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1975

PARLIAMENT OF NEW SOUTH WALES

REPORT

FROM

THE SELECT COMMITTEE

OF THE

LEGISLATIVE ASSEMBLY

UPON

THE APPOINTMENT OF JUDGES TO THE HIGH COURT OF AUSTRALIA

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(*a*) Discharged, 18th March, 1975.

(*b*) Appointed, 18th March, 1975.

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SELECT COMMITTEE
UPON
THE APPOINTMENT OF JUDGES TO THE HIGH COURT OF AUSTRALIA

On Wednesday, 19th February, 1975, on the motion of Mr W. P. Coleman, B.A., M.Sc.(Econ.), Barrister-at-law, M.L.A., the Legislative Assembly of New South Wales resolved:

(i) That a Select Committee be appointed to consider the present system of appointment of Judges to the High Court of Australia and to recommend amendments to the Constitution of the Commonwealth of Australia which will ensure that such appointments are made in a more equitable and acceptable manner.

(ii) That such Committee consist of Mr Dowd, Mr Leitch, Mr Maher, Mr F. J. Walker and the mover.

(iii) That such Committee have leave to sit during the sittings or any adjournment of the House, to adjourn from place to place, and to make visits of inspection within the State.

Subsequently, on the 18th March, 1975, Mr Maher and Mr F. J. Walker were discharged from service on the Committee and Mr Coates and Mr Harrold were appointed in their places.

Your Committee has agreed to the following report and begs to submit it to your Honourable House.

INTRODUCTION

1. The Committee held its first meeting on 25th February, 1975, elected Mr W. P. Coleman, M.L.A., as Chairman, formulated certain procedures and decided upon plans for the inquiry.

The Committee subsequently met and deliberated on eleven occasions.

2. The Committee agreed that the terms of reference were wide and adequate.

3. The Committee invited submissions from individuals and organizations and, to this end, caused an advertisement to be published on Saturday, 3rd May, 1975, in each of the following newspapers, viz., *The Sydney Morning Herald, The Australian, The Age* (Melbourne), *The Advertiser* (Adelaide), *The West Australian* (Perth), *The Courier Mail* (Brisbane), *The Mercury* (Hobart), *The Examiner* (Launceston) and *The Canberra Times.*

The Committee received thirteen written submissions (which are printed as Appendix "D" to this report) and fifty-seven letters.

4. Informal discussions were held with individuals who had not submitted recommendations to the Committee as well as with some of those who had.

5. Methods of appointment to the supreme constitutional courts in several other federations were closely examined.

6. The Committee has had throughout its deliberations the invaluable attendance and assistance of Mr Lindsay Holmwood, C.B.E., LL.B., the Director, New South Wales State Secretariat, Australian Constitutional Convention Delegation.

7. The Committee also wishes to record its thanks to Mr W. G. Luton, the Clerk of Select Committees, for his diligent assistance.

FEDERATION IN AUSTRALIA

1. The Committee's terms of reference do not permit it to discourse on the philosophy of federalism. But it has been clear to the Committee from the beginning that federalist, as opposed to centralist principles, have been at the basis of the terms of reference. It has seemed proper, therefore, to summarize briefly the Committee's view that Australian federalism is one expression of the idea that the freedom of the individual, the involvement of the citizen in public affairs, and the efficiency of government instrumentalities are best advanced where centralized controls are kept to a minimum and where political power is widely distributed among a number of self-governing units.

2. The essence of any federal system of government is its division of sovereignty between a central government and state or provincial governments. Each government in a federation has authority to act independently within its sphere of sovereignty and recognizes in turn the sovereignty of the other parts of the federation. Each government in a federation is supreme within its jurisdiction subject to rules in the constitution for the resolution of conflicts in areas of dual sovereignty.

3. The principal instrument that provides for the government of the Australian federation is the United Kingdom Act of 1900 which established the Commonwealth of Australia. Its short title is "The Commonwealth of Australia Constitution Act". This Act divided sovereign legislative power in Australia between the Commonwealth Parliament and the State Parliaments, preserving exclusive powers for the State Parliaments in certain areas, creating exclusive powers for the Commonwealth Parliament in certain areas, and creating dual sovereignty in others.

4. The States retain power to legislate in general areas assigned to the Commonwealth, with a few notable exceptions, unless the Commonwealth enacts inconsistent legislation. Where a State law is inconsistent with a valid Commonwealth law, section 109 of the Commonwealth Constitution provides that the Commonwealth law prevails and the State law is, to the extent of the inconsistency, invalid. The result of this division of power is that the Commonwealth and State Parliaments are complementary and in no way is one inferior to the other.

5. It was this concept to which the electors of the six States agreed as a condition of federation. In the words of Judicial Committee of the Privy Council (*James* v. *Commonwealth,* 55 C.L.R. at page 41):

> "Thus the powers of the States were left unaffected by the Constitution except insofar as the contrary was expressly provided; subject to that each State remained sovereign within its own sphere. The powers of the State within those limits are as plenary as are the powers of the Commonwealth."

Or, as put by Mr Justice Starke in his dissent in the First Uniform Tax Case and adopted in the Melbourne Corporation Case in 1947:

> "The government of Australia is a dual system based upon the separation of organs and of powers. The maintenance of the States and their powers is as much the object of the Constitution as the maintenance of the Commonwealth and its powers."

6. Three institutions created by the Commonwealth Constitution were clearly intended to strengthen the federal character of the constitutional compact. The first is the referendum as the method of amending the Constitution. Any proposed amendment of the Constitution must be approved, in a referendum, not only by a majority of all electors voting in the Commonwealth but by a majority of electors voting in a majority of the States. This provision has plainly strengthened the power of the less populous and smaller States, which might otherwise be out-voted by the fewer but larger States.

7. The second federal institution is the Senate. Intended to be a States House, each State is equally represented in it. It is, at the same time, one of the most powerful second Chambers in the world. It has equal power with the House of Representatives in respect of all proposed laws, save that it may not amend any proposed law imposing taxation or appropriating revenue or moneys for the ordinary annual services of the Government, and it may not amend any proposed law so as to increase any charge or burden on the people. Laws to appropriate revenue or moneys, or to impose taxation may not originate in the Senate. The Senate, nevertheless, may decline to pass any bill, even though it be a bill which it may not amend. The framing of the whole of the Part dealing with the Senate in the Constitution shows the intention to give the States predominant power in that Chamber, although the Senate no longer sees itself in that role.

8. The third federalist institution created by the Commonwealth is the High Court of Australia, the judicial machinery established for the resolution of conflicting claims on the part of the Commonwealth Government and the Governments of the States. To this we now turn.

THE APPOINTMENT OF JUDGES TO THE HIGH COURT

1. The Committee takes as one of its starting points that, as a court of law, the High Court has, without any doubt, attained the highest of stature within the common law world.

2. At the opening of the 1971 Legal Convention in Melbourne, the Right Honourable Lord Diplock of the House of Lords expressed himself in the following terms:

> "There were, of course great names in the Australian courts even before Federation as well as after, but I think it is true to say that twenty-five years ago it was rare for Australian cases to be cited in English Courts, except in the Privy Council. Today the High Court of Australia has a reputation as one of the great common law courts of the world and I should like, on this occasion, to pay a tribute to the leader of it who brought it that high pinnacle of fame and who is still with us, Sir Owen Dixon. He will go down in history not only in this country, not only in England, but I think I can speak for Judge Wisdom in saying, in the United States, as one of the great illuminators of the common law of this century. And the result is today that if we have a question of basic common law to be considered in the Court of Appeal or in the House of Lords, we think that counsel hasn't done his duty unless he is ready to cite us Australian cases to see what thinking there has been on this subject, not only in the High Court but in the Supreme Courts of the States."

3. Some 3 years later, at the commemoration of the sesquicentenary of the proclamation of the Charter of Justice of New South Wales, Lord Hailsham, erstwhile Lord Chancellor, delivered a similar encomium in saying:

> "I have practised in the Privy Council since before the war, and I have now sat judicially both in the House of Lords and in the Privy Council in cases which I have had to compare and cite authorities from Britain, the United States, Ireland, Canada, Australia and the Caribbean. I put Australian lawyers, as epitomized for instance in the judges of the High Court, as second to none, and I mean this meed of praise in absolute terms, that is, making no allowance whatever for the relative size in the populations of the countries concerned."

4. The Committee is glad to record, adopt, and repeat these judgments. Similar judgments have been made by leading lawyers in Canada and the United States of America. But respect for the legal eminence of the High Court does not automatically carry with it unqualified acceptance of its constitutional decisions. As Sir Robert Menzies put it (*Hansard*, 10th April, 1946):

> "There is no question that what we call constitutional law is only half law and half philosophy, political philosophy, and therefore it, more than any other branch of law, changes according to the philosophical current in the minds of the people from time to time."

(*See also* Sir Charles Court's submission on behalf of the Government of Western Australia.)

5. It is these constitutional aspects with which the Committee is especially concerned. The Committee has noted that constitutional cases are a small percentage of the High Court's work. According to Professor Geoffrey Sawer in his chapter "The Constitution and its Politics" in *Australian Politics. A Third Reader*, edited by Henry Mayer and Helen Nelson (1973), the High Court had decided more than 8,000 cases by the end of 1968, of which only 650 were constitutional cases—approximately 8 per cent of the whole. Since 1950, according to Professor Sawer, the annual average of constitutional cases had sunk to seven a year. It is these comparatively few cases, however, that have been decisive in the development of Australian federalism and we repeat that it is in relation principally to these that the Committee is concerned with the issue of appointments to the High Court.

6. A fundamental aspect of the appointment of judges to the High Court is that the States had and have no part in the selection of members of the Court. Provision for a High Court of Australia is made in sections 71 and 72 of the Constitution in terms as follows:

> 71. The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.
>
> 72. The Justices of the High Court and of the other Courts created by the Parliament—
>
> (i) Shall be appointed by the Governor-General in Council.
>
> (ii) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity.
>
> (iii) Shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

7. This is the sum total of the Constitution provision dealing with the setting up, the structure and the composition of the Court. The Constitution leaves all other matters relating to the Court to be determined by Parliament under the "incidental" legislative power conferred by s. 51 (xxxix). That is leaving a very great deal indeed to the Parliament and leaves much to be desired.

8. Among the omissions from the Constitution are—

- lack of any provision whatsoever as to qualifications required for appointment;
- lack of provision limiting to the number of appointments that may be made by a government to the Court;
- lack of any provision prescribing disqualifications; e.g., there is nothing in the Constitution to prevent the Commonwealth appointing the Prime Minister to be also a High Court Judge; [See Sawer's *Australian Federalism in the Courts* at page 154.]
- lack of any provision preventing a government so structuring a High Court as to ensure that particular types of cases came before particular members of the Bench.

9. These matters are further touched on in Appendix 1.

10. What has happened is that the Parliament of the Commonwealth enacted the Judiciary Act of 1903, and that Act has since been the subject of amendment. In it there are provisions, among others—

- as to qualifications for appointment;
- that a judge may not hold any other office of profit, except judicial office;
- as to the composition of full courts for various purposes, including cases where the constitutional powers of the Commonwealth are in question;
- that in certain circumstances the Chief Justice or other senior judge present is to have a second or casting vote.

All, or any of these provisions can, of course, be altered by Act of the Commonwealth Parliament.

11. The most critical feature here is that all appointments are made by the Governor-General in Council, i.e. by the Governor-General acting on the advice of the Federal Executive Council. Canada is the only other federation that has adopted this system of appointment to the Court which is the constitutional umpire in contests between the central government and the governments of the constituent States.

12. The concern displayed by the Legislative Assembly of New South Wales in appointing this Select Committee is not new. One of the principal architects of the Constitution and later the first High Court Chief Justice, Sir Samuel Griffiths argued that High Court appointments should require the approval of the Senate but his views did not prevail. Alternative schemes for appointment were proposed in the 19th century debates preceding the formation of the Constitution. Although delegates were as much concerned with the necessity to protect the judges from political influences once appointed as with the composition of the Court, it was clearly contemplated during the debates that the composition of the Court will influence the course of the Australian Federation. South Australian delegates to the 1897 Adelaide Convention foreshadowed the enormous effect the High Court would have, and in the debates in the Commonwealth Parliament at the time of the passing of the Judiciary Act, 1903, the Attorney-General, Mr Deakin, in particular elaborated at length on the peculiar nature of the High Court as devised in the Australian Constitution and the wide and undefined nature of the *inter se* powers to be interpreted.

13. In 1914, there was public controversy when it was alleged that a proposed appointee to the High Court had been questioned beforehand as to—and had indicated —his views upon the broad question of competing Commonwealth/State claims to authority. An account of this episode, is given in L. F. Fitzhardinge's biography, *William Morris Hughes,* where there are quoted at page 277 a telegram to the proposed appointee:

Confidential and important know your views Commonwealth versus State rights, very urgent

and the reply—

In sympathy with supremacy of Commonwealth powers.

In the event, the public reaction was such that the appointment was not pursued.

14. In 1928 and again in 1935, Sir Owen Dixon touched upon this question before this Select Committee and we quote him later in this chapter.

15. In 1973, prior to the first sitting of the Constitution Convention at Sydney, the question of State participation of High Court appointments had been raised directly in the written submissions tendered on behalf of the New South Wales Government supporting delegates and on behalf of the Victorian Parliamentary delegation. The relevant extracts from these submissions are in Appendix 2. The extracts from the 1973 Convention Debates in Appendix 3 indicate that concern in this area was felt also by Western Australia.

16. The opinions of Sir Owen Dixon, reputed one of the greatest, if not the greatest of the Chief Justices of the High Court, carry particular weight and we quote him at some length. In evidence on behalf of the Victorian Committee of Counsel before the 1929 Royal Commission on the Constitution (The Peden Royal Commission), while he was King's Counsel and before his elevation to the Bench, he put it thus:

> "The other suggestion put forward is that the courts should belong to neither body," (i.e., neither to the Commonwealth nor the States) "but that the Constitution should be amended to provide that the courts stand midway between the Federal and the State systems, and that there be an hierarchy of judicial officers appointed jointly by the co-operation of the State and Federal executives, to advise the Crown, to appoint judges instead of the Cabinet doing so, and that the State and Federal Parliaments be empowered to give that body of courts jurisdiction as they think fit." (Evidence page 794.)

Later, on the same page, he continued—

> "Of course, the reason underlying that idea is to give the courts complete independence from either side. Those who have considered this system have thought that there has been a tendency to regard a Federal court as an agency of a Federal Government, and a State court as the agency of a State Government, whereas they should be agents of neither Government, and should administer the law without any suspicion of being inclined to expand it if they are Federal and to contract it if they are State, and vice versa."

17. Later, while Mr Justice Dixon, he repeated the same theme in a paper "The Law and the Constitution" published in 1935 in the *Law Quarterly Review,* at pages 590 *et seq,* in the words:

> "An attempt of one agency to intrude upon the field of another was simply an excess of legal power and the attempt would, therefore, be nugatory and void. In such a polity, the part played by the Courts is, or should be, to decide, in the ordinary course of ascertaining and enforcing the law, whether government action in reference to the citizen was lawful or unlawful, valid or void; that is in the case of legislation to decide whether it was effectual to make a change in the law, or left it unaltered. This function must be performed whenever the necessity arises for enforcing rights which depend upon a doubtful exercise of power. Every Court in the land must exercise it. The only alternative when such a question arises is for it to refuse jurisdiction. Now in such a state of affairs, it would appear natural to endeavour to establish the Courts of Justice as independent organs which were neither Commonwealth or State. The basis of the system is the supremacy of the law. The Courts administering the law should all derive an independent existence and authority from the Constitution. Some practical difficulties would occur in carrying such a principle beyond the superior Courts, but it is not easy to see why the entire system of superior Courts should not have been organised and erected under the Constitution to administer the total content of the law. No doubt, some financial provisions would be required for levying upon the various Governments contributions to the cost of administering justice. To make judicial appointments and deal with some other matters, it would have been necessary to create a joint committee."

18. We quote these passages from the Chief Justice because of the authority his words must carry. We would suggest further that the "tendency to regard a Federal Court as an agency of a Federal Government" is strengthened by the propensity of the Commonwealth Executive to appoint to the High Court, Commonwealth Law Officers or former Commonwealth Law Officers. This has added significance in that in certain situations the Commonwealth Judiciary Act gives to the Chief Justice a second or casting vote if the Court is equally divided on any question; a vote which in very recent years has been exercised in matters of outstanding constitutional import.

19. Latterly, we have had the experience of every second Chief Justice on the High Court Bench being a some-time Commonwealth Attorney-General. Currently also, we have the position again—such as obtained from 1913–1929—of there being on the High Court Bench concurrently no less than three judges who had previously held Law Officer rank within the Commonwealth.

20. It is probably inevitable that such prominent persons would be among those who would, under any system, be considered for appointment to the High Court. We agree with the view put in the submission to this Committee by Professors Cowen and Ryan: "The object must be to ensure that only persons of outstanding capacity are appointed. Political experience may be of great value in forming such persons and in establishing their quality. So may previous judicial experience, or eminence in legal practice or scholarship."

21. The Committee considers, however, that it is reasonable to ask whether confidence in the Court is maintained when it is known that Commonwealth legislation under challenge, by States or individual citizens, was drawn having regard to the expressed views of its Attorney-General since made a High Court judge. This, precisely, was the position openly avowed in the Report of the Senate Select Committee on Off Shores Petroleum Resources, in 1971. Paragraph 6.54, at page 112 of the report, is in terms as follows:

6.54 The Committee has received a submission, in two parts, from the Commonwealth Attorney-General's Department which was presented by the Department's Deputy Secretary and by the Parliamentary Draftsman of the Commonwealth. It was expressly informed by these witnesses—as would in any case have been presumed—that the Commonwealth had acted on the views of its then Attorney-General, Sir Garfield Barwick, (since 1964 Chief Justice of the High Court) and of its then Solicitor General, Sir Kenneth Bailey, who was an acknowledged authority on the law of the sea. The Committee, in the latter stages of its preparation of this Report also received evidence from Sir Kenneth Bailey.

22. In revenue cases, for example, it must be difficult for the citizen to accept that justice is even-handed if a High Court bench hearing his case—from which there is now no appeal—includes former Commonwealth law officers who may have advised upon the particular area of taxation law being contested with the Commissioner of Taxation. The Commissioner, in electing to have put to the test in the courts any question of taxation law, would appear to many to be in an advantageous situation when he is moving on advice in the field in question given earlier by the law officer since made a High Court judge. (Obviously, if his advice had been given on the particular *case* in question, the judge would not participate in any consequent proceedings.)

23. The Committee makes no further comment on this aspect of the Australian system of appointment and notes that there is no other federation among those examined by the Committee where the Executive of the central government is com-

SUPREME FEDERAL COURT

(Constitutional)

	U.S.	West Germany	Malaysia
Title	Supreme Court U.S.A.	Federal Constitutional Court.	The Federal Court of Malaysia.
Appointed	By President of U.S.A. with the consent of the Senate.	Half judges elected by Bundestag, half elected by Bundesrat. A Committee for the selection of judges participates in their appointment.	By the Ruler, on the advice of the Prime Minister, after consulting with the Conference of Rulers. The Court must include the Chief Justices of three States.
Source	P. H. Lane—The Australian Federal System with United States Analogues page 1000.	The *Europa Year Book* 1970, at page 713.	L.A. Sheridan & Harry E. Groves—*The Constitution of Malaysia*, 1967, at page 712.

Source: (Taylor Cole's "Three Constitutional Courts—A Comparison". *The American Political Science Review*, Vol. LIII No. 4, pp. 963 *et seq.*)

Detail of the Swiss Federal Tribunal is not provided here because of the considerations referred to in Professor Nygh's submission, viz.:

> "However, the Court is not competent to examine the constitutionality of legislative acts of the Federal Parliament issued in the form of federal laws or generally binding federal decrees, the rationale being that such laws are subject under the Swiss Constitution to an optional referendum if demanded by thirty-thousand Swiss voters or eight cantons. The electorate itself is therefore the ultimate court of appeal in such matters."

pletely unfettered in making appointments to the court which has to decide upon conflicts between the central government and the governments of the component parts making up the federation. In the words of Professor Peter Russell of Toronto University, referring to Australia: "It does seem anomalous that the Court should appear in the Constitution to be so completely a creature of the Federal Government." (*See* article in *Alberta Law Review,* 1968–69 at pages 105 *et seq.*) Or as Sir Charles Court, the Premier of Western Australia, put it in his submission on behalf of his Government:

"Just as no man should be a judge in his own cause, so no Government should be solely concerned in the appointment of the judge in its own cause."

24. The situation in this respect elsewhere is set out briefly in the tables below. It is set out in greater detail in the submission made to the Committee by Professor Nygh of Macquarie University and appended to this Report.

25. The Committee has been concerned primarily with the effect on the interpretation of the Constitution in respect of appointments to the High Court. It has also, however, considered the function of the High Court as an Appeal Court from State courts on matters not involving the Constitution. It may be argued that, on a matter of law not involving the Constitution, it is irrelevant to consider who appoints the judge, as his function as judge does not involve any conflict of Commonwealth and State interests. However, an artificial situation arises under the Constitution whereby the States whose law is being interpreted do not have any say at all in the appointment of what is, in effect, their own appellate court. At a time when moves to abolish appeals to the Privy Council are gathering some momentum, this situation becomes increasingly anomalous.

SUPREME FEDERAL COURT

(Constitutional)

India	Nigeria	Canada	Austria
Supreme Court of India.	Supreme Court of Nigeria (C.J. and not less than 5 judges).	Supreme Court of Canada.	Constitutional Court.
By President of India after consultation with certain holders of judicial office.	By President of Nigeria, on the Prime Minister's advice, but so that four judges are appointed on the advice of the Premier of a different Region. (Constitution Article 112 (1).) (The present status of the Constitution of Nigeria is not completely clear.)	By the Governor-General in Council. It is to be noted that the "Victoria Charter" agreed upon by the Federal Government and all 10 Provinces in June, 1971, approved a formula under which the Provinces would be necessary parties to the appointment of judges of the Supreme Court. Detail of this formula is set out in the body of this report.	President, Vice-President and six of the judges (and three substitute judges) appointed by President of Austria on the nomination of the Federal Government; the remaining six judges (and three substitute judges) are appointed in part on the recommendation of the Federal Lower House of Parliament and in part on the recommendation of the Upper House. The *Upper House is composed of persons elected by the State legislatures*, and may be but need not be drawn from within the membership of the legislature. Each State's membership of the Upper House is proportionate to its population with the largest State having twelve members. (*See* Peaslee's *Constitutions of Nations*, Revised Third Edition, Vol. 3, p. 36.)
Encyclopaedia Britannica 1962, Vol. 12, page 194.			

THE HIGH COURT AND COMMONWEALTH-STATE FINANCIAL RELATIONS

1. The Committee is of the opinion that the "tendency to regard a Federal Court as an agency of a Federal Government" in Sir Owen Dixon's words, is strengthened by an examination of the High Court's history.

2. It is outside the terms of reference of this Committee to examine the working of the Australian Constitution and the High Court in detail, but the question whether the High Court has unduly extended Commonwealth power almost inevitably arises in any discussion of the most suitable method of appointment of High Court judges and some reference to it is necessary.

3. The Committee considers that, in the area of Commonwealth-State financial relations, the subordination of the States has led to the situation where the States have not the financial resources needed to discharge their responsibilities and have become dependent on the Commonwealth. It has, therefore, seemed appropriate to the Committee to note the High Court's role in this development.

4. Professor Sawer in his work *Australian Federalism in the Courts* (pages 150 *et seq.*) summed up this development in this way:

> "Thus, financial relations between Commonwealth and States, whether in relation to the loans system under s. 105A, or the grants system under s. 96, and the scope of the Commonwealth's taxation powers, and the working of inter-governmental compacts and the requirements on discrimination and preference in tax, revenue and trade laws, have all been interpreted in a sense favourable to Commonwealth authority and unfavourable to the protection of State autonomy and formal equality."

Or, in the words of Sir Robert Menzies (*Central Power in the Australian Commonwealth,* page 3):

> ". . . the powers of the Central Government, though defined and therefore in form limited by a written Constitution, have tended to grow far beyond the conception of the original draftsmen; to some extent, it is true, as a result of formal amendment of the language of the Constitution itself, but to a material extent as a result of new and extended judicial interpretation of existing powers."

5. A brief summary of some of the more important High Court decisions referred to by Professor Sawer and Sir Robert Menzies is as follows.

6. In 1908 in the Surplus Revenue decision (*N.S.W.* v *the Commonwealth* 7 C.L.R. 179) the Constitution was emasculated of section 94. This section of the Constitution provides:

> "After five years from the imposition of uniform duties of customs, the Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth."

The High Court held that, by the device of appropriating to some Commonwealth trust account the revenue collected in any year and not expended by 30th June, there was no "surplus revenue" to transfer under section 94, to the States. It was that decision which led to the institution of Commonwealth *per capita* payments to the States which continued until the Financial Agreement was entered into in 1927.

7. Section 114 of the Constitution includes a provision—

> ". . . nor shall the Commonwealth impose any tax on property of any kind belonging to a State."

But when a transport contractor acting on behalf of the State of New South Wales attempted to remove out of the control of Commonwealth customs wire netting imported by the State, it was held that this was prohibited under the Commonwealth Customs legislation (*R.* v *Sutton* (1908) 5 C.L.R. 789).

8. In the same volume, in the Steel Rails case (1908) reported at page 818, it was held that the Commonwealth might validly impose customs duty on steel rails even though these were being imported by the State specifically for use in State railway construction.

9. In 1926, there came the Roads Case (*Victoria* v. *Commonwealth* 38 C.L.R. 399) on section 96, the section which, again in Sir Robert Menzies' words "has achieved a permanent character and is employed for purposes which I venture to believe were never contemplated by the original draftsmen. For the section has become a major, and flexible, instrument for enlarging the boundaries of Commonwealth action; or, to use realistic terms, Commonwealth Power". The argument that the Federal Aid Roads Act was invalid, as being in substance a law relating to roadmaking and not a law for granting financial aid to the States, was rejected in an eight-line judgment:

"The Court is of opinion that the Federal Aid Roads Act No. 46 of 1926 is a valid enactment. It is plainly warranted by the provisions of section 96 of the Constitution, and not affected by those of section 99 or any other provisions of the Constitution, so that exposition is unnecessary."

10. In parenthesis, it is interesting and instructive to observe what was said in 1901 on section 96 of the learned authors of the *Annotated Constitution of the Australian Commonwealth,* Sir John Quick and Sir Robert Garran:

"The section (s. 96) is not intended to diminish the responsibility of State Treasurers, or to introduce a regular system of grants in aid. Its object is to strengthen the financial position of the Commonwealth in view of possible contingencies, by affording an escape from an excessive rigidity of the financial clauses. It is for use as a safety-valve, not as an open vent; and it does not contemplate financial difficulties, any more than a safety-valve contemplates explosions."

11. In the related area of excise, there has been a similar process. Because under section 90 the Commonwealth's taxing power over excise is *exclusive,* it necessarily follows that the *wider* the meaning which can be given to excise, the *narrower* the residual revenue field open to the States. In 1904, in *Peterswald* v. *Bartley* (19) 4 1 C.L.R. 497) it was said by the High Court that excises were "taxes in respect of the manufacture or production of goods by reference to the volume or value produced" (Sawer page 145). In 1938, in *Matthews* v. *Chickory Marketing Board* (60 C.L.R. 263) the Chickory Marketing Board of Victoria had, as part of a scheme or organized marketing endorsed by producers, made a levy of £1 a half acre on land planted with chickory. By *three to two majority,* this was held an excise, and so invalid. In 1949, in *Parton* v. *Milk Board* (Victoria) (80 C.L.R. 229) a levy on milk distributors earmarked to promote milk consumption, improve milk quality, and compensate deregistered producers was held an excise and so invalid. In *Dennis Hotels Pty Ltd* v. *Victoria* (104 C.L.R. 529), State annual liquor licence fees just escaped, by a bare *four to three majority.* And then, of course, came *Western Australia* v. *Hamersley Iron Pty Ltd* (1969) (120 C.L.R. 42) *with its bench split evenly* and the Chief Justice's view therefore prevailing to hold that a stamp duty (one cent in every $10) was an excise, the money passing being paid for goods. There followed *Chamberlain Industries* (121 C.L.R. 1) and *I.A.C.* (121 C.L.R. 1) in the same vein.

12. The High Court's actions in the field of excise have been described in the following terms:

"The action of successive High Courts in extending the definition of excise taxes in such a way as apparently to preclude the States from imposing taxes on consumption, is not only illogical, at variance with the intentions of the framers of the Constitution, and contrary to common English usage and the practice of other countries; it is also one of the greatest impediments preventing the achievement of a rational and lasting division of financial powers in the Australian federal system." (Matthews & Jay: *Federal Finance* (1972) pp. 317–8.)

13. In the only other such field, that of *income tax,* by decisions in 1942 and 1957 the Commonwealth was enabled to oust the States from the income tax field. In issue in the first case was the validity of Commonwealth Acts which for the duration of the war, among other things, imposed income tax at such high levels as to leave no room or virtually no room for the States to impose income tax, and provided also for grants to each State by way of reimbursement of income tax foregone on condition that the State did not itself levy an income tax. The decision in the first of these brought about what Sir Robert Menzies has described in his *Central Power* at page 92 as "a major revolution without any formal constitutional amendment". In at least one authoritative view this revolution came about by reason only of the absence of Mr Justice Owen Dixon, as he then was, as Australian Minister to Washington (*see* Sawer—"Getting around the Constitution"—*Public Administration,* Journal of the Australian Regional Group of the Royal Institute of Public Administration, March, 1970, page 29).

14. *The Uniform Tax Case No.* 2 (*Victoria & N.S.W.* v. *the Commonwealth* 99 C.L.R. 575) involved a challenge to the Commonwealth's post-war "uniform income tax" legislation, much to the same effect as the war-time legislation. The Commonwealth, when the war ended, had been emboldened to continue the wartime legislation by reason of the fact that in the 1942 challenge the High Court relied very little on the "defence power" of the Commonwealth in arriving at its decision. This second case was also decided adversely to the States, and cemented the doctrine that the Commonwealth may attach any term it wishes to a section 96 grant. Noteworthy in Uniform Tax Case No. 2, is that one critical provision held valid in Uniform Tax Case No. 1 was held invalid in Case No. 2; i.e., the provision—most helpful in ousting the States from the income tax field initially—that a taxpayer was liable to six months' imprisonment and to double tax if he paid State tax in any year before the totality of this Commonwealth tax for that year had been paid by him and received by the Commonwealth.

15. In 1971 there came the payroll tax case where it was held that the Commonwealth could lawfully impose payroll tax in respect of the salaries and wages of all State employees. In so deciding, the Court rejected certain reservations thought to have existed in the Engineers' Case in favour of the States which had been embraced in earlier cases by Dixon *J.*, and Latham *C.J.*

16. These cases illustrate how, in the field of public finance, the High Court has distorted, or at least allowed the Parliament of the Commonwealth to distort, the distribution of revenue resources in Australia in a way not contemplated by the framers of the Constitution. It can be said that Australia is now only formally a federation. The only name with which to describe the current structure of government in Australia is coercive federalism.

17. The Committee has carefully noted the observations of the late High Court Justice, Sir Douglas Menzies, on the rectification of errors of the High Court. In his William Fullagar Memorial Lecture on 6th May, 1968 (reported at 42 *Australian Law Journal*, 79–87), His Honour made these comments:

> "To adopt one of two possible interpretations of a constitutional provision which time proves unworkable would also plainly be error. The Constitution must be regarded as an instrument providing for a workable system of government. The real difficulty arises when, for instance, there being two interpretations of a constitutional provision open, the one which is adopted is claimed to have created a less satisfactory framework for government than the one rejected. In such a case my view is that, if and when the final court of appeal is satisfied of this, it would be error to adhere to what has been decided earlier."

and later, on page 86:

> "It follows that when upon the language of The Constitution, two courses are open to a court, there must always be room for difference of opinion, and it cannot be affirmed that a decision once reached must be adhered to if in time it is shown to have created greater problems than it has solved."

18. It appears to us that there now exists a strong case for the view that the High Court's decisions especially in taxation have been shown to have almost destroyed the independence of the States and with it, federalism.

19. While recognizing the power of the High Court to rectify what may now be regarded as errors, the Committee has considered the question whether or not a change in the system of appointment of judges may assist this process. To this, we now turn.

POSSIBLE COURSES OF ACTION AND RECOMMENDATION

1. After examining the submissions received and the practice in other federations, the Committee has found it convenient to classify methods of appointment of judges (other than the method now used only in Australia) and proposals for reform under four headings, depending on whether the key role is played by:

(1) a system of State quotas; or

(2) Senate (or Upper House) election or approval; or

(3) selection by the Judiciary; or

(4) an Advisory Commission.

2. In assessing these methods and proposals and their relevance to Australian conditions, the Committee has taken the view that any recommendations must be—

(i) practical, and

(ii) increase the say of the States.

3. As to (i) *practicality*:

The Committee has been concerned to avoid a proposal which, however attractive in principle, has no hope of being adopted in Australia. The Committee has noted and the majority is in substantial agreement with the opinion of Mr Leslie Katz of the Faculty of Law of the University of Sydney, who in his submission to the Committee wrote:

> "My belief is that it would not be a fruitful exercise for the Committee to canvass methods of appointment of High Court judges as though we were still in the 1890's and any method of appointment were open to us. The inertia created by almost seventy-five years of operation of the present Constitution would be impossible to overcome unless there were some real threat of the break-up of the federation and there is not. Therefore, any recommendation for change, if it is to be acceptable to the electorate, must not represent a radical departure from the present method of High Court appointments."

4. The Committee is aware that there may be, for some, great satisfaction in imagining a very different Constitution of Australia, or indeed in rewriting the history of Australia in the past 75 years so that it takes on a more thoroughly federalist spirit. The Committee has, however, resisted this temptation and the majority has confined itself to the immediately practicable.

5. The President of the New South Wales Bar Association, Mr T. E. F. Hughes, Q.C., stated part of the problem bluntly:

> "No government in Canberra, whatever its political colour, will be disposed to surrender control or to permit any diminution of its control over Federal judicial appointments."

The President speaks with the experience of a former Commonwealth Attorney-General.

6. The Committee does not accept this opinion but all due weight must be given to it. It would be foolish at this stage of our history to expect any Federal Government to renounce its power in this area or wholly give up its predominant role.

7. As to (ii) *increasing the say of the States,* the Committee is nevertheless convinced that the anomalous situation should not be allowed to continue in which one party to the federal compact, the central government, has the right—without even any obligation to consult—to appoint the umpires in the cases of conflict between it and the State Governments.

8. Further, the Committee believes that the High Court has so interpreted the Constitution as to lead to an unworkable and unacceptable imbalance in the distribution of financial resources in relation to financial needs, which should be corrected if federalism is to survive in Australia. Some modification in the system of appointment of judges will contribute to this correction. We now turn to the proposals made for such modification.

State Quotas

9. The Committee agrees with what has been put to it that there has been an undue concentration of appointments to the High Court from the eastern States of New South Wales, Victoria, and Queensland. We find it inconceivable that in over 70 years of federation there has never been one instance where a judge or legal practitioner in Western Australia, South Australia, or Tasmania was worthy of appointment at the time when a vacancy occurred.

10. The fact that High Court judges have tended to come overwhelmingly from New South Wales and Victoria, has probably resulted indirectly in a more centralist interpretation of the Constitution than if the smaller States had had representation on the Court. It can be suggested that it would be a different Australia if the Constitution had been interpreted by a Court representative of the smaller States which tend to be more distrustful of the central government, as well as of the larger States. When a Court is dealing with matters that are not subject to previous decisions the interpretation of the Court must be influenced by the attitude and the background of the judges who are appointed to it.

11. We do not consider the fact that, in most cases before it, the High Court is far more concerned with general law than with constitutional law is decisively relevant in this respect. We are aware that the benches and bars of the three mainland eastern States exceed many times the numerical strength of their counterparts in other States. More litigation, and it may be a greater proportion of more complex litigation, emerges from the three eastern States mentioned. These factors, it has been put to us, could result in a situation, at a particular time when a vacancy occurred, that to appoint from Western Australia, South Australia, or Tasmania would result in the appointee being of less calibre than might otherwise be obtained. But whether this would have been necessarily so would seem debatable. Professor Geoffrey Sawer, for example, in his submission speaks of certain, "at least five", unsatisfactory appointments having been made from the eastern States and gives as his view that "equivalent appointments from Adelaide, Perth, and Hobart could not have been worse and might well have been much better".

12. Be this as it may, we cannot and do not accept the proposition that the bar and Supreme Court bench of South Australia, Western Australia, and Tasmania are chronically incapable of producing a candidate well fitted for High Court appointment.

13. For this reason, and because we regard it as important to Australia that its highest court should be, and appear to be, representative of the whole country, we consider that, subject to the paramount consideration that the most able lawyer available should be appointed to any vacancy in the High Court, appointments should reflect as far as is practicable the legal profession of each and every State.

14. In passing, it is of interest to note that this very principle is embraced in a related field in a recent advertisement seeking applicants for appointment to the Australian Law Reform Commission. The advertisement's third paragraph reads:

"The Australian Government is concerned that appointments of Members to the Commission should reflect the national character of the Commission and is, therefore, anxious to make appointments from the profession in all parts of Australia."

15. The observations on the High Court of the Editor of the *Australian Law Journal* published in Vol. 49 at pages 109–110 in March, 1975, are also of interest. They conclude with the statement:

"The High Court of Australia, and this is precisely its title under s. 71 of the Constitution, will become more truly a High Court of Australia as a whole if its membership is representative to an appropriate extent of the three non-Eastern States."

16. The Committee, however, does not recommend the adoption of a rigid system of State quotas in Australia. It considers first that this would require a utopian self-abnegation by the Commonwealth Government, and secondly that the fundamental criterion for any appointment should be legal distinction and not State residence.

17. The Committee has examined State quota proposals and practices in other federations and has found no reason to change its view.

18. The Nigerian Constitution is the only one which has explicitly made a provision of this sort. The Committee has noted, too, Professor Sawer's opinion that while the Nigerian Constitution has been suspended, "I do not think that Nigeria's misfortunes can be attributed in the slighest degree to the composition of the Federal Supreme Court." Nevertheless Nigeria remains an isolated case, whose special circumstances do not recommend it to Australia.

19. The Canadian debates may have more relevance to Australian conditions. The Committee has given considerable attention to discussions on the question of Provincial participation in judicial appointments in Canada where, as in Australia, appointments are made by the Governor-General-in-Council but where, too, the Supreme Court Act requires that three of the judges shall be from the superior courts or bar of Quebec and where convention requires other judges to come from Ontario, the Atlantic Provinces and the Western Provinces.

20. Nevertheless, there has been much discussion of methods of further increasing the Provincial say (and by no means only in Quebec). Writing in the article already quoted in the *Alberta Law Review* (1968–69) (at page 105) Professor Peter H. Russell saw the position in the following terms:

"Both in the popular imagination and in the view of most Canadian statesmen, the primary role of the national Supreme Court is to act as the final arbiter of the Constitution or the 'umpire of the federal system'. Given this conception of the Court's prime function, it does seem anomalous that the Court should appear in the Constitution to be so completely a creature of the federal government.

. . . The task of Constitutional statesmanship here is to design provisions which will secure the provinces' confidence in the integrity of the Court without so bifurcating control over it that it is unable to act effectively as the nation's highest tribunal.

The basic requirement is to provide for the *participation of provincial* (or extra-federal) *interests in the appointment process.* With the exception of Australia (and Canada) this is the norm in other federations where the national supreme court acts as the final arbiter of the Constitution."

21. In December, 1969, this issue was again discussed at the Third Meeting of Canadian Constitutional Conference, which had before it a report of its Committee of Ministers on the Judiciary. The view of the Canadian Government was that there was a case for provincial participation in Supreme Court appointments. Mr Pierre Trudeau said in his paper, "Proposals for Reforming the Supreme Court", printed in *Politics*: *Canada* (3rd Edition) 1970, at pages 452–454:

"In considering the manner of selection of the members of the Court, the Government of Canada has been concerned that this body must exercise a judicial, not an arbitral function. Judges should not be regarded as representatives of several different governments which could conceivably be allowed to appoint them. For this reason, a single system of appointment is to be preferred. *It is recognised, however, that to ensure continued confidence in the Court it would be preferable that there be some form of participation on behalf of the provinces*

in the appointing process. It is therefore proposed that nominations of potential appointees be submitted by the federal government to the Senate for approval. If the proposals for the revision of the Senate are adopted, provincial viewpoints could be effectively expressed by this means . . ." (*Italics added.*)

22. Later, however, the Victoria Charter (or more accurately, the Canadian Constitutional Charter) was approved by the Constitutional Conference of Ministers in Victoria, B.C., on June, 14–16, 1971. It was passed upon by a Special Joint Committee of the Canadian Senate and House of Commons in March, 1972—vide pages 161 *et seq.* of the Canadian Votes and Proceedings. Although not yet implemented, it is understood that this is on account of differences emerging within certain of the Parliaments on matters in the Charter other than those concerned with the Supreme Court.

23. The Charter's constitutional provisions concerning the Supreme Court of Canada are set out in the appendix to Professor Sharman's submission. The more important provisions for our purposes are those in Articles 28–31. Those provisions would lead to the situation that the federal government may make an appointment to the Supreme Court only if—

(a) the Attorney-General of the Province in question agrees to the nominee proposed; or

(b) the appointment is agreed to by one or other of the two types of nominating council selected by the provincial Attorney-General concerned; i.e.—

(i) a nominating council comprising the federal Attorney-General (or his nominee) and all the provincial Attorneys-General (or their nominees); or

(ii) a nominating council comprising the federal Attorney-General (or his nominee) and the relevant provincial Attorney-General (or his nominee) with, as chairman, a person agreed upon or in default of agreement some person nominated by the Chief Justice (or senior judge) of the Province involved; or

(c) the Attorney-General of the Province involved does not agree to the appointment and fails to activate the machinery in (b) above.

24. The Committee notes that the constitutional provisions of the Victoria Charter have been approved by all governments in Canada.

25. The Charter must have great appeal to anyone concerned with the preservation of federalist ideals. But the Committee considers that, however attractive to some the proposal may be, a requirement that the Federal Government subject to all its judicial appointments to a process in which the States have the dominant role is unlikely ever to be countenanced by any Federal Government in Australia.

The Senate

26. In submissions to the Committee, frequent reference is made to the United States of America and to Western Germany where the Senate or Bundesrat respectively play a major role in judicial appointments.

27. In the United States the nomination of a Supreme Court Justice is the exclusive prerogative of the President, but he must obtain the advice and consent of the Senate which has frequently refused, after lengthy public deliberation, to give its consent to nominees.

28. The Committee is of the opinion that, whatever may be said in favour of the American system, the adoption of a similar system in Australia would not result in greater State participation in the process of judicial appointment. The Australian Senate has not been—the filling of casual vacancies apart—predominantly a States House. It is divided on party lines and, unless concurrent steps were taken to alter the constitution of the Senate, it would not act as a watchdog of State interests. The Committee cannot assume that any such alteration will take place.

29. The Western German Upper House, the Bundesrat, is composed of delegates of eleven States which give the delegates instructions on how they shall vote. In practice, eleven members of the Upper House elect half the Constitutional Court and twelve members of the Lower House elect the other half. This ensures formal State participation, but first, it is idle to assume a reorganization of the Senate in Australia along West German lines, and secondly, according to Professor Nygh, despite the formal involvement of the States, the States divide according to political allegiance and the actual selection of judges is made by the national parties. The Committee does not consider that this is a suitable model for Australia.

30. The West German system has also been recommended to the Committee for one other reason which it is appropriate to discuss now. Unlike other federations, such as Australia, West Germany has created a separate Constitutional Court, one of five specialist federal superior courts (the other four being The Labour Court, The Social Security Court, The Tax Court, and The Administrative Court).

31. The Committee received a submission from the Honourable L. Adrian Solomons, M.L.C., recommending the establishment in Australia of a separate Constitutional Court similar to West Germany's. In an accompanying letter, Colonel W. Ford, the General Secretary of the Australian Country Party (N.S.W.) writes: "The Central Executive of the Australian Country Party (N.S.W.) is generally in agreement with the Paper and submits these views for the consideration of the Committee." The Committee has not taken this as a complete and official endorsement by the Australian Country Party (N.S.W.).

32. Mr Solomons recommends the splitting of the High Court into two divisions—a general legal division dealing with all ordinary, original and appellate jurisdictional matters in all fields both civil and criminal, and a Constitutional Court. In the former court, there need be no change in methods of appointment of judges; in the latter: "the States could reserve the right to nominate judges to sit in the Constitutional Court, such nominations coming from either the Bar, the Supreme Court of the States, or even perhaps existing judges on the High Court from the particular State concerned."

33. The Committee sees serious difficulties in this proposal. First, as Mr Solomons says: "As the great bulk of the Court's work is non-constitutional, it may be questioned whether the appointment of a full-time Constitutional Court would be warranted." The Committee has above quoted Professor Sawer's estimate that in the 1950's and 1960's the annual average number of constitutional cases before the High Court was seven.

34. This small volume of work would involve a second and consequential difficulty: there is a serious possibility that the type of lawyer available for such a Constitutional Court would not be of the same stature as that available to the High Court. This would not be a desirable development, as there is obvious advantage in having the best legal minds apply themselves to our constitutional conflicts.

35. Finally, the proposal for a separate Constitutional Court does not itself solve the problem of finding a method of appointment acceptable to both the Commonwealth and the States. The proposal, in short, increases our problems: it requires the establishment of a new court as well as a new method and criterion of judicial appointment.

The Judiciary

36. The Committee has given attention to the system of appointment in India where the President appoints each judge of the Supreme Court after such consultation as he deems necessary with the existing judges of the Supreme Court and of the State High Courts. The Committee also received a submission from Mr Peter S. Philips, recommending that a new section 72 (1) be added to the Constitution of the Commonwealth of Australia so that High Court judges be appointed alternatively by the Governor-General-in-Council (as at present) and by a Committee of all the Chief Justices of the States voting together.

37. The Committee has noted Professor Nygh's opinion that the Indian Bench lacks political sensitivity and without making comment on this view, considers, in any case, that the adoption of a similar system in Australia would involve too great a departure from existing practice to be feasible.

38. The Committee repeats that it finds much that is appealing in the Indian, the West German, Canadian, and other overseas models. It may be, too, that some years of public persuasion, and a different political climate in some period ahead, may give their supporters some hope of success. For the moment, however, the Committee cannot recommend their adoption in Australia.

Advisory Commission

39. In the submissions received by the Committee a majority recommended the formation of formal advisory machinery which, while still leaving the ultimate power of appointment with the Commonwealth Government, would both give the States a greater say in appointments and remove "the murk and whimsy" (to quote Professor Sawer) characteristic of present methods of appointment. (A minority of submissions —these from Professors Cowen and Ryan, Professor Aitkin, Professor Parker, and Mr T. E. F. Hughes, Q.C.—saw little or no merit in proposals for changes in the method of appointment.)

40. Various suggestions have been made to the Committee as to the composition and powers of any proposed advisory commission. Mr Peter S. Philips suggested a committee of State Chief Justices. Professor Sawer suggested a Nominating Committee of the Prime Minister, Deputy Prime Minister, the Leader of the Opposition, The Chief Justice of the High Court, the Commonwealth Attorney-General and a State Attorney-General. Dr Sharman suggested that a variation of the Canadian Victoria Charter "might very well prove acceptable to Australian conditions". Professor Nygh suggested a variation of the West German system. Mr Colin McKenzie suggested a combination of the Indian system and consultation with State Governments, with Senate ratification. Professor Nash suggested a Commission consisting of the Chief Justice of the High Court, the Commonwealth Attorney-General, six Senators (one from each State and representing Government and Opposition) and a nominee of the Law Council of Australia.

41. These proposals were, in all cases, tentative and suggestive and have been received in that spirit. It would not be to the point to examine each one in detail.

42 The Committee considered two alternative suggestions, made by members of the Committee, as to a mechanism for the appointment of judges. The first of these was a proposal that the States and the Commonwealth in turn appoint judges to fill vacancies, with the Commonwealth retaining the right to appoint the Chief Justice. The other was a proposal that the States themselves should select a panel of three or some other small number of nominees from which the Commonwealth could select its appointee.

43. The Committee, however, has been impressed by the weight of opinion favouring the establishment of an Advisory Commission. Such a Commission, by leaving the final say with the Commonwealth but reducing defects in the present system of appointment, would meet the Committee's two tests of—

(i) practicality; and

(ii) increasing the say of the States.

44. We note Mr Katz's view that any proposal for reform should be capable of acceptance by the Opposition parties in the Commonwealth Parliament and, without making further comment, consider that a workable proposal for an Advisory Commission should attract such acceptance. (*See*, in this connection, Sir Charles Court's submission.)

45. *Accordingly we recommend that*:

Appointments to the High Court be made by the Governor-General on the advice of the Federal Executive Council after considering the recommendation of a majority of a High Court Appointments Commission constituted by the Attorneys-General for all States and the Commonwealth Attorney-General. Such recommendation should be advisory only.

46. The High Court Appointments Commission would be the Standing Committee of Attorneys-General sitting in the capacity as advisor on High Court appointments.

47. The majority of the Select Committee considers that this recommendation has these advantages over alternatives:

(1) It does not require an impossible renunciation from a Commonwealth government. The central government will still have the final say and it may reject advice it receives.

(2) It, nevertheless, builds in consultative machinery to the appointment process and any recommendation from the proposed Advisory Committee, representing professional opinion in the Commonwealth and the States, would carry great weight.

(3) It gives the smaller States an equal say in the consultative process without going so far as a system of State quotas.

(4) It allows more time for mature consideration and would be a brake on precipitate action. Professor Nygh says of the United States system—"One does not pick up the *New York Times* to read that Mr X has been appointed to the highest Court", as one reads of corresponding appointments in the Australian Press—for example, the most recent appointment. He considers that the well-known, if protracted, consultative procedures in the United States strengthen public respect for the United States Supreme Court, and we believe that a slower and more formal system in Australia would have a similar result. It would, to quote Professor Sawer again reduce "the murk and whimsy" of the present system.

48. The Committee is aware that this proposal may be subject to the criticism that, since Attorneys-General are politicians, an Advisory Commission composed of such people may divide on political lines and that political considerations rather than arguments as to merit will dominate their deliberations. The Committee, however, believes that while some political considerations may come into any discussion of any public appointment (as they do in relation to the present method of appointing High Court judges), the criticism would, in relation to the Committee's recommendation, be an exaggerated one. The proposal remains, in the opinion of the majority of the Committee, the one which best satisfies the tests applied and which is best calculated to remove defects in the present system of appointment.

49. The changes we have proposed should, in our view, be submitted to the electors by way of a referendum for the alteration of the Constitution. Such an amendment of the Constitution would offer the maximum protection against continued aggression by the Commonwealth against the States. The Committee, is, of course, aware of the difficulties in that method.

50. However, an entrenchment of the provision of the kind we have referred to, by way of a Commonwealth Act which might be amended or repealed only by some very special Parliamentary process beyond a simple majority in both Houses, would offer a tangible safeguard and might be more within the realm of practical political possibility.

51. A member of the Committee, Mr D. S. Leitch did not support the majority recommendation, but was of the view that the Committee should recommend that appointments to the High Court be made alternately so that the first of any vacancies should be made by the Governor-General on the advice of the Federal Executive Council and that alternate appointments should be made by the Governor-General on the advice of a Committee comprised of the Commonwealth Attorney-General and the Attorneys-General of the States, provided that the Chief Justice would not be subject to such alternate appointment and would be appointed as now by the Governor-General on the advice of the Executive Council. Whilst Mr Leitch acknowledged the force of the reasons adduced by the majority of the Committee for favouring the majority recommendation, he adhered to his view that it did not go far enough to ensure that the States participation was substantive rather than advisory. He also thought the majority proposal more likely to cause discord between the States and the Commonwealth over the appointment of judges than would his proposal.

52. It is convenient here to refer to the observation of the New South Wales Bar Association's President to the effect that "were one to recommend the establishment of a Committee to consider and advise upon appointments to the High Court, a similar body might desirably be appointed for each State to advise on judicial appointments"; i.e., presumably to State Courts.

53. With respect, it is suggested that there is no analogy of the kind the President seeks to draw. Except in limited areas, State Courts' decisions are subject to appeal, and unlike the High Court in constitutional cases, they are not courts of last resort. But more importantly, the Constitution, aided by Commonwealth legislation, ousts State Courts entirely from becoming seized of cases involving any questions as to the limits *inter se* of the constitutional powers of the Commonwealth and the States. It is the High Court, and the High Court alone, to which is assigned the role of maintaining a balance with the federation's constituent elements.

54. Indeed, what the Commonwealth has done in its Judiciary Act provisions applicable in this area is to take for itself what the Constitution did not provide; viz., a High Court monopoly of decision-making on *inter se* questions. By so doing, of course, any possibility of well-reasoned State Supreme Court judgments on *inter se* questions ever being produced was eliminated very early in the life of the federation.

The Committee has made itself aware of the history of the provisions being spoken of, in that they were directed primarily to preventing appeals from State Supreme Courts to the Privy Council rather than the High Court. But a side consequence of that action was what is stated above.

PETER COLEMAN, Chairman.

Legislative Assembly Committee Room,
Parliament House,
Sydney, New South Wales,
18 September, 1975.

APPENDIX "A"

Related Matters

In the course of its inquiry the Committee became aware of important features involving the functioning of the High Court which were outside the terms of reference.

We note them in this Appendix, however, because of their importance.

1. *Qualifications of High Court Judges*

The Constitution prescribes no qualifications for membership of the High Court. It is true that the Judiciary Act 1903–73 prescribed certain qualifications, but it is merely an Act of the Legislature, as is any other Act, and can be amended or repealed as the Legislature wishes. It provides no entrenched protection for the rights it confers.

As Professor Geoffrey Sawer, when referring to the Constitution, put in his *Australian Federalism in the Courts* at page 154:

> "No qualifications are prescribed for judicial office, and it would be open to the Parliament to provide for the appointment of non-lawyers, possibly of executive officials or even of sitting Members of Parliament, providing the latter performed their judicial function without salary."

In other words, there is nothing in the Constitution prohibiting a Commonwealth government appointing to the High Court the Commonwealth Attorney-General, together with the Commonwealth Solicitor-General and Crown Solicitor, or even the Prime Minister, the Treasurer, and other members of the Federal Cabinet—*all to hold their public offices as well as being on the High Court Bench concurrently!* All that would be needed would be to pass a simple Act amending the Judiciary Act stating that, as judges, these office-holders were to receive no pay.

There is, indeed, nothing to prevent a Commonwealth government, by a simple Act, making the Commonwealth Attorney-General, or some other person, President of the Court and requiring all constitutional cases to be determined by him and two other judges he nominated—a type of provision not unlike that in existing legislation relating to the Commonwealth Conciliation and Arbitration Commission—thus relegating the other judges of the Court (with the possible exception of the Chief Justice) to determining only cases on the general law.

To those who would argue that ministerial office would be incompatible with judicial office and that any such appointment would be invalid, the simple response is that this doctrine of incompatibility permits of varying interpretations and that, with the President "in the saddle" as it were, the practical prospect of mounting a successful challenge to the appointments could be virtually nil. In federal cases the Commonwealth Parliament has already taken the step of abolishing appeals to the Privy Council.

The Committee does not suggest that these are probable developments but the potential for abuse is extraordinarily large and should be removed by constitutional amendment.

2. *The size of the High Court*

There is no restriction in the Constitution upon the size of the High Court bench. A government with control of both Houses of Parliament and considering itself and its policies thwarted by a majority within the High Court, would clearly be able, as a matter of law, to increase the Court's numerical size and to appoint to the resultant vacancies persons known to be, or considered likely to be, disposed to upholding the constitutional validity of legislation the Government wished to have applied.

Within the democratic process, if allowed to operate, there is, of course, the sanction of revulsion to such a course on the part of the electors at the next election. In the democratic federations of the Western world, this sanction has, we believe, proved sufficient in the past to dissuade governments from yielding to the temptation to "stack" their constitutional courts. Whether it is a sufficient safeguard for the future is a matter of opinion.

Only 40 years ago this almost happened in the United States of America. With so much of its "New Deal" legislation held unconstitutional by the U.S. Supreme Court, the Roosevelt Administration threatened to "stack" the Court. It refrained from doing so, it would seem, only because vacancies which occurred in the natural course were filled in such a way that the majority in the Court came to view the "New Deal" legislation more benevolently and the case for a "stacking" thus disappeared.

3. *Retiring age*

The High Court has held that the Constitution does not permit the Parliament to enact a compulsory retiring age for holders of Commonwealth judicial office.

The Peden Royal Commission of 1929 recommended that the Constitution should be amended to prescribe a retiring age, not, of course, applying this to judges in office when the alteration was made.

In the Committee's opinion, the recommendation of the 1929 Royal Commission in this respect should be adopted and embodied in an amendment of the Commonwealth Constitution.

A possible alternative course, seemingly not requiring a constitutional amendment to support it, has been mentioned as a method of inducing retirements after a certain age, namely the introduction of tapered pension rights and/or retirement benefits for judges.

The Committee do not favour such a provision. We mention it simply to stress that its availability is further evidence of the lack of necessary constitutional safeguards to the independence of the judiciary.

APPENDIX "B"

Government Submissions to Australian Constitutional Convention, 1973—Agenda Item 12 (a)

1. SUBMISSION OF VICTORIAN DELEGATION

4. *Judicial Appointments*

It is submitted that the procedure for appointment of Justices of the High Court should allow for State participation and so reflect the federal nature of Australia. Possible means whereby this could be achieved would be amendment of s. 72 to provide that appointments—

(i) should alternate between the Executive Council of a State and the Executive Council of the Commonwealth—with the Commonwealth filling every second vacancy and each State every twelfth; or

(ii) should remain with the Governor-General-in-Council but should be preceded by agreement of Attorneys-General of all States.

2. SUBMISSION OF GOVERNMENT OF NEW SOUTH WALES

The High Court

It is considered that, by constitutional amendment, provision should be made for State participation in the process of nominating High Court Judges, together with other provisions securing the integrity of the High Court.

APPENDIX "C"

Extract of Summary of Debates, Australian Constitutional Convention, 1973

Agenda Item No. 12 (a), referred to Committee D, to inquire into and report upon:

"The Judicial Power of the Commonwealth, with particular reference to—

(a) the appointment of High Court Judges."

Mr Punch (New South Wales) *Debates,* pages 300, 301

The three sections of Item No. 12 are interlinked. Dealing first with the appointment of High Court judges, I submit that it is important for the wellbeing of the Commonwealth that no one political philosophy held by the party in power should be allowed to dominate or manipulate the membership of the High Court. The appointment of judges whose political or philosophical beliefs are biased is dangerous. It is not novel to propose that, if the constitutional court in a federation is not to actively promote centralization, the State elements must have a share in the making of appointments to that constitutional court.

When the Constitution was being drafted, Sir Samuel Griffith, Chief Justice of Queensland and later first Chief Justice of Australia, pressed to the last that the appointment of judges to the High Court should require the approval of the States' House—as it was envisaged the Senate would be. It is indeed unfortunate that the Senate has been non-existent since 1908 so far as the protection of the States is concerned. In the United States of America the principle Sir Samuel Griffith had in mind exists today. Indeed, in the world as we know it the widespread view is that, one way or another, it is essential that the States share in the appointment process. This is done in Switzerland, Austria, West Germany and Malaya, and was recommended in Canada by the central government and the governments of all the provinces when they approved the Victorian Charter in October, 1971. The same result could readily be achieved here by a constitutional alteration which left the Commonwealth filling every odd vacancy on the Court, and the States filling the even vacancies, either in turn or through some co-operative arrangements among themselves. Other alterations might suggest themselves.

I daresay Western Australia, South Australia and Tasmania see some special merit in this proposal, for they must believe it is passing strange that in seventy years not one of their Supreme Court judges or one member of their bars has ever been appointed to the High Court.

Mr Galbally (Victoria) *Debates,* pages 307, 308

I am conscious of my limited time and I trust I will be pardoned if I touch but sketchily on a number of other matters. The first matter is one of some delicacy: it concerns the retirement of High Court judges. I am the first to acknowledge that the work of those judges is arduous and calls for great professional skill. The judges are asked to burn the midnight oil, the vacation oil and the early morning oil. But their tenure of office is for life, and that is out of step with the stream of modern thought in Australia. Public servants retire at a certain age. Even in the board room there is a retiring age—something almost unthinkable a few years ago in that area of activity. Waterside workers retire at a particular age and so, of all persons, do those who are concerned with higher matters, the clergy. All State governments throughout Australia insist on a compulsory retiring age for judges, in their early 70's. Commonwealth judges should fall within that framework of modern philosophy, which is that there should be some leisure in life. There is some doubt about immortality. We may have our own personal beliefs and support them, but delegates can be assured beyond a reasonable doubt that no person gets out of this world alive. It seems to me a reasonable proposition that we ought to make a retiring age for all judges in Australia. A retiring age for all judges does not mean that their scholarship has ended. I take the outstanding example of Sir Victor Windeyer, who is pursuing his scholarship not only here but also in Canada. However, judges ought to have the privilege of working, if they choose to do so, at a more leisurely pace. For their great contributions we offer them the justice of honoured retirement.

The appointment of judges to the High Court of Australia is another question of some delicacy. It seems to us that the spirit, if not the letter, of federation would be better served if the Commonwealth conferred with the States before making appointments to the High Court. The aim, of course, is to obtain the very best from the bar, irrespective of where they may come from—whether it be little Tasmania or the vast Northern Territory. Of course the Commonwealth must reserve to itself the power, but it would be more in the uneasy spirit of compromise in Australia if the federal Attorney-General were to confer with the various States before making appointments to the High Court. We do not go further than that.

Senator Greenwood (Commonwealth) *Debates,* page 337

I address myself to items 12 and 13. It is generally recognized that when the founding fathers prescribed the judicial system for the new Commonwealth they relied heavily on the American experience. There have been other consequences apart from the difficulties of evolving that American experience in the light of our Westminster system produced over the years since federation. I agree that the tenure of

office of High Court judges, whether they should be appointed for life or for a fixed term, is a matter that should be looked at by a standing committee because it is only by constitutional amendment that the existing position under which those judges have decreed they are appointed for life can be changed.

Sir Charles Court (Western Australia) *Debates*, page 343

In regard to the appointment of High Court judges, in my opinion the fact that judges have never been appointed from some States in the time since federation is a reflection on the system. I am not suggesting a lack of quality in any of the appointees, but I know that there are lawyers of great calibre in States not yet represented on the High Court bench. I do not say that some of those persons have never been invited to accept office as a justice of the High Court of Australia, but I have not been able to find out whether they have been so invited. As I say, the present method of selecting High Court judges reflects on the whole legal profession in this country, which has achieved pre-eminence throughout the world. It is time that the Commonwealth consulted the States on the matter of appointments, which are of crucial importance, and will become increasingly important.

I believe also—though I do not suggest that this should be written into the Constitution—that it is bad when a man who has been a Minister in the federal Government is appointed to the High Court bench within a period of five years of his holding ministerial office. After all, one must assume that the person appointed would have been Attorney-General, or the like, and I believe that it is not possible to separate one's opinions in those circumstances, the advice given to the Government, and the entries made in the records of the day, from what one would decide as a member of the High Court. I repeat, this is no reflection on the persons who have been appointed to the High Court bench, but let us ensure that no judgment given by a member of the High Court of Australia could be said to have political overtones. I hope that there are no aspirations for that office among the supporters of the present federal Government.

Mr Sinclair (Commonwealth) *Debates*, page 348

I dislike the suggestion advanced by Mr Punch and Sir Charles Court in respect of item 12 which deals with the appointment of High Court judges. I think it important for the Standing Committee to recall some of the problems that have arisen in the United States of America where there is a balance between the rights of the Senate and the President to appoint members of the federal judiciary. Those who recall the days of President Johnson will be aware of the difficulties he had with some of the names submitted by the Senate. They will recall the impasse for a period of years while President Johnson would not accept the recommendations of the United States Senate. I do not believe there is any validity in the criticism that past High Court justices have not necessarily represented States other than those on the eastern seaboard.

I think it is desirable that a person's geographic location be taken into account as a factor, but it is the intrinsic merit of the man and not his place of residence that should be the basis upon which he is appointed to what is, after all, the supreme court of the land. I am concerned that there should be any reflection—and I am sure it was not intended—on the standard of past appointments to the High Court. The judicial character of the appointment should be quite beyond the bounds of any political prejudice. Indeed, I do not believe that experience has shown that the men in general who have been appointed to the High Court have been in any way representative other than of the interests of Australia as a whole. If that is to be the desired basis, I see it as a matter within the right of the federal Parliament, not the individual States or the States' House, the Senate. I am opposed to any change in the appointment of High Court judges.

APPENDIX "D"

S.1

SUBMISSION TO SELECT COMMITTEE TO INVESTIGATE METHODS OF APPOINTMENT TO THE HIGH COURT AND TO RECOMMEND WAYS OF ENSURING FUTURE APPOINTMENTS ARE MADE IN A MORE EQUITABLE AND ACCEPTABLE MANNER

by PETER S. PHILIPS

It is submitted that appointments to the High Court would be made in a more equitable and acceptable manner if the undermentioned constitutional change was effected by referendum:

Section 72, subsection (1) of the Constitution to be deleted and the following inserted in lieu:

New section 72 (1) "Shall be appointed alternately by the Governor-General-in-Council and by a committee of all the Chief Justices of the States voting together."

Recent overseas precedent is persuasive. In West Germany, whose constitution was adopted in 1949 and is therefore the most modern in Western Federations, half the Federal Constitutional Court is appointed by the Bundestag (popular House) and half by the Bundesrat (Second House representing the States).

In Switzerland, the National Council (popular House) and Council of States (representing the Cantons) share in appointing Judges to the Federal Tribunal.

The West German precedent is the most modern—the Swiss precedent one of the best known.

If the above were followed as nearly as practicable in Australia the House of Representatives would appoint three or four Judges to the High Court and the Senate four or three respectively instead of the Executive of the Federal Government appointing all seven Judges as at present.

However, this course suffers from the objection that the Senate does not function as a States House in practice in Australia.

c.o. Meares and Philips,
33 Bligh Street,
Sydney, N.S.W.
10 March, 1975

S.2

SELECT COMMITTEE, PARLIAMENT OF NEW SOUTH WALES, APPOINTMENTS OF JUDGES TO HIGH COURT

Notes by Professor GEOFFREY SAWER, Pro-Vice-Chancellor, The Australian National University

1. I gather that a survey of present and past laws and practices in federal countries has been carried out under your supervision. So far as I know, the only federal constitution which has ever explicitly provided for a "Regional Voice" in the appointment of Federal Constitutional Judges was the Nigerian Constitution between 1960 and the breakdown of that system in about 1969. There is an analogy in the power of the United States Senate to confirm Supreme Court appointments, and more distant analogies in the conventions ensuring representation for French law on the Canadian Supreme Court and Scottish law on the United Kingdom Judicial Committee of the House of Lords. Then there are the diverse methods by which the judges of the West German Federal Constitutional Court are chosen; the choice of half the justices by the Bundesrat does ensure some representation of Laender opinion, because the Bundesrat itself consists of agents (in the strict sense) of the Laender governments, though they are not equally represented in that House. In view of the diverse social and legal-professional backgrounds of these countries, one cannot place too much emphasis on their example as a model for Australia. I do not think that Nigeria's misfortunes can be attributed in the slightest degree to the composition of the Federal Supreme Court. The most that can be said about such examples is that in no case has the practice in question produced either unworkable situations or demonstrably bad consequences for the administration of law in general and the interpretation of constitutional law in particular. On this comparative basis I would say that some method for spreading the choice of Federal Constitutional Judges among the member regions of a federation is in itself quite unobjectionable.

2. In the particular case of Australia, I do not believe that it would be feasible to provide for the choice of High Court Judges in a manner which ensured effective representation of "State interests" as such in matters of constitutional interpretation, for the simple reason that in contemporary circumstances lawyers of the highest achievement are inherently unlikely to have or adhere to strongly marked views on constitutional questions having a close correlation with "State interests" as such. It would be quite inconsistent with our cherished traditions of judicial scholarship and judicial independence to expect any such adherence to a "constitutional party line" from High Court Judges.

3. Quite a different matter is to want some say in a choice between eminent lawyers tending towards "strict construction" or towards "broad construction" of constitutional provisions. It is often possible to predict with some confidence the style of a person's mind in this connection, especially if he has sat on a Supreme Court Bench for a while. However, it must be emphasized that there is no necessary relationship between "strict

construction" and "protecting State rights", or between "broad construction" and "increasing Federal power". The approach chosen can favour either Commonwealth or States, depending on the context, the nature of a particular provision and at times on the historical period in which the question arises.

4. To my mind a conclusive consideration is that the High Court is not solely a constitutional tribunal; most of its work is concerned with non-constitutional cases including every area of private law. For this task, the very highest degree of legal competence is essential. I strongly favour including on the Court a number of men with a special gift for and experience of constitutional work, but it is essential that they should also be fully capable of participating in the other aspects of the Court's work. For this reason, any consistent or far-reaching policy of trying to choose judges by reference to the matters mentioned in 2 and 3 above would be disastrous.

5. Nevertheless, I have always been dissatisfied with the history of High Court appointments overwhelmingly from Sydney and Melbourne and never at all from Adelaide, Perth, or Hobart. This is not for any "State representation" reason, but for a reason which would have applied even if in 1900 a centralized system had been adopted, and would still apply if one were adopted now. The reason is that the physiography, demography, and history of Australia has unavoidably produced six main foci of population, economic life, and legal culture, and although there is a very high degree of homogeneity in these six legal cultures, I think it would be highly desirable to have persons drawn from each of the six main centres on the High Court. This would increase the sense of participation in the High Court as a national tribunal expressing the highest achievements of a very uniform type of legal system, with a seamless common law and close similarities in the statutory law and the organization and style of the legal professions, and would help to maintain high standards at each main centre. I completely disagree with the attempts of the Whitlam Government to build up an auxiliary system of Federal Courts approximating to the Supreme Courts. A good case could be made for transferring the whole responsibility for the administration of justice from the States to the Federation, but so drastic a reform has no hope of securing electoral approval. Failing this, we should avoid the ludicrous tangles of Federal jurisdiction and treat the State judiciary, with its Judicature Act type of simplicity and flexibility, as the working basis of the national system. Then the High Court needs to be built up so as to fit powerfully into that setting.

6. In my opinion, choice of justices from each State would not, but for a factor about to be mentioned, have seriously weakened the Court during its history to date. There have been at least five unsatisfactory appointments from Melbourne, Sydney, and Brisbane, and in my view equivalent appointments from Adelaide, Perth, and Hobart could not have been worse and might well have been much better. But a fatal objection to consistent choice on a State basis hitherto would have been the probability of missing, in consequence, the chance of even better appointments from in particular Sydney and Melbourne. This is because the Court has since 1907 had only six or seven sitting justices. The obvious solution to this is to increase the number of justices. In my view this is highly desirable for other reasons. There have been continuous difficulties on the Court over the years, very marked in the past three years, because of the pressure of major cases—not only constitutional ones—which have required the attention of seven or six justices, preferably seven. The Court has always lacked the margin for safety required to cope with illness, absence on leave or delayed filling of a vacancy. It has also been under pressure to cope with such problems by reducing its jurisdiction when in many areas, notably crime and civil liberties, an increase in its jurisdiction would now be highly desirable. The Court should have both a margin to spare, and enough justices to be able at any time to mount a Full Bench of seven for major cases, and sitting simultaneously a Full Bench of three for less important appeals, plus one or two "spare" justices, giving a total of eleven or twelve. (I assume here the constitutionality of a "split" Court.) With those numbers, and with the present population and size of the profession, there would not be the slightest difficulty in maintaining quality. There could then without difficulty be a principle of having one position always filled from the Supreme Court of each State. This would leave ample margin for appointments justified only by great merit (whether from Bar or State Supreme Court) and for occasional appointments of Commonwealth Attorneys-General (in my view highly desirable for keeping up direct contact with the contemporary feel of Australian Government).

7. The above merely sketches a plan for strengthening the High Court and introducing in a more orderly fashion some regional diversification of its membership. It remains to sketch some way of bringing appointments to the Court out of the murk and whimsy of present methods of appointment so as to ensure in all cases adequate consultation and responsible choice. I think that the Federal Government must retain a predonderant influence in the process. I do not think it possible to draft rigid constitutional provisions for such a purpose, even if the electors could be induced to adopt them. It should be possible to embody the outlines of a desirable procedure in

Federal legislation, though probably much would have to be left to practice maturing into convention. A possible procedure is as follows. Nominating Committee to consist of Commonwealth Prime Minister and Deputy Prime Minister and Leader of Opposition, Chief Justice of High Court (except when appointment is of Chief Justice), Commonwealth A.G., one State A.G. chosen by the six State As.G. This Committee to consult with President of the Australian Law Council and in the case of appointments "reserved" to a State Supreme Court, with the President of the Bar Council (or equivalent body) in that State. Variations on this procedure: when the Chief Justiceship is under consideration, the position which otherwise the Chief Justice would have taken to be filled by a State Chief Justice chosen by Commonwealth Prime Minister; when it is proposed to appoint Commonwealth A.G. to a vacancy not reserved to a State Supreme Court, that A.G. not to be a member of the Nominating Committee and his place to be taken by a Commonwealth Cabinet Minister or M.P. supporting the Government who in the view of Commonwealth Prime Minister would be a likely successor to the A.G.

25 March, 1975.

S.3

THE UNIVERSITY OF SYDNEY
FACULTY OF LAW

173–175 Phillip Street, Sydney, 2000
9 April, 1975

Select Committee on High Court Appointments
Legislative Assembly
Parliament House
Sydney

Gentlemen:

Professor Lane has shown me your letter to him of March 21, 1975. I am appreciative of the opportunity to make the following comments. (I do not attempt to exaggerate their importance by describing them as a "submission".)

My belief is that it would not be a fruitful exercise for the Committee to canvass methods of appointment of High Court judges as though we were still in the 1890's and any method of appointment were open to us. The inertia created by almost seventy-five years of operation of the present Constitution would be impossible to overcome unless there were some real threat of the break-up of the federation and there is not. Therefore, any recommendation for change, if it is to be acceptable to the electorate, must not represent a radical departure from the present method of High Court appointments. Furthermore, given the present federal government's views on federalism, I cannot believe that it would lend its support to any recommendation for change in the present method, no matter how modest. Therefore, any recommendation for change the Committee makes must be addressed to an anticipated federal L-CP government.

To what extent would a future federal L-CP government be prepared to give up its sole power of appointment of High Court judges? Surely the answer realistically given must be, "Not at all." This precludes a recommendation's being made for the adoption of the American method of appointing Supreme Court judges. It also precludes either a recommendation that the State governments be given themselves the power to appoint some portion of the High Court bench or a recommendation that they be given the power to veto the appointment of federal government nominees.

This anticipated attitude of a future L-CP federal government does not, however, preclude its supporting a recommendation of a rather more modest nature than those referred to above. This recommendation would be that the federal government be required to consult with the State governments prior to making High Court appointments. A future L-CP federal government might well be prepared to put the referendum machinery into operation in an attempt to entrench such a requirement.

A constitutional requirement of consultation prior to appointment would not be unique. In 1966 R. L. Watts referred to other federations in which there was a similar requirement. For instance, in Malaya and Malaysia the executive was required to consult the Conference of Rulers about all appointments to the court equivalent to our High Court, while in India it was required to consult judges of the State High Courts. (*New Federations: Experiments in the Commonwealth,* 286–87.)

Such a requirement, though certainly not all that the States might desire, seems to me to be all they are ever likely to obtain, unless in the (unforeseeable) future a federal government is forced to make significant concessions to the States in order to prevent a break-up of the federation. For this reason, I believe that the Committee ought to concentrate on a recommendation embodying this requirement.

Yours truly,

LESLIE KATZ, Lecturer.

S.4
Institute of Commonwealth Studies
27 Russell Square, London, WC1
16 April, 1975

Mr W. G. Luton,
Clerk of Select Committees,
Legislative Assembly,
Parliament House,
Sydney, N.S.W. 2000
Australia

Dear Mr Luton:

THE APPOINTMENT OF JUDGES TO THE HIGH COURT OF AUSTRALIA

Thank you for your letter of 27 March; I am sorry that there has been some delay in answering it. I have given the matter some thought, and my comments are numbered, as you request.

1. In the first place, I have no particular quarrel with the manner in which High Court judges have been appointed since the High Court was set up in 1903, and since I have been out of Australia for some months I am not sure of the factors which prompted the Legislative Assembly to establish the Select Committee. Nor am I sure what it meant by "a more equitable and acceptable manner".

2. I do not think it is wise or even possible to do away with the political element in the selection of judges. In one sense, of course, all appointments to the High Court are political, in that they are greatly desired prizes in the gift of the government of the day, and are therefore likely to go to its friends rather than to its opponents. Nevertheless, even the most obviously *political* appointments—past or present politicians at the time of appointment—have been on the whole a distinct asset to the Court, I would have thought. One only has to bring to mind Barton, O'Connor, Griffith, Isaacs, Evatt, Latham and Barwick, among others, to make the point.

3. Given fairly regular alternation of parties in power, political appointments will tend to balance out, and, more importantly, the Court will represent more than one side of legal opinion. It is the case, I think, that non-Labor appointments to the Court have usually been conservative in their attitude to law and the legal system as well as "professedly or by instinct" in politics. (The quotation is from Geoffrey Sawer, "The Constitution and its Politics", in H. Mayer and H. Nelson, *Australian Politics. A Third Reader,* Melbourne, 1973, p. 202; the article might well be read by your committee if you have not already noticed it.) Evatt and Isaacs, by contrast, were prepared for much greater change in the legal system as well as in the political one. In my view a good Court would be, other things being equal, a balanced one. It is worth noting that so far there have been, I think, 28 appointments to the High Court, of which nine were made by Labour Governments.

4. At the same time, it should be remembered that the Court's business arises from appeals from the State Supreme Courts far more than it does from constitutional cases. Sawer has estimated (*op. cit.,* p. 201) that in the first 65 years of its existence the Court determined more than 8,000 cases, of which only ten a year were constitutional. There is, therefore, abundant need for good, widely experienced lawyers to be chosen, whatever their experience or brilliance in constitutional law. They would tend, I suppose, to come from the largest bars—Sydney and Melbourne. Any "representative" elements introduced into the system would cause the selection of judges from the smaller states. So far virtually all the judges of the High Court have come from New South Wales and Victoria.

5. I can see no obvious virtue in a system whereby the Governments of the States played a part in the selection of judges. I might be able to discuss this point more usefully if I could be presented with the arguments in favour of such a system. But at the moment, my feeling is that the system we have has served us well and will in all probability continue to do so.

These remarks are, I am afraid, rather disjointed. But I am not sure what the Committee is after, nor why it set out.

With best wishes,

DON AITKIN, Professor of Politics, Macquarie University.

APPOINTMENT OF JUSTICES OF THE HIGH COURT OF AUSTRALIA

by Professor ZELMAN COWEN and Professor K. W. RYAN, The University of Queensland

1. Section 72 of the Commonwealth Constitution provides that Justices of the High Court shall be appointed by the Governor-General-in-Council. It is clear from this formula that appointments are made following a decision by the Federal Cabinet. This differs from the position in England, where judicial appointments are made on the personal advice of the Lord Chancellor, or, in the case of the Court of Appeal and House of Lords, the Prime Minister. In Australia, the Attorney-General recommends to Cabinet persons for appointment, but the final decision and responsibility for an appointment rest with Cabinet.

The Constitution contains no provision as to the qualifications of a Justice of the High Court, but sec. 5 of the Judiciary Act states that he must either be or have been a Judge of the Supreme Court of a State, or be or have been a practising barrister or solicitor of the High Court or of the Supreme Court of a State of not less than five years' standing.

2. These are the only constitutional and statutory provisions relating to the appointment of Justices of the High Court. There is thus no provision in the Constitution or in any Commonwealth legislation which requires Cabinet or the Attorney-General to secure the approval of, or consult with, any other body or persons before appointments are made to the High Court. Furthermore, no formal system of consultations has been established for the purpose of advising Cabinet or the Attorney-General on this matter. It appears from the terms of reference of the Select Committee that it is to recommend amendments to the Commonwealth Constitution to improve the manner in which appointments are made. We wish to make the point that certain changes, such as the establishment of formal machinery for consultation, could be made without any constitutional amendment, unless perhaps it was intended that Cabinet would be bound to accept the decision of any outside body or that any appointment made would be invalid unless that machinery had been used.

No doubt the Attorney-General makes a recommendation to Cabinet for the appointment of a person as a Justice of the High Court only after he has had informal consultations with a number of persons. But we would be surprised if it were contended that a practice had developed that certain individuals or bodies were invariably consulted before such a recommendation was made. Probably the circle of these consulted in an informal way varies almost entirely with the personal knowledge and habits of the Attorney-General of the day.

3. It is implicit in the terms of reference of the Select Committee that the Legislative Assembly of New South Wales considers that the present system of appointments is not fully equitable and acceptable. The basis for this opinion is not elucidated, but the statement that the Committee is examining in particular the role played in the appointment of judges to the highest constitutional courts in various federations by the Governments of the constituent states or provinces makes clear the main concern of the Legislative Assembly. We take this to be that as the High Court of Australia has ultimate responsibility for deciding questions arising under the Constitution which affect the balance of Commonwealth-State powers, appointments to the High Court should not be made solely by the Commonwealth Government, but rather through some process in which the States are involved.

4. It was such a conception which underlay the formulation of the provision in the Constitution of the United States on the appointment of Justices of the Supreme Court. This gives indirectly a role to the States by providing in Article 11 section 2 that the President, by and with the advice and consent of the Senate, shall appoint judges of the Supreme Court. The role was rather more direct under the original terms of the Constitution according to which members of the Senate were chosen by the legislatures of the various States.

In considering whether the Australian Constitution should be amended to follow the United States model, two questions immediately suggest themselves. The first is: Would the adoption here of the provision in the Constitution of the United States give an effective role to the States in the appointment of High Court Justices? We think that this question can only be answered in the negative. The Australian Senate is a very different kind of body from the United States Senate; in particular, it has never played the same role as a States' house. The original conception underlying the provision in the United States Constitution, that the senators were representatives in Washington of their State legislatures, has never had any place in the thinking of the Australian Senate—except, perhaps, for senators appointed to casual vacancies. Though, as now in the United States, they are elected by the electors of a State, Australian senators have regarded themselves and taken positions much more as representatives

of a political party than as representatives of a State. It would be naive to consider the Australian Senate as a body devoted to the preservation of State interests and powers against the central government, and as such a proper watchdog of State rights in considering High Court appointments.

A second question is: Even if it is assumed that the Senate would not act as a States' house in this matter, would it not be appropriate to submit proposed appointments to it and to require its approval to them, so that appointments would be closely scrutinized as they are by the United States Senate? Once again, we consider that the answer must be no. Australian political history shows that it is all too likely that the confirmation of appointments by the Senate would be a formality when the Government had a majority in the Senate, and an impossibility when the Government did not control the Senate.

5. Though we think that the Senate is not an appropriate body to be entrusted with the approval of judicial appointments, it does not of course follow that other political or non-political institutions would be subject to the same objections. It seems to us that two important issues require consideration in relation to procedures for such appointments. One is whether the appointment of Justices of the High Court should be subject to consultation with, or approval by, a body other than Federal Cabinet. The other, assuming a favourable answer to the first, relates to the composition of that body, and in particular whether it should be primarily political or non-political in membership.

6. We assume throughout our discussion of these issues that the sole criterion which should apply in appointing a Justice of the High Court is that he is the most suitable person available for appointment. By "suitable" we do not of course limit ourselves to technical competence. This is obviously essential, as is the highest personal integrity. But it is also necessary that he should have a breadth of vision and intellect, and a range of experience, which will enable him to carry out his important functions. The object must be to ensure that only persons of outstanding capacity are appointed. Political experience may be of great value in forming such persons and in establishing their quality. So may previous judicial experience, or eminence in legal practice or scholarship.

We have seen it stated in some publications that, since justice should not only be done but also be seen to be done, the process of appointing judges should not only lead to proper appointments, but should also be such that no criticism could be made of the method of appointment. It is then stated, as if it were a self-evident proposition, that the present system under which appointments are made by Cabinet can lead to public criticism and loss of confidence in the judiciary on the ground that they are selected on political considerations, and hence that it should be replaced by one which would be non-political and impartial in assessing a judge's qualifications for office.

We do not dispute that if federal governments are so misguided as to make patently unsatisfactory appointments, and in particular if it becomes manifest that they have regard in making appointments primarily to a person's political views and activities (including his opinions on Commonwealth-State relations) there will be every justification for changes which will limit their powers. But we believe that at present the High Court enjoys public confidence in a high degree. The issue is therefore not whether a change in the existing system is necessary to restore public confidence in the High Court, but whether it would produce better results in the selection of the persons who are most qualified to be appointed.

6A. In Canada, an arrangement was made in 1966 between the Canadian Bar Association and the Minister of Justice under which a National Committee on the Judiciary was established to advise the Minister as to whether or not in its opinion a nominee was qualified for appointment to the Bench. Its function is purely advisory; the Minister is not bound to accept its advice. There is no constitutional reason why such an arrangement should not be made in Australia. But it is suggested that it would be unsatisfactory if put upon any formal basis. The main objection to it is that the very existence of such a body would lead to pressure by interested persons or groups to be represented on it as a means of influencing High Court appointments; and one can only suspect that selection on the basis of outstanding judicial capacity would not always be the overriding concern of all members. Even if this problem were surmounted, it is difficult to see how a purely advisory body could do anything other than draw up a list of persons it considered qualified for high judicial office and express its opinion on the qualifications of possible nominees. In Canada, this may be a useful function, given the quite different organization of the legal profession from that in Australia and the coexistence of two ethnic groups and legal systems in the country. In Australia, however, an Attorney-General should know or have little difficulty in ascertaining informally the views of the legal profession and other interested bodies on the qualifications of the rather small number of persons who would be likely to be considered for appointment to the High Court.

We can therefore see no point in suggesting adoption of the Canadian procedure, and it may be harmful.

7. More far-reaching reforms have been advocated in the United States, and applied in some of its constituent States. Essentially these involve the constitution of a non-partisan commission to draw up a list of persons qualified for judicial appointment, and the imposition of an obligation on the executive to appoint judges exclusively from this list.

We would not favour the introduction of either element of such a scheme in Australia. Despite the attractiveness of the expression "a non-partisan commission", it would be extremely difficult to imagine a body entrusted with the task of drawing up a panel of High Court nominees which could be so constituted as to avoid suggestions that it or its members were representative of certain partisan interests. Our objection to making mandatory an appointment from such a panel is that in our opinion responsibility for appointments must continue to be borne by the Government of the day. A Government should not be required, nor permitted, to shift this to a non-elected outside body, however non-partisan.

8. The interest expressed by the Select Committee in the role of States in the appointment of high judicial officers in federations indicates that what may be contemplated is not necessarily a non-partisan commission, but rather one containing representatives nominated by the States and concerned to uphold their interests. We think it highly likely that any commission to nominate persons for judicial appointments would be subjected to considerable pressures from within or without to take into account factors other than fitness for office, and that its list would often represent compromises which would result in the inclusion of persons of inferior quality and the exclusion of outstanding persons.

We would add to this that the likelihood that the most suitable persons available in Australia would be appointed would not be enhanced if the States were given, under a constitutional amendment, a direct power to make certain appointments to the High Court or to veto appointments.

9. Any proposals that the Federal Cabinet's autonomy in making appointments should be fettered must be based ultimately on the conviction that Cabinet can not be trusted to make proper appointments. The validity of that assumption is best tested by looking at the record on appointments which have been made thus far in the Commonwealth's history. We believe that this shows that all federal Governments have exercised their power in this field with a great sense of responsibility. It is simply not true that appointments have stressed unduly political affiliations or convictions, or that incompetent people have been appointed. In the history of the High Court, a number of its members have earned universal recognition as great judges. In general, the quality of the High Court is very high; it is one of the most respected appellate tribunals in the common law world.

We are convinced that no justification exists at present for any change in the method of appointing Justices of the High Court, and that the probable effect of any change would be to lower the quality and standing of that Court.

18 April, 1975.

ZELMAN COWEN, Vice-Chancellor.

K. W. RYAN, Professor of Law.

S.6

UNIVERSITY OF LONDON
INSTITUTE OF COMMONWEALTH STUDIES

27 Russell Square
London WC1B 5BS
21 April, 1975

Mr W. G. Luton,
Serjeant-at-Arms and Clerk of Select Committees,
Parliament House,
Sydney, N.S.W. 2000
Australia.

Dear Mr Luton,

SELECT COMMITTEE OF THE LEGISLATIVE ASSEMBLY UPON THE APPOINTMENT OF JUDGES TO THE HIGH COURT OF AUSTRALIA

Thank you for your letter of 27 March which has caught up with me here. I am sorry that my travelling abroad prevents me from making a properly documented submission to the above Select Committee. I must content myself at this time with some general observations which I trust will be of help. I note that the Committee is itself comparing modes of appointment to "constitutional courts" in other federations. My comments follow in numbered paragraphs as requested.

1. As I gather from your letter the Committee's main concern is whether representatives of the States, as well as of the federal government, should play some part in the appointment of High Court judges—in the hope that appointments so made might be "more equitable and acceptable" from the point of view of the States. For reasons outlined below I think that the proposition is impracticable and the hope illusory.

2. The suggestion seems to be that in "constitutional" cases—presumably cases affecting the powers of the Commonwealth and the States *inter se*—the High Court is likely to be fairer if State representatives have a say in appointing its judges than under the present system in which the federal government alone appoints them. My primary objection to such a suggestion is that it seems to rest on a general assumption or principle, namely that the fairness of a court is to some extent proportional to the number of potential litigants before it who can take part in appointing its judges. Obviously such a principle would have far-reaching implications. For example, State governments alone appoint the judges in State courts. Would these courts be fairer if other potential litigants before them, such as the hundreds of public and private corporations, or even potential accused persons in criminal cases, were represented in the appointment of their judges? In short, it seems to be as reasonable for High Court judges to be appointed by the federal government, which directly represents all Australian citizens, as for State court judges to be appointed by the government that represents all the citizens of a State—and any other application of the representative principle is both more complicated and less practical.

3. There is a more specific objection. The proposition is that a part in High Court appointments should be extended only to potential litigants in a particular class of case—namely "constitutional" or *inter se* cases. In the first place, the High Court is no more a "constitutional court" than other Australian courts. "Constitutional law" is only a part of the statute and subordinate law which may be adduced in a wide variety of cases before State as well as federal courts. The High Court may be distinguished from other courts by its superior status as a court of appeal, but the fact that it hears "constitutional cases" offers no reason for differentiating its mode of appointment from that of State courts. In the second place it must be noted that "constitutional cases" form only a very small fraction of the work of even the High Court. The great bulk of its time is spent on private litigation in which State governments are not concerned as partners in the federation. It is not obvious that these governments should be given some special status in appointments to a court almost wholly occupied with business that does not concern them. The Committee might of course wish to consider the pros and cons of recommending the establishment of a separate "constitutional court"; that is a subject beyond my competence.

4. Supposing for the moment that the basic proposition (paragraph 2) were sound in principle, it would be necessary to consider the practical problems of putting it into effect. As I do not think it is sound, I merely list some of them here. At the outset it would seem that the role of the States, as a matter of legal right, could not possibly be made more than advisory to the Commonwealth. Section 72 of the Australian Constitution requires that High Court judges be appointed by the Governor-General-in-Council. Members of the Committee will know what chance there is of securing a

constitutional amendment to alter that power. Apart from this, what form should State participation in appointments take? Should the federal government merely consult State governments before making appointments? Should the federal or State governments begin by nominating panels of potential appointees for mutual consideration? How many States should concur for their advice to be taken into consideration? Who should represent the States for any such purposes—the Premiers, the Attorneys-General, the Executive Councils, the parliaments, or committees of the parliaments?

5. Supposing that all such questions could be resolved, what is the object to be attained, and how likely is it to be attained by the means proposed? From the political context of the Committee's appointment, the object of state participation would seem to be to prevent the appointment of "centralizers", or "socialists", or "radicals"—that is, judges of some supposedly political orientation especially in relation to state rights. A more realistic objective might be to ensure that any such appointments were balanced by appointments of judges of other political persuasions. It is apparently thought that such attention to appointments would secure better protection for state rights throughout the subsequent life terms of the judges concerned. My submissions are that such notions are illusory, and are no more likely to attain the object sought than is the present system of appointment. I give my reasons in what follows.

6. I suggest that the only practicable criteria for High Court appointments are (a) that appointees should be among the more eminent and distinguished members of the Bar, and (b) that their collective experience should range more or less comprehensively over the main fields of law that the Court is called upon to administer. I realize that the current safeguards of these criteria lie only in the self-respect and common sense of the federal government of the day, as reinforced by the prevailing conventions of public life and the risk of political criticism that can threaten to weaken its electoral standing. I believe that if further safeguards seem to be required they should be sought in something like mandatory consultation of representatives of the legal profession—through law councils or bar associations—rather than in participation by state governments which would merely add further unpredictable political dimensions to those already present.

7. In any case, the elimination of "political" considerations from these judicial appointments seems to me neither desirable nor practicable—always assuming that the above professional criteria are maintained. Precisely because the High Court may occasionally be concerned with cases of great constitutional and therefore political import, it benefits from including some members with eminent political experience. Some of the most distinguished jurists on the Court have been men in that category. But whether appointees are ex-politicians or not, they are bound to have "political" views of one sort or another (not necessarily "party" views), and these are bound to influence their constitutional judgments in one way or another. That does not mean, however, that the political "complexion" of the Court—whether on a conservative-radical or centralist-federalist spectrum—can somehow be pre-ordained by means of reforms in the appointing process. Of course if all that matters is to keep up an appearance of equity at the time of appointment there is no need to pursue this point. But if the Committee is concerned with the practical bearing of the mode of appointment on the actual future conduct of the Court, this is the point I submit is most worthy of attention. It has two facets.

8. As already mentioned, High Court appointments are for life—a constitutional requirement. There are (at present) seven justices, and vacancies on average are infrequent and unpredictable. If the political complexion of the Court as a whole (which is what matters most) reflects changes in its membership that complexion must evolve quite slowly. The opportunity for any one federal government to transform it is limited, and changes of federal government from time to time would produce a court of mixed political complexion—as they have done. If, indeed, a federal government retained office long enough to make a significant number of fresh appointments, it could be argued that any effect this had on the attitudes of the Court would justifiably reflect majority sentiments in the electorate. I believe this to be more relevant to the work of the Court as a whole than trying to make its membership reflect at any one time the views of all the partner governments over previous decades—supposing this were feasible.

9. But it is not worth trying. It is unreal to assume that the attitudes of the Court toward "centralism" or "state rights" could somehow be "corrected" or "balanced" by taking thought and involving state governments when individual judges were being appointed. The connection is tenuous indeed between the supposed political orientation of judges on appointment and their subsequent interpretations of constitutional law over a lifetime. High Court judges who when ministers of the Crown were reckoned as convinced "federalists" have delivered some of the most "centralist" judgments in the history of the Court—and vice versa. Short-run calculations in this matter are too crude to cope with the complex long-term reality. In summary, I submit that the idea

of state representatives intervening in these judicial appointments rests on a fallacious principle, could not be implemented in any meaningful way, and if it could is not calculated to produce any more "satisfactory" results, from the state point of view, than the present system.

R. S. PARKER, Professor of Political Science, Australian National University.

S.7

A SUBMISSION TO THE SELECT COMMITTEE OF THE LEGISLATIVE ASSEMBLY OF NEW SOUTH WALES UPON THE APPOINTMENT OF JUDGES TO THE HIGH COURT OF AUSTRALIA

by Dr G. C. SHARMAN, Department of Political Science, University of Tasmania

1. The question of the appointment of judges to a court which arbitrates constitutional disputes in a federation is a delicate one. This is particularly the case in federations which have accepted the British tradition and style of appointment of judges. The high status, institutional independence and legal expertise which characterize Australian judges make it difficult to impute political bias to judicial decisions, even those involving such sensitive issues as constitutional interpretation. Nonetheless, it must be recognized that differing political philosophies and, more particularly, differences in judicial experience may modify the court's attitude to particular constitutional issues. What, might be asked, has been the effect of an absence of judges from the three smaller states on the deliberations of the High Court in terms of the Court's corporate lack of judicial notice of the constitutional perspective of the citizens of these states?

2. The response might be that the Court has no representative function and that judicial notice of special circumstances affecting the smaller states or any state can be acquired from argument by counsel and perhaps by the travelling of the Court itself from state to state. Moreover, so the argument might run, the Court's main function in constitutional matters is the application of the best legal expertise available and to this extent any regional or other representation on the court is not only irrelevant but may be an obstacle to the selection of the best judicial candidates.

3. The experience of Canada in dealing with this issue is instructive. On the one hand, the central government (which appoints judges to the Supreme Court of Canada in a similar manner to the Australian practice with respect to the High Court) has consistently refused to admit that the Supreme Court of Canada has any representative function. In practice, however, the central government has followed the precedent that there is a regional balance among the nine members of the Court. This policy has been encouraged by the fact that three of the judges of the Court are required by law to have special expertise in the law of the Province of Quebec (which has inherited a European based civil law tradition from its French colonial past). This has meant that three other judges are usually appointed from the Province of Ontario and the remaining three from among the smaller eastern and western provinces. It has been suggested that linguistic and religious considerations have also played a part in the maintenance of a Court which represented, in microcosm, the diversity of constitutional perspective that existed in the Canadian community at large.

4. There has been considerable interest among the provincial governments of Canada to establish some form of provincial involvement in the process of judicial selection. In part, this interest has been prompted by a desire to enshrine the convention of regional balance in a constitutional document. There has, however, been a second motivation for the provinces to press for a change in the manner of judicial selection to the Supreme Court of Canada. This has been the belief on the part of the provinces that the Court has become increasingly insensitive to the views of provincial governments in constitutional matters and that this insensitivity has stemmed, in part, from the perspectives of judges appointed to the Court in recent years. It is not necessary to impute any conscious attempt at manipulation of the Court by the central government: the provinces have simply pointed out that the present method of selection carries an inherent bias, however slight, in favour of the central, rather than the provincial government view of constitutional issues.

5. This matter of the selection of judges for the Supreme Court of Canada was one of the many issues discussed during the process of review of the Canadian Constitution (the British North America Act) over the period 1968 to 1971. Some success at a compromise was reached at the Victoria Charter of 1971. Under its provisions a form of consultation was to be established so that ". . . no person shall be appointed to the Supreme Court of Canada unless the Attorney-General of Canada and the

Attorney-General of the appropriate Province agree to the appointment . . ." and a complex procedure was established in case of disagreement (*see* Appendix). It should be noted that there was no attempt to build in any explicit regional balance to the Court nor was there any diminution of the central government's power to initiate the process of selection. Nonetheless, the provisions of the Victoria Charter, if they had been accepted, would have amounted to a substantial modification to the existing procedures for judicial appointment and would have quietened many of the doubts of provincial governments over central government bias in judicial selection. (The Victoria Charter did not gain the unanimous provincial and central government approval necessary for its adoption, for reasons which were in no way connected to the matter of appointments to the Supreme Court of Canada.)

6. In the Australian context, it would seem that the provisions of the Victoria Charter might very well prove acceptable to Australian conditions. Their great virtue is that they deal with the central point of state dissatisfaction, that of a lack of consultation and participation in the selection process, without affecting either the prerogative powers of the Crown in right of the Commonwealth, or the nature of the High Court itself.

G. C. SHARMAN, University of Tasmania, April 1975.

APPENDIX

Articles 22 to 33 of the *Victoria Charter,* 1971, as reproduced on pages 381 to 383 of *The Constitutional Review* 1968–1971: *Secretary's Report* prepared by the Canadian Intergovernmental Conference Secretariat, and published by Information Canada, Ottawa, 1974:

Art. 22. There shall be a general court of appeal for Canada to be known as the Supreme Court of Canada.

Art. 23. The Supreme Court of Canada shall consist of a chief justice to be called the Chief Justice of Canada, and eight other judges, who shall, subject to this Part, be appointed by the Governor General in Council by letters patent under the Great Seal of Canada.

Art. 24. Any person may be appointed a judge of the Supreme Court of Canada who, after having been admitted to the Bar of any Province, has, for a total period of at least ten years, been a judge of any court in Canada or a barrister or advocate at the Bar of any Province.

Art. 25. At least three of the judges of the Supreme Court of Canada shall be appointed from among persons who, after having been admitted to the Bar of the Province of Quebec, have, for a total period of at least ten years, been judges of any court of that Province or of a court established by the Parliament of Canada or barristers or advocates at that Bar.

Art. 26. Where a vacancy arises in the Supreme Court of Canada and the Attorney General of Canada is considering a person for appointment to fill the vacancy, he shall inform the Attorney General of the appropriate Province.

Art. 27. When an appointment is one falling within Article 25 or the Attorney General of Canada has determined that the appointment shall be made from among persons who have been admitted to the Bar of a specific Province, he shall make all reasonable efforts to reach agreement with the Attorney General of the appropriate Province, before a person is appointed to the Court.

Art. 28. No person shall be appointed to the Supreme Court of Canada unless the Attorney General of Canada and the Attorney General of the appropriate Province agree to the appointment, or such person has been recommended for appointment to the Court by a nominating council described in Article 30, or has been selected by the Attorney General of Canada under Article 30.

Art. 29. Where after the lapse of ninety days from the day a vacancy arises in the Supreme Court of Canada, the Attorney General of Canada and the Attorney General of a Province have not reached agreement on a person to be appointed to fill the vacancy, the Attorney General of Canada may inform the Attorney General of the appropriate Province in writing that he proposes to convene a nominating council to recommend an appointment.

Art 30. Within thirty days of the day when the Attorney General of Canada has written the Attorney General of the Province that he proposes to convene a nominating council, the Attorney General of the Province may inform the Attorney General of Canada in writing that he selects either of the following types of nominating councils:

(1) a nominating council consisting of the following members: the Attorney General of Canada or his nominee and the Attorneys General of the Provinces or their nominees;

(2) a nominating council consisting of the following members: the Attorney General of Canada or his nominee, the Attorney General of the appropriate Province or his nominee and a Chairman to be selected by the two Attorneys General, and if within six months from the expiration of the thirty days they cannot agree on a Chairman, then the Chief Justice of the appropriate Province or if he is unable to act, the next senior judge of his court, shall name a Chairman;

and if the Attorney General of the Province fails to make a selection within the thirty days above referred to, the Attorney General of Canada may select the person to be appointed.

Art. 31. When a nominating council has been created, the Attorney General of Canada shall submit the names of not less than three qualified persons to it about whom he has sought the agreement of the Attorney General of the appropriate Province to the appointment, and the nominating council shall recommend therefrom a person for appointment to the Supreme Court of Canada; a majority of the members of a council constitutes a quorum, and a recommendation of a majority of the members at a meeting constitutes a recommendation of the council.

Art. 32. For the purpose of Articles 26 to 31 "appropriate Province" means, in the case of a person being considered for appointment to the Supreme Court of Canada in compliance with Article 25, the Province of Quebec, and in the case of any other person being so considered, the Province to the Bar of which such person was admitted, and if a person was admitted to the Bar of more than one Province, the Province with the Bar of which the person has, in the opinion of the Attorney General of Canada, the closest connection.

Art. 33. Articles 26 to 32 do not apply to the appointment of the Chief Justice of Canada when such appointment is made from among the judges of the Supreme Court of Canada.

LIST OF SELECTED REFERENCES

(a) *The Supreme Court of Canada—General*

Peter H. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution,* Document of the Royal Commission on Bilingualism and Biculturalism, Information, Canada, Ottawa, 1969.

Paul Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada,* Carswell/Methuen, Toronto, 1974.

(b) *The Supreme Court of Canada—Proposals for New Appointment Procedure*

Canada, Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, *Final Report,* Information, Canada, Ottawa, 1972.

Canada, Canadian Intergovernmental Conference Secretariat, *The Constitutional Review* 1968–1971: *Secretary's Report,* Information, Canada, Ottawa, 1974.

(c) *The Canadian Court System*

G. C. Sharman, *The Courts and the Governmental Process in Canada,* unpublished Ph.D. thesis, Department of Political Studies, Queen's University, Kingston, Ontario, 1972.

S.8

THE NEW SOUTH WALES BAR ASSOCIATION

Selbourne Chambers
174 Phillip Street
Sydney 2000
9th June, 1975.

W. G. Luton, Esq.,
Serjeant-at-Arms and
Clerk of Select Committees,
Parliament House,
Sydney 2000.

Dear Sir,

Re SELECT COMMITTEE OF THE LEGISLATIVE ASSEMBLY UPON THE APPOINTMENT OF JUDGES TO THE HIGH COURT OF AUSTRALIA

1. The authority for these appointments is to be found in Chapter 3 of the Constitution Act, ss. 71 and 72 which read as follows:

"71. The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes."

"72. The Justices of the High Court and of the other Courts created by the Parliament:

(i) Shall be appointed by the Governor-General in Council.

(ii) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity.

(iii) Shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office."

2. Apparently Parliament "prescribes" the number of Justices in the Judiciary Act 1903–1969, Part 2, section 4, which reads:

> "4. The High Court shall be a superior court of record and shall consist of the Chief Justice and six other Justices, who shall respectively be appointed by commission."

3. The qualifications and seniority of such Justices is referred to in the sections of that Act which follow then; and also the duties and circumstances which can evolve upon the senior Justices and in the case of absence of the Chief Justice from Australia.

It would appear that however the matter might be considered there could be no appointment of any such Justice otherwise than in accordance with the Constitution.

4. So far as one is aware a proposed appointee is recommended by the Attorney-General to Cabinet. If approved by Cabinet, the appointment is made by the Governor-General in Council, who acts in such a matter only on the advice of Ministers.

This inevitably means that the appointment is "political".

5. It is to be remembered that the "Governor-General in Council" means the Council which is referred to in sections 62 and 63 of the Constitution:

> "62. There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.
>
> 63. The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council."

In the nature of things apart altogether from convention the members of the Council might be expected to be of a particular political party.

6. In the circumstances, that last mentioned group will formally recommend an appointment and would not be obliged to follow the recommendation of any other committee or advisory board. It is not easy to accept that it would allow its own views to be over-ridden anyway. Accordingly no particular purpose would appear to be served hereby referring to the method of appointment of Judges in legal systems other than our own.

7. It is to be observed that were one to recommend the establishment of a Committee to consider and advise upon appointments to the High Court, a similar body might desirably be appointed for each State to advise on judicial appointments.

8. The prospects of securing an amendment to the Commonwealth Constitution that would permit the interposition of a Committee of the kind envisaged must be regarded as extremely remote. No government in Canberra, whatever its political hue, would be disposed to surrender control or to permit any diminution of its control over Federal judicial appointments.

Yours faithfully,

T. E. F. HUGHES, President.

S.9

SUBMISSION TO THE SELECT COMMITTEE OF THE LEGISLATIVE ASSEMBLY UPON THE APPOINTMENT OF JUDGES TO THE HIGH COURT OF AUSTRALIA

by P. E. NYGH, Professor of Law, Macquarie University

Introduction

This is not a submission in the usual sense in that I put to the Committee my own views as to the course to be undertaken. I feel that the answer to the question of whether the States should participate in the selection of the High Court Justices and, if so, to what degree, depends very much on one's political philosophy. For those who espouse conservative political views the High Court should be a protective shield against too radical experimentation at the centre. Thus, for them, the more checks and balances imposed on the selection of Justices the better. For those who favour radical changes, the High Court should be composed of Justices who will favour an expansive interpretation of central power which can only be achieved by allowing the central

government, if it is anxious to expand its power, to appoint Justices with a minimum of interference. A moderate may wish to see a court on which both conservative and radical philosophies were represented. I personally favour the last solution, but this view has no more value to the Committee than that of any other informed citizen.

For that reason, I have confined myself to a survey of the systems followed in other federations such as the United States, Canada, India, the Federal Republic of Germany, Switzerland and Malaysia, with a sideways glance at the suspended constitution of Nigeria and the quasi-federal EEC Court of Justice. Where information has permitted me to do this, I will seek to point out not only the formal method of selecting Justices to the Highest Court but also their operation in practice and the effect this practice has had on the attitudes taken by the Court in question on important constitutional issues, including the question whether it produced a conservative or an activist court. To avoid a plethora of footnotes I refer the Committee to a bibliography in respect of each of these countries, which will indicate the primary sources on which I have relied.

Finally, I have put to the Committee five alternative models, pointing out the merits and demerits, in my opinion, of each model. The final choice between them, as I have pointed out earlier, must be made by the Committee on political grounds, understood, of course, in its wider sense, of what in the Committee's views would be best suited to the Australian body politic rather than in the sense of giving a particular political party a temporary advantage.

The United States of America

Description of Court

The United States does not have a unified national system of courts but independent court systems for each of the fifty States and for the federal government. At the apex of the federal structure stands the United States Supreme Court. It can hear appeals from the federal courts and also has the power to review decisions of the highest courts of the States in so far as they involve questions of federal law, including questions arising out of the United States Constitution. The United States Supreme Court is therefore not exclusively a constitutional court, but the vast area of private law, including the law of torts, contracts, real property, etc., is governed by State law and hence is outside the jurisdiction of the United States Supreme Court.

The Supreme Court will only hear an appeal if a substantial federal question is involved. In doing so the Court has confined its jurisdiction to the most fundamental questions, usually, though not exclusively, those arising under the Constitution.

Method of Appointment

The Court consists of a Chief Justice and eight Associate Justices. They are appointed by the President, who, under Art. 2 s2 of the United States Constitution, must obtain the advice and consent of the Senate to each appointment. In relation to judicial appointments this means the consent of a simple majority of Senators present.

The nomination is exclusively the prerogative of the President, although he will frequently seek the advice of his Attorney-General. In making his selection the political compatibility of the appointee to the President and his party is an important consideration. Many nominees have been close political associates of the President who appointed them. Justice Frankfurter was an advisor of President Franklin Roosevelt, Chief Justice Vinson an aide of President Truman, and Justice Fortas a close political associate of President Johnson.

President Nixon was seen as deliberately breaking with tradition when he selected as his nominee for Chief Justice, Judge Burger, a judge of a lower federal court, with whom he was not personally acquainted. But President Nixon did later nominate Mr Rehnquist, who had been a member of his Cabinet, to be an Associate Justice.

Even nominations of persons who are not obvious party-political personalities can be politically motivated. This again is illustrated by President Nixon, who, even before his election to the presidency, campaigned on the basis that he would change the character of the Supreme Court from judicial-activist (as it had been under Chief Justice Warren—incidentally, a former Republican Governor of California appointed by the Republican President Eisenhower) to a conservative and "strict constructionist" Court. The nominations of Burger and Blackmun, both non-political judges at the time of nomination, were seen in that light, and their appointments have indeed had the effect of changing the balance of the Court to a more restrained policy than previously applied.

Other considerations besides party and political, which the President looks for, are geographical distribution and religious and ethnic background. The geographical distribution is not in terms of States since clearly nine Justices cannot be appointed to suit all fifty States, but in terms of the various regions of the United States:

conservative democrat South, liberal Northeast, republican conservative mid-West, and politically unpredictable Pacific Coast. There is no definite quota but at the same time no region should be left entirely without representation on the court. Indeed in his unsuccessful nominations of Carswell and Haynsworth, President Nixon sought to redress an alleged imbalance against the South.

Religious balance is another factor. Since the appointment of Justice Frankfurter by President Franklin Roosevelt there had been a "Jewish seat" on the Supreme Court. This tradition was broken by President Nixon, who did not replace Justice Fortas with another Jew. President Johnson, with the appointment of Justice Thurgood Marshall, a Negro, made an attempt to create an ethnic balance as well.

Last, but not least, comes the question of fitness for office. This is always a very important consideration. It does not appear, however, to be a primary consideration. A number of Justices, such as Justices Holmes, Brandeis and Frankfurter, have been outstanding jurists, but most Justices have not been giants of the law. Chief Justice Warren's greatness lay in his statesmanship, not in his depth of legal analysis. But a minimum of legal expertise must be found to exist and the appointee must be of above average stature. To that end the opinion of the American Bar Association is sought on every nominee. Although that body rarely reports back in negative terms, the danger of doing so is clearly in the President's mind. The rejection by the Senate of President Nixon's nomination of Judge Carswell was based to a very large extent on the nominee's alleged mediocrity. The view expressed by Republican Senator Hruska that mediocrity had a right of representation on the Supreme Court was not shared by his colleagues.

The role of the Senate in this process is to act as a check on the President. That it is not a rubber stamp is evidenced by the fact that the Senate has refused to give its consent to one in every five presidential nominees. As is well known, the United States Senate consists of two representatives elected by the voters of each State, regardless of size and population. It was intended as the State House as opposed to the House of Representatives which is elected on a population basis. Nevertheless, the Senators are in no way representatives of the State governments and do not, therefore, indirectly involve the States in the selection process.

As party discipline in the Senate is lax and regional blocks such as Southern democrat conservative, mid-West republican conservative, liberal Eastern Democratic or Republican, etc., transcend official party labels, it is clear that the Senate can and does act to ensure a basic regional balance in appointments. President Nixon failed with his Southern nominations because the racial views and the mediocrity of talent of his nominees were distasteful to many mid-Western Republican Senators. He succeeded with the nominations of two mid-Westerners, Burger and Blackmun, because Southern Democrats were willing to support them. Since no President can dominate the Senate a certain amount of coalition politics is necessary to obtain endorsement.

At the same time the Senate does accept that the President has the exclusive right of nomination and that he will normally exercise that right in favour of a person whose political outlook is compatible with that of the President. A Democrat controlled Senate will allow a Republican President to appoint a Republican Justice provided his views are not such as to provoke the majority. When President Hoover in 1930 nominated Judge Parker, a conservative with alleged anti-Labour and anti-Negro views, the nomination was rejected by the Senate. In the same manner the Senate rejected President Nixon's Southern nominees because it appeared too blatant a manoeuvre to gain political kudos in the South. By contrast the moderate conservative Judges, Burger and Blackmun from the mid-West, were accepted by the Senate without demur.

Another feature of the Senate confirmation process is that the process of appointing a Justice is both public and protracted. One does not pick up the *New York Times* to read that Mr X has been appointed to the highest Court. Instead the candidate has to undergo public questioning by a Senate Committee and have his merits and demerits discussed in the press. If the public reacts strongly against the nomination the sensitive American Senator will react towards it accordingly. In a certain sense, therefore, the entire country takes part in the process of selection. This does not appear to have endangered the public respect for the Court. Indeed it could be argued that it has re-enforced it.

The Effect of the Selection Process on the Court

The effect of the selection process on the Court has been to create a Court which is highly political and sensitive to changes in public opinion. Examples from the history of the Court will illustrate this. In the period following the Civil War prevailing public opinion was for national reconciliation and national economic development by *laissez-faire*. The Court responded to this mood by emasculating the Fourteenth Amendment and by striking down any legislative attempt to interfere with the sacred right of business to conduct itself as it saw fit. In the 1930's there was a serious

divergence between the Court and national opinion. The Court continued to hold economic regulation to be unconstitutional when public opinion in the throes of the Great Depression had come to accept the need for it. President Franklin Roosevelt was not permitted by Congress to "pack" the Court in 1937 but the Court itself was persuaded to make the "switch in time that saved nine" when Chief Justice Hughes switched his support from the conservative to the liberal side. Conservative Justices who resigned in protest were replaced by liberal nominees of President Franklin Roosevelt, and a new era set in.

In the 1950's the Court responded to a growing public acceptance of the notion of racial and social equality by reversing the old decisions and giving the Fourteenth Amendment the force and vigour its framers had originally intended. The activist "Warren Court" gradually expanded civil rights generally. Then came the riots and civil disturbances of the late 1960's and a public reaction set in. Nixon campaigned inter alia on a promise to "turn the Court around" and interpreted his win correctly as a mandate to carry out this policy. Although he did not gain majority support in the Congress or even in the Senate, he was permitted, as we have seen, to appoint sufficient conservatives to the Court to reverse the previous liberal majority. The "Nixon Court" has moved nonetheless in a cautious, and certainly not reactionary, manner, whittling down some of the effects of the civil rights decisions of the "Warren Court" but not reversing their essential principles.

Whilst the Supreme Court is responsive to shifts in public attitudes it is not, of course, in any sense a party-political Court. Presidents have found to their chagrin that the Justices they have nominated do not always support them and their immediate causes. President Theodore Roosevelt was disappointed by the conservatism shown by Justice Holmes in anti-trust matters, and President Eisenhower was undoubtedly unpleasantly surprised by the liberalism shown by Chief Justice Earl Warren once he sat securely on the Bench. President Nixon was probably disappointed when Chief Justice Burger continued to uphold "bussing" orders which Nixon had sworn to oppose and the Court, including the Nixon appointees, was unanimous in the celebrated "Watergate case" of *U.S.* v. *Nixon.*

These illustrations show that the Court is clearly impartial and not beholden to any immediate political pressures. Its sensitivity is more subtle and global. To sum up: the United States Supreme Court is cognizant of the fact that it is a branch of government and applies not only the law but also statesmanship.

Impact on Federal-State Relations

The selection procedure has done little to safeguard the States from encroaching federal power in the United States. In a process which began at the turn of the century with the establishment of the "affectation test" in *Addyston Pipe and Steel Co.* v. *U.S.* (1899) 175 U.S. 211 and culminated with the rejection of any reservation of power in the States in *U.S.* v. *Darby* (1941) 316 U.S. 517 during the presidency of Franklin Roosevelt, the congressional power over interstate trade and commerce has been expanded by the Supreme Court to such an extent that it covers virtually all commercial activity within the United States. The "Warren Court" permitted Congress to legislate to outlaw even certain purely non-commercial activities such as racial discrimination by reference to the extended notion of interstate trade and commerce: *Katzenbach* v. *McClung* (1964) 379 U.S. 294. In consequence there seems to be little legislative competence left which is reserved exclusively for State control. Nor does there appear to be much resentment on the part of the States against this position.

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FEDERAL REPUBLIC OF GERMANY

Description of the Court

The highest court in the Federal Republic is the Federal Constitutional Court (Bundesverfassungsgericht) which sits in Karlsruhe in Southern Germany. Like a number of other continental federations, such as Austria and Yugoslavia, the Germans have created a specialist constitutional tribunal. The jurisdiction of this Court is under

article 92 of the Constitution confined to the interpretation of the Constitution, the compatibility of federal law with the law of a State (Land), differences of opinion on the rights and duties of the Federation and States and other public law disputes between the Federation and the States or between different States. With the exception of the State of Schleswig-Holstein which has delegated this function to the Federal Constitutional Court, disputes concerned only with the interpretation of State constitutions are dealt with by State constitutional courts existing in each of the other States except West Berlin which has a special status within the Federation. A separate court, the Supreme Federal Court (Bundesgerichthof), also in Karlsruhe, stands at the apex of the courts concerned with the interpretation of federal law which in Germany governs virtually all aspects of private law, the civil, penal, commercial and family codes all being federal legislation.

Side by side with the Supreme Federal Court exist other specialist federal superior courts dealing with defined areas: The Federal Labour Court in Kassel, the Federal Social Security Court also in Kassel, the Federal Tax Court in Munich and the Federal Administrative Court in Berlin. All of these five courts stand at the apex of a hierarchy of lower State courts. Thus all the lower criminal, civil, labour and administrative courts, whether administering federal or State law, are State courts under the control of the State governments.

Method of Appointment

The Federal Constitutional Court since 1959 has consisted of sixteen members divided into two senates presided over by the President and Vice-President of the Court, respectively. The division into senates exists simply to facilitate the work of the Court by allowing the Court to hear two cases simultaneously. Since 1970 the Judges are appointed for a term of twelve years and cannot be re-appointed. They must retire at the age of sixty-eight. At least three members of each senate must be chosen from the Judges of other federal courts which, as we have seen, are each the highest court in a State-based hierarchy.

The principles on which appointments are made to the Constitutional Court are laid down in article 94 of the Constitution. This provides that half of the members of the Court are to be elected by the Upper House of Parliament (*Bundesrat*) and half by the Lower House (*Bundestag*). The Judges may not belong to either House of Parliament, the Federal Government and corresponding bodies of a State, but nothing in the Constitution prevents a person holding any of these offices from being appointed to the Court on condition, of course, that he relinquishes that appointment upon taking the judicial office.

In this process of selection the States are directly involved since the Upper House under article 51 of the Constitution consists of direct representatives of each of the eleven States which can appoint and recall them and give them detailed instructions on how they shall vote. Their voting power is not equal, however; each State has at least three votes, States with more than two million inhabitants have four, and States with more than six million inhabitants have five votes. The votes of each State may be given only as a block vote and only by members present or their representatives. Usually the Upper House consists of one senior public servant for each State casting the three to five votes for his State in accordance with instructions received from the State government.

Since only eleven persons are therefore involved the Upper House exercises its right of election in plenary session. To prevent one political party forcing its nominee upon the other, a two-thirds majority of the votes cast is required. In the Lower House, which is a much larger body, the function of electing members of the Court has been delegated to a twelve-member Committee of Electors made up of members of the Lower House. The political parties are represented on the Committee in proportion to their strength in the House. Again a two-thirds majority is required.

The President and Vice-President of the Court are elected as such by the two electoral colleges in turn. If there is a deadlock in an electoral college resulting in the position remaining unfilled for two months after the expiry of the term of duty of the Judge whose vacancy is to be filled, the Constitutional Court itself must submit a list of three recommended candidates. The electoral college may, but need not, choose a replacement from among those candidates. A candidate who has obtained the required majority is then formally appointed by the Federal President.

It is interesting to note, if not immediately relevant here, that joint Federal-State committees usually consisting of the Ministers of Justice or their representatives also elect the Judges of other federal courts, including the Federal Supreme Court.

Because of the two-thirds majority requirement it is clear that a successful candidate must have bi-partisan support since the major political parties in Germany, the conservative Christian Democrats (CDU) and the socialist Social Democrats (SDP) are usually closely balanced in political favour with the electorate. This support can only be achieved by an informal negotiation process before the candidate is

actually put to the vote in the committee. Until 1971 it appears that negotiations about candidates to be elected by the Upper House were conducted within an ad hoc commission composed of representatives from each State. In 1971, because of a large number of vacancies, the negotiations were conducted between teams of negotitors nominated by the two major parties, each including representatives of the States. The negotiations about candidates to be elected by the Lower House Electoral Committee are conducted within that Committee itself by representatives of the parties represented on that Committee.

As can be seen from this, the process is essentially a political one and mainly directed at striking a balance between the political parties. The fact that in 1971 the political parties took over negotiations from the States show that national politics are considered as more important than State representation. There appears to have developed an unofficial quota of positions allocated to each party. The CDU is traditionally allowed to nominate the President of the Court and the SPD the Vice-President. The division of the positions overall were last revised in the 1971 negotiations which took over one year in the light of the then recent victory of the SPD at the polls. That division is now: nine positions to the CDU, six positions to the SPD and one position for the SPD's smaller coalition partner, the Free Democrats (FDP). If one of these positions fall vacant the party entitled to the position is allowed to nominate the successor, the other party, however, having the right to veto the appointment if the candidate selected has extreme political views (e.g. Nazi or Communist) or has poor legal qualifications or is otherwise obnoxious.

This does not mean that all appointees are necessarily former politicians or even affiliated with a political party. As we have seen, at least three judges in each senate must come from amongst the existing judges of the federal courts. A party may also appoint a prominent lawyer or public servant or university professor with no stated political affiliation. The nominations by the socialist SPD tend to be more obviously political than the nominations by the conservative CDU. This can be explained by the fact that lawyers with radical views are more likely to be politically committed than conservative lawyers, a phenomenon not unknown in Australia.

It appears that despite the formal involvement of the States, specific State pressure for a candidate is rare. The States divide according to political allegiance and hence it is left to the national party machinery to find a candidate.

It is interesting to contrast the experience of the Federal Supreme Court with that of the Constitutional Court. In that Court there exist not only informal political quotas, but also informal State quotas which allow a State to fill a vacancy left by one of its own judges with its nominee if that person is properly qualified. If no qualified person can be found, the State will pass its turn and be allowed to make an extra appointment later to redress the balance.

Evaluation of the Court

It is clear from the foregoing that the Court is a political court. This, it appears, is in line with German tradition. The post-war system of checks and balances was devised to prevent unilateral "packing" of the Court, not to prevent political figures from being appointed to it. Certainly politicians have been appointed to the Court to an even greater degree than with the United States Supreme Court.

There is not much evaluation available of the impact in political terms which the Court has had. Certainly German, like Australian and British commentators, are much more restrained in their comments on their Supreme Courts in this respect than their US counterparts. However, in 1958, after the Court had been operating for six years, an American commentator wrote:

> The presentation of cases to the Court, permitted by "higher constitutional organs and other participants" at the federal level, has usually been done by the minority party in the Bundestag and has been designed to question the constitutionality of some type of action approved by the majority party. In view of the party composition of the Bundestag after the elections of 1949 and 1953, there was no real occasion for controversies involving the respective "rights and duties" of the Bundestag, Bundesrat, or President to be sponsored by leaders of the majority party. The Court has thus come to be looked upon as the guarantor of minority rights, a fact which may help explain the consistent Social Democratic support of it since its foundation. The governments of certain of the States, particularly those which do not have CDU majorities or party coalitions, have also been inclined to view the Court as a defender of the rights and powers of the States under the federal system. As the "weaker party" in the "federal system" to express the viewpoint of one judge, the States consider the Federal Constitutional Court as a bulwark against unconstitutional federal pretentions. It is no surprise, in view of the composition of the upper chamber, that the Court has been generally regarded with more favour by the Bundesrat than by the Bundestag, and that within the Bundestag, it has been more sympathetically appraised by the minority party than by the majority coalition.

(Cole, *The West German Federal Constitutional Court: An Evaluation After Six Years* (1958) 20 Journal of Politics 278.)

Ten years later another commentator wrote:

> Considering that the 1949 Constitution is the Basic Law of a Federation, it is small wonder that the respective roles of the central government and the constituent units, the Länder, have been a central issue of judicial review. Set forth in Article 20 of the Basic Law as one of the three characteristics of the Federal Republic (together with the separation of powers and the rule of law) the federal structure, in the opinion of the Constitutional Court, is such that it amounts to the acknowledgment of the national government's supremacy over the Länder, which do not even have power to participate in the amendment or quasi-amendment of the Constitution (Article 79 (24)), a power reserved to the authorities of the Federation. On the other hand, both Länder and federal authorities are committed to the standards of "federal loyalty" (Bundestreue) which requires them to respect each other and may even oblige them to co-operate in areas of substance which under the Basic Law are within the legislative or executive jurisdiction of the Federation or the Länder. Accordingly the Constitutional Court has, for example, stated that in determining the salary scale of their civil servants, the Länder must take due account of federal civil service remunerations as well, their budgetary autonomy notwithstanding. Conversely, exercise of the federal power over telecommunications must not restrain the use of existing broadcasting facilities by their rightful owners which are public corporations set up by the Länder and operating under their authority.
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> (Hahn, *Trends in the Jurisprudence of the German Federal Constitutional Court*, 1968, 16 American Journal of Comparative Law 570 at 576.)

The Court has also shown a remarkable aptitude for statesmanship. Although not compelled to do so by the Constitution, it has worked out a system of admonitory advice to the legislature whereby it gives notice that a law is constitutionally invalid without actually invalidating it provided the legislature later acts to put matters right within a stated period of time. Thus the Court warned that the existing laws relating to illegitimacy, as inherited from pre-war Germany, were contrary to the 1949 Constitution which provides expressly for equality between legitimate and illegitimate children and that it would strike all existing laws on the topic down unless Parliament before the expiration of the then current legislative session enacted new legislation in accordance with the constitutional principle. This clearly shows a flexibility unknown to the common law where a court would have been compelled to hold that since 1949 the existing laws had automatically been invalidated. The Court clearly sees itself therefore as a non-political third branch of government with functions of policy making. The constitutional directive of equality between all citizens has also been progressively interpreted by the Court not merely with regard to notions of equality as at 1949 but also in the light of changing conceptions of equality. Thus the Court warned at one stage that the existing rules relating to letters written by prisoners which dated from a bygone and more restrictive age were no longer in accordance with the Constitution and would have to be revised even if under concepts current in 1949 they would have been considered unobjectionable.

Like the United States Supreme Court, and perhaps even more so, the Court has had submitted to it most of the political controversies in post-war Germany. It started soon after the creation of the Court with the issues arising out of the decision to re-arm Germany. It was followed by disputes concerning nuclear weapons, the absorption of the Saarland into the Federal Republic, the political division of the Southwest of Germany into States, and the issue of equality of representation under electoral laws. Although there has for long been a myth that one senate is traditionally Red (that is associated with the socialist SPD) and the other traditionally Black (that is associated with the clerical and conservative CDU), there is no hard evidence to support this contention. Nonetheless, at least in the first ten years of the Court, this assumption has led to some manoeuvring on the part of the government and opposition of the day, respectively, to get a case before a senate which was reputedly favourable towards the plaintiffs.

Despite the very political manner in which appointments to the Court are made, the impression one gains from the jurisprudence of the Court is that of an impartial tribunal studiously concerned to maintain an even balance between conflicting constitutional claims. The introduction of the principle of "federal loyalty" as binding on both Federation and States, despite the fact that legislative authority is overwhelmingly weighted on the side of the Federation, is an important contribution to the notion of co-operative federalism for it "implies an obligation on the part of the Federation and of its constituent States to co-operate in a manner appropriate to the notion of a federal state" (Muller, *The Federal Constitutional Court of the Federal Republic of Germany*, 1965, 6 Journal of the International Commission of Jurists 191 at 199). At the same time it has been reluctant to interfere with the activities of the legislature:

> The prudent self-restraint shown by the Federal Constitutional Court in relation to decisions based on expediency or involving the exercise of discretion in the political field again becomes apparent. In many of its rulings the Court has repeatedly emphasized that the judgment of the legislator violates legal principles only if it oversteps the bounds of law or is misused in a way conflicting with the general principles of justice. Other rulings state that a legal provision can only be annulled if its partiality is evident. The Federal Constitutional Court has in this respect repeatedly applied the principle of so-called pro-constitutional interpretation, i.e., it has not held a law to be unconstitutional as long as its wording can in any way be interpreted in a manner consistent with the Constitution. In so doing the

Court has contributed to maintaining the free play of forces within the democratic order of the State, while at the same time indicating the limits, together with all their implications, which the general principles of law, in particular the principle of justice, impose on the sphere of the individual.

(Muller, *op. cit.* at 217.)

Although for most of the period since 1951 most positions on the Court have been at the disposal of the conservative CDU, the Court has not shown partiality in political disputes. The Constitution permits one-third of the membership of the Lower House to bring proceedings in the Court concerning the constitutionality of a statute and the SPD opposition during the long rule of the CDU between 1951 and 1966 has on several occasions taken advantage of this section sometimes with, and sometimes without, success.

The Court does not aim for unanimity and divisions on the Court are quite common. Each senate must sit to hear a case in its entirety and at least six of the eight judges must be present. Individual judges may be challenged for bias which challenges must be resolved by the entire panel. The mere fact that the philosophy of a particular judge is hostile to a party and that his views on the constitutional issue may therefore be predictable is not enough. A public pre-trial declaration that a disputed statute is constitutionally valid, on the other hand, has been held to be sufficient ground for challenge.

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CANADA

Description of the Court

The Supreme Court of Canada is a general court of appeal for all Canadian courts, both provincial and federal. Unlike the constitutions of the United States and Australia, a supreme court was not an essential part of the design of the fathers of confederation but a mere by-product. Section 101 of the British North America Act 1867 provides:

> The Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the constitution, maintenance, and organization of a general court of appeal for Canada, and for the establishment of any additional courts for the better administration of the laws of Canada.

In pursuance of this authority the Canadian Parliament created the Supreme Court of Canada in 1875. It is therefore a statutory, but not a constitutional court, which could conceivably be abolished and reconstituted by the Canadian Parliament if it thought fit. At present it is governed by the Supreme Court Act RSC 1952 c 259. According to s. 4 of the Statute the Supreme Court consists of a Chief Justice called the Chief Justice of Canada, and eight puisne judges who are appointed by the Governor-General in Council by letters patent under the Great Seal of Canada.

As s. 101 of the Constitution indicates the jurisdiction of the Supreme Court is general and lies in matters of both public and private law whether of federal or provincial origin. As a result constitutional cases form only a minor part of the Court's work.

Method of Appointment

Section 96 of the Constitution provides that judges of the superior, district and county courts in each province shall be appointed by the Governor-General. Although no mention is made of appointments to the general court of appeal in s. 101 it has been assumed that the general power of Parliament to provide for its constitution, maintenance and organization permits it to make provision for appointment

by the Governor-General likewise. The remarkable situation is reached that in contrast to virtually all federations, the federal government alone appoints both federal and most provincial judges. The only limitation which the Supreme Court Act imposes on the power of appointment is the requirement in s. 6 of the Supreme Court Act 1952 that at least three of the judges shall be appointed from among the judges of the Court of Queen's Bench or of the Superior Court or the barristers or advocates of the province of Quebec. The reason for the requirement lies, of course, in the fact that the province of Quebec alone among the Canadian provinces does not follow the common law but has a civil law system inherited from France. There must therefore be sufficient Quebec judges on the Bench to hear and determine appeals on Quebec law.

There appears to be a convention which decrees that three judges must come from Ontario, one from the Atlantic Provinces and two from the four Western Provinces. Within that convention, however, the federal government has considerable freedom in making appointments. In 1970 Mr Russell, writing in *The Supreme Court of Canada as a Bilingual and Bicultural Institution* at p. 72 stated:

> From an observation of the biographical data of the forty-nine men who have been appointed to the Canadian Supreme Court since its establishment in 1875, two career patterns emerged as most apt to lead to the Supreme Court—politics and the federally-appointed judiciary. Of the forty-nine, only ten had not previously been either members of a federal or provincial legislature or members of the Bench of a provincial superior court and even among the ten exceptions, two served as deputy ministers of justice in Ottawa. There has been a considerable amount of overlap between those two who were promoted from the provincial courts and those who had been actively engaged in party politics: eleven of the twenty-seven supreme court judges who rose from provincial courts had been either federal members of parliament or members of a provincial legislature before being appointed to the provincial court.
>
> More than half of the twenty-three judges who had at one time or another been elected politicians, had held very prominent governmental positions. Six held the office of attorney-general in a province, three were federal ministers of justice, three were senior federal cabinet ministers, and two had been provincial premiers.

Professor Angus in *Constitutional Reform*: *The Judiciary,* a paper presented at the Annual Meeting of the Association of Canadian Law Teachers in Calgary on 6th June, 1968, and partly reproduced in Lyon and Atkey, *Canadian Constitutional Law,* 1970, at p. 336, says of the actual mode of appointment:

> At present, judicial appointments are a cabinet decision made after recommendation from the Minister of Justice or Attorney-General as the case may be. An exception is the custom, observed since 1896, that the Prime Minister exercises the prerogative of appointing Chief Justices . . .
>
> In Canada, the faceless mask of a Cabinet confronts the public in judicial selection. Behind the closed door of a Cabinet meeting, the considered recommendation of the Minister of Justice or Attorney-General may go for nought in the face of local, ethnic, partisan, personal or other considerations of the institutional decision for which the Minister or Attorney-General cannot be held completely responsible. If he alone was vested with authority to make a choice of the merits, more qualified and non-partisan appointment of outstanding judges could reasonably be expected.

It is not surprising that the criterion for selection is primarily political. Angus states at page 336:

> A more critical factor has been partisan abuse of the judiciary by rewarding the party faithful with appointment to the Bench. Except for a brief interlude during the Laurier regime after the turn of the century when a highly principled Minister of Justice, the Hon. Charles Fitzpatrick, endeavoured to remove the partisan element, the "right" party affiliation has remained virtually a condition precedent to judicial selection since confederation despite unceasing protests in Parliament, from the legal profession, through newspaper editorials and by the general public. Surveys conducted in 1952 and 1965 confirmed that the practice has continued in more recent times.

However, there is a ray of hope. As he mentions about a more recent development:

> One relatively new development deserves consideration. In September of 1966, responding to criticism of federal judicial appointments, the Canadian Bar Association at its Annual Meeting in Winnipeg approved the establishment of a National Committee on the Judiciary of the Association to make recommendations to the Minister of Justice, when asked to do so, on whether a prospective appointee is qualified for judicial office. The Committee was to be composed of one member from each province. A private members bill was introduced in the House of Commons shortly thereafter providing for an amendment of s. 96 of the British North America Act requiring the Minister of Justice to seek a recommendation from the Canadian Bar Association Committee in advance of a judicial appointment. It suffered the usual fate of such bills. During the 1967 annual meeting of the Association in Quebec City, the new Minister of Justice disclosed that he had been consulting the Committee since assuming office in the spring of that year.

The "new Minister of Justice" Professor Angus referred to is the present Prime Minister of Canada, the Hon. P. E. Trudeau, and for that reason the practice can be

presumed to have continued. At the Supreme Court level it appears to have resulted in a decline in purely political appointments. An American commentator wrote in 1973:

> . . . A counter-trend has developed in the selection of persons of academic rather than political distinction. At least six of the judges appointed since 1940 have been active in teaching at Canadian Law Schools, whereas only two such judges were listed prior thereto. Of the present members of the Court Chief Justice Fauteux and Justices Laskin, Martland and Ritchie are ex-academics.

(Fowler, *The Canadian Bill of Rights, A Compromise between Parliamentary and Judicial Supremacy,* 1973, 21 American Journal of Comparative Law 712 at 735.)

In Canada, like Australia at the present time, there have been suggestions for federalizing the system of appointment. One such proposal was put forward by Mr Russell in *Constitutional Reform of the Canadian Judiciary,* 7 Alberta Law Review 103:

> The basic requirement is to provide for the participation of the provincial (or extra-federal) interests in the appointment process. With the exception of Australia (and Canada) this is the norm in other federations where the national supreme court acts as the final arbiter of the constitution. Although there are almost as many ways for providing for this as there are federal constitutions, most of these could be reduced to two general approaches: participation of the division of the federal legislature which is most responsive to provincial interests in the appointing process, or direct collaboration of federal and provincial authorities in making appointments. The writer's inclination is towards adopting the former method for Canada. Such a system, following the American pattern, would require Senate concurrence in the federal executive's nomination. Clearly the merit of this procedure would largely depend upon reforming the Canadian Senate so that it more effectively presents provincial interests. Increasing provincial confidence in the Court's integrity, it should be noted, is by no means the sole advantage of such a system. An additional benefit is the increased public exposure it would give to the federal government selection of judges.
>
> Parliamentary discussion of nominees, particularly when it is part of the ratification process, might possibly be a better check on their appointments than the professional nominations board usually favoured by lawyers.
>
> The writer's preference for this method over the more direct involvement of the Provinces in the appointing process is slight. One way of implementing the latter would be the adoption of an amalgam of West German and Indian methods—a requirement that the federal executive confer with the Attorneys-General and/or the Chief Justices of the Provinces before making appointments. If it was felt desirable to clarify the power of the respective parties in this process, it could be provided that the federal government would make the nomination, while a majority of the Provinces would have to ratify such nominations. A procedure such as this is certainly preferable to one which would regionalize the Court by establishing a quota of Supreme Court judges for each major section of the country, and require the federal government's collaboration with the appropriate Provinces in filling each region's vacancies. (And certainly preferable to the awkward system suggested by Faribault and Fowler, in which, for each constitutional law case, an ad hoc panel of the Supreme Court would be formed from four Supreme Court judges and the Chief Justices of three Provinces. Faribault and Fowler, *Ten to One*: *The Confederation Wager,* 76 (1965).)
>
> This type of scheme would go much too far in the direction of fashioning the Court in the image of the representative legislature and unduly rigidify the recruitment process. Indeed, if the suggestion that the Provinces be given the power to determine which Court should have final appellate power over provincial law matters were accepted, I would not favour entrenching even the present statutory requirement that at least three of the Court's nine judges come from Quebec. The size of regional populations and litigation in the Court are likely to change drastically over time. It would be a serious mistake to entrench regional quotas based on current patterns. The one quantitative dimension of the Court which might be entrenched is the overall number of judges—a provision which would make court packing more difficult.

A suggestion that the Senate be given the power to approve nominations to Supreme Court judgeships was also made in the 1968 Constitutional Conference although in the present state of Canadian politics no constitutional amendment is likely to be adopted.

Evaluation of the Court

Although the Australian, United States and West German constitutional courts have had their fair share of former politicians on the Bench, the reputation of these courts has not suffered in consequence. In Canada, on the other hand, the Canadian Supreme Court does not appear to have as high a reputation as the other constitutional courts. This is partly due to the fact that unlike the United States, Canadian law is still primarily analytical on the British pattern.

Legal analysis requires a certain skill, not always acquired by politicians. Hence the Court falls between two stools: too political for good law and too legal for good politics. The recent spate of academic appointments may alter this reputation.

There does not appear to be any party political predominance on the Court. This can be explained by the fact that the two major Canadian political parties, the Conservatives and the Liberals, are not radically different in political philosophy. Indeed one matter for complaint has been that political patronage has been exclusively confined to the major parties and that minority parties such as the Social Credit Movement and the New Democratic Party (socialist) have been ignored.

It has been suggested by certain Canadian commentators that the real division visible in the Canadian Supreme Court is between the Anglophonic majority and the Francophonic minority, particularly in relation to civil liberties. The former are inclined

to take typical British liberal views in such issues as the treatment of political (communist) or religious (Jehovah's Witnesses) dissenters. The latter are inclined to take a strict view of the need for provincial control (almost always in Quebec) over such groups conditioned by the conservative and deeply Catholic society from which they come.

Impact on Federal-State Relations

As far as the distribution of federal and provincial powers are concerned, the basic outlines were determined by the Privy Council on appeal from Canada prior to 1947. This interpretation was very much in favour of provincial autonomy. The absence of an *inter-se* clause, as is found in the Australian Constitution, means that prior to 1947 the Canadian Supreme Court was not the ultimate arbiter in constitutional matters, another explanation, of course, for the relatively low prestige of that Court. Because of the essentially fragile nature of the Canadian confederation, the balance created by the Privy Council has not been disturbed since the Canadian Supreme Court became the final court of appeal for Canada in 1947.

As a result the legislative and fiscal powers of the Provinces are greater in Canada than any other federal State including the United States and Australia. But the Supreme Court of Canada has done little to bring this state of affairs about. When it was subject to the ultimate jurisdiction of the Privy Council its dominion-centred decisions were frequently reversed by the Privy Council in favour of provincial autonomy. Since appeals to the Privy Council have been abolished, political pressures, particularly from Quebec, have been instrumental in maintaining and considerably extending provincial autonomy.

READING

McWhinney, *Federal Supreme Courts and Constitutional Review,* 1967, 45 Canadian Bar Review 572.

McWhinney, *Judicial Review in the English Speaking World,* 1960.

Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution,* 1970.

Russell, *Constitutional Reform of the Canadian Judiciary,* 1969, 7 Alberta Law Review 103.

Fowler, *The Canadian Bill of Rights,* 1973, 21 American Journal of Comparative Law 712.

INDIA

Description of the Court

Article 124 (1) of the Indian Constitution creates a Supreme Court of India consisting of a Chief Justice and not more than seven other judges. Like the court systems of Canada and Australia, the Supreme Court stands at the apex of an integrated court system and hears appeals on both constitutional and non-constitutional matters.

Method of Appointment

Under s. 124 (2) of the Constitution every judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose. In the case of appointment of a judge other than the Chief Justice the Chief Justice of India shall always be consulted.

The appointment must be made from persons who have been High Court (State Supreme Court) judges for five years, High Court advocates for ten years or who are distinguished jurists. There is no requirement of regional distribution or of consultation with State cabinets.

An American commentator has described the Indian appointment process in the following terms:

> Success as a judge in India tends to be based upon 'legal' criteria and legal experience. A large part of the selection process is done by the judiciary itself. In the case of the Supreme Court, the Chief Justice always is consulted; and he evidently has a large amount of influence in determining the person who is chosen. Although the Constitution allows for selection of Justices from among those men who have been High Court judges, High Court advocates for ten years or who are 'distinguished jurists', the men seem always to come to the Supreme Court after serving on the High Court Bench for some time.
>
> Among the eleven judges who decided the Privy Purse Case, only one had not been a High Court judge; and among the others, the average length of service on the High Court was nine years.
>
> The men themselves were of an average age of sixty-two, and all had long careers at the Bar before becoming judges. The high quality of education the Justices received, coupled with the high cost of education in India, points to the fact that they were from well-to-do families. Over half of them not only attended Indian universities and colleges but also received legal education in England. Only one of the judges had any type of academic career before becoming a judge; and more importantly, only one judge had a political post or elected position prior to his appointment to the Bench.

This, then, points to one very salient feature of the Indian Supreme Court: that is, ideological or partisan political views of the men have not been a significant criterion of their selection.

(Roberts, *The Supreme Court in a Developing Society: Progressive or Reactionary Force?*, 1972, 20 American Journal of Comparative Law at 81.)

Evaluation of the Court

India, in contrast to the other federations, has a Supreme Court virtually free of former politicians and composed of persons appointed solely for their seniority and reputation within the legal profession. What type of court has this produced?

It appears that it has produced a Bench which is out of touch with current Indian politics. They lack the political sensitivity which is characteristic of the United States Supreme Court and the West German Constitutional Court. This has brought them often into direct conflict with the legislature as the upholders of vested rights which the legislature wished to abolish or modify. On most major issues the legislature has managed to overcome the Court's objections by amendment of the Constitution even though this requires a two-thirds majority of the Union Parliament.

The Court therefore appears to be excessively conservative in relation to the politicians who have governed India since 1947. It has upheld agricultural property owners against attempts to redistribute land, it has protected banks and insurance companies from nationalization and finally protected Indian princes from losing their titles and privy purses.

In all these instances the Court's protection was ultimately undone by constitutional amendment. In contrast to Australia, where the High Court's decision in the Bank Nationalization Case was in effect endorsed the next year by the overwhelming vote of the Australian electorate, the political representatives of those who wish to maintain the existing property structure in India number less than one-third of the Indian Parliament and have no foreseeable hope of ever increasing that representation. Thus the Supreme Court has been asserting rights which are essentially the rights of a minority in the Indian body politic.

An American commentator has described the action of the Indian Supreme Court in the Privy Purse Case in the following terms:

A group of eleven men, only one of whom had ever had any contact with electoral politics and all of whom were highly educated, well-to-do men of late middle age who had been little involved in the independence movement, overturned an action by the executive branch in an area of extreme political sensitivity. The men intervened in a relationship which their institution had not sought to regulate previously, and they did so in spite of the provision which had been used before to defer any dispute settlement to the parties themselves. The avowed aim of the executive in this instance was supported by a large segment of the populace and certainly by a large majority of the elected legislature. The Court's decision, while heralded by many, also resulted in significant opposition to the Court as an institution, and various calls were made both to change the composition of the institution and to change the rules under which the institution operated. Further, by basing its jurisdiction upon a conclusion as to the character of the princes' rights, the Court circumscribed any future settlement of the dispute between the two parties.

(Roberts, *op. cit.*, at 106.)

A more dangerous step taken by the Court was its decision in *Golak Nath* v. *Punjab* (1967) ALR 1643, where it held that rights or property were so entrenched in the Constitution that they could not be taken away by constitutional amendment. This decision appears to have been based not on anything which appeared in express terms in the Constitution itself, but on notions of inalienable human rights and a distrust of an elected legislature. This assertion of power by the Supreme Court has been greeted by Indian commentators with much hostility and could eventually give rise to a political reaction which might well endanger the future of the Court. The Court's contribution to States-federal relations appears to be slight. In any event, since the Indian Constitution enables the central government to set aside the government of any State and impose President's rule, the Constitution and constitutional interpretation is of little help to State rights. The Court's assertion of property rights and other civil liberties has been directed as much against the States as against the Union.

READING

Roberts, *The Privy Purse Case in India,* 1972, 20 American Journal of Comparative Law, 79.

Tripathi, *Nature and Scope of Fundamental Rights in India: A Critique of Golak Nath,* 1971, 2 Lawasia 1.

MALAYSIA

Description of the Court

The highest court in Malaysia is the Federal Court which is subject to appeals to the Privy Council. The Federal Court is a court of general appeal from the High Courts of West Malaysia (Malaya) and East Malaysia (Borneo), but it also has a constitutional jurisdiction which extends to—

(i) to determine any challenge to the competence of a legislature to enact a particular law;

(ii) to determine disputes on any other question between States or between the Federation and any State;

(iii) to determine any question as to the effect of any provision of the Constitution which question has arisen in proceedings before another court.

In the last case the Federal Court does not assume jurisdiction of the whole case but only of the constitutional issue remitting the case to the court of original jurisdiction for disposition in accordance with the constitutional determination.

(iv) to render advisory opinions on questions referred to it by the Ruler of Malaysia as to the effect of any provision of the Constitution which has arisen or appears likely to arise. (Malaysia Constitution 1963 articles 128–130).

Method of Appointment

The original Constitution of the Federation of Malaya of 1957 created a Judicial and Legal Service Commission under the chairmanship of the Chief Justice with a membership composed of judges and senior public servants on a protected tenure. Before 1960 judges could only be appointed by the Ruler of Malaya on the recommendation of the Commission, and the Commission exercised full control over the appointment, protection and dismissal of inferior court judges and magistrates. The Commission was abolished in Malaya in 1960, but reconstituted as part of the Malaysian Constitution in 1963. However, it is now under the chairmanship of the Chairman of the Public Service Commission and has as one of its members the Attorney-General and such judges as are appointed to it by the Ruler of Malaysia on the advice of the Lord President of the Federal Court. Its functions are confined to disciplinary action for something done or omitted by a member of the public service (including the judiciary) in the exercise of a judicial function conferred on that member by law (Malaysia Constitution article 135 (3)).

The Commission is not consulted on the making of judicial appointments. All members of the Federal Court and of all High Courts are appointed by the Ruler of Malaysia acting on the advice of the Prime Minister. The Constitution directs "consultation" with a number of bodies and persons in reference to judicial appointments:

(a) The Ruler of Malaysia is to consult the Conference of Rulers as to all appointments. This body under article 38 of the Constitution consists of the Ruler of Malaysia, the hereditary Rulers of the Malay States, the governors of those States without hereditary Rulers and their Chief Ministers. The functions of the Rulers must be exercised in accordance with the views of the State Executive Councils.

(b) The Prime Minister is to consult the Lord President and all the Chief Justices of the High Courts as to the appointment of the other judges of the Federal Court.

(c) The Prime Minister is to consult each High Court Chief Justice before making any appointment to that office; and if the appointment is for Borneo, he is also to consult the Chief Ministers of Sarawak and Sabah.

(d) The Prime Minister shall consult the Chief Justices of the High Court concerned as to an appointment of a judge of that Court. The Prime Minister is not obliged to consult anyone in recommending the appointment of the Lord President of the Federal Court. And in the final analysis the Ruler of Malaysia must appoint any judge determined upon by the Prime Minister.

Because of the shortage of qualified lawyers, particularly those of Malay race, who under the Constitution must be preferred in making appointments to high offices, relatively few appointments have been made from the practising Bar. Most appointments are made from the Judicial Service, which is a body of career judges progressing through the hierarchy of courts much along the line of the continental judicial services.

SWITZERLAND

Description of the Court

The highest court in Switzerland is the Federal Tribunal. This Court is the final court of appeal in civil, criminal and administrative law as well as in constitutional matters. All lower courts are cantonal courts whose members are appointed by the cantons even though much of the law administered by them is federal in origin. The constitutional competence of the Court is defined in article 84 of the Federal Law on the Administration of Federal Law of 16th December, 1943, as follows:

(a) infringement of the constitutional rights of citizens;

(b) infringement of treaties between cantons;

(c) infringement of treaties with foreign countries, with the exception of the infringement of civil law or criminal law provisions of treaties by cantonal acts;

(d) infringement of federal law provisions relating to the delimitation of the substantive or geographical jurisdiction of the authorities.

However, the Court is not competent to examine the constitutionality of legislative acts of the Federal Parliament issued in the form of federal laws or generally binding federal decrees, the rationale being that such laws are subject under the Swiss Constitution to an optional referendum if demanded by thirty-thousand Swiss voters or eight cantons. The electorate itself is therefore the ultimate court of appeal in such matters. The Court is therefore mainly concerned with the protection of civil rights and preventing infringement by the cantons of the Constitution or of federal law.

Method of Appointment

The Federal Tribunal consists of twenty-six to twenty-eight members and eleven to twelve alternates. Under article 107 of the Swiss Constitution, members of the Federal Tribunal and their alternates are appointed by the Federal Assembly who shall ensure that the three official languages, German, French and Italian, are represented on the Court. This is usually done in proportion to the population with the result that the largest number of judges are German speakers, a smaller group are French speakers and a very small group Italian speakers.

The Federal Assembly consists of the National Council and the Council of States. The National Council, under article 72 of the Constitution, is composed of deputies of the Swiss people as a whole, elected in the proportion of one member for every twenty-four thousand souls of the population. The Council of States is composed of forty-four deputies from the cantons. Each canton appoints two deputies and in divided cantons each half-canton elects one.

The law does not require that the judges be qualified lawyers. However, in practice they always are. An outstanding reputation as a lawyer is a necessary requisite. Appointments have been made of academics, well-known lawyers (frequently from members of the Federal Parliament), Federal Tribunal registrars and secretaries and members of the superior cantonal courts. The term of office is six years, but judges are capable of re-election and are by convention always re-elected if they do not wish to resign. The President and Vice-President of the Court are elected from among the members of the Tribunal for a term of two years.

READING

Zellweger, *The Swiss Federal Court as a Constitutional Court of Justice,* 1966, 7 Journal of the International Commission of Jurists 97.

NIGERIA

The Republican Constitution of Nigeria of 1963 created a federation consisting of four regions. As its highest court there was created a Supreme Court presided over by a Chief Justice and not less than five puisne justices.

Apart from appeals from the High Courts of the Regions on matters of general law, the Supreme Court was invested with original jurisdiction over disputes between the Federation and a Region or between the Regions, jurisdiction over questions as to the interpretation of the Constitution arising in proceedings before any court and stated for the opinion of the Supreme Court and jurisdiction to give an advisory opinion to the President or the governor of a Region on constitutional matters (Nigeria Constitution 1963 articles 114–117).

Article 112 (1) of the Constitution provided:

The Chief Justice of Nigeria and the justices of the Supreme Court shall be appointed by the President, acting in accordance with the advice of the Prime Minister, so however, that four of the justices of the Supreme Court shall be appointed by the President acting on the advice, as respects each of those justices severally, of the Premier of a different Region.

In 1966 a military coup took place in Nigeria displacing the civil government of the Federation and the Regions. Since then the Constitution has been suspended.

THE EUROPEAN ECONOMIC COMMUNITY

The Court of Justice of the EEC is one of the four organs of the EEC. Its jurisdiction is limited to—

(1) questions whether a member State has violated its obligations under the Treaty of Rome;

(2) questions of the validity of actions taken by the other organs of the EEC, including the EEC Commission, in pursuance of the Treaty;

(3) suits for damages against the EEC and its organs;

(4) claims concerning civil servants of the EEC; and

(5) to advise national courts on the interpretation of the EEC law.

Since the EEC is not a federation in the normal sense of that word, the Court of Justice cannot be compared to constitutional courts reviewed earlier. The Court does not reverse decisions of lower courts, but merely tenders advice which they can accept or reject. More importantly the Court has no independent power of enforcing its decrees. Decrees against corporations or individuals must be enforced through the national systems of member States. Decisions against member States themselves cannot be enforced at all: only moral and public pressure has so far prevented member States from ignoring the decisions of the Court.

The Court does, however, have a very great power to act not only as constitutional interpreter about the powers of the EEC Commission and the obligations of the member States, but also to make community law because the formal bodies established with legislative powers, the Council of Ministers and the Commission, are hampered by veto rights and insufficient power. To this extent, therefore, the Court is in power and prestige comparable with an institution like the United States Supreme Court.

As originally established between the original six members of the EEC the Court had seven members: an uneven number to prevent split decisions as well as an extra member to permit some impartiality in the appointment of judges. On the entry of the United Kingdom, the Republic of Ireland and Denmark, the number was raised to nine. This retained the uneven number but limited the number of judges to one for each of the nine countries. Each member State may nominate a judge to the Court to hold office for six years. The United Kingdom nominated a Scotch judge, Lord MacKenzie Stuart, to be its first judge on the Court. Judges are eligible for reappointment upon nomination by their own government and approval by other member States.

Because judges are obliged to give unanimous opinions, i.e. dissenting opinions are not published and the fact of dissent is not even indicated, the individual judge has the protection of anonymity against an abuse of the renomination provisions which would otherwise be very apparent.

There is certainly no suggestion that the nationally appointed judges have not been impartial or have seen themselves as defenders of national interest. This is indicated by the fact that at 1st January, 1974, the Court had in twenty-seven cases of alleged violation of the Treaty by member States found in twenty-two of them that a violation had in fact taken place. To the contrary, if any criticism can be made of them, it is that they have been too ready to further the interests of the Community over that of the member States by giving an expansive interpretation to the Treaty of Rome. Even if the States appoint them, once appointed there is a tendency to identify with the Community of which the Court is an organ.

READING

Schermers, *The European Court: Promoter of European Integration,* 1974, 22 American Journal of Comparative Law 444.

Grementieri and Golden, *The United Kingdom and the European Court,* 1973, 21 American Journal of Comparative Law 664.

Zines, *The Balancing of Community and National Interests by the European Court,* 1973, 5 Federal Law Review 171.

CHOICES

A. The Status Quo

As the summary has shown, Australia is unique among federations in that it allows the federal executive to appoint judges to the High Court without any restriction. Even Canada, which comes closest to the Australian position, has at least the statutory

requirement that at least three judges must come from Quebec and observes a convention which allocates judges on a regional basis. No such law or convention exists in Australia, where five of the seven judges come from New South Wales, Victoria has one judge, Queensland another, and the other States none.

Although it would be absurd to suggest that the High Court has shown a distinct New South Wales bias in its judgments, it has to some extent reduced the respect which the Court has in other States. It certainly has caused resentment among politicians, practising lawyers and the judges in other States.

The present situation makes it theoretically possible to "pack" the Court with supporters of the government. It is, of course, a matter for political argument whether this has in fact taken place in Australia. There is no doubt that Australian governments have not hesitated to place their committed supporters on the High Court, but whether this was part of a plan to change the political character of the Court or merely to ensure that their point of view was represented on the Court is uncertain. Another factor is that the Australian Labor Party has never held office in Canberra long enough to make sufficient appointments to change the character of the Court, even if it wanted to (the fact that besides political appointments a Labor government has also made non-political appointments would argue against such intention).

The conservative parties have held office long enough, particularly between 1949 and 1972, but no conscious pattern of "packing" is visible. Of course, a radical might point out that a conservative government has no need to pack a court since most lawyers of no particular political affiliation tend nonetheless to be conservative. Thus a non-political appointment is often a conservative one.

It is mainly on the State-federal relationship that the present system has caused unhappiness. Since 1913 the High Court has been in practice the final arbiter in disputes of competence between the States and the Federation. This is in marked contrast with Canada, where the Privy Council fulfilled that role until appeals to the Privy Council from Canada were abolished in 1947. There has since the beginning of Federation been a political tension between the States and the federal government, a tension which to some extent transcends political affiliation. Governments in Canberra are likely to clash with governments in the States, whether a conservative or Labor government is in office. Political differences will exacerbate the debate and the advent of a Labor government in power in Canberra has accentuated the position because of the Labor Party's centralist philosophy, but the tension would remain even if there was a change of government.

The High Court is the ultimate arbiter in the inevitable tension between centralist (the word is used without pejorative meaning: I make no judgment whether centralism is a good or a bad thing for Australia) and federalist tendencies. Has the present appointment system led the High Court to steer in one way rather than the other?

The original High Court appointed in 1903 was strongly federalist following the precedent of the then conservative United States Supreme Court in making "reservations" from federal power in favour of the States. This radically changed in 1920 when Isaacs *J*, a former federal Attorney-General of non-Labor, but "radical" persuasion, became the dominant intellect on the High Court. Since then the interpretation of federal power has been weighted in favour of the Commonwealth, anticipating a similar switch on the United States Supreme Court seventeen years later. But the Australian interpretation has not gone as far as that ultimately reached in the United States: a literal interpretation of "interstate trade and commerce" in Australia has prevented that power from becoming the all-embracing basis for economic and civil rights legislation that it is today in the United States. The most marked manifestation of pro-centralism in the High Court has been in relation to federal fiscal power (uniform tax, section 96 grants and the meaning of "excise").

Other examples are found in the expansive interpretation of "interstate industrial disputes", the external affairs power, telecommunications and lately the corporations power.

Because the issue of federalism versus centralism transcends politics, there does not appear to be any distinct relation between the politics of an appointee and his performance on the Bench. A former federal Attorney-General, who has had bitter experience of struggling with the States for legislative primacy, is not likely to look kindly upon State claims whatever his political allegiance. Without mentioning present justices, one can illustrate this proposition by referring to Isaacs and Latham. But even a judge as non-political and inherently conservative as the late Sir Owen Dixon was responsible for decisions which deprived the States from an important source of independent taxation by giving the word "excise" a meaning which it does not appear to have in British tax history.

Compared to the United States and Canada, the Australian Federation has an overwhelmingly fiscal superiority not found in the other two federations. On the other hand, the Australian Federation lacks the power enjoyed by Congress to control the national economy, and this has caused difficulties in recent political history. At the

danger of sounding superficial, one can sum up the present Australian position by saying that the Commonwealth has most of the money and the States most of the legislative power. As a result both sides are to a certain extent frustrated in their objectives. The High Court can be accused of showing poor constitutional statesmanship, but it cannot be accused, in my opinion, of being excessively pro-centralist or excessively pro-federalist except from the point of view of a person favouring either a unitary state or a confederation of states on the EEC pattern.

In my opinion a change in the method of appointment would not necessarily change the present balance. Except where there are special political factors present such as the French-speaking minority in Canada, the tendency visible in most modern federations and the EEC is towards greater control at the centre over the economy and a constitutional court, if it has any political sensitivity, must accede to that pressure. Another factor is the fact that all constitutional courts are part of the federal or supranational structure; they see problems from a national rather than a local point of view. The main objection to the present system is a psychological one: leaving the power of appointment exclusively in the hands of the federal government invites the criticism that the Court is biased against the States. Even if it is not effective to produce a pro-State bias in the Court, State participation in some form may help to make the Court more acceptable as an impartial arbiter.

B. Participation by the Senate in the Process of Appointment

As we have seen, the United States system of requiring the advice and consent of the majority of Senators works very well in that country. Its main strength is not so much State participation since the Senators do not represent or speak for State governments, but in the publicity which it gives to appointments. For that reason it has been suggested that Canada should follow the United States example.

Whilst I see great merit in allowing nominations for judicial appointments to be "tabled" as it were, and publicly debated (hopefully, however, with more reason and less acrimony than the debate on the last High Court appointment), I doubt whether the Australian Senate is a proper body for that purpose. Unlike the United States Senate it is primarily a party political body and the merits and demerits of an appointee would quickly be lost in the political debate. There are no conservative Democrats to side with the Republicans, or liberal Republicans to side with the Democrats. There would indeed be the danger that judicial appointments would come to lie in the hands of independent Senators or minority parties. This problem could, of course, be overcome by requiring confirmation of two-thirds of the Senators present and voting, which would ensure that any successful candidate should have bi-partisan support.

C. Direct State Nominations

The suspended 1963 Nigerian Constitution and the European Economic Community, as we have seen, provide for direct nomination by the constituent States. Such a system has the advantage of simplicity and equality among the States. It could be provided, for instance, that the Chief Justice be appointed on the nomination of the Prime Minister, whilst each of the other justices be appointed on the nomination of the Premier or Attorney-General of a State in turn.

Whilst it may be attractive from the point of view of a smaller State, this procedure has certain objections. In the first place it makes the pendulum swing too strongly from one extreme to the other. An Australian government of any political complexion is unlikely to agree to a proposal which would deprive it of control over six of the seven appointments. The quality of the Court might also suffer. For political reasons it is unlikely that States would nominate persons not resident there. The Bars of the States are uneven in quality and quantity and there is a tendency for promising young barristers to migrate from smaller States such as Tasmania and Western Australia to the Victorian and New South Wales Bars.

This problem could be partly overcome by increasing the number of justices to nine and allowing the federal government to appoint two other justices besides the Chief Justice. In that case at least five justices out of the nine would be appointed from the larger Bars in New South Wales and Victoria.

Another solution would be to give the smaller States a joint say in one appointment which they can exercise by rotation. Thus a system could be devised whereby New South Wales and Victoria have one appointment each, South Australia and Queensland have one appointment jointly, and Western Australia and Tasmania have one appointment jointly. The other three appointments, including the Chief Justice, are to be made by the Commonwealth.

D. Appointment by Non-Political Committee

In some of the younger Commonwealth countries provision was made in the Constitution originally granted by Britain on Independence for judicial service commissions composed of the Chief Justice and other judges which were vested with the power of selecting and nominating judges. The experience of these commissions has not been heartening since in most countries they were soon abolished. Politicians simply like the patronage which the traditional British system of judicial appointments gives. This does not mean, of course, that such a system would not work in a mature democracy like Australia.

Provision could be made for consultation by the federal Attorney-General with a committee composed of Chief Justices of the State Supreme Courts in the selection of justices to the High Court. Such persons would rarely be interested in their own translation to the High Court unless it were to the position of Chief Justice, in which case that position might require special provision.

The advantage of this system would be that appointments would be by legal merit alone and would exclude political considerations. However, the Indian experience which follows in practice this procedure, is not encouraging. A constitutional court is a political court and exercises political functions. As such, as the experience of the United States and West Germany has shown, the participation by persons with political experience in the work of the court is invaluable and, in my opinion, essential. It cannot be said that political figures like Higgins, Isaacs, Evatt and Latham, to name only past justices, were poor judges whose contribution to Australian constitutional law was pernicious. What a constitutional court requires is both legal knowledge and statesmanship. The latter can only be acquired through political experience either as an active politician such as a federal or State Attorney-General or as a senior public servant such as a State or federal Solicitor-General.

E. Appointment by Federal-State Committee

The West German system is very complex and could not be copied in Australia. However, its essence is a political committee in which government and opposition, States and Federation are represented. A similar committee could be created in Australia. The forms which such a committee could take are endless and I will not try to give details. It would be important, however, to ensure that no group on the committee be in a position to enforce its decision and override the others. Thus a special qualified majority would be required as it is in the German system.

The advantage of such a system would be that the committee could choose qualified lawyers from the whole of Australia without artificial barriers by reason of specific State interests. Politicians would not be excluded, but there would have to be an agreement between opposing interests. This could lead to a purely political quota system as in Germany or to an ad hoc negotiation with each appointment. A compromise might be a non-political appointee or a trade-off, whereby a person committed to one political party is appointed together with a person from the other party. Extremists in political terms or in State-rights-centralist terms would be excluded from the Court since either side would have in effect a veto on appointment.

The danger is, of course, that this system may not work if political passions run too high. On the other hand it is unlikely that a political party would wish to take responsibility for leaving appointments to the High Court unfilled. If the system does work it would result in a balanced Court which would have the respect of both States and Federation of the major political parties. It would therefore have both legal and political expertise.

But there must be a sense of responsibility on the part of the negotiators. There is a danger of the process degenerating into a pension scheme for parliamentarians or to be seen by the public as such. This could be overcome by introducing impartial and judicial members to the committee, making it a mixed political and judicial committee or by requiring, as in Germany, that a certain proportion of appointments be made from persons having a number of years' experience on a State Supreme Court.

It will also help if the appointment process were public, i.e., that the names of the nominees were known and their merits publicly debated, whilst preserving, of course, the privacy of the debate within the committee itself. In that case public opinion could be brought to bear on the committee in favour or against a particular nominee whilst preventing the tendency of birds of a feather to flock together and choose one of their own, whatever the political allegiance.

P. E. NYGH, Professor of Law, Macquarie University.

S.10

SUBMISSION TO THE SELECT COMMITTEE OF THE LEGISLATIVE ASSEMBLY UPON THE APPOINTMENT OF JUDGES TO THE HIGH COURT OF AUSTRALIA

by GERARD NASH, Professor of Law, Monash University

1. The common law holds it as a fundamental tenet that justice should not only be done but should be manifestly seen to be done. Basic to this fundamental tenet is the proposition that the Judiciary should be independent of all external pressures and influences and in particular should be independent both of the Legislature and of the Executive.

2. The Commonwealth of Australia Constitution Act establishes "one indissoluble Federal Commonwealth". By the very nature of the Australian Constitution, power is divided between Commonwealth and State Legislatures and the interpretation of the Constitution is left in the hands of the High Court of Australia which is also in most respects the ultimate appeal court in relation to litigation initiated within Australia.

3. The fact that appointment as a Judge of the High Court lies in the hands of the Executive arm of the Commonwealth Government would appear to be anomalous in view of the importance of judicial independence and the vital role of the High Court in interpreting the Constitution and the relative powers of States and Commonwealth.

4. The concept of judicial independence relates not only to the attitude of mind which the holder of judicial office is expected to display in dealing impartially between litigants, but it also presupposes that the right individual is appointed to judicial office for the right reasons and that there is general acceptance of the non-political nature of that appointment.

5. To the present time five former Attorneys-General of the Commonwealth of Australia have been appointed as Judges of the High Court and of the seven High Court Judges at present in office five come from the State of New South Wales, one from the State of Victoria and one from the State of Queensland. In the first three quarters of a century of Federation, there has been no appointment to the High Court from Western Australia, Tasmania or South Australia.

6. Irrespective of the motives underlying an appointment to the High Court or to the Supreme Court of any Federation, there is always room for those dissatisfied with appointment, so long as control of appointment lies with the Executive, to argue that a particular appointment represents a "stacking" of the Court, is by way of reward for past services to a particular political party or is otherwise "political" in its nature. Even in the United States where a strict doctrine of separation of powers is embodied in the Constitution and where there is a legislative power to veto appointments made by the Executive to the Supreme Court, there have been cases where such allegations have been made.

7. Government involvement in commercial matters is much greater than it was when the Commonwealth of Australia came into existence. Similarly, there is an ever increasing amount of social welfare legislation, environmental conservation legislation and economic regulation by the Federal Government which will more and more involve the Commonwealth of Australia in litigation not only with the States as to the interpretation of the Constitution but also with individuals affected by the increasing spate of Federal legislation. For form's sake, it would appear preferable that control over the appointment of the Judges who have the ultimate say as to the relative rights and duties of State and Commonwealth and of Government and individual should not lie with one of the parties to such litigation.

8. It is often stressed that judicial appointments are properly a matter for the Executive and that practice and convention ensure that the matters most relevant to appointment, namely, legal capacity and fitness for appointment, are taken into account. Without in any way doubting the accuracy of this statement, there would seem to be no reason in principle why such unenforceable practices or unspecified conventions should continue to be relied upon as the exclusive means of maintaining the independence of the Judiciary.

9. In many European countries and in most of those Commonwealth countries which have recently achieved independence, the problems adverted to in the previous paragraphs have been overcome by the establishment of a Judicial Service Commission to nominate or appoint members of the Judiciary to the highest court in the land.

10. Almost invariably the Chief Justice is a member (and often chairman) of the Commission. In some instances the Attorney-General or the Prime Minister is a member of the Commission; in other instances the Chairman of the Public Service Board is a member. Some Constitutions specifically provide that members of the legislature shall be included in the membership of the Commission; others specifically debar members of the legislature from serving on the Commission.

11. On analysis of the use which has been made of Judicial Service Commissions in other countries and for the reasons set out in paragraphs 1. to 8. above, I would recommend—

(i) that the Chief Justice of the High Court and the other Judges of the High Court continue to be appointed by the Governor-General in Council on the advice of the Australian Cabinet;

(ii) that a Judicial Service Commission be set up to make recommendations in relation to the appointment of the Judges of the High Court other than the Chief Justice;

(iii) that nominations made by the Judicial Service Commission be considered by Cabinet and that Cabinet's role in relation to the appointment of Judges other than the Chief Justice be limited to advising the Governor-General in Council upon the appointment or non-appointment of each person so nominated.

12. The exact membership of such a Commission involves questions of political expediency and a balancing of numerous conflicting interests. I would, however, tentatively suggest that membership of the Commission be as follows:

(i) The Chief Justice as Chairman.

(ii) The Attorney-General.

(iii) Six Senators each representing one of the six States and equally representative of the Government and of the Opposition.

(iv) A nominee of the Law Council of Australia who is not currently practising as a barrister or solicitor.

GERARD NASH, Professor of Law.

Monash University, 20th June, 1975.

S.11

SUBMISSION TO THE SELECT COMMITTEE UPON THE APPOINTMENT OF JUDGES TO THE HIGH COURT OF AUSTRALIA (1975)

by COLIN MCKENZIE

Introduction

While I have no background knowledge as to the motivations behind the setting up of this Committee, I expect that it is a response to the situation that arose when Senator L. K. Murphy was appointed to the Bench of the High Court.

The Constitutional Convention of 1973 had on its agenda the following item:

"Item No. 12

The judicial power of the Commonwealth, with particular reference to—

(a) the appointment of High Court Judges;

(b) the power of the High Court to give advisory opinions;

(c) the judicial system of the High Court."

While the Convention did not debate the item in full it was discussed along with several other proposals *in globo*. The Convention decided to refer this item together with two others to Standing Committee D. It is hoped that the Constitutional Convention will be reconvened on September 24, 1975. Thus the Legislature of the State of New South Wales could be pre-empting a decision of the Convention. While realising that the Convention has been slow moving I would hope that the Parliament would not undermine the Convention's work. If possible it could have its report ready for the Convention on September 24.

I believe that the Parliament of the State of New South Wales and every other Parliament should investigate matters in relation to the Australian Constitution and produce some proposed alterations that would provide an extremely concrete base for the Convention to work from. I also believe that this Select Committee should work in close co-operation and consultation with Standing Committee D to ensure that the research of one Committee is freely available to the other. By so doing avoiding a waste of time and money.

Information Concerning Previous Appointments to the High Court

CHIEF JUSTICES

Name	Term of Office	State Bar	Previous Experience
Griffith	1903-19	Qld	1893—Chief Justice of Queensland; Chairman of Committee which produced first draft of Constitution
Knox	1919-30	N.S.W.	
Isaacs	1930	Vic	See under Puisne Judges
Gavan Duffy ..	1931-35	Vic	
Latham	1935-52	Vic	Commonwealth Attorney-General 1925-9 and 1932-4
Dixon	1952-64	Vic	See under Puisne Judges
Barwick ..	1964-	N.S.W.	Commonwealth Attorney-General 1958-64

PUISNE JUDGES

Name	Term of Office	State Bar	Previous Experience
Barton	1903-20	N.S.W.	N.S.W. Attorney-General 1889; Leader of Federal Convention 1897; Prime Minister 1901-3
O'Connor ..	1903-12	N.S.W.	Member of drafting Committee of Federal Convention 1897; N.S.W. Minister of Justice and Solicitor-General 1891-3
Isaacs	1906-30	Vic	Vic. Solicitor-General 1893; Vic. Attorney-General 1894-9, 1900-1; Commonwealth Attorney-General 1905-6
Higgins	1906-20	Vic	Commonwealth Attorney-General 1904
Gavan Duffy ..	1913-31	Vic	
Powers	1913-29	Qld	Qld Crown Solicitor 1899; Commonwealth Crown Solicitor 1903
Rich	1913-50	N.S.W.	
Starke	1920-50	Vic	
Dixon	1929-52	Vic	Acting Justice of Vic. Supreme Court 1926
Evatt	1930-40	N.S.W.	
McTiernan ..	1930-	N.S.W.	N.S.W. Attorney-General 1920-2, 1925-7
Williams ..	1940-58	N.S.W.	
Webb	1946-58	Qld	Supreme Court Judge 1925-46; Chief Justice 1940-6; Crown Solicitor 1920-2; Solicitor-General 1922-5
Fullagar ..	1950-61	Vic	
Kitto	1950-70	N.S.W.	
Taylor	1952-69	N.S.W.	Supreme Court Judge 1952
Menzies	1958-74	Vic	
Windeyer ..	1958-72	N.S.W.	
Owen	1961-72	N.S.W.	Acting Judge of Supreme Court 1936; Supreme Court Judge 1937-61
Walsh	1969-	N.S.W.	Supreme Court Judge 1954-69
Gibbs	1970-	Qld	Supreme Court Judge 1961-7; Judge of the Federal Court of Bankruptcy and the Supreme Court of A.C.T. 1967-70
Stephen	1972	Vic	Supreme Court Judge 1970-2
Mason	1972-	N.S.W.	Commonwealth Solicitor-General 1964-9; Judge of the Supreme Court of Appeal 1964-72
Jacobs	1974-	N.S.W.	Supreme Court Judge 1960-74; Judge of the Court of Appeal 1966-74; President of Court of Appeal 1972-74
Murphy ..	1975-	N.S.W.	Commonwealth Attorney-General 1972-5

STATE REPRESENTATION

For Chief Justices

State	No.	Per cent
Queensland	1	14
Victoria	4	57
New South Wales ..	2	29

For Puisne Judges

State	No.	Per cent
Queensland	3	12
Victoria	8	32
New South Wales ..	14	56

For All Judges

State	No.	Per cent
Queensland	4	14
Victoria	9	31
New South Wales ..	16	55

By Population

State	'000	Per cent
Queensland	1,823	14.3
New South Wales ..	4,590	36.0
Victoria	3,496	27.5
Tasmania	390	3.1
South Australia ..	1,173	9.2
Western Australia ..	1,027	8.1
Australian Capital Territory and Northern Territory	229	2.0
Total	12,728	

Population figures from *Australian Year Book*, census figures 1971.

While it can be seen that Queensland has had nearly the correct proportion of Judges appointed, both New South Wales and Victoria have representation that greatly exceeds their entitlement. Looking at the figures it can be seen that there is a need to provide a more equitable distribution of judicial appointments among the States. This would be in accord with the aim of the Committee, viz., "To consider the present system of appointment of Judges to the High Court of Australia and to recommend amendments to the Constitution of the Commonwealth of Australia which will ensure that such appointments are made in a more equitable and acceptable manner."

Great note should be given to the fact that not one woman has been appointed to the bench of the High Court. History was recently made in the appointment of a woman to the bench of the Commonwealth Conciliation and Arbitration Commission, viz. Miss Justice Evatt. Since this year is International Women's Year, there is a need to recognize the position of women in our society and this should include the appointment of women to the bench of the High Court.

Of the judges so far appointed to the High Court the following had previous political experience in either State or Federal Legislatures: Griffith, Knox, Latham, Barwick, Barton, O'Connor, Isaacs, Higgins, Powers, McTiernan and Murphy. Thus of the judges so far appointed 40 per cent had had previous political experience. When a person with a political career is appointed there is bound to be an uproar from those people of the opposite political persuasion. Does this mean that politicians should not be appointed to the High Court Bench? The practice of late has been to appoint mainly people who have previous judicial experience from State Supreme Courts. Of the judges so far appointed it would be difficult to call into question their integrity despite the fact that they have been politicians.

The High Court of Australia is the final court of appeal in most matters of law, which means that its decisions are of major importance. State governments are most interested in the Court's power of having original jurisdiction in any matter—"Arising under this Constitution, or involving its interpretation". This power enables the High Court to decide the limits of the powers of both the States and the Commonwealth. So for the States if they wish to maintain the *status quo,* or for the Commonwealth if they wish to enlarge their powers they would need to have judges of their persuasion on the bench.

It should be noted that the proposed Superior Court of Australia also has original jurisdiction in all matters "arising under the Constitution and its interpretation" (Superior Court of Australia Bill 1974, section 19 (1) (a)). Judges to the Superior Court "shall be appointed by the Governor-General" (Superior Court of Australia Bill 1974, section 6 (1) (a)). While the Superior Court has not been established the Committee should also give consideration to the method of appointing judges to the Superior Court as well.

Additionally the following Attorneys-General of Australia have been appointed to the Court: Isaacs, Latham, Barwick, Higgins and Murphy. So it has not been uncommon for Attorneys-General to be appointed to the bench.

The following Judges of the Court were, previous to their appointment, Judges of a State Supreme Court: Griffith, Dixon, Webb, Taylor, Owen, Walsh, Gibbs, Stephen, and Mason. It is interesting to note that in recent years (1952–75), of the eleven appointments made, seven of the appointments were people with previous judicial experience.

Factors in the Appointment of High Court Judges

The section of the Constitution of the Commonwealth of Australia that relates to the appointment of High Court Judges is section 72. It reads in full as follows:

> 72. The Justices of the High Court and of the other courts created by the Parliament—
>
> (i) shall be appointed by the Governor-General in Council;
>
> (ii) shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity;
>
> (iii) shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

While the appointment of the High Court is normally a Cabinet decision the actual decision would normally be made by the Attorney-General in consultation with the Prime Minister. Other Cabinet members could be consulted depending on their legal experience. If the Attorney-General or a Cabinet member was a prominent member of the Bar it would be possible for him to make discreet inquiries with the Bar leaders or with High Court Judges. In this way it would be possible to obtain people of known ability.

Appointment of Judges is further complicated by two provisions of the Judiciary Act 1903–69:

> Section 4—"The High Court shall be a superior court of record and shall consist of the Chief Justice and six other Justices who shall respectively be appointed by commission."
>
> Section 5—The qualification of a Justice of the High Court shall be as follows: "He must either be or have been a Judge of the Supreme Court of a State, or have been a practising barrister or solicitor of the High Court or of the Supreme Court of a State of not less than five years' standing."

So that the Committee could investigate ways of altering the qualification to obtain more acceptable and equitable appointments. The Parliament having the power to create additional positions to the Court and possibly stack the Court in the Government's favour. But as yet this numbers power has been used extremely sensibly. The number of judges has been altered in 1906, 1912, 1933 and 1946, each time to create one additional position.

The American Constitution contains the following provision in part for the appointment of the Judiciary:

> "Article II Section 2
>
> The President . . . shall have power, by and with the consent of the Senate to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . Judges of the Supreme Court . . ."

Thus when the President nominates a person to be a Judge, he must obtain the consent of the Senate. While it appears superficially that a President would be unable to appoint Judges of his own political persuasion if the Senate majority were opposite to his own persuasion, this has not always been the case. For example, President Nixon was able to put Judges on the Supreme Court despite the fact that the Senate was Democrat controlled. But with the awakening after Watergate it will be very difficult for Presidents to rig the Courts.

Another fact that does arise when making appointments to the bench is the type of work that the appointee will be doing. The Court should not be flooded with lawyers who are masters in Constitutional law only. Specialists should be available on the Court to deal with all the aspects of law that are raised, whether Constitutional or not.

Alternate Methods of Appointment

1. Leaving the system unchanged. The problems of the present system which is open to political bias and its lack of representation for three States is totally unacceptable and is not really a viable proposition.

2. Using a system to provide for the Senate to have to agree to the appointment (U.S. Constitution). The adoption of such a procedure would necessitate the alteration of the Constitution to read: Section 72: "The Justices of the High Court and other courts created by the Parliament—shall be nominated and by and with the consent and advice of two-thirds of the Senate be appointed by the Governor-General." While the American constitution stipulates only by and with the consent of the Senate this would be unrealistic in Australia since one party could still obtain a majority in the Senate. A two-thirds majority would necessitate a bi-partisan appointment which is what the Committee is looking for. While the Senate was deemed to be a State's House I doubt whether it would act in this way when looking for a Judge. It should attempt to choose the best person suitable for the Judge.

3. A process whereby the States share in the appointment process. This is the type of system that is used in Switzerland, Austria, West Germany and Malaya. Canada recently adopted a system whereby the Central Government fills every odd vacancy on the Court while the States fill every even vacancy. The filling by the States either in turn or by co-operative agreement. I have not much information about this system as I only read about it in a speech Mr Punch gave to the Constitutional Convention (*see Proceedings of the Australian Constitutional Convention,* pages 300–1). This process still is open to political appointments by either the States or the Commonwealth.

4. A combination of proposals 2 and 3 thereby incorporating the advantageous provisions of both systems. The States would be able to offer advice regarding appointments and the Senate could decide on the appointment.

5. Alterations could be made to ensure that State Governments are *consulted* together with Judges of the High Court and the Supreme Courts of the States when making appointments. These consultations would involve the suggestion of names to the Commonwealth to aid them in their appointments. But the system would still be under the direct control of the Governor-General in Council, i.e., Cabinet.

Conclusion

A definite need exists to alter the Constitution or the Judiciary Act to ensure that appointments are made in a more fair and equitable manner. Special consideration should be given to the fact that South Australia, Western Australia and Tasmania have yet to have an appointment from the Bars of the respective States or from the Supreme Court Benches of the States. This surely must have the effect of causing barristers and solicitors to move to areas where there would be more work and advancement is better, i.e., to New South Wales or Victoria. This would have a detrimental effect on the standard of service obtained in those States. Further consideration should be given to the fact that no woman has been appointed to the High Court or even I believe the Benches of the State Supreme Courts.

All systems of appointing Judges to the High Court will involve the use of politicians whether State or Federal. The need is to obtain the best and most eminently qualified people available. I would see that the only way of doing that is to use a system of consultations with the State governments, High Court Judges and Judges of the State Supreme Courts. In addition the appointments should be ratified by two-thirds of the Senate to obtain a bi-partisan approach. In order to obtain any constitutional amendments, history has shown a bi-partisan approach. I hope the Committee will reach such an approach.

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COLIN McKENZIE, Ringwood, Vic. 3134.

27 June, 1975.

S.12

THE AUSTRALIAN COUNTRY PARTY (N.S.W.)

6th Floor,
56 Young Street,
SYDNEY. 2000
19th August, 1975.

Mr W. G. Luton,
Serjeant-at-Arms and
Clerk of Select Committees,
State Parliament House,
Macquarie Street,
Sydney, N.S.W. 2000

Dear Mr Luton,

You will recall your letter of the 22nd April, 1975, in which you referred to the "Select Committee of the Legislative Assembly upon the Appointment of Judges to the High Court of Australia", and in which you courteously requested any observations from the Australian Country Party (N.S.W.).

This matter has now received consideration and a Paper has been prepared by The Hon. L. A. Solomons, M.L.C., the Immediate Past Chairman of the Party. The Central Executive of the Australian Country Party (N.S.W.) is generally in agreement with the Paper and submits these views for the consideration of the Committee.

May I, on behalf of the Party, thank you for your invitation to submit opinions.

Yours sincerely,
W. FORD, General Secretary.

P.O. Box 524,
Tamworth. 2340.
2nd July, 1975.

The General Secretary,
The Australian Country Party (N.S.W.),
6th Floor,
56 Young Street,
Sydney, 2000.

Dear Colonel Ford,

Re PROPOSED SUBMISSION TO THE SELECT COMMITTEE OF THE LEGISLATIVE ASSEMBLY OF NEW SOUTH WALES UPON THE APPOINTMENT OF JUDGES TO THE HIGH COURT OF AUSTRALIA

I forward herewith certain observations for the approval of the Executive and, if approved, for forwarding in due course to the Select Committee:

1. *Preliminary Observations*

Criticism of appointments to the High Court and their method of appointment are not new and have been echoed in political circles, the press and amongst lawyers, virtually ever since Federation.

The main basis of criticism which has in the past, and is still offered, is that the High Court, being the highest judicial tribunal in the land should in fact attract the best qualified persons by way of legal and temperamental qualifications that are available, whereas if political considerations effect the selection either in whole or in part, then the object of obtaining the best qualified persons cannot be faithfully pursued.

2. *Past Experience*

There can be no doubt that in the past, governments of every political colour have taken political considerations into account in making appointments to the High Court, and without seeking to descend into personalities which would be odious, it must be said, and will no doubt be uniformly agreed by experienced lawyers, that the results have been mixed.

Some appointments having political overtones have been outstanding successes and some similarly so appointed have been dismal failures.

In almost every case where the politically activated appointment has been a success, the candidate was virtually self selective and possessed such qualifications as would have probably resulted in his appointment in due course, irrespective of the politics of the situation.

These comments would apply to at least three judges who have held the office of Chief Justice with the greatest distinction.

Those whose appointment was for more mundane political reasons, have again almost invariably been unsuccessful, and I use this term as a lawyer's term to represent a course of conduct on the Bench, consisting of agreeing with judgments written by more able and facile members of the Court, and slavishly following an activated line in constitutional cases.

The present method of selection of High Court Judges is the same as that in the States, and directly follows the British precedent whereby the Prime Minister appoints Judges on the advice of his Attorney General, and with the assent of his Executive Council, and it may be thought that with so much British precedent behind it, this method ought not to be interfered with.

The British precedent is not applicable in Australia as there is no similar situation, and no British Court has the constitutional, and thus the political power, of the High Court.

In any consideration of this matter it must be remembered that the High Court is in fact a political court, being the final arbiter in constitutional matters, a privilege which in Great Britain is reserved to the High Court of Parliament itself.

Consideration of the debates at the Constitutional Conventions which took place before Federation, make it patently clear that the constitution was intended to be a power sharing arrangement and that the ability of the High Court to override the specific legislative enactments of the Commonwealth where the Commonwealth went outside that power sharing arrangement, placed it in a position of being a referee in the political arena.

It is felt that the planners of the Constitution, having only the Westminster system of judicial appointment to guide them, and having been brought up in a tradition of the fearless impartiality of British Judges, could have had no way of foreseeing what would be the political ramifications of this system when projected into the more political context of a court having strong political overtones, and indeed direct political power.

3. *Reasons for Concern*

Although there have been many criticisms expressed in the past, only recent events have polarised the politics of the situation into overt political concern.

When recently a federal politician, with only moderate technical qualifications, known to have openly advocated a centralised form of government, and the abolition of the States whose future is so strongly connected to the impartiality of the Court, was appointed to the Bench, such concern was immediately expressed by the States which saw the only recourse against a Commonwealth Government programme of "stacking the Court" would be to move for constitutional change to vary the methods of appointments to the Court.

It must be noted at this juncture, that I make no comment on the probability of a "stacking" proposition and deal as I should, only with the possibilities of such an occurrence.

4. *Suggestions for Reform*

There are a number of suggestions which could and should be considered:

The first is to rely on the present Westminster type system and to use as the precedent the existing conduct of a majority of the Judges whose service has brought nothing but distinction and honour to the Tribunal, and thus to do nothing.

The probabilities of the situation would justify this course, but the possibilities in light of recent history, dictate otherwise.

The second would be to move for an amendment to the constitution to provide that each of the component States have the right through their normal channels to appoint a member of the Court with the Commonwealth, for example, having the right to appoint the Chief Justice.

This is superficially attractive, but the plain fact of the matter seems to be that the more populous States with their larger volume of litigation, and therefore their stronger bar representation, have provided greater strength of leadership in the legal profession, and the Court has gained much from having the advantage of great and eminent lawyers from New South Wales and Victoria, who have in very substantial majority populated the Court.

The third would be that the High Court be divided into two divisions—a general legal division dealing with all ordinary, original and apellate jurisdictional matters in all fields both civil and criminal *AND* a Constitutional Court.

In this case, the appointment of judges sitting in the general jurisdiction could quite properly proceed under the ordinary Westminster System, but in constitutional matters the States could reserve the right to nominate judges to sit in the Constitutional Court, such nominations coming from either the Bar, the Supreme Court of the States, or even perhaps existing judges on the High Court from the particular State concerned.

As the great bulk of the Court's work is non-constitutional it may be questioned whether the appointment of a full time Constitutional Court would be warranted. It should be realized that other Federal systems have found it necessary, e.g., West Germany.

The only other practicable suggestion seems to me to be that the Constitution be altered so as to provide for a different method of selection of Judges to the present Court, whereby the States have a direct participation, and there are so many permutations of this idea that it is difficult to pick out an appropriate one, because all are fraught with difficulties.

One method could be that appointments should rotate from State to State, with the selection being made by the Federal Attorney-General from a panel submitted to him by the appropriate State Attorneys-General, and this could perhaps assure, with the shift of political power in the normal way, a well balanced Court.

The drawback of this system would be to deprive the larger States with the greater reserve of properly qualified people, from full participation in the Court, and the Court would be the poorer for it.

Again, if each of the State Attorneys-General provided the Federal Attorney-General with a panel, and this provided a bank of candidates for Federal nomination, the system would be so open to political manipulation from existing political alliances, to make it undesirable.

A third and equally difficult concept would be to require the appointments to have the approval of a majority of a Council consisting of the Federal and State Attorneys-General, with perhaps the Prime Minister having the overriding right to nominate the Chief Justice from time to time.

This system could work if the constituent members of the Council motivated by the tremendous importance of the Court, could conduct their affairs without any political wrangling which would bring dishonour both on the participants and the appointment.

5. *Final Conclusions*

The High Court of Australia is the most powerful political Court in any democratically organized society in the world, and it seems therefore that the continuance of the Federal system and its possible susceptibility to attack, is such that for the reasons I have set out above, the splitting of the Court into two jurisdictional levels—

(i) General; and

(ii) Constitutional,

with the special method of selecting constitutional members as above set out, is, having regard to the experience in other similar democracies, the most practical reform which could be achieved.

6. *Last Comment*

As a last comment, let me say that the Constitution of Australia does not provide for a retiring age for Judges, and whilst judges have continued to make a substantial contribution to the work of the Court whilst remaining on it to very advanced ages, this does not seem either psychologically, sociologically or legally desirable.

It is suggested therefore that if any reform of the Court's structure were to be contemplated, a retiring age of 65, 70 or even 75 years, should be contemplated to ensure—

(a) the application of fresh and vigorous minds to the difficult problems to be comprehended by the Court;

(b) the appropriate turnover so that lawyers having the appropriate qualities of mind and character might have the opportunity to aspire to appointment to Australia's highest Judicial Tribunal.

Yours sincerely,

L. ADRIAN SOLOMONS, M.L.C.

S.13
Our Ref.: P.D. 555/74
Premier's Department,
Perth, W.A. 6000.
29th August, 1975.

Dear Mr Coleman,

This letter is addressed to you in your capacity as Chairman of the Committee of the New South Wales Legislative Assembly charged to consider the present system of appointment of High Court Judges.

I am making this brief submission to you on behalf of the Government of Western Australia, which believes that the system laid down in the Constitution for the appointment of Judges is not the most desirable system under the present conditions of our Federation.

Appointment to the High Court is entirely the prerogative of the Federal Government, and, subject to the appointee having the qualification of a Judge of the Supreme Court of a State, or being a practising barrister or solicitor of the High Court or of the Supreme Court of a State, of not less than five years' standing, the Federal Government may appoint whomsoever it pleases.

The High Court has rightly established for itself a high reputation in common law countries, both for its application to principle and its industry. Individual members of the High Court have been, in most cases, men of great ability, possessing a high sense of public duty.

Notwithstanding this, however, it is considered inappropriate that the method of selection of High Court Judges should be retained as the sole prerogative of the Commonwealth Government.

It should be borne in mind that the High Court is the final Court of appeal in Australia on Constitutional matters, and that there can be no appeal to the Privy Council in such cases. Hence, arguments between the States and the Commonwealth, or any State and the Commonwealth, will be heard and determined by the High Court, and it should not therefore be the sole prerogative of the Commonwealth to appoint the Judges who will hear and decide the causes in which it may be a party. Just as no man should be a judge in his own cause, so no Government should be solely concerned in the appointment of the judge of its own cause.

Quite apart from the question of principle, justice must be seen to be done by enlightened public opinion.

Whilst it is undisputed that the High Court has achieved pre-eminence in its judgments on matters of law, it must also be conceded that questions of Constitutional law often involve decisions which impinge on philosophy rather than pure law. Here again, the temptation to appoint a Judge of the same philosophical view as the Government must be present, and who can say that it will be resisted?

I also have a strong feeling about a High Court Judge being appointed who in recent times has been a Commonwealth Minister.

For example, the appointment of a Commonwealth Attorney-General to the Court presents obvious difficulties, unless there has been a substantial break between service as an Attorney-General and as a Judge.

Obviously, the Commonwealth Government would know the views of the former Attorney-General on certain matters should they contemplate action or have to appear before him in a case.

Australia is historically, geographically and politically a Federation, and it is tremendously important that attempts to change its political pattern should not be made through its judicial system which is publicly accepted as being the repository of independence and justice.

Such attempts will inevitably bring the Court into disrepute and consequently weaken the real fabric of Government.

Attempts to change the political pattern of the Country must be made by orthodox political means and not through the possibility of judicial patronage.

Notwithstanding what I believe to be the efficacy of these arguments, it will be apparent that a Constitutional change would be necessary in order to give the States who are parties to the Federation some official say in the appointment of Judges of the High Court.

There is a motion before the Australian Constitutional Convention somewhat to this effect, but taking a practical view, one must concede that it is unlikely that there will be a Constitutional change in the near future.

Perhaps the most effective method of securing a better system—and one which is open at present—is to endeavour to have the Federal Government agree to some measure of consultation in the selection of future appointees to the High Court. This will only come about as the result of an intelligent and concerted argument on behalf of the States, and it would seem a fitting subject for a report which may be presented both to the Government and the Opposition parties in the Federal Government.

It will be apparent that my Government favours some change in the method of appointment of High Court Judges, and, because of the immediate difficulties in securing a Constitutional change, advocates that a proper case be prepared and presented by all the States jointly to a Federal Government and Opposition, and to the Press and public of Australia.

Yours sincerely,

CHARLES COURT, Premier.

Mr W. P. Coleman, M.L.A.,
Parliament House,
Sydney, N.S.W. 2000

APPENDIX "E"

The Treasury, New South Wales,
State Office Block,
Macquarie Street,
Sydney, N.S.W. 2000.
23 July, 1975.

Mr W. G. Luton,
Serjeant-at-Arms and Clerk of
Select Committees,
Parliament House,
SYDNEY.

Dear Mr Luton,

The information set out below is provided in response to your request for particulars of the public debts of the Commonwealth, the States and Local Government.

The amount of securities on issue at 30th June, 1974, as disclosed in the latest issue of the Commonwealth publication "Government Securities on Issue" was:

States' debt	$11,219 million
Commonwealth debt (excluding internal Treasury Bills amounting to $931 million)	$ 3,157 million

These figures, however, need to be adjusted to reflect in the case of the States specific purpose loans from the Commonwealth and Sinking Fund balances and in the case of the Commonwealth the security holdings of the Loan Consolidation and Investment Reserve, Sinking Fund balances and specific purpose loans to the States. When these adjustments are made the figures become:

States' debt	$13,811 million
Commonwealth—net creditor position	$ 1,056 million

The States' debt includes advances from State Loan Funds to State semi-governmental authorities but it does not include loans raised directly by these authorities (details not yet available).

The latest date for which figures are available for Local Government is at 30th June, 1971, when the net debt of councils, after allowing for Sinking Fund balances was $1,623 million. This figure would, of course, have increased considerably in the intervening period.

While some information is available regarding the position in Canada, it is not on a comparable basis to the above figures and the details required to make the necessary adjustments are not available to the Treasury.

You also sought information concerning taxation and I would refer you to the Australian Bureau of Statistics publication "Public Authority Finance—Taxation" which shows that in 1972–73 (the latest year for which the publication has been issued) 78.9 per cent of total taxation in Australia was received by the Commonwealth, 16.5 per cent by the States and 4.6 per cent by local government authorities.

A statement is attached giving comparable figures for Canada, the United States and West Germany, together with some other tax comparisons which I trust will be helpful to the Committee.

Further schedules are attached setting out the main fields of taxation tapped by each tier of government in Australia, together with similar information for Canada, United States and West Germany.

Yours faithfully,

W. E. HENRY,
Under Secretary and Comptroller of Accounts.

TAXATION—COMPARISONS WITH OVERSEAS TAX REVENUES AS A PERCENTAGE OF GROSS NATIONAL PRODUCT

(i) *O.E.C.D. Comparisons*

Comparisons of taxation in member countries, expressed as a percentage of gross national products, are compiled by the Organisation for Economic Co-operation and Development. Figures issued in December, 1973 provide comparisons for 1971 and as an average of the seven years 1965 to 1971.

According to the O.E.C.D. analysis the proportion of taxation to G.N.P. is highest among Scandinavian countries and lowest for Japan and Spain. Australia with a proportion of 26.6 per cent in 1971 was sixteenth out of the 22 countries surveyed. The figures for selected countries are set out below and particulars for each O.E.C.D. member country are given in Annexure A. It should be noted that the proportions shown will have been affected by subsequent taxation trends, including the progressive introduction of value added tax in Europe and the increasing dependence on income tax in Australia in recent years.

Total Tax Revenue as a Proportion of Gross National Product

	Including Social Security Contributions		Excluding Social Security Contributions	
	1971	Average 1965-71	1971	Average 1965-71
	per cent	per cent	per cent	per cent
Denmark (highest)	43·99	37·00	40·19	33·91
United Kingdom	35·65	34·57	30·63	29·65
France	35·62	35·79	20·71	21·77
Germany (Fed. Republic) ..	34·46	33·72	22·80	23·11
Canada	32·26	30·06	29·63	27·81
United States	27·77	27·43	22·03	22·33
Australia	26·60	25·43	26·60	25·43
Japan	20·06	19·38	16·04	15·62

The O.E.C.D. has drawn attention to some of the limitations of the statistics and the pitfalls of making comparisons from one country to another. Non-tax revenues are omitted from the statistics but the relative importance of such revenues differs widely from country to country. Methods of achieving certain policy objectives also vary between countries. For example, some countries rely more on tax concessions to assist persons and industries while others favour transfer payments from revenues. There are also wide variations in the extent to which health services and other social security benefits are financed through taxation.

In 1971 the proportion of each main category of taxation to G.N.P. for selected countries was as shown below. Particulars for each O.E.C.D. member country are given in Annexure A.

Main Tax Revenues as a Proportion of Gross National Product, 1971

	Taxes on Goods and Services	Taxes on Income and Profits	Social Security Contributions	Taxes on Wealth and Immovable Property
	per cent	per cent	per cent	per cent
Denmark	16·17	21·22	3·80	2·28
United Kingdom	10·31	14·61	5·02	3·73
France	12·66	5·67	14·91	0·53
Germany (Fed. Republic) ..	10·24	10·80	11·65	0·97
Canada	10·65	14·24	2·64	3·63
United States	5·61	12·22	5·74	3·70
Australia	8·42	14·23	....	1·56
Japan	4·47	8·58	4·02	1·00

(ii) *Taxation by Level of Government as a Proportion of Gross National Product.*

The proportions of federal, state and local taxation to total G.N.P. in Australia, Canada and the United States in the latest years for which figures are readily available were as follows:

	Australia 1972-73	Canada 1972	United States (*a*) 1970
	per cent	per cent	per cent
Federal	20·8	16·8	15·0
State/Provincial	4·4	10·0	4·9
Local	1·2	4·1	4·0
Total	26·4	30·9	23·9

(*a*) Excluding social security contributions

Relative Shares of Total Taxation by Level of Government

The proportions of federal, state and local taxation to total taxation in Australia, Canada, the United States and the Federal Republic of Germany in recent years were as follows:

	Australia 1972-73	Canada 1972	United States 1970	Germany 1971
	per cent	per cent	per cent	per cent
Federal	78·9 (*a*)	54·5	62·7	54·7
State/Provincial	16·5	32·3	20·6	33·0
Local	4·6	13·2	16·7	12·3
Total	100·0	100·0	100·0	100·0

(*a*) Reflects exclusion of States from income tax

ANNEXURE A.

TABLE 1

TOTAL TAX REVENUE AS A PERCENTAGE OF GROSS NATIONAL PRODUCT OECD MEMBER COUNTRIES, 1971 AND 1965–71 AVERAGE

	Including Social Security Contributions		Excluding Social Security Contributions	
	1971	Average 1965–71	1971	Average 1965–71
Denmark	43.99	37.00	40.19	33.91
Netherlands	42.20	38.70	27.20	25.58
Sweden	41.80	39.61	34.28	32.47
Norway	41.53	37.74	30.81	28.78
Austria	36.82	35.87	27.16	26.53
United Kingdom	35.65	34.57	30.63	29.65
France	35.62	35.79	20.71	21.77
Belgium	35.22	33.32	24.68	23.62
Finland	35.12	33.18	30.33	28.94
Germany	34.46	33.72	22.80	23.11
Luxembourg	34.10	33.05	24.05	23.11
Canada	32.26	30.06	29.63	27.81
Ireland	31.54	28.67	28.92	26.43
Italy	30.92	30.05	19.20	19.20
United States	27.77	27.43	22.03	22.33
Australia	26.60	25.43	26.60	25.43
Greece	24.54	23.19	18.17	17.20
Switzerland	23.97	23.00	18.27	17.71
Turkey	23.74	18.63	20.83	16.19
Portugal	21.77	20.39	16.25	15.75
Japan	20.06	19.38	16.04	15.62
Spain	20.02	18.59	12.01	11.82

TABLE 2

MAIN TAX REVENUES AS A PERCENTAGE OF GROSS NATIONAL PRODUCT OECD MEMBER COUNTRIES, 1971

	Taxes on Goods and Services	Taxes on Income and Profits	Social Security Contributions	Taxes on Wealth and Immovable Property
Denmark	16.17	21.22	3.80	2.28
Netherlands	11.26	14.44	15.00	.78
Sweden	13.27	19.55	7.52	.26
Norway	17.48	12.22	10.72	.73
Austria	13.52	9.59	9.66	.76
United Kingdom ..	10.31	14.61	5.02	3.73
France	12.66	5.67	14.91	.53
Belgium	12.11	11.55	10.53	—
Finland	14.48	15.11	4.79	.19
Germany	10.24	10.80	11.65	.97
Luxembourg	7.22	14.27	10.04	1.43
Canada	10.65	14.24	2.64	3.63
Ireland	15.66	9.17	2.61	3.27
Italy	11.40	5.76	11.72	.32
United States	5.61	12.22	5.74	3.70
Australia	8.42	14.23	—	1.56
Greece	9.52	3.45	6.37	—
Switzerland	6.28	9.83	5.69	1.44
Turkey	11.65	7.42	2.95	.56
Portugal	8.63	5.29	5.52	.06
Japan	4.47	8.58	4.02	1.00
Spain	6.58	4.16	8.01	.09

MAIN FIELDS OF TAXATION

(1) *Australia*

(a) Federal Government

(i) Income tax—Personal and Company
(ii) Customs and excise duties
(iii) Sales tax
(iv) Estate duty
(v) Gift duty
(vi) Pay-roll tax (Commonwealth Territories)
(vii) Stamp duties (Commonwealth Territories)

(b) State Governments

(i) Income Tax (constitutionally but not in practice)
(ii) Pay-roll tax
(iii) Stamp duties
(iv) Probate and death duties
(v) Gift duty
(vi) Land Tax
(vii) Business franchise licences
(viii) Motor vehicle taxation
(ix) Liquor licences
(x) Racing taxation
(xi) Poker machine tax (N.S.W.)
(xii) Entertainment tax (Victoria, Tasmania)
(xiii) Casino tax (Tasmania)
(xiv) Football pools

(2) *Canada*

(a) Federal Government

(i) Income tax—Personal and Corporations
(ii) General and other sales taxes
(iii) Customs duties
(iv) Excise duties
(v) Oil export tax
(vi) Social insurance levies
(vii) Universal pension plan levies

(b) Provinces

(i) Income tax—Personal and Corporations
(ii) Sales tax
(iii) Motive and other fuel taxes
(iv) Motor vehicle licensing revenues
(v) Alcoholic beverages revenues
(vi) Succession duties
(vii) Gift taxes
(viii) Race track taxes
(ix) Property (land) taxes
(x) Business taxes (on capital)
(xi) Amusement taxes
(xii) Insurance premium taxes
(xiii) Mining taxes
(xiv) Hospitalisation and medical care premiums and pay-roll taxes

(3) *United States*

(a) Federal Government

(i) Income tax—Personal and Corporation
(ii) Customs duties
(iii) Excise duties
(iv) Death duties
(v) Gift duty
(vi) Social insurance taxes
(vii) Employment taxes
(viii) Unemployment insurance levies

(b) States

(i) Income tax—Personal and Corporation
(ii) Sales taxes
(iii) Motor fuel taxes
(iv) Alcoholic beverages taxes
(v) Motor vehicle and Operators' licences
(vi) Death duties
(vii) Gift duty
(viii) Property taxes
(ix) Corporation licences

(4) *West Germany*

(a) Federal Government

(i) Income tax—Personal and corporation (shared)
(ii) Value—added tax (shared)
(iii) Petroleum tax
(iv) Customs duties
(v) Excise duties
(vi) Trade tax (shared)
(vii) Road haulage tax
(viii) Taxes on insurance, securities, company incorporation and share turnover
(ix) European economic community levies

(b) States

(i) Income tax—Personal and corporation (shared)
(ii) Value—added tax (shared)
(iii) Trade tax (shared)
(iv) Wealth and inheritance taxes
(v) Motor vehicle tax
(vi) Beer taxes
(vii) Levies from gambling casinos

EXTRACTS FROM THE VOTES AND PROCEEDINGS OF THE LEGISLATIVE ASSEMBLY

Entry No. 12, *Votes and Proceedings No.* 43, 19 *February,* 1975

APPOINTMENT OF JUDGES TO THE HIGH COURT OF AUSTRALIA.—

(1) URGENCY.—Mr Coleman moved, That it is a matter of urgent necessity that this House should forthwith consider the following Motion, viz.:

(i) That a Select Committee be appointed to consider the present system of appointment of Judges to the High Court of Australia and to recommend amendments to the Constitution of the Commonwealth of Australia which will ensure that such appointments are made in a more equitable and acceptable manner.

(ii) That such Committee consist of Mr Dowd, Mr Leitch, Mr Maher, Mr F. J. Walker and the mover.

(iii) That such Committee have leave to sit during the sittings or any adjournment of the House, to adjourn from place to place, and to make visits of inspection within the State.

Question put.

The House divided.

Ayes, 52

Mr Arblaster	Mr Fisher	Mr Park
Mr Barraclough	Mr Freudenstein	Mr Pickard
Mr Boyd	Mr Griffith	Mr Punch
Mr Brewer	Mr Harrold	Mr Rofe
Mr Brown	Mr Healey	Mr Rozzoli
Mr Bruxner	Mr Hunter	Mr Ruddock
Mr Clough	Mr Jackett	Mr Singleton
Mr Coates	Mr Leitch	Mr Taylor
Mr Coleman	Mr Lewis	Mr Viney
Mr Cowan	Mr McGinty	Mr Waddy
Mr Crawford	Mr Mackie	Mr Walker
Sir Charles Cutler	Mr Maddison	Mr Webster
Mr Darby	Mr Mason	Mr Willis
Mr Dowd	Mr Mauger	Mr Wotton
Mr Doyle	Mr Mead	
Mr Duncan	Mrs Meillon	*Tellers,*
Mr Fife	Mr Morris	Mr Brooks
Mr Fischer	Mr Osborne	Mr Mutton

Noes, 46

Mr Barnier	Mr Hatton	Mr O'Connell
Mr Bedford	Mr Hills	Mr Paciullo
Mr Booth	Mr M. L. Hunter	Mr Petersen
Mr Brereton	Mr Jackson	Mr Quinn
Mr Cahill	Mr Jensen	Mr Ramsay
Mr Cleary	Mr Johnson	Mr Renshaw
Mr Cox	Mr Johnstone	Mr Rogan
Mr Crabtree	Mr Jones	Mr Sheahan
Mr Day	Mr Keane	Mr K. J. Stewart
Mr Degen	Mr Kearns	Mr Wade
Mr Durick	Mr L. B. Kelly	Mr F. J. Walker
Mr Einfeld	Mr Maher	Mr Wran
Mr Face	Mr Mahoney	
Mr Ferguson	Mr Mallam	*Tellers,*
Mr Flaherty	Mr Mulock	Mr Bannon
Mr Gordon	Mr Neilly	Mr Haigh

And so it was resolved in the affirmative.

(2) SUSPENSION OF STANDING ORDERS.—Mr Coleman moved, That so much of the Standing Orders be suspended as would preclude the consideration forthwith of the following Motion, viz.:

(i) That a Select Committee be appointed to consider the present system of appointment of Judges to the High Court of Australia and to recommend amendments to the Constitution of the Commonwealth of Australia which will ensure that such appointments are made in a more equitable and acceptable manner.

(ii) That such Committee consist of Mr Dowd, Mr Leitch, Mr Maher, Mr F. J. Walker and the mover.

(iii) That such Committee have leave to sit during the sittings or any adjournment of the House, to adjourn from place to place, and to make visits of inspection within the State.

Question put.

The House divided.

Ayes, 52

Mr Arblaster	Mr Fischer	Mr Mutton
Mr Barraclough	Mr Fisher	Mr Osborne
Mr Boyd	Mr Freudenstein	Mr Park
Mr Brewer	Mr Griffith	Mr Pickard
Mr Brooks	Mr Harrold	Mr Punch
Mr Brown	Mr Healey	Mr Rofe
Mr Bruxner	Mr Hunter	Mr Rozzoli
Mr Clough	Mr Jackett	Mr Ruddock
Mr Coates	Mr Leitch	Mr Singleton
Mr Coleman	Mr Lewis	Mr Viney
Mr Cowan	Mr McGinty	Mr Waddy
Mr Crawford	Mr Mackie	Mr Walker
Sir Charles Cutler	Mr Maddison	Mr Webster
Mr Darby	Mr Mason	Mr Willis
Mr Dowd	Mr Mauger	
Mr Doyle	Mr Mead	*Tellers,*
Mr Duncan	Mrs Meillon	Mr Taylor
Mr Fife	Mr Morris	Mr Wotton

Noes, 46

Mr Bannon	Mr Haigh	Mr Neilly
Mr Barnier	Mr Hatton	Mr O'Connell
Mr Bedford	Mr Hills	Mr Paciullo
Mr Booth	Mr M. L. Hunter	Mr Petersen
Mr Brereton	Mr Jackson	Mr Ramsay
Mr Cahill	Mr Jensen	Mr Renshaw
Mr Cleary	Mr Johnson	Mr Rogan
Mr Cox	Mr Johnstone	Mr Sheahan
Mr Crabtree	Mr Jones	Mr K. J. Stewart
Mr Day	Mr Keane	Mr Wade
Mr Durick	Mr Kearns	Mr F. J. Walker
Mr Einfeld	Mr L. B. Kelly	Mr Wran
Mr Face	Mr Maher	
Mr Ferguson	Mr Mahoney	*Tellers,*
Mr Flaherty	Mr Mallam	Mr Degen
Mr Gordon	Mr Mulock	Mr Quinn

And so it was resolved in the affirmative.

(3) Mr Coleman moved—

(i) That a Select Committee be appointed to consider the present system of appointment of Judges to the High Court of Australia and to recommend amendments to the Constitution of the Commonwealth of Australia which will ensure that such appointments are made in a more equitable and acceptable manner.

(ii) That such Committee consist of Mr Dowd, Mr Leitch, Mr Maher, Mr F. J. Walker and the mover.

(iii) That such Committee have leave to sit during the sittings or any adjournment of the House, to adjourn from place to place, and to make visits of inspection within the State.

And Mr Ferguson requiring that the members of the Committee be appointed by ballot—

Mr Speaker stated that in view of the request for a ballot he would propose as one question only paragraphs (i) and (iii) of the motion, and in the event of that question being agreed to, a ballot would be held.

Question proposed—That paragraphs (i) and (iii) of the motion be agreed to.

Debate ensued.

Mr Walker moved, That the Question be now put.

Question put—"That the Question be now put".

The House divided.

Ayes, 50

Mr Arblaster	Mr Fisher	Mr Osborne
Mr Barraclough	Mr Freudenstein	Mr Park
Mr Boyd	Mr Griffith	Mr Pickard
Mr Brewer	Mr Harrold	Mr Punch
Mr Brooks	Mr Healey	Mr Rofe
Mr Brown	Mr Hunter	Mr Ruddock
Mr Bruxner	Mr Jackett	Mr Singleton
Mr Clough	Mr Leitch	Mr Taylor
Mr Coleman	Mr Lewis	Mr Viney
Mr Cowan	Mr McGinty	Mr Waddy
Mr Crawford	Mr Mackie	Mr Walker
Sir Charles Cutler	Mr Maddison	Mr Webster
Mr Darby	Mr Mason	Mr Willis
Mr Dowd	Mr Mauger	Mr Wotton
Mr Duncan	Mr Mead	*Tellers,*
Mr Fife	Mr Morris	Mr Doyle
Mr Fischer	Mr Mutton	Mr Rozzoli

Noes, 45

Mr Bannon	Mr Gordon	Mr Mulock
Mr Barnier	Mr Haigh	Mr O'Connell
Mr Bedford	Mr Hatton	Mr Paciullo
Mr Booth	Mr Hills	Mr Petersen
Mr Brereton	Mr M. L. Hunter	Mr Quinn
Mr Cahill	Mr Jackson	Mr Ramsay
Mr Cleary	Mr Jensen	Mr Renshaw
Mr Cox	Mr Johnson	Mr Rogan
Mr Crabtree	Mr Johnstone	Mr Sheahan
Mr Day	Mr Jones	Mr F. J. Walker
Mr Degen	Mr Keane	Mr Wran
Mr Durick	Mr Kearns	
Mr Einfeld	Mr L. B. Kelly	
Mr Face	Mr Maher	*Tellers,*
Mr Ferguson	Mr Mahoney	Mr K. J. Stewart
Mr Flaherty	Mr Mallam	Mr Wade

And it appearing by the Tellers' Lists that the number in favour of the motion, being a majority, consisted of "at least thirty Members"—

Question—That paragraphs (i) and (iii) of the motion be agreed to—put.

The House divided.

Ayes, 52

Mr Arblaster	Mr Fischer	Mr Osborne
Mr Barraclough	Mr Fisher	Mr Park
Mr Boyd	Mr Freudenstein	Mr Punch
Mr Brewer	Mr Griffith	Mr Rofe
Mr Brooks	Mr Harrold	Mr Rozzoli
Mr Brown	Mr Hatton	Mr Ruddock
Mr Bruxner	Mr Healey	Mr Singleton
Mr Clough	Mr Hunter	Mr Taylor
Mr Coates	Mr Jackett	Mr Viney
Mr Coleman	Mr Leitch	Mr Waddy
Mr Cowan	Mr Lewis	Mr Walker
Mr Crawford	Mr McGinty	Mr Webster
Sir Charles Cutler	Mr Mackie	Mr Willis
Mr Darby	Mr Maddison	Mr Wotton
Mr Dowd	Mr Mauger	
Mr Doyle	Mr Mead	*Tellers,*
Mr Duncan	Mr Morris	Mr Mason
Mr Fife	Mr Mutton	Mr Pickard

Noes, 44

Mr Bannon	Mr Gordon	Mr O'Connell
Mr Barnier	Mr Haigh	Mr Paciullo
Mr Bedford	Mr Hills	Mr Petersen
Mr Booth	Mr M. L. Hunter	Mr Quinn
Mr Brereton	Mr Jackson	Mr Ramsay
Mr Cleary	Mr Jensen	Mr Renshaw
Mr Cox	Mr Johnson	Mr Rogan
Mr Crabtree	Mr Johnstone	Mr Sheahan
Mr Day	Mr Jones	Mr K. J. Stewart
Mr Degen	Mr Keane	Mr Wade
Mr Durick	Mr Kearns	Mr F. J. Walker
Mr Einfeld	Mr L. B. Kelly	Mr Wran
Mr Face	Mr Mahoney	*Tellers,*
Mr Ferguson	Mr Mallam	Mr Cahill
Mr Flaherty	Mr Mulock	Mr Maher

And so it was resolved in the affirmative.

Whereupon the House proceeded to the ballot.

Mr Speaker declared the following to be the Committee duly appointed—Mr Coleman, Mr Dowd, Mr Leitch, Mr Maher and Mr F. J. Walker.

Entry No. 3, *Votes and Proceedings No.* 52, 12 *March,* 1975

RESIGNATION FROM SELECT COMMITTEE UPON THE APPOINTMENT OF JUDGES TO THE HIGH COURT OF AUSTRALIA.—Mr Acting-Speaker informed the House that he had received the following communication from the honourable member for Drummoyne, Mr M. J. Maher, dated 11 March, 1975—

"Pursuant to the ruling of Mr Speaker Cameron on 25th February, 1975, that it is permissible for a member to resign from a select committee, I hereby submit my resignation from the Select Committee on High Court Appointments.

Yours faithfully,
MICHAEL MAHER, M.L.A.,
Member for Drummoyne".

Mr Acting-Speaker stated that on 25 February, 1975, the honourable member for Georges River had raised as a matter of privilege the position of members elected, albeit reluctantly, to serve on select committees. Mr Speaker had stated—

"I do not think that this is a case in which the House is totally bound by English precedent. I understand that the House has on occasions permitted a member of a select committee to resign from such select committee, and that on other occasions the House has discharged a member of a select committee and replaced him with another member."

Mr Acting-Speaker said that while the standing orders did not prescribe the procedure for the resignation of a member from membership of a select committee he deemed it his duty to report to the House the receipt of Mr Maher's letter.

Entry Nos 3, 10 *and* 14, *Votes and Proceedings No.* 54, 18 *March,* 1975

RESIGNATION FROM SELECT COMMITTEE UPON THE APPOINTMENT OF JUDGES TO THE HIGH COURT OF AUSTRALIA.—Mr Acting-Speaker informed the House that he had received the following communication from the honourable member for Georges River, Mr F. J. Walker, dated 18 March, 1975—

"Dear Sir,

I hereby formally confirm my prior statements to the House to the effect that I was not prepared to serve as a Member of the Select Committee on appointments to the High Court.

I would be grateful if you would be so kind as to convey my position to the House.

Yours faithfully,
FRANK WALKER,
M.L.A. for Georges River."

* * * * *

SELECT COMMITTEE UPON THE APPOINTMENT OF JUDGES TO THE HIGH COURT OF AUSTRALIA.—Ordered, on motion of Mr Willis (*by consent*), That Mr Maher and Mr F. J. Walker be discharged from attendance upon the Select Committee upon the Appointment of Judges to the High Court of Australia and that Mr Coates and Mr Harrold be appointed members of such Committee.

* * * * *

PARLIAMENTARY COMMITTEES ENABLING BILL.—

(1) Mr Willis moved, pursuant to Notice, That leave be given to bring in a Bill to enable certain Committees of the Legislative Council and Legislative Assembly to function during the prorogation of Parliament and during the third session of the forty-fourth Parliament; and for purposes connected therewith.

Debate ensued.

Question put and passed.

(2) Mr Willis then presented a Bill, intituled *"A Bill to enable certain Committees of the Legislative Council and Legislative Assembly to function during the prorogation of Parliament and during the third session of the forty-fourth Parliament; and for purposes connected therewith"*—which was read a first time.

Ordered by Mr Acting-Speaker, That the second reading stand an Order of the Day for To-morrow.

Entry No. 20, *Votes and Proceedings No.* 55, 19 *March,* 1975

PARLIAMENTARY COMMITTEES ENABLING BILL.—The Order of the Day having been read, Mr Willis moved, That this Bill be now read a second time.

Debate ensued.

Question put and passed.

Bill read a second time.

Mr Acting-Speaker left the Chair, and the House resolved itself into a Committee of the Whole for the consideration of the Bill.

Mr Acting-Speaker resumed the Chair, and the Acting-Chairman reported the Bill without amendment.

On motion of Mr Willis the Report was adopted.

And Mr Acting-Speaker having consented to the third reading being taken forthwith—

Bill, on motion of Mr Willis, read a third time.

Bill sent to the Legislative Council, with the following Message:

Mr PRESIDENT—

The Legislative Assembly having this day passed a Bill, intituled *"An Act to enable certain Committees of the Legislative Council and Legislative Assembly to function during the prorogation of Parliament and during the third session of the forty-fourth Parliament; and for purposes connected therewith"*—presents the same to the Legislative Council for its concurrence.

Legislative Assembly Chamber,
Sydney, 20 *March,* 1975, *a.m.*

Entry No. 11, *Votes and Proceedings No.* 57, 25 *March,* 1975

MESSAGES FROM THE LEGISLATIVE COUNCIL.—Mr Acting-Speaker reported the following Messages from the Legislative Council:

* * * * *

(3) Parliamentary Committees Enabling Bill:

Mr ACTING-SPEAKER—

The Legislative Council having this day agreed to the Bill, intituled *"An Act to enable certain Committees of the Legislative Council and Legislative Assembly to function during the prorogation of Parliament and during the third session of the forty-fourth Parliament; and for purposes connected therewith"*—returns the same to the Legislative Assembly without amendment.

Legislative Council Chamber,

HARRY BUDD,
President.

* * * * *

PROCEEDINGS OF THE SELECT COMMITTEE OF THE LEGISLATIVE ASSEMBLY UPON THE APPOINTMENT OF JUDGES TO THE HIGH COURT OF AUSTRALIA

TUESDAY, 25 FEBRUARY, 1975, AT PARLIAMENT HOUSE, AT 3.40 P.M.

MEMBERS PRESENT:

Mr COLEMAN Mr DOWD Mr LEITCH

Entry No. 12 in *Votes and Proceedings* No. 43 of the Legislative Assembly, for Wednesday, 19 February, 1975, was read by the Clerk of Select Committees. (Appointment of Committee and terms of inquiry.)

On the motion of Mr Leitch, seconded by Mr Dowd, Mr Coleman was called to the Chair and thereupon made his acknowledgments to the Committee.

Resolved, on the motion of Mr Leitch, seconded by Mr Dowd: That arrangements for the calling of witnesses and visits of inspections be left in the hands of the Chairman and Clerk of the Committee.

Resolved, on the motion of Mr Leitch, seconded by Mr Dowd: That, unless otherwise ordered, the press and the public (including witnesses after examination) be admitted to the sittings of the Committee.

Resolved, on the motion of Mr Dowd, seconded by Mr Leitch: That departmental officers be invited to assist the Chairman.

The Committee deliberated.

Resolved, on the motion of Mr Leitch, seconded by Mr Dowd: That the Attorney-General and Minister of Justice be requested to make available the services of Mr Lindsay Charles Holmwood, C.B.E., LL.B., Director, New South Wales State Secretariat, Australian Constitutional Convention Delegation, and that he be invited to travel with the Committee when deemed necessary.

Resolved, on the motion of Mr Leitch, seconded by Mr Dowd: That press statements concerning this Committee be made only by the Chairman.

Resolved, on the motion of Mr Leitch, seconded by Mr Dowd: That unless otherwise ordered, transcripts of evidence taken by the Committee be not made available to any person, body or organization: provided that witnesses previously examined shall be given a copy of their evidence.

Resolved, on the motion of Mr Leitch, seconded by Mr Dowd: That the Chairman and the Clerk of Select Committees be empowered to negotiate with the Treasurer for the provision of funds to meet expenses in connection with travel, accommodation and other approved incidental expenses.

Resolved, on the motion of Mr Dowd, seconded by Mr Leitch: That this Committee requests the Treasurer to approve payment of the following:

(i) A daily allowance to each member when he attends a meeting of the Committee on a day on which the House is not sitting, and for each day he is present at an official visit of inspection.

(ii) Air travel for visits of inspection when other modes of transport are impracticable.

(iii) Air travel between his electoral district and Sydney for Mr Leitch, when necessary, for the purpose of attending meetings of the Committee.

Resolved, on the motion of Mr Leitch, seconded by Mr Dowd: That the Clerk be empowered to write to interested parties requesting written submissions within the Terms of Reference.

Resolved, on the motion of Mr Leitch, seconded by Mr Dowd: That the Chairman and Clerk examine suitable document cases to be purchased for members and the Clerk.

The Committee deliberated.

It was agreed that the Committee invite written submissions from persons, organizations and authorities who, in its opinion, would be in a position to advise it in accordance with the terms of reference of its inquiry.

For this purpose the Clerk was requested to ascertain the names (where available) and addresses and to compile an appropriate list of the following:

(1) The Crown Solicitor of each State in the Commonwealth.

(2) The President of the Bar Association of New South Wales and of the Law Society of New South Wales and their counterparts in each State and the Australian Capital Territory.

(3) The Deans of the Faculties of Law within the several universities throughout the Commonwealth and the Australian Capital Territory.

(4) The Departments of Politics and Government and similar departments within the several universities throughout the Commonwealth and the Australian Capital Territory.

Submissions also to be invited from—

(1) Professor P. H. Lane, B.A., LL.M., S.J.D. (Harvard), Professor of Law, University of Sydney Law School, 173 Phillip Street, Sydney, N.S.W. 2000.

(2) Professor Zelman Cowen, C.M.G., Q.C., D.C.L., M.A. (Oxon.), B.A., LL.M. (Melb.), Vice-Chancellor, University of Queensland, St Lucia, Qld 4067.

(3) Professor Geoffrey Sawer, B.A., LL.M., Professor of Law, Research School of Social Science, Australian National University, Canberra, A.C.T. 2600.

(4) Professor J. E. Richardson, B.A., LL.M. (Melb. and McGill), Robert Garran Professor of Law, School of General Studies, Australian National University, Canberra, A.C.T. 2600.

It was also agreed that the major political parties be asked if they have at any time prepared material on the method of appointment of judges to the High Court of Australia and, if so, to furnish copies of the same.

The Clerk was requested to make inquiries regarding the Committee's rights or otherwise to insert paid advertisements in interstate newspapers to describe its functions and invite submissions.

The Committee adjourned at Ten minutes before Six p.m., until Tuesday next, 4 March, 1975, at Five p.m.

TUESDAY, 4 MARCH, 1975, AT PARLIAMENT HOUSE, AT 5 P.M.

MEMBERS PRESENT:

Mr COLEMAN (in the Chair)

Mr DOWD Mr LEITCH

Mr L. C. Holmwood was in attendance.

The Minutes of the previous meeting were read and confirmed.

Correspondence:

(a) Letter dated 27 February, 1975, from Mr L. C. Holmwood advising progress in his researches into sources of reference and conveying copies of certain papers to the Chairman.

Letter received, copies of the papers distributed.

(b) Letter dated 28 February, 1975, from Mr L. C. Holmwood advising further reference material and the libraries holding the same.

Letter received. Members to be provided with copies of both letters.

The Committee deliberated.

Resolved, on the motion of Mr Dowd, seconded by Mr Leitch: That any member not being present at any meeting be circulated with copies of material received and with a copy of the minutes of proceedings of that meeting.

The Committee deliberated.

The Committee adjourned at Ten minutes after Six p.m., until Tuesday, 18 March, 1975, at Five p.m.

TUESDAY, 18 *MARCH,* 1975, *AT PARLIAMENT HOUSE, AT* 5 P.M.

MEMBERS PRESENT:

Mr COLEMAN (in the Chair)

Mr DOWD Mr LEITCH

Mr L. C. Holmwood was in attendance.

The Clerk informed the Committee that the House had this day agreed to the following resolution, viz.: "That Mr Maher and Mr F. J. Walker be discharged from attendance upon the Select Committee upon the Apointment of Judges to the High Court of Australia and that Mr Coates and Mr Harrold be appointed members of such Committee."

Whereupon Mr Coates and Mr Harrold, being summoned, entered and took their places as members of the Committee.

The Minutes of the previous meeting were read and confirmed.

Discussion ensued.

Agreed, That papers to have been handed to Mr Maher and Mr F. J. Walker be now given to Mr Coates and Mr Harrold.

The Clerk distributed to each member a copy of pages 161 to 167, inclusive, of the *Votes and Proceedings* of the House of Commons of Canada, 16 March, 1972, being a Summary of the Recommendations of the Special Joint Committee of the Canadian Senate and House of Commons upon the Canadian Constitutional Charter. The Charter itself appears as Appendix "B" to the paper, at pages 171 to 175, inclusive, and attached. (Refer Mr Holmwood's letter of 27 February, 1975, page 3, paragraph 2.)

Correspondence:

(a) From Mr L. C. Holmwood, 6 March, 1975, re statements made by distinguished non-Australian lawyers in commendation of the work of the High Court and of its membership.

Received. Copies distributed to members.

(b) From Mr L. C. Holmwood, 10 March, 1975, conveying copies of further papers to the Chairman.

Received. The Clerk was requested to retain the papers for later distribution to members.

(c) From Mr L. C. Holmwood, 10 March, 1975, to the Chairman, suggesting a certain avenue into which the Committees' inquiry might be directed.

Received. Copies to be distributed to members later.

(d) Submission from Mr P. S. Philips, c.o. Messrs Meares and Philips, 33 Bligh Street, Sydney—*numbered S.1.*

Submission received and copies distributed by the Clerk.

The Committee deliberated.

Agreed, That an advertisement promulgating the appointment of the Committee and inviting written submissions from organizations and individuals be inserted in at least one major newspaper in every capital city and the Australian Capital Territory—draft to be prepared and final form approved by the Chairman.

The Committee adjourned at Fifteen minutes after Six p.m., until Wednesday, 7 May, 1975, at Half-past Two p.m.

NOTE: Meeting set down for Wednesday, 7 May, 1975, at 2.30 p.m., postponed until this day at 2 p.m.

WEDNESDAY, 16 *JULY,* 1975, *AT PARLIAMENT HOUSE, AT* 2 P.M.

MEMBERS PRESENT:

Mr COLEMAN (in the Chair)

Mr DOWD — Mr HARROLD

Mr LEITCH

An apology was received from Mr Coates.

Mr L. C. Holmwood was in attendance.

The Minutes of the previous meeting, as circulated, were confirmed.

The Clerk reported that pursuant to resolution agreed to on 18 March, 1975, he had caused an advertisement to be published on Saturday, 3 May, 1975, in each of the following newspapers, viz., *The Sydney Morning Herald, The Australian, The Age* (Melbourne), *The Advertiser* (Adelaide), *The West Australian* (Perth), *The Courier Mail* (Brisbane), *The Mercury* (Hobart), *The Examiner* (Launceston), and the *Canberra Times.*

Correspondence:

(a) Letter from the Honourable the Premier and Treasurer advising approval of advance to meet expenses.

(b) Letter from the Honourable the Attorney-General and Minister of Justice re possible appearance before the Committee of certain persons from Victoria.

(c) Letter from the Rt. Hon. the Prime Minister declining to authorize the Commonwealth Attorney-General to make a submission to the Committee.

(d) Letters from the undermentioned organizations and individuals acknowledging invitations to make written submissions to the Committee:

(1) The Attorney-General of Australia.

(2) The Premier of Victoria.

(3) Crown Solicitor of New South Wales.

(4) Crown Solicitor of Victoria.

(5) Crown Solicitor of South Australia.

(6) Crown Solicitor of Queensland.

(7) Crown Solicitor of Tasmania.

(8) The New South Wales Bar Association

(9) The Victorian Bar Council.

(10) The Bar Association of Queensland.

(11) The Law Society of New South Wales.

(12) Law Institute of Victoria.

(13) Law Society of South Australia Incorporated.

(14) Queensland Law Society Incorporated.

(15) The Law Society of Western Australia.

(16) The Law Society of the Northern Territory.

(17) Professor D. G. Benjafield, Dean, Faculty of Law, University of Sydney Law School, 173 Phillip Street, Sydney, New South Wales.

(18) Professor P. H. Lane, Professor of Law, University of Sydney Law School.

(19) Professor H. Mayer, Department of Government, University of Sydney, Camperdown, New South Wales.

(20) Professor E. A. Judge, Head, School of History, Philosophy and Politics, Macquarie University, North Ryde, New South Wales.

(21) Professor D. E. Allan, Dean, Faculty of Law, Monash University, Clayton, Victoria.

(22) Professor A. C. Castles, Chairman, Department of Law, The University of Adelaide, Adelaide, South Australia.

(23) Professor G. C. Duncan, Politics Department, The University of Adelaide.

(24) Professor R. S. O'Regan, Law School, University of Queensland, St Lucia, Brisbane, Queensland.

(25) Professor E. J. Edwards, Dean, Law School, The University of Western Australia, Nedlands, Perth.

(26) Professor G. S. Reid, Department of Politics, The University of Western Australia.

(27) Professor L. R. Zines, Dean, Faculty of Law, The Australian National University, Canberra, A.C.T.

(28) Professor J. E. Richardson, Faculty of Law, The Australian National University.

(e) Letters from the following branches of the major political parties acknowledging requests for any material relevant to the Committee's inquiry:

(1) Australian Labor Party (New South Wales Branch).

(2) Australian Labor Party (Tasmanian Section).

(3) Australian Labor Party (Northern Territory Branch).

(4) Liberal Party of Australia (South Australia Division).

(5) Liberal Party of Australia (Queensland Division).

(6) The Country Party, Victoria.

(7) Australian Country Party (South Australia).

(8) National Country Party of Australia (Western Australia).

Letters received.

(f) Letters from the following organizations and individuals offering comment and opinion on and furnishing material relevant to the Committee's inquiry:

(1) The Australian Capital Territory Bar Association.

(2) Professor H. Whitmore, Dean, Faculty of Law, The University of New South Wales, Kensington.

(3) Professor D. M. McCallum, Head, School of Political Science, The University of New South Wales.

(4) Professor S. R. Davis, Faculty of Economics and Politics, Monash University, Clayton, Victoria.

(5) Professor Derek Roebuck, Dean, Faculty of Law, The University of Tasmania, Hobart, Tasmania.

(6) Liberal Party of Australia (Western Australia Division).

(7) The Honourable Mr Justice B. P. Macfarlan, O.B.E., 34 Cleveland Street, Wahroonga, New South Wales.

(8) Mr K. McColl, Goondiwindi, Queensland.

Letters received—copies distributed to members.

(g) Submissions from:

Professor Geoffrey Sawer, Pro-Vice-Chancellor, The Australian National University, Canberra, A.C.T.—*numbered S.2.*

Mr Leslie Katz, University of Sydney Law School, 173 Phillip Street, Sydney, New South Wales—*numbered S.3.*

Professor D. A. Aitkin, Professor of Politics, Macquarie University, North Ryde, New South Wales—*numbered S.4.*

Professor Zelman Cowen, Vice-Chancellor, and Professor K. W. Ryan, Department of Law, University of Queensland, St Lucia, Brisbane, Queensland—*numbered S.5.*

Professor R. S. Parker, Professor of Political Science, The Australian National University, Canberra, A.C.T.—*numbered S.6.*

Dr G. C. Sharman, Department of Political Science, The University of Tasmania, Hobart, Tasmania—*numbered S.7.*

The New South Wales Bar Association—*numbered S.8.*

Professor P. E. Nygh, Head of School of Law, Macquarie University, North Ryde, New South Wales—*numbered S.9.*

Professor Gerard Nash, Professor of Law, Monash University, Clayton, Victoria—*numbered S.10.*

Mr Colin McKenzie, 126 Warrandyte Road, Ringwood, Victoria—*numbered S.11.*

Submissions received—copies previously distributed by direction of the Chairman.

The Committee deliberated at length upon a working paper prepared by Mr Holmwood and previously distributed to all members.

The Chairman asked that it be recorded that on Friday, 11 July, 1975, the Committee had had an informal discussion with Professor Gerard Nash (see S.10 above) who was on a brief private visit to Sydney and that a valuable interchange of ideas had resulted therefrom.

The Committee adjourned at Four p.m. until Thursday, 31 July, 1975, at Fifteen minutes after Two p.m.

WEDNESDAY, 6 AUGUST, 1975, AT PARLIAMENT HOUSE, AT 7.45 P.M.

MEMBERS PRESENT:

Mr COLEMAN (in the Chair)

Mr DOWD	Mr COATES
Mr LEITCH	Mr HARROLD

Mr L. C. Holmwood was in attendance.

The Minutes of the previous meeting, as circulated, were confirmed.

Correspondence. Letter from the Under Secretary, The Treasury, New South Wales, furnishing information relating to the public debts of the Commonwealth, the States and local government, and also information relating to taxation.

Letter received—copies distributed to members.

The Committee deliberated upon a preliminary draft report prepared by the Chairman and previously distributed to members—consideration of draft incomplete and to be resumed at next meeting.

The Committee adjourned at Ten p.m. until To-morrow at Fifteen minutes before Three p.m.

THURSDAY, 7 AUGUST, 1975, AT PARLIAMENT HOUSE, AT 2.45 P.M.

MEMBERS PRESENT:

Mr COLEMAN (in the Chair)

Mr DOWD	Mr COATES
Mr LEITCH	Mr HARROLD

Mr L. C. Holmwood was in attendance.

The Minutes of the previous meeting were read and confirmed.

The Committee resumed its consideration of the preliminary draft report prepared by the Chairman.

The Committee adjourned at Five minutes after Four p.m., *sine die.*

WEDNESDAY, 3 SEPTEMBER, 1975, AT PARLIAMENT HOUSE, AT 8 P.M.

MEMBERS PRESENT:

Mr COLEMAN (in the Chair)

Mr DOWD	Mr COATES
Mr LEITCH	Mr HARROLD

The Minutes of the previous meeting were read and confirmed.

Correspondence:

(a) Further letter from the Law Institute of Victoria relating to invitation to make a submission.

Letter received.

(b) Letter from Mr Leslie Katz, University of Sydney Law School, further to his submission numbered S.2.

Letter received—copies previously distributed to members.

(c) Submission from The Australian Country Party (New South Wales) prepared by the Honourable L. A. Solomons, M.L.C.—*numbered S.*12.

Submission received—copies previously distributed by direction of the Chairman.

A copy of the Draft Report which had been transmitted to each member of the Committee was brought up by the Chairman.

The Committee proceeded to consider the Draft Report.

Consideration of the Draft Report to be resumed at the next sitting.

The Committee adjourned at Twenty minutes after Ten p.m., until Tuesday, 9 September, 1975, at Eight p.m.

TUESDAY, 9 SEPTEMBER, 1975, AT PARLIAMENT HOUSE, AT 8 P.M.

MEMBERS PRESENT:

Mr COLEMAN (in the Chair)

Mr DOWD	Mr COATES
Mr LEITCH	Mr HARROLD

The Minutes of the previous meeting were read and confirmed.

Correspondence. Further letter from The Law Society of the Northern Territory enclosing an Interim Report of a sub-committee of that Society appointed to examine the terms of reference of this Committee.

Letter received.

Consideration of the Chairman's Draft Report was resumed.

Consideration of the Draft Report to be resumed at the next sitting.

The Committee adjourned at Fifteen minutes before Ten p.m. until Thursday, 11 September, 1975, at Fifteen minutes after Two p.m.

THURSDAY, 11 *SEPTEMBER,* 1975, *AT PARLIAMENT HOUSE, AT* 2.15 *P.M.*

MEMBERS PRESENT:

Mr COLEMAN (in the Chair)

Mr DOWD	Mr COATES
Mr LEITCH	Mr HARROLD

Mr L. C. Holmwood was in attendance.

The Minutes of the previous meeting were read and confirmed.

Submission. From the Honourable Sir Charles Court, O.B.E., M.L.A., Premier of Western Australia on behalf of the Government of that State—*numbered S.*13.

Submission received—copies distributed to members.

Consideration of the Chairman's Draft Report was resumed.

Consideration of the Draft Report to be resumed at next sitting.

The Committee adjourned at Ten minutes before Three p.m. until Tuesday, 16 September, 1975, at Six p.m.

TUESDAY, 16 *SEPTEMBER,* 1975, *AT PARLIAMENT HOUSE, AT* 6 *P.M.*

MEMBERS PRESENT:

Mr COLEMAN (in the Chair)

Mr DOWD	Mr COATES
Mr LEITCH	Mr HARROLD

Mr L. C. Holmwood was in attendance.

The Minutes of the previous meeting were read and confirmed.

Correspondence. Further letter from The Law Society of New South Wales relating to Committee's invitation to make a submission.

Letter received.

Consideration of the Chairman's Draft Report was resumed.

Consideration of the Draft Report to be resumed at next sitting.

The Committee deliberated.

Resolved, on the motion of Mr Dowd, seconded by Mr Harrold: That this Committee place on record its appreciation of the efficient services rendered it by the Serjeant-at-Arms and Clerk of Select Committees, Mr W. G. Luton, and, in so doing, acknowledges the cheerful and helpful manner in which he had assisted the Committee during its deliberations. Also, that the Chairman be requested to communicate this Resolution to the Speaker of the Legislative Assembly.

Resolved, on the motion of Mr Coates, seconded by Mr Dowd: That this Committee records its appreciation of the outstanding services of Mr L. C. Holmwood, C.B.E., LL.B., Director, New South Wales State Secretariat, Australian Constitutional Convention Delegation, and its particular recognition of the fact that his expert knowledge was of invaluable assistance to the Committee in all aspects of its deliberations.

Resolved, on the motion of Mr Leitch, seconded by Mr Coates: That the Committee place on record its keen appreciation of the Chairmanship of Mr Coleman and pays tribute to his ability and tolerance throughout its sittings. It is also to be recorded that the successful and harmonious manner in which the Committee had functioned was due, in no small measure, to his efforts.

The Chairman, in making his acknowledgments, thanked the members for the earnest manner in which they had applied themselves to the task to which they had been committed.

The Committee adjourned at Ten minutes before Eight p.m. until Thursday, 18 September, 1975, at Ten a.m.

WEDNESDAY, 18 *SEPTEMBER,* 1975, *AT PARLIAMENT HOUSE, AT* 10 *A.M.*

MEMBERS PRESENT:

Mr COLEMAN (in the Chair)

Mr DOWD — Mr COATES

Mr LEITCH

Mr L. C. Holmwood was in attendance.

The Minutes of the previous meeting were read and confirmed.

Consideration of the Chairman's Draft Report was resumed.

Resolved, on the motion of Mr Coates, seconded by Mr Leitch: That the Draft Report, as amended, be the Report of the Committee.

Whereupon the Report was signed by the Chairman in the presence of the Committee.

The Committee adjourned at Half-past Ten, a.m. *sine die.*