Owen Dixon

By Justin Gleeson SC

Philip Ayres has produced a fascinating exposition of the character, life and beliefs of Owen Dixon. His source material is largely the private papers of Dixon. Dixon kept diaries for 1911, part of 1929 and the 31 years of 1935 - 1965. He kept travel diaries covering trips to Europe and the United States for 1922 – 1923, 1923 – 1924, 1939, 1953, 1955 and 1958. Ayres concludes the diaries were composed for Dixon himself and not for posterity. They were made available to Ayres by Dixon's surviving daughter. In addition, Ayres has conducted interviews with a number of Dixon's surviving associates or personal assistants, and has analysed Dixon's judgments and speeches.

The biography is unfortunately, but perhaps inevitably, given a barrister's lack of time to keep a diary, abbreviated on Dixon's 12 years at the junior Bar. We learn that he earned 113 guineas in his first year at the Bar, with some months being very lean. The Melbourne University School of Law refused him a lectureship which might have supplemented his income. Selborne Chambers, at 462 Chancery Lane, provided a spartan but collegial environment. In his second year at the Bar, Dixon appeared before the High Court in Sydney in an estate matter. Dixon had time to watch the first Test between Australia and England at the Sydney Cricket Ground, and subsequently visited galleries and gardens and took boating excursions with his family in Sydney. In 1914 Dixon assisted Sir Leo Cussen in the consolidation of the statute law of Victoria. His practice was already extensive. He was accepting briefs in industrial matters, local government and traffic, insolvency, wills, defamation and intellectual property. Robert Menzies became Dixon's pupil in 1918. He remarked on Dixon's close knowledge of the forensic qualities and methods of his leading opponents, and of the judicial strengths and weaknesses of the judges before whom he appeared. Reminiscent perhaps of the current Australian cricket team, Dixon, according to Ayres, would regularly engage in a running commentary, in undertones, on the weaknesses of opposing counsel's argument, to great effect. His arguments were not always successful. In one case he added claims for equitable relief in order to avoid the matter being heard by a jury. The chief justice, Sir John Madden, threw out Dixon's application, stating that it was a 'palpably bad common law claim masquerading in a rugged gown of equity'. By some means not fully explained, Dixon rapidly came to have a detailed and complete mastery of case law. His later associate, Richard Searby, referred to a judgment which Dixon wrote straight through without authorities. Searby pointed to this deficiency. Dixon laughed and then 'decorated' the judgment, to use his word, by inserting in every relevant point the name of the case, year of the report, name of the judge and page at which the passage appeared.

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Dixon took silk after 12 years in March 1922 by which time he was appearing in a majority of the High Court cases emanating from Victoria, especially constitutional, equity and common law cases. He travelled to London to appear before the Privy Council at the end of 1922 to seek leave to appeal in the *Engineer's* case and a year later made a similar trip on behalf the Central Wool Committee. His travel diaries are revealing for the life which a barrister could then have. His 1923 diary records in great detail the books he was reading, especially classical Greek and Latin literature, as well as the very late hours he would work mastering the detail of the case. He would prepare extraordinarily detailed chronological notes of the facts in the case. Arriving in London, there were plays to be seen, a visit to the Privy Council to observe the judges who would be hearing the case and ultimately a meeting with Sir John Simon who was to appear in a common interest with Dixon. There is a fascinating account of how Dixon and Simon prepared for the appeal, the start being less than promising. At the first conference Simon knew nothing of the case. The second conference was cancelled. Three days before the appeal they commenced preparation in earnest at Simon's house in Oxfordshire. Although Simon and Dixon were successful in the appeal, there were already notes in Dixon's diary of a view he was to come to hold of the Privy Council that the judges did not adequately prepare themselves in the full details of the Australian cases coming before them, and that the reasons given by the Privy Council were not satisfactorily expressed for application later by Australian courts.

Dixon was an acting justice of the Supreme Court of Victoria for six months in 1926. He produced a formidable number of judgments. He had already formed a view that reserved judgments were preferable in any cases of complexity. He regarded the practice in English courts of giving *ex-tempore* judgments in complex cases as a mark of laziness. At the end of the year he declined the offer of a permanent appointment to the same bench, having made up his mind he would never be a judge. He returned to the Bar but in early 1929 accepted an offer from attorney-general Latham of an appointment to the High Court.

Ayres describes Dixon as a reluctant justice on the High Court in the decade up to the Second World War, largely because the court was composed of conflicting personalities with everybody seeming to dislike everybody else. Sir Frank Gavan Duffy had been on the court since 1913. He succeeded Isaacs as chief justice in 1931 and remained on the Bench until 1935. According to Dixon, Duffy never liked sitting on the Bench and did as little as he thought was necessary. Sir George Rich had also been appointed in 1913. Rich 'had ability but lacked energy'. One of Dixon's first judgments for the court was written on request of Rich in a case in which Dixon had not even sat! Subsequently, Rich would on occasions have the judgment written for him by a judge not even on the court, or on other occasions Dixon would be forced to write in addition to his own judgment the (conflicting) judgment of Rich. Evatt and McTiernan were appointed in late 1930 to replace Knox and Powers. The Labor Caucus instructed cabinet to make the appointments, notwithstanding the opposition of Labor prime minister James Scullen and attorney-general Frank Brennan who were out of the country. When the appointments were announced, Dixon wished to resign but Starke persuaded him not to do so. As Ayres notes, the new men 'were begrudgingly accommodated within an already uncongenial club'. Starke in particular treated them with contempt, and would later cease all communication with them, leaving Dixon to act as a go-between. Dixon's own views were harsh. He would describe Evatt as being 'an essentially political judge and dishonest', although he forced himself to get along with him. McTiernan he thought of as 'lazy and unqualified', although the two would sometimes go out together to tea or for a walk.

Ayres describes some of Dixon's judgments from the early and middle 1930s as ranking among his most brilliant, influencing the common law world in profound ways. Yet he notes that by the end of 1934 and probably much earlier, Dixon was looking for an opportunity to resign. He was preoccupied with who would be the new chief

justice. Latham had resigned as attorney-general and returned to the Bar, apparently on a promise that it would be him. On the other hand, if the Labor Party took office federally, Evatt would probably be the choice. Although Dixon respected the quality of some of Evatt's judgments, he was frequently critical of him and, according to Ayres, over the decade lost faith in his probity. Dixon regarded Evatt as one who could be very partial on the bench. The diary records on one occasion Evatt being 'full of antagonism to the respondent'; 'most unjudicial'. However, when Evatt was not particularly interested in a case he generally concurred with Dixon's judgment.

In February 1935 Dixon was offered an escape route from the High Court, being the chairmanship of a royal commission on banking and finance. According to his diary he seriously considered resigning to do this work and then returning to the Bar. Dixon however refused the royal commission and continued on to hear what would become the major cases on sec 92 of the Constitution in the following years. His classic interpretation of sec 92 as a protection of individual liberty was established in four judgments written in late February and early March 1935. Often he worked until 4a.m. on the judgments. In March 1935 a further blow up ensued between Dixon and Starke and again Dixon thought of alternatives to the High Court appointment, including whether he would accept the Victorian chief justiceship. Ultimately he decided against it but his views were very negative. He thought nobody could get any pleasure out of judicial work and he advised colleagues against taking appointments. He learnt in October 1935 that Latham had been appointed chief justice. Dixon regarded Latham as 'a usurper' and felt Menzies had let him down in appointing Latham. In 1936 the Privy Council delivered judgment in the *James* case allowing the appeal from the High Court decision. Dixon wrote to Latham that the judgment was 'very poor; very unphilosophical and a crude production'. He added with irony that 'Lord Hailsham seemed to have made some attempt to inform his mind by reading our courts' decisions'.

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From the outbreak of war in 1939 Dixon assumed enormous executive and administrative responsibility within Australia. He gave legal advice and drafted Regulations for the Central Wool Committee. He went beyond this and proffered advice of a political and even military kind to Menzies and made it clear he was prepared to work for the government abroad. He subsequently drafted an ever-growing number of Regulations concerning wheat, transport, aircraft production and other aspects of the war economy. He became involved in decisions as to what aircraft and engines would be manufactured. He continued to write High Court judgments, including on constitutional cases, even though he had become chairman of the CWC and on most days spent several hours in its offices working on its problems. He became chairman of the Australian Coastal Shipping Control Board and drafted the Regulations for it. When urged by the new prime minister, Curtin, he agreed to go to Washington as minister to the United States. The biography then continues with a fascinating record of Dixon's involvement with Roosevelt, the US military and political administration and Evatt as minister for external affairs. Dixon remained a justice of the High Court throughout this appointment. He became a close friend of Felix Frankfurter. According to Ayres, he was able to conduct diplomacy through a personal style by his relationships with Frankfurter, Dean Acheson and Roosevelt. Dixon determined on regular meetings with the senior US military as the best means to ensure continuous supplies for Australia. His diary records General Marshall telling him secrets about the US strategy which Washington would never share with Evatt, whom they distrusted.

Dixon returned home to Australia in 1944 and resumed High Court duties. Over the next five years he would sit on cases in which key legislation relating to government control of health care, airlines and private banks would be contested in the High Court. Ayres detailed extracts from Dixon's diaries concerning the *Bank Nationalisation* case heard in February 1948, and in particular his disparaging observations of both Evatt and Barwick as vounsel.

In 1950 Dixon took on a most difficult mission as the United Nations mediator in Kashmir. Returning to the High Court he sat on the *Communist Party* case and again his diaries provide great insights into his thinking. He was appointed chief justice in 1952 and delivered his famous address in which he stated:

> Close adherence to legal reasoning is the only way to maintain the confidence of all parties in federal conflicts. It may be that the court is thought to be excessively legalistic. I should be sorry to think that with anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.

Ayres notes that Dixon later regretted using the phrase 'strict and complete legalism', because predictably it was misunderstood. He was using it of specifically constitutional matters and when he made the speech he had in mind criticism of the court in the Sydney press over the *Communist Party* case. Dixon believed that many of the great judges of the common law were from the third quarter of the nineteenth century. He modeled himself on judges such as Sir James Parke, Sir William Milbourne James, Sir James Knight-Bruce and Sir George Turner. However, his role was never solely judicial. In October 1952 he gave private advice to the Victorian governor, Sir Dallas Brookes, on a constitutional crisis in Victoria.

In 1955 Dixon attended Yale to receive the Henry V Howland Memorial Prize. It was there he delivered his address 'Concerning judicial method' in which he stated that the common law was 'based on strict logic and high technique, rooted in the Inns of Court, rooted in the year books, rooted in the centuries'. He lamented the many signs that the strict logic and high technique of the common law had fallen into disfavour. He was critical of the judge who, discontented with a result held to flow from a long accepted principle, deliberately abandoned the principle in the name of justice or social necessity or social convenience. Dixon wrote to Frankfurter that to a certain extent he was aiming at Denning LJ. To his consternation, however, he received a letter from Denning saying he completely agreed with everything Dixon had written! Dixon wrote to Lord Simon that Denning baffled him. He always seemed to set principle at defiance.

The biography continues through to Dixon's retirement from the court in 1964 just short of his 78th birthday. In retirement he spent a great deal of time reading the classics.

This is a biography which, because it is so close and faithful to the diaries and letters of Dixon, reveals his thinking and world view in a most complete manner. If there is a fault, it is that the narrative is too close and true to the thinking of Dixon. We are told that Dixon thought particular judges lazy or dishonest or incompetent without much reflection or analysis on whether he was entitled to hold such a view. There are interviews with persons closest to Dixon who held him in loyal and high esteem, but little from those with a different perspective. However, these are the minor criticisms. The work brings a great Australian and a great lawyer closer to his audience. It whets the appetite for the biographies which may come to be written on other great High Court justices and chief justices.