

# Introduction

On a winter's day in Melbourne in 2016 our lunch companion James Merralls described his latest project.<sup>1</sup> This was to produce a third edition of Sir Owen Dixon's *Jesting Pilate* (then out of print) with some reordering of the contents and the addition of unpublished material worthy of inclusion. In a matter of weeks Merralls died suddenly and some months later we assumed the task in a spirit of fidelity to the plans which Merralls had outlined. The time for a third edition had come. With the publication in 2003 of Dixon's biography, Philip Ayres had acquainted many with the contours, details and range of Dixon's distinguished life and thought. Dixon started his professional life as a barrister and completed it with 35 years on the High Court, the last 12 as Chief Justice. There were detours during the Second World War and afterwards when Dixon undertook other major work as administrator, diplomat and international mediator.

The first edition of *Jesting Pilate* (Melbourne, 1965) was published a year after Dixon's retirement as Chief Justice in response to widespread recognition that Dixon's conspicuous distinction – his commanding intellect, his incisive expression and his well-furnished mind – was not only evident in judgments between Volumes 41 to 114 of the Commonwealth Law Reports, but also in his extra-judicial writing. Dixon entrusted Judge Zichy-Woinarski of the Victorian County Court to make the requisite selections.

The second edition of *Jesting Pilate* (New York, 1997), published 25 years after Dixon's death was intended to deepen an appreciation of Dixon's judicial work by reference to his cast of mind, the multiplicity of his intellectual interests and the esteem which he enjoyed both inside and outside Australia. Editorial notes made by Sir John Young were added, as was also a commemorative speech delivered by Sir Ninian Stephen to celebrate the 100th anniversary of Dixon's birth.

This third and enlarged edition has the advantage of containing two contributions from Merralls, Dixon's former associate and friend. Merralls' widow gave us unpublished materials, diaries, correspondence, photos and much other paraphernalia of a distinguished public life.<sup>2</sup> This enabled us to add previously unpublished material to this edition. Just as importantly perhaps, enlarged perspectives confirmed our understanding of Dixon.

The materials collected in *Jesting Pilate*, prepared for disparate occasions, demonstrate aspects of Dixon's personality which might otherwise remain elusive: the warmth of his friendships, his love of an allusive joke and his perspicacity about world affairs and the personalities shaping them.

Dixon was born when Victoria was still a colony. His first appearance as a barrister in the High Court in December 1911 was before three founding fathers, Chief Justice Sir Samuel Griffith and Barton and O'Connor JJ. After a decade as a Justice of the High Court, Dixon took up wartime duties explained elsewhere. Dixon witnessed human

---

1 Our other lunch companion was Professor Michael Crommelin of the University of Melbourne.

2 Now in the High Court archives.

conflict in the judicial context and in the context of war between nations, poised midpoint between two great common law countries, an unequalled vantage point for reflection upon judicial process and the Constitution.

The signature essay, “Jesting Pilate”, written at the height of Dixon’s powers, is full of his mature preoccupations: “If truth is an attribute which can be ascribed to a purely legal conclusion it should be within our reach”. As with the more complex version of this point in the *Banking Case*<sup>3</sup> Dixon’s severe and realistic qualifications look backwards to Roman law and to Bacon and forwards to Foucault and Rawls. It is Dixon’s characteristic restraint which guarantees the continuing vitality of his remarks, notwithstanding ever evolving conceptions of truth and justice.

Dixon’s understanding, elucidation and defence of Australian federalism (when the Privy Council had the last say) brought into focus the plan and structure of our Constitution as it protected personal rights and liberties. As Dixon noted more than once, the Constitution obliged the High Court to question the existence and limits of constitutional powers and the legality of their exercise. Furthermore, when Dixon spoke of the common law he acknowledges James Parke, and for that matter the *corpus juris* temporarily in his keeping and he identifies, as historical fact, that the common law is antecedent to the Constitution: “[C]onstitutional questions should be considered and resolved in the context of the whole law, of which the common law, including in that expression the doctrines of equity, forms not the least essential part”.

Dixon, more than most, was conscious of human frailties. As we have both noted he came to regret his use of the phrase “strict and complete legalism”. The essays in *Jesting Pilate* demonstrate that the subsequent polarising of legalism and judicial activism is inimical to a fair assessment of Dixon’s jurisprudential contribution to modern Australia. Rather, the elucidations of principle by Dixon presaged much of the developments by the High Court across the body of law of which his successors may be most proud.

Dixon had what he ascribed to Marshall, “force, clarity and conviction in judicial reasoning”. He also had what he ascribes to Frankfurter, “great qualities of mind and heart combined ... with a deep and extensive understanding of world affairs”. It is our hope that this third edition of *Jesting Pilate* confirms Dixon’s past and continuing contribution to developments in Australian law and reaffirms his stature as a great man.

We take this opportunity to record our indebtedness to Mrs Rosemary Merralls, Valerie, Lady Stephen, and Mrs Natalia Hulme all of whom consented to the use of certain materials. We also thank research assistant Nicholas Walter, those providing secretarial assistance, Ms Stephanie Betar, Mrs Wendy Dark and Mrs Shirley Downing, and The Federation Press.

Susan Crennan  
William Gummow

3 *Bank of New South Wales v Commonwealth* (1949) 76 CLR 1 at 340.