Chapter Six
John Latham in Owen Dixon's Eyes

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Sir John Latham's achievements are substantial in a number of fields, and it is surprising that, despite the accessibility of the Latham Papers at the National Library, no-one has written a biography, though Stuart Macintyre, who did the *Australian Dictionary of Biography* entry, has told me that he had it in mind at one stage.

Latham was born in 1877, nine years before Owen Dixon. As a student at the University of Melbourne, Latham held exhibitions and scholarships in logic, philosophy and law, and won the Supreme Court Judges' Prize, being called to the Bar in 1904. He also found time to captain the Victorian lacrosse team. From 1917 he was head of Naval Intelligence (lieutenant-commander), and was on the Australian staff at the Versailles Peace Conference.

Latham's personality was rather aloof and cold. Philosophically he was a rationalist. From 1922-34 he was MHR for the Victorian seat of Kooyong (later held by R G Menzies and Andrew Peacock), and federal Attorney-General from 1925-29 in the Nationalist government, and again in 1931–34 in the Lyons United Australia Party government. In addition he was Deputy Prime Minister and Minister for External Affairs from 1931-34. He resigned his seat and was subsequently appointed Chief Justice of the High Court (1935-52), taking leave in 1940-41 to go off to Tokyo as Australia's first Minister to Japan.

Latham was a connoisseur of Japanese culture. He fostered a Japan-Australia friendship society in the 1930s, and in 1934 he led an Australian diplomatic mission to Japan, arranging at that time for the visit to Australia of the Japanese training flotilla. Through Latham, Dixon met the senior Japanese officials in the legation here, and they were still socialising with these officials two weeks before Pearl Harbor.

Already in the 1920s Dixon knew Latham quite well, sitting with him on the Victorian Bar Council, for example. They differed on aspects of constitutional interpretation. Dixon's 1927 submission on behalf of the Victorian Bar Council to the Royal Commission on the Constitution of the Commonwealth foreshadows three or four of his later judgments, most importantly that in the *Boilermakers' Case* (1956).

In his evidence to the Commission, Dixon argued for a strict interpretation of the doctrine of the separation of powers, and referred to the Commonwealth Court of Conciliation and Arbitration, which had been vested with non-judicial (arbitral) as well as judicial powers. This, he stated, "might lead to difficulties . . . but no one has hitherto been courageous enough to pursue this argument". In Dixon's view the necessity of preserving a completely independent judiciary in a federal system may be said to be absolute:

> "Whether it is possible or not to confer non-judicial power upon the High Court or any other Federal court created pursuant to s.71 or s.72 is by no means clear, but we are of opinion that it should not be possible to confer such power".[1]

Here the decision (upheld by the Privy Council) in the *Boilermakers' Case* is anticipated by almost thirty years.[2]

A later letter of Dixon's clarifies his position on this question in 1926-27. Writing to Lord Simonds (Lord Chancellor, 1951–54) in 1957, he pointed out that in 1926 he had warned Latham on the matter – as federal Attorney-General, Latham was the author of the amended *Conciliation and Arbitration Act* of 1926. "But I don't think he really understood", Dixon wrote, "and of course as it was a political matter

with him his legal perception was not at its highest point".[3]

Dixon's principal concern in 1956, he told Lord Simonds, was "the length of time during which the provision had been allowed to stand" – because the power was derived from an Act Latham had introduced as Attorney-General, Latham would have fought hard to preserve it during his tenure as Chief Justice.[4] As Dixon told Felix Frankfurter, Latham "knew that I harboured ideas about the invalidity of his measure, and often on the Bench when I thought of insisting that the matter be argued, I refrained from doing so out of deference to him".

On 13 January, 1929 Mr Justice Higgins died at the age of 77, and ten days later Dixon received a letter from Attorney-General Latham:

> "My dear Dixon,
>
> I wish to know whether you would be prepared to accept a seat upon the High Court bench if you were asked to do so. I have not offered the position to anyone else.
>
> I sincerely hope that your answer will be in the affirmative. I need not emphasise to you the importance, the responsibility, or the interest of the work. You would render a service to the people of Australia by undertaking it. I am sure that your appointment would be welcomed with unqualified approval, alike by the profession and the public.
>
> It is because I know that you possess the necessary qualities of character knowledge and temperament that I have pleasure in writing this letter and in awaiting what I hope will be a favourable reply.
>
> Yours
>
> J G Latham"[5]

Latham told Zelman Cowen that his success in persuading Dixon to accept the seat "was his finest achievement as Attorney-General".[6]

The High Court Dixon joined was riven by conflicts of personality, and by the end of 1934, and probably much earlier, he was looking for an opportunity to resign, though it no doubt occurred to him that, from the position of Chief Justice, it might be easier to improve the Court's tone and harmonise some of the discord. First, though, the octogenarian Frank Gavan Duffy, who had succeeded Isaacs in early 1931 on a "Depression" Court of six rather than seven members, would have to retire and the right appointment be made. That would not be Rich, nor would it be Starke, and as for Dixon no member of the Court had ever been appointed Chief Justice over another, though that did not mean it could not happen.

The next Chief Justice, however, was destined to come from outside. In 1934 John Latham resigned as Lyons's Attorney-General – or, as Sir John Higgins (who was close to members of Cabinet) told Dixon, "was dragged screaming from the perch"[7] (alluding to Latham's high-pitched voice) – in favour of Robert Menzies, who took Latham's Kooyong seat, moving from Victorian to federal politics.

This move, in the period leading up to the 1934 elections, was probably engineered by a small group of people concerned at Latham's lack of popular appeal, and with the intention of positioning Menzies to take over from Lyons after a short time. The circumstances are obscure. Latham returned to the Bar, with tacit assurances, it was said, that Gavan Duffy's seat would soon be his.[8] On the other hand, should the Lyons government fall at the next elections, in 1937 or earlier, and Gavan Duffy not retire until after that, then Evatt would probably be Labor's choice for the position. These were among Dixon's and Evatt's preoccupations through the summer of 1934-35.

Later in 1935 Dixon decided that he would not accept the Victorian Chief Justiceship, which some people thought might be offered to him, telling Latham this on 6 September, when he was invited to the latter's home to meet the Japanese Consul General, Kuramatsu Murai. Latham took Dixon aside:

> "… to implore me not to accept the Vic CJ if offered. [I] Told him it had not been & would not although some time ago I was sounded. He said it would be the end of the HC. I said if he became

the CJ of the HC to see me at once. He wd be horrified. But he said that if I wished to be CJ of it & the government would offer it, he would withdraw. I said it was very kind. But if he took the unthankful job I would support him to the full".[9]

Dixon could hardly indicate an interest in the Chief Justiceship unless he knew that Menzies, as Attorney-General, would back him for it, but Menzies had not sounded him out. On 19 September Dixon saw his close friend Sir John Higgins, who occasionally saw the Prime Minister, and was told of a recent discussion in which Lyons had told Higgins that if Latham were not to be appointed, the Ministry would be regarded as breaking faith, but that he personally thought Latham unsuitable, and would not be sorry to see Gavan Duffy hang on. Menzies, he said, was anxious to appoint Latham.

That night Dixon took the express to Sydney, where all sorts of rumours about the Chief Justiceship were flying around: that Earle Page, Leader of the Country Party, was opposed to Latham, that Menzies had said no one should go from politics to the bench, even that Menzies was sick of the question and would take the position himself.[10] Then on 10 October Dixon learned from Rich that Latham had been appointed.

In Dixon's mind Latham was a usurper, and that view would colour their relationship for the future. The swearing-in was on the 17th – "Menzies saw me afterwards", Dixon noted, "& I was very curt". Latham began his new career with a cutting comment to Rich, who was explaining his failure to send written congratulations. "Excuse accepted", Latham replied. "It is not an excuse", Rich protested, "it is an explanation".[11] Starke forced a re-argument in one case, threw a fit of pique in another[12] – it was business as usual in the "new" Latham Court.[13]

Dixon thought politics unfitted a man for judicial office. When Robert Menzies entered the Victorian Legislative Council in 1928 Dixon told him, only half-jokingly:

"Well, Menzies, it is quite easy, I am told, to convert a good lawyer into a good politician. But reconversion is impossible".[14]

On the way home for the weekend Dixon ran into Menzies on the platform at Albury – "made some trivial civil observation & did not see him again".[15] It would be months before Dixon would once more think of Menzies as a good friend. With rumours flying in all directions, Menzies might have said something without impropriety. But thirty years later, in the period immediately preceding Barwick's appointment, there would be the same silence.

Dixon's integrity and seriousness of purpose, combined with his clarity of thought, led to repeated internal tensions as he perceived how frequently his expectations were let down, not just by other judges but by politicians, including Menzies. Menzies was an egotist in a way that Dixon was not: Menzies was concerned above all with his own advancement, and he frequently let Dixon down accordingly. Dixon's overriding concern was that people and institutions, and the courts especially, should act with propriety and rationality so as to discharge their duties honourably and correctly. In this context it is not surprising that he frequently resorted to the classics, and especially to Greek literature, as a refuge from deep disappointment provided by such actions and events.

Latham proposed to hold regular conferences on important cases, and Dixon makes a few references to them in the diaries.[16] But unlike the informal and frequent conferences Dixon would later convene as Chief Justice, they turned out to be irregular, and were not held on many important cases.

An interesting case of the mid-1930s shows Dixon's and Latham's different approaches to the question of criminal insanity, something that interested Dixon greatly. This was the appeal of Arnold Karl Sodeman, who had been convicted and sentenced to hang for the rape and murder of a girl aged 6, two aged 12 and one aged 16. Without going into this case here in any detail, it suffices to say that Dixon was highly critical of Latham's handling of the appeal.

The matter was heard over three days from 30 March to 1 April, but on the first day, "It seemed apparent that Latham had made up his mind on grounds of public policy to dismiss the appeal". Dixon

took Latham and Evatt to lunch at Menzies Hotel; then, after Court, when Evatt drove Dixon to the Glenferrie Road tram, Evatt mentioned that Latham had been referring to the "public danger".[17] By the following morning Dixon had decided provisionally that leave to appeal should be granted and told Evatt. On assembly, Latham was full of the need to adjourn the Sydney sittings, originally scheduled to commence that week, in order to give the Sodeman appeal "full consideration", but then Dixon learned from Alan Brooksbank that Latham had in fact dictated his judgment before assembling. "Of course this explains his complete lack of interest in my views of the case", he noted, adding that "Starke was terrible – sadism". That day Dixon had lunch with Justices Charles Lowe and Russell Martin, both on the Victorian Supreme Court with Charles Gavan Duffy, learning from Lowe that Gavan Duffy had apparently thought Sodeman irresponsible, but that the Victorian Cabinet had told him "at once" that "the public wd never stand for a reprieve".[18]

On 1 April the Court finished hearing the application. Dixon complained to Latham that Starke "had given no judicial consideration to the case", while for his part Latham appeared "quite unmoved by my attempt at legal reasoning". Dixon began writing his judgment that afternoon, having just learned from Evatt that the real reason Latham had adjourned the Sydney sittings had been his desire to attend the University Commencement that coming Saturday. Dixon's long and careful judgment was not completed until late that night, in chambers, after which he and Brooksbank walked through the cold and empty streets to Flinders Street station in time to catch the last train home.[19]

The judgments were read to a crowded courtroom the following morning. Latham's persuasively emphasised what does seem a fatal flaw in Sodeman's claim of sudden unawareness of his actions at the point of assault, namely the evidence of "planning and deliberation by the accused, choice of a secluded spot, and immediate arrangement of an alibi – all of which tended against the plea of insanity", and went on to argue that:

> "The refusal to recognise a defence of uncontrollable impulse *per se* doubtless looks for its justification, not exclusively to opinions (often differing) in scientific theory or moral doctrine, but to the interests of society and to practical considerations affecting the security of the community".[20]

Latham strongly, and I think effectively, criticised the M'Naghten rules, formulated in the mid-19th Century, which set out the grounds for establishing insanity and hence irresponsibility. In Latham's considered view these rules relied on "an abandoned system of faculty psychology which divided the mind into almost unrelated functions each existing in a separate compartment".[21]

Latham and Starke were already concerned at Dixon's strong influence on the Court, and as Evatt increasingly joined in Dixon's judgments, Latham vainly tried to rein in that influence. Dixon noted in September of that year:

> "On going to Latham's room for dinner he said he had had a long talk with Starke. There is, I think, a desire in both of them to stop my writing judgments. Latham said E[vatt] should not join in my judgments. I agreed but said why should I refuse to let him when he asks".[22]

In fact, Dixon believed at this stage that ideally every judge on the Court should write a judgment for each case on which he sat,[23] and for twenty years (as he later told Lord Morton) he did just that.[24] In certain areas of the law, however, he believed that, if possible, a Court should speak with a single voice – for example, in certain criminal cases, in order to avoid confusion at the trial level. His hand is evident in many of the High Court's joint judgments through the 1930s, and his influence on Evatt and McTiernan in particular (to say nothing of Rich) continued to grow, Starke complaining to Latham in several letters that, in his view, Evatt and McTiernan habitually "parroted" Dixon with his active encouragement:

> "Dixon may be right but let an independent majority say so. I was disgusted with the result of *Phillips and E.S.A. Bank*. Every one agreed with the view that you and I took at the close of the argument. Then Dixon suddenly alters his mind and to me a most confused judgment and the

parrots at once agree".[25]

It could hardly have been to Latham's liking that it was Dixon and not he who was now dominating the Court. Starke rubbed it in:

> ". . . it must be obvious to you as to others that the High Court is becoming more and more dependent upon the opinion of one man. It is a new development in the High Court and much to be deplored.
>
> "I don't accept your generous view that the result is distasteful to that one man. He plays up to it and really encourages it".[26]

Of course, the reason why Dixon was by now so dominant on what, without much distortion, may be termed "the first Dixon Court" was too unpalatable for Starke to mention.

In the closeted world of the High Court, Latham's manner was becoming increasingly familiar and he regularly dropped his guard. A "much talking judge", as Sir Zelman Cowen has observed, in private Latham "talked incessantly and mostly about himself".[27] Dixon appears to have had little respect for his judicial abilities, commenting on his "great ignorance" in one case and on how "extremely stupid" he appeared in another,[28] but he was more critical of Latham's personality – more so even than he was of Starke's.

There were qualities of sensitivity and honour about Starke which Dixon respected, even admired. In fact, Starke's sense of honour contributed to his intolerance of others' frailty and made him hard to work with. He exercised an independent judgment in most cases, preparing his own reasons in a tight and lucid style. His knowledge of the law was extensive.[29] Latham (who had been Starke's pupil on coming to the Bar) was not his equal in any of these respects.

Politics seemed to have coarsened Latham's sensibilities. His comments over the trial of Seaforth Mackenzie were an example of this. August, 1936 had seen the trial in Melbourne of Mackenzie, former Judge of Appeal at Rabaul and, from 1922, Principal Registrar of the High Court, a position within the Attorney-General's department. Mackenzie had run up huge debts to the Commonwealth on plantations bought in New Guinea, and had been charged with forging and uttering seals of the High Court. He was convicted and sentenced to four and a half years' imprisonment.[30] Latham told Dixon that as Attorney-General he had not removed Mackenzie, because "his offences consisted only of (1) living with a woman not his wife 'which might happen to any one' (2) failure to pay his creditors and the usual consequences, which was common to the greater part of the service".[31]

There is no comment – in Dixon's diary these quotations don't require comment. For Dixon there were absolute moral standards. Without them, all was corruption and chaos. Dixon was essentially a kind man, and although he must often have found other people's efforts inadequate, it was not his habit to criticise or upbraid. He was very accepting of the deficiencies of those around him, but he became critical when he was presented with morally culpable behaviour – arrogance, the corruption of power, or a lack of proper diligence. There is much significance in those he admired: they were inevitably persons with a strong sense of duty. Sir Leo Cussen and Sir Wilfred Fullagar were the two Australian judges he most admired, men with a profound sense of duty and high standards of personal conduct.

One evening during the Perth sittings of September, 1937 Latham "nearly exasperated me with much talk of the corrupt political world the sickening atmosphere of which did not appear to offend his sensibilities". Three nights later they dined with Walter Murdoch, Professor of English at the University of Western Australia. Numerous indecent stories were told by Latham and "the evening was ill spent. Murdoch was confirmed I could see in an opinion that lawyers were low brow".[32]

Latham's general attitude to things depressed Dixon, even though the atmosphere on the bench "was more pleasant for his presence" in consequence of his affability.[33] At a dinner party at the home of the Chief Justice of New South Wales, Sir Frederick Jordan, Latham "dominated the conversation", dragging in "a reference to Roberts' case, the sadist murder" in which there had been an acquittal,

remarking, in the presence of women including the American wife of the Chinese Consul, "that 'all the ladies were reading it'!". However, Latham "went down" well with Dudley Williams, KC, Dixon noted disapprovingly.[34] Three days later, on Rich's seventy-fifth birthday, Latham named Williams as Rich's most likely successor.[35]

Probably the worst evening Dixon ever spent in Latham's presence was on 26 November, 1938, in Sydney, when he dined as one of Latham's party in the Kent Room of the Hotel Australia. Guests included New South Wales Justices Reginald Long Innes, Colin Davidson, Kenneth Street, Allan Maxwell and Milner Stephen, as well as Rich and McTiernan. From what Dixon could overhear (he was two places to the left of Latham), Latham's conversation "included much propaganda . . . to spread the view that he had reformed the Court: the great point being that we used to short circuit counsel & that he insisted on full argument: also he dissociated himself from particular decisions". It was "a disgusting evening for me", the Kent Room "very vulgar: ditto food", Latham "obviously vain & hostile: my end of the table reduced to low jokes & stories no doubt suited to our inferiority".[36] (He enjoyed Wilbur Ham's comment that Latham was ineffable and "wore ermine in his bath".[37]) A few days later the Chief Justice seemed to be "fighting for the husband" in a divorce case and "taking rather a low attitude over sexual relations".

Standards everywhere were sliding. After court that day Dixon took a long stroll through Centennial Park and down Oxford Street, noting closely the squalor produced by eight years of economic depression, the looks in the eyes of those idling about the streets, and the tenor of their conversation. "The conditions of life", he noted, "seemed to me very bad and to be producing a very low and dangerous class of youth and young women".[38]

Dixon believed that, as Chief Justice, Latham downplayed the Court's function of judicial review of challenged legislation, and I will end with two examples. The Chifley government's decision to nationalise the banks triggered the *Bank Nationalisation Case* (1948), the longest, costliest and most interesting case of the 1940s.[39]

The case was to begin on 9 February, 1948, in Melbourne. The Government tried to strengthen its hand in advance by endeavouring to get Webb back from Tokyo and, through Evatt as Attorney-General, making diplomatic overtures to the Chief Justice. Evatt met with Latham at 5 pm on 9 December, a meeting about which Latham chose to remain silent. Dixon learned of it independently, probably (like Rich) through his staff.

Discussing the matter with Dixon on the 11th, Rich thought it unlike Evatt to call without requesting to do so, wondering why the Chief Justice had concealed the visit (perhaps he suspected that Latham was prepared to be influenced by Evatt). Dixon replied that concealment was instinctual with Latham – it probably meant nothing. Next day he saw Latham on his return from the cricket, where he had met Evatt, who had said " 'all was set: affdts filed'[.] L. did not mention having seen him before".[40]

If it was not clear from this that the Government was fiddling with the Court, it became so on 29 January:

> "Latham rang up at noon to say that through DEA [Department of External Affairs] he had received decyphered a telegram from Webb saying that the PM had requested Gen Macarthur to enable Webb to return to Australia for the hearing of the Banks case & that it would be necessary for him Webb to resign from the War Crimes Tribunal & that Bks [Banks] should have chance of objecting. I said that he shd cable Webb that he was writing & to do nothing pending receipt of a lre [letter] & should air mail (sat [Saturday] to avoid DEAs reading it) a lre telling Webb he was not required & ought not to resign. L said [Solicitor-General Kenneth] Bailey had made an appointment to see him & he wd tell me what passed. I said he shd tell Bailey nothing except it was no business of the Government's. I also said if Webb came & his presence affected the result I would grant a certificate [allowing appeal to the Privy Council] & state the reason[.] In the evg at the Club L told me that he told B the Govt had no right to deal with the constitution of the Court,

plrly when a litigant. B said he came about the message which he had seen. L said he wd communicate with Webb but not through DEA & he 'authorized' B to show the copy of Webbs message to him to the PM & AG (though he knew they had seen them). B produced a cutting from *The Bulletin* (28/1/48 cabled additions) quoting from the *Chicago Tribune* about Webb's return in November [1947, a brief trip home] & said the Govt could not stand up to the consequences of Webb's resignation from the tribunal at this stage: that probably it would be decided on Friday that he should not be asked to do it: that the PM had not sought to recall him but only to ask Gen Macarthur to facilitate his return shd Webb wish to come (a lie). L said he did not ask B to tell him the result but of course he wd be interested. *Credat Judaeus Appella*".[41]

Had Dixon not pressured Latham so strongly on the matter, the Government might have gone ahead and engineered Webb's early return to the Court.

During the case Latham began to show his hand most unguardedly. On 23 February Frank Kitto, KC finished his "clear and acute" argument for the Bank of Australasia, Alan Taylor, KC for the same plaintiff followed him and finished, and Edward Hudson, KC began his argument for the State of Victoria. Dixon noted that Latham:

> ".....seemed openly to espouse the Govt & met every contention of the Bank with initial disfavour. It is not easy to understand; perhaps due to settling down upon his habitual bias for the Govt & antipathy to what he regards as the bias of Starke & Wms. Most of the points were disputable but he gave bad answers even to the good ones & before they had been formulated".

Latham found himself in a minority of two, with McTiernan also supporting the legislation. In the *Communist Party Case* (1950) he was in a minority of one. Again he seemed predisposed to support the Government, this time the Liberal Government. Like Dixon, Latham was unimpressed by Barwick's case for the legislation, but Latham nevertheless thought the Act valid. When he read to Dixon the opening section of a judgment he had been preparing, Dixon observed that, "It sickened me with its abnegation of the function of the Court & I said so".

Like Fullagar, who stressed it in his judgment, Dixon believed strongly in the doctrine of judicial review – the Court's right and responsibility, under a federal Constitution, to decide whether challenged Acts of the legislature were within power, a principle on which Latham was notoriously ambivalent.[42] It is interesting that when Latham circulated his judgment, Fullagar was concerned and upset by it, Kitto more concerned for Latham, "whether it meant that he had something wrong with him", while "Dudley Williams considered him mad".[43]

Dixon's comments on Latham as recorded in the private diaries should be received with some reservation, perhaps, for no doubt in many instances they represent exasperation at the end of a trying day. They should not be taken as Dixon's overall assessment of Latham. Nevertheless, they show us what Dixon thought of Latham's character, and of a number of his important judgments.

Endnotes:

1. Royal Commission on the Constitution of the Commonwealth, *Minutes of Evidence*, Part 3, Government Printer, Canberra, 1929, p. 782.

2. *R v. Kirby; ex parte Boilermakers' Society of Australia* (1956), 94 CLR 254; (1957) 95 CLR 529 (PC); [1957] AC 288.

3. Dixon, draft letter to Lord Simonds, 12 February, 1957, in *Correspondence, 1957-1959*, Owen Dixon, Personal Papers.

4. Owen Dixon to Lord Simonds, 15 April, 1956, in *Correspondence, 1955-1956*, Owen Dixon, Personal Papers.

5. John G Latham to Dixon, 23 January, 1929, in *Correspondence to end of 1946*, Owen Dixon, Personal Papers.

6. Zelman Cowen, *Sir John Latham and Other Papers*, Oxford University Press, Melbourne, 1965, p. 34 n.

7. Richard Searby (in conversation with the author) reporting Dixon reporting Higgins.

8. The original idea was said to have been that Gavan Duffy's son Charles would be appointed to the Victorian Supreme Court, Gavan Duffy would later retire from the High Court, and Latham would meanwhile retire from politics, move for a decent space of months to the Bar, then be appointed Chief Justice, while Menzies would win Latham's seat of Kooyong and be appointed Attorney-General in Canberra. As it happened, Charles Gavan Duffy was appointed to the Supreme Court of Victoria on 30 May, 1933, Latham retired from politics in 1934, but Frank Gavan Duffy decided to stay on. See Stuart Macintyre, *John Greig Latham*, in Bede Nairn and Geoffrey Serle (gen. eds), *Australian Dictionary of Biography*, Vol. 10, Melbourne University Press, Carlton, 1986, 5. See also Zelman Cowen, *op. cit.*, p. 31. Latham always claimed he retired from politics voluntarily, with no thought of taking the Chief Justiceship.

9. Owen Dixon, *Diary*, 6 September, 1935, Owen Dixon, Personal Papers.

10. *Ibid.*, 8 October, 1935, reporting second- and third-hand sources.

11. *Ibid.*, 17 October, 1935.

12. *Ibid.*, 18 and 15 October, 1935.

13. On the Latham Court generally, see Clem Lloyd, *Not Peace but a Sword! – The High Court Under J G Latham*, in *Adelaide Law Review*, 11 (1987–88), 175–202.

14. Robert Menzies, Address on Dixon's retirement, 13 April, 1964, CLR, 110 (1964), v–viii at vii. Dixon, as he told Richard Searby, had said the same thing to Latham in 1922 when Latham had come into Dixon's chambers to announce, rather pompously, that he was going into politics because he thought it his duty to do so. Richard Searby, in correspondence with the author.

15. Owen Dixon, *Diary*, 19 October, 1935, Owen Dixon, Personal Papers.

16. *Ibid.*, 22 October, 1935. An early example is the conference on the *Metal Trades Case* and the *Tramways Case* which took place between Rich, Evatt, McTiernan and Dixon on 15 November, 1935 (noted in Dixon's diary entry for that day). Among other examples, see the entry for 10 June, 1937: "In the afternoon we had a cfce about Riverina Transport & Dried Fruit where politics predominated"; and that for 29 November, 1939: '[Latham] [Evatt] [Rich] & I had a discussion over an appln for sp l [special leave] tomorrow in a custody case (*Evans v. Cleary*) where the fight is over religion".
Zelman Cowen's "understanding" (*op. cit.*, p. 34) that there "was no judicial conference" until Dixon became Chief Justice is incorrect. Latham's conduct of conferences on the *Banking* and

Communist Party cases of 1948 and 1951 is discussed in Lloyd, *op. cit.*, p. 187.

17. Owen Dixon, *Diary*, 30 March, 1936, Owen Dixon, Personal Papers.

18. *Ibid.*, 31 March, 1936. See also 3 April:

> "Lowe told me Starke had said his remark to me about Chas D. thinking Sodeman irresponsible had caused a lot of trouble. Lowe seemed inclined to minimise what he had said but on my saying he had told me that Chas thought Sodeman was irresponsible or ought to have been found so he appeared to agree".

19. Owen Dixon, *Diary*, 1 April, 1936, Owen Dixon, Personal Papers.

20. *Sodeman v. The King* (1936), 55 CLR 192 at 201, 204.

21. *Ibid.*, at 205.

22. Owen Dixon, *Diary*, 30 September, 1936, Owen Dixon, Personal Papers.

23. *Ibid.*, 10 October, 1937.

24. Dixon to Lord Morton, 25 November, 1959, in *Correspondence, 1957-1959*, Owen Dixon, Personal Papers.

25. Starke to Latham, 23 February, 1937, in Latham Papers, MS 1009/62. The case was *English Scottish and Australian Bank Ltd v. Phillips* (1937), 57 CLR 302.

26. Starke to Latham, 31 March, 1937, in Latham Papers, MS 1009/62, National Library of Australia.

27. Zelman Cowen, *op. cit.*, p. 35.

28. Owen Dixon, *Diary*, 2 October, 1936 and 12 April, 1937, Owen Dixon, Personal Papers.

29. See James Merralls, *Sword of Honour*, in *Victorian Bar News*, 95 (1995), 37-8; and Merralls, *Sir Hayden Erskine Starke*, in John Ritchie (gen. ed.), *Australian Dictionary of Biography*, Vol. 12, Melbourne University Press, Carlton, 1990, 53-4. As a barrister Starke had once been treated rudely in Court by Mr Justice Hodges, who later offered an apology in the lavatory of their club. Starke replied, "An insult offered in open court cannot be wiped out by an apology in a urinal". Quoted in Arthur Dean, *A Multitude of Counsellors: A History of the Bar of Victoria*, F W Cheshire, Melbourne, 1968, p. 180.

30. See Ronald McNicoll, *Seaforth Simpson Mackenzie*, in Bede Nairn and Geoffrey Serle (gen. eds), *Australian Dictionary of Biography*, Vol. 10, Melbourne University Press, Carlton, 1986, 304–5.

31. Owen Dixon, *Diary*, 27 August, 1936, Owen Dixon, Personal Papers.

32. *Ibid.*, 14 and 17 September, 1937.

33. *Ibid.*, 25 August, 1938.

34. *Ibid.*, 30 April, 1938.

35. *Ibid.*, 3 May, 1938.

36. *Ibid.*, 26 November, 1938.

37. *Ibid.*, 16 May, 1938.

38. *Ibid.*, 30 November, 1938.

39. *Bank of New South Wales v. Commonwealth* (1948), 76 CLR 1. On this case see, for example, Geoffrey Sawer, *Bank of New South Wales and Others v. The Commonwealth*, in *Australian Law Journal*, 22 (1948), pp. 213-16; S R Davis, *The Australian Bank Nationalisation Case*, in *Modern Law Review*, 13 (1950), 107-11; M G Myers, *The Attempted Nationalisation of Banks in Australia, 1947*, in *Economic Record*, 35 (1959), pp. 170-86; A L May, *The Battle for the Banks*, Sydney University Press, Sydney, 1968; and more general works, such as Leslie Zines' *The High Court and the Constitution*, Butterworths, Sydney, 1981 and later edns.

40. Owen Dixon, *Diary*, 11-12 December, 1947, Owen Dixon, Personal Papers.

41. *Ibid.*, 29 January, 1948. *"Credat Judaeus Appella"* – "the Jew Appella may believe it, I don't" (the last two words understood). Horace, *Satires*, I.iii.

42. Owen Dixon, *Diary* entries for the relevant dates, Owen Dixon, Personal Papers; and Fullagar's judgment, *Australian Communist Party v. Commonwealth* (1951) 83 CLR 1 at 262-3. The doctrine derives principally from *Marbury v. Madison* (1803) 5 US (1 Cranch) 137. The chief reasons why Dixon and the others, apart from Latham, found the Act invalid were that there was no threat of general war justifying recourse to the defence power, and that the Act did not provide against specific acts. It dealt only with bodies and persons, whose actions were then to be characterised by the legislature and the Executive. In this respect it differed from the legislation examined by the Dixon Court two years later in *Marcus Clark & Co Ltd v. Commonwealth.*

43. Owen Dixon, *Diary*, 2 March, 1951, Owen Dixon, Personal Papers.