

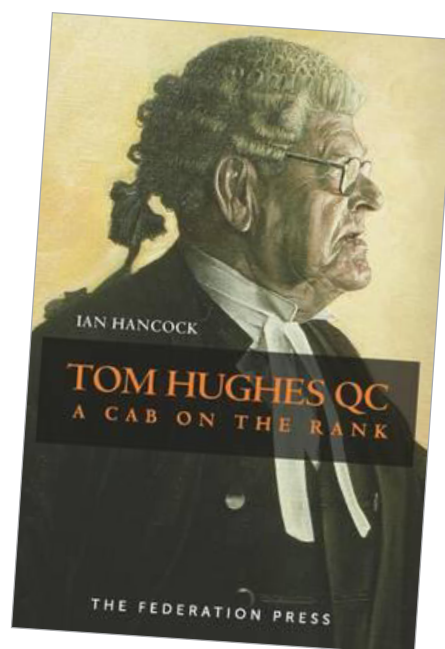
# A BARRISTER WITHOUT PEER

## *Tom Hughes QC: A Cab on the Rank*

By Ian Hancock

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Reviewed by Dyson Heydon



The principal features of Tom Hughes's life are quite widely known—or ought to be, because he could say as Gordon Samuels used to say, alluding to Othello's reference to the Venetian Senators: 'I have done the state some service, whether they know it or not'. And the principal virtues of this book are quite widely known through their description in other reviews.

The book, whether taken as a whole or in any discrete part, reaches the heights one would expect from Ian Hancock—an extremely experienced professional historian and biographer. He had access to public materials about Tom Hughes's service to the state (war papers, Hansard, Cabinet notebooks and the like) and his service to the legal profession (law reports, articles, biographical works and press material). He also had access to many private papers preserved on a scale which is uncommon these days (school reports, family letters, diaries and autobiographical writings). A remarkably large number of Tom Hughes's associates survive and have been interviewed. The work is the product of full cooperation between author and subject. All these advantages have been exploited with matchless

skill. And far from the least sign of that skill is the masterly prose in which a very detailed account of a very long and rich life is presented.

It can never be easy to write a biography the subject of which is still alive. On the other hand, if the first biography to be written about a person is written after that person has died—particularly, as in Sir Owen Dixon's case, quite a while after that person has died—inevitably the death of contemporaries will entail the loss of material that can never be retrieved. This biography has been written at a time when it was possible to avoid that waste. It takes many talents to cover a life of distinction in such varied fields—military service, legal professional life, a political career, pastoral activity—against the background of changes in mores and opinions over nine decades. These talents Ian Hancock possesses in ample



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measure. This is one of the finest biographies ever to have been written by an Australian or about an Australian. And the Federation Press, too, deserve praise: the production of this book is, by local standards, of exceptionally high quality.

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The balance of this review aims simply to highlight some aspects of Tom Hughes's professional life. The golden years of that life flowed after his departure from the Federal Ministry in 1971 and particularly after his departure from Parliament in 1972. Those golden years would never have happened but for the vicissitudes of politics. Tom Hughes always had stature in Parliament from his election in 1963. Sir John Gorton's wise selection of him as Attorney-General was justified by a short but successful tenure. Tom Hughes's dismissal by Gorton's experienced, able but deeply loathed successor, and his perception of an unpalatable prospect of many lean political years ahead, were blessings in disguise. These circumstances influenced Tom Hughes to return to what was, from both personal and public points of view, his real *métier*. Another significant year was 1985, which, as AJP Taylor said of 1848, was a turning point at which history failed to turn. In that year he declined an invitation to become Chief Justice of the Supreme Court of the Australian Capital Territory. It is difficult to think of anything that would have caused him greater unhappiness than acceptance.

So the golden years began, and they proceeded into the sere and yellow. What were Tom Hughes's skills in those golden years? What were their sources?

A key factor was his educational background at St Ignatius' College, Riverview. Then as now it was a highly regarded school. It was probably even better then than it is now. For Tom Hughes the education was strong on the languages side (Latin, Greek and French). The school taught him how to work and how to inquire. From its influence sprang his detestation at the Bar of bad grammar, ugliness of

style and obscurity in expression. He took immense pains to avoid these faults himself. Ian Hancock describes well his intolerable wrestles with words and meanings in the course of a passionate search for precision.

Another important factor was his training at the University of Sydney Law School, bisected by the years of war service. The mature Tom Hughes was no narrow legal scholar, ardently pursuing juristic concepts for their own sake. For him the law was a tool. It was a means to an end beyond itself. But the somewhat positivist didacticism of his teachers ensured that he entered practice with a good all-round knowledge of the law. He knew the leading cases and statutes relevant to practice at the Bar. Over the years he appeared in a great many leading cases himself. Leading cases have roots stretching back into the past. They scatter seeds which grow up after them. The result is that he had no need of legal digests and encyclopaedias to ascertain the law. Nor, in later days, was it necessary for him to bring in the over-abundant harvests available from computer searching. He knew basic principles. He knew the major cases which stated them. He knew the forbears of those major cases. He knew where those major cases had led. He knew where they might well lead. The result was that he was a very good lawyer. He was very good partly because of what he knew and partly because of what he did not know. When he started practice, it was relatively easy for a lawyer to be familiar with the main Australian and English cases in a particular field. Well before he left practice, the available authorities had become massive. Like unwanted weeds, they were tending to clog and muddy the streams of clear thought. Tom Hughes was familiar with the authorities and the principles he needed. That familiarity was not destroyed by over-exuberant accumulation of detail. No-one could have conducted a High Court practice in the constitutional and commercial fields he did without being a lawyer of highly developed skill.

A marked feature of his professional habits was his total dedication to the interests of the client. That dedication was coupled with organisation. One aspect of that organisation was an insistence on punctuality—a virtue on diminishing display in many areas of modern life. He was never late for

court. He arrived there tense, full of energy, but not flustered. He was an early starter in chambers and rose very much earlier. If he fixed a conference for 6 am, even before 5.50 am there would be consultation of the watch every minute with muttered grumbling to the effect: ‘they’re nearly late’, ‘why can’t they get here?’ and ‘this is intolerable’. And woe betide those who arrived after 5.50 am. Juniors soon learned the lesson or perished. He abhorred waffle. He detested delay. He thought, like Mirabeau, that one should never ask for time—disaster never gives it. He always wanted to isolate what was relevant and get to it as fast as possible. That was true of his written opinions. It was true of his written submissions. It was true of his oral addresses. And it was true of his elicitation and cross-examination of testimony. He believed deeply that in law the glittering prizes of victory never come without hard preliminary work. As the years went by he had to deal with material that became more voluminous, flabby, chaotic and ill-focused. These trends were the product of new customs in large solicitors’ firms, the advent of the photocopier, the fax and email, and the growth of over-complex legal rules grasping after the illusion of individualised perfect justice. He managed to control these phenomena by seeking to select the fundamental point, or devise a case theory, or design a blueprint. What conformed to that selection was closely considered. What did not conform was discarded, unless emerging forensic events made it necessary to abandon the plan and devise another. No-one was more cold-bloodedly ruthless in discarding theories that turned out not to survive the grim questions which reality asks.

A further characteristic which was not fully appreciated was the intense energy he brought to work in court. In him there was no languid affectation of effortless superiority. As his forefinger, bronzed, gnarled and calloused by years of physical work on his farms, stretched out to press the lift button marked ‘Up’, it often shook. The cause was not a lack of confidence. It certainly was not fear. It was pent-up force—emotional, nervous and intellectual power. It was that energy which gave him both the appearance and the reality of authority, gravitas, dignity, probity, straightforwardness and determination. His loud, clear and firm voice, his

rugged, pugnacious but handsome appearance, his mastery of educated English, the extreme care with which he chose his words and the impact some damning phrase had on being rapped out after a significant pause, his evident sincerity and seriousness, his wide experience of the world, the patently strong grip he had on the facts and the law and his gumption conveyed as a larger than life impression. He could dominate a courtroom not only by the vigour and trenchancy of what he said but also by his minatory, forceful and striking personality. He was listened to in total silence and in an atmosphere of crackling tension. What happens in courts is serious business for most people unfortunate enough to be there. He brought to his work in courts an appropriately serious demeanour. His eyes and ears were acutely sensitive to everything that happened there. He detested being distracted by extraneous noise in court. Judges trusted him. Most of them appreciated his talents. They welcomed his presence. They listened very closely to his questions and submissions. They knew he was not just a paladin mouthing colourful phrases, but their best hope of grasping the points which would lead to a just result. They knew he was not wasting their time. The same was true of juries.

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He also had the quality he admired above all others, which was captured in his often-repeated quotation of Sir Owen Dixon’s definition: ‘Advocacy is tact in action’. Witnesses under cross-examination, however mighty their stature outside the courtroom, very soon became meek and mild and well-behaved in his hands. If they did not—if they paltered with him, or evaded his questions, or did not do justice to their testimonial responsibilities—the smell and sight of cordite smoke soon drifted into the courtroom. While much of his fame rested on cross-examination, and some of his cross-examinations were thunderous affairs, his supreme talent lay in the lucid and forcible exposition, in language and through structures appropriate to

give the greatest assistance to a judge under a duty to give convincing reasons for judgment, of what matters of law and fact supported the making of the orders which best advanced his client's interests. Professional opponents who played within the rules and avoided personalities were treated with great courtesy. But if they strayed, they could suffer—like the opponent in Adelaide who said that Tom Hughes had made a captious submission, and was told, with considerable volume, muzzle velocity and rhythmic emphasis: 'My learned friend doesn't know me very well. If he did he would know that I don't make captious submissions'. All these qualities combined to make him seem slightly out-of-date. He could appear remote from the modern age, while retaining touch with the higher standards and skills of an earlier time. On occasion he tried to minimise this impression of non-modernity as when he told a witness he wanted to ask a question about McDonalds and said, with an air of shared expert knowledge about modern demotic behaviour: 'you know—the fast food people'.

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A key trait was loyalty. To his family he had an intense, almost tribal, loyalty. To friends, too, he was very loyal. But in his professional work also he was loyal to juniors and solicitors. Contrary to modern habits, all his life he practised across all fields of law—the only exception perhaps being the higher arcana of intellectual property. Naturally in some areas he relied on juniors or solicitors who were more familiar with specialist detail than he was. Unlike certain famous figures of the past, he repaid assistance with gratitude and loyalty, and loyalty was returned to him. Even if the efforts of those trying to help him fell below standard, he would not lightly endure criticisms of those efforts from professional opponents. He took the view that if criticism was to be meted out, it was best meted out not by others

in public, but by himself in the confidentiality of his chambers. Immensely talented, experienced and confident though he was, he enjoyed working with a small team. He was skilled in getting the best out of a small team. He liked the process of testing ideas, of rehearsing possible arguments, of working out lines of questioning. To work with him was to mingle education and pleasure. He was the best of friends, both professionally and in a wider sense.

How did he deal with the lay client? Generally he was good at devaluing great expectations and letting them down gently. He would handle the profane outbursts of a formidable personality like Kerry Packer with the soothing remark: 'Kerry, old son, I remember your father used to say things like that. It doesn't do any good.' Occasionally clients had to be reminded of their proper role, as when in conference he tensely asked a plaintiff in defamation how he felt on reading the libel for the first time at breakfast. The plaintiff, apparently detached from any perception of what was expected of him, fell below the level of events by remarking in indifferent tone that he felt all right. This provoked an explosion: 'What? All right? After reading that filthy muck? Now I'll ask you again. How did you feel when you read that disgraceful libel at breakfast?'

Ian Hancock chronicles without supporting various criticisms of Tom Hughes: short-tempered, authoritarian, declamatory, theatrical and old-fashioned. The critics either did not know the man or did not understand what they did know. Any short temper he displayed was triggered by unendurable provocation. He was not authoritarian. He simply had authority. He did not declaim. But he was eloquent. He was not theatrical. But he could be dramatic. In substance he was not old-fashioned. But he did have virtues that existed before this age and are perhaps only diminishingly in evidence as it wears on.

A key part of a barrister's job is to stand up for clients who cannot stand up for themselves against the power of the State or their other enemies. Tom Hughes was peerless in performing that role in his golden years. Among many other things, the book is a fine record of how he acquired the skill to perform it and how he acquitted himself in doing so.