

JUDICIAL ETHICS IN AUSTRALIA

THIRD EDITION

THOMAS



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Judicial Ethics in Australia

Third edition

The Hon James Thomas AM
Formerly a judge of the
Court of Appeal, Queensland

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Foreword

Judicial Ethics in Australia deals with a subject matter that is significant for Australia's judiciary, and for the rule of law. The publication of this third edition is welcome.

The values of independence and impartiality are central to our concept of the judicial office, and to the performance of judicial duties. These values are also central to our idea of the rule of law because the rule of law requires that there be an independent and impartial judiciary. Public confidence in the judiciary is founded on the judiciary's adherence to these values. These values (independence and impartiality) have implications for the manner in which judicial officers (judges and magistrates) discharge their duties, and for the manner in which they lead their lives. It follows that the acceptance of judicial office involves an obligation to maintain a standard of conduct that is consistent with the values that attach to judicial office, values the observance of which will maintain public confidence in the judiciary.

Judicial officers should act in a manner consistent with the values that attach to judicial office. How can the public have confidence in a judicial officer who behaves in a manner inconsistent with the values that attach to judicial office? Moreover, judicial officers should bear in mind that in the public eye a judicial officer is a judicial officer 24 hours a day. The public does not acknowledge a clear divide between conduct in the exercise of the judicial office and private conduct, although it may acknowledge that somewhat different considerations apply to each. This is why it is essential that a judicial officer have a sound understanding of the standard of conduct expected from a judicial officer.

The standards that judicial officers must observe are drawn from various sources — from the law itself, from an understanding of the implications of the values that attach to judicial office and from the collective wisdom and experience of judges and magistrates. In some situations it is clear what is required. In others it is not. A range of responses may be appropriate. Careful reflection is necessary in some situations. Sources of reliable guidance are invaluable when reflection is needed. This book contains material that provides reliable guidance.

Judicial officers will find much of value (and of interest) in this book. As far as I am aware, it is the only Australian publication of its kind. It provides helpful examples, helpful commentary and guidance. The book is more than a source of guidance for judicial officers. It exposes the basis of the principles regulating the conduct of judicial officers, which have developed over time. It encourages reflection on them. As well,

it reminds the reader that the standard of behaviour required of judicial officers can change as society changes. The underlying principles may be immutable, but their application in the circumstances of contemporary society may change.

There is another significant aspect of this book. It is available to the Australian public as a demonstration of the values and standards to which the Australian judiciary aspire. It is a source to which the public can refer when they want to know how judicial officers regulate their conduct, and by reference to what principles. In this respect it complements the *Guide to Judicial Conduct* published by the Australasian Institute of Judicial Administration Incorporated for the Council of Chief Justices of Australia.

I commend the Hon J B Thomas AM QC for the resource that he has provided to Australia's judiciary through this book, and for the reassurance and information that he has provided to the Australian public.

The Hon John Doyle AC
Chief Justice of South Australia
Supreme Court of South Australia, June 2008

Foreword to the Second Edition

Judging is a profession. Like any other profession, service of the community is the chief purpose of the profession but the service is of a special kind. Judging serves the community in two ways: by doing justice according to law in each case and by maintaining the rule of law in the community at large. Judging is a complex function, calling for legal competence, experience of the human condition, a capacity to hear, a humility to learn and a firmness of mind to reach and to adhere to a just conclusion. These are demanding qualifications and they can be satisfied only by judges who adhere to high standards of professional practice. Some standards can be prescribed by law, but the spirit of, and the quality of the service rendered by a profession depends far more on its observance of ethical standards. These are far more rigorous than legal standards. They are learnt not by precept but by the example and influence of respected peers. Judicial standards are acquired, so to speak, by professional osmosis. They are enforced immediately by conscience.

This is why Justice Thomas has produced such a valuable book on ‘judicial ethics’. His book is informed by practical experience of problems that might be encountered in judicial life but it is more than an elegant recital of personally preferred solutions. It is a work of scholarship, displaying a familiarity with legal precedents and the relevant writings of jurists past and present. Ethical practice that is clear is clearly stated; where it is not clear, the relevant frames of reference are sketched in.

High standards of judicial conduct are rightly expected by the community, for public confidence in the courts and judges is essential to their authority and therefore essential to the rule of law. Public confidence is readily reposed in the courts and judges when the judges are and are seen to be competent, impartial and above suspicion. A newly-appointed judge, anxious to maintain the standards and traditions of the bench but unfamiliar with the means by which that public confidence must be maintained, will find much helpful advice in Justice Thomas’ work. To read this book is not to be a student at the foot of a master but rather to have a fireside chat with a wise, well-read and experienced colleague who is willing to share his knowledge and experience and to give practical advice on what is expected and how to fulfil the expectation. Whether he is recounting the story of the judge who presided over his own prosecution for a driving offence, or reciting the measures taken by

the Visigoths to remedy judicial misconduct, or discussing the emerging doctrine of incompatibility between judicial and non-judicial functions, the author is seeking to inform, not to pontificate. But advice is not lacking on a range of practical problems. What is to be done when a summing up is wrongly transcribed? Is a judge personally entitled to the benefit of 'Frequent Flyer' points? To what organisations can a judge properly belong?

Extensive research, the reading of texts both legally sacred and profane, the insights of others interested in judicial ethics and a lifetime of critical observation from either side of the bar table have equipped Justice Thomas to write this book. Scholarly discipline, logical analysis, a felicitous style and a touch of humour make it a good read. More — an imperative read for those who wish to understand the aspirations and habits that are shared by judges and that sustain them in their arduous and lonely vocation.

Gerard Brennan
Chief Justice's Chambers
High Court of Australia, April 1997

Preface

Judicial ethics is a practical subject. What does a judge do to solve an ethical problem? The judge's peer group may help but will not always provide the best answer. Since the previous edition of this work, a guide to judicial conduct has been approved by the Chief Justices and published. It provides helpful steerage but is necessarily general and expressly abstains from laying down what judges should or should not do.

This present study tries to supply detailed discussion and examples to assist a reasoned solution to many types of ethical difficulty. Problems of judicial conduct are best illustrated by actual rather than theoretical examples of behaviour. Therefore, as many Australian examples as possible are included, but these mercifully are relatively few when compared with the wealth of overseas case histories available from North America. In dealing with present-day problems there is a risk of hurting the feelings of those who may have unwittingly been involved in matters that suddenly turned into public issues. The Australian experiences have therefore, in general, been treated by quoting the sources that purport to record the incident without further naming the judicial officers involved. That practice, of course, is pointless in matters which have attracted wide publicity.

The previous edition (1997) attempted to digest all relevant writings on the subject to that time. The decade since then has seen a veritable explosion of writing about judicial conduct, and reference to such writings is here confined to the more significant contributions. Although references from the 1980s and 1990s may now be of diminishing force, many have been retained in order to expose the evolution of current thinking.

Astute use of the fairly substantial index provided with this edition should lead the reader fairly quickly to most contemporary problem areas.

As with past editions, from time to time a 'moral' has been interpolated. These are generally flippant or sardonic comments in the spirit of the 'morals' of Theobald Mathew whose admirable forensic fables¹ are almost but not quite forgotten.

I am extremely grateful to Justin Carter for his valuable voluntary research and assistance. I am also indebted to Mr Ernie Schmatt from the Judicial Commission of New South Wales, and Aladin Rahemtula, Librarian of the Supreme Court of Queensland, for their considerable

1 Mathew Theobald, 'O', *Forensic Fables*, 1961. Complete edition republished by Butterworths, London, 1961.

support. But the book remains essentially an expression of the one judge's views from which anyone is welcome to differ.

The format of one judge talking to his fellow judges has been retained. But standards of conduct expected of our judges are not private rules to be seen and heard only by a select group. It is in the interest of the public as well as the judges themselves that standards of judicial conduct be widely known. Some people may be agreeably surprised at the rigorous standards judges are expected to observe both in public and private life. This is therefore a conversation to which others are welcome to listen.

J B Thomas

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