

BOOK REVIEW*

Owen Dixon

By PHILLIP AYRES

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Sir Robert Menzies wrote about Sir Owen Dixon in his memoir, *The Measure of the Years*, to help preserve Dixon's legacy:

because time marches on; new generations of lawyers are arising who know not Caesar. With our modern temptation to think that all knowledge began with us, Dixon's memory could, for a time, fade. So here I am striking a blow for survival ... [so that] future generations of Australian lawyers [will] recall Owen Dixon, who has left an ineradicable mark upon the constitutional history of Australia.¹

To some extent Philip Ayres' *Owen Dixon* has a purpose similar to that described by Menzies. It is more than 30 years since Dixon died. The man regarded as the greatest common lawyer of his day and one of the greatest of all time² has not been the subject of an extensive biography until now. Ayres, an Associate-Professor of English literature, has not set out to write a legal text book nor a legal biography. Rather he has sought to 'integrate the personal and professional [parts of Dixon's life] as seamlessly as possible ... with the advice, supervision and cooperation of senior lawyers'.³ In launching *Owen Dixon* Spigelman CJ observed that:

For a lawyer who attended law school in the mid to late 60s, as I did, the then recent judgments we studied emanated from one of the great common law benches of history ... This biography ... enables lawyers of my generation to better understand the man who had the most profound intellectual influence on us.⁴

For lawyers of a succeeding generation who are not as familiar with Dixon's judgments, and lay readers wanting to understand Dixon's contribution to the law, the biography is perhaps less revealing. While *Owen Dixon* achieves its aim of presenting a life in full, there is still room for a legal biography of Sir Owen Dixon, a man commonly acknowledged as Australia's greatest ever lawyer.

Sir Owen Dixon's career at the bar was very successful, but many successful lawyers have sat on the High Court with less influence than Dixon. When Sir Owen was appointed to the High Court he gained the respect of his fellow judges

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1 Robert Menzies, *Measure of the Years*, 1972, 232.

2 Philip Ayres, *Owen Dixon: A Biography* (2003), ('Ayres'), 281.

3 Ibid xvi.

4 J J Spigelman, 'Australia's Greatest Jurist: Phillip Ayres' *Owen Dixon*' (2003) 47 (7) *Quadrant* 44, 46.

immediately. Yet the biography only gives us a few clues of what set him apart from other barristers of his day. Dixon appeared in fewer High Court cases than Sir Hayden Starke,⁵ yet it was Dixon who became the intellectual leader of the Court. Perhaps Starke's personality prevented him from being more influential. The only comparative information in the biography concerns Dixon's period as an Acting Justice of the Supreme Court of Victoria. In the second half of 1926, Dixon heard three times more reported cases than any of his colleagues at first instance, and reserved judgments in 81 per cent of cases instead of delivering judgments extempore – an indicator of his intellectual rigour.⁶

Dixon came to a High Court that was 'not a happy place,'⁷ and saw the faults in his colleagues: Starke seems to have got on with no-one and often belittled his colleagues, although Dixon appreciated his sense of honour.⁸ Dixon found Sir Edward McTiernan to be 'lazy and unqualified',⁹ yet Dixon liked Sir George Rich despite his laziness.¹⁰ He thought that Herbert Vere Evatt was essentially a dishonest and political judge¹¹ although he respected the quality of some of Evatt's judgments.¹² Dixon's most trenchant criticism is reserved for Sir John Latham. Dixon's remarks at the ceremonial sitting to mark his own retirement that '[Latham] and I have remained the closest friends,'¹³ are in sharp contrast to remarks recorded in the biography¹⁴ where Dixon criticises Latham who on occasion displayed 'great ignorance', was 'extremely stupid' or would 'talk of the corrupt political world the sickening atmosphere of which did not appear to offend his sensibilities'.¹⁵ Dixon did not approve of Latham's political background nor his skills as a judge. There may have been some jealousy on Dixon's part, as he did not have the interesting and varied international career that Latham had. This may also explain Dixon's keenness to play a role, particularly an international one, during World War II. Ayres leaves it to his readers to draw their own conclusions about whether Dixon's character assessments are just or correct. In the absence of alternative accounts, many of Dixon's judgments of people will be taken as fact by readers. Sadly, Dixon's former colleagues are not here to defend themselves.

While the biography has illuminated many aspects of Dixon's personality, it has been less successful in critically analysing his judgments. This is despite the wide and careful study that the author has given to those judgments. This situation is not unique to the Dixon biography but is common to most of the biographies of the former Chief Justices. These have focused on the character of

5 Dixon appeared in 175 and Starke appeared in 211 cases: Tony Blackshield, Michael Coper and George Williams (eds) *The Oxford Companion to the High Court of Australia* (2001) 164.

6 Ayres, above n 2, 49.

7 *Ibid* 56.

8 *Ibid* 89.

9 *Ibid* 59.

10 *Ibid* 258.

11 *Ibid* 59.

12 *Ibid* 62.

13 'Retirement of the Chief Justice' (1964) 110 CLR xiii.

14 Ayres, above n 2, 89–91, 186–9, 221.

15 *Ibid* 89.

the men rather than their judicial work. From the perspective of a legal audience, the analysis of the cases is inadequate. So many of Dixon's judgments are lauded in this book without detailed analysis that they lose their individual impact. For instance, Ayres praises Dixon's judgments for their 'intellectual rigour ... high quality and legal interest'¹⁶ and because they are 'a model of logical method'.¹⁷ The judgments 'carry weight because of their sheer intellectual power'.¹⁸ In *Ex Parte Nelson No 2*¹⁹ Dixon produced 'the classic exposition of constitutional law'.²⁰ His judgment in *New South Wales v Commonwealth No 1*²¹ is described as 'noteworthy for its appeal to first principles and its simple logic'.²² It is said that '[s]ome of his judgments from the early and middle 1930s rank among his most brilliant, influencing the common law world in profound ways'.²³ In a constitutional case considering s 92, Ayres says that Dixon showed 'a good example of his recourse to Aristotelian concepts as a basis of legal reasoning ... Dixon's interpretation was now about to receive its classic statement ... his mind was wonderfully concentrated on arriving at a definitive legal solution'.²⁴ His work on s 92 is 'simple, clear and semantically logical – that is its brilliance'.²⁵ His judgment in *James v Commonwealth*²⁶ was 'meticulously constructed through argument founded in a host of authorities running back to 1620'.²⁷ Apparently 'Dixon's formulations tend to have a greater exactness' than those of other judges.²⁸ *Stapleton v R*²⁹ is described as 'a landmark case in any assessment of Dixon's greatness'.³⁰ The judgment in *R v Kirby; Boilermakers' Society of Australia (The Boilermakers Case)*³¹ was 'written by Dixon in his finest style, with an authority derived from his profound interest in federalism in Australia and the United States, replete with compelling legal argument, acute analysis of the Constitution and rhetorical concision'.³² Ayres concludes that Dixon is 'the outstanding common lawyer of his day and one of the greatest of all times'.³³ While none of these claims are necessarily disputed, a legal biography would naturally contain deeper analysis of the judgments than that which appears in this biography.

16 Ibid 49.

17 Ibid 227.

18 Ibid 57.

19 (1929) 42 CLR 258.

20 Ayres, above n 2, 58.

21 (1932) 46 CLR 155.

22 Ayres, above n 2, 60.

23 Ibid 61.

24 Ibid 66.

25 Ibid.

26 (1939) 62 CLR 339.

27 Ayres, above n 2, 97

28 Ibid 223

29 (1952) 86 CLR 358.

30 Ayres, above n 2, 235.

31 (1956) 94 CLR 254.

32 Ayres, above n 2, 255.

33 Ibid 281.

In recent years some areas of Dixon's jurisprudence have been heavily criticised. Some of the criticism is acknowledged but not analysed in any detail. For instance Dixon's view of s 92³⁴ and his decision in *Commonwealth v Cigamatic Pty Ltd (in liq)*³⁵ have been criticised as being politically inspired. This criticism is rejected by Ayres. Similarly, criticism has been levelled at Dixon's judgment in s 90 cases³⁶ but the substance of the criticism is not addressed. Nor is there any consideration of the High Court's recent rejection of Dixon's approach in relation to the liability of Highway authorities in *Brodie v Singleton Shire Council*³⁷ and vicarious liability in *Scott v Davis*.³⁸ Criticism of his logical method by Starke J to the effect that it is not so useful 'when applied to human conduct and action'³⁹ is also merely noted. The current debate⁴⁰ between the activist judicial philosophy espoused by some members of the Mason Court⁴¹ and the call for a return to Dixonian traditional method by at least one member of the Gleeson Court⁴² has not been adequately addressed. Notably, there is no discussion of the oft repeated argument that Dixonian method actually masks underlying judicial values.⁴³ Dixon's logical method is lionised but there is no explanation of how it substantively differs from other methods and what makes it superior. And while Dixon's judgments might have represented clarity of thinking and logic they did not always convey clarity of expression. Sometimes even his colleagues found his sentences long and obscure.⁴⁴

Despite this, Dixon exerts a continuing influence on recent High Court jurisprudence. As Justice Gummow points out in *Change and Continuity: Statute, Equity and Federalism*,⁴⁵ this influence has been decisive across a range of fields including s 90 of the *Constitution (Ha v New South Wales; Walter Hammond & Associates v State of NSW)*⁴⁶ the relationship between the Common law and the *Constitution (Lange v Australian Broadcasting Corporation)*⁴⁷, the Commonwealth's liability in tort and contract (*Commonwealth v Mewett*⁴⁸), financial guarantees and the position of wives (*Garcia v National Australia Bank*

34 Ibid 66.

35 (1962) 108 CLR 372; Ayres, above n 2, 280.

36 Ayres, above n 2, 274.

37 (2001) 206 CLR 512.

38 (2000) 204 CLR 333. It should be noted that Dixon may have felt bound in both cases to follow earlier Privy Council decisions which were directly on point and with which, given his low opinion of the Privy Council, he may have disagreed.

39 Ayres, above n 2, 94.

40 Ibid 233

41 See, eg, Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds) *Interpreting Constitutions: Theories, Principles and Institutions* (1996); John Toohey, 'A Government of Laws, and Not of Men?' (1993) 4 *Public Law Review* 158.

42 Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 47 (1) *Quadrant* 9.

43 Anthony Mason, 'The role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 *Federal Law Review* 1, 5.

44 Michael Kirby 'McTiernan, Edward Aloysius' in Tony Blackshield, Michael Coper and George Williams (eds) *The Oxford Companion to the High Court of Australia* (2001) 467.

45 William Gummow, *Change and Continuity: Statute, Equity and Federalism* (1999) xvii.

46 (1997) 189 CLR 465.

47 (1997) 189 CLR 520.

48 (1997) 191 CLR 471.

*Ltd*⁴⁹) and *Melbourne Corporation* doctrine (*Austin v Commonwealth of Australia*⁵⁰).

The biography reveals other fascinating and little-known aspects of Dixon's life and provides an insight into his mode of thinking. Despite his reputation as Australia's most distinguished jurist, Dixon's academic career was average. He achieved second class honours in his Arts degree⁵¹ and did not get honours in Law.⁵² A similar lack of academic prowess affected his eldest son Franklin who showed no aptitude for law. Dixon was a devoted husband and family man. He was always concerned for Franklin's health and happiness as he was for all of his family. His views of the world represented a very strong middle class protestant morality. He was particularly scandalised by adultery and did not respond well to divorce cases.⁵³

Dixon informally advised the Governors of Victoria and Western Australia on constitutional matters,⁵⁴ continuing a long tradition of Chief Justices advising Vice Regal representatives. Dixon was very keen to participate in some helpful way during World War II. He served as Australian Minister in Washington 1942–4 and drafted regulations for the Central Wool Committee and Allied Consultative Shipping Council. After the war he was appointed UN mediator in Kashmir. These appointments sit uneasily with Dixon's previously held view that it was inappropriate for justices of the High Court to hold non-judicial office.⁵⁵ For instance, Dixon declined to be appointed Royal Commissioner in the 1930s. Dixon's change of heart is understandable. A smaller Australia needed all people of outstanding ability to contribute to the war effort.

At the core of this book are Dixon's diaries: an immensely valuable, and hitherto unpublished, source that Ayres justifiably draws upon heavily. Ayres was given access to the diaries by Dixon's surviving daughter who approached him to write the biography. Dixon's diaries reveal a lofty superiority, some hypocrisy and a general malaise. They also reveal that Dixon was in constant physical pain: he suffered from severe haemorrhoids which he refused to have removed because he did not want to 'lose control' by having a general anaesthetic. Instead he would be regularly injected by his physician with an astringent agent.⁵⁶ Ayres reveals that Dixon was regularly doing the work of more than one judge. Dixon wrote many of the joint judgments during his time on the Court and ghost wrote judgments for Sir George Rich. On one occasion he

49 (1998) 194 CLR 395.

50 (2003) 77 ALJR 491.

51 Ayres, above n 2, 11.

52 Ibid 13.

53 Ibid 91, 94, 119 see especially n 16. An example of Dixon's attitude to adultery is revealed in *Ellis v Leeder* (1951) 82 CLR 645, 652: 'No tenderness need be shown to a creditor whose debt grew out of a liaison between her and a married man'. This judgment was overturned by the Privy Council in *Leeder v Ellis* (1952) 86 CLR 64.

54 Ayres, above n 2, 235–8, 249, 255, 259, 275.

55 Ibid 64–5.

56 Ibid 74.

wrote Rich's judgment at first instance and then sat on the appeal.⁵⁷ For someone who was always complaining about the ethics of other justices, this sort of conduct is evidence of at least a modicum of hypocrisy. Perhaps his physical pain and the volume of extra work explains his dislike of judicial work, regular contemplations of resignation and discouragement of others from judicial office.⁵⁸

Dixon was a superlative lawyer, but there were a number of elements that set him apart from others. Dixon came to a fractious High Court with an excellent practice behind him. In contrast to some of his colleagues he was widely read, had a good memory and was extremely industrious. These factors, combined with his personal charm and ability to carry other members of the High Court with him, set him apart from his brethren. One matter that is often overlooked in assessing Dixon's reputation is his relationship with Sir Robert Menzies. Menzies was a towering political figure and in his time at the bar a very successful lawyer. Menzies' achievements reflected well on Dixon who was his pupil master. While Dixon was upset that Menzies did not heed his advice and kept him in the dark over the appointments of Latham and then Barwick as Chief Justice of the High Court and of Sir John Spicer as Chief Justice of the Industrial Court, Menzies and Dixon remained close friends and had some degree of influence on each other.

Dixon had an international reputation for legal scholarship, due in part to the friendships he made in London in the 1920s and in Washington in the 1940s. In particular, his friendships with Felix Frankfurter, Dean Acheson, Sir Girja Bajpai and Lord Simonds were important. These friendships, and the high regard in which Dixon was held during his time in Washington, played a part in the Honorary Doctorates he was awarded by Harvard and Oxford University, and in his appointment as United Nations mediator in Kashmir.⁵⁹ All of these factors are secondary to Dixon's awesome command of the law. His contribution to common law jurisprudence was to be the foremost exemplar of the jurisprudence of legalism comprising 'strict logic and high technique'. The award of the Order of Merit in 1963, a personal gift of the Sovereign, was due recognition of these talents.

The great strength of Phillip Ayres' biography is that it draws heavily on Sir Owen Dixon's personal diaries which have remained in private hands since his death in 1972. It remains a matter for conjecture about whether Dixon expected that one day these diaries would be made public.⁶⁰ Historians, lawyers and political scientists would be interested to examine the source material. Whether the publication of *Owen Dixon* will encourage the Dixon family to make these diaries public remains to be seen.⁶¹ While Dixon eschewed the idea of making his personal papers public by, for instance, donating them to the National Library as

57 Ibid 93. The case was *Associated Newspapers Ltd v Federal Commissioner of Taxation* (1938) 61 CLR 337.

58 Ibid 61, 62–3, 68, 70–1.

59 Ibid 193.

60 Ibid xvii.

61 Ibid 288.

Sir John Latham did, *Owen Dixon* has, to some extent, let the genie out of the bottle. The diaries should be made public so that researchers can delve further into specific aspects of his life by examining the source material on which this fine oeuvre is based. This biography fills an important gap in the biographical history of the High Court. Moreover, it presents a clever, complex and significant Australian in an illuminating and engaging manner – for which Ayres is to be congratulated. Hopefully, *Owen Dixon* will stimulate further research and writing about an extraordinary lawyer.