

# Edmund Barton

By David Ash

In these carbon neutral times, what use a nation-builder who chops down cherry trees or burns cakes? Why not a founding father who is an urbane and unruffled man, for whom the charge of indolence is answered by the zeal of his supporters? And in Edmund Barton, did Australia have such a man, 'Toby' to his friends and 'Tosspot' to the rest?

Regrettably, this note serves neither to rehabilitate Barton if he needs to be, nor to condemn him if he does not. Rather, it deals with a life beyond a leadership of the federal movement, in an attempt to isolate the qualities which made him a successful member of the New South Wales bar and a foundation member of the High Court. It is hoped that the note may be the first of an occasional series on persons who have been members of both.

For those interested in a more detailed picture of the man, there are to date two biographical books, as well as notations in the nation's various dictionaries of biography.<sup>1</sup> There are also the Barton papers, held in the National Library.<sup>2</sup>

The first book is John Reynolds' 1948 *Edmund Barton*. I have the 1979 republication, with a sympathetic foreword by Sir Garfield Barwick. There is also reproduced R G Menzies' foreword to the first edition. He records a bar dinner given to Sir Adrian Knox in Melbourne where he found himself Mr Junior. That brilliant curiosity Sir Hayden Starke sent for Menzies, looked at him, and said 'We won't want you to make a speech', so allowing Menzies to relax. At the end of the dinner, he received a note from one Starke with typical prolixity, 'Menzies, propose Barton's health!'<sup>3</sup>

That biography was published by Angus and Robertson. That may have been a change of heart, for there is A G Stephens's tale of Henry Lawson hawking his latest volume of verse around the Athenaeum Club: Barton offered ten pounds, but as he and Lawson left, George Robertson said that he would disregard the order, adding 'Why, Barton's as bad as Lawson in his way.'

An anecdote which is found in the second biography, Geoffrey Bolton's 2000 *Edmund Barton: The One Man For the Job*, published, appropriately, with the support of the National Council for the Centenary of Federation.<sup>4</sup>

## Of schools

Barton was Australian-born, the son of Sydney's first stockbroker.<sup>5</sup> He appears to have been among the first students of the Sydney Grammar School when it opened – some might say reopened – in 1857, and it was here that Barton received the classical grounding which was to be invaluable to him throughout his life.

It was also here that he first made acquaintance with Richard Edward O'Connor, a lifelong friend and colleague. (Although I am not sure, in the absence of primary material, how much it can be supposed that the friendship started here. Barton had been born in January 1849, and O'Connor in August 1851, over two and a half years his junior. Barton went on to university aged 16.)

In these two boys the school commenced its domination of the nation's supreme court. Only from Sir George Rich's retirement in 1950 to Sir Victor Windeyer's appointment in 1958 has the court been without an



Sir Edmund Barton and Alfred Deakin. Photo: National Library of Australia.

alumnus. It would be churlish to suggest that the Court's reputation in the interregnum was a result, and merely dangerous to suggest that it arose from an infusion of vigorous Victorian blood.

It is interesting, then, that Barton chose in his 'first recorded parliamentary utterance of any length'<sup>6</sup> to dwell on the merits of his other and earlier alma mater, the state school now known as Fort Street High. In the midst of the vicious sectarian battles of the time was the equal certainty that secular rather than denominational schools were 'seed plots of immorality and crime'.<sup>7</sup> During a speech in support of a bill to ensure that all government supported education became free and secular, Barton said:<sup>8</sup>

I was for two years a pupil at the Model School in Fort-street, which was then conducted upon the Irish national system, and if any special religious instruction was given in connection with that system, I do not recollect it. I was afterwards educated in another equally secular institution (the Sydney University.) I point this out because I object that those who were educated with me under a system which has been stigmatized as producing infidelity, immorality and lawlessness, should have it imputed to them that they are other than what I know them to be, namely, upright and God-fearing citizens. We have been told that every legitimate means is to be used to upset the present system of education. There is no doubt that the meaning of that expression is that when this question comes to be discussed before the country, as I have no doubt it will, every means within the four corners of a statute will be used to upset the system proposed to be established by this Bill, and to re-introduce and perpetuate what I take leave to designate as a retrograde system. In view of the strenuous opposition which has been promised, I am tempted to remind honorable members of a quotation from Jeremy Taylor, who said, 'He that will do all that he can lawfully, would, if he durst, do something which is not lawful.' And if the honorable member for West Sydney takes me to Homer I also give him a line or two which he can apply at this juncture:

Αεήτῳε ἂ ὕεμιστος ἀνεστῖος ἔστιν ἐκέῖνος  
Ὅς πολέμου ἔραται ἐπιδημῖον ὑκρυσεντοζ.

There are many honorable members who understand Homer quite as well as I do, but I may freely translate the passage, thus: 'That man is bound by no social, religious, and domestic tie who would court civil war with all its horrors.'

Anyway, the current court has one Fort Street alumnus and one Sydney Grammar alumnus, so it's a case of *Laus deus*.<sup>9</sup>

### Of the Bar

Barton's university career was academically distinguished, culminating in an 1868 graduation with first class honours in classics and a special prize of twenty pounds.<sup>10</sup> As Reynolds observes, with no other assets and no wealthy friends, it was natural that a person such as he would gravitate to the law, although it is to the loss of later generations that only the barest details of his 'first steps on the slippery climb up the professional ladder' remain.<sup>11</sup>

It seems that Barton served time in both branches, first in the office of the solicitor Henry Burton Bradley and later reading with G C Davis. I am not aware of anything Barton later said about either apprenticeship, but Bradley may have been able to give some good tips as to the wonders of the judicial mind: he was the nephew of and had grown up in the home of Sir William Westbrooke Burton, the colony's second puisne judge, and had himself been a sometime chief clerk of and later commissioner of the court.<sup>12</sup>

Barton's first few years were on circuit. It seems that he was a member of Denman Chambers at 182 Phillip Street.<sup>13</sup> As to the bar of the time, Reynolds says it was 'a jovial, expansive society when its work was finished, finding time in those leisurely days for dinners of many courses and toasts, humorous discourses, writing of satires and practical jokes'.<sup>14</sup> Many years later, in the 1950s, a more sober generation faced an important choice, described by J M Bennett in the following terms:<sup>15</sup>

*...with no other assets and no wealthy friends, it was natural that a person such as he would gravitate to the law...*

... a special general meeting of shareholders was held in December 1956 when it was resolved that a ballot should be held of the names Barton, Counsel's Chambers, Edmund Barton, Lachlan, Macquarie, Westminster and Wentworth.

The choice, of course, was Wentworth, the patriot nonpareil of an earlier generation, and this year marks that distinguished chambers' jubilee.

### Of cricket

In Australia, being a cricket tragic is no disqualification for the prime ministership or for high judicial office. But Barton could also play. Frank Iredale described him as very fair with the bat, although a wretched fielder,<sup>16</sup> which perhaps explains his position on reserve powers.

However, it was the far more dangerous activity of umpiring that Barton was to come to the fore and to find the base for his next step forward, to politics. In 1879, Lord Harris brought an England XI on tour of the colonies. Barton was nominated by his colony as umpire in Sydney. The other umpire was the star Australian rules player George Coulthard. As the Wikipedia entry for the latter tells it:<sup>17</sup>

As an umpire he was at the centre of an ugly incident that turned into a riot in Sydney in 1879 when he was officiating in a match between Lord Harris's England side and New South Wales at the Association Ground in Sydney. On the second day of the match, he called star NSW batsman Billy Murdoch run out. Independent witnesses said the decision was 'close but fair', and was supported by the other umpire Edmund Barton, later to become Australia's first prime minister. However, NSW captain Dave Gregory demanded his replacement, claiming he was incompetent. The crowd subsequently invaded the pitch and play was suspended for the remainder of the day. When it resumed the following Monday – with the rioters back at work – Coulthard remained as umpire.

Observers of the politics of cricket will be aware of the later controversy about whether Harris as governor of Bombay<sup>18</sup> contributed to or impeded the development of the game in that land. Meanwhile (and whatever Coulthard's relationship with Barton), Barton's own approach earned (important) domestic plaudits:<sup>19</sup>

It rained incessantly for the rest of the weekend, so that on Monday the New South Wales team was all out for 49 on a murderously sticky wicket. Lengthy controversy resulted, from which Barton was one of the few to emerge with credit. His mediating style brought him into the public eye, and this soon had its political reward. In August, Windeyer was appointed to the Supreme Court bench and resigned as the university's parliamentary representative. Several candidates were thought likely to come forward but, in the end, Barton was opposed only by Dr Arthur Renwick, an energetic physician with a strong interest in public health.

With his own reputation for indolence still in the future, the young barrister won, the *Sydney Morning Herald* recording the return of Mr Edwin Barton.<sup>20</sup>

### Of the speakership

By January 1883, Barton was in his third parliament.<sup>21</sup> In one of those peculiar machinations of colonial politics of the time – part Sir Henry Parkes, part another Lands Bill, part the up and coming George Reid – he came up against the incumbent speaker and won the contest 51-47.<sup>22</sup> It was a singular advertisement for the independence of the Bar, the defeated incumbent being the prominent solicitor Sir George Wigram Allen.

It may be noted in passing that the first Allen to realise that the firm needed to move beyond the family was Wigram's son Arthur. However, it was not this 'Arthur' who is responsible for the current name 'Allens Arthur Robinson'. Rather, that comes from a coupling over a century later with a Melbourne firm, Arthur Robinson & Co. Barton lingers, somewhat indirectly, as the original Arthur Robinson (b 1872) was none other than his nephew.

Of Wigram Allen one biographer has said ‘As speaker he showed dignity, courtesy and ability, his only fault being that occasionally he was not sufficiently firm with some of the wilder spirits in the house.’<sup>23</sup>

Would the same be said of Barton?

In fact, it was not.

Later, in the new parliament of 1887, Reid would state that Barton’s firm methods over the preceding four years would be greatly missed.<sup>24</sup> Sir Patrick Jennings, a leader of the opposition while Barton held the chair, would say ‘the feeling and sense of the House at that time was deeply impressed by the qualities which you have always exercised in your career—more particularly by the judicial quality, which, I think, is so abundantly evident as being part of your character that I need not dwell upon them [sic].’<sup>25</sup>

However, these qualities were not enough to avoid a drubbing at the hands of the mercurial Adolphus George Taylor. Taylor died at Callan Park in 1900 after a tempestuous life: ‘Tall and gangling, he was known variously as ‘Giraffe’, ‘Doll’ Taylor, ‘The Mudgee pet’ and the ‘Mudgee camel’. Rowdy, brilliant, unstable and addicted to the bottle, he sometimes drew attention to real evils.’<sup>26</sup>

The same biographer says ‘He repeatedly obstructed parliament, caused disorder by his violent language, raised points of order, challenged the speaker... and displayed an embarrassing knowledge of constitutional law.’<sup>27</sup> And when Barton was unsuccessful in having the New South Wales judiciary come to the aid of the legislature in a fight with Taylor, he took the matter to the Privy Council.

Taylor, for his part, ‘raised his fare by lecturing on ‘The Iron Hand in Politics’ and selling his stamp collection, took ‘his wife, his mother, a cockatoo, a parrot and a magpie’ to England and successfully conducted his own case’.<sup>28</sup>

The embarrassment of *Barton v Taylor* is summarised in the headnote in the *Appeal Cases* for 1886:<sup>29</sup>

[Taylor] having entered the chamber of the New South Wales Assembly, of which he was a member, within a week after it had passed a resolution that he be ‘suspended from the service of the House,’ he was removed therefrom and prevented from re-entering it:

*Held*, in an action of trespass, that the resolution must not be construed as operating beyond the sitting during which the resolution was passed.

*Held*, further, that the standing order of the Legislative Assembly adopting so far as is applicable to its proceedings the rules, forms, and usages in force in the British House of Commons, and assented to by the governor, was valid, but must be construed to relate only to such rules, forms, and usages as were in existence at the date of the order.

The powers incident to or inherent in a colonial Legislative Assembly are ‘such as are necessary to the existence of such a body and the proper exercise of the functions which it is intended to execute.’

and do not extend to justify punitive action, or unconditional suspension of a member during the pleasure of the Assembly.

In the recent High Court decision on the so-called ‘interim control orders’, the chief justice refers to the opinion in the course of a discussion of the concept of ‘reasonable necessity’.<sup>30</sup>

It seems that Taylor could hardly let a day go by. A year later, directly after Barton had accepted the thanks of the leaders of the house (including those of Jennings, above), Taylor challenged the right of the house to conduct business. The house had previously adjourned, and Taylor opined:<sup>31</sup>

No house ever meets unless it is summoned by the queen, by the representative of the queen, or by the predeterminate vote of the house itself... I say that this house cannot meet by the *mero motu* of the speaker or *mero motu* of members of this house. Can a number of members come together and say, ‘We will meet this evening, and that shall constitute a meeting of parliament’? By no means.

Barton quashed the complaint by answering to the effect that Taylor had acknowledged the right of the house to sit by addressing the question to the chair.<sup>32</sup> He had entered an unconditional appearance, as it were.

It took another three pages of debate for Taylor to let this go, but it would be unfair to the reader, or to Taylor’s memory, to have the reader suppose that this was the end of Taylor’s contribution to parliament for the day. In the first column of page 21 of the relevant Hansard (just after the end of Taylor’s last challenge) are the words ‘THE PARKES GOVERNMENT.’ On the next line, in a smaller font, along the lines of a second header, are the words ‘SEAT OF PREMIER CHALLENGED.’ With a sentiment that can probably be sourced, one way or another, to Runnymede, Taylor expostulated:<sup>33</sup>

What is the position of the Hon. member [that is, Parkes]? I understand from the few words he let drop that he is about to sit here to-night as vice-president of the Executive Council. Whoever heard of such an atrocity in the Lower House? It is good enough to placate members of the Upper House who have retired from legislative life. Whoever heard of the vice-president of the Executive Council coming down here and saying, ‘I am premier, and that is my office’? A premier! Good heavens! A premier of a country has a right to control all the legitimate operations of the administrative part of the government. Where in the Constitution Act is any provision for a vice-president of the Executive Council, except in the Upper House? [and so on, in the same vein]

Taylor was an annoyance, but the sort of annoyance a country bound by the rule of law needs now and again. Whatever, he was the cause of Barton’s first defeat in the Privy Council, and it is to the second that we now turn.

### Of the Privy Council

It would be wrong to think that Barton’s attitude to the Privy Council – something that would not be unimportant to the coming nation – was forged solely in the battering he took by virtue of his office. He received a personal battering as well, in his capacity as the administrator of his father’s estate.

Barton was attempting to argue that a deed of conveyance executed by his father to the Bank of New South Wales notwithstanding, the true relationship was merely that of mortgagor and mortgagee. Their lordships<sup>34</sup> would have none of it, and did not call upon the bank, a party represented by the distinguished Chancery silk Sir Horace Davey, coincidentally counsel for Barton in the earlier matter. Davey was the bank's counsel of choice: in the first of the reports containing the Barton matters, there are two other appeals involving the bank, both with him as (one of) its counsel.<sup>35</sup>

Bolton suggests that 'As in A G Taylor's case the highest court in the British Empire was rebuffing a cherished enterprise of Barton's. It was scarcely wonderful that, with all his loyal sentiments towards Britain, Barton in future felt little reverence for the wisdom of the judicial committee of the Privy Council.'<sup>36</sup>

#### Of the Bar (again)

Then as now, politics was a financial sacrifice to a barrister of Barton's abilities. While he continued to practise upon taking the speakership, he calculated that the 1,500 earned in the role made up almost two-thirds of his income.<sup>37</sup> In the debates of his salary in September 1886, a sympathiser asserted that he could make at the Bar 3,000.<sup>38</sup>

Barton served as attorney-general, and it was likely this as much as anything else which permitted him to take silk at the age of forty. As to his competence, there seems to be no doubt. Reynolds says that his practice 'seems to have lain principally in common law cases'<sup>39</sup>, while Bolton observes that 'He specialised mainly in commercial cases, fiding his way deftly around the intricacies of contract law...'<sup>40</sup>

Both biographers note his reputation or ability as an arbitrator,<sup>41</sup> harking back to Jennings' praise of his judicial tempremant. Indeed, Barton's principal work at the bar before federation took him over entirely was the McSharry arbitration: he took it on in 1896 and only handed down his award in 1898. The expensive and controversial nature of the arbitration took in the public mind. In the election of that year, Reid was able to say of an opponent merely that he had been counsel in the McSharry arbitration.<sup>42</sup>

#### Of dignity

It was not the McSharry arbitration but an earlier case involving another railway contractor that casts an interesting light on Barton's self-perception. Like many, legal or lay, he was quick upon his dignity and upon any sleight on his integrity. It so happened that some time before taking office in Dibbs's ministry, Barton and his friend O'Connor had taken briefs to act in litigation with the railway commissioners. The matter emerged during debate in November and December 1893. There was, was there not, a conflict of interest in the attorney general holding the brief?

Well, from Barton's point of view, there may have been a conflict arising from a stamp duty question, and in any event the retainer was a trivial one. Had he left it there, the matter might have gone away. But Barton was not going to leave the deeper question unanswered:<sup>43</sup>

Now I come to this point. I may state, as matter of fact, that it is the duty of a barrister, in any case in which it is not a conflict of duty-as, for instance, in any case in which he is not retained on the other side-it is the duty of a barrister-the absolute duty-unless there



is some reason of absolute honor against it, to accept the retainer of any solicitor who comes to him with that retainer. [Mr Edden: When it is against the Crown?] No, not when it is against the Crown. If the hon. member had been here at first he would have understood that I am explaining that the Railway Department as regards the Crown Law Department has ceased to be a department of the Crown.

In other words, the railway commissioners were not the Crown. There was no longer a department, but an independent statutory authority, and the complaint of conflict was groundless. As Bolton says, 'This was too fine-drawn a distinction for most members without legal backgrounds to swallow.'<sup>44</sup>

As a result and within a week, the government fell. Barton and O'Connor took holidays. Literally, with O'Connor on a sea voyage and Barton spending three weeks as Sir John Downer's guest in Adelaide. On 20 January 1894, the *Bulletin* published a cartoon with Barton asleep in an armchair, the caption being 'Mr Barton says that the Australians are apathetic on the subject of federation. Mr Barton himself is a monument of apathy.'<sup>45</sup>

#### Of the club

Barton's membership of the Athenaeum Club in Sydney was a basis for his reputation as a tosspot. The original Athenaeum Club in Pall Mall was founded in 1823. There must have been a pre-federation flurry, as the extant club in Hobart dates from 1889,<sup>46</sup> and the Melbourne one from 1868.<sup>47</sup>

The Sydney club appears to have been founded around about 1880, and later had the benefit of premises on a long lease from Lord Rosebery, who had presumably enjoyed the company and not the 'somewhat inadequate rooms' when he visited early in its history.<sup>48</sup>

(Rosebery, it will be recalled, was the man who achieved his three aims, winning the Derby, marrying an heiress, and becoming prime minister.)

The club disbanded a year or two after the First World War, and was probably by then a bit of a shadow of its former self. Ernest Wunderlich – one of the brothers who redroofed suburban Australia – wrote in his memoirs:<sup>49</sup>

About 1902, I became a member of the Athenaeum Club, a rendezvous of Bohemians. To become a member, it was necessary to have a literary, artistic or scientific qualification. There I came into frequent contact with men of the Bulletin: J.F. Archibald, Macleod, Edmund, and its pictorial contributors: Phil May, Livingstone Hopkins, Alfred Vincent, Low and Soutar. Sir Toby Barton used to preside at the 'Knights of the Round Table', who were mostly legal luminaries, Reg Broomfield<sup>50</sup> and other barristers. Wit sparkled while the wine flowed freely.

It may say something for Wunderlich that he put the barristers last and politicians – given that Barton's daytime job by this time was prime minister – not at all, but the likely truth is that Barton's best times with the club had been in the previous century.

I say 'best' without exactly being sure what I mean. Reynolds is circumspect and borders on euphemism, suggesting that the decade before Barton was fully absorbed by the federal movement, he 'probably spent far more time in [the club's] comfortable quarters than he could justify in the light of his position as a professional man with heavy family responsibilities. His young friend Bavin was shocked at his neglect of his profession for the company of his fellow clubmen.'<sup>51</sup>

Bolton sets out two stories from A B Piddington, an admirer of Barton and a quixotic figure who (a) would later resign from the High Court before he ever sat; and (b) would resign the presidency of the New South Wales Industrial Commission a few weeks prior to becoming entitled to a pension, viewing Sir Philip Game's dismissal of Premier Lang as unconstitutional.<sup>52</sup> He also defended Egon Kisch.<sup>53</sup> The second of those three cases is notable for the Crown's reference in argument to legislation which Barton three decades before had overseen as minister for external affairs. Kisch, it will be remembered, failed a dictation test in Gaelic. The Crown frankly admitted 'By not defining the expression 'an European language' the Legislature retained the right to apply an arbitrary test. The statutory provision was designed, primarily, for the exclusion from the Commonwealth of Asiatics, the underlying motive being the preservation of a 'white' Australia.'<sup>54</sup>

As to Bavin, he was still to play a role when Piddington the pedestrian was in 1938 injured in Phillip Street near the southern side of Martin Place. That is, outside where the Lindt chocolate shop now is. The jury found for the defendant. In the full court, only Bavin J – no longer young – would have found for Piddington.

In the High Court, Piddington was represented by a descendant of Barton's parliamentary predecessor (Windeyer KC), with the father-in-law of one of Barton's prime ministerial successors as the opposition (Dovey KC). A new trial was granted, although not without dissents from the chief and from Starke J, the latter advising that 'Friendship

and sympathy for an old and distinguished member of the legal profession should not sway the judgment of the court.'<sup>55</sup>

But returning to Piddington's stories, a half century before. The first is when Barton proposed that members should all do their best to help the club 'drink itself out of debt'.<sup>55a</sup> The second one was while Barton was speaker. He had broken his ankle and was laid up in the club for a fortnight. A Coonamble lawyer was invited to stay with him, but found the going too tough. There was rum-and-milk before breakfast, sherry at 11.00am, beer or stout with lunch, a late afternoon whisky, and a well-wined dinner at 8.00pm. After liqueurs around 10.00pm 'the real and serious business of the day began...'<sup>56</sup>

Bolton is sceptical where Reynolds is ambivalent. He says that a 'convincing explanation for Barton's swings of mood is offered by a medically qualified and experienced grandson, Dr David Barton':<sup>57</sup>

I have come to the conclusion that he suffered a bipolar disorder, the modern term of manic depressive psychosis. This would explain the wild fluctuation in his behaviour and many of the illnesses he suffered. The disorder is familial and it would explain the behaviour of William Barton, also George Burdett Barton, in the extravagances of behaviour they showed... Edmund's flight from one extravagant house to another at times when he could ill afford it, is typical... So is his capacity to work at ferocious pace with little rest in spasms and appear lazy and indolent at other times.

His reputation for eating and drinking too much... suggests that this was a feature of depression... He was never described as an alcoholic – food was the factor and overeating is a compensatory mechanism...

#### Of the Privy Council (again)

As intimated above, this article is not about Barton's triumphs of federation and of premiership. That said, it would be remiss not to look briefly at an issue which arose in London, when Barton and his fellow statesmen arrived to see one of the greatest statesmen of them all, Joseph Chamberlain, steer the Commonwealth Bill through the House.

The Bill which was introduced differed from the draft of the Convention in a couple of ways. Major things turned on clause 74 (which in an amended form is represented by section 74 of our Constitution and relates to Privy Council appeals).

Clause 74 was omitted from the original Bill, with the last sentence of clause 73 being cut-and-pasted to make up the deficiency. That sentence read – and still reads in its restored resting place – 'Until the parliament otherwise provides, the conditions of and restrictions on appeals to the queen in council from the Supreme courts of the several states shall be applicable to appeals from them to the High Court'.

Chamberlain's corollary – the sting in the head, as it were – was in the words added to covering clause 5, 'Notwithstanding anything in the Constitution set forth in the schedule to this Act, the prerogative of her majesty to grant special leave to appeal to her majesty in council may be exercised with respect to any judgment or order of the High Court of the Commonwealth or of the Supreme Court of any state'.<sup>58</sup>

The fight for the colonials' preferred clause 7A was a hard one. Deakin estimated that the Australian party lobbied 3,000 people of influence.<sup>59</sup> There was Australian antipathy too: Sir Julian Salomons 'had opposed Federation as faddish and inimical to the best interests of New South Wales'<sup>60</sup> and was at the time New South Wales's agent-general. At a City Liberal Club dinner, he attacked clause 74 'with an emotion which rendered him almost speechless'.<sup>61</sup> (Followers of bench machinations will recall that Salomons, like Piddington, was appointed but never sat, in this case as chief justice of the colony.)

Barton was equal to the occasion. His biographers note his tremendous industry. In one perhaps ambitious but certainly notorious piece of lobbying, he addressed a dinner of newspaper owners for three-quarters of an hour's worth of close legal reasoning on clause 74.<sup>62</sup>

Quick and Garran summarise the negotiations thus:<sup>63</sup>

To meet the protests of the Delegates, Mr. Chamberlain afterwards proposed... [then] To meet criticisms from the Delegates and from Australia... Finally, the clause as it now stands was suggested by Mr. Chamberlain... [emphasis added]

Bolton the biographer is less prosaic:<sup>64</sup>

It did not suit [Chamberlain's] book to remain at odds with the potential leaders of a federated Australia, and by conceding a degree of Australian autonomy in the constitutional field Britain retained what really concerned Chamberlain, the right of the Privy Council to intervene in commercial cases. It took a day or two to finalise details, but an interview with Chamberlain on 17 May left Barton, Deakin and Kingston so elated that when they found themselves alone 'they seized each other's hands and danced hand in hand in a ring around the centre of the room to express their jubilation'. It is a pleasing image, although Sir Josiah Symon wrote years later, 'knowing the men, I think their joining hands in a fandango... though a good story, is apocryphal'.

The result was, however, a successful appeal in the matter of appeals, and it may have brought Barton qua litigant as much joy as Barton qua statesman.

### Of judging

The Judiciary Bill, the means to put in place the High Court provided for by the Constitution, did not have an easy passage, despite a second reading speech on 18 March 1902 by Deakin as attorney which was rated by one listener as 'the finest speech I have ever heard'.<sup>65</sup> (Leo Amery, the great British politician – and one of Barton's future son-in-law's colleagues at Oxford – rated Deakin 'the greatest natural orator of my day'.<sup>66</sup>)

By 1903, the Bill had passed and the search was on. Sir Samuel Griffith, then chief justice of Queensland, and O'Connor were seen as givens.<sup>67</sup> Barton posed the rhetorical question to Governor-General Tennyson: 'Griffith will be the CJ, that is for sure; O'Connor will be one of the judges that is equally sure. The remaining question is, *can* I persuade myself to leave politics and take the second place?'<sup>68</sup> Among other contenders were Andrew Inglis Clark and the abovementioned Sir Josiah Symon.<sup>69</sup> Barton did overcome his doubts, and took his place with the others on 7 October 1903.

That Barton concurred with Griffith in the 164 cases decided by the full court and reported in the first three volumes of the *Commonwealth Law Reports*, is notorious.<sup>70</sup> Whether it was because of his alleged indolence is hotly disputed. One commentator says:<sup>71</sup>

It would be easy to take the view that he was a tired man scarcely in the condition to show his full powers in conflict with so masterful a personality as Griffith. But this is not borne out by A N Smith, a well-known journalist of the period, who, in his *Thirty Years: The Commonwealth of Australia, 1901-31*, says: 'In the courts, however, it was known that many of the judgments read by the chief justice had been written by Mr Justice Barton'.

Sir Garfield Barwick was not known for his platitudes, and was moved to close his introductory remarks to the second edition of Reynolds' work with the observation 'It has been the practice too long for a superficial view to be taken of Sir Edmund's judicial qualities. As often, volume is mistaken for quality and the lack of it a mark of mediocrity.'<sup>72</sup> The curious can access online Barton's notebook from October 1903 to April 1904.<sup>73</sup>

Certainly, as father time marched on, there were other factors which may have contributed to Barton's quietness, for want of a better word. Barton didn't like Isaacs, and the evidence is found in his letters to Griffith during the latter's absence in 1913: Isaacs was scheming for Griffith's job, there was no sincerity 'in the jewling's attitude', and he was 'always trying to colloque with our colleagues apart from me'.<sup>74</sup>

To our age, such racism (never mind the ageism) is not excused by the times, but what makes it the more disappointing is that Barton was capable of making better potshots at the same colleague, once notebooking an understandable 'Mr Justice Barton concurred *silenter*. Mr Justice Isaacs concurred at great length.'<sup>75</sup>

Barton's notebook is also the source of a dig at the Privy Council. In *Webb v Outtrim*<sup>76</sup> the council had opined that the doctrine of immunity of instrumentalities did not apply to Australia. This was the work of Lord Halsbury, and Barton wrote to (the by now not quite so young) Bavin, saying 'Old man Halsbury's judgment deserves no better description than that it is fatuous and beneath consideration', adding later 'But the old pig wants to hurt the new federation, and does not much care how he does it.'<sup>77</sup> The court fixed the problem in *Baxter v Commissioner of Taxation, NSW*.<sup>78</sup> As the headnote abruptly puts it, 'The rule in *D'Emden v Pedder*, 1 C.L.R. 91, reaffirmed.'

### Of sectarian things

Whatever may be inferred from the note about Isaacs, it seems clear enough that Barton exhibited splendid isolationism when it came to matters Christian, in particular the rough sectarianism of the day. While in Italy in 1902, he met with the 92-year-old Pope Leo XIII (not, as Reynolds has it, Pope Pius X<sup>79</sup>), the two talking in Latin.<sup>80</sup> The pope presented Barton with a medallion.<sup>81</sup> The protestants went hysterical, and the ongoing uproar may have contributed to Barton starting to think about calling politics a day, in early 1903.<sup>82</sup>

Later, in *Nelan v Downes*,<sup>83</sup> Barton was able to unite a healthy disrespect for unsuitable English precedent and for the same sectarianism. The court held that a gift for masses for the repose of a deceased's soul was not a gift for a superstitious use, but charitable, Barton saying

'This is a country without any established church. Within its bounds, all religions are on an equal footing'.<sup>84</sup> The verdict 'was received appreciatively by the Catholic community'.<sup>85</sup>

#### Of the end

It was supposed that Barton might succeed Griffith, but he was not in good health. He knew this from, among other people, his physician and grandfather of Kerry Packer, Dr Herbert Henry Bullmore.<sup>86</sup> He vacillated, and by the time he got around to throwing his hat into the ring, the Little Digger had opted for Knox. It was a disappointment for Barton, but he would act with dignity.

I described at the outset Menzies' recollection of the dinner for Knox, which the former records in his opening to Reynolds' work. I set out now Bolton's description, which captures well this changing of the guard, and allows incidentally a glimpse of Menzies in the vigour of his youth:<sup>87</sup>

Resolutely Barton met Knox on Monday 20 October at the Spencer Street station; Knox said he appreciated nothing in his life more. Barton administered the oath at his swearing in and went with him to a welcoming dinner tendered by the Melbourne Bar Association. By convention the toast of the honoured guest should have been given by the junior member of the Bar, who at that time happened to be Robert Menzies. Unfortunately several senior lawyers, including the chairman of the dinner, Hayden Starke, had taken against Menzies because of what they saw as a self-assurance inexcusable in one who had not seen war service. Instead, the speech welcoming Knox was entrusted to a very senior member, Sir Edward Mitchell. This proved disastrous. Mitchell was tediously longwinded. At length Starke scribbled a message to Menzies on his menu: 'Menzies, propose Barton's health.' The young man rose ably to the occasion, capping his impromptu speech with a quotation from Swinburne:

I come as one whose thoughts half linger,  
Half run before;  
The youngest to the oldest singer  
That England bore.

'The speech,' Menzies liked to remember, '... made me known to the judges; and restored me, permanently, I believe, to Starke's good graces.' Barton congratulated him with his habitual warmth towards promising young people; and so the first of Australia's Liberal prime ministers made contact with the successor who most resembled him.

Early the following year, on 7 January 1920, Barton died.

#### Of family

I have mentioned in the endnotes that Barton's brother was also a barrister. Barton had a number of children. It is no discourtesy to those who eschewed a legal career if I note briefly for the interest of likely readers, other legal links in the immediate family.

Edmund Alfred Barton was born in 1879 and died in 1949, having served as a District Court and as an acting Supreme Court judge, in New South Wales.<sup>88</sup> Wilfred Alexander Barton was born in 1880, was

New South Wales's first Rhodes Scholar, and became king's counsel in London.<sup>89</sup> Finally, Barton's daughter Jean Alice was born in 1882 and married David Maughan, later a leader of the state's Bar.<sup>90</sup> (Among Maughan's other distinctions, he pipped F E Smith and William Holdsworth at Oxford.<sup>91</sup>)

#### Of a conclusion

Near the end of a lengthy and colourful entry in the *Australian Dictionary of Biography*, Martha Rutledge observes 'For a 'lazy' man, his achievements were great.'<sup>91</sup> What of his advocacy? In 1913, the barrister and politician Bernhard Ringrose Wise<sup>92</sup> published *The Making of the Australian Commonwealth 1889-1900*. He was part of it all, and he was able to say of the 1898 election campaign:<sup>93</sup>

Mr Barton was no match for Mr Reid in this style of controversy. His addresses and speeches were logical, but somewhat dull, historico-legal arguments, illumined here and there by a happy phrase... and not in the style which impresses a mob. Except to point contrasts between Mr. Reid's present and past attitudes towards federation, which was legitimate criticism in such a contest, he refrained from personal reference to his opponent.

We are left, then, with a mixed bag as to Barton's effect as a speaker. But it is one of his legacies, that advocacy is more than mere speaking; from his advocacy a new nation was ushered in. It is said that there is a rough and tumble at the Sydney Bar. To the extent that there is, it is apt that the Bar en bloc preferred the name of Wentworth over Barton's. But to the extent that advocacy is not diminished by a more measured and sober approach, it is also apt that chambers since established are named for our nation's first premier.

#### Endnotes

1. Beginning with Martha Rutledge's entry in the Australian Dictionary of Biography. The online reference is [www.adb.online.anu.edu.au/biogs/A070202b.htm](http://www.adb.online.anu.edu.au/biogs/A070202b.htm) (31/10/2007). For context, see the entry in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia*, 2001, Oxford University Press.
2. [www.nla.gov.au/barton](http://www.nla.gov.au/barton) (30/10/2007).
3. John Reynolds, *Edmund Barton*, 2<sup>nd</sup> ed, 1979, Angus & Robertson, page xii.
4. Geoffrey Bolton, *Edmund Barton – The One Man For the Job*, 2000, Allen & Unwin, page 137.
5. Reynolds, page 2.
6. Reynolds, page 18.
7. Roman Catholic Archbishop of Sydney (1877-1883) Vaughan, quoted in Reynolds, page 17.
8. NSW Parliamentary Debates, 3/12/1879, pages 455-456.
9. Curiously, the motto of the latter and, as we know from Barton, secular, institution. Fort Street's motto is *Faber est suae quisque fortunae*, or Every man is the maker of his own fortune.
10. Reynolds, page 9.
11. Reynolds, page 9.
12. [www.adb.online.anu.edu.au/biogs/A030200b.htm](http://www.adb.online.anu.edu.au/biogs/A030200b.htm) (31/10/2007).
13. J M Bennett, *A History of the New South Wales Bar*, 1969, Law Book Co, page 203. I say 'It seems' because the reference is only to 'Barton'; Barton's elder brother was also, among other things, a barrister: cf

- Bennett, page 199; see generally [www.adb.online.anu.edu.au/biogs/A030107b.htm](http://www.adb.online.anu.edu.au/biogs/A030107b.htm) (31/10/2007).
14. Reynolds, page 10.
  15. Bennett, page 210.
  16. Reynolds, page 10.
  17. [en.wikipedia.org/wiki/George\\_Coulthard](http://en.wikipedia.org/wiki/George_Coulthard) (31/10/2007).
  18. Strictly, Governor of the Presidency of Bombay.
  19. Bolton, page 23.
  20. Bolton, page 24.
  21. According to the NSW Parliament's web site (12/09/2007), Barton was member for the University for the ninth parliament (1877-1880); member for Wellington for the tenth (1880-1882); and member for East Sydney (1882-1885).
  22. Bolton, page 131.
  23. [gutenberg.net.au/dictbiog/0-dict-biogA.html#allen1](http://gutenberg.net.au/dictbiog/0-dict-biogA.html#allen1) (23/10/2007).
  24. Reynolds, page 29.
  25. NSW Parliamentary Debates, 20/01/1887, page 16.
  26. [www.adb.online.anu.edu.au/biogs/A060261b.htm](http://www.adb.online.anu.edu.au/biogs/A060261b.htm) (23/10/2007).
  27. [www.adb.online.anu.edu.au/biogs/A060261b.htm](http://www.adb.online.anu.edu.au/biogs/A060261b.htm) (23/10/2007).
  28. [www.adb.online.anu.edu.au/biogs/A060261b.htm](http://www.adb.online.anu.edu.au/biogs/A060261b.htm) (23/10/2007).
  29. *Barton v Armstrong* (1886) 11 App Cas 197.
  30. *Thomas v Mowbray* (2007) 237 ALR 194 @ [26].
  31. NSW Parliamentary Debates, 20/01/1887, page 17.
  32. NSW Parliamentary Debates, 20/01/1887, page 18.
  33. NSW Parliamentary Debates, 20/01/1887, page 22.
  34. *Barton v Bank of New South Wales* (1890) 15 App Cas 379.
  35. *Bank of New South Wales v Campbell* (1886) 11 App Cas 192; *Bank of New South Wales v Taylor* (1886) 11 App Cas 596.
  36. Bolton, page 57.
  37. Bolton, page 51.
  38. NSW Parliamentary Debates, 21/09/1886, page 4978.
  39. Reynolds, page 43.
  40. Bolton, page 65.
  41. Reynolds, page 43 and Bolton, page 65.
  42. B R Wise, *The Making of the Australian Commonwealth 1889-1900*, 1913, London, reproduced by Elibron Classics, page 303.
  43. NSW Parliamentary Debates, 1/12/1893, page 1574.
  44. Bolton, page 118.
  45. The cartoon is reprinted in Bolton, page 121.
  46. [www.athenaeumhobart.com.au/index.htm](http://www.athenaeumhobart.com.au/index.htm) (23/10/2007).
  47. [www.athenaeumclub.com.au/about\\_club.app](http://www.athenaeumclub.com.au/about_club.app) (23/10/2007).
  48. Reynolds, page 52.
  49. The extract appears in Reynolds, page 52. As to the fate of Wunderlich tiles, go to [www.monier.com.au/SelectTile/default.aspx](http://www.monier.com.au/SelectTile/default.aspx) (23/10/2007).
  50. There is a reference to Reginald Broomfield of counsel in an 1897 murder trial: see [www.pansw.org.au/PolNews/Jan28-35.pdf](http://www.pansw.org.au/PolNews/Jan28-35.pdf) (30/10/2007).
  51. Reynolds, page 51.
  52. See Graham Fricke, *Judges of the High Court*, Hutchinson, 1986, pages 77 to 83.
  53. *R v Carter; ex p Kisch* (1934) 52 CLR 221; *R v Wilson; ex p Kisch* (1934) 52 CLR 234; *R v Fletcher; ex p Kisch* (1935) 52 CLR 249.
  54. 52 CLR @ 239.
  55. *Piddington v Bennett and Wood Ltd* (1940) 63 CLR 533 @ 550.
  - 55a. Cyril Pearl has sometime premier Sir John Robertson say, around the same time and as president of the Reform Club, 'We must drink the bloody club out of debt!': *Wild Men of Sydney*, 1970, Universal Books, p15.
  56. Both stories are in Bolton, page 58.
  57. Bolton, page 59.
  58. John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, reprinted 1995, Legal Books, page 242.
  59. Bolton, page 210.
  60. [www.adb.online.anu.edu.au/biogs/A060093b.htm](http://www.adb.online.anu.edu.au/biogs/A060093b.htm) (30 Oct 2007).
  61. Bolton, page 210.
  62. Reynolds, pages 157 and 158; Bolton, page 210.
  63. Quick and Garran, page 750.
  64. Bolton, pages 212 and 213.
  65. Quoted in Michael Fullilove (ed), *Men and women of Australia! Our greatest modern speeches*, 2005, Vintage, page 86.
  66. Fullilove, page 86.
  67. Geoffrey Bolton and John Williams, 'Barton, Edmund', in Blackshield, Coper and Williams, page 54.
  68. Bolton, page 297.
  69. Troy Simpson, 'Appointments that might have been.', in Blackshield, Coper and Williams, page 23; see also Bolton, page 302.
  70. See e.g. Fricke, page 27; Bolton and Williams, page 54.
  71. [gutenberg.net.au/dictbiog/0-dict-biogBa.html#barton1](http://gutenberg.net.au/dictbiog/0-dict-biogBa.html#barton1) (30/10/2007); see also Bolton @ page 305, who in turn refers to Reynolds' defence.
  72. Reynolds, page ix.
  73. [nla.gov.au/nla.ms-ms51-11](http://nla.gov.au/nla.ms-ms51-11) (30/10/2007).
  74. Fricke, page 46.
  75. Bolton, page 305.
  76. *Webb v Outrim* (1906) 4 CLR 356.
  77. Bolton, page 307.
  78. *Baxter v Commissioner of Taxation, NSW* (1907) 4 CLR 1087.
  79. Reynolds, page 183.
  80. Bolton, pages 270 and 271.
  81. Which may be seen @ [nla.gov.au/nla.ms-ms51-13-1296](http://nla.gov.au/nla.ms-ms51-13-1296) (30/10/2007).
  82. Bolton, page 283.
  83. *Nelan v Downs* (1917) 23 CLR 547.
  84. 23 CLR @ 550.
  85. Bolton and Williams, page 56.
  86. Bolton, page 329.
  87. Bolton, page 334.
  88. [investigator.records.nsw.gov.au/Entity.aspx?Path=Person\114](http://investigator.records.nsw.gov.au/Entity.aspx?Path=Person\114) (31/10/2007).
  89. Reynolds, page 54.
  90. Reynolds, page 54.
  91. [www.adb.online.anu.edu.au/biogs/A100443b.htm](http://www.adb.online.anu.edu.au/biogs/A100443b.htm) (30/10/2007).
  92. [www.adb.online.anu.edu.au/biogs/A070202b.htm](http://www.adb.online.anu.edu.au/biogs/A070202b.htm) (31/10/2007).
  93. [www.adb.online.anu.edu.au/biogs/A120614b.htm](http://www.adb.online.anu.edu.au/biogs/A120614b.htm) (31/10/2007).
  94. Reproduced by Elibron Classics: [books.google.com/books?id=kuoySX0X47EC](http://books.google.com/books?id=kuoySX0X47EC) (31/10/2007).