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# Sir Owen Dixon

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# SIR OWEN DIXON

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Sir Owen Dixon was born on 28 April 1886 in Melbourne, Australia. His father, Joseph William Dixon, was a barrister, who ceased practising at the Bar after losing his hearing as a result of a train crash. The only son was strongly influenced by his father and they often discussed legal matters as the younger man's career developed.

Owen Dixon had modest success at the University of Melbourne, graduating with a Bachelor of Arts (1906), a Bachelor of Laws (1908) and a Master of Laws (1909). He derived from his university studies a love of classical literature and language which influenced his legal thinking throughout his career. His Classics professor was disdainful when Dixon announced his intention to pursue law studies: "You will find that very medieval." However, his legal training was nurtured by the foremost law professor in Australia at that time, Professor Harrison Moore. Moore's expertise in English and United States constitutional law developed in Dixon an appreciation of constitutional principle from a comparative perspective.

It was at the Bar and then on the Bench that Dixon showed greatness.[1] After a difficult few years when starting legal practice in 1910, Dixon rose to lead the Australian Bar and judiciary.

Dixon was a talented and later a dominant advocate. Australian Prime Minister Sir Robert Menzies, as a newly called barrister, was Dixon's first ever pupil. Menzies described Dixon as the "greatest legal advocate of his time". But only as a legal or appellate counsel was Dixon supreme. With witnesses and before a jury he could be aloof: "Frequently they wrongly but excusably thought that he was talking down to them." Dixon himself described the art of advocacy as "tact in action", and in this quality he was masterly. He was capable of devastating wit, which Menzies, his junior, did not always appreciate: "at our end of the Bar table, [Dixon] keep up a running fire of *sotto voce* comments on our opponent's conduct of the case. … But I came to know that this was a defect of his quality".[2]

As a barrister, Dixon gave the shortest opinion in Australian history. When he was very busy he was asked to advise on whether teaching was an industry. He relied with one word, "No". He charged 50 guineas.[3] At a mere 34 years of age, he took silk.

> "Appointed K.C. in 1922, Dixon came to exercise 'complete dominance' over the Bar. He was its 'acknowledged leader', 'its outstanding lawyer and its greatest advocate'. A tall, loose-jointed figure with somewhat stooped shoulders, he had a reputation for advocacy of 'calculated flippancy'. He was immensely effective, particularly in the High Court of Australia where he frequently appeared in both constitutional and non-constitutional matters; he 'set one judge against another', skilfully isolating a minority opposed to his point of view and 'persuading a majority to decide in his favour'. Before a jury, however, he was 'too intellectual' and did not shine at cross-examination."[4]

Again at the relatively youthful age of 42, he was appointed as one of the seven judges on Australia's highest court, the High Court of Australia. He served 17 years, until he was 66, before succeeding Chief Justice Latham as Chief Justice of Australia. By that time, he had overshadowed Latham within the Court and had already gathered a

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[1] See Ninian Stephen, *Sir Owen Dixon : A Celebration* (Melbourne University Press 1986). Geoffrey Robertson, *The Justice Game* (Chatto & Windus 1998) at 10 agrees that Dixon was "the best judge in the common-law world".
[2] Sir Robert Menzies, *The Measure of the Years* (Cassell Australia Ltd 1970) at 233-4.
[3] Story recounted in Fricke, *Judges of the High Court* (Hutchinson 1986) at 116. Fricke says that Dixon followed up his one word advice with detailed reasons later.
[4] Entry on Sir Owen Dixon (1886-1972) by Darryl Dawson and Grant Anderson in volume 14 (1940-1980) of the *Australian Dictionary of Biography* (Melbourne University Press 1996).

worldwide reputation for the excellence of his judgments and his mastery of the law. Company lawyer HAJ Ford says of Dixon: "If one seeks to identify what it was in his judgments that gave him such a high reputation in the common law world it is the conjunction of a mastery of common law principle … a scholarly inclination, a sense of the worth of history …. What emerges most clearly is his strong faith in the worth of the common law."[5]

His judgments reveal a mastery of the law, a depth of scholarship and analysis, extensive comparison with English and United States decisions, wide reference to leading international law journals, and a profound commitment to developing the law in accordance with the principles which underlie it. Most significant was his common law style of reasoning which became known as "strict and complete legalism".

He demonstrated these skills early in his career on the High Court bench in such cases as: *Tuckiar v The King* (1934) which established the ethical duties owed by defence counsel in criminal proceedings; *Victoria Park Racing v Taylor* (1937) which concerned the law of nuisance and of privacy; and *Yerkey v Jones* (1939) which developed the law of undue influence.

Dixon interpreted and applied the law with a tenor of "strict and complete legalism". He followed established common law principle and, while he developed principle, he eschewed creativity that might undermine confidence in the certainty of the law. Moreover, his commitment to legalism was to emphasise the impartiality of the judiciary, especially in politically controversial cases.

He approached the Constitution with legal method rather than, as a senior US judge might, with political or sociological concerns: "[T]he court's sole function is to interpret a constitutional description of power or restraint upon power and say whether a given measure falls on one side of a line consequently drawn or on the other, and that it has

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[5] Ford, "Sir Owen Dixon: His Judgments in Private Law" (1986) 15 Melb ULR 582 at 590. There are other recollections of Dixon in that volume of the Review.

nothing whatever to do with the merits or demerits of the measure".[6] Accordingly, he usually applied common law principles of interpretation to the Commonwealth Constitution. Heads of legislative power were interpreted according to their natural meaning in line with the *Engineers Case* (1920), while restrictions on power were given an operation which depended on technical tests of compliance. Yet his strict legalism still allowed the Constitution to evolve to meet the fundamental changes in Australia's domestic and international environment during the twentieth century.

Dixon dominated the interpretation of pivotal constitutional restrictions on the power of the Australian States in ss 90 and 92. For each he articulated a similar legal test, against which the constitutional validity of laws could be judged with some precision. Each test was based on a "criterion of liability" which looked to the act which incurred the liability imposed by the impugned law. If that act was sufficiently connected with interstate trade or commerce, it was likely that the law infringed the freedom of interstate trade and commerce in s 92: *Dennis Hotels v Victoria* (1960). Similarly, if that act occurred at some point in the process of bringing goods into a consumable state, it was likely to infringe the prohibition on State excise duties in s 90: *Parton v Milk Board (Vic)* (1949). The High Court has since departed from these approaches to interpretation, preferring to adopt a substance test which gives effect to the underlying purpose of these sections: *Ha v New South Wales* (1997).

The Dixon High Court, with clarity of thought and expression, laid down pivotal principles of Australian taxation law. Following on the strong work of the Latham Court, in which Dixon was a powerful performer, Dixon's High Court settled the elements of assessable income (*FCT v Dixon* (1952)) and of deductibility of business expenses (*Cecil Bros v FCT* (1963); *Lunney and Hayley v FCT* (1958); *Finn v FCT* (1960)). This Court outperformed the subsequent Barwick High Court and its era of technical distinctions and massive expansion in tax disputes and legislation.

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[6] Dixon's speech on appointment as Chief Justice of the High Court in 1952 – cited in (1952) 85 Commonwealth Law Reports (CLR) xi at xiii-xiv.

Under Dixon's leadership, the High Court established an international reputation as an appellate court, particularly within the British Commonwealth and in the United States. This was achieved through his international contacts, such as with Justice Felix Frankfurter of the US Supreme Court, and by the quality of his judgments and those of his more distinguished judicial colleagues. Most significant, however, was the break which he led in *Parker v R* in 1963[7] to no longer follow the decisions of the UK House of Lords. This fundamental alteration to the rules of precedent in Australia, cautiously but firmly asserted Australia's judicial independence: "There are propositions laid down in the judgment [of the House of Lords] which I believe to be misconceived and wrong. They are fundamental and they are propositions which I could never bring myself to accept."

Dixon's High Court was the strongest Australia has seen. With him sat the finest legal minds of two generations, in particular, Justices Fullager, Windeyer, Kitto, and Menzies. This formidable team drew accolades from throughout the world.

Although not interested in political objectives, Dixon served as Australian Minister to Washington from 1942-1944, during the Second War, taking leave from the High Court. Dixon chaffed at having to work with Dr Herbert Evatt, the Minister for External Affairs, and asked to be relieved of his duties there in 1944. He returned to the High Court Bench. He did accept other diplomatic appointments, and in 1950 he was appointed by the UN to mediate in the dispute between India and Pakistan in their contest over Kashmir, which he did without success but with the high respect of both parties.

Sir Owen was honoured internationally. The United Kingdom made him a Knight Commander of the Most Distinguished Order of St Michael and St George in 1941 and in 1954 a Knight Grand Cross of that Order, a member of the Privy Council in 1951, while in 1963 the Queen personally awarded him the Order of Merit. Academic awards included honorary degrees from the Universities of Oxford and Harvard, and the prestigious Howland Prize from Yale in 1955.

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[7] (1963) 111 CLR 610 at 632.

Dixon died at 86 in Melbourne on 7 July 1972. His was a glittering career. He was hailed by two English Lord Chancellors and a US Supreme Court Justice as the greatest judge in the English-speaking world.[8] English doyen Lord Denning wrote in 1994 that Dixon "was the greatest Chief Justice that Australia has ever had". Eclipsing this, Lord Morton of Henryton, opening a legal convention in Australia, announced that Dixon was "one of the greatest judges of all time".[9]

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[8] Ninian Stephen, *Sir Owen Dixon : A Celebration* (Melbourne University Press 1986) at 21. See also Fricke, *Judges of the High Court* (Hutchinson 1986) at 122.

[9] Sir Ninian Stephen's *Sir Owen Dixon: A Celebration* (Melbourne University Press 1994) is still the best writing on Australia's most celebrated judge.