

BOOK REVIEW

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The Honourable James Thomas AM, Judicial Ethics in Australia (Lexis Nexis Butterworths, 3rd ed, 2009)
430 pp

'Judge not that ye be not judged'.²

'If judging were sinful and forbidden, how come papa to be a judge? to have that sin for a trade? to bear the name of it for a distinction?'³

The above are cited as judges are mere mortals 'but they are asked to perform a function that is truly divine'.⁴

This monograph is the third in a trilogy by the author, a retired judge of the Queensland Supreme Court and Queensland Court of Appeal.⁵ The author received the Order of Australia in 1994 primarily for the author's contribution to the 'fields of judicial ethics and music education'.⁶ The 'first edition'⁷ comprises 126 pages, the 'second edition'⁸ comprises 320 pages and the 'third edition'⁹ 430 pages (the edition this review is assessing). The third edition substantially builds on the second edition which also built on the first edition, to the extent of retaining the same basic structure for each edition by reference to the contents pages of each edition. This is a procedure allowing for easy comparison of the three editions and in that sense allows the reader to trace the path of the author's evolving thoughts very easily. Those readers looking for a whistleblower expose of the judicial world and/or an insight into the judicial thought processes when deciding cases will be very disappointed. The author has

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² Matthew 7:1.

³ R L Stevenson, *Weir of Hermiston* (Chatto and Windus, 1st ed, 1896) ch 1.

⁴ D Pannick, *Judges* (Oxford University Press, 1987) 17.

⁵ The author spent 24 years at the Bar, 9 years on the Qld Supreme Court until 1991 when the Court was reconstituted into divisions, a further 7 years on the trial division of the Court and a further period of 3-4 years on the Queensland Court of Appeal, retiring in 2002 (a judicial career spanning 1982-2002): Chief Justice P de Jersey AC, 'Chief Justice's Observations' (Speech delivered at the Valedictory Ceremony to Mark the Retirement of the Honourable J B Thomas AM, Banco Court, Supreme Court, Brisbane, 22 March 2002) 1.

⁶ Ibid.

⁷ The Honourable Mister Justice J Thomas, *Judicial Ethics in Australia* (Law Book Company, 1st ed, 1988).

⁸ The Honourable Justice J Thomas AM, *Judicial Ethics in Australia* (Law Book Company, 2nd ed, 1997).

⁹ The Honourable J Thomas AM, *Judicial Ethics in Australia* (LexisNexis Butterworths, 3rd ed, 2009).

provided an excellent and very readable historical journey through the common law world of judicial behaviour and utilises his opinion allied with numerous examples and *the Guide* (see below) to attempt to provide guidance. The third edition also provides in depth analysis of models of regulating judicial behaviour and is valuable as a resource for law reform purposes. This monograph is generally well researched and attempts to cover all ethical aspects of judicial officers' private and professional lives viewed from the highly principled perspective of the author.

The first edition was written by the author as an attempt to engage the judicial decision-making community to assist in taking up the baton of identifying and examining 'accepted standards of judicial behaviour'¹⁰ and there was an expectation by the author that 'others may build on it'.¹¹ That expectation has not been fulfilled in the manner apparently foreshadowed by the author as the third edition has emerged 21 years after the first edition and no other serving or past judicial officer in Australia has seen fit to fulfill the author's expectation of publishing specifically on judicial ethics. The Honorable John Doyle AC, the Chief Justice of South Australia, notes in the foreword to the third edition that the author's book is 'the only Australian publication of its kind'.¹² Perhaps this displays a reticence by judicial officers to contribute publicly to proclaiming what standards should apply to themselves and in the opinion of the reviewer judicial reticence to publish on ethics may be understandable on that basis alone. However, a very important change has occurred generally on the question of judicial ethics; the *Guide to Judicial Conduct* published by the Australasian Institute of Judicial Administration Incorporated for the Council of Chief Justices of Australia has been published in 2002¹³ with a second edition published in 2007 ('*the Guide*')¹⁴ and *the Guide* specifically refers to the second edition along with two Canadian sources for the basis of *the Guide*.¹⁵ Interestingly, *the Guide* specifically adopts the reasoning given by the author in the second edition for *not* referring to *the Guide* as mandated rules or a code.¹⁶ *The Guide* however, goes further to specifically reject utilising the terms 'unethical' or 'judicial ethics'¹⁷ without noting the irony of on the one hand relying upon the author's book and on the other hand specifically rejecting the title of the author's book. In fact, with the utmost respect to the drafters of *the Guide* the final sentence in the chapter quoted by *the Guide* in the second edition reads 'there is no doubt that judicial ethics exist and that we are all bound by them'.¹⁸ *The author has then repeated that sentence verbatim in the third edition after the publication of the Guide in 2002 and republication of the Guide in 2007;*¹⁹ given the author has generally rearranged and slightly amended text within the third edition from the second when including the same or substantially same material this does not seem to be an accident. With respect, the author clearly believes there are identifiable judicial ethics and 'all the requirements of an ethical system as such are present in relation to the judiciary. Indeed, the ethical standards required from judges call for perhaps the highest and most rigorous standards and disciplines of any profession in the community'.²⁰ It is doubtful that any person would sensibly question the foregoing proposition and the author plainly and clearly is a person of strong views on

¹⁰ Thomas, *Judicial Ethics in Australia* (1988), above n 7, ix.

¹¹ *Ibid* x.

¹² Thomas, *Judicial Ethics in Australia* (2009), above n 9, vi.

¹³ Australasian Institute of Judicial Administration (AIJA) *Guide to Judicial Conduct* (AIJA, 2002).

¹⁴ AIJA, *Guide to Judicial Conduct* (AIJA, 2nd ed, 2007).

¹⁵ *Ibid* vii.

¹⁶ *Ibid* 2.

¹⁷ *Ibid*.

¹⁸ Thomas, *Judicial Ethics in Australia* (1997), above n 8, 11.

¹⁹ Thomas, *Judicial Ethics in Australia* (2009), above n 9, 11.

²⁰ *Ibid* 10.

acceptable behaviour expected from judicial appointees. With respect the author is correct as far as rules *can* be ethical and rules *can* be developed from ethical positions.²¹ The author refers to ‘ethics’ as ‘a collection of rules or standards of conduct expected of a particular professional group’.²² However, *the Guide* is clearly *not* a collection of rules. The author and *the Guide* are, however, both agreed that generally judicial officers should not be subject to prescriptive codes of behaviour. The third edition substantially supplements the second edition by the inclusion where appropriate of reference to *the Guide*.²³

Despite this appearance of congruent thought the strong views of the author are at times seemingly contrary to the more general statements of principle in *the Guide*; the resulting dichotomy left the reviewer at times confused as to whether *the Guide* should be read by reference to the third edition in order to ‘flesh out’ and illuminate exactly the ethical expectations of judicial officers. This approach is diametrically opposed to the United States in the case of ‘the Federal Judiciary of the United States (apart from the Supreme Court)’ as such judicial officers are subject to a Code of Conduct (‘*the Code*’).²⁴ With the rules defined as ‘Canons’.²⁵ The United States system at the federal level is subject to ‘virtually self-regulating management ... arranged through federal judicial councils’.²⁶ However, despite the author noting *the Code* requirements are expressed as ‘shall’ rather than ‘must’²⁷ a finding of a judge’s conduct contrary to *the Code* facilitates the disciplinary process.²⁸ The author acknowledges that the United States *Code* is more relevant to Australian requirements than the United States state systems²⁹ presenting ‘no great constitutional difficulty or undue expense’ for Australia to adopt a similar system³⁰ and the author is quite scathing of the United States state systems. Of particular interest and as a source of great humour to the reviewer are the numerous examples given of the misadventures of the United States judiciary sprinkled throughout. The author provides good comparisons with the United States system and for example points out that greater than 87% of the non-federal judges in the United States are subject to some form of periodic election³¹ and such judges not uncommonly must raise greater than one million dollars to fund their election campaign.³² The author clearly compares the difficulty of tenured judges (for example the judges at federal level in the United States and Australian judges) being subject to and bound by strict ethical duties while expecting similar ethical duties of non tenured judges (such as the non-federal United States judges, Australian part-time judges and Australian ‘quasi – judiciary’ or tribunal members). The reviewer respectfully suggests that substitution of a Code for *the Guide* and adoption of the United States federal system as discussed above would allow the judiciary to maintain control of the judicial system of discipline and most importantly perhaps allow a greater ability to assess conduct of judges by reference to a Code. The judges could assess behaviour objectively and the public and others could also have an objective reference for judicial behaviour. The author identifies two main areas for law reform

²¹ M Lauchs, ‘Book Review: Inside Lawyer’s Ethics’ (2007) 7(2) *Queensland University of Technology Law and Justice Journal* 499, 501.

²² Thomas, *Judicial Ethics in Australia* (2009), above n 9, 9.

²³ See for example *ibid* 195, 201, 209, ch 15.

²⁴ *Code of Conduct for United States Judges* as Appendix 3 to *ibid* 335.

²⁵ *Ibid*.

²⁶ *Ibid* 305.

²⁷ *Ibid*.

²⁸ *Ibid*.

²⁹ *Ibid*.

³⁰ *Ibid*.

³¹ *Ibid* 306.

³² *Ibid*.

discussion and these are the manner in which minor misconduct should be dealt with and whether serious misconduct should be dealt with by a permanent body or on an *ad hoc* basis. The author sets out his proposals for law reform at pages 329-30 of the third edition and believes that ‘only conduct serious enough to warrant removal’ warrants disciplinary proceedings against judicial officers.³³ It is important to emphasise *the Guide is not a Code* that judicial officers must adhere to and the author throughout all three editions emphasises ‘peer group pressure’ as the method of restraining judges to accepted standards.³⁴ *The Guide* also primarily adopts this approach.³⁵ With the utmost respect to the author, this was the primary criticism of the first edition.³⁶ The author has repeated the author’s faith that generally ‘the job makes the person’ and at least in respect of the various Supreme Courts ‘it is usual that they rise to the trust and expectations placed in them’.³⁷ The author as a long term incumbent of the Queensland Supreme Court and Queensland Court of Appeal should, in the opinion of the reviewer be able and encouraged to make such observations regarding the Queensland Supreme Court. The difficulty for the reviewer arises when assessing the faith of the author in the quality of the appointees to courts other than the Supreme Courts (and by implication higher Courts in the Australian judicial hierarchy) by way of personal experience. The author has helpfully included in tabulated form the constituency of the ‘traditional judiciary’ of all Australian jurisdictions.³⁸ The author notes that as at March 2008 there were 256 higher court judges (High Court, Federal Court, Family Court, Federal Magistrates Court and Supreme Courts and Courts of Appeal), 217 intermediate court judges (District Court, Land and Environment Court and County Courts) and 510 magistrates in Australian jurisdictions (a total of 973 in the traditional judiciary); additionally within the ‘quasi-judiciary’ there were also over 6500 members of tribunals, with a full time equivalent of 1500 and a ‘large number of arbitrators, alternative dispute resolution personnel, and persons who act in private law tribunals’.³⁹ Accordingly, the proportion of ‘higher court judges’ in comparison to both the ‘traditional judiciary’ and the ‘quasi-judiciary’ is a small minority.

To be fair, the author discusses in great depth the various judicial disciplinary regimes operating in Australian jurisdictions and generally utilises statistics wherever required as a basis for the author’s conclusions throughout the third edition. This mixing of personal opinion along with researched conclusions is an attraction for the reviewer as the third edition moves between a ‘scholarly’ piece of research and a personal opinion piece resulting in a very interesting book that is distinct from a purely ‘scholarly’ piece. Without doubting for one moment the genuine nature of the author’s beliefs, the third edition does display a perceived deterioration in the opinion of the author as to judicial standards of behaviour in two particular areas; the first area deserves verbatim quotation:

When the last edition of the work appeared in 1997, breaches of the criminal law by judges were very hard to find in England and Australia. Sadly, the contents of the three preceding pages show that this is no longer the case. Why this is so I cannot tell. *What was once unthinkable is now not all that uncommon* (emphasis added).⁴⁰

³³ Ibid 329 (point ‘4’).

³⁴ For example see *ibid* 247.

³⁵ For example AIIA, *Guide to Judicial Conduct* (2007), above n 11, 5.

³⁶ G Winterton, ‘Review Article: Judicial Ethics in Australia’ (1988) 11 *University of New South Wales Law Journal* 220, 226-7.

³⁷ Thomas, *Judicial Ethics in Australia* (2009), above n 9, 247.

³⁸ *Ibid* 235: table 13.1.

³⁹ *Ibid* 237-9.

⁴⁰ *Ibid* 177.

In the respectful opinion of the reviewer this fearless expose and comment by the author is in the best tradition of the independence of the judiciary in our Westminster system both from other judges and as a component of the separation of powers doctrine. The Honourable Mr Justice Pincus in the foreword to the first edition states the author has expressed views with 'fearless earnestness' and cautions that 'few judges will read the work without wincing now and then';⁴¹ the reviewer detects no slackening in fearlessness within the third edition.

The second general area of concern to the author is contained within chapter 15 entitled 'Restraints After Retirement' and the third edition has incorporated *the Guide* and the author has fearlessly observed what seems a significant change in judicial attitude, whether or not that change equates to a change in judicial ethics is not a connection the reviewer is willing to make. This area also requires a verbatim quotation:

I would personally discourage anyone contemplating a judicial career from a 'way station' approach. But in today's era of economic rationalism, judges increasingly take the attitude, 'I will take an appointment and will retire whenever it seems economically expedient to do so'. In short, the tradition of judicial service as a one-way trip to a pinnacle is currently on the wane.⁴²

With respect, and without doubting the genuine opinion held by the author, perhaps researched figures to support the author's contention of earlier retirement of judges would have supported more fully the author's comments.

The reviewer notes, incidentally, the proportion of women as a percentage of full time judicial officers in Australia has risen from 10 % in the second edition⁴³ to more than 30% in the third edition.⁴⁴ The increasing inclusiveness of women within the judiciary is not commented on by the author, however the significant increase of participation by women will possibly be a factor to be assessed into the future regarding judicial ethics in the opinion of the reviewer. The fact is that more women than ever before are now judicial officers and research and comment may be warranted in that area.

With the greatest of respect to the author, the reviewer suggests that one aspect of judicial decision making has been overlooked and may form the basis for expansion of future edition(s) by the author or alternatively by other judicial officers. The author's three editions to date and *the Guide* do not touch upon the metaphysical/theoretical/subconscious bases of judicial decision making. However, there is an increasing awareness amongst the judiciary of the need for education so as to guard against any subconscious or conscious bias.⁴⁵ Judicial officers by necessity, in my respectful opinion, possess intellectual capacity that commonly is associated with intellectual curiosity. That curiosity could be utilised by a retired or serving judicial officer to either refute or find support for the notion that judicial officers are subject to wider considerations than are found in the author's texts and *the Guide*. The reviewer suggests one area as an example; *American Realism*, wherein the well known United States judicial officer Oliver Wendell Holmes famously defined the search for prediction of court outcomes as 'the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law'.⁴⁶ Holmes was of the belief that political,⁴⁷ economic or

⁴¹ Thomas, *Judicial Ethics in Australia* (1988), above n 7, v.

⁴² Thomas, *Judicial Ethics in Australia* (2009), above n 9, 272.

⁴³ Thomas, *Judicial Ethics in Australia* (1997), above n 8, 191.

⁴⁴ Thomas, *Judicial Ethics in Australia* (2009), above n 9, 235.

⁴⁵ For example see Queensland Supreme Court, *Equal Treatment Bench Book* (Supreme Court of Queensland, 2006) note 11, [4.1].

⁴⁶ J Gervase Riddall, *Jurisprudence* (Butterworths, 2nd ed, 1999) 223.

psychological inclinations are the bases for *subconscious* judicial decision making in many cases.⁴⁸ What is particularly interesting is that literature exists supporting⁴⁹ and debunking⁵⁰ links between political philosophy and judging decisions whether conscious or subconscious.

In conclusion, the third edition (and first and second editions) should be compulsory reading for all prospective and existing judicial appointees in conjunction with *the Guide*. The third edition is also a useful resource for practitioners and legal scholars and is also written with at least an eye to educating the layperson as to the onerous and unrelenting nature of judicial duties.

⁴⁷ For a contemporary examination of claimed direct correlation between United States Supreme Court appointee's decisions and political philosophy see L Epstein and J A Segal, *Advice and Consent: The Politics of Judicial Appointments* (Oxford University Press, 2005) 121, 128. The civil law countries are also very concerned as to 'political' decisions by judges see P Feuillee – Kendall and H Trouille (eds), *Justice on Trial: The French 'Juge' in Question* (Peter Lang, 2004).

⁴⁸ Riddall, above n 46, 223.

⁴⁹ For example see S U Philips, *Ideology in the Language of Judges: How Judges Practice Law, Politics and Courtroom Control* (Oxford University Press, 1998) 87; J Crawford Greenburg, *Supreme Conflict: The Inside Story of the Struggle for Control of the US Supreme Court* (Penguin Press, 2007).

⁵⁰ For example see P McCormick and I Greene, *Judges and Judging: Inside the Canadian Judicial System* (James Lorimer & Co, 1990) 241-4.