INSIDE STORY

BOOKS & ARTS

2832 words

CONTRADICTORY COUNSEL

1 JULY 2016

Books | A new biography of Sydney lawyer and sometime politician Tom Hughes details a remarkable career, writes *Tony Blackshield*

Right:

Detail from Tom Hughes QC, by Jiawei Shen (b. 1948, China, from 1989, Australia), Oil on canvas, 167 x 167 cm. Collection of New South Wales Bar Association/Purchased 2004 © Jiawei Shen

Tom Hughes QC: A Cab on the Rank

By Ian Hancock | *Federation Press* | $59.95

This absorbing biography falls into three parts: before politics; politics; after politics.

The early chapters trace a family saga of almost epic proportions, beginning with the arrival in 1840 of Hughes's great-great-grandparents as boat people from Ireland. His grandfather Sir Thomas Hughes – like his own daughter Lucy Turnbull a century later – rises to the position of lord mayor of Sydney. His father Geoffrey is a first world war flying ace, who engages in a pitched battle with Baron Manfred von Richthofen, and shoots down von Richthofen's brother Lothar (who then recovers in hospital). In the second world war it seems inevitable that Tom should enlist in the airforce. Unlike his father, he is not a very good pilot, but he assists in the Normandy landing.

Although Ian Hancock doesn't seek to probe the relationship between father and son, there are glimpses of the father as overly protective and interfering, seeking to control his son's prospects both at school and in the airforce. An extended set-piece recounts the father's extraordinary postwar efforts to mastermind Tom's application for a Rhodes scholarship and to ensure its success, and then to arrange for Tom to be flown back to Australia in time for the interview. Tom doesn't get the scholarship, and goes into law instead.

Hancock – an inveterate historian of the Liberal Party – has written before about the years of John Gorton's prime ministership, and undertook this latest project at the suggestion of Gorton's

one-time private secretary, Ainsley Gotto. His main focus is on Hughes's sojourn in politics, and especially his sixteen months as Gorton's attorney-general, which began twelve days after Gorton was confirmed as prime minister (after an election win followed by a leadership challenge) in October 1969, and ended twelve days after Gorton was replaced by Billy McMahon.

Hughes began his new office with two significant moves: an increase in legislative drafting strength, and the appointment as departmental secretary of Clarrie Harders – who remained until 1979, and in 1997 praised Hughes as "the best attorney-general under whom I served." Hancock demonstrates convincingly that this assessment is justified.

Hughes's name seems forever to conjure up memories of the Sunday in 1970 when protesters against conscription for the Vietnam War presented themselves at his home and he drove them away with a cricket bat. He was still indignant when he addressed the parliament three days later, but insisted that in dealing with such issues as attorney-general, he had "at all times endeavoured to exercise a judgement based on caution, moderation and restraint." Hancock agrees that this was the case.

In 1969, when Gorton denounced as an "incitement to mutiny" a trade union meeting urging conscripts to act according to conscience, Hughes insisted that "it would be most unwise to prosecute… when the context is highly political." Three weeks before the Moratorium marches of 8 May 1970, Hughes made a ministerial statement inveighing against communist influence but primarily urging Labor members and other "well-intentioned citizens" to rethink their participation. On 6 May, under pressure to name the communists involved, he agreed that they existed but cautioned against press exaggerations of their role – and concluded that it would not be "proper" to name names under parliamentary privilege.

But Hughes's major achievements as attorney-general came to fruition only under the Whitlam government, in the *Seas and Submerged Lands Act* 1973 and the *Trade Practices Act* 1974. The former sought to settle the question of sovereignty over the territorial sea; in 1975 the High Court would hold that it lay with the Commonwealth. The latter was a sequel to the High Court's decision in the *Concrete Pipes Case* (which Hughes himself had argued), which cleared the way for control of restrictive trade practices through the power relating to corporations. Both issues were anathema to the anti-Gortonites, whom Hughes saw as "termites," "troglodytes," and "Gadarene swine" – the equivalent of today's "Delcons."

Hughes did succeed, by the skin of his teeth, in securing the passage of the *Public Order (Protection of Persons and Property) Act 1971*. (He delivered his second reading speech two days before he was sacked.) In an article published in February this year (Hancock quotes an earlier internet version), Evan Smith argues that because this Act resulted in very few arrests and convictions, it was a failure. In fact that "failure" was a measure of Hughes's success. Tracing the Bill's development through its six-month history, Hancock shows how Hughes consistently sought to liberalise the existing law by reducing penalties and setting careful limits on criminality. "Calls for law and order," said Hughes, "must not be allowed to deteriorate into attacks upon the right to dissent."

Despite the claim in *Iolanthe* that all of us are either Liberal or Conservative at birth, all the interesting people are a mixture. By that measure, Hughes is a very interesting person indeed. Like Murray Gleeson, he remains conservative in the old-fashioned Burkean sense; beyond that (as for many in his generation) his "conservatism" lay primarily in strident anti-communism. But there was always more to him than that.

Hancock struggles to explain the contradictions. At one point he suggests that Hughes's experience as attorney-general may have "mellowed" his views, which may well be true. In 1978, when he first met Malcolm Turnbull (for a *Bulletin* interview), Hughes thought he had been "wrong about Vietnam" and "too fervent, too unquestioning" about the supposed communist menace. Elsewhere Hancock suggests that what made Hughes different was his support for "the strand of liberalism associated with the free market." Yet the essence of "liberalism" in its small-l version lies in its concept of individual freedom in civil and political matters, rather than in the economic sphere to which that concept is often (mistakenly?) transferred. Besides, "the free market" speaks with forked tongue. For Hughes it required protection of competition through the *Trade Practices Act*; for another Liberal MP, Ray Whittorn (reacting in 1965 to attorney-general Billy Snedden's more cautious version), such an Act was an "unjustifiable intrusion into normal business affairs."

Already in 1965 Brian Johns had written (in the *Bulletin*) that Hughes was "not a predictable liberal." Despite his "repeated broadsides charging communist and leftist influences in the opposition ranks," he was "by no means doctrinaire." And on issues relating to the free market, added Johns, he was in fact "pragmatic."

In 1968, Hughes joined Whitlam's campaign for eighteen-year-olds to be given the vote. He noted that Whitlam might be "rather surprised," having thought him "a rather conservative person. But I am not always so." In fact his amicable relations with political opponents like Clyde Cameron (and Whitlam himself) were an essential part of the picture.

Hughes had suffered a humiliating defeat in 1964, his first year in parliament, when Cameron, on whom he had mounted a swingeing attack, was able to show that he had got his facts wrong. But thereafter "the two men developed a respectful and civilised relationship." In 1970, amid heated debate over whether the left-wing journalist Wilfred Burchett should be prosecuted for treason (as the conservatives thought) or be subject to an inquiry that might clear him (as the Labor Party thought), Cameron complimented Hughes for confining himself to the legal issues: he had acted correctly "by discussing the law rather than… the political backwash."

Later, in 1971, Hughes's ready cooperation with Cameron helped to demonstrate the reformist aspects of the Public Order Bill. And in 1975, when Cameron appointed Jim Staples to the Arbitration Commission, he first asked Hughes for advice. (The year before, when a magistrate accused the irrepressible Staples of unprofessional conduct, Hughes had chaired a Bar Council meeting that decided to take no further action – reportedly after Hughes told them "we'll convict Staples over my dead body.") Similar examples abound.

The rest of Hancock's book covers Hughes's four decades of preeminence at the Sydney Bar, with fees rising eventually to as much as $6000 per day. These chapters, built around an endless sequence of forensic successes and failures, are less consistently gripping. But there are some vivid pen-pictures from other observers. In the courtroom, Hughes is "declamatory and theatrical, full of hectoring flourishes, airy swoops and lethal pounces" (Sandra Hall); "dashing, dominating, charismatic, patrician and handsome … an elemental force of nature" (Michael McHugh); armed with a "penchant for the pregnant pause, flashing eyes, imperious mien, razor sharp mind, brutal cross-examination, pomposity, wit, apposite quotes from the Bard" (Andrew Clark). If the detailed narrative never quite reaches this level, it has its moments.

Often they relate to defamation cases, with Hughes appearing for the plaintiffs and usually winning. Elizabeth Evatt, chief judge of the Family Court, is defamed when a newspaper article "investigating" the court turns out to be a vehicle for the grievances of embittered husbands. The West Indian cricket captain Clive Lloyd is defamed in an article criticising Kerry Packer's World Series Cricket. Reg Austin, a rugby coach, seeks relief after a journalist describes him as a "fitness fanatic" whose players are being "trained into the ground." When the cases of Lloyd and Austin go on appeal to the Privy Council, they provide the opportunity for an enjoyable holiday, including "a most agreeable dinner" with one of the law lords hearing both cases.

Other successes follow. Greg Hodge, a former Olympic swimming coach, is accused of sexual harassment. Patrick Henry, a dentist in Perth, is defamed when a close-up of his hands is mistakenly used (by Derryn Hinch) in a program about another dentist. Jane Makim (sister to the Duchess of York) is falsely accused of adultery. The solicitor Nicholas Carson is defamed by the *Sydney Morning Herald* columnist John Slee, described by Hughes as a "pedlar of deliberate falsity." A jury awards damages totalling $600,000, but the appeal courts find the amount excessive and order a new trial, at which the second jury awards $1.3 million. To avoid another appeal, Hughes advises Carson to settle for less. Carson is married to Ainsley Gotto; she and Gorton sit in on the case.

A magazine photograph of the football player Andrew Ettinghausen contains a shadow "capable of being interpreted as his penis." In a highlight of cross-examination, Hughes asks the magazine editor (imitating her New Zealand vowels): "Is it a duck?"

A whole chapter is devoted to a 1978 inquiry into alleged interference with an electoral redistribution in Queensland. Hughes defends Eric Robinson, a former political opponent, and brutally demolishes Don Cameron, a former political ally. Hancock uses the case to illustrate two recurring themes: the importance of Hughes's adherence to the "cab-rank" principle (that a barrister cannot pick and choose his briefs) and the surgical savagery of Hughes's cross-examinations. The cross-examination is savage indeed, too much so for comfortable reading. But for those outside Liberal Party culture the dispute is of little interest, except as a reminder of the party's long history of internal dissension and disunity.

In a later case Hughes cross-examines Warwick Fairfax for fourteen days (using notes supplied by Turnbull). The Fairfax company, having previously taken financial advice from Laurie Connell's merchant bank Rothwells, has switched to the new merchant bank Whitlam Turnbull, and refuses to pay Rothwells's fee. Rothwells sues. It is represented by Hughes, with Dyson Heydon as a junior and Julie Bishop as an instructing solicitor. Ultimately the case is settled.

Then there is the "Murphy affair" – focused (once "the *Age* tapes" are out of the way) on the claim by NSW chief stipendiary magistrate Clarrie Briese that Murphy had sought to influence the hearing of charges against Morgan Ryan. At the first Senate committee Hughes attacks Briese's evidence for "stupidity" and "shocking pollution of legal principle"; at the second Senate committee he cross-examines Briese with "withering righteous indignation" and "unremitting attack." But Murphy declines to give evidence. Hughes dutifully offers the reasons for Murphy's decision, but disagrees with it. He is right to do so. As Murray Gleeson (appearing for Briese) asserts, five minutes of evidence from Murphy "would have been of more assistance than a day of argument from Mr Hughes."

Hughes is not involved in the subsequent trial, but returns at the sentencing stage. He fails in a constitutional challenge before the High Court, but is largely successful in the Court of Criminal Appeal. Harders, now deeply involved on Murphy's behalf, considers it "one of the best performances as a barrister that I ever heard."

When Murphy dies, Hughes writes to his widow of the "unjust ordeal" that she and Lionel had borne "with consummate dignity," adding "I shall always have fond memories of Lionel" and of their "essential comradeship." The scepticism with which Hancock reports these comments does less than justice to either Murphy or Hughes.

Hancock touches only briefly on Hughes's private life. His divorce in 1972 from his first wife Joanna is ascribed to mutual disappointment, though earlier we have seen Joanna performing electoral duties as a Good Wife and Hughes writing to her as "darling wife." Later relationships are referred to with a judicious mixture of discretion and candour. The actor Kate Fitzpatrick is named, but only because Hancock cannot resist some tart comments by Michael McHugh. Fitzpatrick had described Hughes as "sweet"; McHugh wondered whether she was a good judge of such things, for she had spoken of Murray Gleeson as the sexiest man she had ever met. "Poor Kate," said McHugh: "she must have led a sheltered life."

Even Hughes's prolonged relationship with his protégé Katie Weigall is touched on only lightly. The one genuine scandal comes when barristers in Selborne Chambers blackball her move to a room on their floor because of the relationship. Curiously, Hancock suggests that they may have had legitimate concerns. Hughes's response is more appropriate: he immediately moves to different chambers (and Weigall to different chambers again).

The timing of the book's publication – at the beginning of June, halfway through an election campaign – is puzzling. The glimpses of Malcolm and Lucy Turnbull are consistently likeable, but

unlikely to change anyone's vote. Conceivably Hughes's reaction in 2009 to Turnbull's displacement by Tony Abbott might remind some voters of their relief at Turnbull's resurrection in 2015: among other things, Hughes found the choice of Abbott "the equivalent of putting the bull in charge of the china shop or the principal lunatic in charge of the asylum." Yet when the *Australian* seized on this passage immediately after publication, Turnbull apologised for it, and assured us that Hughes had already apologised to Abbott as well. That such apologies should be considered necessary is deeply depressing.

Yet apologies are sometimes necessary. One of the students involved in the cricket-bat incident was Ian Macdonald; indeed, it was he who later unsuccessfully charged Hughes with assault. Hancock notes gleefully that this was the very same Ian Macdonald who in 2013 was found to have given corrupt assistance to Eddie Obeid. Yet he also notes that in 1994, as a guest at a family wedding, Macdonald apologised to Hughes.

I should take this opportunity to apologise too. In a letter published three days after the cricket-bat incident, I accused Hughes of "exaggerated and melodramatic reactions." Often in those days his public behaviour was indeed confrontational; but what I wrote was exaggerated and melodramatic as well. More seriously, I charged him with "persistent refusal to receive public representations in the course of his public office." Hughes indignantly refuted that charge, enlisting Whitlam in his support. His indignation was wholly justified, and his refutation convincing.

My purpose was to criticise certain forms of protest, while defending the right to protest. The purpose was admirable. But the letter was not.

T*om Hughes QC: A Cab on the Rank* is splendidly produced, and halfway through comes a lavish portfolio of photographs, the most recent of them from February this year. It is a pity that Jiawei Shen's wonderful portrait (above), shown in part on the dust jacket, is not reproduced there in a more permanent form. •

TONY BLACKSHIELD

Tony Blackshield is an Emeritus Professor of Law at Macquarie University, a Visiting Professorial Fellow at the University of New South Wales and an Honorary Professor at the Indian Law Institute in New Delhi. He is co-editor of *The Oxford Companion to the High Court of Australia*.