

THE HIGH COURT OF AUSTRALIA: A PERSONAL IMPRESSION OF ITS FIRST 100 YEARS

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[This article records my impressions of the High Court, its jurisprudence and the Justices up to the time when I became Chief Justice in 1987. For obvious reasons it would be invidious for me to record my impressions of the Court from that time onwards. The article reviews the work of the Court and endeavours to convey a picture of the contribution and personality of some of the individual Justices. The article concludes with the statement that the Court has achieved the high objectives of which Alfred Deakin spoke in his second reading speech on the introduction of the Judiciary Act 1903 (Cth). The Court has established its reputation as one of the world's leading courts of final appeal and has fulfilled its role alongside the Parliament and the executive in our constitutional framework.]

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I INTRODUCTION

This article records my personal impressions of the High Court in its first 100 years. My account concludes in 1987 when I became Chief Justice, although I go on to discuss some of the contemporary issues which face the High Court. It would be invidious for me to comment upon, let alone evaluate, the Court after 1987. This is also a convenient point of conclusion because, as a result of the *Australia Act 1986* (UK) c 2 and its companion Commonwealth and state Acts,¹ appeals to the Privy Council from Australian courts finally came to an end in that year. From that point, the High Court assumed the sole final responsibility for declaring the law in Australia.

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¹ *Australia Act 1986* (Cth); *Australia Acts (Request) Act 1985* (NSW); *Australia Acts (Request) Act 1985* (Qld); *Australia Acts (Request) Act 1985* (SA); *Australia Acts (Request) Act 1985* (Tas); *Australia (Acts) Request Act 1985* (Vic); *Australia Acts (Request) Act 1985* (WA).

II IN THE BEGINNING

One hundred years later, we can say that the High Court of Australia has lived up to the expectations held of it by Alfred Deakin when he delivered his famous address on the second reading of the Bill that was enacted as the *Judiciary Act 1903* (Cth) ('*Judiciary Act*'). In that address, he predicted that the proposed High Court would achieve the standing of the other great, established common law courts: the Supreme Court of the United States, the Privy Council, the House of Lords and the Supreme Court of Canada.²

Deakin's address on that occasion was designed, at least in part, to reinforce his proposal for the creation of a strong Court of five Justices. This proposal had encountered opposition principally on the ground of expense — a major concern in the early days — and, to a lesser extent, on the ground that it was unnecessary.³ There had even been a suggestion that the Court should be composed of the Chief Justices of the states, but this suggestion was impractical and was discarded. Despite Deakin's eloquence, he failed in his objective, as Parliament insisted on a Court of three Justices and rejected the proposal for judicial pensions.

A Court of three Justices was established consisting of Sir Samuel Griffith as Chief Justice, Sir Edmund Barton and Sir Richard O'Connor. Each had played a part in the Conventions which preceded the enactment of the *Constitution* by the Imperial Parliament,⁴ while Griffith had undertaken the leading role in preparing the early draft of what was to become the *Constitution*. They became close colleagues and held each other in high regard. Their experience in the Conventions equipped them with an understanding of the United States federation and they were impressed with its jurisprudence.

The High Court had a dual role under the *Constitution*. It was to be Australia's final court of appeal, subject to the prerogative appeal by special leave to the Privy Council from the High Court,⁵ and the appeal to the Privy Council from the Supreme Courts of the states. The High Court was also to be a constitutional court, having an original jurisdiction in both constitutional cases and in other cases conferred by the *Constitution* itself and by Commonwealth statutes.⁶ In these respects, the High Court is closer to the Supreme Court of Canada than any other major common law final court of appeal. The growth of the High Court's constitutional and appellate work resulted eventually in the creation of the Federal Court of Australia in 1976 to take on much of the High Court's original jurisdiction.⁷ This enabled the High Court to concentrate on its appellate and constitutional work.

² Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10971, 10981 (Alfred Deakin).

³ Commonwealth, *Parliamentary Debates*, House of Representatives, 9 June 1903, 597–615 (Alfred Deakin), 616–32 (Patrick Glynn).

⁴ *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, s 9.

⁵ *Constitution* s 74.

⁶ *Constitution* ss 75–6.

⁷ *Federal Court of Australia Act 1976* (Cth).

In the realm of politics and political commentary, the Court's constitutional decisions have always been regarded as more important — having more impact and generating more controversy — than its non-constitutional decisions. For example, *Bank of New South Wales v Commonwealth*⁸ and *Australian Communist Party v Commonwealth*⁹ each represented a major blow to the policies of the governments of the day. Two significant non-constitutional decisions were the indigenous land rights cases, *Mabo v Queensland [No 2]*¹⁰ and *Wik Peoples v Queensland*,¹¹ which generated great controversy and strong political criticism of the Court.

III THE EARLY HIGH COURT

From its very inception, the Court has been engaged with the complex concept of federal jurisdiction. The first reported case in the *Commonwealth Law Reports*, the series of authorised reports dedicated to reporting decisions of the High Court of Australia, was *Dalgarno v Hannah*.¹² On 15 October 1903, the Court granted the defendant special leave to appeal from a decision of the Full Court of the Supreme Court of New South Wales. This decision, delivered before the *Judiciary Act* was enacted, upheld a verdict for the plaintiff for £200 damages. The plaintiff was a cabman who was injured when Commonwealth telephone wires fell on him. As the plaintiff had brought his action in negligence under the *Claims against the Commonwealth Act 1902* (Cth), the Supreme Court had been exercising federal jurisdiction. Appearing for the plaintiff was Dr Sly and for the defendant Mr Bernhard Wise KC, the Attorney-General for New South Wales. The Sly arguments prevailed over the Wise arguments and the order granting special leave was rescinded. The Court held that the case did not fall within those provisions of s 35 of the *Judiciary Act* which conferred a right of appeal from judgments delivered before the *Judiciary Act* was passed. Applying the test formulated by the Privy Council in *Prince v Gagnon*¹³ — a test which has, in one form or another, governed the grant or refusal of leave ever since — it was not a case for the grant of special leave.

The judgment of Griffith CJ was delivered as the judgment of the Court. This became the pattern for the immediate future. Griffith CJ generally delivered the judgment of the Court or his own judgment (a judgment with which his colleagues usually agreed). Indeed, they rarely dissented. This was the measure of the early Court's unanimity.

As additional Justices were appointed to the Court and, subsequently, as the influence of Sir Isaac Isaacs made its impact on other members of the enlarged Court, the influence of Griffith CJ progressively declined. In his later years he was in dissent from time to time. Griffith CJ and Isaacs J had opposing views on the *Constitution*. Griffith CJ was a federalist while Isaacs J, a nationalist,

⁸ (1948) 76 CLR 1 ('*Bank Nationalisation Case*').

⁹ (1951) 83 CLR 1 ('*Communist Party Case*').

¹⁰ (1992) 175 CLR 1 ('*Mabo [No 2]*').

¹¹ (1996) 187 CLR 1 ('*Wik*').

¹² (1903) 1 CLR 1.

¹³ [1882] 8 AC 103, 105 (Lord Fitzgerald).

favoured strong central power. Both men were dogmatic and convinced of the correctness of their own views. Dr Herbert Vere Evatt, writing of the Court at the end of its first decade, referred to the ‘exceedingly fierce brushes between Chief Justice Griffith and Justice Isaacs [which] delighted the law students, if they scandalized the public’.¹⁴

IV CONFLICT WITH THE EXECUTIVE

The principal registry of the Court was established in Melbourne. However, the Justices wanted the principal seat of the Court to be at Sydney, the home of Barton and O’Connor JJ and the intended home of the Chief Justice. The first annual report of the Court in November 1904 showed that the Justices sat on 55 days and that there were 20 appeals to the High Court compared to six appeals to the Privy Council.¹⁵

The appointment of Sir Josiah Symon as Attorney-General in August 1904 led to a petty but ugly dispute with the Court over expenses. Symon had been an aspirant for appointment to the Court and wished to reduce the Court’s expenses. The Court had adopted the ‘circuit’ policy of sitting in state capitals. Symon’s response was that all expenses were to be computed from Melbourne and they were not to exceed a maximum of three guineas a day for a judge and his associate.¹⁶ The Court could sit in Sydney on dates to be fixed by Symon. Brisbane appeals could be heard in Sydney but all other matters were to go to Melbourne. In correspondence, the Justices accused Symon of interfering with their exercise of statutory powers vested in them, while Symon, complaining of the Court’s excessive expenses in travelling, asserted that any rule of court conflicting with the executive’s decision was ‘ultra vires and illegal and that the circuit which takes place under its assumed authority [was] also illegal’.¹⁷

The dispute continued, and on Saturday 29 April 1905 the Chief Justice announced in Sydney that the Melbourne sittings were to be adjourned, and that urgent business would continue to be heard in Sydney. Because Castles, the principal Registrar in Melbourne, left the Registry at 12:30pm on Saturday before a telegram from the Chief Justice arrived, notices in the press were published too late to avoid inconvenience to litigants and witnesses in the cases scheduled to commence on the following Tuesday. This led the Chief Justice to publicly reprimand the Registrar. The dispute simmered on, with Symon claiming that the Registrar was accountable to the executive, not to the Chief Justice. The dispute finally ended with the defeat of the Reid-McLean government on 30 June 1905, and Symon’s replacement as Attorney-General by Sir Isaac Isaacs. Ultimately the Court was vindicated. It continued to go on circuit and travelling expenses were paid to judges and associates.¹⁸

¹⁴ Herbert Vere Evatt, *Australian Labour Leader: The Story of W A Holman and the Labour Movement* (1940) 161.

¹⁵ Roger Joyce, *Samuel Walker Griffith* (1984) 262.

¹⁶ *Ibid.*

¹⁷ *Ibid.* 264.

¹⁸ For a more detailed account of the dispute, see *ibid.* 262–6.

Until the Court moved to its permanent home in Canberra in 1980, the Court sat in the state capitals, visiting capitals other than Sydney and Melbourne once a year, so long as there was enough work to justify a visit. However, some Justices (notably Starke and Williams JJ) refused to travel to Adelaide and Perth on occasions. When the Court moved to Canberra, Chief Justice Sir Garfield Barwick was in favour of hearing all cases in the Canberra courthouse, which was called 'Gar's Mahal' by the wits and some of the Justices residing in Canberra. Barwick was against travelling on the grounds that it was inefficient, disrupted the work of the Court and involved the Court using borrowed facilities which were inferior to the facilities available in Canberra. His view was supported by the government but opposed by the other Justices. Ultimately, the government gave way: the Court now sits in state capitals other than Sydney and Melbourne not more than one week a year, provided there is enough work to justify such a visit. The Court hears special leave applications in Sydney and Melbourne and the Justices maintain, if they so decide, a principal place of residence away from Canberra and retain chambers in their city of principal residence.

The Court's move to Canberra met with some opposition on the part of the legal profession. Opponents of the move thought that the Justices might be influenced by the prevailing pro-government sentiments in Canberra. This apprehension has proved to be unfounded, and it may be that the decision to allow Justices to maintain a principal place of residence away from Canberra has contributed to this outcome. The move to Canberra coincided with the enactment of the *High Court of Australia Act 1979* (Cth) which enabled the Justices to administer the Court with funds appropriated to the Court by the Parliament. This move reinforced the Court's independence from the executive government and exorcised the ghost of Sir Josiah Symon.

V CONFLICT WITH THE PRIVY COUNCIL

In 1904, the Court heard its first major constitutional case, *D'Emden v Pedder*.¹⁹ It held that a Commonwealth public servant was not liable to pay Tasmanian stamp duty on his salary. If the decision in this case was supportable, the reasoning was not. Griffith CJ, invoking United States authority, stated that the Commonwealth and each of the states was 'within the ambit of its authority, a sovereign State, subject only to the restrictions imposed by the Imperial connection and to the provisions of the *Constitution*'²⁰ and that an attempt by a state to interfere with 'the free exercise of the legislative or executive power of the Commonwealth ... unless expressly authorized by the *Constitution*, is to that extent invalid and inoperative.'²¹

¹⁹ (1904) 1 CLR 91 ('*D'Emden*').

²⁰ *Ibid* 109.

²¹ *Ibid* 111.

The Chief Justice was in error in describing the Australian states as ‘sovereign’. In this respect, they were unlike their American counterparts which were ‘sovereign’.²²

The Court followed and applied *D’Emden* in *Deakin v Webb*²³ and *The Federated Amalgamated Government Railway & Tramway Service Association v New South Wales Railway Traffic Employees Association*.²⁴ In *Webb v Outtrim*,²⁵ however, the Privy Council held that Victoria could tax federal public servants and disapproved *D’Emden* and *Deakin*. Lord Halsbury, in delivering the advice of the Privy Council, was extremely critical of the Chief Justice’s approach. He rejected the analogy between the United States and the Australian constitutions and suggested that the provisions of the *Judiciary Act* blocking inter se questions from proceeding direct to the Privy Council from state courts were invalid.

The last word lay with the Chief Justice and the High Court. In *Baxter v Commissioners of Taxation (NSW)*,²⁶ in a biting judgment, the Court castigated Lord Halsbury’s judgment and pointed out that the question involved in *Outtrim*, as in *Baxter*, was an inter se question in respect of which no appeal lay to the Privy Council in the absence of a certificate granted by the High Court under s 74 of the *Constitution*. The decision in *Outtrim* no doubt contributed to the Chief Justice’s low opinion of the Law Lords.²⁷

VI THE ARRIVAL OF ISAACS AND HIGGINS JJ

So the doctrine of implied prohibitions survived. But the harbingers of its later demise became apparent after 1906 when Isaacs and Higgins JJ were appointed to the Court. They soon made it clear that they rejected the doctrine and its companion, the doctrine of state reserved powers. They also favoured a liberal interpretation of the arbitration power, as did O’Connor J, whereas Griffith CJ and Barton J held to a narrow interpretation. The clash of views on these questions generated great personal hostility between the Justices, which became more apparent as the arbitration power became the principal constitutional battleground between the Commonwealth and the states. The dislike which the Chief Justice and Barton J held for Isaacs J found expression in private correspondence and private comments. Barton referred to him as a ‘malign influence’

²² The *United States Constitution* was a compact to which the original states, in the exercise of their sovereignty, had agreed. Having won the War of Independence against Britain, the original states had achieved independence as ‘sovereign states’. The Australian settlements, on the other hand, were British colonies whose peoples requested the Imperial Parliament to enact the *Australian Constitution* — whereby the states were brought into existence with boundaries coterminous with those of the former colonies. See *Victoria v Commonwealth* (1971) 122 CLR 353, 370–2 (Barwick CJ) (*‘Payroll Tax Case’*).

²³ (1904) 1 CLR 585 (*‘Deakin’*).

²⁴ (1906) 4 CLR 488 (*‘Railway Servants Case’*).

²⁵ (1906) 4 CLR 356 (*‘Outtrim’*).

²⁶ (1907) 4 CLR 1087 (*‘Baxter’*).

²⁷ He was not alone in this respect. Deakin, in his second reading speech on the Judiciary Bill 1903 (Cth), had invoked the strong criticism of the Privy Council made by Sir Robert Stout, Chief Justice of the New Zealand High Court: Commonwealth, *Parliamentary Debates*, House of Representatives, 9 June 1903, 595 (Alfred Deakin). Sir Owen Dixon also held the Law Lords in fairly low esteem, considering that they knew little of federal constitutional law.

and said of him ‘I don’t think there is the least bit of sincerity in the Jew boy’s attitude.’²⁸

Despite the Justices’ personal antagonisms, the Court laid the foundations for the future interpretation of Commonwealth legislative powers by recognising that the *Constitution* was an instrument of government intended to endure and to apply to changing circumstances. The Court enunciated the paramount principle of constitutional interpretation which it has continued to apply to the present day. In 1908, O’Connor J expressed the principle in these terms:

We are interpreting a *Constitution* broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve. For that reason, where the question is whether the *Constitution* has used an expression in the wider or in the narrower sense, the Court should ... always lean to the broader interpretation unless there is something in the context or in the rest of the *Constitution* to indicate that the narrower interpretation will best carry out its object and purpose.²⁹

The logical consequences of this approach were qualified by the implied prohibitions doctrine and the reserved powers doctrines favoured by the original Justices.

An account of the Court’s work in its first two decades would be incomplete without reference to Griffith CJ’s classic definition of ‘judicial power’ in *Huddart Parker & Co Pty Ltd v Moorehead*³⁰ and the decision in *Re Judiciary and Navigation Acts*.³¹ Griffith CJ stated that the words ‘judicial power’ in s 71 of the *Constitution* mean:

the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.³²

In *Re Judiciary and Navigation Acts*, the Court held invalid Part XII of the *Judiciary Act*, which attempted to confer jurisdiction on the High Court to give a binding advisory opinion on any question of law as to the validity of any enactment of the Commonwealth Parliament. The Court concluded that a declaration of the law divorced from any attempt to administer that law was not a ‘matter’ within the meaning of s 76 of the *Constitution* (which sets out the matters with respect to which Parliament may vest jurisdiction in the High Court). The Court stated that ‘matter’ in s 76 does not mean a legal proceeding, but rather means the subject matter for determination in a legal proceeding.

²⁸ Joyce, above n 15, 301.

²⁹ *Jumbunna Coal Mine, No Liability v Victorian Coal Miners’ Association* (1908) 6 CLR 309, 367–8. See also *A-G (NSW) v Brewery Employees Union of New South Wales* (1908) 6 CLR 469, 611 (Higgins J).

³⁰ (1909) 8 CLR 330, 357 (‘*Huddart Parker*’), adopted in *Labour Relations Board of Saskatchewan v John East Iron Works Ltd* [1949] AC 134.

³¹ (1921) 29 CLR 257.

³² *Huddart Parker* (1909) 8 CLR 330, 357.

This definition of ‘matter’ has influenced the Court’s approach to federal jurisdiction ever since,³³ while Griffith CJ’s definition of judicial power has been at the core of the Court’s jurisprudence relating to the vesting of judicial power in Ch III courts and its treatment of the constitutional separation of powers.³⁴ To this day, the separation of powers has been a dominant influence on the shaping of Australian public law.

In the field of general law, the Court established a high reputation. Griffith CJ — later described by Sir Owen Dixon as a formidable exponent of Austinian jurisprudence³⁵ — along with Isaacs J, was largely responsible for that reputation. Their judgments on voluntary assignments and dispositions of interests in property in *Anning v Anning*³⁶ remain a shining example of their learning and vividly illustrate the quality of the judgments of the Court at that time on matters of general law. Their judgments in *Butler v Fairclough*³⁷ on caveats under the Torrens title system in the context of conflicting equitable titles and priority are also good examples of their skill and style.

Griffith devoted much of his free time to abstruse mathematics and the translation of Dante’s *Divine Comedy*. A copy of the translation remains in the High Court library. I understand that it is not highly regarded by experts in the field, but it bears witness to Griffith’s considerable learning.

Griffith was interested in politics and had been an experienced politician in Queensland. He was not troubled about giving advice to Governors-General and to the government of the day. He advised the Earl of Dudley on Prime Minister Fisher’s proposed dissolution in 1909, Sir Ronald Ferguson about Prime Minister Cook’s proposed dissolution in 1914 and the federal government about the War Precautions regulations in 1916.³⁸ Indeed, he offered to help ‘in framing necessary legislation’ and informed Prime Minister Hughes to this effect.³⁹ He appears to have been consulted by Sir Ronald Ferguson on a number of occasions. Although this may seem to be at odds with the modern view of the separation of powers, it was in all probability a continuation of a practice followed by colonial Chief Justices and Governors and may well have reflected an obligation which Griffith CJ felt was owed to the King’s representative.

When Griffith CJ resigned from the Court in 1919, he was succeeded as Chief Justice by Sir Adrian Knox. So great were the divisions within the Court at the time that Sir Frank Gavan Duffy said of Knox, ‘he has come to command a set of feudal barons, not an army staff.’⁴⁰

³³ *Mellifont v A-G (Qld)* (1991) 173 CLR 289; *Croome v Tasmania* (1997) 191 CLR 119.

³⁴ See, eg, *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245; *A-G (Cth) v Breckler* (1999) 197 CLR 83.

³⁵ ‘Retirement of the Chief Justice’ (1964) 110 CLR v, xi.

³⁶ (1907) 4 CLR 1049.

³⁷ (1917) 23 CLR 78.

³⁸ Joyce, above n 15, 321.

³⁹ *Ibid* 349, 352.

⁴⁰ Letter from Sir Frank Gavan Duffy to Sir Samuel Griffith, 23 December 1919 in Joyce, above n 15, 357.

VII SIR ISAAC ISAACS

Sir Isaac Isaacs may have been, apart from Sir Owen Dixon, the most influential Justice to sit on the High Court. Isaacs J did not dominate the Court as Griffith CJ did in his early days, but Isaacs J's influence has been enduring. His judgments extended Commonwealth power and exhibit 'a strong awareness of the social purposes of law'.⁴¹ It is therefore not surprising that they were often cited in the 1980s and 1990s, especially by Deane J. Possessing a remarkable memory, Isaacs J had 'an energy, a learning, a concentration of mind and an intellectual resourcefulness which can seldom have been equalled'.⁴²

Isaacs J dominated the Court while Knox was Chief Justice, taking a vigorous part in argument to the point where, at times, he appeared to be an advocate rather than a judge. Although Sir Owen Dixon denied that Isaacs J was ever overbearing or assertive — indeed, Dixon said of him that he was always receptive to a new point which would occasionally cause him to change his mind — Sir Robert Menzies, who appeared before the Court on many occasions, expressed a different view of Isaacs J.⁴³

Isaacs J's judgments read as if they were forensic exercises in advocacy. They were rhetorical, extravagant, florid and prolix. His judgments during the years of the First World War were extremely nationalistic and had a strong Imperialist flavour.

As Sir Zelman Cowen said, he 'was an intense, driving, ambitious man'.⁴⁴ However, he was not popular and he was given to pretension. He had a penchant for citing Privy Council decisions reported in the *Indian Appeals*. When I first came to the Bar, a story was told by senior members of the New South Wales Bar concerning a case heard in Sydney by the High Court. During argument, Isaacs J said to senior counsel who was on his feet that he had a recollection that there was Privy Council authority for a particular proposition. 'Could it be in the *Indian Appeals*?' inquired Isaacs J. Senior counsel replied, 'Yes, it could be [naming a decision] which is reported in the *Indian Appeals*, but yesterday when we sought to borrow the relevant volume from the Attorney-General's library, we discovered that the volume had been taken out in your Honour's name'.⁴⁵

VIII THE *ENGINEERS CASE* AND ITS CONSEQUENCES

Isaacs J delivered the joint judgment in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*.⁴⁶ The *Engineers Case* repudiated the doctrines of implied prohibitions and state reserved powers and asserted the paramountcy of Commonwealth laws over inconsistent state laws, based on the terms of s 109 of the *Constitution*. The *Engineers Case* was thought, incorrectly, to banish implications from the *Constitution*. In fact, it upheld the principle of

⁴¹ Sir Zelman Cowen, *Isaac Isaacs* (1967) 145.

⁴² Sir Owen Dixon, 'Foreword' in Max Gordon, *Sir Isaac Isaacs: A Life of Service* (1963).

⁴³ A view expressed to the author by Sir Robert Menzies in conversation.

⁴⁴ Cowen, *Isaac Isaacs*, above n 41, 117.

⁴⁵ This incident was not an isolated occurrence: see *ibid* 100–1.

⁴⁶ (1920) 28 CLR 129 ('*Engineers Case*').

responsible government as a constitutional implication, with a view to distinguishing the *Australian Constitution* from that of the United States. Strangely enough, in view of its importance, the *Engineers Case* is not an impressive judgment. It was poorly constructed and composed, but there is no denying its significance.

The early Justices of the High Court had adopted principles of constitutional interpretation well-adapted to an Australia which was organised around state-based communities and intra-state trade. By the time the *Engineers Case* was decided, Australians had acquired a national unity and a sense of national identity in consequence of the First World War, which made it appropriate to contemplate an expansion in the exercise of Commonwealth powers. This development was memorably captured by Windeyer J in a passage in his Honour's judgment in the *Payroll Tax Case*.⁴⁷ It would, however, be a mistake to think that the *Engineers Case* turned on reasoning which was not expressed in the judgment. At the very beginning of their service on the Court, Isaacs and Higgins JJ had emphatically disagreed with the doctrines espoused by the early Justices. The combination of literal interpretation and a broad construction of Commonwealth powers led to the Commonwealth assuming a dominant position in the Australian federation vis-à-vis the states.

The *Engineers Case* ushered in a period of literal interpretation of the *Constitution*. Literal interpretation and legalism (of which Sir John Latham was the chief exponent) were characteristic of the Court's constitutional interpretation for the greater part of the 20th century. Despite the frequent association of Sir Owen Dixon's name with legalism and his own invocation of a policy of 'strict and complete legalism' in constitutional cases, it would do him an injustice to describe him as a legalist. His legal thinking was so sophisticated and profound that it cannot accurately be described by any label. Indeed, Dixon J's contribution was to inject more of a federal balance into constitutional interpretation after the *Engineers Case* by developing what have been called 'the federal implications'.

I recall meeting Dixon in Melbourne after his retirement and my appointment as Commonwealth Solicitor-General in 1964. He asked me: 'Are there any federalists left in Canberra?' When I replied in the negative, he said, 'It does not surprise me.'

Before the *Engineers Case*, the Court made considerable use of United States authorities. Following the *Engineers Case*, references to United States authority were much less frequent. The majority remarked: 'American authorities ... are not a secure basis on which to build fundamentally with respect to our own *Constitution* [but] in secondary ... matters they may ... afford considerable light and assistance'.⁴⁸

Much later, in the 1980s and the 1990s, the Court made extensive use of foreign authorities and comparative law. This use of foreign precedents was

⁴⁷ (1971) 122 CLR 353, 395–7.

⁴⁸ *Engineers Case* (1920) 28 CLR 129, 146 (Knox CJ, Isaacs, Rich and Starke JJ).

associated with the demise of the Privy Council appeal and the Court's recognition of its responsibility to declare the law for Australia.⁴⁹

IX THE COURT POST-ENGINEERS CASE

Neither Sir Adrian Knox nor his successor as Chief Justice, Sir Frank Gavan Duffy, made a distinctive mark on the jurisprudence of the Court. Knox was interested in horseracing and, as Dixon noted rather dismissively, in reading biographies. Each had been an outstanding advocate at the Bar. When I was associate to Roper J of the Supreme Court of New South Wales before I went to the Bar, his Honour told me that he and his acquaintances in the profession who had heard Gavan Duffy as counsel in the High Court considered him to be an advocate of matchless skill. However, as Chief Justice, Duffy did no more than he thought necessary and applied the standard of necessity strictly. In his day, the judges travelled by ship to Perth and stayed at the Weld Club adjacent to the Supreme Court of Western Australia where the Court sat. Court folklore had it that, ostensibly (if not in fact) suffering from a severe cold, he would cheerily wave from the Club verandah to his colleagues as they set off for the Court and the day's work.

The arrival on the Court of Sir Hayden Starke, a lawyer of considerable ability and experience, promised better things. In his earlier years on the Court, his Honour wrote some particularly good judgments, however he was a difficult and abrasive man who became a disruptive influence. He had no hesitation in criticising other members of the Court — especially Evatt and McTiernan JJ whom he described as 'the parrots'⁵⁰ because they often agreed with Dixon J. He declined to circulate his judgments because he feared that Evatt J might reveal them to others. He would send his judgment in a sealed envelope to the Registrar with instructions not to open it until the day when the case was listed for judgment.

In one appeal in which Evatt J's brother, Mr Clive Evatt QC, was appearing, Starke J asked him some difficult questions to which Evatt J then suggested the answers. Starke J's response was to ask another question, saying 'There, let's see Brother Bert get you out of *that* one.'⁵¹ Examples of his contrariness can be found in *The Oxford Companion to the High Court of Australia*⁵² and in Ayres's biography of Dixon, who described him as a 'pitiless man'.⁵³

⁴⁹ See, eg, Bruce Topperwien, 'Foreign Precedents' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 280.

⁵⁰ See, eg, Letter from Sir Hayden Starke to Sir John Latham, 22 February 1937 in Clem Lloyd, 'Not Peace but a Sword! — The High Court under J G Latham' (1987) 11 *Adelaide Law Review* 175, 181.

⁵¹ *Ibid* 638 (emphasis in original).

⁵² See Graham Fricke, 'Hayden Erskine Starke' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 637, 638–9.

⁵³ Philip Ayres, *Owen Dixon* (2003) 79.

X CHANGING OF THE GUARD

In the space of two years, the composition of the Court changed dramatically. Sir Owen Dixon was appointed in 1929. In 1930, Sir Isaac Isaacs was appointed Chief Justice, only to retire nine months later on his appointment as Governor-General. Sir John Latham was then appointed as Chief Justice and, in 1931, Herbert Vere Evatt and Sir Edward McTiernan were appointed as Justices.

The contents of the Dixon diaries paint an extraordinary picture of the personalities of the Justices and of their relationships in the 1930s through to the 1950s.⁵⁴ With the exception of the early years when Griffith CJ presided over his colleagues Barton and O'Connor JJ, the Court was riven with personal antagonisms until Dixon became Chief Justice in 1956.

Despite the distraction of such resentments, the quality of the Court's judgments reached a high level in this period. This was due in large measure to the influence of Dixon J, whose judgments both in public law and private law were outstanding. Evatt J was also a judge of outstanding ability, despite the criticisms that have been made of him. His judgments on questions of constitutional law and public law may be compared with those of Dixon J. While Dixon J's judgments on matters of private law have been regarded as superior, Evatt J's judgment on nervous shock in *Chester v Council of the Municipality of Waverley*⁵⁵ was a classic in its time.

Victoria Park Racing and Recreation Grounds Co Ltd v Taylor,⁵⁶ decided in 1937, reveals the Court's style and technique in this period. The judgments of Dixon and Evatt JJ are illuminating. Evatt J's judgment, though a dissenting one, makes out a persuasive case for relief on the ground of nuisance. It has been suggested that the judgment recognises a tort of invasion of privacy, though Evatt J disclaimed this. His fine dissenting judgment in *Australian Knitting Mills Ltd v Grant*⁵⁷ was upheld by the Privy Council.⁵⁸

Occasionally Dixon and Evatt JJ were authors of a joint judgment. Their dissent in *R v Federal Court of Bankruptcy; Ex parte Lowenstein*⁵⁹ is so persuasive that one wonders why it did not prevail. This judgment is an unusual instance of interpretation of s 80 of the *Constitution*.

Although Evatt J's interpretation of s 92 was not accepted, he offered a coherent view of the section.⁶⁰ The Court's interpretation of the interstate trade and commerce power (s 51(i)) and s 92 lacked consistency and the Privy Council's

⁵⁴ See Philip Ayres, 'Dixon Diaries' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 222; Ayres, *Owen Dixon*, above n 53, ch 5.

⁵⁵ (1939) 62 CLR 1.

⁵⁶ (1937) 58 CLR 479.

⁵⁷ (1933) 50 CLR 387.

⁵⁸ *Grant v Australian Knitting Mills Ltd* (1935) 54 CLR 49.

⁵⁹ (1937) 57 CLR 765.

⁶⁰ In *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30, Evatt J stated that s 92 postulates the free flow of goods interstate, so that goods produced in any state may be freely marketed in any other states, and that nothing can lawfully be done to obstruct or prevent such marketing. It does not mean that those engaged in interstate trade are at liberty to ignore the general regulatory laws of a state: at 56–87. In *James v Commonwealth* (1936) 55 CLR 1, the Privy Council stated that Evatt J's judgment was 'of great importance': at 50 (Lord Wright MR).

contributions to s 92 did nothing to improve the position. When I was a law student, Lord Wright's notion of 'freedom as at the frontier'⁶¹ became the received doctrine but, like others, it found its way into the dustbin of legal history. At that time law students were told that there were five competing interpretations of s 92. They included Dixon's interpretation which ultimately gained acceptance.⁶²

The consequence of the restrictions on appeals to the Privy Council was that an appeal could be taken to their Lordships on s 92 (not an inter se question) but not on s 51(i) (an inter se question). Yet the two provisions are closely interrelated, as their exposition by Dixon in his judgments made clear. The restriction on the appeal to the Privy Council was thus bound to cause a problem.

The Court's decisions in *South Australia v Commonwealth*⁶³ and *Victoria v Commonwealth*,⁶⁴ which effectively left the Commonwealth in sole possession of the field of income tax, reinforced the Commonwealth's dominant position in federal financial relations. These decisions, followed later by *Attorney-General (Vic) ex rel Black v Commonwealth*,⁶⁵ upheld the power of the Commonwealth to attach conditions to its grants of financial assistance to the states under s 96 of the *Constitution*. Through this mechanism, the Commonwealth exercises effective control of fields such as education and health, in respect of which it lacks comprehensive legislative power.

Dixon J was the architect of the federal implication, developed in cases such as *West v Commissioner of Taxation (NSW)*,⁶⁶ *Melbourne Corporation v Commonwealth*⁶⁷ and *Commonwealth v Cigamatic Pty Ltd (in liq)*.⁶⁸ It protected the states from the exercise of Commonwealth power which discriminated against the states and likewise protected the Commonwealth from a similar exercise of state legislative power. The implication is weak, difficult to apply and, as *Re Australian Education Union; Ex parte Victoria*⁶⁹ shows, does not offer much protection to the states.

Dixon J was also the architect of *R v Kirby; Ex parte Boilermakers' Society of Australia*,⁷⁰ which held that the vesting of judicial power and non-judicial functions in the Commonwealth Court of Conciliation and Arbitration was invalid. Central to the reasoning was the proposition that the *Constitution* does

⁶¹ *James v Commonwealth* (1936) 55 CLR 1, 58.

⁶² According to Dixon's interpretation, known as the 'individual rights theory', s 92 protected activities forming part of interstate trade (which was narrowly defined) from restrictive burdens, but not from permissible regulation (which was not clearly defined). But, in determining whether a restrictive burden was imposed, the Court was to have regard to the direct legal operation of the legislation, not to its practical or economic effect. This interpretation was upheld by the Privy Council in *Hughes and Vale Pty Ltd v New South Wales* [1955] AC 241.

⁶³ (1942) 65 CLR 373 ('*First Uniform Tax Case*').

⁶⁴ (1957) 99 CLR 575 ('*Second Uniform Tax Case*').

⁶⁵ (1981) 146 CLR 559 ('*DOGS Case*'), which upheld legislation granting financial support to private schools, including religious schools.

⁶⁶ (1937) 56 CLR 657.

⁶⁷ (1947) 74 CLR 31.

⁶⁸ (1962) 108 CLR 372.

⁶⁹ (1995) 184 CLR 188.

⁷⁰ (1956) 94 CLR 254; aff'd *A-G (Cth) v The Queen* (1957) 95 CLR 529 (Privy Council).

not allow Ch III courts to discharge functions which are not in themselves part of the judicial power and are not incidental thereto.

Latham CJ was also a lawyer of considerable ability, though his reputation also has suffered as a result of the strong criticism in the Dixon papers of Latham's handling of cases, judgments and personalities.⁷¹ Latham CJ was disposed to see legal questions from the perspective of government. He constantly rejected challenges to the validity of legislation during the Second World War and in its immediate aftermath. His judgments tended to favour central power, the most notable example being his dissent in the *Communist Party Case*⁷² — a dissent which attracted strong criticism from Dixon J. Latham CJ's judgment in *Cowell v Rosehill Racecourse Co Ltd*⁷³ illustrates both his legalism and his clarity of style.

The image of Latham CJ that now emerges from the Dixon diaries and other sources is very different from the impression which I formed of him when, as a student, I attended High Court hearings in the courthouse at Darlinghurst, Sydney. To me, he had the appearance of an ascetic schoolmaster, meticulously noting the arguments in order to make sure that he had understood them correctly. These precautions did not protect him from Barwick's criticism that he (Latham) misunderstood the argument which Barwick had presented to the High Court in the *Bank Nationalisation Case*, a misunderstanding which Barwick exposed in the Privy Council appeal⁷⁴ when he accused Latham CJ of demolishing an argument which had never been presented.

Sir Wilfred Fullagar was a member of the Court in the period from the 1930s to the 1960s. Unquestionably an outstanding lawyer, he was a very highly regarded colleague of Dixon J and of other Justices as well. Even Starke J had nothing venomous to say of him. He often appeared to be asleep during the hearing of a case, but such was his sense of humour that he would always chuckle if a witty or humorous comment was made. The appearance of slumber was perhaps no more than the outward manifestation of meditation. His judgments were uniformly of very high quality, and his reputation was second only to that of Dixon J himself. His judgment in *Wilson v Darling Island Stevedoring and Lighterage Co Ltd*,⁷⁵ holding that the stevedore was not exempted by a provision in the bill of lading from liability for negligence in the stacking and storing of goods after discharge from the ship, was applied by the House of Lords in *Scruttons Ltd v Midland Silicones Ltd*.⁷⁶ In his judgment in that case, Viscount Simonds paid a glowing tribute to Fullagar J and his judgment in *Wilson*.⁷⁷

⁷¹ Ayres, *Owen Dixon*, above n 53, 76–7, 89–91, 186–9, 221–4, 267.

⁷² (1951) 83 CLR 1.

⁷³ (1937) 56 CLR 605.

⁷⁴ Sir Garfield Barwick, *A Radical Tory: Garfield Barwick's Reflections and Recollections* (1995) 69–70.

⁷⁵ (1956) 95 CLR 43, 65–79 ('*Wilson*').

⁷⁶ [1962] AC 446.

⁷⁷ *Ibid* 469–72.

XI THE COURT WHEN SIR OWEN DIXON WAS CHIEF JUSTICE

It is generally thought that the standing and reputation of the Court was at its highest when Dixon was Chief Justice. This was to be expected in the light of Dixon CJ's personal reputation throughout the common law world as an outstanding judge. He has been compared with Frankfurter J of the Supreme Court of the United States, with whom he corresponded. Dixon CJ was, in my view, superior to Lord Atkin who, in all probability, was the outstanding English judge of Dixon's time. He was certainly superior to Viscount Simonds, with whom he also corresponded. Viscount Simonds had great respect for Dixon CJ's judgments. In the Privy Council he would ask counsel, 'Are you challenging the judgment of Sir Owen Dixon?' in a tone of voice which suggested that counsel had called in at the Privy Council en route to a lunatic asylum.

Lord Atkin was the author of the leading speech in *Donoghue v Stevenson*⁷⁸ in which the 'neighbour' principle was espoused as underlying the existence of the duty of care in negligence. Dixon J, on at least two occasions after *Donoghue v Stevenson*, said that the law of torts had fallen into 'confusion'⁷⁹ and 'chaos'.⁸⁰ He may have had *Donoghue v Stevenson* in mind. Dixon J did not like overarching principles — he favoured incremental development of the law by the means of principles which were heavily qualified. Dixon J strongly disagreed with Lord Atkin's proposition that the criminal standard of proof applied in a civil case where criminal conduct is alleged.⁸¹ After flirting with Lord Atkin's heresy for decades, English courts now accept that, in such a case, the civil standard applies, however the application of the standard will vary with the seriousness of the criminal conduct alleged.⁸²

Apart from Dixon CJ himself and Fullagar J, Sir Frank Kitto and Sir Alan Taylor were members of that Court. They were joined by Sir Victor Windeyer and Sir Douglas Menzies. The attitude of the Court toward counsel in the course of argument in Dixon's Chief Justiceship was very different from that of the Court in earlier times and, for that matter, the Court when Sir Garfield Barwick became Chief Justice. Dixon explained his approach when he was sworn in as Chief Justice in 1952:

When I first began to practise before [the Court] its methods were entirely dialectical, the minds of all the judges were actively expressed in support or in criticism of arguments. Cross-examination of counsel was indulged in as part of the common course of argument. ... there was a large body of counsel who disliked that procedure ... I felt that the process by which arguments were torn to shreds before they were fully admitted to the mind led to a lack of coherence in the presentation of a case and to a failure of the Bench to understand the complete and full cases of the parties, and I therefore resolved ... that I should not follow that method and I should dissuade others from it. In the course of years I

⁷⁸ [1932] AC 562.

⁷⁹ *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479, 505.

⁸⁰ *Aiken v Warden Councillors and Electors of the Municipality of Kingborough* (1939) 62 CLR 179, 208.

⁸¹ *Briginshaw v Briginshaw* (1938) 60 CLR 336; *Helton v Allen* (1940) 63 CLR 691.

⁸² *Re H (Minors)* [1996] AC 563, 586–7 (Lord Nicholls).

think the temper of the court has entirely changed, but it probably has developed opposite defects.⁸³

Dixon CJ did not say much in argument. He confined himself to Delphic comments, conveying that sense of Olympian omniscience and detachment which is apparent when reading his judgments. Occasionally he would evince surprise when a new perspective on an old problem was revealed in argument.

Despite his public recognition of the important role of counsel, anecdotal reports suggest that he thought counsel could put the Court in possession of the facts, but that was about as much as could be expected from them.

Dixon's influence on Australian constitutional law has been profound. The federal implications which he formulated post-*Engineers Case* continue to be important. His judgment in *R v Burgess; Ex parte Henry*⁸⁴ paved the way for the modern decisions on the external affairs power. He was responsible for reshaping the interpretation of s 92 on an extremely conceptual, legalistic basis. His interpretation failed, however, to achieve certainty of application and was overthrown in *Cole v Whitfield*⁸⁵ when the Court adopted the view that the section was directed at discriminatory burdens on interstate trade of a protectionist kind.

His interpretation of s 90 ultimately prevailed long after his death. By extending the concept of 'excise', his interpretation gave the Commonwealth greater control of economic policy than the interpretation previously favoured by the Court. It became enmeshed in the artificial distinctions which divided the Court in *Dennis Hotels Pty Ltd v Victoria*.⁸⁶ The confusion created by *Dennis Hotels* was not eliminated until the decision in *Ha v New South Wales*⁸⁷ which substantially vindicated the Dixon interpretation. That decision, by further limiting the power of the states to impose duties on the sale of commodities, reinforced Commonwealth domination of the federation.

Dixon CJ's influence on non-constitutional cases was just as profound. His early judgments in administrative law, regarding the grounds on which the exercise of statutory powers could be judicially reviewed, were well in advance of contemporary English judgments. Indeed, there is scarcely any branch of private law which his judgments have not illuminated. His judgments on estoppel in *Thompson v Palmer*⁸⁸ and *Grundt v Great Boulder Pty Gold Mines Ltd*⁸⁹ have been regarded as classics, both in Australia and overseas. In addition, Dixon CJ was responsible for a more contextual and purposive approach to the interpretation of statutes. His judgments on revenue statutes, notably income tax,

⁸³ 'Swearing in of Sir Owen Dixon as Chief Justice' (1952) 85 CLR xi, xiv–xv.

⁸⁴ (1936) 55 CLR 608.

⁸⁵ (1988) 165 CLR 360.

⁸⁶ (1960) 104 CLR 529 ('*Dennis Hotels*').

⁸⁷ (1997) 189 CLR 465.

⁸⁸ (1933) 49 CLR 507.

⁸⁹ (1937) 59 CLR 641.

were particularly illuminating and enabled the *Income Tax and Social Services Contribution Assessment Act 1936* (Cth) to work effectively.⁹⁰

Although he was a master of equity, an exception should be made in relation to some of his judgments on the Torrens title statutes. His fundamental view of the effect of the statutes was rightly rejected by the Privy Council in *Frazer v Walker*.⁹¹ His view was too complicated, as a reading of his judgments reveal.⁹² This tendency was occasionally noticeable in other areas of the law.

Kitto J made his name as an equity lawyer but, as a Justice of the High Court, he wrote many notable judgments in other areas of the law. He had a powerful analytical mind with a meticulous eye for detail, and possessed a fine command of language. Kitto J wrote judgments which commonly left the reader wondering how anyone could subscribe to a different result. He was a legalist who disapproved sternly of arguments based on social convenience, as his judgment in *Rootes v Shelton* shows very clearly:

it is a mistake to suppose that the case is concerned with ‘changing social needs’ or with ‘a proposed new field of liability in negligence’, or that it is to be decided by ‘designing’ a rule. And, if I may be pardoned for saying so, to discuss the case in terms of ‘judicial policy’ and ‘social expediency’ is to introduce deleterious foreign matter into the waters of the common law — in which, after all, we have no more than riparian rights.⁹³

Kitto J’s command of equity is exhibited in his judgments in *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)*⁹⁴ and *Livingston v Commissioner of Stamp Duties (Qld)*⁹⁵ on the nature of equitable interests. The latter was approved by Viscount Radcliffe in the Privy Council on appeal.⁹⁶ Kitto J’s approach to the nature of the residuary legatee’s interest in an unadministered deceased estate was preferred by the Privy Council to that of Dixon CJ.

Barwick, who had strong disagreements with Kitto, regarded him as a gifted legal drafter and writer. According to Barwick, Kitto was the author of critical passages in the banks’ case book in the appeal to the Privy Council from the decision in the *Bank Nationalisation Case*.⁹⁷ He was, to quote Barwick, ‘a gifted penman’.⁹⁸ An example of Kitto J’s ability was his short judgment in *Breen v Sneddon*⁹⁹ in which, though he had been a dissenter on the point, he came to write a more persuasive justification for upholding the validity of the road maintenance contribution tax legislation than his colleagues had managed to

⁹⁰ *Amalgamated Zinc (De Bavay’s) Ltd v Federal Commissioner of Taxation* (1935) 54 CLR 295; *Sun Newspapers Ltd v Federal Commissioner of Taxation* (1938) 61 CLR 337; *Ronpibon Tin No Liability v Federal Commissioner of Taxation* (1949) 78 CLR 47.

⁹¹ [1967] 1 AC 569.

⁹² See *Clements v Ellis* (1934) 51 CLR 217; *Brunker v Perpetual Trustee Co Ltd* (1937) 59 CLR 140.

⁹³ (1967) 116 CLR 383, 386–7.

⁹⁴ (1965) 113 CLR 265.

⁹⁵ (1960) 107 CLR 411.

⁹⁶ *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694.

⁹⁷ (1948) 76 CLR 1.

⁹⁸ A comment made by Barwick in conversation with the author.

⁹⁹ (1961) 106 CLR 406.

do in the earlier cases in the face of his dissent. Yet, in writing the judgment, he was simply accepting the force of precedent and explaining how it was to be understood.

Taylor was an accomplished lawyer who was held in high regard at the Bar. He asked penetrating questions during the course of argument, although these questions were often destructive and counsel sometimes felt that he gave their arguments an unwelcome reception. That was not my experience of him. He had an acid wit. His judgments did not do justice to his ability.

Windeyer, though not as nimble of mind as some of his colleagues, was an erudite legal scholar with a profound knowledge of history and an acute understanding of politics and government. His qualities can be seen to advantage in his judgments in the *Payroll Tax Case*,¹⁰⁰ *Skelton v Collins*¹⁰¹ (where his open approach to the nature of the judicial function stands in marked contrast to that of Dixon CJ and Kitto J), *Smith v Jenkins*¹⁰² and *Norman v Federal Commissioner of Taxation*.¹⁰³ Windeyer's considerable contribution to our jurisprudence has not been sufficiently recognised.

Menzies was a dazzling advocate. I remember him arguing one of the s 92 road tax maintenance contribution cases. I think it was *Armstrong v Victoria [No 2]*,¹⁰⁴ when I was waiting to appear in a subsequent case. Engaging, agile of mind, witty and urbane, with a mastery of the case law relating to the case in hand, he was, I thought, the model that counsel should aspire to be. Some time later, when I appeared in a later s 92 case¹⁰⁵ in the Privy Council, I read the transcript of argument in *Armstrong* and it reinforced my admiration for Menzies as an advocate in the High Court.

The Dixon diaries reveal that Dixon did not consider that Menzies had lived up to expectations as a High Court Justice.¹⁰⁶ This may have been due to the fact that he did not enjoy good health while on the Court. On the Court, he was noted for asking questions 'out of left field' which often threw light on the question under debate. Later, when I joined the Court, Barwick, who was greatly attached to him, would say 'Young Doug has an unusual perspective on the law'. And so he had. The distinctions which he made in a succession of cases on s 90, distinctions which eluded his colleagues, were eloquent testimony to the correctness of Barwick's comment on his good friend.¹⁰⁷

Menzies was educated at Devonport in Tasmania before he went to Melbourne University Law School. This explains why he introduced Bill Harris QC to me as the one honest member of the Victorian Bar, adding, as if by way of afterthought, 'He's a Tasmanian'. Menzies had an infectious laugh which invariably broke out

¹⁰⁰ (1971) 122 CLR 353.

¹⁰¹ (1966) 115 CLR 94.

¹⁰² (1970) 119 CLR 397.

¹⁰³ (1963) 109 CLR 9.

¹⁰⁴ (1957) 99 CLR 28 ('*Armstrong*').

¹⁰⁵ *Freightlines & Construction Holding Ltd v New South Wales* (1967) 116 CLR 1.

¹⁰⁶ Ayres, 'Dixon Diaries', above n 54, 224.

¹⁰⁷ *Dennis Hotels* (1960) 104 CLR 529, 589; *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1, 25; *M G Kailis (1962) Pty Ltd v Western Australia* (1974) 130 CLR 245, 254.

before he reached the punch line in the anecdote that he was telling. In his early days he suffered from a noticeable stutter, traces of which remained even in later years. Sir Robert Menzies told me that when Menzies was in first year at Melbourne Law School, he (Sir Robert) wondered whether he should tell Douglas that he should not go to the Bar, in view of what Sir Robert thought was a pronounced disability. Fortunately, Sir Robert said nothing.

It was Menzies who arranged my meeting with Dixon after I was appointed Solicitor-General. What impressed me then was Menzies' deference and respect for Dixon.

XII THE COURT WHEN SIR GARFIELD BARWICK WAS CHIEF JUSTICE

Barwick was a powerful advocate, certainly the most successful appellate advocate in my experience, and regarded as the leader of the Australian Bar in his time. Courageous, confident, tough, with a razor-sharp mind, dynamic energy and a remarkable capacity to absorb material, he was constantly reformulating evolving ideas. He was a formidable advocate before a jury and before the High Court.

There was, as the Dixon biography discloses, strong antagonism between Dixon and Barwick. Barwick clearly regarded Dixon as an antagonist but I always thought that Barwick, though critical of Dixon, recognised him as a lawyer of great ability. Indeed, I thought that Barwick recognised that Dixon had a sophisticated intellectual grasp that he (Barwick) could not aspire to. Without seeking to disparage Barwick's ability to make subtle distinctions, as a judge he exhibited more of a black and white cast of mind than Dixon. Barwick was a strong administrator, which Dixon was not. Barwick regarded his colleagues as lesser mortals. Dixon did as well, but Barwick expressed this view privately in his lifetime whereas Dixon committed his view to the diaries. Barwick often said that Australia could not, at any given time, produce more than five lawyers worthy of appointment to the High Court. I took good care not to ask him which members of the Court did not meet his exacting standard. My suspicion was that we would have disagreed on the point.

In the early days of the Barwick Court, it intervened strongly during the course of argument. Barwick CJ had a destructive mind and was inclined to crush an argument before it became airborne. Kitto, Taylor and Menzies JJ were also strongly interventionist. On one occasion when I was Solicitor-General, the Commissioner of Taxation sent to me a transcript of argument in a taxation appeal in the High Court. He complained that the High Court had so savaged the Commissioner's counsel that they were unable to present the substance of their argument. The transcript was not a pretty sight but when the argument that counsel were seeking to present on behalf of the Commissioner was understood, all that could be said was that the argument was pulped sooner than one might normally have expected.

The Barwick Court delivered a number of important constitutional judgments. These included two decisions on s 57 of the *Constitution* relating to deadlock between the House of Representatives and the Senate and the passage of

legislation at a joint sitting: *Cormack v Cope*¹⁰⁸ and *Victoria v Commonwealth*.¹⁰⁹ A third decision, *Western Australia v Commonwealth*,¹¹⁰ upheld the validity of legislation passed at a joint sitting which provided for Territory representation in the Senate. This decision was affirmed in *Queensland v Commonwealth*.¹¹¹ *Attorney-General (Cth) ex rel McKinlay v Commonwealth*¹¹² dealt with malapportionment in the House of Representatives and rejected the argument that equality of voting power required electorates to consist of an equal number of votes.

In the area of constitutional law, Barwick, more so than Dixon, was convinced that it was the High Court's responsibility to finally declare the law for Australia. In *Mutual Life and Citizens' Assurance Co Ltd v Evatt*, he accepted that it was the High Court's responsibility to develop the law 'as appropriate to current times in Australia'.¹¹³ In *Viro v The Queen*, the Court held that it was 'no longer bound by decisions of the Privy Council'.¹¹⁴ Barwick CJ fought a long but unavailing battle to gain acceptance for his view of s 92, which was a modification of Dixon CJ's view. All he succeeded in doing was weakening the Dixon CJ interpretation. Barwick CJ did, however, make an important contribution in moving away from Dixon CJ and Kitto J's exclusive focus on 'the legal operation' of a law toward the practical operation of the law in the context of ss 51(i), 90 and 92.

Barwick CJ made a strong contribution to the development of the common law, particularly criminal law. Barwick CJ had very strong views on taxation law. In a series of decisions, the Court, reflecting his views, gave s 260 of the *Income Tax and Social Services Contribution Assessment Act 1936* (Cth) (the general anti-tax avoidance provision) a limited operation. In other taxation appeals, he frequently found in favour of the taxpayer.¹¹⁵ The Court's decisions on taxation often brought the Court into controversy.

Barwick's misfortune was being Dixon's successor. The Justices who admired and respected Dixon were unlikely to regard his successor in the same light. Barwick described them as 'slaves to precedent'.

When I joined the Court, Menzies J acted as a bridge between Barwick CJ and the younger members of the Court. Barwick CJ had an amicable relationship with McTiernan J, who was a more knowledgeable lawyer than his critics have been prepared to admit. McTiernan J was extremely courteous and widely read. He was not quick to make up his mind, due in part to his anxiety about being

¹⁰⁸ (1974) 131 CLR 432.

¹⁰⁹ (1975) 134 CLR 81 ('PMA Case').

¹¹⁰ (1975) 134 CLR 201 ('First Territory Senators Case').

¹¹¹ (1977) 139 CLR 585 ('Second Territory Senators Case').

¹¹² (1975) 135 CLR 1.

¹¹³ (1968) 122 CLR 556, 563.

¹¹⁴ (1978) 141 CLR 88, 93 (Barwick CJ). See also *Cook v Cook* (1986) 162 CLR 376 (where the Court stated that the precedents of other legal systems, including England, are not binding and are only useful to the degree of the persuasiveness of their reasoning).

¹¹⁵ See *Steinberg v Federal Commissioner of Taxation* (1975) 134 CLR 640; *Gauci v Federal Commissioner of Taxation* (1975) 135 CLR 81; *Federal Commissioner of Taxation v Westraders Pty Ltd* (1980) 144 CLR 55.

inconsistent. Avoiding inconsistency was a massive problem for a Justice who served on the Court for well over 40 years.

When the Court visited Adelaide and Perth, Menzies J, who was a lover of good wine, would organise visits by the Court to vineyards in the McLaren Vale and the Swan Valley. He did not like Coonawarra reds.

With the departure of Menzies J and the impending move to Canberra which Barwick CJ masterminded, the relationship between Barwick CJ and other members of the Court deteriorated. The arrival of Justice Lionel Murphy accentuated this process. Barwick and Murphy did not see eye to eye. It was not so much that they came from opposite sides of politics as that their judicial philosophies and methods were totally opposed. Murphy admired the Supreme Court of the United States, on which he thought the High Court should model itself. He favoured the Supreme Court style of judgment writing but he had less respect for authority than the Supreme Court had.

In the chambers allocated to Murphy in the Melbourne courthouse, there was a set of the old English reports (the reprints). He threw them out because he had no use for them. I rescued them and installed them in my chambers.

Barwick CJ supported three important reforms which had an important impact on the Court's work: the abolition of appeals to the Privy Council in federal matters,¹¹⁶ followed by the abolition of *all* appeals from the High Court to the Privy Council,¹¹⁷ and the establishment of the Federal Court with the view to enabling the High Court to concentrate on its principal work as a constitutional and appellate court.¹¹⁸ The Federal Court has undertaken much of the High Court's original jurisdiction work and has lightened the High Court's appellate burden by acting as an intermediate court of appeal in federal matters.

The second reform left extant the potential appeal to the Privy Council from the High Court on an 'inter se question' under s 74 of the *Constitution* by virtue of the grant of a certificate by the High Court. As the *Constitution* provided for an appeal on an inter se question upon the grant of a certificate, it could not be amended by statute. The High Court had by then made it clear that it would never again grant a certificate.¹¹⁹ Only once had the Court granted a certificate and that was in *Colonial Sugar Refining Co Ltd v Attorney-General (Cth)*.¹²⁰ The basic reason for the Court's refusal thereafter to grant a certificate was, as Dixon CJ stated in delivering the judgment of the Court in *Whitehouse v Queensland*, that 'experience shows — and that experience was anticipated when s 74 was enacted — that it is only those who dwell under a Federal *Constitution* who can become adequately qualified to interpret and apply its provisions.'¹²¹

¹¹⁶ *Privy Council (Limitation of Appeals) Act 1968* (Cth).

¹¹⁷ *Privy Council (Appeals from the High Court) Act 1975* (Cth).

¹¹⁸ *Federal Court of Australia Act 1976* (Cth).

¹¹⁹ *Kirmani v Captain Cook Cruises Pty Ltd [No 2]* (1985) 159 CLR 461, where the Court stated that the jurisdiction to grant a certificate was 'obsolete': at 465 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

¹²⁰ (1912) 15 CLR 182.

¹²¹ (1961) 104 CLR 635, 638.

Barwick CJ succeeded in persuading the government to fund the building of the High Court in Canberra, which provides an excellent home for the Court with very good facilities, particularly the library. Barwick CJ also succeeded in persuading the government to pass the *High Court of Australia Act 1979* (Cth), which vests the administration of the Court in the Justices and provides for the Court to expend the funds directly appropriated to it by Parliament. Barwick CJ may well have been the only Chief Justice of the High Court with the influence and the initiative to achieve these developments. Barwick CJ had initially proposed that the Act vest the administration of the Court in the Chief Justice, but the government would not have it.

XIII THE COURT WHEN SIR HARRY GIBBS WAS CHIEF JUSTICE

Sir Harry Gibbs was an outstanding lawyer who, in the constitutional field, was a federalist. The consequence was that he became a dissenter when a majority of the Court decided cases in favour of the Commonwealth. His independence of mind was demonstrated by his dissents in a number of cases decided shortly after his appointment to the Court.¹²² Always courteous, he presided over a court which was not as interventionist as the early Barwick Court. Gibbs was a lawyer with a similar cast of mind to that of Sir Cyril Walsh, who died after a short period of service on the Court. Gibbs was unfortunate in that the Court, through no fault of Gibbs's own, became embroiled in controversy following the allegations made against Murphy J, and the subsequent inquiries and legal proceedings.

*Commonwealth v Tasmania*¹²³ was the most notable decision of the Court in that time. It upheld the validity of a law enacted under the external affairs power to give effect to an international treaty acceded to by the government, even if the obligations it imposed related to conduct within Australia. That decision excited controversy, though not on the same scale as the later controversy surrounding *Mabo [No 2]*¹²⁴ and *Wik*.¹²⁵ Critics said the *Tasmanian Dam Case* upset the federal balance and endangered the federation. Predictably, such apprehensions were exaggerated.

The Court delivered a number of notable constitutional and non-constitutional judgments. The Court expanded the arbitration power in *R v Coldham; Ex parte Australian Social Welfare Union* by taking a broader view of what is an 'industrial dispute', giving it the popular meaning of a dispute between employer and employee.¹²⁶ The Court adopted the wider view of excise duties¹²⁷ and enabled the corporations power to regulate the trading activities of trading corpora-

¹²² *Kotsis v Kotsis* (1970) 122 CLR 69; *Felton v Mulligan* (1971) 124 CLR 367; *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468; *R v Phillips* (1970) 125 CLR 93; *Downs v Williams* (1971) 126 CLR 61.

¹²³ (1983) 158 CLR 1 ('*Tasmanian Dam Case*').

¹²⁴ (1992) 175 CLR 1.

¹²⁵ (1996) 187 CLR 1.

¹²⁶ (1983) 153 CLR 297, 312 (Gibbs CJ, Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ).

¹²⁷ *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599.

tions.¹²⁸ The Court also considered questions of ‘accrued’ jurisdiction.¹²⁹ There were other important and controversial cases: *Chamberlain v The Queen*,¹³⁰ *Hospital Products Ltd v United States Surgical Corporation*¹³¹ (where the Court set limits to expansion in fiduciary relationships) and *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*¹³² (on implied terms and frustration of contracts).

Sir Ninian Stephen’s very considerable talents need no endorsement from me. He always expressed himself, in judgments and elsewhere, with elegance and style. He possessed the most mellifluous voice in the Australian legal world of his day. His most sensational achievement was to activate the fire alarm in the old Supreme Court of Queensland by the seemingly harmless expedient of smoking a cigarette. The firefighters burst into the chambers to find him serenely writing a judgment. Had he not accepted appointment as Governor-General, he would have gone on to supplement what, by the time of his retirement, was already a significant contribution to the jurisprudence of the High Court.

Sir Kenneth Jacobs had established a fine reputation in the New South Wales Court of Appeal where, with Walsh, I had also been a Judge of Appeal. As Jacobs was a close friend of mine, his unexpected departure from the Court, due to illness, was a distinct loss. He was an original and distinctive legal thinker who had an eye for the social purpose of law within a framework of principle and precedent.

Sir Keith Aickin, who had been one of the most successful counsel in Australia and a highly regarded commercial and equity lawyer, was another Justice whose service was unexpectedly cut short.

Sir Ronald Wilson was the first Western Australian appointed to the Court. Formerly Solicitor-General for Western Australia, he brought to the Court not only a detailed knowledge of constitutional law but also of criminal law. From the time of Barwick CJ onwards, the Court made a significant contribution to the development of the criminal law, notably by ensuring the fairness of the criminal trial. Wilson J played a strong part in this development.

The Gibbs era was the beginning of the development of the equitable remedies which continued in the time when I was Chief Justice. The most significant of the early cases was *Legione v Hateley*,¹³³ in which the doctrines of estoppel and unconscionability were elaborated. *Legione* was also notable in that it did not follow earlier decisions in which the Privy Council refused to grant relief to a purchaser under a contract with an essential time stipulation which had been rescinded for noncompliance by the purchaser.

The same comment applies to administrative law. In both these fields, Sir Gerard Brennan and Sir William Deane played an important part. Each had

¹²⁸ *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169.

¹²⁹ *Fencott v Muller* (1983) 152 CLR 570.

¹³⁰ (1983) 153 CLR 514.

¹³¹ (1984) 156 CLR 41.

¹³² (1982) 149 CLR 337.

¹³³ (1983) 152 CLR 406 (*‘Legione’*).

considerable experience of administrative law on the Federal Court. Indeed, Brennan had been the foundation President of the Administrative Appeals Tribunal.

The enactment of the *Australia Act 1986* (UK) c 2 by the United Kingdom Parliament accompanied by a substantially similar *Australia Act 1986* (Cth) enacted by the Commonwealth Parliament and complementary legislation by the states marked the end of the power of the United Kingdom to legislate for Australia, as well as the end of appeals to the Privy Council from state Supreme Courts. The existence of the appeal from state courts had resulted in a ridiculous situation in which an appeal could be brought by a disappointed litigant in a Supreme Court to either the High Court or the Privy Council at the option of the litigant. This strange appellate structure had given rise to problems. The Australia Acts finally put the seal on the High Court's responsibility to declare the law finally for Australia.

XIV CONCLUDING COMMENTS

The High Court began as a court of three Justices. It soon increased to five and in 1913 expanded to seven. It has remained at seven ever since. In that time the amount of the Court's work has expanded prodigiously both in volume and difficulty. However, I doubt that the problem can be solved by simply increasing the number of Justices.

Initially many of the appeals were appeals as of right, provided that they satisfied a pecuniary qualification as to the amount or the value of the proprietary right at stake. Although the level of the pecuniary qualification was raised, appeals as of right continued to provide a significant part of the Court's work until they were abolished in 1984. Since then, the number of special leave applications has increased dramatically. Dealing with these applications consumes time which would be better spent hearing appeals and other substantive matters, yet it is important that the Justices of the Court decide these applications. No other Australian judges are capable of determining — with the same knowledge, experience and authority — what cases are the most appropriate to be considered by the High Court of Australia.

The burden on the Justices could be reduced to some extent by dispensing with an oral hearing of special leave applications (except when the Justices consider it expedient) and by deciding the applications on written materials. Of course, the written materials can be extensive and they must be read and understood, taking a substantial amount of time.

Although the number of constitutional cases has increased, it has not increased to such an extent that there is a need to separate the functions of the High Court into a constitutional court and a separate general appellate court. Indeed, the fact that the Court serves the two functions is a source of strength. It firmly sets the Court's constitutional work in the context of the general law.

The growing incidence of cases in which there is a litigant in person is an additional burden for the Court. Rarely does a litigant in person present an argument which is worthy of consideration by the High Court.

The use of privative clauses in the *Migration Act 1958* (Cth) has resulted in an increase in the number of applications for writs under s 75(v) of the *Constitution*, as persons seeking to challenge migration decisions seek to take advantage of the constitutional jurisdiction which cannot be eliminated or curtailed by legislation. These applications now constitute a significant burden for the Court.

The number of individual judgments delivered in the High Court has generated calls for more judgments of the Court, joint judgments or one majority and one minority judgment. In my experience, the Justices have been conscious of the desirability of producing joint judgments. But for various reasons that has not always been possible. Justices may disagree about the result, the reasons or even about the role of the Court. The adoption of a convention that there should be a single majority judgment and a single minority judgment would compromise the intellectual integrity of an individual Justice who wishes to express his or her own view, even if it coincides to some extent with that of other colleagues. By means of conferences and discussions, apart from interventions in argument, the members of the Court become acquainted with each other's views on a particular case.

The Court, in common with courts in other jurisdictions, is subject to strong political criticism from time to time. The refusal of the Attorney-General to defend the courts from criticism means that the courts, including the High Court, are more exposed. So far no solution to this problem has been identified, however the likely result is that a Chief Justice will find it necessary to speak on behalf of his or her court.

Although the Court has made great use of comparative law, the High Court's jurisprudence has, with the exception of a period in the 1980s and 1990s, not been policy oriented. In this respect, the High Court's jurisprudence is to be contrasted with that of other jurisdictions whose jurisprudence is influenced by the interpretation of entrenched or statutory bills of rights. This difference may affect the Court's use of comparative precedents and judicial reasoning.

At the end of 100 years, it can be said without hesitation that, with the exception of Dixon's Chief Justiceship, the Court's record over 100 years is one of strong individualism. The Court has fulfilled Deakin's expectations of it by achieving an international reputation — placing it on a footing with the world's leading courts of final appeal. At the same time, the Court has consolidated its position as a national institution ranking with the legislature and the executive.