

SIR OWEN DIXON – FEDERALISM AND HIS CONTRIBUTION TO THE DEVELOPMENT OF COMMONWEALTH POWER

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Introduction

1. Sir Owen Dixon, justice of the High Court of Australia from 1929 to 1952, and Chief Justice from 1952 to 1964, is a towering legal figure in the history of Australian law and politics¹. His contributions to the law had a major impact on the development of Commonwealth power through his judgments interpreting the Australian Constitution in matters involving State and Commonwealth powers. This paper will cover his contributions as to how the power of the Commonwealth Parliament developed.
2. In 1920, the High Court departed from its previous authority, with the effect of substantially expanding Commonwealth power. That decision is the seminal *Engineers' Case*. Dixon, appointed in 1929, developed limitations and reservations on that case in the process explaining his view on intergovernmental relations and federalism, culminating in his judgment in the *State Banking Case* (or *Melbourne Corporation Case* as it may be better known). Other important cases that demonstrate Dixon's views will also be discussed.

The Australian Constitution

3. On a yacht called the *SS Lucinda*, four men² drafted the Constitution in three days³ of seclusion on the Hawkesbury River near Sydney. The whole process, Garran says, was one in which “federation came down from the skies to the earth, and from vague aspiration was crystallised into a precise plane setting out the terms of the federal compact”⁴. On 31 March 1891 the draft was put before the Constitutional Convention.

¹ Dixon also served as Australia's Minister to the United States from 1942 to 1944.

² Barton, Kingston, Inglis Clark and Griffith.

³ From 27 March to 29 March 1891.

⁴ Robert Garran, *Prosper the Commonwealth* Angus and Robertson 1958, page 98.

4. The Constitution creates the federal structure of the Commonwealth, which declares the Federation to consist of the States of the Commonwealth joining together into an “indissoluble Commonwealth”⁵. The states, of course, were pre-existing entities, with constitutions, territorial integrity, legal jurisdictions and powers that were to continue after Federation⁶. It was the Commonwealth that was the new entity on the block. That fact had an important impact on the first twenty years of Federation. The consensus remained that the Commonwealth Parliament was to be of enumerated, limited powers⁷. The Convention Debates support this view, with senior figures agreeing that the limited Commonwealth powers implied a prohibition and a reservation of powers to the States⁸.
5. The Constitution established the Federal compact, that is, allocating the powers belonging to the States and those belonging to the Commonwealth Parliament. It is trite to say that the Commonwealth Parliament’s powers are those enumerated in section 51, but the first twenty years of Federation saw a different interpretation of how the States’ and the Commonwealth’s powers interacted. The States jealously guarded their powers from the start of the new Commonwealth Parliament, and the Commonwealth power was interpreted narrowly. The High Court supported this view through the development of the reserved powers doctrine and implied government immunities.
6. These doctrines held that the States had “reserved powers” (powers they had before the Commonwealth was born) and that the States were immune from Commonwealth interference. The States were senior to the Commonwealth in other words, and their powers were akin to those of the Mother Parliament. The doctrine was stated by the original three High Court justices, Barton J (Australia’s first prime minister, who had stated in the Convention debates that there was an implied prohibition and reserved powers), Griffith CJ and O’Connor J. All had taken part in the Conventions and had pre-existing notions of how the powers were to be shared between the States and the new federal parliament.

⁵ Preamble to the *Commonwealth of Australia Constitution Act 1900* (UK).

⁶ Aroney, M, *The Constitution of a Federal Commonwealth* p362 Cambridge 2009.

⁷ Aroney p362.

⁸ Barton, Griffith and O’Connor were early members of the push for Federation, and had served in colonial parliaments; Barton as Speaker in NSW, O’Connor as Justice Minister in NSW, and Griffith as Queensland Premier.

7. This view held sway from 1904 to 1920. New justices were appointed to the High Court, namely Higgins J⁹ and Isaacs J. Both participated in the Conventions and had a more expansive view of the Commonwealth's power. Their view was, until 1920, a minority one¹⁰. Dixon himself said that it was strange that the judges who argued for State supremacy "seemed to recede from the true principle of the federal supremacy...(b)ut when these judges had all departed the High Court swept aside the whole doctrine"¹¹.
8. By 1920, Australia was quite a different place, having been through the trials of the First World War¹², the experiences of many who served¹³ and the social and economic changes that it brought.
9. Sir Owen Dixon, appointed in 1929, through his own interpretation and skill as a lawyer and philosopher, came to interpret the Constitution through its actual words and federalist implications. Dixon saw a gradual expansion of the federal sphere and lessening in the power of the States. Dixon, did not barrack for one side or the other¹⁴, either the States or the Commonwealth. Dixon applied consistent statutory interpretation techniques to support his judgments. The political consequences could fall where they may. Dixon nibbled away at the *Engineers' Case*, in finding exceptions to it, before later developing a thorough theory of intergovernmental relations in 1947 in *Melbourne Corporation*.

The *Engineers' Case* – the flipping of the accepted paradigm

10. As earlier indicated, the conception of Commonwealth power was limited by the understanding and imagination of the Founding Fathers, who found their way into the Commonwealth Parliament and later into the High Court. It was a conception that was

⁹ Both nominated by Alfred Deakin, both appointed in 1906.

¹⁰ The Bench was expanded in 1912 to seven members.

¹¹ Sir Owen Dixon, *Jesting Pilate* (The Law Book Company, 1965) at p170.

¹² *NSW v Cth* [2006] HCA 52; (2006) 229 CLR 1 (*Work Choices*) at [193].

¹³ Ayres says that nineteen Melbourne barristers volunteered for service, and five did not return. This was out of a Bar that was less than 100 in strength. Dixon did not serve in the Great War.

¹⁴ Compare Robert Menzies, whose political career commenced after the *Engineers' Case* in which he appeared. By June 1928 he was a member of the Victorian Parliament. Menzies was Dixon's pupil when he came to the Bar.

jealous of potential reductions in state power¹⁵. It appears the Commonwealth was to get no higher than the states and was indeed a junior, functional, partner.

11. Prior to the *Engineer's Case* the High Court had developed the doctrine of intergovernmental immunity¹⁶, or doctrine of immunity of instrumentalities¹⁷. The first major case about intergovernmental relations took the view that the States and the Commonwealth were mutually 'sovereign' entities, that enjoyed a considerable degree of immunity, or freedom, from interference from the law making of the other. The States could not bind the Commonwealth¹⁸ and *vice versa*¹⁹. The effect was to limit the Commonwealth's ability to legislate over the States. The case thus held the Commonwealth in check.
12. Between 1904 and 1920 a series of decisions questioned the authority of these cases²⁰, and a different path of national development may well have occurred if a Privy Council opinion had been followed by the High Court.²¹
13. The *Engineers' Case* arose out of a dispute lodged by a union of engineers in the Commonwealth Court of Conciliation and Arbitration for an award relating to 844 employers across Australia.²² In Western Australia, the employers included three State governmental employers. The question was whether a Commonwealth law made under the "conciliation and arbitration" power regarding industrial disputes, section 51(xxxv), could authorise the making of an award binding the three governmental employers. As usual, the Union sought a federal award coverage as it was superior to State award coverage²³.
14. If previous authority had been followed, the result would have been that the Arbitration Court could not bind government employers with regard to wages because States were immune from Federal power.

¹⁵ A W Martin *Robert Menzies, A Life* (Melbourne University Press 1993) p40.

¹⁶ *D'Emden v Pedder* (1904) 1 CLR 91.

¹⁷ *Federal Constitutional Law, An Introduction Booker* (Glass Watt 2nd Edition 1998 Butterworths) p38.

¹⁸ In *D'Emden v Pedder* the state could not tax a commonwealth employee's salary.

¹⁹ In the *Railway Servants Case* (1906) 4 CLR 488 the Commonwealth could not make an industrial award for state railway employees.

²⁰ *Chaplin v Commissioner of Taxes (SA)* (1911) 12 CLR 375.

²¹ *Webb v Outtrim* [1907] AC 81.

²² The case was referred to the High Court by Higgins J in his capacity as President of the Conciliation and Arbitration Court.

²³ A W Martin *Robert Menzies A Life* at p 40.

15. However, the High Court decided in 1920²⁴ to overturn the doctrine of implied mutual immunities of Commonwealth and State instrumentalities, along with the previous understanding of the reserve powers of the States.²⁵ The cases were overruled in a decision delivered by Sir Isaac Isaacs²⁶, who found that the previous cases had been wrongly decided, and that the cases where state laws had been found to lead to immunity were invalid for inconsistency with federal law, pursuant to s109 of the Constitution²⁷.
16. The *Engineer's Case*²⁸ held that, generally speaking, the Commonwealth Parliament could enact laws that bind States and State instrumentalities, agencies and employees. The actual provision under question, section 51(xxxv) (the conciliation and arbitration power) could authorise the making of industrial awards applying to disputes at State undertakings (in this case a Western Australian sawmill and engineering works).
17. Isaac J's reasoning commenced with the view that the previous decisions of the Court had led to "increasing entanglement and uncertainty". Isaacs J then embarked upon his statement of the method of constitutional interpretation.
18. Isaacs J²⁹ delivered the majority judgment³⁰ and dismissed the previous cases as being decided "on a vague, individual conception of the spirit of the compact, which is not the result of interpreting any specific language to be quoted, nor referable to any recognised principle of the common law of the Constitution...". Ouch. Isaacs J threw the previous decisions, and judges, under the bus.
19. Basing his judgment on two "cardinal" features of the political system, Isaacs J stated that these were - "One is the common sovereignty of all parts of the British Empire; the other is the principle of responsible government". These features distinguished the

²⁴ Geoffrey Sawyer said: "The joint judgment is one of the worst written and organized in Australian judicial history. Isaacs was given to rhetoric and repetition, and here he gave these habits full rein."

²⁵ The case lasted six days. Menzies was faced with a hostile bar table with all States represented against him. He was 25 years old. Nethercote cites Sir Gerard Brennan in his recent address on *Engineers*, on the basis of research in the records of the High Court, states that while Menzies lit the fuse, and Justices Isaacs and Rich had prepared the charge in the 1919 *Municipalities Case*, it was the argument of counsel for the Commonwealth, Leverrier, KC, which "seems to have had the greatest impact on the putative author of the majority judgment".

²⁶ Later Governor-General of the Commonwealth.

²⁷ Section 109 played surprisingly little role in previous High Court judgments.

²⁸ The case was 5:1, with Knox CJ, Isaacs, Higgins, Rich and Starke, with Gavan Duffy dissenting. (Gavan Duffy was a former lecturer to Sir Owen Dixon).

²⁹ It is generally understood he wrote the majority judgment.

³⁰ On behalf of Knox CJ, Isaacs, Rich and Starke JJ.

Australian from the American Constitution, on which earlier Court decisions had been based, or at least found support in. Isaacs J also theorised that the Constitution was founded upon the authority of the Australian people as a whole and the sovereignty of the imperial Parliament³¹.

20. Importantly, *Engineers'* overruled the previous authority³² which held the structure of the Constitution held an implication that certain powers were reserved for the States and were not within the authority of the Commonwealth. This is known as the doctrine of implied prohibitions, or the doctrine of reserved powers. The reserved powers doctrine was based on s107 of the Constitution³³ which 'saved' powers to the States. However, s107 does not contain a list of exclusive State powers. The doctrine required judges to assume certain matters were beyond Commonwealth authority when they were determining the scope of that authority³⁴.

21. The Court said, in relation to s107:

“Sec. 107 continues the previously existing powers of every State Parliament to legislate with respect to State exclusive powers and (2) State powers which are concurrent with Commonwealth powers. But it is a fundamental and fatal error to read sec. 107 as reserving any power from the Commonwealth that falls fairly within the explicit terms of an express grant in sec. 51, as that grant is reasonably construed, unless that reservation is as explicitly stated. The effect of State legislation, though fully within the powers preserved by sec. 107, may in a given case depend on sec. 109. However valid and binding on the people of the State where no relevant Commonwealth legislation exists, the moment it encounters repugnant Commonwealth legislation operating on the same field the State legislation must give way.” (citations omitted)

³¹ Aroney p364. There is great doubt about this proposition given the limited nature of the franchise prior to 1900, and the amendment forced on the Constitution by the British Government prior to the Constitution's enactment as a piece of legislation.

³² As a matter of interest, a barrister called Robert Gordon Menzies appeared for the claimant.

³³ “Saving of Power of State Parliaments - Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.”

³⁴ Dixon was later to say that “the attempt to read s107 as the equivalent of a specific grant or reservation of power lacked a foundation in logic”.

22. In other words, reading the Constitution as containing reserved powers to the states was an incorrect interpretation of the Constitution. Coming at it from the other direction, the Commonwealth Parliament had plenary power and s107 provided no limitation on that power. Any limitations had to be explicit. The limitation is in s109, where state laws are invalid to the extent they are inconsistent with federal laws. Higgins J said that there was no need for any implication as to implied prohibition as the express statement in s109 gave primacy to federal law³⁵.
23. *Engineers'* used a method of constitutional interpretation in which only the words of the Constitution itself³⁶, not their alleged implications, was paramount.
24. The States received *Engineers'* as a revolutionary³⁷ blow to their sovereign rights and powers, and felt resentful³⁸. The practical effect was to move thousands of employees to federal award coverage as the burgeoning Commonwealth industrial jurisdiction greatly expanded³⁹.
25. Looking at the situation from a historical vantage point, it must have been self-evident to the early judges of the High Court that the states were the predominant political bodies. The Commonwealth of Australia was barely seven years old when the first constitutional interpretations were adjudicated⁴⁰. The original judges of the High Court had all been instrumental in its foundation⁴¹, yet had not seen far enough to envisage the possibilities of Commonwealth power. Others had to do so. Until *Engineers'* it is arguable the shackles had not been taken off the Commonwealth to effect its full potential as a political entity.

³⁵ Higgins J said that it was “wrong to apply the principle of *Collector v Day* to the construction of sec. 51 (XXXV.)”, an American decision on the interpretation of the US Constitution.

³⁶ Also known as textual literalism. Compare to Griffith, he was especially scathing of suggestions that the Constitution should be construed, as he put it in 1907, “merely by the aid of a dictionary, as by an astral intelligence, and is a mere decree of the Imperial Parliament without reference to history” That view, he considered, was “negated by the preamble to the Act itself”.

³⁷ Sir Robert Garran, *Prosper the Commonwealth*, Angus & Robertson, 1958, 180. He titled his chapter on *Engineers'*, “Revolutionary Year”.

³⁸ Jestling Pilate Sir Own Dixon p116

³⁹ In 1920, 670,000 unionists worked under State awards; only 100,000 worked under Commonwealth awards. By 1924 the comparable figures were 225,000 under State awards; 550,000 under Commonwealth awards – John Nethercote <https://www.samuelgriffith.org.au/papers/html/volume6/v6chap11.htm>

⁴⁰ It took until 1927 for the Federal Parliament to have its own home in Canberra, and sat in Melbourne’s Parliament until then.

⁴¹ Indeed, Barton as first Prime Minister would leave his office in Melbourne with his papers in his top hat.

26. In one fell swoop the case law, and roles of governments, had been turned on their heads. The restrictive interpretation had been discarded in favour of one that would increase Commonwealth power at the expense of the states⁴². But that would not be the end of the story, as the development of the law in *Engineers'* may have swung matters too far to the other side of the pendulum.

Dixon's development of the law commences

27. In October 1929, the Great Depression hit Australia. Wall Street had crashed, sending economies, including Australia's, into a downward spiral. Until then the development of the Commonwealth had been steadily increasing and improved economic conditions after the Great War had Australia in a buoyant mood.

28. Dixon had been on the Court a matter of months prior to hearing his first constitutional case. He was appointed to the Court in 1929, aged 42. Dixon had been at the Bar since 1910 and took silk twelve years later. He served as an Acting Judge in the Victorian Supreme Court from 1927, appeared in the High Court within eighteen months of admission and represented litigants before the Privy Council⁴³ in London. Reluctantly, he accepted a role on the High Court⁴⁴.

29. As a senior member of the Bar, Dixon provided his views on federalism in a Royal Commission on the Constitution of the Commonwealth⁴⁵ held in late 1927⁴⁶. He put forward views on the separation of powers⁴⁷, section 92 (that trade and commerce should be "absolutely free") and the enumeration of powers.

Australian Railways Union v. Victorian Railways Commissioners

30. In late 1930, Dixon's second year on the Court, a case came before the High Court concerning, again, industrial relations. The Railways Commissioners argued that they

⁴² In *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 227, Mason J said that the rejection of the reserved powers doctrine has never been doubted.

⁴³ Dixon became a Privy Councillor but never took up his seat.

⁴⁴ His income was said to be 10,000 pounds a year, which was to be reduced to 3000 pounds as a judge.

⁴⁵ The Royal Commission was held against the backdrop of the Western Australian Secessionist push, the 1928 Commonwealth-State Financial Agreement and decisions such as *Engineers'*.

⁴⁶ The Victorian Committee of Counsel was invited by the Royal Commissioner to make a submission. Dixon was on a sub-committee with Menzies and another barrister. Ayres says that Menzies made little contribution.

⁴⁷ Dixon presaged the outcome in the *Boilermakers Case* [1956] HCA 10; (1956) 94 CLR 254 when he said that the Conciliation and Arbitration Court could not be both a court and an arbitral body. He said that no one had been courageous enough to argue the point.

could not be bound by an award, since they lacked power to pay the wages awarded themselves, being dependent upon parliamentary appropriations for their funds. In fact, the Railway Commissioners wished to reduce rates of pay to meet the financial emergency, and the Scullin Government attempted to use the conciliation and arbitration power to block the application.

31. In *Australian Railways Union v Victorian Railways Commissioners*⁴⁸, Dixon said the central principle in *Engineers'* was that:

*".....unless, and save in so far as, the contrary appears from some other provision of the Constitution, or from the nature or the subject matter of the power or from the terms in which it is conferred, every grant of legislative power to the Commonwealth should be interpreted as authorizing the Parliament to make laws affecting the operations of the States and their agencies **if the State is not acting in the exercise of the Crown's prerogative and if the Parliament confines itself to laws which do not discriminate against the States or their agencies**"⁴⁹.*
(bolding added)

32. The nature of the reservation that Dixon stated was that the Crown could not be affected in its executive power, and secondly that States could not be discriminated against. This, he said, was built into the drafting of the Constitution. A State was still sovereign in how it operated as if the Crown were still in charge, that is, over ministers, the parliament and executive functions. The issue of state discrimination would be more fully expounded twenty years later.

West v Commissioner of Taxation (NSW)

33. Dixon next had an opportunity to review the effect of *Engineers'* in *West v. Commissioner of Taxation (NSW)*⁵⁰. This case, and its fascinating import, can be gleaned from the opening paragraph of Latham CJ's judgment:

The question which arises upon this case stated is whether moneys received by a retired Federal public servant by way of pension under the

⁴⁸ [1930] HCA 52; (1930) 44 CLR 319.

⁴⁹ *Australian Railways Union v. Victorian Railways Commissioners* (1930) 44 CLR 319 at 390. Italics added.

⁵⁰ (1937) 56 CLR 657

Superannuation Act 1922-1934 are subject to taxation under the Special Income and Wages Tax (Management) Act 1933 of New South Wales.

34. In *West*, Dixon “boldly affirmed”⁵¹ the validity of implications⁵²:

*Since the Engineers' Case a notion seems to have gained currency that in interpreting the Constitution no implications can be made. Such a method of construction would defeat the intention of any instrument, but of all instruments a written Constitution seems the last to which it could be applied. I do not think that the judgment of the majority of the court in the Engineers' Case meant to propound such a doctrine. It is inconsistent with many of the reasons afterwards advanced by Isaacs J. himself for his dissent in Pirrie v. McFarlane. Indeed, he there refers to 'the natural and fundamental principle that where by the one Constitution separate and exclusive governmental powers have been allotted to two distinct organisms, neither is intended, in the absence of distinct provision to the contrary, to destroy or weaken the capacity or functions expressly conferred on the other'. He adds: 'Such attempted destruction or weakening is prima facie outside the respective grants of power'. There is little justification for seeking to find in the Engineers' Case authority for more than was decided*⁵³.

35. This paragraph, in my view, throws Sir Isaac Isaacs⁵⁴ under the proverbial bus. Not only does Dixon say that Isaacs was inconsistent in his judgments, he says that Isaacs himself went further than *Engineer's* had decided. He throws his words in *Pirrie* back at him. It is a withering judicial commentary. Implications could be made, Dixon J said, just not the implications previously propounded by the High Court, particularly under Isaacs.

36. Dixon repeats the two reservations he stated in the *Railways Case* (1930) that no Commonwealth legislation should affect "the exercise of a prerogative of the Crown

⁵¹ Phillip Ayres, page 85.

⁵² Mason J said: “Dixon J was the architect of the federal implication” - Mason, Anthony "The High Court of Australia: A Personal Impression of Its First 100 Years" [2003] *MelbULawRw* 33; (2003) 27(3) *Melbourne University Law Review* 864

⁵³ *West v Commissioner of Taxation (NSW)* (1936---1937) 56 CLR 657 at 681-682.

⁵⁴ Isaacs had been given the Vice-Regal position in January 1931.

in right of the States", and federal Parliament would appear not to be authorised "to enact legislation discriminating against the States or their agencies"⁵⁵.

37. Dixon read the Constitution logically as a *federalist* document with necessary implications for the protection of the States against discriminatory federal legislation that threatened to infringe their powers. Dixon, while reading down the *Engineers'* Case did not re-enliven the doctrine of the reserve powers of the States. He took *Engineers'* to be a valid check not only to that doctrine, but to the excesses (as he saw them) of the "implied immunities" of Commonwealth and State instrumentalities.

Essendon Corporation v. Criterion Theatres Ltd

38. In *Essendon Corporation v Criterion Theatres Ltd* (1947), in a judgment heavy with American citations⁵⁶, he added a third reservation to *Engineers'*: that the States could not tax the Commonwealth in respect of the exercise of its powers and functions⁵⁷. Dixon J eloquently sets out the issue for decision:

In this suit... a municipality seeks to recover rates. The rates were levied upon or in respect of land of which the Minister for the Army had taken possession. The land was used and occupied by the Military Forces of the Commonwealth. Throughout the period for which rates are claimed the Army's possession of the land continued and the country was still actively at war.

Ordinarily it is the occupier upon whom the direct liability to pay rates falls in the first instance. But, as the occupier was the Commonwealth, the municipality makes alternative claims. It claims the rates from the owners of the fee simple upon the hypothesis that the Commonwealth incurred no liability. But, failing this, it makes an alternative claim against the Commonwealth for the rates, a claim based on the contrary hypothesis.

⁵⁵ *Ibid.*, at 682.

⁵⁶ Again, Dixon had been Australian Ambassador to Washington and spent time with great judicial figures and in the US court system as well. In *Essendon Corporation*, Dixon J cited the recent US Supreme Court decision in *New York v United States* 326 U.S. 572 (14 January 1946) (*the Saratoga Springs Case*). This case was the US progenitor of what would become the doctrinal basis of Dixon J's decision in *Melbourne Corporation* (discussed below).

⁵⁷ *Essendon Corporation v. Criterion Theatres Ltd* (1947) 74 CLR 1 at 22.

State Banking Case (or Melbourne Corporation)

39. The Chifley Labor Government sought to make the Commonwealth Bank the central bank, extending a wartime power. Section 48 of the *Banking Act 1945* provided that State entities had to use the Commonwealth Bank, and not any other bank. Chifley believed that nationalisation of the banks was not achievable, but felt that the central bank should carry all government accounts. On 1 May 1947, the Treasury began to warn local governments of the need to commence transfer of their accounts to the Commonwealth Bank, including Melbourne City Council. Even though the legislation had been in place for several months, it had not attracted much attention. After the note from Treasury, the banks became quite concerned about losing large customer accounts. They appealed to the High Court on the grounds the legislation was unconstitutional. On 13 August 1947, the case was heard by the Full Court⁵⁸.

40. Dixon, who had been on the Court since 1929, gave what is by modern standards a relatively short judgment⁵⁹. His judgment is lucid, engaging, biting and pithy. He commenced by saying:

The question for our decision...is whether in the exercise of the power to make laws with respect to banking, other than State banking, the incorporation of banks and the issue of paper money, the Commonwealth Parliament may forbid banks, except the Commonwealth Bank and State banks, to conduct any banking business for a State save by the consent of the Federal Treasurer.

41. He therefore started with the enumerated power (the s.51 banking power) as the first step before stating whether the power supported the legislation, section 48 of the Banking Act.

42. He characterised the impugned section in this way:

The purpose of s. 48 may, therefore, be taken to be to complete the concentration of all governmental accounts in the Commonwealth Bank or to carry it as near completion as practical considerations allow, a

⁵⁸ Latham C.J. Rich, Starke, Dixon, McTiernan and Williams JJ.

⁵⁹ For example, the *Work Choices* judgment is 914 paragraphs in length.

matter of which the Treasurer is to judge and make exceptions accordingly. Such a purpose accords with the conceptions held of the function of a central bank and with the view that for its fulfilment the central bank should carry the government account so that it may take measures or counter-measures when the necessary financial operations of government might otherwise produce undesired consequences.

Under a unitary constitutional system there is no legal difficulty in giving effect to such a policy or in carrying it as far down the line of public authorities as may be desired. But it is otherwise in a federal system. State and federal governments are separate bodies politic and prima facie each controls its own moneys. To enable the Parliament of the Commonwealth to deny to the States the use of any bank but the central bank of the Commonwealth and thus to guide the collections and disbursements of the States into and through an account of that bank, there must be found in the Constitution a definite legislative power of sufficient amplitude.

43. Dixon said, in preface, that the attempted imposition of central banking in a unitary system of government would be acceptable. He then contrasts it with the federal system of government, identifying that the Commonwealth Parliament would need a “definitive legislative power of sufficient amplitude” to enact such a law. The States and Commonwealth and separate entities, and it would require an enumerated power to effect what was in effect central banking in the Federation.

44. Dixon then sets out what he considers is the “prima facie rule” as to how federal laws can impact the States:

*The prima-facie rule is that a power to legislate with respect to a given subject enables the Parliament to make laws which, upon that subject, affect the operations of the States and their agencies. **That, as I have pointed out more than once, is the effect of the Engineers' Case stripped of embellishment and reduced to the form of a legal proposition. It is subject, however, to certain reservations and this also I have repeatedly said.** Two reservations, that relating to the prerogative and that relating to the taxation power, do not enter into the*

*determination of this case and nothing need be said about them. It is, however, upon the third that, in my opinion, this case turns. The reservation relates to the use of federal legislative power to make, not a general law which governs all alike who come within the area of its operation whether they are subjects of the Crown or the agents of the Crown in right of a State, but a law which discriminates against States, or a law which places a particular disability or burden upon an operation or activity of a State, and more especially upon the execution of its constitutional powers. In support of such a use of power the **Engineers' Case has nothing to say.** (emphasis added)*

45. The discrimination he found was that section 48 forbade State governments the ability to use banks that could be used by other citizens and organisations, even though the law was not directed to States, but was directed to the banks themselves. However, it still discriminated against the States. The banking power did not support such a law.

46. Dixon continued:

...The federal system itself is the foundation of the restraint upon the use of the power to control the States. The same constitutional objection applies to other powers, if under them the States are made the objects of special burdens or disabilities...**The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities. Among them it distributes powers of governing the country".** (bolding added)

47. Dixon was squarely saying that the nature of the federal system puts a brake on Commonwealth legislative power. That is the nature of the federal compact. It is simply not open to the Commonwealth to attempt to control the states by imposing legislation that specifically impacts the states.

48. Dixon then returns to the theme of the political nature of the Constitution:

I do not think that either under the Constitution of the United States or The British North America Act or the Commonwealth Constitution has countenance been given to the notion that the legislative powers of one

government in the system can be used in order directly to deprive another government of powers or authority committed to it or restrict that government in their exercise, notwithstanding the complete overthrow of the general doctrine of reciprocal immunity of government agencies and the discrediting of the reasoning used in its justification. For that reason the distinction has been constantly drawn between a law of general application and a provision singling out governments and placing special burdens upon the exercise of powers or the fulfilment of functions constitutionally belonging to them. It is but a consequence of the conception upon which the Constitution is framed. **The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities. Among them it distributes powers of governing the country.** The framers of the Constitution do not appear to have considered that power itself forms part of the conception of a government. They appear rather to have conceived the States as bodies politic whose existence and nature are independent of the powers allocated to them. The Constitution on this footing proceeds to distribute the power between State and Commonwealth and to provide for their inter-relation, tasks performed with reference to the legislative powers chiefly by ss. 51, 52, 107, 108 and 109.

49. Dixon also made an important statement as to the relative strengths of the governments subject to the Constitution:

"...The position of the federal government is necessarily stronger than that of the States. The Commonwealth is a government to which enumerated powers have been affirmatively granted. The grant carries all that is proper for its full effectuation. Then supremacy is given to the legislative powers of the Commonwealth.

*These two considerations add great strength to the **implication** protecting the Commonwealth from the operation of State laws affecting the exercise of federal power. But they also amplify the field protected. Further, they limit the claim of the States to protection from*

*the exercise of Commonwealth power. For the attempt to read s. 107 as the equivalent of a specific grant or reservation of power lacked a foundation in logic. Accordingly the considerations upon which the States' title to **protection** from Commonwealth control depends arise not from the character of the powers retained by the States but from their position as separate governments in the system exercising independent functions. But, to my mind, the efficacy of the system logically demands that, unless a given legislative power appears from its content, context or subject matter so to intend, it should not be understood as authorizing the Commonwealth to make a law aimed at the restriction or control of a State in the exercise of its **executive authority**. In whatever way it may be expressed an intention of this sort is, in my opinion, to be plainly seen in **the very frame of the Constitution**. (bolding added)*

50. Dixon did not shy away from using implications to interpret the Constitution, however, it was a different implication he used. It was the implication that the structure of the Federation that implied separate entities, each with its own sphere of powers. The states have a continued existence in the Federation.

Work Choices

51. The *Work Choices Case* was a seminal moment in the development of Commonwealth power. The Howard Government used the Corporations power (s.51(xx)) of the Constitution to regulate industrial relations, whereas up until that time the main power used was the conciliation and arbitration power. Essentially, corporations could have their industrial regulations regulated by the Commonwealth because of their corporate status. Previously, the States had administered their own highly functioning and well-developed jurisdictions with their own jurisprudence. That ended almost overnight⁶⁰.

52. The plaintiffs in the case (State governments) argued that the legislation upset the “federal balance”. The argument received short shrift, with the Court quoting

⁶⁰ For example, in NSW, the unfair contracts jurisdiction was its own peculiar and lively jurisdiction that dominated the NSW Industrial Relations Commission’s role. Previously the NSW IRC had Court status with judges administering the law. Today, the Commission has a Chief Commissioner and five commissioners.

Melbourne Corporation as establishing that the Constitution made the Commonwealth the stronger party, with enumerated powers with the full authority to use that power. Arguing for an ‘amorphous reach’ for a “federal balance” that so upset the Federation as to imperil the States was rejected by the Court. Apart from the fact it was unsupported by authority, the Court said no attempt was made to define where the balance should lay.

53. The plurality in the decision validated the *Engineers’ Case* saying the case was “both a consequence of developments outside the law courts (not least a sense of national identity emerging during and after the First World War) and a cause of future developments”⁶¹. From this perspective, the *Engineers’ Case* was a virtually inevitable outcome of the progress of Australian history, from which there was no going back. Justice Kenny says (extra judicially) the justification for the *Engineers’ Case* lay, in the majority’s judgment, in nascent nationhood, rather than in the precedential value of authority or judicial fiat⁶².

Williams v Commonwealth of Australia (School Chaplains Case)

54. As a contrast, what is the legislative limit of the Commonwealth Parliament? In the School Chaplains Case, which concerned federal government monies being spent on religious education in state schools, the High Court outlined the limit of the spending power of the Commonwealth.
55. The Court accepted that there was limitation on the federal power and the text and structure of the Constitution imposed limits⁶³. The Commonwealth submissions in that case were rejected as it would have called *Melbourne Corporation* into question⁶⁴.
56. Ultimately, the Court held that section 61 of the Constitution did not authorise the governmental expenditure just because there was an enumerated power to support that expenditure. Rather, the Court has held that it is unconstitutional for the

⁶¹ *Work Choices* at [193]

⁶² Kenny, Justice Susan, "The High Court of Australia and modes of constitutional interpretation" (FCA) [2007] *FedJSchol* 10.

⁶³ [192] per Hayne J.

⁶⁴ [248] per Hayne J.

Commonwealth executive to spend money in areas beyond the day-to-day running of the government without statutory authority. Hayne J said:

191. The whole Court decided in Pape that the power to spend appropriated moneys must be found either in provisions of the Constitution other than s 81 or s 83, or in statutes made under the Constitution. This conclusion stemmed immediately from the recognition of what the plurality in Pape described as "the nature of the process of parliamentary appropriation", "[t]he grant of an appropriation [being] not by its own force the exercise of an executive or legislative power to achieve an objective which requires expenditure".

192. But in Pape, as in the decisions that had gone before, this Court recognised that the text and structure of the Constitution impose limits on the Commonwealth's power to spend. These limits reflect federal considerations of the kind expressed by Dixon J in Melbourne Corporation v The Commonwealth. They reflect the distribution of powers between the Commonwealth and the States that is effected by the Constitution. [citations omitted]

Conclusion

57. The history of the interplay between governments is a fascinating interplay of politics, economic and social development and legal method.
58. Sir Owen Dixon's decisions still resonate today. That is because they make sense and are consonant with methods we use today in matters of constitutional interpretation, statutory construction and the understanding of the common law and equity.
59. For Dixon to remain the bright flame illuminating the federal compact today, nearly ninety years after his first decision in this area of law, is remarkable. It is unlikely that another jurist will have as great an impact on this area of law as Sir Owen Dixon.

State Chambers

2 March 2018