BOOK REVIEW

JUDICIAL ETHICS IN AUSTRALIA (3RD ED) BY THE HONOURABLE JAMES THOMAS AM

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If one were to judge a book by its cover, a black bound tome of 400 plus pages entitled *Judicial Ethics in Australia* would not be off to a promising start. Sombre appearances can sometimes deceive: Thomas's book, now in its third edition, makes for an informative and, at times, entertaining read.

This subject matter of *Judicial Ethics in Australia* is important. Its primary audience is likely to consist of presiding and retired judicial officers. The book's significance, however, extends beyond the sage advice it gives to judges. Judges exercise enormous power over other members of society and they are not democratically elected. Thomas, a former judge of the Queensland Court of Appeal, mounts a compelling case that judicial power must be exercised ethically if it is to be legitimate. As Thomas reminds us, judges, not courtrooms, constitute courts. If the rule of law is to be maintained, there must be an independent and impartial judiciary that adheres to very high standards of behaviour both in and outside of court. Unethical behaviour by judges is corrosive of the rule of law and undermines public confidence in the judiciary.

Judicial ethics also have constitutional implications. Over the last two decades, numerous constitutional cases have come before the High Court in which it has been argued that the separation of powers has been breached. In some cases, litigants maintain that a power which is incapable of being

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exercised judicially has been impermissibly conferred on a judge; in other cases, litigants contend that judicial power has been conferred on a person who is not a judge. The result is a large, complex and unsettled body of case law which sheds little light on the demarcation between judicial and non-judicial power. Much of this complexity can be distilled into a central question: what is a judge? In *Judicial Ethics in Australia*, Thomas demonstrates comprehensively that one of the essential qualities of a judge is an adherence to a coherent and justifiable body of ethical principles.

Judges, of course, occupy a unique constitutional position. Their position is secured by the fixing of judicial salaries and tenure, which protects a judge from removal except where she or he has engaged in serious misconduct. As judges are not subject, in all but the most extreme cases, to external discipline (short of what Thomas refers to as the 'death penalty of removal'[1]), it is extremely important that they are mindful of their ethical obligations. As put by former High Court Chief Justice Sir Gerard Brennan in 1997, in his foreword to the second edition of *Judicial Ethics in Australia*, judicial standards are enforced immediately by conscience.

In Chapter 1 ('Origins'), Thomas argues that the drawn-out saga of the Murphy affair in Australia in the 1980s demonstrated the need for clarity about what is acceptable and unacceptable judicial behaviour. The confusion about whether the late Lionel Murphy's conduct justified his removal from his position as a Justice of the High Court of Australia, and also about the process by which that judgment could be made, prompted Thomas to write the first edition of *Judicial Ethics in Australia* in 1988.

In Chapter 2 ('The Term "Judicial Ethics"'), Thomas identifies three primary imperatives underlying our system of judicial ethics. They are (i) independence, (ii) impartiality, and (iii) service to humanity. He then goes on to describe judicial good behaviour (sometimes labelled judicial propriety) as a 'practical necessity without which the system would fail because the necessary public trust in the law would not exist'.[2]

In Chapter 3 ('General Tests for Determining Whether Conduct is Unethical') Thomas sets out a general test for establishing professional unethical conduct. He describes the shift from the classic, common law, peer-based test in *Allinson v General Council of Medical Education & Registration*,[3] to a more

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[1] James Thomas, *Judicial Ethics in Australia* (3rd ed, 2009) 318.

[2] Thomas, above n 1, 11.

[3] [1894] 1 QB 750. In *Allison* Lord Escher MR stated that professional misconduct is established 'if it is shown that a medical man in the pursuit of his profession has done something with regard to it which would reasonably be regarded as disgraceful or

contemporary, consumer-oriented, statutory test which is based on the standards of competence and diligence that a member of the Australian public is entitled to expect of a reasonably competent Australian legal practitioner.[4] The importance of judges meeting community expectations of satisfactory judicial behaviour pervades the rest of *Judicial Ethics in Australia*. Thomas also convincingly rebuts the erroneous proposition propounded by some with respect to the Murphy affair, that professional misconduct for a judge can only be constituted by misconduct in the performance of the duties of office, or by conviction for a (serious) criminal offence. As we might expect, Thomas casts the net of judicial misbehaviour much wider.

Although Thomas would be the first to admit that the distinction between judicial misconduct in office and 'non-official misconduct' is a blurred one in many instances, the next nine chapters of *Judicial Ethics in Australia* are organised around that distinction. Chapters 4 ('Misconduct in Office') and 5 ('Bias and Prejudice') detail what misconduct in office is for a judge. Chapters 6 ('Non-Official Misconduct'), 7 ('Community and Media Relations'), 8 ('Community Organisations and Social Conduct'), 9 ('Financial Dealings'), 10 ('Immorality and Crime'), 11 ('Politics, Commissions, and Dealing with Government Officials') and 12 ('Politics, Commissions, and Dealing with Government Officials') all deal with non-official misconduct.

I would expect that Chapters 4 through to 12 of *Judicial Ethics in Australia* will provide an invaluable practical resource for any judicial officer. Thomas's treatment of the material is well researched and comprehensive. He articulates the relevant general principles, and provides numerous detailed examples of where judges have gone wrong. While the chapters are dense reading at times, some of these examples proffered by Thomas are hilarious. In the pages of *Judicial Ethics in Australia* one encounters the 'mooning' magistrate,[5] the battery-operated dildo of Judge Geiler of the Los Angeles Municipal Court,[6] the *digitus impudicus* of Californian Judge Spruance,[7] and

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dishonourable by his professional brethren of good repute and competency': at 763. The test was later applied to lawyers: see *Re a Solicitor; Ex parte The Law Society* [1912] 1 KB 302 referred to in Thomas, above n 1, 13, n 2.

[4] See, for example, the definition of 'unsatisfactory professional conduct' in s 4.4.2 of the *Legal Profession Act 2004* (Vic).

[5] Thomas above n 1, 167. According to Thomas, the Lord Chancellor, who was responsible for disciplining magistrates in the United Kingdom, 'did not like what he saw'. The magistrate was dismissed from office.

[6] Judge Geiler's battery-operated dildo was used to threaten a prolix cross examiner in court:

> Defender: One or two questions, Your Honour, then I won't take any more of your time on this case.
>
> His Honour: Get the machine out.
>
> The Clerk: The battery?

the noise effects machine of Floridian Judge Sheldon Shapiro.[8] If there were a prize for judicial obstinacy, perhaps it should be awarded to the judge from North Carolina who failed to disqualify himself on the grounds of bias in a case where he was the defendant(!).[9] Well may those of us in Australia say, 'Only in America!'

Chapter 13 ('To Whom the Standards Apply') contains some interesting statistics about judges in Australia. The overwhelming majority of the 1000 or so judicial officers in Australia are magistrates or inferior court judges. One would suspect, based purely on those numbers, that judicial misconduct is most likely to occur in the lower courts. Thomas also argues that what he terms the 'quasi-judiciary' – that is, the plethora of tribunal members in the various Australian jurisdictions – needs to comply with ethical standards, and that these ethical standards, although not identical to the standards that are imposed upon judges, must still be founded on judicial ethics. Given that there are approximately 6500 persons now working as members of tribunals in Australia,[10] there is clearly a great deal of important work that remains to be done in developing a coherent body of quasi-judicial ethical standards.

Chapter 14 ('Enforcement') contains a detailed account of both the formal and informal systems of enforcement of judicial standards that operate in the various Australian jurisdictions. Particular attention is paid to New South Wales which, partly as a result of the Murphy saga and the corruption conviction of the former Chief Magistrate of New South Wales, Murray Farquhar, in 1985, has had both a Judicial Commission and an Independent Commission Against Corruption since the late 1980s. While Thomas is not an outright critic of the New South Wales judicial commission system, he is no unabashed fan. As he details later in his book, Thomas believes that a standing judicial commission, which is empowered to deal with minor complaints against judicial officers, has the potential to erode judicial independence through excessive executive interference.

His Honour: The battery.

Defender: I have no further questions Your Honour.

See Thomas, above n 1, 54-5. Judge Geiler's threatened use of the dildo, along with numerous other indiscretions, led to his dismissal from office.

[7] In addition to showing a tardy litigant the *digitus impudicus* (literally 'impudent finger'), Judge Spruance 'emitted a "raspberry" to indicate disbelief of a witness testifying on his own behalf': see Thomas above n 1, 29.

[8] Thomas above n 1, 29. Judge Shapiro's machine made toilet flushing sounds while defence counsel in a rape trial presented his argument.

[9] See *Re Martin* 275 SE 2d 412 (NC, 1981) referred to in Thomas, above n 1, 77.

[10] According to Thomas: see Thomas, above n 1, 238.

Chapter 15 ('Restraints after Retirement') is a useful addition to the book. We are living longer, and are being urged to work into later life. Yet all jurisdictions in Australia have mandatory judicial retirement ages, and many judges are forced to retire with many years left of potentially productive working life. In addition, there appears to be an increasing trend for judicial officers to leave the bench well before the mandatory retirement age, and to go back into an active legal practice. Post-judicial retirement activity can give rise to ethical conundrums, and Thomas attempts to address some of them in this chapter. In passing, it should be noted that Thomas displays a distinct preference for judges who are prepared to accept that judicial appointment is the culmination of a legal career, rather than a mere stepping-stone to something else.

Chapter 16 ('An Historical Perspective') is probably the most interesting chapter in *Judicial Ethics in Australia* for the lay reader. The chapter contains a brief but sweeping historical survey of judicial ethics and judicial independence dating back to Moses, and then proceeding through the Tudor and Stuart periods to the twentieth century. It also has a section which focuses specifically on developments in the United States of America. This historical survey is interesting because it reveals that current expectations of judicial behaviour are the culmination of many centuries of development, and that the struggle for judicial independence did not begin or end with the *Act of Settlement* in 1701. Judicial behaviour that was acceptable in the 18th or 19th centuries, or even in the early 20th century, would not be acceptable today.

In the final Chapter 17 ('The Future'), Thomas studies a number of systems for providing an effective means of dealing with complaints against judicial officers. His study takes in the experiences of the United States, the United Kingdom and Canada, as well as a number of Australian proposals. Thomas's conclusion is that the relative infrequency of instances of judicial misconduct in Australia means that the establishment of a system which disciplines judges for minor misconduct, or the creation of permanent judicial commissions, is not justified. Where an allegation or complaint is made which could, if proven, justify a judge's removal, Thomas argues for a system of standing or dormant panels. These panels would consist of designated serving or retired judicial officers who could be summoned at short notice to form a three person commission of inquiry with broad investigatory powers. After investigation, the commission of inquiry would then have to make a recommendation to the parliament as to whether or not the allegation is made out, and as to whether or not the judge should be removed. Thomas maintains that, while a commission of inquiry's recommendation for removal should be a prerequisite to any parliamentary decision, ultimately the power of removal should remain with the legislature. Readers may note that Thomas's ideal

system is very similar to the system that is now found in the Victorian Constitution.[11]

Judicial Ethics in Australia contains a very detailed and interesting dissection of the Murphy affair, as well as the controversy that engulfed Justice Vasta of the Queensland Supreme Court in the wake of the Fitzgerald Inquiry in the 1980s. It also contains some fascinating material on the behind-the-scenes political machinations of Sir John Latham, Hebert Vere Evatt and Sir Edmund Herring (amongst others), all whilst occupying high judicial office. Disappointingly, there is no discussion of what many would regard as the most spectacular Australian example of judicial misconduct at the highest level, that of the Chief Justice of the High Court, Sir Garfield Barwick, meeting privately with Sir John Kerr, the Governor-General, in the days before the Whitlam dismissal in 1975.

Overwhelmingly this book is very well researched and very informative. It is a sound work of scholarship. If there is one complaint to be made of *Judicial Ethics in Australia*, it is of its generally conservative tone. Thomas appears to be of the old school (not that there is anything wrong with that), but, at times, his treatment of such issues as gender bias, worthy though it is, may be regarded by some as misconceived. The bogey of political correctness looms large. For example, for Thomas, the trial judge who must sum up the evidence for a jury in a contemporary rape trial is negotiating a minefield:

> [I]t is necessary for judges to articulate the strengths or weakness of the particular case, and they would be false to their oath if, through fear of adverse publicity, they fail to put both sides in any arguable case. *Judges must not bend their attitudes so far towards female viewpoints that they end up making or encouraging biased judgments against men. … [J]udges should not lean too far backwards or be timid in order to demonstrate political correctness or sexual enlightenment*. If they lean too far *they may lose their sense of reality* and fail to dispense justice without fear or favour.[12]

My most serious complaint about the conservative tone of *Judicial Ethics in Australia* concerns its treatment of another favourite bogeyman, judicial activism. At the outset, some might say that Thomas's inclusion of judicial activism as a form of unethical judicial behaviour is a bit rich. Moreover, Thomas makes a number of sweeping claims about judicial activism that do not bear up. The 'excesses of that period'[13] (referring primarily to the High

[11] See Part IIIAA of the *Constitution Act 1975* (Vic) as inserted in 2005.

[12] Thomas, above n 1, 96 (emphasis added).

[13] Thomas, above n 1, 38.

Court from 1987 to 1995 under Chief Justice Sir Anthony Mason) are illustrated, for example, by Toohey and Deane JJ's dissent in *Leeth v Commonwealth*.[14] According to Thomas, Toohey and Deane JJ in *Leeth* 'framed an implied right to equality before the law which would have given judges the power to declare legislation invalid on the footing that a judge held its effect to be unreasonable or disproportionate to any legitimate end'.[15] Now whatever one might say about the High Court's flirtation with the implied right to legal equality, it was certainly never intended to operate as a right which would warrant a judge applying a *general* test of proportionality to *all* laws to determine their constitutional validity. At its highest, the implied right promoted substantive legal equality and was only engaged when a law singled out a person or discernable class of persons for discriminatory treatment. Thomas's broadside attack on judicial activism leaves little room for legitimate judicial law making, and does not acknowledge the role that a judge's political and policy views play in the development of the law. While it can be acknowledged that inferior court judges only have a limited role in judicial law making, and that they must largely buckle down under the discipline of precedent, Thomas's strictures have far less relevance to superior and appellate court judges. By contrast, Thomas's several page digression on 'Issue Bias' in Chapter 5 displays a nuanced understanding of the way judges' values influence their judicial decision making.

The role of judges is changing. Judicial ethics are also changing. In Victoria, we have recently witnessed a public spat between the Victorian Attorney-General, Robert Hulls, and the Chief Justice of the Supreme Court of Victoria, Marilyn Warren, about the extent to which judges should engage the public in explaining and justifying the work that they do. With the passage of statutory human rights instruments such as the *Victorian Charter of Human Rights and Responsibilities*, it is likely that judges will be increasingly involved in contentious and policy-laden decision making. It is a common criterion in these statutory instruments that limitations on human rights are lawful if they can be 'demonstrably justified in a free and democratic society'.[16] For judges to be able to make that sort of assessment, they must remain engaged with the society in which they live. Although Thomas is characteristically cautious about what judges should or should not do, he does not advocate that judges should live like monks, or work like saints. Rather, he provides an invaluable resource for judges to guide them ethically in their work in court, and in the lives they lead in the community.

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[14] (1992) 174 CLR 455.

[15] Thomas, above n 1, 38.

[16] See, for example, *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).