

**JESTING PILATE, Crennan and Gummow (eds)  
(Federation Press, 3rd ed: 2019)**

**Book Launch, Supreme Court of Victoria Library, 24 June 2019**

**Address by Professor Michael Crommelin AO, Zelman Cowen  
Professor of Law, Melbourne Law School**

**Opening**

President, your Honours, distinguished guests.

It is a very great honour to be invited to launch this third edition of *Jesting Pilate* in Melbourne. The first edition was published in 1965, more than half a century ago. Four years later, I was given a copy to celebrate my admission as a solicitor of the Supreme Court of Queensland. It remains a treasured item in my professional library.

At the outset, I offer my warmest congratulations to Susan Crennan and William Gummow, editors of the new edition, for their very fine achievement.

**Contents**

The third edition is expanded substantially beyond the original collection of 29 of Sir Owen Dixon's papers and addresses. It includes no fewer than eight additional items, which reveal much more of Sir Owen as a person, a lawyer and a judge, and his enduring contribution to the law.

It also adopts a new structure comprising two parts, called 'The Standing of Sir Owen Dixon' and 'The Dixon Papers'. The editors have arranged Sir Owen's papers and addresses, both old<sup>1</sup> and new, in the second part, in six groups according to subject:

- (A) Dixon in the Wider World;
- (B) Judicial Methods;
- (C) Constitutionalism;
- (D) Comparative Federalism;
- (E) The Professions;
- (F) From the Bench.<sup>2</sup>

This new arrangement achieves greater coherence in the collection while adding emphasis to the remarkable breadth of its subject matter.

### **The new stuff**

The first of the additional items is an address by Sir Ninian Stephen<sup>3</sup> delivered at the University of Melbourne on 28 April 1986, the centenary of Sir Owen Dixon's birth. It is characteristically elegant and informative in equal measure. It was previously published in the second edition of *Jesting Pilate* in 1997.

Two of the new papers were written by James Merralls who was working on the third edition at the time of his sudden death, as the editors explain in their introduction.

One of these is a revealing and thoughtful tribute to Sir Owen's life and work, published in the *Australian Law Journal* shortly after Sir Owen's death in 1972.

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<sup>1</sup> The new edition contains all but one of the 29 papers and addresses contained in the 1965 edition: the one omission is 'Sir Roger Scatcherd's Will in Anthony Trollope's "Dr Thorne"' (1935).

<sup>2</sup> This last group of four addresses is introduced by the editors with short explanatory note on the customary practices for welcoming new members to the High Court and farewelling retiring members from the Court.

<sup>3</sup> Governor-General of the Commonwealth of Australia.

The other is a short talk given here in the Supreme Court Library only three years ago<sup>4</sup> on 'The Library of Sir Owen Dixon', and published subsequently in the *Victorian Bar News*. Sir Owen had his main working library and general library at his home, first in Camberwell and then in East Hawthorn, where he wrote most of his judgments. Sadly, the historical significance of that collection went unrecognised after his death.

Another new item is a personal account of Sir Owen Dixon by SEK Hulme. It was delivered as an address to the HR Nicholls Society in 1992, twenty years after Sir Owen's death. One of SEK's anecdotes encapsulates a theme to which I shall return. Apparently, Sir Owen would put the following question to young lawyers: 'Who is the most important person in the court?' The correct answer was: The litigant who is going to lose. That person must leave the Court satisfied with the system, and satisfied that his or her case had received fair treatment.

Next, the new edition includes two previously unpublished papers by Sir Owen Dixon, both very worthy additions.

One is an absorbing address entitled 'Franklin Delano Roosevelt' delivered in Sydney in July 1949. Sir Owen Dixon demonstrates acute powers of observation and understanding of human nature especially in the sharply contrasting pictures that he draws of Roosevelt and Sir Winston Churchill. Sir Owen also remarks upon the 'fierce animosities of domestic politics' in the USA during the Roosevelt era and their deleterious effect on history. Plus ça change ...

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<sup>4</sup> 22 July 1916

The other is an address delivered to the American Foreign Law Association in New York City in December 1942, on 'The Separation of Powers in the Australian Constitution'. Sir Owen identifies the separation of powers as a significant structural element of our constitutional architecture. Tellingly, he does not confine his attention to Chapter III of the Commonwealth Constitution. He also reflects ruefully on a question that arose in 1931 regarding separation of powers between the legislative and executive branches of government. He does not disguise his dissatisfaction with the answer given to that question. He is clearly referring to *Dignan's Case*,<sup>5</sup> in which he participated as a member of the High Court, although he doesn't identify the case by name. Those who have pondered upon the meaning of an enigmatic dictum in his judgment<sup>6</sup> in *Dignan*, will be stirred to further contemplation.

Lastly, each of the editors contributes a new paper on aspects of a common theme, the enduring influence of Sir Owen Dixon on Australian law. These papers go far beyond the usual remit of editors. They identify and scrutinise the essential ingredients of the Dixon legend. They provide the justification, if any be necessary, for publication of a third edition of *Jesting Pilate*.

Susan Crennan vividly recalls the *Communist Party Case*,<sup>7</sup> decided in 1951, and reflects on its significance then and now. She records Sir Owen's quest for legal principle as the bedrock of judicial power, his characterisation of the rule of law as a conception of the common law and thus a robust thread in our constitutional fabric, and his derivation, from the rule of law, of the role of the courts in the protection of basic constitutional values such as personal liberty.

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<sup>5</sup> *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73

<sup>6</sup> *Ibid* 101

<sup>7</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1

William Gummow provides a comprehensive evaluation of Sir Owen's contribution to both private and public law in Australia. Unsurprisingly, more than 90 years after Sir Owen's appointment as a Justice of the High Court of Australia and 45 years since his retirement from the office of Chief Justice of the Court, the remnants of that contribution, while voluminous, are mixed. But the legacy is still powerful. As Gummow says:<sup>8</sup>

'... it remains true that statements of principle by Dixon on a range of subjects remain an uncontested starting point from which immediate disputes are presented for determination. This aspect of Dixon's reputation should not be underestimated.'

He offers 6 examples. You'll find them all in the third edition.

### **Selected themes**

The extraordinary breadth of the collection is apparent from this brief outline of the contents of the new edition. Even more remarkable is the depth of treatment of the subjects. This was a signal attribute of the 1965 edition; it is strengthened in the new edition.

From the many themes that may be chosen to demonstrate this remarkable depth, I offer the following: judicial method, comparative method, federalism, and the separation of powers. All are inextricably intertwined. Each, along with many others, deserves careful analysis and mature reflection, but not (you will be relieved to hear) tonight. Instead, in a spirit of provocation designed to ensure that nobody leaves this evening without your own copy of the new edition, I shall simply make a handful of unsubstantiated assertions. I trust that, when you pore over your copy, you will find something to support them.

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<sup>8</sup> At 60

## Judicial method

Much ink has already been spilt on this vexed subject. Sir Owen viewed it as an essential ingredient of the critical relationships between the courts and the other branches of government, legislative and executive. In 'Jesting Pilate', his paper that gave its name to the book, he made this observation of the High Court:<sup>9</sup>

'No very profound study of the court ... was necessary to teach the lesson that the real weakness of powerful and confident minds strengthened by dialectal gifts, and at the same time accustomed to the responsibility of decision, lies in the tendency to work their way to a conclusion rather than to stop to inquire.'

To inquire for what? The foundational legal principles and values.

Analytical technique and logic were indispensable to Sir Owen, but only as means. The ends of inquiry were justice and fairness. His unfortunate reference to 'strict and complete legalism' in his address on taking office as Chief Justice of the High Court in 1952,<sup>10</sup> so often quoted out of context, should not distract attention from Sir Owen's unwavering commitment to this search for legal principle and values.

Nor should one forget Sir Owen's acknowledgment of the responsibility of the courts to justify their decisions to unsuccessful litigants. Principle, justice and fairness were best equipped to fulfil this obligation.

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<sup>9</sup> (1957) at 77

<sup>10</sup> 'Address on Taking Office as Chief Justice of the High Court' (1952) at 289

## Comparative method

Sir Owen Dixon understood the value of comparative analysis and the demands that it made on members of the Court. In his judgments and several papers included in the collection, he fully acknowledged the significance of historical and social context in undertaking the delicate task of drawing from the experience of other jurisdictions. Again, he was engaged in the quest for legal principle and values. In this regard he exercised an intellectual discipline that was not always apparent in the writings of some of his predecessors and colleagues on the Court.

## Federalism

Sir Owen Dixon must surely have harboured a special antipathy for the reasoning of the plurality of the High Court in the *Engineers' Case*.<sup>11</sup> It was as far removed from his precepts of judicial and comparative method as one could possibly travel, and it inflicted serious damage on the federal principle that was deeply embedded in the Commonwealth Constitution. Sir Owen set out boldly but carefully to repair some of that damage in cases such as *Melbourne Corporation*,<sup>12</sup> *Bank Nationalisation*,<sup>13</sup> and *Communist Party*,<sup>14</sup> but he never managed completely to exorcise the ghost of *Engineers'*.

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<sup>11</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 18 CLR 129

<sup>12</sup> *Melbourne Corporation v Commonwealth (State Banking Case)* (1947) 74 CLR 31

<sup>13</sup> *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1

<sup>14</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1

## The separation of powers

In their papers, Susan Crennan and William Gummow both demonstrate the importance of Sir Owen Dixon's role in gaining recognition of another structural principle of the Commonwealth Constitution, the separation of powers. He was an active participant in defining the uneasy boundary between the courts and the other branches of government in Australia. The other boundary between the legislative and executive branches proved even more difficult to locate. As previously noted, Sir Owen suggested some possible markers in *Dignan*,<sup>15</sup> but they have since been largely ignored. I wonder whether, if he were here today, Sir Owen may have drawn some comfort from the High Court's recent decisions in the *School Chaplaincy Cases*.<sup>16</sup>

## Thanks

In concluding, I thank the editors and publishers for this stimulating and attractive new edition of *Jesting Pilate*, and the Chief Justice and Judges of the Supreme Court of Victoria for providing the perfect premises for its launch in Melbourne.

## Launch

It remains only for me to launch the third edition of *Jesting Pilate*, edited by Susan Crennan and William Gummow, published by The Federation Press.

I do so with my strongest commendation.

Michael Crommelin  
24 July 2019

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<sup>15</sup> *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73

<sup>16</sup> *Williams v Commonwealth* (2012) 248 CLR 156; *Williams v Commonwealth [No 2]* (2014) 252 CLR 416