australia’ (at 154). See Winterton, ‘The Communist Party Case’, above n 1379, 128; Winterton, ‘The Significance of the Communist Party Case’, above n 1379, 651-652; Laurence W Maher, ‘Tales of the Overt and the Covert, Judges and Politics in Early Cold War Australia’ (1993) 21(2) Federal Law Review 151, 182-183; Winterton, ‘The Significance of the Communist Party Case’, above n 1379, 651-652; Anderson, above n 1380, 41-42; Lloyd, above n 879, 194.

1566 Williams, ‘Reading the Judicial Mind: Appellate Argument in the Communist Party Case’, above n 18, 24. See Australian Communist Party v Commonwealth (1951) 83 CLR 1 at 161, per Latham CJ.

1567 Ibid. See Williams, ‘Reading the Judicial Mind: Appellant Argument in the Communist Party Case’, above n 18, 24.

Latham CJ’s draft judgments and notes\textsuperscript{1569} show that he was critical of the Commonwealth’s case presented by Barwick. In Lloyd’s words:

Latham implied that Barwick had made a major tactical error by basing his argument on two sections of the Act which permitted the Governor-General to make declarations about Communist organisations, unlawful associations and individual Communists. He felt that Barwick had made heavy weather out of using these declarations as a link with the defence power so as to validate the legislation. Barwick’s action required ‘tortured construction’ of subsections of the Act, and he had encountered much difficulty in using those sections to establish a connection with defence ... Latham asserted scathingly that the defendants had shown no conception of the nature of executive and parliamentary power and responsibility.\textsuperscript{1570}

Latham CJ ‘was just as critical of Barwick’s efforts to use the recitals in the Act’s preamble to provide the ‘real connection’\textsuperscript{1571} and stated that ‘[a]ternatively the connection was to be found in the recitals, but the defendant’s arguments on the recitals seemed to me to get nowhere’.\textsuperscript{1572} Although Chief Justice Latham found in favour of the Commonwealth, his comments suggest that he was not persuaded by Barwick’s submission, but perhaps more fundamental convictions of his own regarding constitutional validity.

Barwick greeted the decision with disappointment; this was his first brief to defend a major piece of legislation and he was unsuccessful. Although defending the validity of the Act was always going to be difficult failure ‘demonstrated weaknesses in his technique’.\textsuperscript{1573} However, based on the reception Barwick received from the Court, it seems clear that Barwick was always going to face considerable difficulty in attempting to persuade the Court of the constitutional validity of this legislation.

As has been discussed above, although Barwick’s advocacy conformed to the ideals of appellate advocacy at times, he did not reach this standard of excellence consistently throughout his submissions. It was his ability to achieve these ideals consistently in other cases which resulted in him being regarded as the leading advocate of his time.

\textsuperscript{1569} Lloyd, above n 879, 201.
\textsuperscript{1570} Ibid.
\textsuperscript{1571} Ibid.
\textsuperscript{1573} Marr, above n 8, p.87.
There is a view that Barwick was more successful and effective when he was briefed to attack the validity of legislation rather than defend the validity of legislation. The result in this case certainly adds credence to this view, as does the observation by Mason:

My view is that he was an outstanding deconstructive advocate in the sense that he was very effective in demolishing another’s argument and identifying the perceived flaws in their argument. However, he was not as effective when presenting a constructive case.

In relation to this case, Marr suggests that:

The central forensic challenge had been to sweep the court off its feet with the vision of the world on the brink of war but it hadn’t worked. His ability to dissect legislation, to find the fatal technicality to bring an Act down, was not matched by an equal skill at knitting legislation schemes together in a persuasive way before a court. His technique of simplification, of finding a fresh and simple principle to support his argument when tracing a new path through the cases to develop the newly-discovered principle, did not really work in defence of large and complex pieces of legislative machinery.

According to Marr, to:

defend the Communist Party Act by claiming that it was simply preventive, that the connection between ‘declaration’ and defence power need only be ‘logical’ and that troubles on the coal fields and in Korea were one and the same, cumulatively, absurd.

Marr’s criticism of Barwick’s arguments in this case echo (albeit more colourfully) the criticism of Chief Justice Latham and Justice Dixon.

At the time of this case, it was clear that Justice Dixon exerted considerable influence over the other judges on the High Court. If this was in any doubt, it was confirmed by the events leading up to the judgment being handed down. Justice Dixon had formulated the fundamental components of

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1575 Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 August 2006).


1577 Ibid.

1578 Chief Justice Dixon’s influence over the other judges on the High Court increased when he assumed the Chief Justiceship in 1952. His influence was evident in the courtroom where the atmosphere became more civilised and less threatening as well as behind the scenes with his ability to unite and control the judges: see Fricke, above n 801, p.118.

1579 On 13 December 1950, Chief Justice Latham read to Justice Dixon the opening section of the judgment he had been preparing. Justice Dixon stated: ‘It sickened me, with its abnegation of the function of the Court & I said so’. Justice Dixon was a passionate advocate of the notion of judicial review, that is, the High Court’s role under the Constitution to determine whether legislation was supported by the powers granted under the Constitution. Justice Fullagar held a similar view. However, based on the early draft of his judgment, Chief
his judgment whilst the case was being heard. Apparently, Chief Justice Latham did not convene a meeting of the judges to discuss the case prior to the respective judgments being written.\textsuperscript{1580} Justice Dixon discussed his views of the case with the other High Court judges, particularly Justice Fullagar and Justice Kitto, the two judges he respected the most. Both judges wrote their judgments throughout January and February 1951; Justice Dixon’s views would have been foremost in their thinking during this time.\textsuperscript{1581}

Justice Dixon was highly critical of Barwick’s arguments in this case and this view may have influenced the other judges. For this reason, Barwick’s inability to convince Justice Dixon of the merits of the Commonwealth’s case may have contributed significantly to him losing this case. This failure could be attributed to a combination of a number of factors, such as a lack of preparation, a failure to welcome judicial questions and comments, a failure to watch the bench and tailor his submissions accordingly as well as, possibly discourtesy and arrogance. All such factors represent a failure to achieve the ideals of appellate advocacy.

There is an alternative explanation. It is clear that this case, probably more than any other in the High Court’s history, was polarising, controversial and politically sensitive. As such, it could be suggested that the case was not decided purely on the arguments put forward by the respective counsel, or at the very least, with less reliance on counsel’s arguments than usual. It is readily apparent that Justice Dixon could find no way to validate the Act, irrespective of Barwick’s arguments.

\textsuperscript{1580} Justice Latham did not hold the same view but was ‘notoriously ambivalent’ (see Owen Dixon, Diary, 11 December 1950, Owen Dixon, Personal Papers; See Ayres, above n 50, p.221). Prior to the judgments being delivered, Chief Justice Latham circulated a memorandum to all the other judges. The 25 page memorandum defined the issues as Latham CJ saw them (see National Library of Australia: Sir John Latham’s Papers’ MS 1009, Chief Justice, Series 62, Memorandum, 11 January 1951; Lloyd, above n 879, 199-200). According to Justice Dixon, Justice Fullagar was concerned and upset by it. Meanwhile, Justice Kitto expressed concern for the mental state of Chief Justice Latham and ‘whether it meant that he had something wrong with him’ (Owen Dixon, Diary, 2 March 1951, Owen Dixon, Personal Papers - see Ayres, above n 50, p.223), while ‘Dudley Williams considered him mad’ (Owen Dixon, Diary, 2 March 1951, Owen Dixon, Personal Papers. See Ayres, above n 50, p.223). On 13 February 1951, Justice Dixon spoke to Justices McTiernan and Webb in relation to the case and discovered that they both ‘vacillated’. Justice Fullagar had completed his draft judgment by 12 February 1951 and provided it to Justice Dixon to read – he had concluded that the entire Act was invalid. In the meantime, external pressure was being exerted on Justice McTiernan to uphold the Act’s validity. On 1 March 1951, Justice Dixon read Justice Fullagar’s revised judgment. Justice Dixon thought that it was very good and that he ‘showed his view of Barwick’s argument by ignoring it’ (see Ayres, above n 50, pp.222-223).

\textsuperscript{1581} At the end of 1951, Menzies and Justice Dixon discussed the case. According to Justice Dixon, Menzies: mentioned Commo case and said he was shocked on reading my judgment to find what I said[.] I answered it was presented only dialectically and Barwick had no general knowledge. We needed international facts. I added that Latham had avoided having a cfce [conference]. He said he preferred to dissent like Isaacs.

See Ayres, above n 50, pp.223-224. There is a suggestion that Chief Justice Latham generally opted not to have a conference as he preferred not to voice his arguments against Justice Dixon’s in front of the other judges: see Ayres, above n 50, pp.223-224.

\textsuperscript{1581} For example, see Owen Dixon, Diary, 15 December 1950, Owen Dixon, Personal Papers where Justice Dixon stated that ‘Fullagar & Kitto came to dinner with me at 52 & we had a good talk about the case, on the lines I suggested, but inconclusive’. See also Ayres, above n 50, pp.221-222.
and, with this in mind, he wrote his judgment. Perhaps the other judges followed Justice Dixon’s approach; there is certainly evidence that Justice Fullagar adopted a similar approach. Chief Justice Latham was profoundly opposed to communism – it has been said that ‘he was obsessed by and loathed Communism’.

Latham also believed that Barwick’s argument in this case was the worst he had ever heard from Barwick. Yet despite this, Chief Justice Latham found in favour of upholding the Act. This adds weight to the proposition that the case was not decided purely on the arguments advanced by counsel. Maher described Chief Justice Latham’s judgment as ‘an example of judicial policy preferences infected with partisan political sentiment’ and a case ‘in which he expressed himself with the deepest personal involvement and that this demonstrated an inadequate regard for fundamental liberties’.

According to some, Justice Dixon disliked Barwick and this may have affected the reception Barwick received from the other judges. For these reasons, it was always going to be difficult for Barwick’s arguments to succeed. This was exacerbated by Barwick’s inability to employ the elements of appellate advocacy at times and his failure to achieve the ideals of appellate advocacy at other times.

Justice Dixon’s dislike of Barwick continued after he became Chief Justice, and even possibly intensified. In Ayres’ words, Dixon thought Barwick ‘a declared enemy of the Court and of himself in particular’. In fact, Dixon lamented that he ‘hated being a judge for such reasons’.

1582 Lloyd, above n 879; Maher, ‘Tales of the Overt and the Covert, Judges and Politics in Early Cold War Australia’, above n 1565, 176.
1583 See above n 1535.
1584 Maher, ‘Tales of the Overt and the Covert, Judges and Politics in Early Cold War Australia’, above n 1565, 153 and 200-201. See also Cowen, Sir John Latham And Other Papers, above n 400, pp.47-48. Maher also stated, in reference to Latham CJ’s judgment that, ‘both its structure and execution, it directly reflects the political rhetoric which Menzies had been using steadily since 1948’ (at 178). Maher contended ‘that Latham’s willingness to defer to Parliament on this occasion only make sense when it is viewed in the context of Latham’s long-held set of uncompromising anti-Communist beliefs and his anti-Communist activities prior to his appointment as Chief Justice’ (at 178). Latham’s dissent has also been described as ‘almost incredulous’ (Cowen, Sir John Latham And Other Papers, above n 400, p.43), ‘forceful’ (Galligan, above n 781, p.204) and ‘rather tired’ (Winterton, ‘The Significance of the Communist Party Case’, above n 1379); see also Douglas, ‘A Smallish Blow for Liberty? The Significance of the Community Party Case’, above n 1383, 279.
1585 In fact, it is suggested that Justice Dixon never liked Barwick:

Dixon had a poor opinion of most of his fellow lawyers, and especially of his predecessor John Latham and successor Garfield Barwick. He regarded Latham as a usurper and was very curt with Menzies at the swearing-in. He never liked Barwick, who had often appeared before him as an advocate.

1586 Chief Justice Dixon recounted an occasion in mid-September 1952 where he, along with other judges of the High Court, as well as Barwick attended the Law Society dinner in Adelaide. Barwick proposed the toast of the Bar and the Bench ‘in terms which threw me off balance. I tried to deal with the offensive undertones or implications of his speech but did it all badly. I felt tired off colour and worried at the sense of judicial failure
9.4 The Aftermath

One observation in the aftermath of the case was that:

Just as the Bank Nationalisation Case dealt a blow to a major policy aim of the Chifley Labor Government, another milestone case — the Communist Party Case — dealt a blow to a major policy aim of the new Liberal Government led by Robert Menzies.\footnote{Hull, above n 783, p.28.}

The result surprised Menzies. He responded by approaching the Governor-General, William McKell, for a double dissolution following Parliament's failure to pass the Commonwealth Bank Bill\footnote{Ayres, above n 50, p.235.} of Parliament to give him the opportunity to control both Houses of Parliament. His intention was then to hold a referendum to amend the Constitution and grant the Commonwealth increased power to address the communist threat, including passing the Act.\footnote{Hull, above n 783, p.28.} As a result, Menzies called an early election. The issue of communism dominated the election campaign.\footnote{Ayres, above n 50, p.224; Kirby, 'HV Evatt, The Anti-Communist Referendum and Liberty in Australia', above n 1380, 105.} The election was held on 28 April 1951 and the Menzies Liberal government was returned with control of the Senate.\footnote{Fricke, above n 801, p.170.}

Menzies called a special Premiers Conference on 18 June 1951 to request that the states refer their powers to deal with communism to the Commonwealth but the Labor governments in NSW and Queensland refused to do so.\footnote{Maher, 'Tales of the Overt and the Covert, Judges and Politics in Early Cold War Australia', above n 1565, 189; Maher, 'Downunder McCarthyism: The Struggle Against Australian Communism 1945-1960: Part Two', above n 1379, 447; Douglas, 'A Smallish Blow for Liberty? The Significance of the Communist Party Case', above n 1383, 282; Winterton, 'The Communist Party Case', above n 1379, 130; Winterton, 'The Communist Party Case', above n 1379, 130.} A referendum under section 128 of the Constitution was subsequently held on 22 September 1951; its objective was to alter the Constitution to enable the

\footnote{Douglas, 'A Smallish Blow for Liberty? The Significance of the Communist Party Case', above n 1383, 253.}
Commonwealth to ban the Communist Party and overcome the High Court’s decision in the Communist Party Case.  

The referendum failed by a narrow margin – 2,317,927 ‘Yes’ votes to 2,370,009 ‘No’ votes, and failed to be carried in a majority of States. Menzies was disappointed with the result. Nevertheless, the anti-communist measures subsequently adopted by his government contributed to the membership of the Communist Party declining, and it was voluntarily disbanded in December 1989.


Chapter 10: Conclusion

"He was obviously very sharp; and the stories go that he had a great ability to pick out just the right example at the right time. He was the sort of advocate who could always pick a point that would serve to demonstrate his argument in a way that just made it seem right, he seemed to have that knack. And if you read some of his advocacy from some of the earlier cases, say early on from the Banking Nationalisation case, you'll also see that he had an immense rapport with the judges themselves. He seemed almost to be able to work out what was the best line to take to pull the disparate judges on the High Court together. And he was just immensely persuasive, in a way that say some other advocates, particularly Evatt, when he appeared in the same case, the Banking Nationalisation case, was not. Evatt seemed more to antagonise the Bench, whereas Barwick was very much almost on their side and simply leading to them what was obviously the right result".

Professor George Williams, 1997

The core question which this thesis sets out to answer is whether Sir Garfield Barwick's reputation as one of Australia's greatest appellate advocates, especially in constitutional law cases, was justified. This required an examination of the elements of effective appellate advocacy focusing on Barwick's advocacy in constitutional law cases, particularly, the Bank Nationalisation Case and the Communist Party Case.

Specifically, this was undertaken by:

1. establishing a methodology for assessing appellate advocacy following the critical exploration of the elements of appellate advocacy and the identification of the ideals of appellate advocacy;
2. employing this methodology for the purposes of assessing the appellate advocacy of a leading appellate advocate and using this to contrast the ideals of appellate advocacy to appellate advocacy in reality;
3. providing an insight into Barwick's advocacy in the lead-up to, and in, the Bank Nationalisation Case; and
4. providing an insight into Barwick's advocacy in the lead-up to, and in, the Communist Party Case.

The thesis attempted to identify 'effective appellate advocacy'; that is, the ability to apply, employ or adhere to the elements of appellate advocacy in reality in a manner that approximates the ideals of

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appellate advocacy or typifies exemplary appellate advocacy to the extent possible. As discussed in the Introduction, effective appellate advocacy does not necessarily equate to success in terms of winning.

From the material relating to advocacy and appellate advocacy emerged a number of elements of appellate advocacy (that is, the basic and fundamental principles of appellate advocacy) and a number of ideals (that is, the ability to apply, employ or adhere to those principles in a manner that exhibit standards of perfection or excellence). The most revealing aspect of the research was the almost universal acknowledgment of the elements and the ideals amongst judges, former judges, barristers and legal commentators, based on their respective research, experiences, observations and anecdotes. It is this confluence of thought and commonality of perspectives about appellate advocacy that this thesis attempted to capture and classify.

The process of developing the methodology resulted in the identification of the elements of appellate advocacy and the ideals of appellate advocacy. In light of the crucial role that appellate advocates play in the legal system and the administration of justice, recognising the elements and aspiring to attain the ideals of appellate advocacy, will result in effective appellate advocacy as well as facilitate the efficient and effective administration of justice. Ultimately, this serves the greater public interest.

Relevant background information about Barwick's advocacy and his early years at the Bar provided an insight into the manner in which he developed and acquired an understanding of the elements and ideals of appellate advocacy. It also provided a foundation for analysing his advocacy specifically with reference to the ideals captured in the 'three category analysis'.

Barwick acquired early the ability to conceptualise a case and reduce complex propositions into simple terms. This was a key feature of his advocacy throughout his career. Ironically, during his early years at the Bar, he received feedback that his submissions were often too brief. It was also in his early years of practising in the High Court that he experienced rigorous judicial questioning of advocates, a style he enjoyed. Later, Barwick's interaction with the Court became a hallmark of his appellate advocacy as well as being a key element and ideal of appellate advocacy. During his early years at the Bar, Barwick recognised and applied many of the elements of appellate advocacy.

Barwick's 'ground up' approach was the cornerstone of his preparation. It ensured a thorough and meticulous presentation which prepared him for presenting his case as well as gave him confidence. However, the reality of appellate advocacy which Barwick experienced was that often a detailed or comprehensive preparation was not possible. He acknowledged this but he also developed the ability to listen to his opponent and work on the next case.
Barwick’s confidence and knowledge of the law and relevant procedure, however, led to occasional bouts of arrogance, and even occasions where he appears to have shown a lack of respect for the court.

While Barwick placed great emphasis on knowing the court and the likely attitudes of each judge, this knowledge was only effective if, in practice, judges approached similar issues consistently.

Barwick’s ability to conceptualise a case in simple terms and advance succinct arguments was exceptional and he often used his opening as an opportunity to conceptualise the case. In reality, the danger was over-simplifying certain issues and not accurately conveying the totality of the relevant issue. His reply was more controversial, due to his renowned technique of ‘trailing his coat’. Whilst this worked on occasions for Barwick and allowed him to have the ‘last say’, in reality, it was a questionable (some may say underhanded) tactic and unlikely to be available or tolerated in modern day appellate advocacy.

In his presentation, Barwick focused on the substance and was not considered an elegant advocate. He thrived on judicial dialogue and generally welcomed questions from the bench. He used his response to questions as an opportunity to clarify and reiterate his main propositions. He often employed useful illustrations or analogies when doing so. He considered the questions an insight into the thinking of the judges. He cited authority with care by extracting the relevant principle for the benefit of the court rather than reading long passages from a judgment. His ability to do so was aided generally by his comprehensive preparation.

Courage is an aspect of personation and Barwick demonstrated this in his advocacy. He was willing to disagree with judges and engage in fiery exchanges when the situation warranted. This was widely admired. However, he was not always tactful and he was on occasions perceived as discourteous and arrogant. This relates to the next aspect of personation, namely, honesty, respect and candour. Whilst Barwick was considered honest, his combative and argumentative character led to him being considered disrespectful at times.

Barwick generally controlled his emotions and maintained objectivity. However, at least one anecdote reveals a loss of temper and another, where Barwick caused another advocate to lose control of his emotions.

Barwick’s ability in terms of ‘the extras’ also aided his advocacy, particularly his presentation. His voice was not a feature although many found it sufficiently interesting. However, he was skilled in the use of language and spent considerable time during the preparation phase considering his choice of language. His use of wit occurred mainly through sarcasm and led to acidic or acerbic comments on occasions. Despite not being tall, he had a presence which derived from his confidence, much of
which can be traced back to his comprehensive preparation. His exceptional memory allowed him to process and recall enormous amounts of information and then use it effectively during his submissions or in response to judicial questions.

Barwick’s presentation in the Bank Nationalisation Case included effectively all the elements of appellate advocacy identified (in relation to presentation and personation) and his presentation largely conformed to the ideals of appellate advocacy. His presentation also demonstrated the effectiveness of his preparation.

His submissions were characterised by his ability to conceptualise complex concepts in simple terms and utilise answers to judicial questions as a means of conveying his arguments and his submissions. His submissions were primarily delivered during the course of judicial dialogue and he adopted a ‘pleasant conversational style’ when doing so. He employed examples and analogy to great effect to support his arguments, to attack his opponent’s arguments or to respond to judicial questions. He also repeated his submissions periodically to reinforce the main tenets of his argument.

His submissions included selective use of humour and sarcasm which he used to great effect. He cited authority with care, including the clever technique of referring the judges to their previous statements on relevant issues. When, at one point, his references to a series of cases seemed to irritate the judges, Barwick detected this and initially persisted, but then ceased.

Barwick also referred the Court to Evatt’s previous statements as a judge of the High Court since he was now representing the interests of Commonwealth in this case. This last aspect demonstrates that advocacy in reality sometimes presents unexpected opportunities which can be capitalised upon.

Barwick seemed to control his emotions at all time, even where he was subject to intense judicial interrogation. He handled such instances delicately, exercising flexibility, discretion and tact as required. However, he also demonstrated courage to maintain his key arguments. He utilised language appropriately, including powerful language when required, and referred to the policy implications in upholding the validity of the legislation. He did, however, engage in what was described as ‘psychological warfare’ to distract Evatt and possibly other counsel. This may be considered an underhanded tactic designed to derive an advantage and one that does not conform to the ideals.

Overall, Barwick’s advocacy in the Bank Nationalisation Case was consistent with the ideals of appellate advocacy, despite the fact that he did not succeed on every argument.

When Barwick was briefed to appear in the Bank Nationalisation Case before the Privy Council, a significant amount of his preparation had already been done in the lead-up to the case in the High
Court. Following the special leave application, Barwick remained in London and prepared for the hearing for almost five months. His presentation suffered initially as a result of the discomfort he experienced in the unfamiliar surroundings and was also affected by the non-interventionist approach of the judges. However, he quickly adopted a different posture and started feeling more comfortable in the surroundings, even responding to a judge in a humorous way and altering the atmosphere of the courtroom. This indicates how an element of appellate advocacy such as wit can be used effectively to assist in altering the dynamic of advocacy and, in doing so, attains the status of an ideal of appellate advocacy.

Barwick’s presentation was also characterised by other elements and ideals of appellate advocacy such as flexibility, his ability to refer to the policy implications of upholding the validity of the legislation, as well as his ability to conceptualise the case by advancing propositions in a clear and concise manner. The many who witnessed Barwick’s advocacy in the special leave application also confirmed its effectiveness and their plaudits included references to a number of the elements and ideals of appellate advocacy.

Barwick used the opening to outline the structure of his submissions then succinctly conceptualised the difference between the two parties. His style of presentation had to adjust to the Privy Council where the judges would ask questions infrequently and he seized upon any question asked.

Barwick’s advocacy required him to demonstrate courage and tact on occasions to disagree with judges for the purposes of maintaining the key aspects of his arguments. At times, he employed powerful language to enhance the persuasive effect of his submissions. As he had become renowned for, he was able to draw upon relevant examples or analogies to illustrate a point and assist the Privy Council to understand, and be persuaded by, his submissions.

In his submissions, it became necessary for Barwick to assist the judges of the Privy Council navigate the case law with respect to section 92. In doing so, he was able to cite authority with care, providing sufficient information to allow the judges to gain an understanding of the relevance of the case law without providing excessive or tedious information. However, on occasions, Barwick failed to get this balance right which led to him reading long passages from previous judgments.

Again, the assessment of Barwick’s advocacy in the Bank Nationalisation Case before the Privy Council suggests that it was consistent with the ideals of appellate advocacy. However, some of the strategic decisions Barwick made in preparation may not have been sound, although these did not affect the final outcome. This also illustrates the difficulties associated with appellate advocacy in reality where it is difficult to predict, with any level of certainty, the extent to which an appellate court will be persuaded by certain judgments of other courts.
Barwick’s advocacy in the *Communist Party Case* was characterised by its inconsistency. At times, he employed and applied the elements and ideals of appellate advocacy, whereas at other times, he failed to do so and even acted inconsistently with the ideals of appellate advocacy.

His advocacy in this case reveals a less than thorough preparation. Unlike his preparation in the *Bank Nationalisation Case*, Barwick was engaged at a relatively late stage and had to prepare amongst his other commitments. Consequently, his preparation was limited. This also highlights the reality of appellate advocacy. In addition, Barwick’s preparation was not assisted by having already been involved in a series of relevant cases as he had been in the lead up to the *Bank Nationalisation Case*.

At times, Barwick’s presentation lacked its usual persuasiveness. One of the notable features of this case was his failure to detect key messages from the judges and tailor his submissions accordingly; at times, instead he appeared obstinate and inflexible. Rather than welcoming judicial interruptions and engaging the Court in dialogue, he seemed to become impatient with such questions, and appeared almost to resent judicial comments or questions. He was also too focused on returning to his planned order of submissions rather than weaving his submissions into his responses. On occasions, Barwick failed to address the concerns of the judges and appeared arrogant. He also used sarcasm in response to some questions and in his submissions generally.

In addition, although Barwick’s knowledge of the Court was significant he failed to appreciate the influence that Justice Dixon exerted over the other members of the Court. This must be counted as one of Barwick’s major miscalculations. The possibility remains, however, that, even if Barwick had adopted the line of reasoning offered by Justice Dixon he may still have been unsuccessful. This also highlights another one of the difficulties with appellate advocacy in reality; it is often difficult to know or appreciate the other factors that may influence the judges or that may bear upon a decision.

At various times, however, Barwick did demonstrate a close adherence to the elements of appellate advocacy as well as the ideals of appellate advocacy. He conceptualised his case and key propositions succinctly and with both simplicity and clarity; he cited authority with care and referred the judges to their previous statements on relevant issues; he referred the Court to the policy implications of invalidating the legislation; he used humour and emotion appropriately; he employed powerful language to convey to the Court the threat posed by communism, and regularly employed compelling analogies to demonstrate his point. Generally, he would respond to judicial questions immediately and, where possible, sought to convey his submissions via his answers. There were some occasions however, where Barwick could not respond immediately and indicated that he would return to the question at a later point but never did so. He was required to demonstrate courage on a number of occasions in the face of judicial interrogation; however, this is where he appeared to become increasingly frustrated.
Overall, in relation to the Communist Party Case, he failed consistently to apply the elements of effective appellate advocacy, or attain the ideals.

Following the Communist Party Case, Barwick continued to appear in a range of constitutional cases in the High Court and Privy Council until winding down his practice after becoming a federal member of Parliament in 1958. In this period, he continued to achieve great success in constitutional cases (for example, Hughes and Vale Pty Ltd v New South Wales (1954)\textsuperscript{1599} and also appeared for ASIO in the Royal Commission on Espionage (1954-55). The earlier reference to the Privy Council noting down his propositions word for word was evidence of his ongoing success and exceptional reputation. Barwick’s success post-Communist Party Case indicates that his performance in the Communist Party Case was most certainly uncharacteristic.

Overview

The assessment of Barwick’s appellate advocacy using the ‘three category analysis’ in the Bank Nationalisation Case and the Communist Party Case, reveals that Barwick was an accomplished appellate advocate who regularly and almost routinely applied the elements and ideals of appellate advocacy. The Bank Nationalisation Case in both the High Court and Privy Council demonstrated his ability to apply, employ and adhere to the elements of appellate advocacy, and conform largely to the ideals. It was indeed the high watermark of Barwick’s career. Barwick demonstrated a similar ability, albeit less consistently, in the Communist Party Case and at times acted contrary to the elements of effective appellate advocacy. It is not possible, however, to know to what extent his less-than-effective advocacy impacted upon the ultimate result.

Barwick’s performance in both cases, as well as an assessment of his overall approach, suggest that his reputation as one of Australia’s greatest appellate advocates was justified.

However, this assessment has to be considered in its historical context. There are a number of reasons for this. Barwick’s period at the Bar during the late 1930s and early 1940s was uninterrupted by military service; there were fewer barristers (although some would also argue that there was proportionately less work) and few (if any) female barristers.\textsuperscript{1600}

\textsuperscript{1599} 93 CLR 1. See also Hughes & Vale Pty Ltd v New South Wales (1953) 87 CLR 49 and Hughes & Vale Pty Ltd v New South Wales (No 2) (1955) 93 CLR 127.

\textsuperscript{1600} According to statistics provided by the NSW Bar Association on 25 July 2011, at the time Barwick was:

1. admitted to the Bar in 1927 - there were only 2 female barristers admitted (it is not recorded how many of these were still practising);

2. appointed Senior Counsel in 1941 - there were 7 female barristers admitted (unknown how many of these were still practising);
In addition, as outlined earlier, appellate advocacy in the years that Barwick was at the Bar was conducted in an atmosphere different from today. Today there is more reliance on written submissions and therefore less opportunity for oral advocacy; also, in many jurisdictions, time limits are now imposed on appellate advocates. In many respects, the greater dependence on written advocacy has led, in the view of some, to the decline in the skills associated with rhetoric and persuasion compared with appellate advocates in the past who enjoyed frequent opportunities to practise and refine these skills.

However, the elements and ideals of appellate advocacy that have been explored (and contrasted to reality as appropriate), are as relevant today as they were at the time Barwick practised at the Bar. Whilst the pendulum may have swung from a greater reliance on oral advocacy to written advocacy, many of the elements and ideals of appellate advocacy are equally applicable to written submissions. For example, it remains important that an advocate conceptualise their case in simple terms. More importantly, with the reduced opportunity to engage in oral advocacy, some of the elements and ideals have assumed even greater significance as appellate advocates have a narrower ‘window’ by which to convince an appellate court. For this reason, elements and ideals such as conceptualising the case, the use of opening and reply and watching the bench, are arguably now of greater significance and importance than ever.

This discussion inevitably leads to the question: would Barwick’s ability as an appellate advocate have ensured success in the present day environment? In my view, the question can be answered in the affirmative since many of the strengths and features of his advocacy are still regarded as elements and ideals of appellate advocacy in the modern appellate advocacy setting. Nevertheless, for Barwick to be an effective appellate advocate in the current environment, he would have to adapt his style to the time limits imposed and the greater reliance on written submissions. In saying this, in light of Barwick’s ability to adapt his style of advocacy, as evidenced in the Privy Council in the context of the Bank Nationalisation Case, one would expect he would have little difficulty doing so.

In conclusion, Sir Garfield Barwick was regarded as one of Australia’s greatest appellate advocates because his style of advocacy incorporated the key elements and ideals of appellate advocacy and, to some extent, his success as an advocate, can be traced to a close adherence to these elements and ideals. His reputation as one of Australia’s greatest appellate advocates this thesis concludes was justified.

3. involved in the Bank Nationalisation Case - there were 12 female barristers admitted (unknown how many of these were still practising); and

4. involved in the Communist Party Case - there were 15 female barristers admitted (unknown how many of these were still practising).
Barwick's advocacy, is best encapsulated by the following passage from the eulogy delivered by Robert Ellicott at Barwick's State Memorial Service in July 1997:

Much has been written of Barwick as an advocate. I have tried to sum it up by saying that Barwick was to advocacy what Bradman was to cricket. On a number of occasions I appeared against him but only once with him.

His memory, his rapier fine intellect, his 'indomitable spirit' as Jim Killen recently described it, his will to win, led him constantly to pursue his clients' interests through excellence in his advocacy and, to an extent rarely seen in others. He was not flamboyant. Rather he was quiet, incisive, extremely persuasive and he always had an answer for the Bench. He was cocky at times and could be scathing in his criticisms of the opponent's case. You always knew you had a fight on your hands. He was one of several Australians of his generation who performed at the cutting edge of excellence. They were intensely independent and committed Australians, unstoppable in their chosen endeavours and pathfinders for others - men like Kingsford-Smith, Bradman and Mawson. Barwick as an advocate was, I think, in that mould.\(^{1601}\)

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4. Interview with Hon. Tom Hughes AO QC (Sydney, 2 August 2006) – Blackstone Chambers, Sydney
5. Interview with Murray Gleeson, Chief Justice of the High Court of Australia (Sydney, 14 August 2006) – Chief Justice’s Chambers, Queens Square, Sydney.
6. Interview with Ross Barwick (Sydney, 4 October 2006) – CQ Cafe, Sydney
7. Interview with Sir Anthony Mason, former Chief Justice of the High Court of Australia (Sydney, 21 February 2006) – Chambers, Sydney
Appendix A

At the time of Barwick’s death in July 1997, many prominent persons reflected on his life and inevitably his advocacy. Despite these tributes occurring in an eulogistic setting, the comments pertaining to Barwick’s reputation are supported by the sources. At his State Memorial Service, Bob Ellicott QC in his eulogy, gave the following fitting tribute:

Much has been written of Barwick as an advocate. I have tried to sum it up by saying that Barwick was to advocacy what Bradman was to cricket.

... He was one of several Australians of his generation who performed at the cutting edge of excellence. They were intensely independent and committed Australians, unstoppable in their chosen endeavours and pathfinders for others – men like Kingsford-Smith, Bradman and Mawson. Barwick as an advocate was, I think, in that mould. We will not see the like of any of them again.  

The Governor-General at the time, Sir William Deane, described Barwick as ‘probably the leading appellant advocate our country has produced’. Sir John Kerr described Barwick’s achievements at the Bar as ‘brilliant achievements as a barrister.’ The President of the NSW Bar Association at the time, Mr David Bennett QC, paid tribute to the late Sir Garfield Barwick and stated that he ‘... was, with little doubt, the greatest advocate this country has ever produced’. The then Prime Minister, The Honourable John Howard, paid tribute to Barwick in a speech in the House of Representatives. He stated:

Before he entered federal politics, Sir Garfield had already established a remarkable career as a pre-eminent barrister and advocate, and as an undisputed leader of the Australian bar. I doubt that, in the period since World War II, anybody has so dominated so completely the Australian bar as did Barwick at the time of his entry into federal politics in 1958. You can reel off any other names you like but none would go within a bull’s roar of the ascendancy that Barwick had established within the legal fraternity of Australia at the bar when he entered parliament in 1958.

At the time Barwick entered parliament, the then young member for Werriwa, Mr Whitlam made the following remarks following Sir Garfield’s maiden speech:

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1602 Ibid.
1604 Kerr, above n 116, p.35.
Honourable members have listened to the maiden speech of the greatest lawyer to enter this chamber since the Leader of the Opposition (Dr Evatt), and the greatest advocate to enter it since the Prime Minister (Mr Menzies).\(^{1606}\)

Subsequently, Whitlam also considered Barwick ‘the most successful barrister in Australian history’.\(^{1607}\)

Justice Peter Young observed that:

> There will never be another Sir Garfield Barwick. Of course, we are all unique. I mean something more than that. He was a true one-off original – in most respects never to be repeated. There are many people in public life of whom one could say – the original thing about them is original sin – all their ideas are borrowed.\(^{1608}\)

Barwick has also been described as ‘the most brilliant advocate of his generation ...’.\(^{1609}\)

Ray Reynolds, a former Judge of Appeal, in his obituary emphasised Sir Garfield Barwick’s dazzling career as counsel. Ray Reynolds concluded, ‘He was in every respect, a great counsel. The Bar of NSW will claim him as their own long and proudly’.\(^{1610}\) In a statement released by the Law Council of Australia following Barwick’s death, they described him as ‘... a great barrister; probably the leading appellant advocate our country has produced’.\(^{1611}\)

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\(^{1606}\) Referred to in Commonwealth, *Parliamentary Debates*, House of Representatives, 25 August 1997, 6756-6759 (Ross Cameron, Member for Parramatta).


\(^{1608}\) Young, ‘Sir Garfield Barwick’, above n 1601, 654.


\(^{1610}\) Young, ‘Sir Garfield Barwick’, above n 1601, 653.

Appendix B

Some of the key provisions of the Banking Act 1947 (Cth) were as follows:

- Section 3 outlined the objects of the Act as:
  
  (a) the expansion of the banking business of the Commonwealth Bank as a publicly-owned bank conducted in the interests of the people of Australia and not for private profit;
  
  (b) the taking over by the Commonwealth Bank of the banking business in Australia of private banks and the acquisition on just terms of property used in that business;
  
  (c) the prohibition of the carrying on of banking business in Australia by private banks.

- Section 6 provided that if any provision of this Act was inconsistent with the Constitution, that provision and all the other provisions of this Act shall nevertheless operate to the full extent to which they can operate consistently with the Constitution.\(^\text{1612}\)

- Section 13 empowered the Treasurer to publish a notice in the Gazette declaring that, as at a particular date, the shares in a private bank are to be vested in the Commonwealth Bank.

- Section 14 provided that the Commonwealth Bank was to be the holder of the shares and could transfer those shares.

- Section 15 stated that the Commonwealth Bank was to pay ‘fair and reasonable compensation’ for the acquisition of those shares. Under sections 37-41, the amount of compensation was, unless agreed to, determined by the Federal Court of Claims.

- Section 17 provided that the directors of the Australian private bank in relation to the shares in which the notice was given were to cease to hold office. Section 18 provided that the Governor of the Commonwealth Bank, with the approval of the Treasurer, could appoint directors for the relevant Australian private bank. Under section 19, the newly appointed directors would have full power to manage, direct and control the business and affairs of the Australian private bank.

- Section 24 provided for the business of an Australian Bank to be compulsorily taken over by the Commonwealth Bank and all its assets and liabilities to be vested in the Commonwealth Bank. Under section 25, the Commonwealth Bank was required to pay ‘fair and reasonable compensation’ in relation to the acquisition of property. Under sections 42-45, the amount of compensation was to be agreed between the Commonwealth Bank and the Australian private bank or determined by the Federal Court of Claims.

\(^{1612}\) Coper described this as ‘one of the widest severability clauses conceivable’: see Coper, Freedom of Interstate Trade under the Australian Constitution, above n 822, p.92.
Section 46 provided that the Treasurer could, by notice published in the Gazette and given in writing to a private bank, require a private bank to cease carrying on banking business in Australia.\footnote{Sawer described the prohibition of non-government banking in section 46 as 'part of a complex programme for vesting the business of the non-government banks in the Commonwealth Bank, and then confining banking business to government-owned institutions': Sawer, \textit{Australian Federalism in the Courts}, above n 295, p.114. See also May, above n 778, pp.65-76; Blainey and Hutton, above n 783, pp.230-231; Hull, above n 783, p.25; Weerasooria, above n 777, 78–79; Sawyer, \textit{Australian Federal Politics and Law (1929-1949)}, above n 143, pp.194-195; Crisp, \textit{Ben Chifley: A Political Biography}, above n 783, pp.333-334. At the time, there were 14 named private banks in existence.}
Appendix C

In relation to the Bank Nationalisation Case before the High Court, the parties in the respective actions and their respective Counsel were as follows:

**The Bank of New South Wales and Ors v The Commonwealth of Australia and Ors**

*Counsel for the plaintiffs:* Mr G E Barwick KC and Dr E G Coppel KC (with them Mr A D G Adam, Mr R M Eggleston, Mr R Ashburner and Mr R B Riley).

*Counsel for the defendants:* Dr H V Evatt KC (Attorney-General), Professor K H Bailey (Solicitor-General) and Mr C A Weston KC (with them Mr J D Holmes and Mr D G Benjafield).

**The Bank of Australasia and Ors v The Commonwealth of Australia and Ors**

*Counsel for the plaintiffs:* Mr F W Kitto KC, Mr A R Taylor KC, Mr A Dean KC (with them Mr S Lewis, Mr J A Spicer and Mr T W Smith).

*Counsel for the defendants:* Dr H V Evatt KC, Professor K H Bailey and Mr H H Mason KC (with them Mr B P Macfarlan).

**The State of Victoria and Anor v The Commonwealth of Australia and Ors**

*Counsel for the plaintiffs:* Mr E H Hudson KC (with him Mr D I Menzies).

*Counsel for the defendants:* Dr H V Evatt KC, Professor K H Bailey and Mr J V Tait KC (with them Mr G Gowans).

**The State of South Australia and Anor v The Commonwealth of Australia and Ors**

*Counsel for the plaintiffs:* Mr A J Hannan KC (with him Mr K J Healy).

*Counsel for the defendants:* Dr H V Evatt KC, Professor K H Bailey, Mr P D Phillips KC (with them Mr C I Menhennitt).

**The State of Western Australia and Anor v The Commonwealth of Australia and Ors**

*Counsel for the plaintiffs:* Mr A J Hannan KC (with him Mr K J Healy).

*Counsel for the defendants:* Dr H V Evatt KC, Professor K H Bailey, Mr P D Phillips KC (with them Mr C I Menhennitt).
In relation to the special leave application in the *Bank Nationalisation Case* before the Privy Council, the parties and their respective Counsel were as follows:


4. Sir David Maxwell Fyfe, K.C., Mr D.I. Menzies (of the Australian Bar) and Mr J.H. Barrington, instructed by Messrs Freshfields, appeared for the States of Victoria, South Australia and Western Australia.

In relation to the *Bank Nationalisation Case* before the Privy Council, the parties in the respective actions and their respective Counsel were as follows:


2. Sir Cyril Radcliffe, K.C., Dr E.G. Coppel, K.C. (of the Australian Bar), Sir Valentine Holmes, K.C. and Mr B.J.N. McKenna (instructed by Messrs Linklaters & Paines, appeared for the Bank of New South Wales and Others;

3. Sir Walter Monckton, K.C., Mr G.E. Barwick, K.C. (of the Australian Bar), Mr F.W. Kitto, K.C. (of the Australian Bar) and Mr Kenneth Diplock, K.C., instructed by Messrs Farrer & Co., appeared
for the Bank of Australasia, instructed by Messrs Bircham & Co., for the Union Bank of Australia Ltd, instructed by Messrs Slaughter & May for the English, Scottish and Australian Bank, Ltd;


5. Mr A.J. Hannan, K.C. C.M.G (of the Australian Bar) and Mr J. Harcourt Barrington (instructed by Messrs Freshfields) appeared for the States of South Australia and Western Australia; and

6. Mr D.N. Pritt, K.C. and Mr Frank Gahan (instructed by Messrs Light & Fulton) appeared for the Interveners, the States of New South Wales and Queensland.
### Appendix D

<table>
<thead>
<tr>
<th>Grounds of challenge</th>
<th>Latham</th>
<th>McTiernan</th>
<th>Dixon</th>
<th>Starke</th>
<th>Rich &amp; Williams</th>
</tr>
</thead>
<tbody>
<tr>
<td>1(a). The Act is not a law with respect to banking (section 51(xiii))</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>✓</td>
</tr>
<tr>
<td>1(b). The Act is not a law with respect to acquisition for lawful purpose (section 51(xxxi))</td>
<td>X</td>
<td>X</td>
<td>X*</td>
<td>X**</td>
<td>✓</td>
</tr>
<tr>
<td>2. Acquisition, management and prohibition contrary to the absolute freedom of section 92</td>
<td>X</td>
<td>X</td>
<td>✓***</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>3. Acquisition infringes just terms requirement of section 51(xxxi)</td>
<td>Partly</td>
<td>Partly</td>
<td>Virtually all</td>
<td>Virtually all</td>
<td>✓</td>
</tr>
<tr>
<td>4. Infringes constitutional integrity of the States</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>O</td>
</tr>
<tr>
<td>5. Violates Financial Agreement between Commonwealth and States under section 105A</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>✓</td>
</tr>
</tbody>
</table>

**Key:**

- X = Rejected
- ✓ = Accepted
- O = Not decided
- * = With reservations
- ** = section 51(xxxix) needed as well to support takeover of bank liabilities
- *** = prohibition only

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1614 Galligan, above n 781, p. 174.
Appendix E

In relation to the Communist Party Case before the High Court, the parties in the respective actions and their respective Counsel were as follows:

The Australian Communist Party and Ors v The Commonwealth of Australia and Ors

Counsel for the plaintiffs: Mr Paterson, Mr Laurie, Mr Julius and Mr Hill.

The Waterside Workers’ Federation of Australia and Healy v The Commonwealth of Australia and Ors

Counsel for the plaintiffs: Dr Evatt KC, Mr Isaacs KC and Mr Sullivan.

The Australian Railways Union and Brown v The Commonwealth of Australia and Ors

Counsel for the plaintiffs: Mr Ashkanasy KC and Mr Laurie.

Bulmer and Ors (suing for the Building Workers’ Industrial Union) and Purse v The Commonwealth of Australia and Ors

Counsel for the plaintiffs: Mr Ashkanasy KC and Mr Laurie.

The Amalgamated Engineering Union (Australian Section) and Rowe v The Commonwealth of Australia and Ors

Counsel for the plaintiffs: Mr Weston KC and Mr C.M. Collins.

The Seamen’s Union of Australia and Elliott v The Commonwealth of Australia and Ors

Counsel for the plaintiffs: Mr Isaacs KC and Mr Julius.

The Federated Ironworkers’ Association of Australia and McPhillips v The Commonwealth of Australia and Ors

Counsel for the plaintiffs: Dr Evatt KC, Mr Isaacs KC and Mr Sullivan.

The Australian Coal and Shale Employees’ Federation and Williams v The Commonwealth of Australia and Ors

Counsel for the plaintiffs: Mr Webb KC and Mr Sullivan.

Sheet Metal Workers’ Union v The Commonwealth of Australia and Ors

Counsel for the plaintiffs: Mr Isaacs KC and Mr Julius.

Federated Clerks’ Union of Australia (New South Wales branch) and Hughes v The Commonwealth of Australia and Ors
Counsel for the plaintiffs: Mr Hardie KC and Mr Sullivan.

Commonwealth

Counsel for the defendants: Mr Barwick KC, Mr Taylor KC, Mr Windeyer KC, Mr Lewis KC, Mr Ashburner, Mr Riley, Mr Macfarlan, Mr McInerney, Mr Menhennitt and Mr Lush.
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