

BOOK REVIEWS

Tom Hughes QC: A Cab on the Rank

Sessions and District Court when he first started out and remembered having his ears 'boxed' a few times when appearing against senior juniors. He reflected that nowadays, junior barristers spend much less time on their feet whereas he had the benefit of learning by trial and error and being forced to live with his mistakes.

When Hughes returned to the bar after retiring from politics in 1971, a single room on 11th floor Selborne Chambers cost \$8,500 (at a time when the average Australian male full-time earnings were

approximately \$5,000 per year). In 1973, when Hughes was president of the New South Wales Bar Association, there were 562 practising barristers in New South Wales, almost three-quarters of whom had chambers on Phillip St, compared with over 2000 today.

Hancock does not attempt to provide his own assessment of Hughes as a person, barrister or politician. He allows Hughes' diary entries, letters, interviews and the opinions of others to speak for themselves. One aspect of

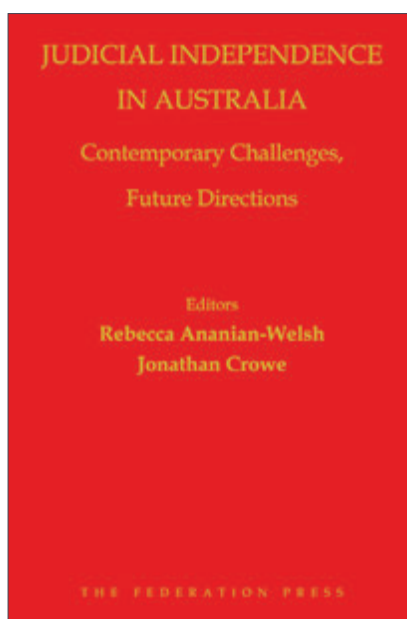
Hughes' personality which appears to be undisputed is that despite his abiding success at the bar, he never got over the (unfounded) fear that he would not have enough work, a fact which may both comfort and trouble members of the bar.

Ian Hancock is to be commended for an entertaining, thorough and well-researched portrait of one of the bar's greats.

Reviewed by Victoria Brigden

Judicial Independence in Australia: Contemporary Challenges, Future Directions

By Rebecca Ananian-Welsh and Jonathan Crowe (eds) | Federation Press | 2016



In the introduction, the editors Rebecca Ananian-Welsh and Jonathan Crowe, do a quick run-down on High Court cases dealing with judicial independence, from the not-so-recent *Huddart, Parker & Co Pty Ltd v Moorehead*,¹ through to *Brandy*,² *Kable*,³ and *Re Wakim*.⁴ These are some of the high profile cases of the

last century. But there are other, less elucidated but equally important aspects of judicial independence that creep under the radar: court-funding, extra-judicial activities like vice-regal and academic posts, the use of social media by judges, lawyers and counsel, and diversity in the judiciary. This book tackles all of these subjects, and so it ranges from abstract, philosophical inquiry (see the chapters on 'Conceptualising Judicial Independence' in Part I and on *Kable* and 'Institutional Integrity' in Part III) to practical and empirical analysis of current social trends (see, for example, Part VI on 'Courts in Social Context').

The Centre for Public, International and Comparative Law at the T C Beirne School of Law at the University of Queensland hosted a conference in July 2015, and most of the essays spring from papers presented there. The content is fascinating; the breadth of subject matter all-encompassing. While none of the reading is light, some is more demanding, giving the book a flexible range, which allows the reader to pick and choose

depending on mood or interest.

Sir Anthony Mason opens the book with a look at contemporary challenges to judicial independence in Australia. Amongst many topics, Sir Anthony considers the Hon Dyson Heydon's controversial article 'Threats to Judicial Independence', in which Heydon considered the negative impact an overbearing judge could have on judicial independence in a multi-member court, identifying Lord Diplock as one. Sir Anthony suggests Heydon had in mind at least one High Court colleague too.

Six parts then follow, each with two or three chapters conceptualising divergent aspects of judicial independence. Part I tackles the philosophy of the separation of powers. Emeritus Professor of Public Law at the University of Queensland, Suri Ratnapala provides an overview of two theses of the separation of powers – the diffusion and methodological theses – and concludes the principle of the separation of powers does not promote the rule of law and liberty of citizens without

further restraints concerning its manner of exercise. Professor Jonathan Crowe and Emeritus Professor HP Lee follow with chapters on human fallibility and the separation of powers, and international comparisons of judicial independence.

Part II of the book is concerned with 'Judicial Appointments and Tenure', and includes a chapter by Professor Heather Douglas and Francesca Bartlett titled 'Practice and Persuasion: Women, Feminism and Judicial Diversity', which explores the research findings of the Australian Feminist Judgments Project, in which 41 women decision makers identified as feminist were interviewed as to whether feminism influenced their decision making.

Part III of the book is dedicated to *Kable* and titled 'Institutional Integrity'. In a fascinating chapter titled 'Comparative Constitutional Law and the Kable Doctrine', Professor Rosalind Dixon and Melissa Vogt consider whether comparative constitutional experience may help to develop objective guideposts for the application of the *Kable* doctrine. The authors suggest that decisions since *Kable* have left courts to make considerable evaluative judgments on a case-by-case basis. For the authors, judges would be well-off in first pointing to some transnational comparative support – 'transnational anchoring' – before making open-ended evaluative judgments. The authors analyse how an application of transnational anchoring may have played out in *Momcilovic*,⁵ *Pollentine*,⁶ *Totani*,⁷ and *Wainohau*.⁸ PhD candidate Constance Youngwan Lee and Associate Professor Gabrielle Appleby round out this part of the book with chapters titled 'Constitutional Silences and Institutional Integrity' and 'Institutional Costs of Judicial Independence' respectively.

Part IV is concerned with judicial reasoning and rhetoric. It includes an

illuminating chapter by David Tomkins and Katherine Lindsay titled 'The Judicial Scholar and the Scholarly judge: Extra-Curial Writing and Intellectual Independence on the High Court', in which the authors use case studies of the Honourable Dyson Heydon – a 'judicial scholar' – and Justice Stephen Gageler – the 'scholarly judge' – to consider how extra-curial writing can be a source for evaluating the intellectual landscape of judges.

The authors give a lengthy account of the contrast in academic and professional backgrounds reflecting the old and new world, or the Oxford/Harvard divide: Heydon's postgraduate study and academic post at Oxford, his Honour's 'Judicial Activism and Death of the Rule of Law' speech at the Quadrant Dinner in October 2002, his lone judgments in his last term on the High Court, and his praise for many characteristics of Windeyer J, including, amongst others, his 'considerable distinction of style' and familiarity with the words of Thomas Cranmer, the *Authorised Version of the Bible* and the classics of English literature. And with respect to Justice Gageler, his frequent forays into scholarly research and law journal publication, during his time as Frank Knox Memorial Scholar at Harvard and while on the teaching staff at ANU, his first sole authored article in the *Federal Law Review* in 1987 on the subject of Australian federalism and judicial review, and his return following his appointment as senior counsel to judicial review of administrative action in a presentation at a colloquium in honour of Sir Anthony Mason, and his recent co-authoring with Brendan Lim of a paper on decision making procedure in common law courts, the impetus for which was a 1947 publication by GW Paton and G Sawyer on 'Ratio Decidendi and Obiter Dictum in Appellate Courts'. The authors conclude that the intellectual

independence of High Court Justices such as Heydon and Gageler strengthens the institutional independence of the High Court.

Part V is dedicated to 'Extra-judicial Activities', with chapters by the Hon Justice Martin Daubney on 'Extra-Judicial Activities and Judicial Independence' and by Rebecca Ananian-Welsh and Professor George Williams on 'State Judges as Lieutenant Governors'.

Part VI relates to 'Courts in Social Contexts', and includes a chapter by Pro Vice-Chancellor John M Williams and another by Rebecca Ananian-Welsh. It also includes a chapter on 'Social Media and the Judiciary: A Challenge to Judicial Independence', by Alysia Blackham and Professor George Williams, which considers the effect on perceptions of judges' independence as a result of the use by courts of applications like Twitter and Facebook – applications that, unlike television and other historic forms of media, are different essentially because they facilitate participation and interaction.

The book is a nuanced and exciting treatise on the abundant issues relating to judicial independence in Australia: it would be well loved by practitioners.

Reviewed by Charles Gregory

Endnotes

1. (1909) 8 CLR 330.
2. *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.
3. *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
4. *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.
5. *Momcilovic v The Queen* (2011) 245 CLR 1
6. *Pollentine v Attorney-General (Qld)* (2014) 253 CLR 629.
7. *South Australia v Totani* (2010) 242 CLR 1
8. *Wainohau v New South Wales* (2011) 243 CLR 181.