



Time for Sir Garfield to sail away

SIR GARFIELD Barwick should step down. His extraordinary invitation to the States to relitigate the validity of the Territorial senators has resulted in two of his most loyal allies on the court deserting him. One, Mr Justice Gibbs, has gone as close as any judge can to attacking the Chief Justice's tactics.

In 1975, four of the seven High Court judges, Mason, Jacobs, Murphy and McTiernan, decided that the Territorial senators were constitutionally valid. Three, Barwick, Stephen and Gibbs, said they were not. As a result the senators and MPs from the Territories retained their seats in the Federal Parliament.

In late 1976 Sir Edward McTiernan retired from the High Court. Sir Edward, a Labor appointee, was replaced by Sir Keith Aickin. This year in McKellar's case, which prompted the recent redistribution, Sir Garfield invited a relitigation of the Territorial senators case. He said it would be unfortunate if the decision which, "with due respect to the opinion of others, appears to me to be a serious departure from the Federal nature of the constitution becomes entrenched... by the passage of time."

Queensland and Western Australia quickly took up the offer and re-challenged the Territorial representatives, less than two years after they had been held constitutional. All eyes were on Mr Justice Aickin. Assuming everyone else stuck to their guns, he would be the deciding factor.

Aickin did say that the Territorial representatives were unconstitutional and Sir Garfield didn't change his mind. But the court did not over-rule itself. Both Sir Harry Gibbs and Sir Ninian Stephen said that while they believed the 1975 decision to be wrong, they considered it wrong to over-rule it.

Precedent is the cement of the common law. Inferior courts follow superior courts and superior courts will not lightly over-rule their past decisions. To do so would produce chaos and uncertainty. However the High Court has always been ready to change its mind on constitutional matters. As Mr Justice Murphy has said "... the task is to apply the constitution, not the judicial decisions." Sir Garfield Barwick said in the present case: "The area of constitutional law is pre-eminently an area where the paramount consideration is the maintenance of the constitution itself."

So if the constitution is, because of its crucial importance, more open to

reconsideration than the rest of the law, why did Justices Stephen and Gibbs decide to support a point of view they considered incorrect?

In my opinion it is clear they did so because they disapproved of the way the Chief Justice had invited the relitigation of the matter following the retirement of Sir Edward McTiernan. Mr Justice Gibbs said in his judgment: "But when it is asked what has occurred to justify the reconsideration of a judgment given not two years ago, the only possible answer is that one member of the court has retired, and another has succeeded him..."

"... Barton J said that 'changes in the number of appointed justices can ... never of themselves furnish a reason for review' of a previous decision ... Still less should the replacement of one justice by another in itself justify the review of an earlier decision."

Sir Garfield Barwick in his judgment said: "It may be granted that a change in the personal composition of the court is not itself any reason to entertain the question whether the decision of a court differently composed is erroneous. But, on the other hand, the fact that there has been a change in the personal composition of the court since an earlier decision was given can be no reason, in my opinion, why any justice should refrain from expressing what he is convinced is the right conclusion in the

matter before the court."

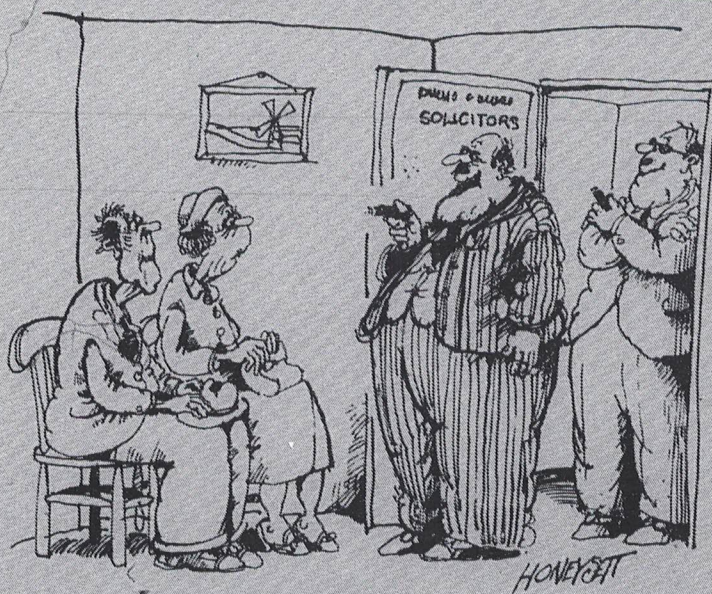
Sir Garfield is undoubtedly correct, but he should practise what he preaches. His remarks in McKellar's case could be construed by many as meaning nothing more than that he, Barwick, thought Aickin would vote differently from McTiernan. I am not suggesting this is what Sir Garfield meant, but given the way Aickin did vote, it would not have been an unreasonable interpretation of the Chief Justice's statement.

Sir Garfield is a very political judge. Many lawyers would reply, "But so is Murphy." And so he is. Barwick is a very different judge. While Murphy's radical view of the constitution is an adornment to the nation's jurisprudence, he has not bothered to justify his radicalism with learned argument. As a result Murphy's law is sadly ignored.

Barwick, on the other hand, is a consummate legal technician. As an advocate he bestrode the legal world like a colossus.

In recent years, however, Barwick has stepped into the political arena in a fashion that not even Murphy would dare emulate. Barwick gave his much-criticised advice to the Governor-General, and now he has been inviting litigants to the High Court so that decisions he disagreed with may be re-heard.

Let us not be naive. Barwick has nailed his colors to the mast. It is time he sailed off into an honored retirement.



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