THE AUSTRALIAN JUDICIARY

Second Edition

The second edition of HP Lee's *The Australian Judiciary* provides a timely update to this seminal text. The only definitive survey of the entire Australian judiciary, this text describes and evaluates the work, techniques, problems and the future of the different tiers of courts and judges and the important role of the judiciary within a democratic polity. It discusses the role of the judiciary as the third sector of government, and analyses and comments on judicial conduct, judicial independence and impartiality, the work of judges beyond the courts, accountability of judges, and the dangers to judicial institutions.

The Australian Judiciary is an excellent reference work, and this new edition will appeal to legal scholars and practitioners throughout Australia and internationally.

HP Lee is the Sir John Latham Professor of Law at Monash University. The author of many legal works on Australia, Singapore and Malaysia, he has been a member of various committees advising on the press and international humanitarian law.

Enid Campbell was Emeritus Professor of Law at Monash University. She was the author of many legal publications and had been a member of the Royal Commission on Australian Government Administration and the Australian Constitutional Commission. Professor Campbell passed away shortly before the writing of this second edition.

THE AUSTRALIAN JUDICIARY

SECOND EDITION

H P LEE

ENID CAMPBELL

CAMBRIDGE UNIVERSITY PRESS

Shaftesbury Road, Cambridge CB2 8EA, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India

103 Penang Road, #05–06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of Cambridge University Press & Assessment,
a department of the University of Cambridge.

We share the University's mission to contribute to society through the pursuit of
education, learning and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9780521769167

First published 2001
Second edition 2013

Cover design by Anne-Marie Reeves

A Cataloguing-in-Publication entry is available from the catalogue of the National Library of Australia at www.nla.gov.au

ISBN 978-0-521-76916-7 Hardback

Foreword

Chief Justice Robert French AC

The publication of the second edition of Enid Campbell's and HP Lee's *The Australian Judiciary* is a welcome event. It is sad that Professor Campbell, one of Australia's leading legal scholars, did not live to see this edition come to fruition. Her colleague, Professor HP Lee, has produced a high-quality text that will be of value to all who study, practise in, or teach about, Australia's judicial system.

The title of the book might be thought to imply a descriptive account of the Australian court system and those who hold office in it. It would be expected that such an account would explain the place of Australia's courts under the Constitutions of the Commonwealth and the States, the inheritance of the common law and the way in which it informs the characteristics of the courts and their relationships to government, the processes for the appointment and removal of judges and the terms and conditions under which they hold office. This book does all of that and much more. It is a substantive legal text that discusses and provides a basis for reflection about topics concerning the judiciary with which any practitioner in or student of our courts, including responsible officials in the other branches of government, should be familiar.

A useful overview of the text is set out in the first chapter. Professor Lee there discusses the importance of an independent judiciary as a branch of government distinct from the legislature and the executive. The history of the development of that distinctive function is considered. So, too, is the content of the term 'judicial independence' and its connection with the sometimes protean concept of the 'rule of law'. As Professor Lee points out, judicial independence and the closely related concept of impartiality is a standard recognised in international instruments including the International Covenant on Civil and Political Rights and a significant number of statements by gatherings of jurists from a variety of jurisdictions

around the world. Those statements include a *Declaration of Principles of Judicial Independence* issued by the Chief Justices of the Supreme Courts of the States and Territories in 1997.

No public institution is beyond scrutiny and criticism. No public institution can immunise itself from controversy. The judiciary is no exception. Professor Lee illustrates that point by reference to the history of particular controversies that have embroiled Australian courts in the past. Resilient and robust institutions, which the courts are, can endure beyond criticism and controversy, but as the late Justice RM Hope said in February 1990 on his retirement from the Court of Appeal of New South Wales, 'while Judges and the judicial system must be sufficiently robust to be subject to informed criticism, the attrition of continual uninformed and unjustified criticism can cause great harm to the system itself'.

The relationship, sometimes in tension, between judicial independence and judicial accountability is a topic of ongoing debate, which is covered in this book. Judicial independence has its individual and institutional dimensions. So, too, does accountability. Judicial decisional independence is demonstrated by open and transparent judicial court processes and reasons for decisions. At an institutional level it is consistent with proper accounting for the efficient use of public money provided to the Courts to carry out their functions. Accountability that encompasses the administrative efficiency of court processes does not extend to executive interference with the manner or content of adjudication. The content and boundaries of each of these concepts are not readily reduced to precise verbal formulae. They involve matters of judgement and mutual respect between the different branches of government.

The book provides the necessary descriptive account of the Australian judicial system by reference to the various courts of the States and Territories, the federal courts and the High Court. That description makes appropriate historical references and, as with the rest of the book, is generously footnoted with indications for further reading. The constitutional and statutory underpinning for the exercise of federal jurisdiction by federal and State courts is described along with the failed experiment in cross-vesting of jurisdiction from State to federal courts. As to the latter, Professor Lee correctly points out that the expansive concept of federal jurisdiction means that federal jurisdiction can often be found and almost always is found in commercial matters. The cross-vesting scheme continues to operate from federal courts to State Supreme Courts and vice versa where there is federal jurisdiction in a matter in the State court. The essential characteristics of the judicial function are considered.

The appointment of judges to non-judicial office is considered in an important chapter devoted to that topic, which refers to recent decisions

of the High Court concerning the use of judges as *personae designata* to discharge administrative functions, and the compatibility of such functions with judicial office and the essential characteristics of the courts to which such judges belong.

The appointment and conditions of service of judges include an interesting discussion of the question whether appointments to the judiciary, historically the province of the Executive Government, should be informed by recommendations from judicial commissions or perhaps even determined by such commissions. The terms and conditions of appointment affecting judicial independence are discussed, including the use of acting or part-time judges. The diversity of arrangements concerning the appointment and tenure of judges and magistrates and their terms and conditions of service was referred to in *Northern Australian Aboriginal Legal Service Inc v Bradley* 2004 218 CLR 146 in which Gleeson CJ observed:

> All those arrangements are relevant to independence. The differences exist because there is no single ideal model of judicial independence, personal or institutional. There is room for legislative choice in this area; and there are differences in constitutional requirements.

The chapter on appointments and conditions of services also includes a discussion of the *defacto* officer doctrine applicable to invalidly appointed judicial officers and proceedings in the nature of *quo warranto* in which the entitlement of a judge to hold and exercise judicial office can be raised for judicial decision.

The removal, suspension and discipline of judges has been a topic of public discussion for some time. Issues of principle and legislative proposals relating to those questions are covered in chapter 5. In the light of recent legislative initiatives with respect to federal courts this is a timely coverage of the topic. In chapter 6, dealing with judicial conduct, there is an extended and helpful discussion about the sometimes difficult question of whether a judge should be disqualified on account of a reasonable apprehension of bias. The difficulty of the judgements that may be required in such cases was illustrated by the division of view of the High Court in *British American Tobacco Australasia Limited v Laurie & Ors* [2011] HCA 2.

This book provides an invaluable resource for anybody involved with the work of the courts. It is a readable and thorough account of the topics with which it deals, and a gateway to further research for those who wish to focus on particular aspects of the issues with which it deals. I congratulate the authors and the publishers, and commend the book to its readers.

Contents

Preface

Second Edition

My late colleague, Emeritus Professor Enid Campbell, and I were very delighted when Cambridge University Press gave us the green light to proceed with a second edition of *The Australian Judiciary*. We were much heartened by the warm reception to the first edition of the book. Unfortunately, Enid did not recover from an illness and unexpectedly passed away before work on the second edition could commence. In this edition I have taken into account a number of interesting and controversial developments pertaining to individual members of the judiciary and to the institution as a whole.

This new edition follows the scheme of the first edition of the book. As was stated in the first edition, the principal aim of this book is to contribute to a better understanding of the Australian judiciary. Australians are entitled to engage in critical discussions about the judicial branch of government, as is befitting a healthy democracy; however, when they do so, it should be from an informed standpoint. Sir Gerard Brennan, Chief Justice of the High Court of Australia 1995–8, said:

> The judiciary, the least dangerous branch of government, has public confidence as its necessary but sufficient power base. It has not got, nor does it need, the power of the purse or the power of the sword to make the rule of law effective, provided the people . . . have confidence in the exercise of the power of judgment.[1]

In a society regulated by the rule of law, disputants place their faith in the judicial institutions to resolve their conflicts. In other words, the judiciary provides a forum in which laws are interpreted and applied to resolve conflicting claims between citizens and citizens, or between citizens and governments. As stated earlier, in the Australian federal system the judicial role extends even to the determination of the validity of laws made by

the various legislatures in the Australian federation. Hence, the judiciary occupies a very important place in the framework of government.

Most Australians are conscious of the existence of a system of courts and tribunals. In general they accord deference to persons who carry the title of 'judge' or 'justice'. They also harbour the impression that answers to disputes are to be found in 'the law', and that these judges or justices are people who are steeped in the learning of the law and who have the ability and the backing of the state to elucidate the law and apply it. This impression is maintained by the constant reporting in the media of cases that capture the interest of the public, or cases that have a profound impact on the development of the law. Chapter 2 seeks to explain the Australian court system and the use of the title of 'judge'. It also provides some observations on the people who constitute the body of judges in Australia.

The judiciary exists as a branch of government. The strength of the institution lies in the perception of the public that it is not subservient to the legislative and executive arms of government. As a whole, the judiciary in Australia continues to command the confidence of the public. Chapter 3 explains how the maintenance of public confidence in the judiciary is underpinned by the principle of judicial independence. The chapter seeks to elucidate the doctrine of separation of judicial powers that has developed in Australia.

The enhanced awareness that judges do contribute to the development of the law and that they are not mere automatons engaged in a mechanical exercise of applying the law has generated increasing interest in the types of persons who are appointed to the Bench. This is particularly true of the higher levels of judicial appointment, such as the Federal Court and the High Court of Australia. The selection and appointment of judges and the terms and conditions of their appointment are covered in chapter 4. Chapter 5 explores the mechanisms for the removal, suspension and disciplining of judges.

Once a person is appointed a judge there are certain unstated assumptions about how that person shall conduct himself or herself in his or her private and public life. The conduct of judges is controlled by a combination of law, ethics and conventions. These matters are discussed in chapter 6.

Judges make a significant contribution to other spheres of public life. They are often the source from which a government will appoint persons to chair various public inquiries. Judges have been appointed and continue to be appointed to various 'non-judicial posts' such as chancellors of universities or patrons of various organisations. Questions relating to the propriety of judges engaging in extra-curial or 'non-judicial' work are considered in chapter 7.

Chapter 8 examines the panoply of laws that provide protection to the judicial institutions. It looks at the key weapon available to judges to protect the dignity of the courts, namely the law relating to contempt of court. The various criminal offences pertaining to the administration of justice, the law and conventions regarding parliamentary debate on matters before the courts and legislative intrusion into the discharge of judicial functions are canvassed. Reference is also made to the judicial immunities from suit and prosecution.

From time to time attacks have been levelled at judges, and a familiar refrain is that judges lack accountability. The concept of accountability is discussed in chapter 9. The focus of the chapter is to highlight the different ways in which judges are rendered accountable for their performance of judicial duties.

The book is not intended to comprehensively cover all matters relating to the judiciary. Hence, matters such as court administration and case management, court procedures, the pros and cons of the adversary system, alternative methods of dispute resolution, the costs of litigation and the operation of the jury system are not considered in this book.

Today there is significant interest in the varying approaches to the interpretation of constitutions and statutes. This interest is heightened in the case of constitutional interpretation by the High Court. This book does not seek to consider whether the judiciary should engage in 'judicial activism' or whether judges should deflect criticism of judicial usurpation of parliamentary functions by adopting a policy of judicial self-restraint. For the reader who is interested in this particular matter there is a growing body of literature in Australia and an overwhelming abundance of books and articles in other jurisdictions, particularly the USA.

Notes

1 G Brennan, 'Justice Resides in the Courts', *The Australian* (Sydney), 8 November 1996, 15.

Acknowledgments

I wish to place on record my heartfelt thanks to the Hon Sir Gerard Brennan AC, KBE (Chief Justice of the High Court of Australia 1995–8), the Hon Sir Anthony Mason AC, KBE (Chief Justice of the High Court of Australia 1987–95), the Hon Michael Black AC (Chief Justice of the Federal Court of Australia 1991–2010), and the Hon Chief Justice John Doyle AC of the Supreme Court of South Australia (1995–2012), who kindly gave their time to read the drafts of various chapters of the second edition and proffered insightful and valuable feedback.

I am grateful to the Hon Justice Pamela Tate of the Court of Appeal of the Supreme Court of Victoria, Professor Marilyn Pittard, Ms Maria Sullivan and Mr Peter Sallman, who generously made available their expertise to assist me in updating aspects of the book. Responsibility for any errors in the book remains with the author.

I am indebted to Michael Adams for his meticulous research assistance, which was of the highest order. Apart from assisting me in updating the book, he also collated the Table of Cases and the Table of Statutes. I extend my thanks to the Faculty of Law, Monash University, for providing some research assistance funds for the preparation of the manuscript, and Bridget Ell (Commissioning Editor) and her colleagues at Cambridge University Press for their wonderful support. Jane O'Regan was magnificent in editing the manuscript.

I thank the Council of Chief Justices of Australia and the Australasian Institute of Judicial Administration (AIJA) for their kind permission to reproduce the Guide to Judicial Conduct in the book. I also wish to thank Professor Greg Reinhardt (Executive Director, AIJA) and Mr Andrew Phelan (Chief Executive and Principal Registrar, High Court of Australia) for their assistance on this matter. I place on record my gratitude and thanks to the Hon Chief Justice Robert French AC of the High

Court of Australia who, despite his many pressing commitments and demands on his time, kindly agreed to write a Foreword to the book.

With great respect and admiration for two Australian scholars who were trail-blazers in the world of public law scholarship, I dedicate this second edition of *The Australian Judiciary* to Emeritus Professor Enid Campbell AC, OBE (30 October 1932 – 20 January 2010) and Emeritus Professor George Winterton (15 December 1946 – 6 November 2008).

H P Lee
Faculty of Law
Monash University