Sir Owen Dixon: a Strict and Complete Legalist?

His Contract Decisions Examined

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Preface

I would like to thank my supervisors, Professor Adrian Bradbrook and Dr John Keeler, both of the Adelaide Law School, for their help and advice. I would also like to thank Susan Bartie, Frank Carrigan, Janey Greene, Jeannie Paterson and members of the Brown Bag Seminar series at the Adelaide Law School for reading and commenting on various drafts of various sections of this thesis. During the currency of my candidature I was a recipient of a Zelling–Gray Scholarship.

The cases examined for this thesis consist of all the contract cases decided in the High Court during the period when Sir Owen Dixon was a member of the High Court (4 February 1929 to 13 April 1964). Cases were treated as contract cases when a contract law issue was before the court. Those cases which involved contracts but only dealt with other areas of law were not considered.

For reasons of economy, where there was a joint judgment in which Sir Owen Dixon participated, reference will be made in this thesis only to Dixon J or Dixon CJ, but full attribution of all judges in the joint judgment will appear in the footnote reference.


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May, 2010
Abstract

This thesis examines the contract decisions of Sir Owen Dixon during his tenure on the High Court of Australia to see whether they are in line with his self-proclaimed strict and complete legalism.

The thesis shows that Dixon’s understanding of the judicial role did not encompass a naïve mechanical jurisprudence or a simple-minded declaratory theory of law. Instead, Dixon saw the act of judging as a practice, based on mastery of the authorities, principles and style of reasoning associated with the common law. Dixon accepted that judging was a creative enterprise but he understood it as a bounded activity and not akin to political activity. The thesis also argues that Dixon’s conception of judging is a testable hypothesis capable of showing if a judge has decided a case in conformity with it.

For practical reasons not all the cases examined could be described in this thesis but a representative sample of the analysis of major and minor cases, covering a variety of contract law issues and ranging over the entire period of Dixon’s time on the High Court (1929–1964), have been presented. In addition, all of Dixon’s contract law judgments that raise any question about his fidelity to strict and complete legalism have also been described in the thesis.

The thesis shows that, with two relatively minor exceptions, Dixon did decide his contract decisions in conformity with his self-proclaimed strict and complete legalism. The thesis concludes by discussing the limits on what can be drawn from this finding and what implications flow from it.
Statement by student

This work contains no material which has been accepted for the award to me, John Gava, of any other degree or diploma in any university or other tertiary institution, and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text. The research for this thesis was carried out during the course of my candidature.

I give consent to this copy of my thesis, when deposited in the University Library, being made available for loan and photocopying, subject to the provisions of the Copyright Act 1968.

I also give permission for the digital version of my thesis to be made available on the web, via the University’s digital research repository, the Library catalogue, the Australasian Digital Theses Program (ADPT) and also through web search engines, unless permission has been granted by the University to restrict access for a period of time.

A professional editor, Margaret Rose, has provided assistance in preparing this thesis. Editing assistance has been restricted to ASEP Standards for ‘Language and Illustrations’ and for ‘Completeness and Consistency’. No advice has been sought or given on ‘Substance and Structure’. Margaret Rose was given a copy of the University’s Specifications for Thesis and worked with a copy of the ASEP Standards.

.................................................................Date

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Sir Owen Dixon’s Contract Decisions

Cohen v Cohen (1929) 42 CLR 1
George v Greater Adelaide Land Development Co (1929) 43 CLR 91
Sinclair, Scott and Co Ltd v Naughton (1929) 43 CLR 310
Land Development Co Ltd v Provan (1930) 43 CLR 583
Leske v SA Real Estate Investment Co Ltd (1930) 45 CLR 22
Australian Gypsum Ltd v Hume Steel Ltd (1930) 45 CLR 54
Wendt v Bruce (1931) 45 CLR 245
J C Williamson v Lukey and Mulholland (1931) 45 CLR 282
Shepherd v Felt and Textiles of Australia Ltd (1931) 45 CLR 359
Redapple and Howgate v Hely (1931) 45 CLR 452
A H McDonald & Co Pty Ltd v Wells (1931) 45 CLR 506
Kilminster v Sun Newspapers Ltd (1931) 46 CLR 284
McKernan v Fraser (1931) 46 CLR 343
Need v J H Coles Pty Ltd (1931) 46 CLR 470
O’Young v Walter Reid & Co Ltd (1932) 47 CLR 497
Noske v McGinnis (1932) 47 CLR 563
Australian Provincial Assurance Association Ltd v The Producers and Citizens
Co-operative Assurance Co of Australia (1932) 48 CLR 341
McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457
Adelaide Development Co Pty Ltd v Pohlner (1933) 49 CLR 25
Dudley Buildings Pty Ltd v Rose (1933) 49 CLR 84
Cutts v Buckley (1933) 49 CLR 189
Chapman Bros v Verco Brothers & Co Ltd (1933) 49 CLR 306
Copping v Commercial Flour and Oatmeal Milling Co Ltd (1933) 49 CLR 332
Wragge v Sims Cooper and Co (Australia) Pty Ltd (1934) 50 CLR 483
Cameron v Hogan (1934) 51 CLR 358
Marshall v City Mutual Life Assurance Society Ltd (1934) 51 CLR 666
New South Wales v Bardolph (1933-34) 52 CLR 455
Marriot v General Electric Co (1935) 53 CLR 409
Horton v Jones (1934-35) 53 CLR 475
Southern Cross Assurance Co Ltd v APAA Ltd (1935) 53 CLR 618
Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd
(1935-36) 54 CLR 361
Jarvis v Pitt Ltd (1935) 54 CLR 506
Birmingham v Renfrew (1937) 57 CLR 667
Kirsch v H P Brady Pty Ltd (1937) 58 CLR 36
Williams v Frayne (1937) 58 CLR 710
Hope v RCA Photophone of Australia Pty Ltd (1937) 59 CLR 348

1 Deciding whether or not a case is a contract case is not an exact science. As stated in my preface I have not examined all cases that involved contracts but only those where issues of contract law or interpretation were raised and in which Sir Owen Dixon sat as a judge. The cases are listed here in the order in which they were published in the Commonwealth Law Reports.
John Grant & Sons Ltd v Trocadero Building and Investment Company Ltd
(1937–38) 60 CLR 1
McDermott v Black (1940) 63 CLR 161
Neal v Ayers (1940) 63 CLR 524
Yerkey v Jones (1939) 63 CLR 649
Fletcher v Manton (1940) 64 CLR 37
Larking v Great Western (Nepean) Gravel Ltd (1940) 64 CLR 221
Mackenzie v Rees (1941) 65 CLR 1
Anderson v G H Mitchell & Sons Ltd (1941) 65 CLR 543
Dougan v Ley (1946) 71 CLR 143
Plaimar Ltd v Waters Trading Co Ltd (1945) 72 CLR 304
Steele v Tardiani (1946) 72 CLR 386
Automatic Fire Sprinklers Pty Ltd v Watson (1946) 72 CLR 435
Reid v Moreland Timber Company Pty Ltd (1946) 73 CLR 1
Bird v Perpetual Executors and Trustees Association of Australia Ltd (1946)
73 CLR 140
Fink v Fink (1946) 74 CLR 127
Hedges v Halliday (1947) 75 CLR 42
Psaltis v Schultz (1948) 76 CLR 547
Peters American Delicacy Co Ltd v Patricia’s Chocolates and Candies Pty Ltd
(1947) 77 CLR 575
Clarke v Tyler (1949) 78 CLR 646
York Air Conditioning and Refrigeration (Asia) Pty Ltd v The Commonwealth
(1949) 80 CLR 11
Axelsen v O’Brien (1949) 80 CLR 219
Associated Newspapers v Bancks (1951) 83 CLR 323
Milburn v Blomley (1951) 83 CLR 453
McRae v Commonwealth Disposals Commission (1950–51) 84 CLR 377
Stanwell Park Hotel Co Ltd v Leslie (1952) 85 CLR 189
Vickery v Woods (1951–52) 85 CLR 336
Slee v Warke (1949) 86 CLR 271
Brundza v Robbie & Co (1952) 86 CLR 345
Neill v Hewans (1953) 89 CLR 1
Carr v J A Berriman Pty Ltd (1953) 89 CLR 327
Maybury v Atlantic Union Oil Company Ltd (1953) 89 CLR 507
Peter Turnbull & Co Pty Ltd v Mundis Trading (Australasia) Pty Ltd (1953–54)
90 CLR 235
Duncombe v Porter (1953) 90 CLR 295
Holland v Wiltshire (1954) 90 CLR 409
Bellgrove v Eldridge (1954) 90 CLR 613
Petrie v Dwyer (1954) 91 CLR 99
Electronic Industries Ltd v David Jones Ltd (1954) 91 CLR 288
Masters v Cameron (1954) 91 CLR 353
Leonard v Booth (1954) 91 CLR 452
Davis v Pearce Parking Station Pty Ltd (1954) 91 CLR 643
Australian Woollen Mills Pty Ltd v The Commonwealth (1953–54) 92 CLR 424
JS Robertson (Australia) Pty Ltd v Martin (1955) 94 CLR 31
Alati v Kruger (1955) 94 CLR 216
Besier v Foster (1952) 94 CLR 526
Wilson v Darling Island Stevedoring & Lighterage Co Pty Ltd (1955–56) 95 CLR 43
Howie v NSW Lawn Tennis Ground Ltd (1955–6) 95 CLR 133
Fitzgerald v Masters (1956) 95 CLR 420
Milne v Attorney-General for Tasmania (1956) 95 CLR 460
Svanasio v McNamara (1956) 96 CLR 186
Tallerman & Co Pty Ltd v Nathan’s Merchandise (Victoria) Pty Ltd (1956–57)
89 CLR 93
Ballas v Theophilos (1957) 98 CLR 193
Cooper v Ungar (1958) 100 CLR 510
International Harvester Company of Australia Pty Ltd v Carrigan’s Hazeldene Pastoral Company (1958) 100 CLR 644
Parer v Carlton (1959) 101 CLR 515
Pirie v Saunders (1960–61) 104 CLR 149
Hall v Busst (1960) 104 CLR 206
Braham v Walker (1960–61) 104 CLR 367
The Administration of the Territory of Papua and New Guinea v Leahy (1960–61)
105 CLR 6
Ballantyne v Phillot (1960–61) 105 CLR 379
Kennedy v Vercoe (1960) 105 CLR 521
Australian Racing Drivers Club Ltd v Metcalf (1961) 106 CLR 177
Colyton Investments Pty Ltd v McSorley (1962) 107 CLR 177
Rawson v Hobbs (1961) 107 CLR 467
Derbyshire Building Co Pty Ltd v Becker (1961–62) 107 CLR 633
South Australia v The Commonwealth (1961–62) 108 CLR 131
Introduction

How do judges decide cases? This question has been at the centre of legal and jurisprudential debate in the twentieth century. Indeed, Neil Duxbury has described this question as the most important issue facing legal scholars in the last century. In a celebrated lecture given in 1977 H L A Hart characterised this question in terms of either a nightmare (that judges have become de facto legislators) or a dream (that despite periods of judicial aberrations and mistakes judges can and should apply existing law to the disputes before them). In Australia the decision in *Mabo* ignited a popular and political debate over the role of judges that has not subsided till this day. Indeed, the recent debate over the creation of a Bill of Rights in Australia was dominated by accusations that such an instrument would give more power to an already politicised judiciary.

In Australia, one particularly influential view on this issue was that expressed by Sir Owen Dixon in his address given upon taking the oath of office as Chief Justice of the High Court of Australia, when he called for a ‘strict and complete legalism’ for judges. Dixon clearly saw the judicial role as bounded and, as will be shown, believed that the rules and principles of the law acted as a restraint on judges and limited their capacity to decide cases other than on what might be called legal grounds. He was not, however, a ‘Dreamer’, to use Hart’s term. He did not see judging as a form of divination with judges merely declaring an already existing law. Neither did he believe in any form of mechanical jurisprudence with a judge’s role being equivalent to an umpire who merely applies rules and does not create them. Dixon accepted that there was a creative aspect to strict legalism but that it was a bounded creativity far removed from the actions of political actors. Dixon’s strict

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5 This was the analogy made by the soon to be Chief Justice of the US Supreme Court, John Roberts, in his confirmation hearing before the US Senate in 2005. [http://www.washingtonpost.com/wp-dyn/content/article/2005/09/12/AR2005091200642.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/09/12/AR2005091200642.html)
legalism no longer commands the respect that it once did and it would be fair to say that it is an unfashionable view, especially amongst academics. Indeed, for some commentators, Dixon’s views can be either seen as naïve, reflecting an unsophisticated understanding of judging, or as form of paternalism intended to hide from a credulous public the obvious freedom open to judges when they decide cases.⁶

Was Dixon either naïve or being patronising when he claimed to be a strict legalist? The answer to this will be of some significance to the debate over judging. If Dixon is shown not to be a strict legalist one would have good cause to wonder whether any judge has ever been a strict legalist. If, on the other hand, it is shown that he did judge in this fashion this will amount to evidence that at least one important judge could and did judge as a strict legalist. This in turn will mean that the debate over judging can move beyond a ‘yes he did, no he didn’t’ impasse. Showing that Dixon, and other judges,⁷ did decide at least some cases as strict legalists will then turn attention to questions of appropriateness and practicality. In other words, if strict legalism is shown to be a realistic style of judging the debate over judging can move on to consider whether and to what extent other judges adopted this style; whether this style is still used; and whether other forms of judging are, for any number of reasons, more appropriate today.

Discussion of Dixon’s judging to date has, unfortunately, been rather superficial. Both supporters and opponents of Dixon’s method have simply asserted their positions without providing a sustained analysis of his judgments to back up claims made about Dixon’s fidelity to his self-proclaimed legal method.⁸ This thesis aims to

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⁷ The reference to other judges includes, for example, all those judges on the High Court who wrote joint judgments in cases examined for this thesis, as well as to Fullagar J, whose judgment in Wilson v Darling Island Stevedoring has been used as a proxy for Dixon CJ’s judgment in that case (see chapter five).

advance the debate over Dixon’s strict and complete legalism by providing the first lengthy analysis of his judgments expressly dealing with his judicial method. In doing so it also examines Dixon’s understanding of strict and complete legalism and shows that superficial comparisons to mechanical jurisprudence and the like completely misrepresent the sophisticated form of bounded creativity that was at the essence of the judicial practice of Dixon.

This thesis examines Dixon’s judgments in contract cases decided during his tenure on the High Court (1929–1964) to see if his judging was in accord with his self-proclaimed strict and complete legalism. His contracts decisions have been chosen partly because contract law provides an important, coherent and manageable branch of the law and also because contract law reflects the expertise of the writer of this thesis. This examination takes the form of analysing his judgments, paying particular attention to the views of the other judges on the High Court and his treatment of the authorities used to support his reasoning. A major argument of this thesis is that Dixon’s strict and complete legalism is a testable hypothesis that can show if Dixon did, indeed, decide cases in accordance with his understanding of proper judicial method and that it is possible to illustrate when he has not.

Although all of Sir Owen’s contract judgments handed down while he was on the High Court have been examined in the course of writing this thesis, it would not be practicable to document in detail the analysis of every one of these decisions as this would require several theses. The alternative strategy of examining a representative example of his decision-making has been adopted for this thesis. Five major decisions covering the span of Dixon’s tenure on the High Court and dealing with different aspects of contract law are considered in detail. In addition fifteen shorter case studies of more minor decisions are provided. These cases, too, range across Dixon’s time on the High Court and cover a variety of contract law issues. However, this thesis examines all of Dixon’s judgments which raise any doubt that he had not judged in conformity with his professed legal method and it demonstrates that, in most but not all of these cases, such doubts were misplaced.

The thesis is organised as follows.
Chapter One elaborates Dixon’s understanding of strict and complete legalism in order to show that it is a testable hypothesis against which his decision-making can be considered. It is argued that his strict and complete legalism is not a form of mechanical jurisprudence or a simple-minded declaratory theory and accepts, indeed requires, bounded creativity from judges.

Chapters Two, Three, Four, Five and Six examine five significant contract cases which spanned his time on the High Court. Chapter Two considers the 1933 case of McDonald v Dennys Lascelles,9 which examined termination and rescission after breach as well as the status of unconditionally accrued rights after termination and the law dealing with unpaid instalment contracts. Chapter Three looks at the 1939 case of Yerkey v Jones,10 which examined the ‘special married woman’s equity’. Chapter Four analyses McRae v Commonwealth Disposals Commission,11 a 1951 decision which considered the role and effect of mistake in the common law of contract. Chapter Five examines the 1956 case of Wilson v Darling Harbour Stevedoring12 which looked at privity in the context of transport contracts. Chapter Six considers the 1960 decision of Hall v Busst13 which examined the vexed question of certainty in contracts. Chapter Seven consists of shorter case studies of fifteen decisions taken from the entire span of his time on the High Court, while Chapter Eight analyses those decisions which might on first reading suggest that Dixon had not judged as a strict legalist.

The Conclusion to the thesis describes the findings of the thesis and considers the implications that flow from these findings.

9 (1933) 48 CLR 457.
10 (1939) 63 CLR 649.
11 (1950–51) 84 CLR 377.
12 (1955–56) 95 CLR 43.
13 (1960) 104 CLR 206.