BOOK REVIEW

OWEN DIXON, PHILIP AYRES, THE MIEGUNYAH PRESS, 2003

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Owen Dixon has been described as the 'finest lawyer' Australia has produced.[1] Born in 1886 and called to the Victorian Bar in 1910, Dixon's personal story spans more than half a century of Australian law and politics. As a barrister and judge, Dixon's professional life was dominated by the High Court of Australia. Over time, however, Dixon came to dominate the High Court and it is difficult to identify anyone who has had a greater impact on the Court and its jurisprudence. Dixon's outstanding intellectual ability combined with an exceptional memory and strong work ethic lay behind his success.[2] He first appeared before the High Court as a 25-year-old barrister in 1911, addressing Griffith CJ, Barton and O'Connor JJ in *Cock v Aitken*.[3] This cannot have been easy; Dixon later told one of his associates 'that as a barrister he had been nervous, and felt he should be nervous, at the opening of every case'.[4] Nonetheless, within a decade of *Cock v Aitken* Dixon had a thriving High Court practice, regularly appearing in constitutional and general law matters.[5] He was appointed a Justice of the High Court in 1929 and Chief Justice in 1952. When he retired from the Court in 1964, he was aged nearly 78. During his judicial career, Dixon engaged in certain non-judicial activities without resigning his seat on the High Court. The most famous example is his service as Australian Minister to the United States from 1942 to 1944.

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1 Sir Anthony Mason, 'The Centenary of the High Court of Australia' (2003) 5 *Constitutional Law and Policy Review* 41, 42. Mason is critical of Dixon's judicial methodology, however: see, eg, at 45.

2 On Dixon's memory, see Philip Ayres, *Owen Dixon* (2003) 25–6. On his work ethic, see, eg, at 39, 47, 49, 65, 148, 260–1.

3 (1911) 13 CLR 461. Dixon's argument is summarised in the report at 465–6. As Ayres notes in his account of *Cock v Aitken*, Dixon's brief in this matter came from his uncle, solicitor John Dixon: Philip Ayres, *Owen Dixon* (2003) 21.

4 Philip Ayres, *Owen Dixon* (2003) 26.

5 Ibid 27, 32.

Dixon's longstanding friendship with Sir Robert Menzies, Prime Minister for nearly half Dixon's 35 years on the High Court, provided another point of contact with the wider world of Australian politics and international affairs. [6]

THE BOOK

Owen Dixon is the first full biography of Dixon. In agreeing to write this book,[7] author Philip Ayres took on a project that would have intimidated many; Dixon was, after all, a monumental figure.[8] Undaunted, Ayres has produced a thoroughly engrossing account of his subject and a work of first-rate scholarship. The book is aimed at a general audience and emphasises the man and his life, rather than the body of his work. Naturally, the book has a substantial legal content, but as Ayres says in the preface, 'this is not a textbook'[9] and extended legal analysis of Dixon's judgments, for example, is outside its scope. The book is well-written and well researched and referenced. Ayres was given access to Dixon's personal papers by the Dixon family. The papers include Dixon's private correspondence (he kept in contact with Justice Felix Frankfurter and Lord Simonds, among others) and Dixon's diaries.[10] The Dixon diaries, about which Ayres has written in *The Oxford Companion to the High Court of Australia*, cover 1935 to 1965 as well as brief periods earlier in Dixon's life. They contain Dixon's record of the day's events, including summaries of his conversations and dealings with others.[11] Ayres also describes the diaries as a window on Dixon's inner world, 'being frequently personal, even deeply private, in content'.[12] Drawing on sources such as these, the biography takes the reader into Dixon's daily life, particularly as a Justice of the High Court. In addition, the book covers Dixon's participation in non-judicial work in Australia and the United States during World War II plus his role in 1950 as United Nations mediator between India and Pakistan over their competing claims to Kashmir.

THE MAN AND THE JUDGE

The Owen Dixon that emerges from this book led his life according to a firm set of moral and ethical principles, although he eschewed organised religion.[13] In Ayres' words, 'Dixon's overriding concern was that people and institutions, and the courts especially, should act with propriety and rationality so as to discharge their duties honourably and correctly'.[14] Thus Dixon kept his promise to his mother to abstain from alcohol (his father was an alcoholic)[15] and he disapproved of divorce.[16] He was

6 The friendship between Dixon and Menzies dated from 1918 when Menzies became Dixon's pupil at the bar (ibid 28). At the very end of Dixon's life, he and Menzies, both in poor health, remained in contact exchanging messages via a tape recorder: see ibid 289–90.
7 The invitation came from Dixon's surviving daughter: ibid xvi.
8 Cf ibid 294.
9 Ibid xvi.
10 The detailed bibliography provides further information on these sources: ibid 369–84.
11 Philip Ayres, 'Dixon diaries' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 222.
12 Ibid 223.
13 Philip Ayres, *Owen Dixon* (2003) 4, 55, 291.
14 Ibid 72; see also 89, 183.
15 Ibid 19–20.

also against the death penalty, believing it immoral to 'deal in human life'.[17] As a barrister he scrupulously sought the advice of the Committee of Counsel about his ethical obligations, even as a senior practitioner.[18] Of the judicial role, Dixon believed that judges should decide cases 'rightly' as opposed to simply clearing their case-lists; hence he was wary of ex tempore judgments.[19] He also believed that 'politics unfitted a man for judicial office' (these are Ayres' words) and apparently rejected all thoughts of a political career himself.[20] Privately, he was opposed to the appointments of Sir John Latham and Sir Garfield Barwick to the High Court.[21] Had Dixon lived just a few years longer, we may know what he thought about the appointment to the Court of Lionel Murphy, although perhaps we can guess.

Dixon presumably located his judicial methodology, in particular his commitment to the 'high technique and strict logic of the common law'[22] described in his paper 'Concerning Judicial Method', within this overarching ethical framework.[23] Of course, in matters of judicial method, as in many others, what is 'proper', 'rational' and 'correct' is contested.[24] But although Dixon wrestled with the writing of particular judgments (Ayres notes he was dissatisfied, for example, with the first draft of his judgment in the *Communist Party Case*,[25] writing to Simonds in 1951 that he had 'devoted more time [to this case] than he had to any other'[26]) it seems from this book that Dixon never doubted his general approach to legal reasoning. One of the many fascinating insights contained in the book is Dixon's statement in a letter to Frankfurter that 'Concerning Judicial Method' was '[t]o a certain extent ... aim[ed] at Denning L.J. However, rather to my consternation, I received a letter from him [Denning] saying he completely agreed with everything I wrote in it'.[27] Of his famous commitment to 'strict and complete legalism',[28] Dixon told one of his associates that he 'regretted having used the phrase' because 'it was misunderstood. He was using it of specifically constitutional matters and when he made the speech he had in mind criticism of the Court in the Sydney press over the *Communist Party Case*.'[29] A close reading of the speech in

16 Ibid 39, 195, 248.
17 Ibid 48.
18 Ibid 51–2.
19 Ibid 49; see also 286. Cf *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 where the Court's judgment was given orally by Dixon CJ (although he explains why at 161).
20 Philip Ayres, *Owen Dixon* (2003) 22, 53.
21 Ibid 71 (Latham), 285–6 (Barwick). In 1935 Dixon probably hoped that he would be appointed Chief Justice instead of Latham: ibid 71–2.
22 Sir Owen Dixon, 'Concerning Judicial Method' in Severin Woinarski (ed), *Jesting Pilate* (1965) 152, 157.
23 Ibid 155. See also Philip Ayres, *Owen Dixon* (2003) 232–3. The paper 'Concerning Judicial Method', delivered by Dixon at Yale University in 1955, is discussed at 251–4.
24 See, eg, Mason, above n 1, 45.
25 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1; Philip Ayres, *Owen Dixon* (2003) 222.
26 Philip Ayres, *Owen Dixon* (2003) 222 n 10 (Ayres' paraphrase of Dixon).
27 Ibid 253. Dixon recognised, however, that resort to policy considerations in legal reasoning was necessary in certain situations: ibid 81–2.
28 Sir Owen Dixon, 'Upon Taking the Oath of Office as Chief Justice' in Severin Woinarski (ed), *Jesting Pilate* (1965) 245, 247.
29 Philip Ayres, *Owen Dixon* (2003) 233.

question with its emphasis on 'strict and complete legalism' in 'federal conflicts' confirms this was so.[30]

Although certain themes like Dixon's 'basal' character (as Dixon would have put it) are explored throughout the book, each chapter deals with a consecutive period in Dixon's life (the exception is the final chapter entitled 'The Measure of Dixon's Greatness'). Ayres is generally sympathetic to Dixon and some readers will disagree, perhaps strongly, with the book's treatment of certain events or subjects; whether sufficient attention is given to critiques of Dixonian 'legalism' in constitutional interpretation is one example.[31] However, the book is written in an open style that allows the reader the freedom to interpret the unfolding story of Dixon's life and there is frequent quotation from primary sources. We learn that Dixon's first love was classics, and financial necessity led him to legal practice.[32] He thrived at the bar but was, in Ayres' words, a '[r]eluctant Justice'.[33] He rejected a continuing appointment to the Supreme Court of Victoria as well as the position of Chief Judge of the Commonwealth Arbitration Court before finally joining the High Court.[34] During the 1930s and 1940s, Dixon claimed to dislike being a judge and cautioned friends about accepting judicial appointments.[35] This is despite Dixon's influence within the Court and the impact of his judgments across many areas.[36] The notorious ill-feeling between certain members of the Court at this time contributed to Dixon's unhappiness and the book reveals how truly dispiriting the atmosphere could be.[37] For example, on Victory in the Pacific Day (15 August 1945) Latham approached Justice Hayden Starke, the epicentre of much of this intra-curial conflict, and, as Dixon recorded in his diary:

> sd that as the war had ended & a new period was opening wd not Starke end the unhappy state that existed between them. Starke said he saw no reason to do so. L. spoke of his unhappiness & the unhappiness he caused others. He replied he was not unhappy. 'He did not want L's interference & wanted 'to have nothing to do with any of you'.[38]

Fortunately, the High Court in the 1950s and 1960s was more collegial[39] and in the final year of Dixon's life (1972) he was able to tell his friend Sir Robert Menzies that 'I enjoyed my active life'.[40]

NON-JUDICIAL ACTIVITIES

Unhappiness in judicial office — as was Dixon's lot in the 1930s — is one possible reason for a judge deciding to undertake non-judicial work.[41] However, the book does

30 Dixon, above n 28, 247.

31 For a recent critique, see Leslie Zines, 'Legalism, Realism and Judicial Rhetoric in Constitutional Law' (2002) 5 *Constitutional Law and Policy Review* 21; cf Philip Ayres, *Owen Dixon* (2003) 232–3, 293–4.

32 Philip Ayres, *Owen Dixon* (2003) 9–11, 285.

33 Ibid 56 (title to Ch 5 'A Reluctant Justice on the High Court 1929–1939').

34 Ibid 50, 53.

35 Ibid 70–1; see also 181, 235.

36 Ibid Chs 5 and 9.

37 See generally ibid Chs 5 and 9 and Ayres, above n 11, 223.

38 Philip Ayres, *Owen Dixon* (2003) 178 (punctuation as in original).

39 Ibid Ch 12.

40 Ibid 290.

41 A J Brown, 'The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge' (1992) 21 *Federal Law Review* 48, 87.

not suggest this motivation lay behind Dixon's decision to become involved in extra-judicial activities during World War II. Dixon declined invitations from Menzies in 1935 and again in 1954 to chair a Royal Commission on the basis that such work was inconsistent with judicial office (the second of these was the Petrov inquiry).[42] When war broke out in 1939, we learn that Dixon volunteered his services to the government in what seems to have been an instinctive response to the crisis. He told Menzies a few days after war was declared 'I was anxious to do anything I cd for the war'.[43] As is well known, Dixon subsequently chaired several committees established by the government to deal with specific aspects of the war effort – such as the Central Wool Committee – before later serving as Australian Minister to the United States. The chapters that deal with Dixon's wartime work outside the courtroom are among the most valuable in the book as they provide an in-depth account of the functions Dixon actually performed and highlight the high level executive office he held. Ayres quotes a 1942 cable from Evatt to Curtin in which Evatt describes Dixon's post in Washington as 'practically equivalent to that of War Minister in the United States', a description the book bears out.[44] Even on wartime committees in Australia, Dixon's activities brought him into frequent close contact with those at the heart of government, including Prime Ministers Menzies and Curtin. We discover that Dixon lobbied for particular policy outcomes, offered advice to the government on a range of matters (legal and non-legal) and was involved in the drafting of several sets of national security regulations.[45]

As *Wilson's Case* demonstrates, the *Constitution's* separation of powers now places strict limitations, essentially in the form of a test of compatibility with judicial office, on the non-judicial functions a federal judge can validly undertake.[46] Assessed against today's standards, Dixon's executive activities in the 1940s – at the very least his diplomatic role, but almost certainly his work on the Central Wool Committee and like bodies – would now be regarded as unconstitutional unless justified as a special wartime measure. Wartime exigency is how Dixon appears to have reconciled his actions with general principles of judicial independence.[47] Yet when the war ended, and despite declining to chair the Petrov Royal Commission, it is evident that Dixon engaged in certain extra-judicial conduct the appropriateness of which is open to debate. In particular, Ayres recounts the circumstances surrounding three separate occasions in the 1950s and another in 1960 when Dixon gave advice to a state Governor about an actual or looming constitutional problem. It is clear Dixon had no misgivings about the propriety of this. He did not conceal it and believed he could assist non-legally trained state vice-regal representatives to perform their duties in this way.[48] However, George Winterton correctly observes that the giving of such advice by a member of the High Court would be 'widely considered' contrary to standards of judicial independence today.[49]

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42 Philip Ayres, *Owen Dixon* (2003) 62–3, 70, 243–4.

43 Ibid 116; see generally 115–17.

44 Ibid 144 n 14.

45 See generally ibid Ch 7.

46 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

47 J D Holmes, 'Royal Commissions' (1955) 29 *Australian Law Journal* 253, 272 (commentary of Dixon); Philip Ayres, *Owen Dixon* (2003) 117.

48 Philip Ayres, *Owen Dixon* (2003) 235–8, 249, 255, 275.

49 George Winterton, 'Injudicious Advice' (Letter to the Editor) (2000) 44 *Quadrant* 6 discussed in Philip Ayres, *Owen Dixon* (2003) 238. See also *Wilson v Minister for Aboriginal and Torres*

More worrying is the biography's revelation that following Fullagar J's decision in *Lockwood v Commonwealth*[50] – an unsuccessful challenge under the *Royal Commission Act 1954* (Cth) and associated legislation to the validity of the Petrov inquiry – Dixon told Prime Minister Menzies 'to pass a new Act and announce it immediately while Fullagar's judgment was in his favour' (Ayres' words) which, as Dixon noted in his diary, Menzies 'immediately did' (Dixon's words).[51] Ayres does not comment on this incident, but it is hard to see any basis, then or now, on which the giving of such advice to the government on a politically controversial matter in relation to which the government was a party before the Court (and which might be further litigated) could be regarded as compatible with judicial independence. Dixon's judgment seems to have lapsed on this occasion; by contrast, the book contains many examples of his concern to uphold standards of judicial independence and impartiality which any overall assessment of Dixon must heed.[52] Interestingly, it was only a year after *Lockwood v Commonwealth* that Dixon publicly questioned whether his wartime extra-judicial service had, in retrospect, been 'right'.[53]

READ ON

There is much more in *Owen Dixon* than can be mentioned here. For example, the book provokes questions about the link between Dixon's classical education and his literary and analytical style. There is Dixon's account of the hearing of various cases and the preparation of judgments, such as in the *Bank Nationalisation Case*[54] and the *Communist Party Case*,[55] plus the astounding practice of Dixon writing judgments for Justice George Rich.[56] The story of Dixon's family life rounds out the picture of the man. The scholarly contribution this book makes is immense. However, the book is worth reading simply as a fascinating account of a life spent at the centre of Australian law and public affairs by a man whose daily work powerfully shaped those very things.

Strait Islander Affairs (1996) 189 CLR 1, 19–20 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

50 (1954) 90 CLR 177.

51 Philip Ayres, *Owen Dixon* (2003) 244.

52 See, eg, ibid 219–24, 250, 260. For a thoughtful discussion of how to assess, in retrospect, judicial involvement in Australian cold war politics, see Laurence Maher, 'Tales of the Overt and the Covert: Judges and Politics in Early Cold War Australia' (1993) 21 *Federal Law Review* 151.

53 Holmes, above n 47, 272 (commentary of Dixon).

54 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1; Philip Ayres, *Owen Dixon* (2003) 186–90.

55 Philip Ayres, *Owen Dixon* (2003) 219–24.

56 There are many references to this throughout the book. For the first example, see ibid 56–7.