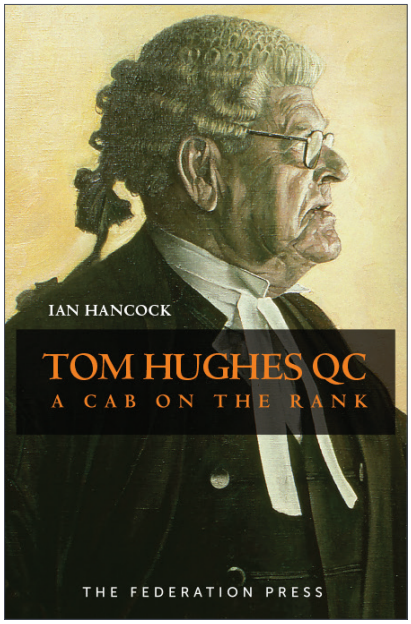
Tom Hughes QC: A Cab on the Rank

By Ian Hancock | The Federation Press | 2016



It is not uncommon for barristers to have a background in military service, politics or agricultural pursuits, and even to combine practice at the bar with one of these endeavours. However, Tom Hughes must be the only Australian barrister who can boast of all of the following: serving as a pilot in World War II, combining a political career with his practice at the bar and later serving as the Commonwealth attorney- general, being regarded as one of the best barristers of his time, contributing energetically to the running of a large farm in his spare time, and continuing practice at the bar to the age of 88, including winning a High Court case at the age of 86.

At over 350 pages, this is a thorough and well-researched biography. Ian Hancock introduces the life of his subject not by reference to Hughes' parents as many biographies do, but by reference to the arrival of his great-great-grandparents in New South Wales in 1840. The book draws on interviews with Hughes and members of his family, colleagues and friends, and voluminous primary material including many letters. It includes charming and amusing anecdotes of Hughes' early life, including descriptions of family holidays at Yaouk in the Snowy Mountains and Hughes' early experiences at school. A letter from Hughes' father to his grandparents in 1928 records of the then five year old, 'Tom is a most important person going off each morning to school'.

One of the strengths of this book is its detailed attention to all periods and aspects of Hughes' life, whether professional, personal or spiritual. It does not only address the good times – Hughes' sacking as attorney-general by Billy McMahon in 1971 and the breakdown of his first marriage are handled candidly yet carefully.

The book depicts the life of a man who achieved great success in the law, but not only that. It provides insight into the reflections of a young man serving as a RAAF pilot at the time of the Allied invasion of Normandy in 1944, and the chapters addressing Hughes' time as a member of parliament and federal attorney-general portray the political mood in Australia in the late 1960s and early 1970s. The infamous 'cricket bat' incident of August 1970, in which Hughes brandished a cricket bat at a group of anti-conscription protesters outside his home in Bellevue Hill, is recounted with considerable detail and colour. The book records a variety of responses: son Michael Hughes, then aged five, remembers seeing lots of 'hippies' outside the house and later drew a drawing of 'hippies in our garden'. Hughes received a number of expressions of support, including one from Jack Fingleton, a former opening batsman for Australia who wrote to Hughes: 'Footwork magnificent – cannot be faulted. Grip with bat just a little suspect. Perhaps hands should have been closer together although gap is permissible if stroke is improvised'. In the following weeks, students dressed in cricket gear greeted Hughes when he attended a university to address a Liberal Club meeting. Journalists were by and large, critical of Hughes. One protester brought a charge of assault against Hughes as a result of the incident, claiming that Hughes poked him in the ribs with the bat. At the hearing, Hughes was asked whether the people who came down his driveway did so with hostile intent, and Hughes replied, 'Well, I didn't think they were a friendly delegation of young Liberals come to admire me'. The charge was dismissed.

A number of Hughes' cases are featured, including the *Concrete Pipes Case*, the West Indian cricketer Clive Lloyd's action against David Syme & Co Ltd in which Hughes was victorious in the Privy Council, Rene Rivkin's defamation action against Fairfax in relation to articles linking him with the death of Caroline Byrne, and Gina Rinehart's action against Rose Porteous in 1999, in which Hughes acted for Rinehart. Entertaining snippets of Hughes' cross-examination of Porteous are included, where upon seemingly becoming frustrated with the long explanations Porteous gave by way of answers to Hughes' questions, he said, 'Do you mind if I interrupt you to ask a question?' Later, when Hughes asked whether Porteous had poor relations with Rinehart, Porteous answered, 'Yes, or we wouldn't be here and you wouldn't be earning so much money.'

Members of the New South Wales Bar will be interested in its evolution over the course of Hughes' time in practice and his observations of those changes. There were 335 barristers at the New South Wales Bar in 1949 when Hughes started practice, and all but one were male. He ran a lot of 'collision cases' and minor criminal cases in the Court of Petty

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.

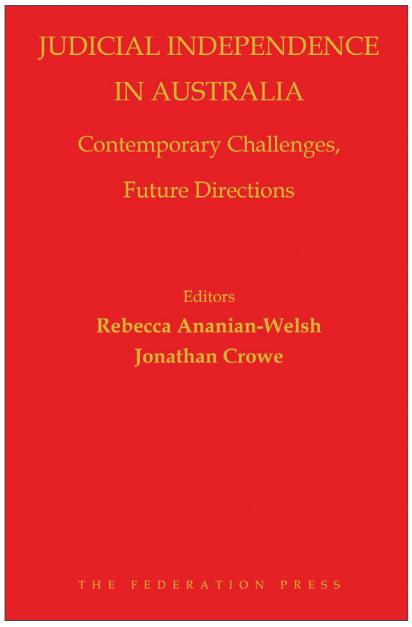
Hancock does not attempt to provide his own assessment of Hughes as a person, barrister or politician. He allows Hughes' diary entries, letters, interviews and the opinions of others to speak for themselves. One aspect of Hughes' personality which appears to be undisputed is that despite his abiding 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

Judicial Independence in Australia: Contemporary Challenges, Future Directions

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 Sawer 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.

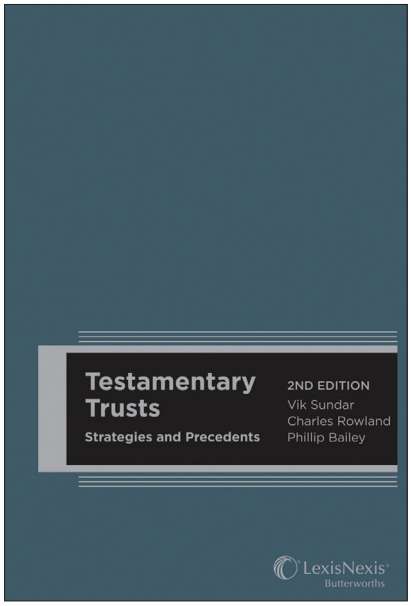
Reviewed by Charles Gregory

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.

Testamentary Trusts: Strategies and Precedents (2nd ed)

By V Sundar, C Rowland, P Bailey | LexisNexis Butterworths | 2016



The first edition title of this text was *Discretionary testamentary trusts: precedents and commentary*. The topic of the second edition is similar but with a perhaps more accurate naming. It complements a text with some similarities of structure in which one of the authors (Dr Rowland) was involved in some earlier editions, *Hutley's Australian wills precedents*.

The first six chapters introduce the place of discretionary testamentary trusts in estate planning and describe the use of discretionary testamentary trusts in relation to tax effectiveness, asset protection, social security and disability legislative tests, insurance, and superannuation.

Chapters 7 to 10 are designed to provide a universal framework base precedent text for testamentary discretionary trusts and then to adapt that text to specialised circumstances with precedential drafting variations that are designed to have been harmonised with the base precedent. As the authors say at [7.1]: 'The system is like a Lego set: because each block is self-contained, a block can be removed and replaced without compromising the integrity of the whole, and removing and replacing one block does not have implications for the rest of the structure. … The great merit of the system is that it saves the drafter the difficulty and danger inherent in laboriously considering each modification to a precedent, unsure all the time whether the change he or she is making will compromise other parts of the precedent.' However, the explicit disclaimer on the opening pages of the text reminds the reader that a precedent is the start of thought not a substitute for it. As is further recognised at [7.3] et seq, not every human situation will fit neatly within an existing block and changing the block will require checking for harmony with the rest of the precedent.

The text is clearly aimed at providing guidance for practitioners, primarily those who are required to draft and advise on the structures which it expounds and for which it provides precedents. The style is direct and practical and the language of drafting and commentary or explanation straightforward. Treatment of case law is directed to practical implications. An explanatory note to give to a testator or other client is provided, with a warning to review it if variations of drafting are used. Complete worked examples of specific factual variations are provided.

Chapters 11 and 12 provide strategies concerning the impact of family provision legislation (recognising that effectiveness may be diminished in New South Wales by the broad notional estate regime) and in respect of blended families (recognising the trade-offs and balances inherent in each strategy).

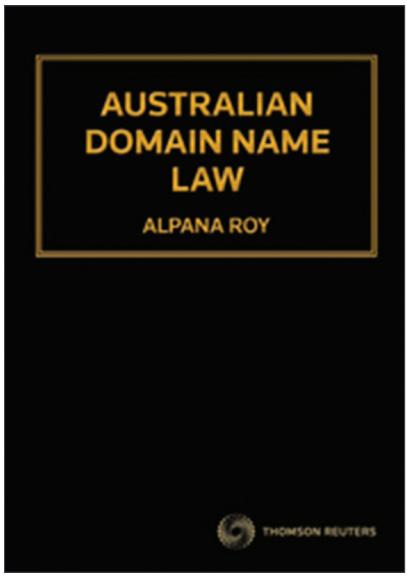
The index is comprehensively helpful.

Although primarily focussed on practitioner drafters and advisers, the text remains of interest to those dealing with the (perhaps litigious) aftermath of drafting, in elucidating the intended purpose and strategy that informs a particular choice of words.

Reviewed by Gregory Burton SC

Australian Domain Name Law (1st ed)

By A Roy | Thomson Reuters | 2016



This is the first published textbook on Australian domain name law. In July 2014 Andrew Christie, assisted by others, published via auDA (.au Domain Administration Ltd) the first edition of an online resource called the auDRP Overview (with a full title auDA Overview of Panel Views on Selected auDRP Questions) whose stated intention is to be regularly updated. This valuable document is in the nature of a digest of approximately 330 published domain name determinations between 1 August 2002 (the beginning of the Australian Dispute Resolution Policy or auDRP) and 15 July 2014 and a synthesis of interpretative principle drawn from those determinations. Its format is based on the UDRP Overview produced by WIPO in relation to the Uniform Dispute Resolution Policy administered by the Internet Corporation for Assigned Names and Numbers (ICANN). The Australian determinations draw on published UDRP determinations when there is similarity of text or principle.

The author of the current text acknowledges at [1.50] that the auDRP Overview was published halfway through the writing of the current text and 'has been incorporated fully in this book as it has been adopted by auDA as representing the consensus view on auDRP panel opinions.' The author points out that the auDRP Overview does not consider in detail the cited determinations and that the current text seeks to undertake that expanded treatment. Although both Overviews are not precedentially binding, the author cites international text writing that fairness and consistency will in practice conform determinations to consensus views, and also to previously-expressed majority views unless there is compelling reason to depart from a majority view. This approach is also consistent with the rationale of the auDRP Overview.

In Chapter 1 the author outlines the concept of domain names and their administration at international or country level depending on the level of the domain name. The genesis of the international and Australian dispute resolution policies, their rationale and operation, is briefly described. Chapter 2 provides detailed description of the auDRP with appropriate reference to the auDRP Overview and a discussion of the rationale for the elements of the auDRP. Chapter 3 does the same for the Rules that govern determination of a dispute.

The remaining chapters 4 to 6 provide detailed analysis of each component required to be demonstrated to entitle a complainant to relief in a determination, as found in auDRP Schedule 1 clause 4a–c: the domain name is identical or confusingly similar to a name or mark in which the complainant has rights; no rights or legitimate interests in respect of the domain name in the current registrant; registration or subsequent use of the domain name in bad faith. A similar format is followed, being a statement of the aspect of one of those components that is being analysed, the position stated in the auDRP Overview on that aspect (if there is a consensus position), and expansion of the cases mentioned in the Overview in conjunction with other authority and principle, including where appropriate from UDRP material and other parts of relevant IP law such as trademarks. The textual differences between auDRP and UDRP are stated and analysed. The approach is largely descriptive rather than critically evaluative, often letting the determinations speak in their own words in substantial extracts or paraphrase. There is a very useful compilation in appendices of the Policies and Rules that are discussed in the text.

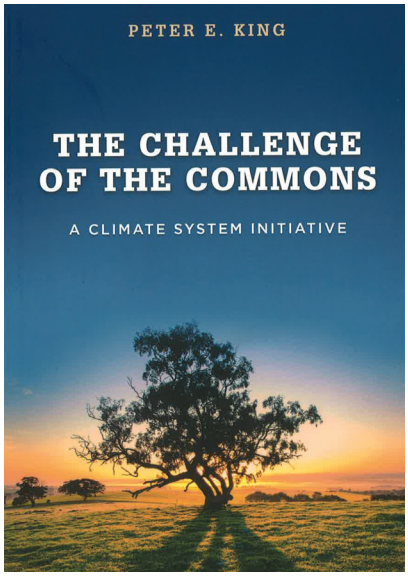
The text provides comprehensive treatment of its topic in a fluent and clear style, with detailed footnoting and a largely comprehensive index. It will be approachable for the early reader in the topic while being a valuable resource for detailed consideration and reference by experienced practitioners and determiners, complementary to the Overviews.

The author acknowledges that the text does not deal with Australian court decisions on domain names. If these increase, their impact on the extra-curial determination framework may require treatment in subsequent editions.

Reviewed by Gregory Burton SC

The Challenge of the Commons

By Peter King | Lyons Press | 2015



I confess that while I practise in public law and in the environmental area, and actively debate the climate change issue with one or two of my colleagues and my daughter, each of whom is far more erudite than me, I had not delved into the complex policies arising from 'climate justice' to any great extent.

Peter King's work is very readable, and makes sense of a difficult subject. Entitled 'The Challenge of the Commons' it is a discussion of the Rio Convention and the future of the Kyoto Protocol, and puts forward what Professor Paul Martin in his preface to the book, considers a well-informed personal discussion of the issues, containing ideas which require serious attention.

The book acknowledges the complexities of the climate change debate and proposes innovative ways forward.

The book reviews the legal and practical operation of the Kyoto Protocol and the Rio Convention, to each of which Australia is a party. The author then proposes reforms to the current version of the Protocol which are thoughtful and far reaching. In my view, they deserve consideration by policy makers and legislators at the highest level. It is, in addition, a compelling read for anyone concerned about climate change and what measures may practicably and equitably be taken to address it and its effects.

You may not agree with all of the arguments in the book, but they are worthy of consideration.

The book was launched in Sydney in June this year by Justice Tim Moore a respected authority on environmental law and policy. Moore J described the work as 'lucid, thoughtful and well-written' during his remarks at the launch at Berkelouw Bookshop Rose Bay.

The Kyoto Protocol was arguably all but abandoned after the Copenhagen Conference of the parties to the treaty in 2010. Its apparent failure was due in part to the concern of many nation states that the radical incursions on national sovereignty then proposed went too far, and were not sustained by the science.

The book discusses the attempt at COP 21 in Paris in December 2015 to review the world's commitment to addressing climate change, which was a more modest proposal, although still almost entirely focussed on a solution to carbon emissions founded upon vegetation retention and regrowth measures. King has proposed different solutions which although carbon retention friendly, are more supportive of working agriculture, and seem far more achievable and of greater practical relevance. This is demonstrated in a revised version of the proposed new Protocol, adapting its mechanisms.

King takes the view that the Australian Government has a woeful record on complying with its obligations under the UNFCCC and the Kyoto Protocol - that it has fudged the figures in its national carbon accounts, and discriminated in its processes against privately owned agriculture, which has no voice on this topic. He considers that there is little justification for the farming community having to bear the brunt of national compliance in the face of a large mining export industry which has continuously worsened the national carbon accounts and has benefitted from so-called government initiatives.

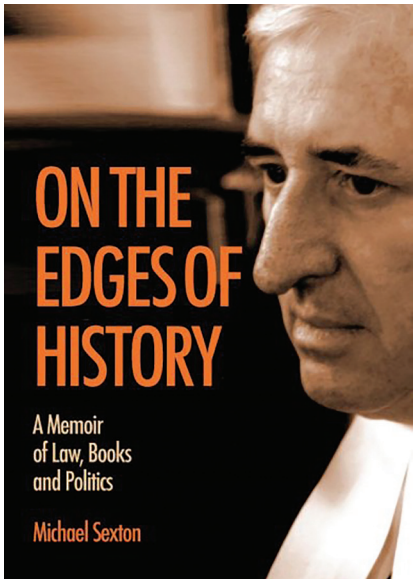
King makes the argument strongly in the book that green alone is not always good; that brown measures are now required, such as those proposed by Darwin at the end of his fruitful life - namely the re-fertilisation of soils depleted by desertification. He also sets out practical solutions for addressing other urgent natural resource challenges, such as balancing water usage and conservation in Australia and Africa the areas of greatest challenge, clean air measures especially in Asia, and harvesting of natural resources for powering the economies of the future, through winds, tides and sunlight.

The simplistic argument that man is the cause of all the new environmental problems in the world is not, according to King, a new one. The work illustrates the point by comparing the plot of the successful Australian film 'Fury Road', and its anti-hero Immortan Joe with what King considers to be the alarmist views of many environmental writers like Lord Stein and Dr Houghton. The film is about a chaotic and depleted world where the only currency is oil. Set in 2031, only some 15 years away, King suggests that it is clear that such a prediction, like the predictions of commentators like Stein and Houghton, have failed to materialise. He is proposing an appropriate and achievable conservative response to the challenge of the commons. Highly recommended.

Reviewed by Stephen Coleman

On the Edges of History: A Memoir of Law, Books and Politics

By Michael Sexton | Connor Court Publishing | 2015



In 1998 Michael Sexton was appointed as the Solicitor-General for NSW, a position he has now held for some eighteen years. In his latest book, *On the Edges of History*, Sexton offers an insight into many of the matters in which he has been involved whilst occupying the office, and provides accounts of some of his more challenging matters at the private Bar. Sexton also details key points in his professional career prior to being called to the Bar. The entire narrative is interspersed with an eclectic array of observations, ranging in subject matter from the failings of our criminal justice system, to the character traits of some of the leading figures in Australian political history. The book is part memoir, part reflection on the two spheres of Australian life in which Sexton is chiefly interested: our legal system and our politics.

Born in 1946, Sexton was one of the first of the post-war baby boomers. In the book's second chapter Sexton broadly outlines the details of his Catholic upbringing in 1950s Melbourne. His evident fascination with the forces at play within his community, as well as its central characters, suggests that Sexton could well have devoted more than a chapter to this part of his life. However, instead Sexton hurtles across the decades to provide an account of some of the more notorious criminal cases in which he has appeared for the Crown. These include the various High Court challenges to NSW's sentencing legislation (in *Baker v The Queen* (2004) 223 CLR 513, *Elliott v The Queen* (2007) 234 CLR 38 and *Crump v New South Wales* (2012) 286 ALR 658), the multiple appeals brought by Kathleen Folbigg in relation to her conviction for the murder of her four children and Bruce Burrell's appeals against his conviction for the kidnap and murder of Kerry Whelan.

Sexton then takes us back to where his legal career commenced, in 1965, at Melbourne University law school. We are assured that in spite of the times, Melbourne University was not a hotbed of revolutionary sentiment. This is easy enough to believe. The picture Sexton paints of his life as an undergraduate is of a carefree and more innocent time, filled with classics conferences, games of squash and tennis, and black-tie balls. After university, Sexton did a short stint in the office of the Commonwealth Crown Solicitor, before taking up a position as Associate to Sir Edward McTiernan in the High Court. Then follows a period of time in the United States completing a master's degree at the University of Virginia. Whilst Sexton appears to have seriously contemplated commencing practice in Philadelphia and settling in America, it was the prospect of being involved in Whitlam's government that, Sexton says, lured him home to Australia.

Sure enough, in 1974 Sexton moved to Canberra, joining the Attorney-General's Department, and then the office of Attorney-General Kep Enderby. Sexton chose the dismissal of the Whitlam Labor government as the topic of his first book, *Illusions of Power* (first published in 1979 and reissued in 2005), excerpts from which are included in this book. However, in this book, Sexton gives a more personal account of events, sharing his observations from within in the months and days leading up to the dismissal. Sexton also explains how it was that he came to write *Illusions of Power* (in his early years as an academic at UNSW), and reflects on its reception when first published. Insights are also offered into the writing of his second book, *War for the Asking*, on the subject of Australia's entry into the Vietnam war.

In the latter half of the book, Sexton describes his time at the Bar prior to becoming the Solicitor-General. It is these chapters, in which Sexton tells of his more difficult cases at the Bar, where his book is at its most intriguing. These cases include the prosecution of complaints by health authorities against Dr Geoffrey Edelsten, the "Mr Bubbles" defamation proceedings, and the Chelmsford Royal Commission.

Unquestionably, Sexton has been involved in some of the state's most fascinating matters. He is also not afraid to voice an opinion on some of the trickier questions that he believes confront our legal system. As a result, this memoir makes for an intriguing snapshot of Australian legal history, and a captivating read.

Reviewed by Juliet Curtin