# Tales from the Bench

**A review of Philip Ayres (2003) *Owen Dixon*, Miegunyah**
**ISBN 0 522 85045 6, RRP $65**

**Frank Brennan SJ AO**

Published in *Eureka Street*, July-August 2003, pp. 37-9

Australia's finest judge was Sir Owen Dixon who spent 35 years on the High Court, 12 of those years as Chief Justice. Almost seven years were spent away from the bench assisting the government with the war effort first at home (when his vituperative brother judge Starke said he "did nothing and just went to lunches and dinners") and then as special minister to Washington. In 1950 he was UN Mediator in Kashmir.

Dixon died 31 years ago and the legal community has awaited his official biography with great anticipation. For years, James Merralls QC from the Melbourne Bar was expected to provide the text. But in the end the family committed Dixon's papers to a non-lawyer Philip Ayres, an English literature academic from Melbourne and the biographer of Malcolm Fraser. Ayres has burrowed deep beyond Dixon's public record but in very selected places. His main additional sources are Dixon's diaries and five of Dixon's surviving and most adoring associates who shared their memories and assisted with the redrafting of the more legal chapters. Judges' associates are usually bright young graduates who spend a year or two with a judge assisting with the researching of judgments before their own successful careers at the Bar and on the Bench. Ayres does not list Merralls as one of the associates who participated in his writing of the biography but he is given special mention for his "extensive and profound" knowledge of Dixon. The result is a very Melbourne book under the imprint of Miegunyah Press from the Melbourne University Press. Miegunyah, for those not in the know, was the residence of Sir Russell Grimwade, Dixon's predecessor as Chairman of the Felton Bequest Committee.

Not only has there never been a finer judge, there has never been one better connected with the government of the day. Prime Minister Menzies had been Dixon's pupil at the Bar. When Dixon decided to retire as Chief Justice, he tried to convince Menzies to take on the job because as Ayres puts it, "it was impossible to leave things to the others". Dixon had a poor opinion of most of his fellow lawyers and especially of his predecessor John Latham and successor Garfield Barwick as Chief Justice. He regarded Latham as a usurper and was very curt with Menzies at the swearing in. He never liked Barwick who had appeared often before him as an advocate. When Barwick's appointment as Chief Justice was announced, Dixon's

judicial colleague Douglas Menzies, the Prime Minster's cousin, called to see him at home. Dixon told him that the appointment was "on the same plane" as that of McTiernan who Dixon regarded as lazy and unqualified. Dixon wrote in his diary: "All my concern was how the PM was implicated. He said he had asked Barwick not to request it but had said that he must have it if he did." Dixon confided in his closest judicial friend Justice Kitto that Barwick's way would be to decide cases "rather than to decide them rightly".

To the layman, Dixon is best known for his espousal of a "strict and complete legalism". Ayres attempts to place Dixon in the centre of our national story proclaiming him to be "the finest and most entire mind Australia has produced". Ayres applies to Dixon the words of Horace: "entire in himself, well-turned and polished, rounded off". Many of the quotes from the ex-associates add a touch of hagiography to the work. The quotes from the diary often raise more questions than they answer.

The *Communist Party Dissolution Case* was a case of profound political significance. Dixon led the court in striking down the legislation by six votes to one. Chief Justice Latham who had been Attorney General was alone in dissent. Barwick had led a bevy of barristers in the Commonwealth's unsuccessful defence. The case ran for 23 days and the court delivered judgment 10 weeks later. The report in the *Commonwealth Law Reports* runs to 285 pages. Dixon commenced his own judgment with the observation:

> The primary ground upon which (the Act's) validity is attacked is simply that its chief provisions do not relate to matters falling within any legislative power expressly or impliedly given by the Constitution to the Commonwealth Parliament but relate to matters contained within the residue of legislative power belonging to the States.

He found the legislation unsupported by the Commonwealth's defence power because by 1950, when the legislation was enacted, "the country was not of course upon a war footing" and "the matter must be considered substantially upon the same basis as if a state of peace ostensibly existed." He thought it quite "unnecessary to discuss the principles of communism" and "even less necessary to examine notorious international events". He knew Menzies would be very upset by the result. They didn't bump into each other for another nine months. Ayres quotes from the diary:

> (Menzies) mentioned Commo case & said he was shocked on reading my judgment to find what I said. I answered it was presented only dialectically and Barwick had no general knowledge. We needed international facts. I added that Latham had avoided having a conference. He said he could understand him because he preferred to dissent like Isaacs.

Was his Honour seriously suggesting to the Prime Minister that the outcome of the constitutional litigation could have been different had there been different counsel or a judicial conference? Eight years later, Dixon would write to Lord Morton:

> I cannot help feeling that in litigation the order of importance is first the formal order, second the reasons, third the adequacy of the basal material and the use of it made by the reasons. The place which the arguments of counsel take should be auxiliary. The place given to them is in fact too great. In the past I have read arguments before the Privy Council presented by Australian counsel which they would not have dared to raise before us.

Diplomat Alan Watt who was Dixon's First Secretary in Washington during the war observed that Dixon's "intelligence and his wide experience have led him to expect little from human

nature and always to anticipate the worst". Dixon once told one of his associates, "When I hear stories…about people who are reformed characters, the only thing it ever reminds me of is the story of the cannibal chief who lost his teeth and became a vegetarian."

Like all of us, Dixon was a product of his age. Some of his fixed attitudes prompt dissent from the assessment as "the finest and most entire mind Australia has produced". Like many Australians then and now, he had a strong aversion to organised religion, verging on prejudice and intolerance. When arbitrating the Kashmir crisis he wrote home, "Like many troubles in the world, religion is at the bottom of the one I am to look after". He described the Islam of the Pakistanis as "a religion which seems to give a good deal of exercise in bobbing up and down and it certainly is not more absurd than the Roman Catholic religion". Of the Indians in the Kashmir dispute he wrote, "The great majority are Hindus and what they believe in is more archaic."

Despite or because of his extensive international experience, Dixon remained a strong advocate of the White Australia policy. When questioned about India by an American judge in 1942, he confided, "we were afraid of the East including India because whether by conquest or peaceful penetration they would overrun us." By the early 1960s, Dixon was very troubled on his regular visits to London, alarmed by the number of Jamaicans and other West Indians on the streets. He predicted race riots and told his associate, "They can have communism and get rid of it after fifty years, but they cannot get rid of that." When Special Minister to Washington during the war, he went down into the heart of old Confederacy country and addressed the Executive Club in Memphis:

> We regard our country as a southern stronghold of the white race - a thing for which it is well fitted; and our population is European. The aboriginal native has retreated before the advance of civilisation, contact with which he apparently cannot survive. The analogy in this country is the Red Indian, but the Australian Aboriginal is of a much lower state of development. He belongs to the Stone Age and no success has attended efforts to incorporate him in civilised society.

No wonder the critics of the *Mabo* decision hanker after Dixon's strict and complete legalism. But even they fail to appreciate that his strict and complete legalism was to be applied to the constitutional interpretation of the federal compact. He was the past master at developing the common law and that would have been more relevant to the *Mabo* exercise. When he thought the House of Lords was erroneously developing the common law on murder and manslaughter, he took the unprecedented step of declaring:

> Hitherto I have thought that we ought to follow decisions of the House of Lords, at the expense of our own opinions and cases decided here, but have carefully studied *Smith's Case* I think that we cannot adhere to that view or policy. There are propositions laid down in the judgment which I believe to be misconceived and wrong. They are fundamental and they are propositions which I could never bring myself to accept.

When the High Court considered *Mabo*, there had been no decision of the High Court which squarely raised the issue of native title with native title claimants being a party to the proceedings. By 1992 a judge in the Dixon mould could readily have been a member of the majority ruling that the common law recognised native title. In earlier times, it might have been uninformed prejudice rather than purity of legal method that would have held back a Dixonian judge from recognising native title in the common law of Australia.

One of Dixon's associates confided to Ayres that "Dixon would often write a judgment straight through without authorities". Once when the associate pointed to the deficiency, Dixon retorted, "You think we better decorate it, then?" He proceeded to add references to various precedents. He once quipped at a dinner party when a woman enthused about the capacity to dispense justice:

> I do not have anything to do with justice. I sit on a court of appeal, where none of the facts are known. One third of the facts are excluded by normal frailty and memory; one third by the negligence of the profession; and the remaining third by the archaic laws of evidence.

Not being a lawyer and being anxious to establish Dixon's brilliance behind the scenes as well as on the public record, Ayres reveals blemishes even in Dixon's judicial behaviour. On one occasion, Dixon diaried "spent all day doing Rich's Sun Newspapers Ltd and Associated newspapers Ltd …Finished Rich's judgment at 2.15am". He then proceeded to sit on the three judge bench for the appeal from Justice Rich. Ayres notes that Justice Rich's judgment "had been substantially written up for him by Dixon, a comic ingredient which must have delighted Dixon beyond words." The impropriety of it does take your breath away.

Dixon had very strong views about the need for utmost propriety by others. He wanted the Melbourne Club to change its rules and drop its automatic offer of membership to Governors-General once William McKell was appointed. Dixon told Latham (the president of the club), "I could not come into a club and meet McKell: that it was not a political matter as he alleged but a moral question: that charges of corruption had been made in the evening Herald as well as other journals and that it was not right to countenance such a man or expose people to the risk of meeting him." At the club, all sorts of business could be done and gossip exchanged. On one occasion at the club, Chief Justice Dixon fell into conversation with the personal physician of his fellow-Justice Williams. Dixon asked about Williams' health and the doctor obliged, "seemingly breaching patient confidentiality," says Ayres. The reader is left with the impression that much discussion in the clubs and with senior government ministers would have been seemingly improper if it had been conducted by mere mortals in public places, restricted by the usual canons of judicial propriety.

What is extraordinary is first that these things happened but also that they can be faithfully reported by a biographer seemingly committed to hagiography. By 1952, Dixon was making a habit of offering advice to State governors confronting constitutional crises. Ayres gives this assessment:

> Dixon believed that English service officers who had become State governors might speak to him if they were troubled by a constitutional crisis, given that they were ignorant of constitutional law and conventions and that there was no one apart from their premiers to whom they could turn. He told some of them this - it was simply an offer to help them in times of trouble. He would not have dreamt of advising a governor who had a legal background. A scrupulous academic lawyer concerned to downplay the Crown's reserve powers might consider Dixon's offer or such advice a breach of propriety, but for Dixon, a commanding judicial figure with an undeniable sense of propriety, the circumstances outweighed any niceties if such existed.

Even at the Commonwealth level, there were times when Chief Justice Dixon thought he had a responsibility to throw the proprieties and conventions to the wind. He would regularly discuss the proceedings of the Petrov Royal Commission with the chief commissioner and with ASIO's Brigadier Charles Spry. Ayres tells us that "it was a matter of national

importance on which he believed he had a civic duty to remain informed." Early in the planning of the politically charged commission, the government hit a legal glitch. There was doubt whether the Royal Commissions Act would permit a commission of three members. Justice Fullagar ruled in the government's favour. Dixon was unpersuaded by Fullagar's judgment. Before any appeal, the Chief Justice came to the Prime Minister's rescue, "telling Menzies to pass a new Act and announce it immediately while Fullagar's judgment was in his favour, 'which he immediately did'." We are not told if the conversation took place at the club, in chambers or at Parliament House.

In his last months, Dixon exchanged some taped messages with Menzies who was recuperating from a stroke. In one of the last messages, Dixon said:

> I sit here quite content but, of course, the loss of Alice (his wife) was a sad blow. We had arranged between us that I should die first, but we didn't keep to the arrangement, and - However, I sit still, and having been told that all is bad with me, and with bad luck, I am not looking forward to anything, because I never had any luck, as you know.
>
> Well, it was delightful to hear you, and all I can say is that you take a great deal more interest in the outside world than I did, but you saw more of it than I did - And so keep going, and keep your pecker up - And our friendship means a great deal to me.

He concluded: "Well, good bye and good luck." Many lawyers will justifiably remain convinced that Dixon was our finest judge. But I will now have an added caution seeking to detect the social and political preconceptions behind the tight judicial logic. In his position of isolated privilege, Dixon had the intellect to command any conversation whether from the bench or at the club. Hopefully the doctrine and practice of the separation of powers has developed and judges are more cognisant of the social realities that generate the conflicts requiring judicial resolution. While Dixon's judicial method remains supreme in his published judgments, the disclosures of his diaries and of his associates highlight the fallibility of one long isolated by power, social position and intellect.