OWEN DIXON: EVIDENCE TO THE ROYAL COMMISSION ON THE CONSTITUTION, 1927-29

BY CHERYL SAUNDERS*

[The Royal Commission on the Constitution was appointed in 1927, at a time when dramatic constitutional events were taking place on all sides. Its investigation was conducted against the background of Australia's emerging constitutional independence, changes to Federal financial relationships, and landmark judicial decisions. Sir Owen Dixon presented the evidence of the Committee of Counsel for Victoria, to which he made the major contribution. Ostensibly restricting itself to drafting defects in the Constitution and the federal system, it canvassed significant aspects of the distribution of powers, including interstate trade and commerce, company law, customs and excise duties and the spending power. Consideration of the judicial power evoked discussion on the independence of the judiciary, the separation of powers, appellate jurisdiction, the individual heads of original jurisdiction in sections 75 and 76, and the origins and effects of the distinction between federal and state jurisdiction. Consideration of this last issue led to one of the earliest suggestions of a single Australian system of courts. Only some of the Committee's suggestions were included in the Commission's report, which was finally delivered to a lukewarm reception in 1929.]

The Royal Commission on the Constitution was appointed on 18 August 1927, during the Bruce administration. Its terms of reference required it to:

> inquire into and report upon the powers of the Commonwealth under the Constitution and the working of the Constitution since Federation: to recommend constitutional changes considered to be desirable; and in particular to examine and report upon the following subjects from a constitutional point of view . . .

The listed subjects were aviation, company law, health, industrial powers, the Interstate Commission, judicial power, navigation law, new States, taxation, and trade and commerce.

Owen Dixon gave evidence to the Commission, as one of three barristers appointed by the Committee of Counsel for Victoria, at the instance of Counsel for the Commission,[1] to 'place before the Commission views and suggestions which might appear fairly to represent those entertained by members of the Bar'.[2] Although the memorandum which he read to the Commission was presented as the joint work of Mr Ham, Mr Menzies and himself,[3] it is clear that Dixon's was a significant, and probably the major, contribution. The evidence has since become legendary. Some of it foreshadows and is directly relevant to constitutional issues current today. Much of it throws light on the early development of ideas later articulated

* Cheryl Saunders: B.A., LL.B., Ph.D.: Reader in Law, University of Melbourne.

[1] Mr H.S. Nicholas.

[2] Royal Commission on the Constitution, *Minutes of Evidence* (1929) 776 (hereafter, *Evidence*).

[3] In his opening statement Dixon told the Commission that the memorandum had been prepared largely by himself and Mr Ham, as Mr Menzies had been occupied with other matters.

by Dixon as a Justice of the High Court. Even those parts which are dated are interesting on historical grounds.

The evidence is now less readily available than was once the case. It is appropriate to recall details of it on the occasion of this review of Owen Dixon's contribution to the law.

1. *The context.*

The Royal Commission performed its task in constitutionally exciting times. Even its appointment was symbolic, coinciding with the the move of the Commonwealth Government and Parliament from Melbourne to the seat of government in the Australian Capital Territory. The development of the national image which this move represented was mirrored by the growing independence of Australia from England. The Imperial Conference of 1926 had recognized that Great Britain and the Dominions, including Australia, were 'autonomous Communities . . . equal in status, in no way subordinate one to another in any aspect of their domestic and external affairs' and set in train an examination of the administrative, legislative, and judicial forms which were 'admittedly not wholly in accord' with this position.[4] This examination culminated in the passage of the Statute of Westminster 1931 (U.K.). Although the Statute was not adopted for Australia until 1942,[5] the ability of the Commonwealth to do so, coupled with the altered executive arrangements, in itself amounted to a major constitutional event.

Meanwhile there was unrest within the Australian federal system, manifested most clearly by the secession movement in Western Australia. In response to it, in 1924, the Commonwealth Government had appointed a Royal Commission to Inquire into the Effect of Federation upon the Finances of Western Australia. In 1926 the Secession League was formed. In 1930 the Western Australians would vote, ineffectually, to leave the federation, stirring up further debate about relations between the Imperial Parliament and Australia.[6]

Concern about the financial settlement was not confined to Western Australia, although there it took a particular form. The per capita grants arrangements by which revenue redistribution had been effected since the constitutional formula[7] ceased in 1910, had become unpopular with the Commonwealth and were under review. When negotiations between governments failed to produce a result the issue was forced by repeal of the per capita grants legislation[8] by the Commonwealth Parliament.

[4] *Summary of Proceedings of the Imperial Conference 1926,* Commonwealth of Australia, (1926) *Parliamentary Papers,* vol. V, 1049, 1058.
[5] Statute of Westminster Adoption Act 1942 (Cth). The adoption was given retrospective effect to 3 September 1939.
[6] Craven, G., *Secession: the Ultimate States Right* (1986) ch. 3.
[7] Section 87.
[8] Surplus Revenue Act 1910 (Cth).

The arrangements which replaced it were to have a profound effect on the Australian federal system and the government of its constituent parts. The voluntary Loan Council, established in 1923, was given formal status by the Financial Agreement of 1927, which in turn received constitutional force from the new section 105A, inserted in the Constitution by a rare, successful referendum in 1928.[9] Under section 105A(5), rashly added to the draft during last minute negotiations at the instance of the Victorian Government[10], the Agreement was expressed to be binding 'notwithstanding everything contained in this Constitution or the Constitution of the several States'. In lieu of the per capita grants the Commonwealth assumed legal liability for the State debts and actual responsibility for meeting amounts of the interest due on those debts. Each Government agreed to submit its borrowing program to the Loan Council annually, for the currency of the Agreement. All borrowings approved by the Loan Council for the States would be made by the Commonwealth on their behalf.

The 1920's also witnessed landmark judicial decisions on various aspects of the Constitution, the consequences of which had clearly begun to emerge by the end of the decade. Foremost amongst them was the *Engineers'* case,[11] in which a majority of the High Court repudiated the doctrines of implied immunity and reserved powers and endorsed a more literal approach to constitutional interpretation. In the same year, with less lasting effect, the Court held that the Commonwealth was not bound by section 92.[12] The correctness of this decision was canvassed in 1928 in *James* v. *Commonwealth*[13] although the decision itself was not reversed until 1936.[14] Also of critical importance, and probably a consequence of the philosophy underlying *Engineers'*, was the development of the 'covering the field' test of inconsistency, clearly propounded for the first time in *Clyde Engineering* v. *Cowburn.*[15]

The first steps on the long road to broadening the definition of excise for the purposes of section 90 of the Constitution were taken in 1926, with the decision in the *Petrol* case[16] that the South Australian law imposing an income tax on vendors of petrol at the rate of three pence per gallon constituted an excise duty and was invalid. Associated with it, in practical terms, was the first decision on section 96. A grant by the Commonwealth to the States for roads, in 1926,[17] was the first significant use of section 96 to provide financial

[9] Constitution Alteration (State Debts) 1928.
[10] Australian Archives, CRS A461: 1 344/1/8 Part 1, *Financial Agreement between the Commonwealth and State Governments. Correspondance between the Prime Minister and Premiers.*
[11] *Amalgamated Society of Engineers v. Adelaide Steamship Company* (1920) 28 C.L.R. 129.
[12] *McArthur v. Queensland* (1920) 28 CLR 530
[13] (1928) 41 C.L.R. 442, 458, per Higgins J.
[14] *James v. Commonwealth* (1936) 55 CLR 1.
[15] (1926) 37 C.L.R. 466, 489, *per* Isaacs J.
[16] *Commonwealth and Commonwealth Oil Refineries v. South Australia* (1926) 38 C.L.R. 408.
[17] Federal Aid Roads Act 1926

assistance for a specific purpose and followed lengthly debate in the Commonwealth Parliament about the scope of the grants power and its relationship with the power to spend.[18] A challenge to the validity of the Act was cursorily dismissed in *Victoria* v. *Commonwealth*[19] in terms which laid the foundation for an apparently limitless grants power.

Whatever the potential of the times for constitutional review the circumstances of the appointment of the Commission do not appear to have been auspicious. The Commonwealth Parliament met for the last time in Melbourne on 24 March 1927, resuming in a new session in Canberra, opened by the Duke of York, on 9 May 1927. During the previous year, intermittent suggestions had been made in debate that the first session of the Parliament in Canberra should be devoted to a general constitutional review.[20] Although initially receptive to the idea[21] the Government became increasingly non-committal in response to increasingly critical questions on the issue. The Royal Commission eventually was appointed during the long adjournment of the Parliament that followed its official opening. Prime Minister Bruce later explained the reason for the Government's decision:

> In view of the great complexity and difficulties surrounding the subject and the lack of any reliable information to guide members in any discussion, it was felt essential to have an investigation made prior to the submission to this House of questions relating to an alteration of the Constitution.[22]

Seven Commissioners were appointed, comprising both parliamentarians and 'experts'.[23] They included two State Labor members, but no nominees of the Federal Labor Opposition, led by Scullin, which had declined to participate.[24]

2. *The evidence.*

(a) *General Comments*

The memorandum from the Committee of Counsel read to the Commission by Dixon began with the observation that it was confined to questions on which the Bar 'might legitimately offer its assistance and possibly might actually aid the Commission'.[25] Two such questions were identified; those arising from the draftsmanship of the Constitution and those relating to the judicial system established by it. An intention to comment on questions

[18] Section 81.
[19] (1926) 38 C.L.R. 399.
[20] Sawer, G., *Australian Federal Politics and Law, 1901-1929* (1956) 292.
[21] (1926) 113 *Commonwealth Parliamentary Debates* 2170 (Bruce).
[22] (1928) 119 *Commonwealth Parliamentary Debates* 6186.
[23] Sawer, *op. cit.* 292.
[24] An earlier proposal for a select committee of the Parliament appears to have foundered because of disagreement between the parties over the proportions of their representation: (1926) 115 *Commonwealth Parliamentary Debates,* 1061 (Thompson). The Opposition may have refused to nominate to the Royal Commission for the same reason.
[25] *Evidence* 776.

depending entirely on political or economic considerations, on which the Bar had no special expertise, was expressly disclaimed. This self-imposed restriction was observed to the extent that much of the memorandum was devoted to the federal judicial system and some questions were avoided on the ground of their political nature. Other parts of the memorandum, however, inevitably ventured beyond problems arising solely from draftsmanship.

One general issue which recurred, subtly but unmistakably, throughout the memorandum and the subsequent questioning of Dixon by the Commissioners, was the continuation of a federal form of government for Australia. It was of course a highly political question, which ultimately was to divide the Commission.[26] It was first raised in the opening statement in the memorandum in the context of a general discussion of the federal distribution of powers. The memorandum noted that most of the difficulties experienced in the administration of the federal system were inherent in the nature of federalism which the authors assumed was to be retained as the system of government, rather than from any defects in the constitutional implementation of it. Not only were there technical and conceptual problems in devising a satisfactory distribution of powers, but:

> Such a distribution necessarily weakens the authority of both sets of legislatures, and renders more difficult the work of carrying out any general policy which requires legislative aid upon subject-matters which do not correspond precisely with those enumerated or reserved.[27]

A statement later in the memorandum shows that its authors held the view, at that time quite widespread, that unification was eventually inevitable:

> a federal form of government represents a compromise, . . . the theory upon which it rests as a political device includes the supposition that it will serve during a period of transition while peoples separately governed may find it possible to unite more closely under a less rigid Constitution.[28]

This view in turn influenced their attitude to the aims of constitutional review. If federalism was merely a phase on the way to a unitary system it followed that improvement 'merely for improvements' sake' was misconceived. 'The power to amendment', they concluded:

> seems rather to be a means for effecting important alterations which new conditions clearly require than for removing blemishes merely because they are discovered. Looked at as a whole the Constitution seems to have worked well enough as a federal instrument.[29]

[26] A majority of the Commission (Peden, Abbott, Bowden and Colebatch) recommended the retention for Australia of a federal system 'in which not only are the powers of the local and central legislatures defined by a charter but the powers of the local Legislatures and Executive Governments are substantial and significant': *Report,* 240.
A minority (Ashworth, Duffy and McNamara) dissented. While they expressed their desire to avoid 'the misunderstanding that inevitably arises when terms of uncertain meaning are used such as Unification or Federalism' their final recommendation that 'full powers such as those embodied in the Constitutions of Great Britain, New Zealand and South Africa be vested in the Commonwealth Parliament' made their meaning reasonably clear: *Report*, 245-6.
[27] *Evidence* 777.
[28] *Ibid.* 790.
[29] *Ibid.*

A connected train of thought emerged later, during questioning. Commissioner Ashworth asked Dixon whether Australia should move in the direction of unification to avoid the 'evils . . . of overlapping and uncertainty in the Commonwealth and State jurisdictions with consequent economic waste'. In reply, Dixon pointed to two views on how unification might more readily be achieved:

> Some may think that to leave it stiff and inflexible is to move towards unification, because it is likely that unification will come quicker; but others may think that by expanding it from time to time you are getting towards unification.[30]

He stated no preference for either, although a later observation that the federal Constitution of the United States might not have gone on for 125 years 'had it not been for the extreme flexibility and expansiveness allowed'[31] perhaps provides a clue. These remarks were, of course, made in the context of improving the Constitution through formal amendment. It is an open question whether Dixon would have thought that similar considerations applied to the performance of the function of judicial review by the courts.

The question of unification was raised again briefly towards the end of Dixon's appearance. Commissioner McNamara, another member of the minority on this issue, asked him whether 'something other than the Federal system' could be accomplished without amendment of the covering clauses of the Constitution. Dixon said that he thought it could: that the references[32] in the covering clauses to components of the federal system:

> would not be thought to be sufficient to prevent an amendment accomplishing unification, and that those references would be taken to mean that the States and the Commonwealth were to exist at the commencement subject to the power of amendment, and that the courts would not treat the power of amendment itself as subject to the States and the Commonwealth.[33]

He also said, however, that the covering clauses would 'prevent any complete and fundamental change in the parliamentary nature of our government'. An amendment to 'get rid of the King as head of the Executive' probably would not be possible. In support of this view he referred to the 'difficulties with the Initiative and Referendum Act' in Canada.[34]

In fact there is little justification in the covering clauses for distinguishing between an alteration which effects a change from a federal to a unitary system and one which removes the monarch as head of the executive. If anything, the repeated references to the federal structure in the covering clauses are more

[30] *Ibid.* 793.
[31] *Ibid.*
[32] The main references are collected in the definitions section, covering clause 6. Clauses 3, 5, 7, and 8 and the preamble also refer to the Commonwealth and to the States either collectively or by name. Clause 3 describes the Commonwealth as a 'Federal Commonwealth'; the preamble refers to 'one indissoluble Federal Commonwealth'. For a discussion of the meaning and legal significance of the preamble and covering clauses in the analogous context of the secession of a State see Craven, *op. cit.* 83-97.
[33] *Evidence* 795.
[34] *In re the Initiative and Referendum Act* [1919] A.C. 935.

compelling and for that reason more likely to govern the power of amendment in section 128. Dixon's reference to the Canadian case is of little direct assistance; the point in issue there was the scope of a provincial power to amend the Constitution which was subject to an express exception for 'the office of Lieutenant-Governor'. It seems likely that Dixon's assessment was influenced by considerations arising from the relationship between the United Kingdom and Australia which, while changing, had not yet undergone the transformation later made possible by the Statute of Westminster.

(b) *Legislative powers*

The memorandum identified four general principles on which a distribution of legislative powers should be based:

(1) Subject-matters of legislation which involve the practical administration and enforcement of the law should be allotted only to the States, because they are charged with functions of police, and are in direct and immediate relation with the individual considered as the object of sanctions.

(2) Subject-matters which arise out of local conditions or conditions, which may vary with different localities, should also be reserved to the States.

(3) Subject to (1), the general body of law, which regulates private rights and which affects the conduct of persons as human beings irrespective of the place where they may reside and without regard to local or other geographical conditions, and upon which uniform legislation may properly be passed, may appropriately be allotted to the central legislature.

(4) In distributing legislative powers unnatural and artificial discriminations should be avoided.

The model was a remarkably centralized one. Principles 1 and 3 suggest a distribution of powers similar to that later adopted for the West German federation, where, with a few exceptions, the general body of law is the responsibility of the central government, leaving much of the administration of government and law to the regions.[35] There may be a connection here with a later observation of Dixon's, as Justice of the High Court, on the nature of Australian federalism:

> The foundation of the Constitution is the conception of a central government and a number of State governments centrally organized. The Constitution predicates their continued existence as separate entities. Among them it distributes powers of governing the country. The framers of the Constitution do not appear to have considered that power itself forms part of the conception of a government. They appear rather to have conceived the States as bodies politic whose existence and nature are independent of the powers allocated to them. [36]

[35] See generally, Sawer, G., *Modern Federalism* (1976) 28-29.
[36] *Melbourne Corporation v. Commonwealth (State Banking* case) (1947) 74 C.L.R. 31, 82.

Principle 2 and to some extent principle 3 accept that subjects of legislative power which 'arise out of local conditions' or 'vary with difficult localities' are properly State powers. Such a reservation could hardly be avoided. In practice however it is difficult to apply with any degree of predictability; there will always be differences of opinion about the existence of specifically local conditions and the weight that should be attached to them. Principle 4 makes obvious good sense, although again may be different to implement in practice, particularly having regard to changes in the subject matter of government policy over time. Several of the observations on legislative power in the memorandum were referable to this principle: the criticism of the distinction between inter-state and intra-state trade, for example,[37] and between trade and industrial relations.[38]

Not surprisingly, the authors acknowledged that no 'systematic adherence' to these principles could be detected in section 51 of the Constitution. They declined to discuss what they described as 'the political question' of the extent to which it would be desirable to amend the Constitution to apply the principles, focussing instead on particular problems arising from the Constitution in its present form.[39] The most substantial of these were inter-state trade and commerce, company law, customs and excise duties and the spending power.

Inter-state trade and commerce

Apart from noting the artificial exclusion of intra-state trade from the scope of the federal power, the discussion of inter-state trade dealt primarily with the guarantee of absolute freedom of trade, commerce and intercourse among the States in section 92. The authors pointed to the apparent paradox created by a guarantee of freedom of inter-state trade on the one hand and a Commonwealth power to legislate for inter-state trade on the other. Conflict between them had temporarily been avoided by the decision in *McArthur*'s case[40] that section 92 did not bind the Commonwealth; a solution which the authors evidently, and correctly, did not expect to last.[41] If the section were

[37] *Evidence* 777.
[38] *Ibid.* 778.
[39] Later however, under questioning about problems of the judicial system, Dixon became more specific: 'We are inclined to think that a mistake has been made in giving too little to the Federal Parliament where there is nothing to differentiate what ought to be the law in one place and what ought to be the law in another. One law on such subjects should have a universal application, no matter where a man is residing': *Evidence,* 794.
[40] *McArthur v. Queensland* (1920) 28 C.L.R. 530.
[41] Shortly before their evidence was presented to the Royal Commission all three authors had been involved in *James v. South Australia* (1927) 40 C.L.R. 1. Shortly afterwards, in *James v. Commonwealth* (1928) 41 C.L.R. 442, 458, Higgins J. referred to the decision in *McArthur* as unnecessary and foreshadowed the possibility of a future challenge to it. In *James v. Cowan* (1932) 47 C.L.R. 386, 398 the Privy Council left the question open. In the later *James v. Commonwealth* (1935) 52 C.L.R. 570, 590, Dixon himself, then on the Bench, described the decision that section 92 did not bind the Commonwealth as 'open to very serious question'. On appeal, the Privy Council reversed *McArthur* on this point: (1936) 55 C.L.R. 1, 61. In doing so they noted that they were 'Giving effect to the declared opinion of three of the five Judges of the High Court who sat on this case, while the other two seemed to indicate that their individual opinions tended the same way.'

applied to the Commonwealth the only other way out of the difficulty was by way of relaxation of the concept of absolute freedom to mean 'free of something less than all legal restriction'. They appeared to favour this result on other grounds in any event, criticizing as 'incredible' the operation of the section 'to prevent the States from including in general prohibitions relating to transactions of trade and commerce, transactions which form part of interstate trade'.[42]

A new section was proposed which the authors suggested would fulfil 'probably the real purpose' for which section 92 was designed:

> The States shall not by any discriminatory law or executive act impair the freedom of trade, commerce and intercourse among the States and the Territories of the Commonwealth.

State regulation of inter-state trade, made possible by the alteration, would be subject to overriding legislation of the Commonwealth in exercise of the inter-state trade and commerce power.

Company Law

The second major issue taken up in this part of the memorandum was the power of the Commonwealth to enact a uniform company law, which had received an unexpected check in *Huddart Parker* v. *Moorehead*.[43] The comments on this point have even greater relevance now, as the full potential of the corporations power[44] has begun to unfold. A uniform company law, in the sense of a company law enacted by the Commonwealth Parliament, has still not been achieved. Its advantages, which the memorandum described as 'probably undeniable, but at the same time . . . not very considerable'[45] would be likely to be more highly rated now, from habit, if not from conviction. The problem remains to design a power which would achieve this result without more. In the absence of any other solution the memorandum suggested an arrangement modelled on that already existing for copyright law,[46] whereby the Commonwealth Parliament could adopt for Australia legislation of the Imperial Parliament on company law. Ironically, the present company law regime is based on an arrangement whereby each State Parliament adopts for the State the legislation of the Commonwealth Parliament for company law in the A.C.T.[47]

[42] *Evidence* 778.
[43] (1908) 10 C.L.R. 330.
[44] Constitution section 51 (xx).
[45] *Evidence* 778.
[46] The Copyright Act 1911 (Imp) was expressed to extend throughout Her Majesty's dominions subject to a proviso, in section 25, that it should not extend to a self-governing dominion unless declared by that dominion to be in force. A declaration was made for Australia by the Copyright Act 1912 (Cth). In *Gramaphone Co Ltd v. Leo Feist Inc* (1928) 41 C.L.R. 1, in which Dixon appeared for the appellant, the High Court held that, after adoption, the Imperial Act applied of its own force in Australia. See also *Copyright Owners Reproduction Society Ltd v. EMI (Australia) Pty Ltd* (1958) 100 C.L.R. 597.
[47] Formal Agreement for a Commonwealth-State Scheme for Co-operative Companies and Securities Regulation and associated legislation: in particular, Companies Act 1981 (Cth), Companies (Application of Laws) Act 1981 (all States).

The objection to the more obvious solution, namely, conferring power on the Commonwealth Parliament to legislate directly for company law, arose from the nature of company law itself. The memorandum described it as 'merely a convenient description of an existing head of law' and 'an entirely artificial and unnatural division of subject matter for a legislative power'.[48] The problem was twofold. First, a power to legislate for company law necessarily must include power to legislate for incorporation, with the potential to indefinitely extend the categories of associations, or even individuals, required to incorporate. The second was the difficulty of placing any limitation on a power as broad as that which would be required:

> It may be doubted whether a power which would extend to regulating all activities and affecting all transactions so long as they were carried on, entered into or performed by companies is a desirable one . . .[49]

In 1927, when the memorandum was prepared, such authority as there was appeared to establish that section 51(xx) did not empower the Commonwealth to legislate for the formation of the categories of corporations to which it referred.[50] Suggestions to the contrary have since been made[51] but the position remains unsettled. The first aspect of the problem foreshadowed in the memorandum consequently has not arisen. The accuracy of the second prediction has become quite clear, however, to the point where section 51(xx) may well develop into the open-ended power for the Commonwealth[52] which the inter-state trade and commerce power became for the United States.

Customs and excise duties

Chapter IV of the Constitution attempted to achieve what for many was the main goal of federation; the creation of an internal free trade unit. Coupled with it was the removal from the States of the power to impose customs duties, not only on goods imported from other States but also on foreign goods. The framers of the Constitution assumed that exclusive Commonwealth powers to impose duties of excise and to grant bounties on the production or manufacture of goods also were necessary elements of the scheme. This assumption was accepted by the authors of the memorandum, who referred to the need for Commonwealth policy in imposing customs duties or prohibiting the importation of commodities and levying excise duties to be

[48] *Evidence* 773.
[49] *Ibid.* 778.
[50] *Huddart Parker v. Moorehead* (1908) 10 C.L.R. 330.
[51] *Kathleen Investments (Aust) Ltd v. Australian Atomic Energy Commission* (1977) 139 C.L.R. 117, 159 *per* Murphy J.; *Actors and Announcers Equity v. Fontana Films Pty Ltd* (1982) 150 C.L.R. 169, 212, *per* Murphy J.; perhaps *R v. Trade Practices Tribunal; ex parte St. George County Council* (1974) 130 C.L.R. 533, 542 *per* Barwick C.J. See also *Mikasa (N.S.W.) Pty Ltd v. Festival Stores* (1972) 127 C.L.R. 617, 661, *per* Stephen J. which sometimes is called in aid on this point.
[52] For a recent, extreme attempt to draw on its potential see Human Embryo Experimentation Bill 1985, which would have prohibited experimentation involving human embryos by trading or financial corporations.

carried out 'as a coherent whole, without interference or disturbance by other legislation.'[53]

The memorandum argued that the constitutional scheme was threatened by recent State practice, referring in particular to State legislation 'which taxes the use of goods produced abroad . . . in the guise of a special income tax.' The exclusive power of the Commonwealth to impose duties of customs did not provide an answer because it was probable that it 'would be interpreted as covering only a tax upon goods in reference to the act of importation and collected at the border.' The remedy proposed, apparently out of all proportion to the problem, was amendment of section 90 to confer exclusive power on the Commonwealth to:

> impose taxes in relation to the importation, production, sale, purchase, use and consumption of goods, and to grant bounties on the production or export of goods.[54]

This part of the memorandum was almost certainly a reaction to the Taxation (Motor Spirit Vendors) Act 1925 (SA) which had been the subject of recent challenge in the *Petrol Tax* case.[55] Section 4 of the Act had imposed a tax, which it described as an income tax, on the first sale of motor spirit within the State, whether the motor spirit was produced in the State or imported from another State or country. Section 7 had imposed a tax on the use of motor spirit brought into the State after purchase elsewhere. A majority of the Court,[56] held that the Act, or enough of it, was contrary either to section 90 or to section 92 and therefore was invalid. The actual outcome of the case however was confused, partly because, insofar as the Act appeared to impose a tax on sales by producers of motor spirit, it was possible to dispose of the challenge without venturing into the more difficult questions of whether the other taxes on sale or use constituted customs or excise duties.

In the final analysis, however, at least three members of the Court held section 4 invalid on the ground that a tax on the sale of motor spirit produced in the State was an excise duty whether the tax was imposed on the producer or not.[57] Their reasoning was consistent with an equally broad definition of duties of customs. Only one member of the Court, Higgins J., expressly held the tax on use in section 7 contrary to section 90 as a customs duty.[58] Two justices, Gavan Duffy[59] and Starke[60] JJ., clearly disputed that view. The remaining justices either did not deal with section 7[61] or held it invalid by reference to section 92, raising a somewhat weak inference that they did not

[53] *Evidence* 779.
[54] *Ibid.*
[55] *Commonwealth and Commonwealth Oil Refineries v. South Australia* (1926) 38 C.L.R. 408.
[56] Gavan Duffy J. dissenting.
[57] Knox C.J., Higgins and Rich JJ.
[58] (1926) 38 C.L.R. 408, 435.
[59] At 436.
[60] At 439.
[61] Knox C.J. and Powers J.

object to it as a customs duty.[62] Although the case certainly is not authority for a broad definition of duties of customs, with hindsight it was hardly a matter for grave concern.

This may be one aspect of the memorandum in which Ham's influence can be detected. He appeared in the case as counsel for the Commonwealth Oil Refineries, in which capacity he was reported to have argued that '[t]he effect of section 90 of the Constitution of the Commonwealth is to place the whole fiscal regulation of commodities under Federal control.'[63] While only two justices in the *Petrol Tax* case itself appeared clearly to accept this view,[64] it also was espoused by Dixon after his appointment to the Court, most notably in the following observation in *Parton* v. *Milk Board (Vict)*[65]:

> In making the power of the Parliament of the Commonwealth to impose duties of customs and of excise exclusive it may be assumed that it was intended to give the Parliament a real control of the taxation of commodities and to ensure that the execution of whatever policy it adopted should not be hampered or defeated by State action. A tax upon a commodity at any point in the course of distribution before it reaches the consumer produces the same effect as a tax upon its manufacture or production.

Concern about the effect of broadening section 90 on the taxation powers of the States, expressed in so many High Court judgments on duties of excise, appeared also in the memorandum. The solution was hinted at, rather than advocated:

> How far the scheme by which complete control of so much indirect taxation was confided to the Commonwealth is politically compatible with the continuance or the exercise of an unfettered power of direct taxation by the Commonwealth is an economic question which we are not disposed to discuss. We merely desire to point out that the scheme actually adopted seems inadequately expressed.[66]

Here again the memorandum clearly is a product of its time. The Commonwealth had imposed income tax for the first time in 1915. There had been intermittent debate during the decade that followed, fueled by recommendations of the Royal Commission on Taxation which was appointed in 1920, about the vacation of all or part of the income tax field by the Commonwealth in return for dicontinuance of the per capita grants. Although that debate led nowhere, ultimately being overtaken by the settlement of the per capita grants question through the Financial Agreement, the underlying assumption that indirect taxation was the proper field for the Commonwealth and direct taxation was the proper field for the States had persisted.[67]

[62] Isaacs and Rich JJ.
[63] (1926) 38 C.L.R. 408, 415.
[64] Higgins J. at 435 and Rich J. at 437.
[65] (1949) 80 C.L.R. 229, 260. See also the lengthy historical analysis of duties of excise by Dixon J. in *Mathews v. Chicory Marketing Board (Vict)* (1938) 60 C.L.R. 263, 293-303.
[66] *Evidence* 779.
[67] A Commonwealth proposal to vacate the field of personal income tax, based on this principle, was put before the Premiers' Conference in 1926 but rejected by the Premiers mainly because, according to Earle Page '. . . the collection of tax from the various fields of taxation would make them unpopular. They frankly said so': (1926) 113 *Commonwealth Parliamentary Debates* 2683.

Spending

The final substantive aspect of Commonwealth legislative power dealt with in the memorandum was the combined effect of sections 81 and 83 of the Constitution on the Commonwealth's power to spend. Under section 83, moneys may not be drawn from the Treasury of the Commonwealth 'except under appropriation made by law'. Section 81 provides that:

> All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.

In passing, the authors noted their view that it was 'difficult to maintain' that loan moneys were not required to be credited to the Consolidated Revenue Fund 'having regard to the words of the section'.[68]

The scope of the spending power was an issue with serious practical ramifications which had been under debate almost from the date of federation. The Maternity Allowance Act 1912 (Cth) was widely supposed to rely for its continued existence on the reluctance of any competent plaintiff to challenge a popular but probably unconstitutional measure. The early roads grants legislation[69] was finally changed to a form which more obviously attracted section 96, after earlier doubts about its constitutional validity.[70] The significance of the problem for the power of the Commonwealth to introduce a system of child endowment was the subject of disagreement between expert legal witnesses, including Dixon himself, before the Royal Commission on Child Endowment or Family Allowances.[71] Under questioning before the Royal Commission on the Constitution, Dixon noted that there were 'almost every year small things' which raised the issue again:

> They may be trivial and may only relate to the acquisition of pictures, or assisting someone to publish a book upon history or the like, but they come under the same difficulty.[72]

The memorandum took the position that the power of the Parliament to appropriate money was restricted to 'the subjects assigned to the Federal legislative power'.[73] This followed partly from the expression 'for the purposes of the Commonwealth' in section 81 which, the authors noted 'seems to be intended to limit the objects of appropriation'. They appeared to attach even greater significance to the requirement, also in section 81, that appropriation take place 'in the manner . . . imposed by this Constitution'. In their view

[68] *Evidence* 779. Quick and Garran took a contrary view: *Annotated Constitution of the Australian Commonwealth* (1901, repr. 1976) 811-2.
[69] Main Roads Development Acts 1923, 1924, 1925.
[70] See generally Saunders, C., 'Development of the Commonwealth Spending Power' (1978) 11 M.U.L.R. 369, 384-6.
[71] *Report of the Royal Commission on Child Endowment or Family Allowances 1929,* Commonwealth of Australia, (1929) *Parliamentary Papers,* Vol. 2, 1289.
[72] *Evidence* 794.
[73] *Ibid.* 780.

these words attracted the requirement in section 83 that appropriations must be 'made by law', as well as the procedural requirements for the form and passage of appropriate bills in sections 53, 54 and 56 of the Constitution. An appropriation made by law 'is a statute passed by the two Houses and assented to by the Crown . . . The power to pass statutes is confined to limited subject-matters'.[74]

The Commission returned repeatedly to the issue during questioning of Dixon after the memorandum had formally been presented. Their questions at this stage were directed to justiciability and standing. Dixon stated the 'true view' that the question was 'fully justiciable by the High Court' but that, with the possible exception of the States, it was 'extremely difficult . . . to have it litigated at the suit of anybody except the Attorney-General of the Commonwealth himself'.[75] Further probing on the basis for a State challenge followed. Dixon's opinion was that the States' interest in the surplus revenue of the Commonwealth under the Surplus Revenue Act 1910 (Cth) had entitled them to challenge an unconstitutional appropriation. That Act, however, had been repealed the year before, by the States Grants Act 1926 (Cth). State interest to challenge an appropriation now depended on section 94 of the Constitution itself which, Dixon plainly thought, was a slender reed. Whether the section conferred on the States a right to the surplus revenue or not, the only obligation it imposed on the Parliament was to distribute the revenue 'on such basis as it deems fair'. The result, in Dixon's view, was that:

> The whole interpretation of the section must be a political rather than a legal matter. I cannot see how it can get before the courts. It seems the section can scarcely be brought before the courts for interpretation. There does not seem to be enough right given to the States to enable them to enforce it by any judgment of the courts.[76]

The view put in the memorandum was that the power to appropriate money was limited but that in practice challenges to the validity of unconstitutional appropriations would be inhibited by the requirements of standing. Nevertheless Dixon himself did not appear confident that the Court would take a similar view. Questioned by Commissioner McNamara about the validity of the Maternity Allowance Act he answered that he did not know what the decision would be, but that he thought it 'probable that it would be upheld'.[77] Questioned further, he agreed that, nevertheless, 'many would say that it was bad'. Shortly before, he had taken a similar stance in an opinion[78] for the Victorian Government on the validity of the Main Roads Development Act 1923, in which he gave his view that the Act could not be supported either by the appropriation power or by section 96, but concluded that:

> probably it would be only with reluctance that a majority of their Honours would reach the position which appears to my mind to be correct.

[74] *Ibid.*
[75] *Ibid.* 790.
[76] *Ibid.* 792.
[77] *Ibid.* 794.
[78] Dated 1 March 1926.

In the event, the issue did not come before the Court until the *Pharmaceutical Benefits* case[79] in 1945 and even then it was not starkly raised. On any view the Pharmaceutical Benefits Act 1944 (Cth) attempted a degree of regulation beyond appropriation whch Dixon J. found 'only too clearly' ultra vires.[80] It was not necessary for the Court to reach a definitive conclusion on the narrower issues of whether the Commonwealth Parliament could appropriate moneys for purposes beyond its legislative powers and whether the States would have standing to challenge such an appropriation. Dixon adverted to these issues only by way of *obiter.* Even so, a shift in his views seemed to have taken place since 1927:

> in deciding what appropriation laws may validly be enacted it would be necessary to remember what position a national government occupies and . . . to take no narrow view, but the basal consideration would be found in the distribution of powers and functions . . .[81]

The memorandum made no suggestion for constitutional change on this point, on the by now familiar ground that 'the question whether the Commonwealth ought or ought not to be at liberty to expend money on any purpose it thinks fit is scarcely a matter for lawyers to consider.'[82] Preserving detachment to the end, it concluded by pointing out:

> that the theory on which the Federal system is founded, if it is consistently applied, seems to require that the expenditure of money shall be for Federal purposes only; but perhaps consistency should not prevail over other motives . . .[83]

(c) *The judicial power*

The memorandum dealt at length with what it described as the judicial power, upon which the authors declared their intention to express their views 'more freely'.[84] A range of issues was canvassed. The authors stated their opposition to amendment of section 72 of the Constitution to provide a retiring age for federal judges,[85] partly because any retiring age would arbitrarily remove from the Bench people whose experience would have continued to be valuable, but more importantly because it was considered undesirable, from the standpoint of the relationship between the executive and the judiciary, for 'a prospective vacancy of a judicial office [to be] a well known fact long before it occurs.'[86] They drew attention to the 'extreme abuse' to which section 73 was open if it allowed the Parliament to create a new federal tribunal to which an appeal did not lie to the High Court and thus

[79] *Attorney-General (Vic) v. Commonwealth* (1945) 71 C.L.R. 237.
[80] (1945) 71 C.L.R. 237, 267.
[81] (1945) 71 C.L.R. 237, 271-2.
[82] *Evidence* 780.
[83] *Ibid.*
[84] *Evidence* 781.
[85] An amendment to this effect was passed in 1977: Constitution Alteration (Retirement of Judges) 1977.
[86] *Evidence* 782.

'to confide to a single person the decision of any question, however momentous'.[87] On this point they suggested a constitutional amendment to empower the High Court to grant leave to appeal from any federal court or court exercising federal jurisdiction. In answer to a question from Commissioner Bowden, Dixon expressed his 'personal opinion' that it would be inadvisable for the High Court to be empowered to give advisory opinions. He gave various reasons, including the practical difficulties that can arise in framing and answering abstract questions and the problem of whether such opinions should be treated as conclusive or genuinely advisory. In response to a question from Mr Nicholas about whether the Canadian provinces worked well through an advisory system, Dixon replied that he knew it had 'worked frequently and, therefore, doubt whether it has worked well'.[88]

A common thread underlying each of these positions was the independence of the judiciary. Its preservation was particularly necessary in 'a Federal system, where the judiciary must stand between the legislature and the various component parts of that system',[89] but by no means relied on that consideration alone; fortunately, perhaps, if the federal system was to be a transitional phase. It followed that the principle should be respected in relation to all courts. An explicit statement of his philosphy on this point was elicited from Dixon during the questioning:

> I am very much in favour of hedging the judiciary around with the greatest possible safeguards. They have an extremely difficult function to perform. The independence of the judiciary is worth a great deal more than, perhaps, people fully realize, and the tendency to interfere with the independence of the judiciary is necessarily great, because everybody who has power of his own naturally resents being overruled by the judiciary, and does not want to be overruled by the judiciary. It is the judiciary's function to overrule those who have power, and, I think the less it is possible for the judiciary to be interfered with, the better. That is what independence is given to them for.[90]

Similar considerations underlay a discussion in the memorandum of the doctrine of separation of powers, which foreshadowed the decision in the *Boilermakers'* case[91] nearly thirty years later. The authors advocated a strict interpretation of the doctrine, noting that although there was 'at present no likelihood' of its adoption in this form for the legislative and executive powers, it already had been adopted for the judicial power 'at least according to one view'.[92] In this context they cast doubt upon the validity of the constitution of the new Arbitration Court, restructured in the previous year in accordance

[87] *Ibid.* In *Collins v. Charles Marshall Pty Ltd* (1955) 92 C.L.R. 529, 544 a joint judgmemt of six members of the Court, including Dixon C.J., took steps to limit the power of the Parliament to make exceptions from the appellate jurisdiction of the High Court: 'such a power is not susceptible of any very precise definition but it would be surprising if it extended to excluding altogether one of the heads specifically mentioned by s. 73.'
[88] *Evidence* 791-2.
[89] *Ibid.* 782.
[90] *Ibid.* 792.
[91] *R v. Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254 (H.C.); (1957) 95 C.L.R. 529 (P.C.).
[92] *Evidence* 782. The reference was to *In re Judiciary and Navigation Acts (Advisory Opinions* case) (1921) 29 C.L.R. 257.

with what was presumed to be the dictates of the decision in *Alexander*'s case.[93] Noting that the Court had been constituted in accordance with section 72 and given 'some judicial power' they continued:

> A logical application of the view that a Federal court created in conformity with these provisions is a body upon whom nothing but judicial power could be conferred might lead to difficulties in relation to the remainder of the powers of that tribunal which are non-judicial, but no-one has hitherto been courageous enough to pursue this argument.[94]

Arguments of convenience against a strict separation of judicial power were discussed. Impairment of the principle would be 'calculated to weaken both the actual administration of justice and the confidence and respect of the people in those who administer it'.[95]

Most of the individual heads of federal jurisdiction in sections 75 and 76 of the Constitution were criticised in the memorandum on grounds that by now are familiar: the mysterious nature of 'maritime jurisdiction',[96] the improbability that matters ever will arise under a treaty,[97] the vagueness of matters affecting consuls,[98] the inconvenience of the diversity jurisdiction,[99] the omission of certiorari from the remedies available under section 75(v), and the problem of the relationship between the jurisdiction over suits against the Commonwealth in section 75(iii), and the power of the Parliament to confer rights to proceed against the Commonwealth in section 78. Greatest criticism, however, was reserved for the creation of the separate concept of federal jurisdiction, with its consequential problems for the Australian judicial system.

'Jurisdiction', the memorandum noted, 'is a generic term and signifies in this connection authority to adjudicate. State jurisdiction is the authority which State courts possess to adjudicate under the State Constitution and laws, Federal jurisdiction is the authority to adjudicate derived from the Commonwealth Constitution and laws'.[1] One problem with the duality arose from the way in which several heads of federal jurisdiction were defined, by reference to the character of questions raised, in what might well be a broader controversy. The key jurisdiction in section 76(i) over matters 'arising under the Constitution or involving its interpretation' provided a model in this regard, which was repeated in section 75(i) and, more significantly, in jurisdiction over matters arising under any law made by the Parliament in section 76(ii). The consequence, according to the authors, was to 'sacrifice the interests of the litigant to the desire of the framers of the Constitution to preserve to the High Court the power of giving constitutional rulings and making constitutional precedents'.[2] The reliance of the framers on the American

[93] *Waterside Workers Federation of Australia v. J.W. Alexander* (1918) 25 C.L.R. 434.
[94] *Evidence* 782.
[95] *Ibid.*
[96] Section 76(iii).
[97] Section 75(i).
[98] Section 75(ii).
[99] Section 75(iv).
[1] *Evidence* 787.
[2] *Ibid.* 784.

Constitution in this and other respects was acknowledged: as Dixon later said, 'Its contemplation damped the smouldering fires of their originality.'[3] The memorandum suggests, however, that in copying this aspect of the American Constitution the framers overlooked an important distinguishing feature of the Australian Constitution in the general appellate jurisdiction of the High Court, which might have rendered the Court's original jurisdiction in these matters unnecessary.[4]

A consequence of the creation of federal jurisdiction in these terms was that a federal claim might manifest itself at a late stage in proceedings at the option of one of the parties and thereby undermine the jurisdiction of the court in which the case so far had been heard. The problem was compounded by the provisions of the Judiciary Act 1903 (Cth)[5] which sought to restrict, as far as possible, appeals to the Privy Council on constitutional questions and to control appeals from State courts exercising jurisdiction over matters answering the description of those listed in sections 75 and 76 of the Constitution.

Several examples were given to illustrate the fact that down-to-earth events could throw up exotic problems in federal jurisdiction. One has become famous: 'So, if a tramp about to cross the bridge at Swan Hill is arrested for vagrancy and is intelligent enough to object that he is engaged in interstate commerce and cannot be obstructed, a matter arises under the Constitution. His objection may be constitutional nonsense, but his case is at once one of Federal jurisdiction'[6] requiring determination by a magistrate sitting alone, from whom an appeal would lie directly to the High Court. The memorandum also analysed the ramifications of the recent decision in *Lorenzo* v. *Carey*[7] that a State court might possess both federal and State jurisdiction at the same time; a decision which Dixon J. later was instrumental in overturning on this point.[8]

A more serious, fundamental point accompanied the criticism of the form which federal jurisdiction took. The memorandum disputed the need to make separate provision for federal jurisdiction at all. The notion of the unity of the law regardless of its source pervades this part of the argument, giving further emphasis to the silliness of the effect that could be produced in proceedings by the sudden emergence of a federal claim. Thus it was argued that:

> Federal jurisdiction forms a grave impediment to the practical administration of justice. . . it ought to receive the serious attention of those interested in maintaining a Federal system of justice which is speedy, efficient and practical.[9]

[3] Dixon, O., 'Law and the Constitution' in *Jesting Pilate* (1965) 38, 44. The paper was originally delivered on 14 March 1935.
[4] *Evidence* 783.
[5] Sections 38A, 40A, 39(2).
[6] *Evidence* 788.
[7] (1921) 29 C.L.R. 243.
[8] *Ffrost v. Stevenson* (1933) 58 C.L.R. 528, 573. The view that the federal jurisdiction prevails appears finally to have been settled in *Felton v Mulligan* (1971) 124 C.L.R. 367.
[9] *Evidence* 789.

The solution recommended by the authors was to do away with federal jurisdiction as a separate concept. They acknowledged that it might not be possible to do so entirely:

> [s]ome original jurisdiction must be exercisable by the High Court (a) for the purpose of enabling it swiftly to deal with urgent constitutional questions, (b) to enable it to enforce constitutional and statutory duties and limitations imposed upon Federal executive and judicial officers, (c) for the purpose of the determination of revenue litigation.[10]

The model which they proposed therefore provided a limited original constitutional jurisdiction for the High Court along these lines. Other features of it included abolition of appeals to the Privy Council from State courts, repeal of sections 75, 76 and 77 of the Constitution, and conferral on the Parliament of power to invest either the State Courts or federal courts, including the High Court, with original and appellate jurisdiction in the exercise of its legislative powers. The advantages claimed for the system relied heavily on the common sense of future Governments and Parliaments:

> our suggestion would leave to the legislature the task of conferring and taking away, as occasion seemed to require, the original jurisdiction of State and Federal courts. The discrimination between jurisdictions by reason of their source would not continue, and the Federal Parliament, with the help of section 109, could regulate the administration of Federal law.[11]

The evidence which Dixon gave to the Royal Commission on the Constitution is traditionally identified as the source of the idea of a single Australian system of courts. In fact the suggestion for a single court system was not included in the memorandum but emerged only later, in answer to a question from Commissioner Duffy. Even then it was not advocated with marked conviction. It was advanced as one of two methods by which a Federal system of courts, within the terms of the Commissioner's question, might be achieved. It rested, as Dixon said, on the view that 'the courts should be agents of neither government and should administer the law without any tendency to expand it if they are Federal and to contract it if they are State'.[12] Although some detail about the co-operative arrangements that would be necessary was given, Dixon predicted significant difficulties with the financial arrangements. The alternative model, which called for federal control over all superior courts, was rejected on the ground that it would give rise to great difficulty 'from the point of view of the States in administering the general body of the law'.[13]

It would appear clear that, at this stage at least, Dixon was more impressed by the need to remove from the law unnecessary distinctions based on source; a view which, interestingly enough, shared common ground with the views expressed in the memorandum about the appropriate division of powers between the Commonwealth and the States.[14] Although he later reiterated the

[10] *Ibid.*
[11] *Ibid.* 790.
[12] *Ibid.* 794.
[13] *Ibid.*
[14] *Supra.*

proposal for a single court system, on each occasion it necessarily was coupled with the concept of the unity of the law. Thus in 1935, in the well known passage from 'The Law and the Constitution':

> it would not have been beyond the wit of man to devise machinery which would have placed the courts, so to speak, upon neutral territory where they administered the whole law irrespective of its source.[15]

Similarly and more explicitly, on taking the Oath of Office as Chief Justice in 1952 he referred to:

> the distinction which we unfortunately maintain between State and federal jurisdiction. That is an eighteenth century conception which we derived from the United States of America in the faithful copy which was made of their judicial institutions. It is to be hoped that at some future time it will be recognized that under the English system of law, the British system of law which we inherited, the whole body of law is antecedent to the work of any legislature and that the courts as a whole must interpret and apply the whole body of law, so that there should be one judicial system in Australia which is neither State nor Commonwealth but a system of Australian courts administering the total body of the law.[16]

3. *Conclusion*

Appropriately enough, the Royal Commission on the Constitution reported at a time of high constitutional and political drama. The controversy over its establishment had persisted during the two years of its existence, if intermittent questions and comments in the Parliament are any guide.[17] By mid-1928 hints about a conspiracy to deliberately delay the Commission's Report beyond the life of the current parliament were circulating, producing a denial from Bruce and an explanation of the establishment of the Commission.[18] Nevertheless, the Report was still a long way off when the House was dissolved on 9 October 1928. When the new Parliament met, in February 1929, the re-elected Bruce Government was again subjected to repeated questions about when the Report would appear. On 28 August 1929 Bruce told Stewart it would be ready for transmission to the Governor-General 'next week'.[19] On 5 September 1929, with summaries of the Report apparently appearing in the press, Bruce answered that it was expected within the next few days.[20] Although the Report is dated 7 September, in response to a question from Fenton on 12 September seeking an assurance that the Report would be available before the House was dissolved, to enable the issues to be discussed 'more intelligently than will be possible if it is not made available', Bruce replied

[15] Dixon, O., *Jesting Pilate, op. cit.* 54.
[16] Dixon, O., *Jesting Pilate, op. cit.*, 247. See also the 1943 address on 'Sources of Legal Authority' 198, 201; and see generally the 1957 paper on 'The Common Law as an Ultimate Constitutional Foundation' at 203.
[17] For example Watkins, in the budget debate in November 1927: 'The Government has appointed a constitutional commission that will involve the country in great expense. Its members draw big salaries, and they go about Australia examining anybody who happens along and desires to give evidence. Many of the witnesses are probably not familiar with even one section of the Constitution. This is being done behind the back of Parliament': (1927) 116 *Commonwealth Parliamentary Debates* 1750.
[18] (1928) 119 *Commonwealth Parliamentary Debates* 6186.
[19] (1929) 121 *Commonwealth Parliamentary Debates* 335.
[20] *Ibid.* 579.

that the Report had not yet been received, on account of delays in the printing office.[21] Bruce had advised a dissolution the previous day, following an adverse vote on the Maritime Industries Bill. The House in fact was dissolved on 13 September. When the new Parliament met, on 20 November 1929, Scullin, whose federal party had refused representation on the Commission, was Prime Minister. The Report of the Commission presumably had been delivered to Government at some stage in the interim.

In the circumstances it was not to be expected that Scullin would receive the Report with any degree of enthusiasm. It was therefore unsurprising that the Royal Commission proved, as Sawer put it, an 'anti-climax. . .which produced a useful student's textbook and a minor alteration to the *Judiciary Act*'.[22] In any event, however, there was a vast gulf between Scullin's views on constitutional reform and the recommendations of the Commission. The point is illustrated best by the majority recommendation on industrial powers which mirrored in essential respects the proposals in the Maritime Industries Bill on which the Bruce Government had fallen.[23] Under Scullin, constitutional reform went off on a very different tack, albeit with a comparable lack of result.[24]

The evidence presented to the Commission by the Committee of Counsel for Victoria was quoted at some length in the Report[25] but had only limited effect on the recommendations of the Commissioners. Of those parts of the evidence canvassed here, the majority accepted in full only the suggestion that the power of the High Court to grant leave to appeal from decisions of any other federal court should be entrenched.[26] The evidence also influenced, after some modifications, the majority recommendations on original jurisdiction[27] and section 92.[28] The majority recommended, contrary to the evidence, a fixed term for judges of federal courts other than the High Court,[29] a power for the High Court to give advisory opinions,[30] relaxation of the exclusive power of the Commonwealth Parliament over excise duties and maintenance of the distinction between inter and intra-State trade and commerce.[32]

[21] *Ibid.* 874.
[22] Sawer, *op. cit.* 326.
[23] *Report*, 248. The majority recommended the deletion of the conciliation and arbitration power, in section 51(xxxv), to leave control of industrial matters solely in the hands of the States. The Bill would have repealed the Conciliation and Arbitration Act, with the same consequences: Sawer, *op. cit.* 308-10.
[24] See, for example, the Constitution Alteration (Power of Amendment) Bill, aimed at conferring parliamentary sovereignty on the Commonwealth Parliament and establishing a unitary system of government. The Bill met considerable opposition from Labor as well as non-Labor sources: Robertson, J., *J.H. Scullin* (1974) 232-4.
[25] See in particular *Report*, ch. IX on the 'High Court and the Judicial Power of the Commonwealth' in which sections of the evidence are extracted.
[26] *Report*, 253.
[27] *Ibid.* 254-5.
[28] *Ibid.* 262-4.
[29] *Ibid.* 251.
[30] *Ibid.* 255.
[31] *Ibid.* 259-60.
[32] *Ibid.* 261.

By the time the Commission reported, Owen Dixon had been appointed a Justice of the High Court of Australia,[33] a position from which he exercised an influence over the future development of the Commonwealth Constitution far greater than that achieved by the Royal Commission.

[33] On 4 February 1929.