JESTING PILATE – THIRD EDITION

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The Honourable Susan Crennan and the Honourable William Gummow, and The Federation Press, have done an important service to legal history and scholarship by the production of this Third Edition of extra-curial writings and speeches by Sir Owen Dixon, a towering figure of the twentieth century with a reputation of pre-eminence, not only in Australia, but throughout the common law world.

The Third Edition differs from the earlier editions in two important respects. First, the papers and addresses are re-arranged and helpfully classified in a manner that makes them more accessible. Second, as an introductory section, there are commentaries on Sir Owen Dixon and his work by Sir Ninian Stephen, James Merralls, SEK Hulme and the two Editors themselves. This introductory material is not only valuable in itself, but will

also be very useful for modern lawyers who may not be as familiar with Dixon's place in the legal landscape as people of my generation.

Sir Owen Dixon served on the High Court of Australia for 35 years, with 12 years as Chief Justice. In those days Justices of the High Court were appointed for life. He resigned at the age of 77. He was Chief Justice while I was at Law School, and no-one there doubted that he was Australia's greatest judge. His resignation was shortly after I was admitted to the Bar, and I appeared before him only once. I was briefed as junior to WP Deane in a case in the original jurisdiction of the High Court concerning section 92 of the Constitution and interstate air transport of goods. Our client made an ex parte application for urgent relief. We had a message from the Court saying that the Chief Justice would deal with the matter in private chambers. We went up to Taylor Square in Darlinghurst. I had two responsibilities. The first was to carry Bill Deane's papers. The second was to remain silent. In the second respect my comportment matched that of the Chief Justice. We were shown into his chambers and he motioned us to sit down at his desk. Deane briefly explained what we were there for. The Chief Justice picked up the originating process and a supporting affidavit and glanced at them. Then he wrote some things in his note book, handed the book to his Associate, and gave a nod that indicated it was time for us to leave. He was then four years younger than I am now, but he

seemed very old and remote. If he said anything at all, I was unable to hear it.

In his address on the occasion of his retirement Dixon said that he enjoyed being a barrister but found judicial work hard and unrewarding. He added that he knew quite well what was worth reading in the *Commonwealth Law Reports* and what was not, and that he did not intend to read them in retirement. Perhaps in those days retired Justices of the High Court did not receive each month a free copy of the ALJ containing that month's report of Court decisions. And, of course, he never lived to use AustLII. His biographer, in an entry in *The Oxford Companion to the High Court of Australia*, entitled 'Dixon Diaries', records that his diaries show that in the 1930s he disliked his life on the Court, and was looking for a way out. In 1935, he considered accepting an offer to Chair a Royal Commission into the Banking and Finance Industries on the basis that this would give him an excuse to resign and then, after the Royal Commission was completed, to return to the Bar. That entry is interesting in a number of respects. The subject matter of the Royal Commission shows that life has a certain rhythm. The need to resign before serving on it reflects his view, adhered to on the Court to this day, that serving Justices should not be Royal Commissioners. The idea of a Justice of the High Court contemplating resignation and return to the Bar may unsettle some assumptions, but that

is what his colleague Justice Evatt did a few years later. Dixon did not accept that commission, but during and after World War II he engaged in substantial activities of diplomacy and international mediation that were distinctly extra-curricular. Chief Justice Latham and Justice Webb did the same. Sir John Latham was Australian Minister to Japan. Evidently his mission was not entirely successful. Sir William Webb presided at the Tokyo War Crimes Trials. Modern Justices are expected to stick to their knitting.

This publication includes post-war addresses about President Franklin D Roosevelt and Justice Felix Frankfurter. Dixon spoke in high praise of those men, and provided biographical details and observations based on close acquaintance with both. It would have been interesting to know what he thought of Roosevelt's attempt in 1937 to stack the Supreme Court in order to facilitate implementation of his New Deal; an attempt that was encouraged by Frankfurter. However, that topic is not mentioned. The addresses were given to audiences who were probably not encouraged to ask questions, and certainly not questions like that.

Some of these papers and addresses contain passages that have been cited so frequently that it is refreshing to see them in their original context: Concerning Judicial Method; Two Constitutions Compared; Aspects of Australian Federalism; Marshall and the Australian Constitution. One not

so often mentioned, but which I have found of assistance in writing some judgments (more in this Court than in the High Court) is an address in 1935 on The Development of the Law of Homicide. There has been much further development since then, but mostly along a path marked out by Dixon a long time ago. For judges who do criminal work it is well worth re-reading. In order to understand the point of some of his observations about judicial method it is probably necessary to have an idea of the work of Lord Denning at the time, but the Editors have tactfully refrained from drawing attention to that. I think it was in a letter to Frankfurter that he said that a judge should at least pretend to believe that he is guided to his decisions by some standard external to himself.

Dixon's mastery of common law principle, using that term in its widest sense, was unequalled. In one respect, however, he lived in a different world. Since his time there had been an explosion of statute law. That law often cuts across the principles with which he was so familiar. Consider, for example, what began life as section 52 of the *Trade Practices Act;* a provision that, among other things, enables victims of innocent misrepresentation to sue for damages. Think of the judicial energy that went into the exposition and refinement of the principles concerning tortious liability for negligent mis-statements. And in the area of contract law, an allegation that a party has engaged in misleading conduct is now

an indispensable feature of any commercial dispute. Most judges now spend most of their time applying and, where necessary, interpreting statutes. Whether Dixon would have found this congenial may be doubted.

In the area of constitutional interpretation, his experience with section 92 was almost certainly something he found “hard and unrewarding”. The same was probably true of section 90, and also of section 260 of the *Income Tax Assessment Act*. These provisions had one thing in common. There was a mismatch between the simplicity of the text and the complexity of the facts and circumstances to which they were to be applied. The judicial technique to be applied to the task of interpretation of a text is a principal challenge of modern courts.

In his paper in the introductory section of this Third Edition, Bill Gummow referred to the impact of *Cole v Whitfield* upon Dixon’s reading of section 92 of the Constitution. That decision had a calming effect upon what were previously agitated waters. It may be difficult for a modern lawyer to understand the intensity of legal conflict about section 92. In the 1916 case of *Duncan v Queensland* ([1916] HCA 67; 22 CLR 556), there was a challenge to Queensland wartime legislation for compulsory acquisition of meat intended for sale in South Australia. The Bench included four of the framers of the Constitution – Griffith CJ, Higgins J, Barton J and Isaacs JJ.

They divided evenly on the question. Their division was also heartfelt. Barton and Isaacs JJ were in the minority. Barton said:

> "The decision of the present case, if followed hereafter, will be of grievous effect upon the future of the Commonwealth . . . by imputing to the Constitution a meaning which I venture to say was never dreamed of by its framers . . .
>
> To say that one regrets to differ from one's learned brethren is a formula that often begins a judgment. I end mine by expressing heavy sorrow that their decision is as it is."

Isaacs J, who said this was perhaps the most important case to have come before the Court, said:

> "I also cannot add the traditional judicial regret at inability to concur in the decision."

According to Sir Ninian Stephen, in the cloakroom of the club at which he always stayed in Sydney, hat peg number 92 was always left vacant for the exclusive use of Sir Owen Dixon.

During Dixon's time on the High Court, it was not a court of final appeal. Subject to certain restrictions, appeals to the Privy Council lay both from the High Court, and directly from State Supreme Courts. He never sat on the Privy Council. He worked under the necessity to reconcile his views

with English authority. But this had its limits. In *Parker v The Queen*, shortly before his retirement, he forbade Australian trial judges to follow English authority on a question of basic importance to criminal justice. Juries, he held, must not be told that a man may be presumed to intend the natural consequences of his acts. Later, English law changed. I have heard that Lord Reid once ridiculed the earlier English view by saying, in the course of argument: “Show me someone who thinks that a man may be presumed to intend the natural consequences of his acts and I will show you someone who has never hit a golf ball into a bunker”.

It is interesting to speculate about how Sir Owen Dixon might have fitted into the Privy Council. Its decisions took the form of an advice to the Queen. In his time the process did not allow for dissenting opinions; much less for separate majority reasoning. I have been told that when his successor agreed to sit on the Privy Council, he stipulated that he must be entitled, if necessary, to write a dissenting opinion. According to his diaries, Dixon thought that judges should write individual opinions, at least in civil cases, and the idea that judges might modify their personal views in order to produce a single judgment of the Court was frowned upon.

His judgment writing style was distinctive. His judgments would not now be regarded as a model of accessibility. He wrote his judgments in longhand. His diaries record him commenting derisively of a judgment of one of his

colleagues that it appeared to have been dictated. He had great scorn for the oratorical style of judgment. James Merralls told me of being handed sheets of notepaper with closely written passages prepared on trains or aeroplanes. What is most striking is his use, or non-use, of paragraphs. In the *Commonwealth Law Reports* there are sometimes pages of reasoning without separate paragraphs. I was surprised to read last year that the number of paragraphs produced annually has become a judicial performance indicator. By that measure, Dixon would have been a failure. In his day, of course, paragraphs were not numbered. That only came in during the 1990s, and I take some responsibility. It was intended to be in aid of media-neutral citation, not for the purpose of quantifying output.

Dixon's judicial output could never be evaluated by measurement. And it defied evaluation by clichés such as progressive or conservative, centralist or defender of State's rights, cautious or adventurous. Each of the Editors of this edition has contributed an important assessment of Dixon's work. Because each can speak authoritatively, neither has resorted to slogans.

According to Sir Ninian Stephen's address, at the commencement of this book, when Dixon went to the Bar there were only five members of the Supreme Court of Victoria, and over a span of 27 years there had been only one appointment to the Bench. A good deal had changed by the time of his retirement in 1974, but there were many changes yet to come. Much

of what preoccupies a Chief Justice today finds no reflection in these papers. These are some concerns of modern judicial leadership of which he was mercifully free.

It is worth recalling that, just as Dixon never sat in the Privy Council, so also he never sat in Canberra. While he was Chief Justice, the High Court's Principal Registry was in Melbourne. In Sydney it sat in borrowed premises at Darlinghurst. Dixon disapproved of politicians becoming judges. Sometimes, however, they can get important things done. The Supreme Court of the United States now occupies a grand building, constructed in the first part of the twentieth century, during the time of Chief Justice Hughes. He had been a prominent politician and a presidential candidate. It was Sir Garfield Barwick who provided the High Court with its own building in Canberra. Politicians know how to get money from governments.

In his paper in the introductory section of this work, William Gummow wrote:

> "The range of Dixon's intellectual interests is demonstrated by the subjects he chose and the audiences to whom he addressed the papers in this collection. The themes which recur include the interaction between law and science, law and economics, and law and the teaching of Latin, the mental

> element in criminal responsibility, international relations, particularly with the United States, and comparative federalism. The institutions which he addressed included not only legal bodies but those of medical practitioners, chemists and other scientists, accountants and classicists."

This edition of *Jesting Pilate* would be an adornment to any legal library. The Editors have done a fine job. They commence their Introduction with the bleakest of beginnings: "On a winter's day in Melbourne . . .". After that, things could only get better, and so they did, with splendid results.

This is a very handsome publication by The Federation Press, and deserves to be a commercial success. There is a lot of added value in this Third Edition of a famous legal work, and the Editors and the publisher are to be congratulated.