

Judicial Ethics in Australia

by

the Honourable Mr Justice Thomas

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This slim but admirable book was written by Mr Justice Thomas of the Supreme Court of Queensland partly because of the confusion surrounding the distressing case of the late Mr Justice Murphy. As he says, there was no apparent need for such a study in the comfortable days which lasted until then. He believes that the confusion was caused by a failure to understand and identify both the ethical issues and the correct procedure when a judge is accused of misconduct. He has set out to describe and analyse the ethical rules applying to judges, and to suggest remedies, particularly if a breach amounts to professional misconduct.

This book is not just of theoretical interest. As this review is written, the Queensland Parliament has passed legislation to establish a Commission of Inquiry into the conduct of two judges. We may safely suppose that the opinions in the book have influenced those responsible for the legislation, and that they will be considered by the three judges to be appointed as the Commission of Inquiry. After decades of seclusion, and few controversies, the conduct of judges in Australia is now much more under scrutiny. Many regret that. But it has happened, and this book will help lawyers, politicians, and the public know how a judge should behave, and what should be done if allegations of misbehaviour are made.

The author discusses judicial behaviour on the bench, in private life, and after retirement. He gives practical examples of acceptable and proscribed behaviour — not surprisingly, many are from the U.S.A., as English and Australian judges, so far, have usually kept to the straight and narrow paths of rectitude. It is certain that none have misbehaved in court as did Judge Geiler of California. He threatened the (male) defence counsel with an electric vibrator equipped with an especially powerful battery, if he did not shorten a cross-examination. Counsel did that, and the judge was removed for misconduct.

Practitioners learn to live with the prejudices and preconceptions of judges. But the author goes further, and suggests that “issue bias” may lead to public disquiet, and so amount to misconduct. Perhaps we will see more frequent objections to a judge hearing a particular sort of case, on this ground? Indeed, the outspoken Mr Justice Einfeld of the Human Rights Commission is presently under attack for his views in a sexual harrassment case, and it has been suggested by some that he should not hear further cases of that sort. If objection is not made before a case starts, it might be too late to complain — how can such bias be proved in a particular case? Few judges these days are so intemperate as to publicly declare support or disdain, say, for a controversial political or racial point of view. This is a difficult area for practitioners, and some may be encouraged by this study to object to a judge hearing a case. This is more likely when the judge has entered some public controversy about an issue. All the more reason, the author would say, for judges to remain aloof from such controversies.

Curiously, the author does not mention laziness and delay as potential misconduct. All practitioners know that there is the occasional judge whose pathological fear of working causes real injustice to those whose cases should be heard. There is also the judge who delays for a year or so before giving a decision — some mechanism is needed to stop that, as it often causes injustice.

The author has decided not to discuss the appointment of judges, that being outside the ambit of the work. Many will be disappointed by that decision. The lack of suitable selection systems for judges is a contemporary problem in Australia — the English system could serve as a model, with wide consultation and careful investigation of candidates. As the author says, “Confidence in the honesty of the Government in making judicial selections is a necessary pre-requisite not only to the maintenance of ethical standards, but also to the maintenance of public respect for the judiciary.” Experience has shown for generations that such confidence is occasionally abused, while it is unlikely that a judge approved by the profession will misbehave in office. Perhaps we shall see this topic dealt with in the next edition?

The publication of this work is well-timed. Our generation expects a great deal from judges, and with very few exceptions, they give a great deal in return. It reminds us that this is so, in the Anglo-Australian tradition. It also reminds us, and tells a wider audience who should know these things that a judge is expected to obey a rigorous set of ethical standards. Such a reminder is occasionally necessary, and never more so than in Australia today. It will serve that purpose very well.

The book has been handsomely produced by the Law Book Co. — it is printed on good quality paper, and is attractively bound. It has an interesting forward by Mr Justice Pincus of the Federal Court, and a valuable bibliography. It would be a welcome addition to the shelves of any students of Professional Conduct (it will surely be a prescribed text for future examinations) and to the library of those aspiring to judicial office.

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