that, for example, Peter Lawrence's "State Versus Stateless Societies"[3] was required reading; it is not mentioned in the "successor".

As I indicated, P.N.G. entered the international community with high expectations. Law was seen as having a vital part to play. While there has been much disappointment, it is to the credit of the authors of these papers that they have captured the spirit of those expectations and have treated their subjects constructively.

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FOOTNOTES

1 (1980).
2 B.J. Brown (ed.), (1969).
3 *Id.*, 15.

Sir John Did His Duty, by SIR GARFIELD BARWICK, former Chief Justice of the High Court of Australia, (Serendip Publications, Sydney, 1983) pp. i-xi, 1-129. Recommended retail price $7.50 (ISBN 0 949379 00 x).

Brushing aside[1] the copious quantities of printers' ink which, without too much wastage, has been spilt[2] on the events precipitated by the Senate's deferment on 16 October 1975 of Appropriation Bills (Numbers 1 and 2) 1975-1976[3], Sir Garfield Barwick[4] again[5] expounds his view of the constitutional powers, duties and obligations of the principal 1975 protagonists — the Senate, the Governor-General, the Prime Minister and the Chief Justice of the High Court of Australia. Written for "those who, though interested in the affairs of government, have no particular knowledge of the Constitution and of its operation,"[6] *Sir John Did His Duty*[7] adopts a lofty, at times condescending style. Filled with broad generalities but bereft of nuances, Barwick's exposition marches with absolute assuredness towards a seemingly foreordained conclusion: Sir John Kerr, in withdrawing the ministerial commission of Whitlam and commissioning John Malcolm Fraser, "did no more and no less than perform his duty".[8] By combining dogmatism, errors and misleading propositions, the opportunity to contribute a lucid, illuminating, informative and enduring exegesis[9] has been lost. Australian constitutional law, if not devalued, is the poorer.

Three central propositions constitute the substance of the Barwickian vindication of the Governor-General's actions. First, that "[t]he Senate had power to fail to pass the appropriation bills; and to do so in the manner which it adopted".[10] Secondly, "the express power given to the Governor-General to appoint persons to hold office during his pleasure inherently authorises him to terminate the appointment at any time".[11] Thirdly, the Governor-General "was in duty bound to exercise this constitutional power".[12] Elevation of this constitutional power, with

resile from any dialogue with the Governor-General. At the very least this would have ensured that the independence and integrity of the judiciary would not have even been seen to be at risk.

Before his retirement from the High Court on 11 February 1981 it had been suggested that the giving of advice to the Governor-General might have warranted Chief Justice Barwick's removal from judicial office.[38] Such action was never initiated or pursued. The former Chief Justice retains his credentials as one of the select few who have occupied with grace, esteem and power, the centre seat of the Court. To ensure that a formidable legal reputation is not devalued will, however, require greater intellectual effort than is contained in his exhortation of Sir John's duty.

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FOOTNOTES

1 "No *real* attempt has been made to assist the citizen to understand the constitutional significance of the events themselves or to appreciate their constitutional consequences or possible consequences for our system of parliamentary democracy.":
G. Barwick, *Sir John Did His Duty* (1983) vii-viii (emphasis added). But see *e.g.*, G. Sawer, *Federation Under Strain: Australia 1972-1975* (1977); G. Winterton, *Parliament, The Executive and the Governor-General: A Constitutional Analysis* (1983).

2 For bibliographies see Standing Committee D, "Special Report to Executive Committee: The Senate and Supply (23 June 1977) 149-50 (Appendix G) in *Proceedings of the Australian Constitutional Convention and Standing Committee Reports* (1978); R.M. Eggleston and E. St. John, *Constitutional Seminar* (1977) 63-68; G. Winterton, note 1 *supra*, 329-346.

3 The history of events is chronologically set forth in Standing Committee D, *id.*, 7-24; see also R. Darroch, "Australia's Longest Day" (Pt.1), *Australian* (Weekend), 30 October 1976, 1, 3; Pt.2, *Australian*, 1 November 1976, 9; Pt. 3, *Australian*, 2 November 1976, 11.

4 For bibliographical details, see *e.g.*, D. Marr, *Barwick* (1980); (1981) 55 *A.L.J.* 4, 169.

5 For previous elaborations, see *e.g.*, Letter to Sir John Kerr (10 November 1975) reproduced in G. Sawer, note 1 *supra*, 203-204; Standing Committee D, note 2 *supra*, 21-22; "Sir Garfield Barwick Addresses The National Press Club in Canberra — 10 June 1976, and Answers Questions put to him by Members of the Press" (transcript 12 pages) partially reproduced in R. Hall and J. Iremonger, *The Makers and The Breakers: The Governor-General and the Senate Vs The Constitution* (1976) 211-16; "Conversation with Sir Garfield Barwick" (1983) 57 *Law Institute J* 1304, 1310. For internal inconsistencies between these advices, see C. Howard, "Sir Garfield's New Tune" *National Times*, 14-16 June 1976, 7; note 34, *infra*.

6 G. Barwick, note 1 *supra*, ix.

7 This book has already been subject to review and comment. See *e.g.*, G. Evans, "Did Sir John Do His Duty?: A Remembrance Day Response to Sir Garfield Barwick" *Press Release* 157/83, 11 November 1983, *Canberra Times*, 12 November 1983, 16; G. Sawer, "Barwick Disputed on whether Sir John did his Duty "*Canberra Times*, 14 December 1983, 2; D. Solomon, "November 11: Barwick's defence" *Australian Financial Review* 11 November 1983, 35, 38; G. Barker, "Barwick's Truth of the Matter" *Age* 10 November 1983, 11; P. Kelly, "Barwick finally reveals why he advised Kerr, and why Kerr was right" *Sydney Morning Herald*, 3 November 1983, 1; P. Kelly, "Fundamentally different views of Parliament" *Sydney Morning Herald*, 4 November 1983, 9; P. Kelly, "Barwick — still the jurist, and still above them all" *Sydney Morning Herald*, 5 November 1983, 5-6; G. Winterton, "The Third Man: Sir Garfield Barwick", (April 1984) 28 *Quadrant* No. 4, 23. (See also J.B. Paul "An Epistle from Paul: On Winterton on Barwick", *id.* 27); C. Howard, "But did Sir Garfield do his duty?" (1984) 58 *Law Institute J* 136. For a response see G. Barwick, "Dismissal by the Governor-General" *Canberra Times*, 9 December 1983, 2.

8 G. Barwick, note 1 *supra*, 127.

9 The contrast with, for example, O. Dixon, *Jesting Pilate and Other Papers and Addresses* (1965), is remarkable.
10 G. Barwick, note 1 *supra*, 5. See also *id.*, 28-52; G. Sawer, note 1 *supra*, 107-40; G. Sawer, note 7 *supra*, 2.
11 G. Barwick, *id.*, 107; G. Sawer, note 1 *supra*, 147; G. Sawer, note 7 *supra*, 2.
12 G. Barwick, *id.*, 110.
13 G. Sawer, note 1 *supra*. 159-60; G. Sawer, note 7 *supra*, 2. See also G. Winterton, note 1 *supra*, 36-38.
14 G. Barwick, note 1 *supra*, 99-102 (citing sections 61, 62 and 64 of the Constitution). But see note 13 *supra*.
15 G. Barwick, *id.*, 5. See also *id.*, 96-97.
16 Cited by G. Sawer, note 7 *supra*, 2. See generally, J. Quick and R.R. Garran, *The Annotated Constitution of the Australian Commonwealth* (1901 rep. 1976) 57-58.
17 See *e.g.*, G. Evans, note 7 *supra*, 3. At the National Press Club Barwick was asked: "What section of the Constitution specified that a Prime Minister, unable to obtain Supply, should either advise an election or resign; what section of the Constitution lays down that the Governor General's duty would, in these circumstances, be to commission the Opposition as a caretaker government?" Barwick replied: "None. But you couldn't carry on a government otherwise." Barwick was then asked: "Which section is that again, Sir Garfield?" Barwick replied: "I said none." National Press Club Address, note 5 *supra*, 4-5.
18 G. Barwick, note 1 *supra*, 112.
19 D. Solomon, note 7 *supra*, 35. "Accordingly, it matters nothing when Supply is blocked that the Government might have sufficient funds for six weeks or even six months, or in the case of the Whitlam Government for another three weeks beyond November 11. The fact for Barwick is that such a Government is without parliamentary approval or confidence"; P. Kelly, "Fundamentally different views of Parliament", note 7 *supra*, 9.
20 See *e.g.*, J. Quick & R.R. Garran, note 16 *supra*, 670; G. Sawer, note 1 *supra*, 196; G. Sawer, note 7 *supra*, 2; G. Sawer, "Pruning the Senate's Power *Canberra Times*, 1 June 1983, 2; G. Sawer, "Suggested tactics for Labor in any future set-to with the Senate" *Canberra Times*, 13 October 1976, 2; G. Winterton, "Can the Commonwealth Parliament Enact 'Manner and Form' Legislation?" (1980) 11 *Federal L. Rev.* 167, 198-201. See also, P. Rae, "Observations, Reservations and Recommendations", in *Standing Committee "D" Report* (2nd vol. 1982) (Appendix L) (Aust. Const. Convention); Constitutional Alteration (Appropriation Bill) 1983 (introduced in Senate 17 May 1983).
21 G. Barwick, note 1 *supra*, 14, 44, 61, 66. See also *e.g.*, *A.G. ex rel. Black v. Commonwealth* (1981) 55 A.L.J.R. 155, 158- "the text of our own Constitution is always controlling".
22 G. Barwick, note 1 *supra*, 32. (emphasis added). See generally, G. Sawer, note 1 *supra*, 129-139. P.J. Hanks, "Parliamentarians and the Electorate" in G. Evans (ed.), *Labor and the Constitution 1972-1975: Essays and Commentaries on the Constitutional Controversies of the Whitlam Years in Australian Government* (1977) 166, 183-190; J. Crawford, "Senate Casual Vacancies: Interpreting the 1977 Amendment" (1980) 7 *Adel. L. Rev.* 224. "[T]erritory representatives [in the Commonwealth Parliament] need not be 'directly chosen by the people'. The Parliament may, for example, provide for them to be appointed or indirectly chosen, for example through an electoral college system". L. Zines, "Representation of Territories and New States in the Commonwealth Parliament", in *Standing Committee "D" Report*, note 20 *supra*, Appendix H, 5. Barwick does note: "This is not the place to remark on the present position when the Senate is not so composed". But he goes on: "The important fact for the present is that the Senators are all elected". G. Barwick, note 1 *supra*, 32. For another instance where the text was not relied on see note 17 *supra*.
17 *supra*.
23 G. Barwick, note 1 *supra*, 74-75.
24 See note 5 *supra*.
25 See *e.g.*, G. Sawer, note 1 *supra*, 158-160.
26 G. Barwick, note 1 *supra*, 87-93. Barwick "provides a comprehensive list ... and many more could be garnered from last century. However, all these examples, including the one federal case are redolent of the cosy executive-judicial relationships of colonial times, and are dangerous precedents for the differently situated High Court of Australia". G. Sawer, note 7 *supra*, 2. For some earlier examples see *e.g.*, J.A. Thomson, *Judicial Review in Australia: The Courts and the Constitution* (S.J.D. thesis Harvard Law School, 1979) 38-57. As to advice by Justices of the U.S. Supreme Court to Presidents, see B.A. Murphy, *The Brandeis/Frankfurter Connection: The Secret Political Activities of Two Supreme Court Justices* (1982) 345-363. See also, S. Crawshaw, "The High Court of Australia and Advisory Opinions" (1977) 51 *A.L.J.* 112; Constitutional Alteration (Advisory Jurisdiction of High Court) 1983 (introduced in House of Representatives 19 October 1983).

27 The letters exchanged by Barwick C.J. and Murphy J., are reproduced in "High Court Judges Clash" *National Times*, 14-19 June 1976, 5. Justices Jacobs and McTiernan are also reported to have "expressed disagreement with the decision to offer advice to the Governor-General". *Id.*, 1, 5. See also, G. Evans, note 7 *supra*, 5: "It is well known that there were strong reactions ranging from serious conern to strong objection on the part of brother Judges...to the fact that a High Court Judge should place himself in the position of giving extra judicial advice". In 1976 Barwick denied that any Justices, other than Murphy J., had "expressed their disapproval". National Press Club Address, note 5 *supra*, 9.

28 G. Barwick, note 1 *supra*, 68. See also *id.*, 76-78, 82-84. "The question was as to legal — constitutional — authority and duty and did not involve in its answer any political considerations. It was a non-justiciable question of Vice-Regal authority under the Constitution." (page 82).

29 *Id.*, 79. "I was asked whether the withdrawal of the commission of a Prime Minister who could not produce money to carry on the ordinary services of Government was within constitutional power...." *National Press Club Address*, note 5 *supra*, 4.

30 G. Barwick, note 1 *supra*, 82.

31 Section 76 of the Commonwealth Constitution.

32 See generally, G. Sawer, "Political Questions" (1963) 15 *Uni Toronto L.J.* 49; G. Lindell, *Justiciability of Political Questions Under the Australian and United States Constitutions* (LL.M. thesis, Adelaide University, 1972).

33 See *e.g.*, *Cormack* v. *Cope* (1974) 131 C.L.R. 432, 449, 452, 453, 454, 455, 460 (Barwick, C.J.), 464, 465-466 (Menzies, J.), 466, 467 (Gibbs, J.), 472 (Stephen, J.), 473, 474 (Mason, J.); *A.G. (Clth) ex rel. McKinlay* v. *Commonwealth* (1975) 135 C.L.R. 1, 17 (Barwick C.J.); *Victoria* v. *Commonwealth* (the P.M.A. Case) (1975) 134 C.L.R. 81, 117-119 (Barwick, C.J.), 163-164 (Gibbs, J.), 181-182 (Mason, J.); *Western Australia* v. *Commonwealth* (1975) 134 C.L.R. 201, 233 (Barwick, C.J.), 275-276 (Jacobs, J.), 293-294 (Murphy, J.); *Victoria* v. *Commonwealth* (the A.A.P. Case) (1975) 134 C.L.R. 338, 364 (Barwick, C.J.), 379-380 (Gibbs, J.) 370 (McTiernan, J.), 417-419 (Murphy, J.). See also, G. Sawer, note 1 *supra*, 42-65, L. Zines, "The Double Dissolutions and Joint Sitting" in G. Evans (ed.), note 22 *supra*, 217, 227-230. See generally, J.A. Thomson, note 26 *supra*. Barwick does try to distinguish the P.M.A. Case from his advice to the Governor-General. G. Barwick, note 1 *supra*, 83-84.

34 G. Barwick, *id.*, 83. For Barwick's previous decisions, see note 33 *supra*. Indeed his attitude on the justiciability of the issue on which the Governor-General had requested advice may well have hardened between the time of Barwick's 1975 letter, note 5 *supra* ("unlikely to come before the Court") and his 1983 book. At least by 1976 he was certain that "the question of whether the Governor-General withdrew his Ministers' commission, could never come before the Court in any shape or form.... [I]t was a matter which could not in any sense come before the court. There was no doubt about that. It was not a matter which could ever come before the court in any sense, shape or form". National Press Club Address, note 5 *supra*, 9. For his 1983 explanation that "unlikely" "was too weak a word" and "was not wisely used" see P. Kelly, "Barwick — still the jurist and still above them all", note 7 *supra*, 5.

35 For views that this issue can be justiciable see *e.g.*, G. Sawer, note 1 *supra*, 148-150, 158; C. Howard, note 5 *supra*, 7; G. Winterton, note 1 *supra*, 125-127. For Barwick's reply see, P. Kelly, "Barwick — still the jurist and still above them all", note 7 *supra*, 5. Compare the differing views as to the justiciability of presidential impeachment pursuant to Art.2 s.4 of the U.S. Constitution. See *e.g.*, J.R. Labovitz, *Presidential Impeachment* (1978) 245-247; R. Berger, *Impeachment: The Constitutional Problems* (1973) 103-121; C.L. Black jr., *Impeachment: A Handbook* (1974) 53-64; The Committee on Federal Legislation of the Bar Association of the City of New York, *The Law of Presidential Impeachment* (1974) 36-43, 52-57; P. Brest and S. Levinson, *Processes of Constitutional Decisionmaking: Cases and Materials* (2nd ed. 1983) 922-928.

36 *Cf.*, *Attorney-General (Vic) (ex rel. Dale)* v. *Commonwealth* (the Pharmaceutical Benefits Case) (1946) 71 C.L.R. 237 and the A.A.P. Case, note 33 *supra* and Chief Justice Griffith's advice (noted in G. Barwick, note 1 *supra*, 87-88) and the P.M.A. Case, note 33 *supra*. Since 1975 see *e.g.*, *Re Toohey, ex parte Northern Land Council* (1981) 38 A.L.R. 439; *FAI Insurances Ltd.* v. *Winneke* (1982) 56 A.L.J.R. 388; *Wilsmore* v. *Court* [1983] W.A.R. 190. See generally, G. Sawer, note 1 *supra*, 148, 158; G. Evans, note 7 *supra*, 4; G. Evans, "Dismissal of Whitlam Government" Senate Hansard, 3 November 1983, 2184-2185; Standing Committee D, "Special Report", note 2 *supra*, 52-54: "[T]he boundaries of the 'justiciable' are flexible, giving rise to conflicting judicial opinions, and the limits of judicial control over governmental persons and actions have been extended with particular frequency in this century"; G. Sawer, note 7 *supra*, 2.

37 See notes 32 and 36 *supra*. As to the U.S. Supreme Court's vacillation with respect to justiciability see *e.g.*, G. Gunther, *Cases and Materials on Constitutional Law* (10th ed. 1980) 1688-1717; P.A.

Freund, A.E. Sutherland, M.D. Howe, E.J. Brown (eds.), *Constitutional Law: Cases and Other Problems* (4th ed. 1977) 71-85; P. Brest and S. Levinson, note 35 *supra*, 903-928.

38 "More drastic would be the removal of the present Chief Justice by the Governor-General in Council upon the motion of both Houses pursuant to section 72(2) for proved misbehaviour.... Barwick C.J.'s action in giving advice to the Governor-General could be seen to be unconstitutional, inasmuch as it conflicted with the High Court's own rulings that the giving of advice is not part of the judicial power of the Commonwealth and that there must be a strict separation of Commonwealth and judicial and other power so that judicial officers should not exercise powers that were not Commonwealth judicial powers. Considering that the remedy in both *Waterside Workers' Federation of Australia* v. *J.W. Alexander Ltd.* and in *Boilermakers* was to deny the exercise of judicial power to those who purported to exercise both federal judicial and other powers, removal from judicial office could be argued to be appropriate in the case of the Chief Justice."
C.J. Sampford, "Some Limitations on Constitutional Change" (1979) 12 *Melb. U.L. Rev.* 210, 226 (footnotes omitted). On this removal power see generally, J.A. Thomson, "Removal of High Court and Federal Judges: Some Observations Concerning Section 72(ii)" (unpublished manuscript, 1983).

Parliament, The Executive and The Governor-General, by GEORGE WINTERTON, LL.M. (W.A.) J.S.D. (Columbia), Barrister and Solicitor of the Supreme Courts of Western Australia and Victoria, Barrister of the Supreme Court of New South Wales, Associate Professor, University of New South Wales. (Melbourne University Press, Melbourne, 1983), pp. i-viii, 1-376, with Table of Cases and Index. Cloth recommended retail price $39.00 (ISBN 0 522 84242 9; ISSN 0726-4852).

This book is a most impressive, scholarly and well written legal and constitutional analysis of federal executive power in Australia. It is destined to be regarded as a definitive and exhaustive work on the subject with which it deals. As foreshadowed in the preface, the book discusses what the Commonwealth Government can do without legislative authority, the constitutional relationship between the Queen and the Governor-General, the Governor-General and the Ministry, and the Parliament and the Executive. It also deals with the scope of judicial review of governmental action, the reserve powers of the Governor-General and what may be done to prevent a repetition of the constitutional crisis which occurred in 1975.

Chapter 1 contains an incisive examination of the tensions which exist between the principles of federalism, the separation of powers and responsible government, each of which underlies to some extent the Australian Constitution. In particular there is a discussion of the problems created by the clash between the Senate's powers over supply and the British notions of responsible government. The author's conclusion is that this conflict remains in a state of flux which leaves relations between the two Houses of federal Parliament, and hence the Government and the Senate, dangerously uncertain (page 11). The author argues strongly that the powers vested by the Constitution in the Governor-General were intended to be exercised in accordance with the principles of responsible government both as a matter of convention and, by implication, law as well, in some cases. The author also argues that these powers cannot legally be exercised by the Queen or be the subject of instructions issued by Her (pages 17-26).

Chapters 2 and 3 provide a comprehensive analysis of the executive power referred to in section 61 of the Constitution. The author suggests that to be valid the exercise of the power must satisfy two tests. The first is concerned with the *federal* aspect of the powers referred to in section 61. The author accepts that, generally, the executive powers must follow or be relevant to the distribution of