MENZIES AND THE LAW

JAMES EDELMAN AND ANGELA KITTIKHOUN

Contents

I INTRODUCTION

'Did anybody suppose that a man like myself who loves the law, and the practice of the law, and the whole philosophy of the law, would go into this turbulent stream, for a job. A job! Of course not.'[1] So said Sir Robert Menzies, perhaps only partly facetiously, in 1954 as Prime Minister. Years later, shortly after retirement from politics, he said that '[p]olitics proved to be my greatest duty. But the law remained my first love'.[2] Despite Menzies' extraordinary contributions to the law as author, as barrister, as Attorney-General for the State of Victoria, and as Attorney-General of the Commonwealth, his service and duties in politics meant that his exceptional legal ability was never fully developed. In a sense, therefore, this chapter has something of a sliding-doors focus. In examining the many contributions that Menzies made to the law, there is a sense of how much more he might even have contributed had he not departed the legal profession.

The obvious comparison is with another man whose extraordinary legal contributions were made during a career that intersected throughout with that of Menzies. That other man was perhaps Australia's greatest-ever lawyer and Menzies' mentor, Sir Owen Dixon. Ultimately, as Prime Minister, Menzies was to offer Dixon the position as Chief Justice of the High Court of Australia, saying that although this was usually the role of the Attorney-General he could not resist doing so.[3] And when Dixon retired as Chief Justice of the High Court, Barwick speculated that the only two people who satisfied the requirements for the appointment were himself and Menzies.[4] But Menzies, who by then was about to turn seventy and would soon retire, had no interest in the position. Menzies wrote to his daughter that he had 'no ambition to knock off work to carry bricks'.[5] Sir Garfield Barwick, who was appointed to

[1] Menzies, 'Principle and Expediency'.
[2] Menzies, *Afternoon Light*, p. 318. See also Menzies, Opening Speech given at The Third Commonwealth and Empire Law Conference.
[3] Ayres, p. 229.
[4] Barwick, p. 209.
[5] Twomey, p. 298, quoting letters from Menzies to his daughter Heather Henderson, 31 July 1961.

succeed Dixon as Chief Justice, to the great dismay of Dixon[6], once speculated that Menzies might have preferred the office of Chief Justice to that of Prime Minister.[7] Menzies himself remarked that he envied Barwick's appointment adding that 'if I had been in his place, still remaining with my old passions for the law, I would have said, "Yes, I would like to go to the High Court." I am sure I would have.'[8]

II MENZIES' BEGINNINGS IN THE LAW

In 1916, a fresh faced, 22-year-old Robert Menzies graduated with a Bachelor of Laws from the University of Melbourne. He finished at the top of his year[9] and was the recipient of the coveted Supreme Court Prize.[10] He would graduate with a Masters degree just over a year later.[11] Along the way, Menzies won a swathe of academic awards: the Dwight Prize in British History and Constitutional History; the John Madden Exhibition in Jurisprudence; the Jesse Leggatt Scholarship in Roman Law, the law of contract and the law of property; and the Bowen prize for an essay entitled *The Rule of Law During the War*.

At the time of Menzies' graduation, the law school of the University of Melbourne was under the Deanship of the brilliant constitutional lawyer Professor Harrison Moore.[12] Menzies was taught by Harrison Moore and colourfully said that 'whatever is right in my knowledge of constitutional law is derived from him'.[13] Around a decade earlier, Harrison Moore had taught another student who spoke of Harrison Moore in equally glowing terms saying that the legal history of Victoria was perhaps more extraordinary than any other part of the Empire owing to Harrison Moore's profound influence.[14] That earlier student was Owen Dixon.

Following twelve months' articles of clerkship in 1917 with a solicitor, who Menzies described as having a small conveyancing practice,[15] Menzies was admitted to the Victorian Bar on 13 May 1918[16] as 'No. 155' on the Roll of Counsel.[17] He was the first of only three pupils taken by Dixon in the latter's time at the Bar.[18] As Dixon's pupil, Menzies described himself as 'entering a new world of thought' and losing any 'self-conceit which may have been induced by my success as a student'.[19] Menzies was entranced by Dixon's intellect. At Dixon's retirement, he described Dixon as 'the greatest legal advocate I saw either here or abroad'.[20] Menzies described an occasion

---

[6] Ayres, p. 286.
[7] Barwick, p. 214.
[8] Menzies, Speech given at Dinner in honour of the Rt Hon Sir Garfield Barwick.
[9] Menzies, *The Measure of the Years*, p. 229.
[10] Blackshield, Coper and Williams (eds), p. 477.
[11] Martin, *Robert Menzies: A Life. Volume 1, 1894-1943*, pp. 19-20.
[12] Blackshield, Coper and Williams (eds), p. 477; Menzies, 'The Challenge to Federalism', p. 1.
[13] Joske, p. 16.
[14] Ayres, pp. 11-2.
[15] Menzies, *The Measure of the Years*, Cassell, p. 229.
[16] Martin, 'Sir Robert Gordon Menzies', p. 354.
[17] Heerey, p. 532.
[18] Australia, Senate, *Parliamentary Debates* (Hansard), 23 May 1978, p. 1712. The others being Sir Henry Baker and Sir James Tait. See also Martin, *Robert Menzies: A Life. Volume 1, 1894-1943*, pp. 35-6.
[19] Menzies, *The Measure of the Years*, pp. 230-1.
[20] Menzies, 'Retirement of The Chief Justice, p. vi.

when his wife expressed doubt as to some opinion that Menzies had offered, to which he replied 'Well, Dixon thinks so, and that's good enough for me.' Menzies describes the exchange that followed: 'Bob, I think you ought to realize that Dixon is not God!', she said in retort. To which he replied, 'You're quite right, my dear; but only just.'[21]

III MENZIES' EARLY YEARS AT THE BAR

Menzies considered his 'happiest reminiscences' as being from his early years of practice in the County Court of Victoria due perhaps to the greater informality than that encountered in the Supreme Court of Victoria or the High Court of Australia.[22] But it was not long before his appearance was heavily sought after in cases before the Supreme Court of Victoria and the High Court of Australia. In September 1918, just four months after admission to the Bar and at the age of twenty-three, he first appeared in the High Court as junior counsel to Dixon.[23]

Like Dixon, Menzies worked extremely hard, often long into the night. Menzies estimated that he averaged at least eighty hours of work a week.[24] By the time Menzies was in his late twenties, he was appearing on multiple occasions every year in the High Court – in cases ranging in subject matter from constitutional law, industrial arbitration law, to income tax law.[25] Many of these appearances were with Dixon. For a decade, until Menzies took silk and Dixon was appointed to the High Court, Menzies appeared with Dixon in more than a dozen cases before the High Court and in many cases in the Supreme Court of Victoria. [26] As was observed in Parliament many years later, Menzies was an outstanding constitutional lawyer who had few rivals when, 'in 1929, at the age of 34, he became Australia's youngest King's Counsel'.[27]

Menzies' technical excellence and appreciation of the 'mechanics of the [lawyer's] art'[28] were honed on a foundation of pragmatism. Menzies attached significance to the relationship between law and life – to his mind, the law should 'constantly [be seen] against a human background'.[29] He viewed the law as a social construction which needs to develop to benefit the 'growing needs of the growing community'.[30] He disapproved of the law being perceived as 'something desiccated and detached, unrelated to the life of human beings'.[31]

Perhaps the reason that Menzies and Dixon made such a formidable team was that Menzies' pragmatism and the power of his rhetoric complemented Dixon's formal and rigorous logic. Dixon was steeped in classical learning and doctrine. Dixon's

---

[21] Menzies, *The Measure of the Years*, p. 239.
[22] Ibid, p. 245.
[23] *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Daily News Pty Ltd* (1919) 26 CLR 404.
[24] Martin, *Robert Menzies: A Life. Volume 1, 1894-1943*, p. 44; Menzies, *Afternoon Light*, p. 318.
[25] Martin, *Robert Menzies: A Life. Volume 1, 1894-1943*, pp. 45-6.
[26] Ibid.
[27] Australia, Senate, *Parliamentary Debates* (Hansard), 23 May 1978, p. 1705.
[28] Menzies, 'Law Council of Australia Dinner', p. 26.
[29] Menzies, Opening Speech given at The Third Commonwealth and Empire Law Conference.
[30] Ibid.
[31] Ibid.

1923 diaries reveal that his reading was classical Greek and Latin literature. Later, on the bench of the High Court, Dixon would cheekily pass notes to Fullagar in Greek, across Williams who was not a Greek scholar. Menzies, who had struggled with Latin at school, was not an enthusiastic classicist.[32] But he had outstanding judgement, a powerful feel for a case, and an appreciation of there being 'a world of difference … between academic learning and the same learning when applied to the tangled facts of life'.[33] Menzies therefore had a strong grasp of the secret of advocacy: connecting with people. In Menzies' words, 'a good advocate must be a good judge'.[34] Despite Dixon's brilliant mind and formal logic, he did not always connect with witnesses and juries.[35] As Menzies said of Dixon, 'I did not ever think him to be quite at home addressing a jury ... he found difficulty in getting on to the same wave-length'.[36]

IV Menzies as Counsel in the High Court

Menzies' first appearance unled in the High Court was at the age of twenty-four in *Troy v Wrigglesworth*.[37] The brief apparently came to him after the senior counsel who had been instructed to argue it fell ill. The brief carried only a small fee so the instructing solicitors seized upon Menzies as an affordable junior who knew constitutional law.[38] Menzies appeared for the appellant, with his father, James Menzies, observing at the back of the court. The appellant was an employee of the Commonwealth who had been convicted in a Court of Petty Sessions, constituted by two Justices of the Peace, for driving a motor-car in a dangerous manner. Menzies' client succeeded in the High Court by majority on the ground that the Court of Petty Sessions as constituted had no jurisdiction because the matter was in federal jurisdiction and, pursuant to s 39(2)(d) of the *Judiciary Act 1903* (Cth), such jurisdiction could only be exercised by a Police Magistrate. In the first line of their reasons, Barton, Isaacs and Rich JJ wrote: 'This case has been very ably argued on both sides'. Justice Gavan Duffy, who dissented, subsequently told Menzies that he had been 'very much impressed by the ability with which you ... presented your argument'.[39] Menzies' father also admitted to his wife after observing their son's performance in court that he had been underestimating Menzies' talents.[40]

Appearances in the High Court involved vast amounts of preparation. They could be arduous. Menzies described the Socratic method as having reached its peak in the years he appeared before the Court.[41] He recounted that on one occasion a judge tore his argument to pieces, without any attempt to 'temper the wind to the shorn lamb'.[42] Still, Menzies did his best to hold the 'tatters' of the argument together, speaking to his obstinate refusal as an advocate to surrender at the first shot.[43] Menzies

[32] Chavura and Melleuish, p. 108.
[33] Menzies, *The Measure of the Years*, p. 239.
[34] Menzies, *Afternoon Light*, p. 334.
[35] Menzies, *The Measure of the Years*, p. 234.
[36] Menzies, Speech and Speakers.
[37] (1919) 26 CLR 305.
[38] Martin, *Robert Menzies: A Life. Volume 1, 1894-1943,* pp. 37-8.
[39] Ibid, p. 38.
[40] Ibid.
[41] Menzies, *The Measure of the Years*, p. 240.
[42] Ibid, p. 263.
[43] Ibid, p. 262.

understood that an advocate must know their audience, should catch their mood, and should be prepared to pivot to productive avenues at the expense of the pre-determined course.[44] During one appearance, Menzies answered the first question posed by Gavan Duffy J as 'Yes.' Subsequently, in Menzies' words, Gavan Duffy J 'in a sense, took me out to sea. As I was about to sink for the third time, I gave a sickly grin, and said, "Your Honour, I seem to feel that when I said yes some time ago, I should have said no. Could I now say no and let us start all over again?"'.[45]

Some of the arguments made by Menzies in the High Court concerned matters on which he had strong views. For example, on the power in s 96 of the *Constitution* for the Commonwealth to grant financial assistance to the States upon terms and conditions as the Parliament thinks fit, Menzies believed that the power should be given a restrictive interpretation. In *Victoria v The Commonwealth*[46] together with Fullagar, a later Justice of the High Court, Menzies attempted to argue, on behalf of the State of Victoria, that the power in s 96 could not be used by the Commonwealth, in effect, as a head of power to legislate. In Menzies' submission, the Commonwealth could not attach any conditions to its grant that amounted in substance to the exercise of legislative power which was not within a head of power in s 51 of the *Constitution*.[47] Legislation granting aid to the States for the construction of roads, in his submission, was properly characterised as a law for the construction of roads, which the Commonwealth had no power under the *Constitution* to pass. This argument was unanimously rejected in a single paragraph of reasoning in a decision delivered on the same day as argument. Menzies regarded the case as his 'number one' failure. But he later spoke of the decision in pragmatic terms, describing its salutary effect of permitting financial aid for State universities as one which 'is a good illustration of how something which was not anticipated in the Constitution when it was first enacted can come into existence by judicial interpretation and the inexorable demands of new circumstances'.[48]

V LEGAL VICTORY: THE *ENGINEERS' CASE*

Perhaps ironically, a case in which Menzies' achieved the greatest victory for his clients was one where he was briefed to argue for a dramatically expanded approach to Commonwealth power. Menzies described himself as having had, at the age of twenty-five, 'the impertinence to accept a brief [as sole counsel for his client] ... before the High Court of Australia'.[49] The case in which he accepted the brief was the *Engineers' Case*[50]. The decision in that case is one of the most important decisions for the operation of the federal compact that has ever been given by the High Court of Australia. Although the result in the *Engineers' Case* was partly due to a strong disposition by some members of the Court, and also partly due to powerful advocacy from Leverrier KC for the Commonwealth, the decision and reasons, delivered on 31 August 1920 only weeks after the Court had finished hearing the case, brought

[44] Menzies, Speech and Speakers.
[45] Menzies, *The Measure of the Years*, p. 262.
[46] (1926) 38 CLR 399.
[47] *Victoria v The Commonwealth* (1926) 38 CLR 399 at 405.
[48] Menzies, 'The Challenge to Federalism', p. 11.
[49] Menzies, *Central Power in the Australian Commonwealth*, p. 8.
[50] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

Menzies 'sudden fame'.[51] It is, therefore, upon the contribution of Menzies that we will focus.

Prior to the *Engineers' Case*, the High Court had recognised an implied prohibition in the *Constitution* against the States and the Commonwealth interfering with various aspects of the functions of the other level of government. This included interference by the Commonwealth with State instrumentalities.[52] But a questionable distinction was drawn between a trading function of a state instrumentality and a governmental function.[53] The former was not immune from interference by Commonwealth legislative power whereas the latter was immune.

The *Engineers' Case* was concerned with an alleged industrial dispute submitted to the Commonwealth Court of Conciliation and Arbitration between the Amalgamated Society of Engineers as claimant and hundreds of respondents in various parts of Australia, including Western Australian government instrumentalities. The essential question was whether the Commonwealth Parliament had power to extend the jurisdiction of the Commonwealth Court of Conciliation and Arbitration to these Western Australian government instrumentalities. Constrained by the High Court's earlier decisions, Menzies' original submission for the Amalgamated Society of Engineers was that the Western Australian government instrumentalities were not immune from interference by Commonwealth legislative power as they were engaged in trading activities and not in governmental activities. It followed that the legislation establishing the Commonwealth Court of Conciliation and Arbitration applied to them without transgressing the implied constitutional prohibition which precluded any Commonwealth legislative power being exercised to give the Court of Conciliation and Arbitration jurisdiction over industrial disputes to which a State instrumentality exercising governmental functions was a party.

What happened in court at the first hearing in Melbourne was colourfully described by Menzies:

> [A]n hour or so after I had begun by developing this argument, distinguishing the *Railway Servants' Case*, doing lip service to the Doctrine [of the immunity of instrumentalities], Mr Justice Starke, who was a very distinguished Common lawyer, and whose blunt habits of expression made no exception in favour of a very young man, looking at me in a grumbling way, said "This argument is a lot of nonsense!" [… [N]othing could have persuaded me to walk out of Court. This was my first big brief in the High Court of Australia; I was not going to leave it.] So, when Starke said "This argument is a lot of nonsense", I, in what I later realized to be an inspired moment, replied: "Sir, I quite agree." "Well", intervened … Chief Justice Knox, never the most genial of interrogators, "why are you putting an argument which you admit is nonsense?" "Because", said the young Menzies (the old Menzies would not have dared to do this) "I am compelled by the earlier decisions of this Court. If your Honours will permit me to question all or any of these earlier decisions, I

[51] Martin, 'Sir Robert Gordon Menzies', p. 354.
[52] *The Federated Amalgamated Government Railway and Tramway Service Association v The New South Wales Railway Traffic Employer Association* ('*Railway Servants' Case*') (1906) 4 CLR 488, explaining *D'Emden v Pedder* (1904) 1 CLR 91.
[53] *Australian Workers' Union v Adelaide Milling Co Ltd* (1919) 26 CLR 460.

> will undertake to advance a sensible argument." I waited for the heavens to fall. Instead, the Chief Justice said: "The Court will retire for a few minutes." And when they came back, he said, "This case will be adjourned for argument at Sydney. Each government will be notified so that it may apply to intervene. Counsel will be at liberty to challenge any earlier decision of this Court!"[54]

When the hearing resumed in Sydney,[55] Menzies argued that: (i) the power of the Commonwealth should be construed fully, and without regard to the 'reserved' powers of the States; and (ii) the *Railway Servants' Case* – which held that State instrumentalities were immune from Commonwealth legislative control – should be overruled. Menzies had an extremely sympathetic Court to his argument. From their appointments in 1906, Isaacs and Higgins JJ had been trenchantly critical of the doctrines of the reserved powers of the States and the implied immunities of State instrumentalities.[56] In the result, with only Gavan Duffy J, who later became Chief Justice, dissenting, Menzies' submission was accepted. The decision abandoned the doctrines of reserved powers and implied intergovernmental immunities. Menzies said of the *Engineers' Case* that '[i]t represented the acceptance of the view that the powers of the Commonwealth Parliament are to be interpreted quite fully, comprehensively, subject only to express restrictions contained in the Constitution. The existence of the States was not, as a general rule, to constitute one of these restrictions'.[57]

The *Engineers' Case* was not without difficulty. In a joint judgment of four members of the Court, almost certainly authored primarily by Isaacs J, the heart of the reasoning appeared to suggest that the text of the *Constitution* should be interpreted without any implications from matters outside the *Constitution*, including those drawn from the very nature of the federal compact.[58] The decision in the *Engineers' Case* was trenchantly criticised by some.[59] Speaking of the decision nearly a century later, Callinan J wrote:[60] 'To disregard entirely a, or perhaps the, fundamental "policy" of the *Constitution*, federalism, and the careful division of power that it involves, is to disregard, or is at least to attach little weight to, the object which, beyond all doubt, the framers intended, the people who voted in favour of federation adopted.' Even Isaacs J might later have had some doubts about the strictness of some of the language. In the personal set of Commonwealth Law Reports owned by Issacs J, which were purchased by Edelman J in 2020, there are annotations and underlinings throughout the joint judgment, including references to qualifications upon the strictness of the decision in later decisions of Isaacs J.

---

[54] Menzies, *Central Power of the Australian Commonwealth*, pp. 38-9.
[55] The notebooks of Knox CJ and Isaacs J raise some doubts about the timing of Menzies' account: Brennan, pp. 145-147.
[56] *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1164; *R v Barger* (1908) 6 CLR 41 at 83-4, 113-4; *Attorney-General (NSW) v Brewery Employes' Union (NSW)* (1908) 6 CLR 469 at 585; *Huddart, Parker & Co Ptd Ltd v Moorehead* (1909) 8 CLR 330 at 390-1, 415-6; *Attorney-General (Qld) v Attorney-General (Cth)* (1915) 20 CLR 148 at 171-2.
[57] Menzies, 'The Challenge to Federalism', p. 7.
[58] (1920) 28 CLR 129 at 155.
[59] See, eg, Sawer, p. 130; Walker, pp. 686-7; Allan and Aroney, pp. 288-9*;* Stellios, p. 11.
[60] *New South Wales v The Commonwealth* (2006) 229 CLR 1 at 305-6 [741].

As Sawer observed, Dixon disliked the *Engineers' Case*: 'its literary style set his teeth on edge and he never mentioned it without a touch of asperity'.[61] In 1937, Dixon J expressed the view that many had taken of the case, whilst denying that this was its effect:

> 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.[62]

In subsequent decisions, most notably *Melbourne Corporation v The Commonwealth*,[63] Dixon J and other members of the High Court wound back this view of the *Engineers' Case* that rejected constitutional implications drawn from the federal structure. That process has continued, including in the 2019 decision of the High Court, by majority of 4:3, in *Spence v Queensland,*[64] which held that a Commonwealth legislative provision was invalid because it did not have a sufficiently strong connection with federal elections and extended to the regulation of that which is within the heartland of State legislative power. The inroads into the decision in the *Engineers' Case* do not, however, deny the case's past and continuing significance in Australian constitutional law. It is still regarded, at least overtly, as having 'exploded and unambiguously rejected' the reserved powers doctrine.[65] And as Sir Anthony Mason has observed, the decision also still stands for the rejection of the broad or extreme view of intergovernmental immunities.[66]

As always, Menzies' view of the *Engineers' Case* was to see the legal principle in pragmatic terms. While describing as 'revolutionary' the method of interpreting Commonwealth powers that had been approved in the *Engineers' Case*, he thought that the principles laid down in that case were not immutable or absolute.[67] He placed the decision within a movement involving a 'strong centralizing tendency in relation to power', one which he described as carried on partly by 'the rising significance of Australia in world affairs and the obvious need for having a national government which can speak with authority on behalf of the nation'.[68]

VI Legal Defeat: The *Communist Party Case*

If the *Engineers' Case* was the greatest victory in a case in which Menzies was counsel then the *Communist Party Case*[69] was his greatest defeat. But it was not a defeat that Menzies suffered as counsel. It was a defeat of the legislation he introduced as Prime Minister. Once again, it was a circumstance where Menzies' pragmatic view of the law as principle in service of society contrasted with the formalism and logic of his friend and former mentor, Dixon.

---

[61] Sawer, p. 133.
[62] *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657 at 681.
[63] (1947) 74 CLR 31 at 82-3.
[64] (2019) 268 CLR 355.
[65] *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 485.
[66] Mason, pp. 835-840.
[67] Menzies, *Central Power in the Australian Commonwealth*, pp. 42-8.
[68] Menzies, 'The Challenge to Federalism', p. 8.
[69] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

During the Second World War, the Menzies Government had used emergency regulations to declare the Communist Party of Australia as an illegal organisation.[70] After the war, Menzies had initially opposed banning the Communist Party on the grounds of free speech but he later came to see communism as a grave threat to Australia.[71] In 1950, as Prime Minister, Menzies said that he held the 'conviction that Australia must urgently prepare for the possibility of a third world war', saying that if a third world war were to occur 'it will be as the result of attack by international Communism'.[72] When Menzies re-introduced the *Communist Party Dissolution Bill 1950* (Cth) to dissolve the Communist Party, he said that the 'whole foundation of this piece of legislation is that Australia is in a cold war, if that term means a war in which Australian lives are being lost in action, and is also in a state of imminent danger of what people might call a hot war ... this is a bill which deals with the security of Australia'.[73] The preamble of the Bill cited the defence power, s 51(vi) of the *Constitution*, as one of the heads of power principally relied upon. A power which Menzies had earlier described as having 'proved itself the most flexible and most extensible power ever written into this or any other Constitution'.[74]

The Bill, as re-introduced, was passed without any amendments.[75] The *Communist Party Dissolution Act 1950* (Cth) had recited that its purpose was the security and defence of Australia, and s 4 of the Act declared the Communist Party to be an 'unlawful association' and, by force of the Act, dissolved it and vested its property in a receiver. Further, s 5 of the Act empowered the Governor-General to declare a body affiliated or connected with the Communist Party to be an 'unlawful association' if, in the opinion of the Governor-General, the continued existence of that body would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the *Constitution* or of Commonwealth laws. That declaration could only be set aside by the proscribed body making an application to a court, as to which it bore an onus to adduce evidence, and the declaration could only be set aside on the limited ground that it was not a body to which s 5 applied.

The Act was challenged in the High Court by the Communist Party, various trade unions, and a number of individuals. The hearing in the High Court was monumental. It took twenty-four days of hearings. The highly abbreviated summary of argument in the Commonwealth Law Reports runs for over one hundred pages. Garfield Barwick KC, who acted for the defendants and who Menzies would later appoint as Chief Justice to replace Dixon, had nine counsel, including three silks, appearing with him. One of the central questions in the case was whether the Act could be supported by the defence power. The plaintiffs argued that matters such as the preamble of the Act or the opinion of the Governor-General could not bring the law within the defence power. As Fullagar J put the point in his reasons for decision, 'a stream cannot rise higher than its source'.[76]

---

[70] *National Security (Subversive Associations) Regulations 1940* (Cth).
[71] Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 April 1950, p. 1995; Australia, Senate, *Parliamentary Debates* (Hansard), 19 October 1950, p. 1092.
[72] Martin, *Robert Menzies: A Life. Volume 2, 1944-1978*, p. 169.
[73] Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 October 1950, pp. 196-7.
[74] Australia, House of Representatives, *Parliamentary Debates* (Hansard), 23 February 1944, p. 465.
[75] Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 October 1950, p. 200.
[76] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 258.

The High Court held, by a majority of 6:1, with only Latham CJ dissenting, that the Act was invalid. Every member of the High Court gave separate reasons for decision. At the heart of the reasons of Latham CJ in the minority, was the conclusion that the defence power 'includes defence against internal enemies'.[77] That is, the defence power extended to 'protecting the people against internal attack by means of subversive and treasonable activities'.[78] By contrast, in his reasoning in the majority, Dixon J asserted that the 'central purpose' of the defence power was 'the protection of the Commonwealth from external enemies'[79] and that the validity of the Act depended upon the existence of 'serious armed conflict', including 'a mounting danger of hostilities before any actual outbreak of war'.[80] Dixon J also conceded that in times of war, the defence power could in some circumstances sustain legal provisions that prescribe as a sufficient criterion for operation the opinion of a Minister or an agency of the Executive that directions are necessary for public safety or defence. Indeed, Menzies had written, while still a law student, in his 1917 prizewinning essay on the rule of law in the time of war that in 'times of stress ... Courts of Law will stretch rules of interpretation to their utmost'[81] and that in war by 'the gravity of the national emergency ... do we acquiesce in such an extensive abrogation of the Rule of Law', although adding that '[s]hould the almost arbitrary power of the Executive prove to be anything else but temporary, a very great disaster would have befallen the English Constitution'.[82] In a similar vein, Menzies wrote a year later that in times of the war '[t]he bare power of defence has attracted to itself, in the guise of "powers incidental", much that is not of itself military in character at all'.[83]

But the Menzies Government had secured passage of the Act when Australia was not at war. Hence, like the other members of the majority, Dixon J held that in circumstances including that Australia was not at war, the Act was invalid. As John Howard wrote, the decision of the High Court was a 'serious setback for Menzies'.[84] In Parliament, four days after the decision was handed down, Menzies politely said that while it would be 'foolish to pretend that this decision has not given grave concern to the Government', he had 'no legal criticisms to make' of the High Court.[85] Menzies did, however, hone in on the reasons of Dixon J, saying:

> That this decision discloses grievous limitations upon the powers of the Commonwealth Parliament it would be hard to deny; for, as we have repeatedly pointed out in this House, many facts which those responsible for executive government and therefore for the safety of the country know only too well are not susceptible of legal proof, or alternatively could be proved only by the most dangerous disclosure of the personnel and operations of our Security Service.[86]

---

[77] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 143.
[78] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 143.
[79] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 194.
[80] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 195.
[81] Menzies, *The Rule of Law During the War*, p. 22.
[82] Ibid, p. 18.
[83] Menzies, 'War Powers in the Constitution of the Commonwealth of Australia', p. 11.
[84] Howard, p. 129.
[85] Australia, House of Representatives, Parliamentary Debates (Hansard), 13 March 1951,p. 365.
[86] Ibid, pp. 365-6.

In a later conversation with Dixon, Menzies related that he had been 'shocked on reading [Dixon's] judgment' and that he 'could understand [Latham CJ because Latham] preferred to dissent like Isaacs'.[87] Dixon had responded by blaming Barwick, saying that Barwick's submissions were dialectic and that Barwick had no 'general knowledge'.[88]

In the immediate aftermath of the decision, and following a double dissolution of Parliament, Menzies called a referendum to amend the *Constitution*, seeking to reverse the effect of the decision. Although the referendum was ultimately defeated, much of the reasoning in the decision in the *Communist Party Case*, although not the result, was subsequently eroded by the High Court. A much broader approach to the purpose of the defence power was taken by a majority of the High Court in 2007 in *Thomas v Mowbray*.[89] In that case, four members of the High Court[90] held that the purpose of the defence power was not confined to military responses or external attack and that it extended to protect the Commonwealth generally.[91] By upholding the interim control order regime in the *Criminal Code* (Cth) on the basis of the defence power, the Court treated the protection of the realm as not even confined to protection from physical attack but as including terrorist attacks such as seriously interfering with electronic systems. The day after the decision in *Thomas v Mowbray*, the *Age* newspaper summarised the dissenting judgment of Kirby J, saying that 'Australians who accepted the foresight, prudence and wisdom of the Communist Party decision would look back with regret and embarrassment at this latest decision'.[92] Justice Kirby suggested that given the reasoning expressed by the majority, 'it appear[ed] likely that, had the Dissolution Act of 1950 been challenged today, its constitutional validity would have been upheld'.[93]

Nevertheless, the actual result in the *Communist Party Case*,[94] was still upheld by the High Court. As Gummow and Crennan JJ explained, the Menzies Government's legislation had not been 'addressed to suppressing violence or disorder' and had not taken 'the course of forbidding descriptions of conduct [with] objective standards or tests of liability upon the subject'.[95] Indeed, Menzies himself while reflecting on the *Communist Party Case* eventually recognised, quoting Kitto J, that '[t]here is an essential difference between, on the one hand, a law providing for the dissolution of associations as to which specified facts exist and, on the other hand, a law providing specially for the dissolution of a particular association'.[96]

---

[87] Ayres, p. 224, quoting Owen Dixon, Diary, 20 December 1951, Owen Dixon, Personal Papers.
[88] Ibid.
[89] (2007) 233 CLR 307 at 359 [134].
[90] (2007) 233 CLR 307 at 361 [140] (Gummow and Crennan JJ). See also 324 [6] (Gleeson CJ), 511 [611] (Heydon J).
[91] (2007) 233 CLR 307 at 324 [6]-[7]. See also 360 [137] (quoting *Farey v Burvett* (1916) 21 CLR 433 at 440), 362 [142].
[92] Nicholson, p. 2.
[93] (2007) 233 CLR 307 at 442 [386].
[94] (1951) 83 CLR 1.
[95] (2007) 233 CLR 307 at 363-4 [147], quoting *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 192.
[96] Menzies, *Central Power in the Australian Commonwealth*, p. 73, quoting *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 278.

VI CONCLUSION

This short chapter has sought to give a flavour of Sir Robert Menzies' approach to law by discussing some of his enormous contributions to the law despite the relative brevity of his legal career. Some illustration of his perspective of the law has been given by considering the overlap of his legal outlook with that of his close friend, mentor, and also brilliant lawyer, Sir Owen Dixon. Both men were stunningly effective and successful lawyers but with different styles, outlooks, and approaches. In many ways, Menzies' approach to the law as principle shaped by pragmatism may also have contributed to him being such a successful politician. As Senator Withers said in Parliament upon a motion of condolence following Menzies' death, for Menzies 'law and civilization were inseparably bound together'.[97]

[97] Australia, Senate, *Parliamentary Debates* (Hansard), 23 May 1978, p.1705.

BIBLIOGRAPHY

Allan and Aroney, 'An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism', *Sydney Law Review*, vol. 30, 2008.

Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129.

Attorney-General (NSW) v Brewery Employes' Union (NSW) (1908) 6 CLR 469.

Attorney-General (Qld) v Attorney-General (Cth) (1915) 20 CLR 148.

Australia, House of Representatives, *Parliamentary Debates* (Hansard), 23 February 1944.

Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 April 1950.

Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 October 1950.

Australia, House of Representatives, *Parliamentary Debates* (Hansard), 13 March 1951.

Australia, Senate, *Parliamentary Debates* (Hansard), 19 October 1950.

Australia, Senate, *Parliamentary Debates* (Hansard), 23 May 1978.

Australian Communist Party v Commonwealth (1951) 83 CLR 1.

Australian Workers' Union v Adelaide Milling Co Ltd (1919) 26 CLR 460.

Ayres, Philip, *Owen Dixon*, The Miegunyah Press, Carlton, 2003.

Barwick, Garfield, *A Radical Tory*, Federation Press, Sydney, 1995.

Baxter v Commissioners of Taxation (NSW) (1907) 4 CLR 1087.

Blackshield, Tony, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia*, Oxford University Press, Melbourne, 2001.

Brennan, Gerard, 'Three Cheers for *Engineers*', in M Coper and G Williams (eds), *How Many Cheers for Engineers?*, The Federation Press, Sydney, 1997.

Chavura, Stephen and Greg Melleuish, *The Forgotten Menzies*, Melbourne University Press, Carlton, 2021.

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

Farey v Burvett (1916) 21 CLR 433.

Heerey, Peter, 'The Victorian Bar: Some history and a little lore', *Australian Law Journal*, vol. 87, 2013, p. 532.

Howard, John, *The Menzies Era: The years that shaped modern Australia*, HarperCollins, Sydney, 2014.
Huddart, Parker & Co Ptd Ltd v Moorehead (1909) 8 CLR 330.

Joske, Percy, *Sir Robert Menzies: 1894-1978 – a new, informal memoir*, Angus & Robertson, Sydney, 1978.

Martin, A W, *Robert Menzies: A Life. Volume 1, 1894-1943*, Melbourne University Press, Melbourne, 1993.

— —'Sir Robert Gordon Menzies', in *Australian Dictionary of Biography*, vol. 15, Melbourne University Press, Melbourne, 1996.

Mason, Anthony, 'Engineers: One Hundred Years Old and Still Going Strong: A Commentary', *Australian Law Journal*, vol. 94, 2020.

Melbourne Corporation v The Commonwealth (1947) 74 CLR 31.

Menzies, Robert G, *Afternoon Light*, Cassell, London, 1967.

— —*Central Power in the Australian Commonwealth*, Cassell, London, 1967,

— —'Law Council of Australia Dinner', *Australian Law Journal*, vol. 10 1936.

— —Opening Speech given at The Third Commonwealth and Empire Law Conference, Sydney, 24 August 1965.

— —'Retirement of The Chief Justice' (1964) 110 CLR v.

— —'The Challenge to Federalism', *Melbourne University Law Review*, vol. 3, 1961.

— —*The Measure of the Years*, Cassell, London, 1970.

— —*The Rule of Law During the War*, Charles F Maxwell, Melbourne, 1917.

— —Principle and Expediency, address given at dinner at The Athenaeum Club, Melbourne, 10 April 1954.

— —Speech and Speakers, George Adlington Syme Oration, Melbourne, 28 May 1963.

— —Speech given at Dinner in honour of the Rt Hon Sir Garfield Barwick, North Sydney, 26 August 1964.

— —'War Powers in the Constitution of the Commonwealth of Australia', *Columbia Law* Review, vol. 18, 1918.

National Security (Subversive Associations) Regulations 1940 (Cth).

New South Wales v The Commonwealth (2006) 229 CLR 1.

Nicholson, Brendan, 'Kirby lashes judges over terror case ruling', *The Age* (Melbourne, 3 August 2007).

R v Barger (1908) 6 CLR 41.

R v Commonwealth Court of Conciliation and Arbitration; Ex parte Daily News Pty Ltd (1919) 26 CLR 404.

Sawer, Geoffrey, *Australian Federalism in the Courts*, Melbourne University Press, Melbourne, 1967.

Spence v Queensland (2019) 268 CLR 355.

Stellios, James, *Zines's the High Court and the Constitution*, 6th edn, Federation Press, Annandale, 2015.

Strickland v Rocla Concrete Pipes Ltd (1971) 124 CLR 468.

The Federated Amalgamated Government Railway and Tramway Service Association v The New South Wales Railway Traffic Employer Association ('*Railway Servants' Case*') (1906) 4 CLR 488.

Thomas v Mowbray (2007) 233 CLR 307.

Troy v Wrigglesworth (1919) 26 CLR 305.

Twomey, Anne, 'Menzies, the Constitution and the High Court', in J Nethercote (ed), *Menzies: The Shaping of Modern Australia*, Connor Court Publishing, Brisbane, 2016.

Victoria v The Commonwealth (1926) 38 CLR 399.

Walker, Geoffrey, 'The Seven Pillars of Centralism: Engineers' Case and Federalism', *Australian Law Journal*, vol. 76, 2002.

West v Commissioner of Taxation (NSW) (1937) 56 CLR 657.