



THE JUDICIAL CONFERENCE OF AUSTRALIA

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The Hon Rob Hulls MP
Attorney General of Victoria
Attorney Generals Department
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Dear Attorney,

Re: Courts Legislation (Judicial Appointments and Other Amendments) Bill 2004

I refer to my letter of 1 November 2004 on the subject of Acting Judges, to which I have not yet had an acknowledgement.

I have now had an opportunity to examine the provisions of the above Bill. I make the following comments, which are in addition to those made in my letter.

Proposed s 80D(1) of the *Constitution Act*

This provision enables the Governor-in-Council to 'appoint as many acting Judges of the Court as are necessary for transacting the business of the Court'. The legislation does not prescribe standards for determining where it is 'necessary' to appoint acting Judges. Presumably the determination is to be made by the Governor-in-Council which, in practice, means the Cabinet and, specifically, the Attorney-General.

The Bill appears to contemplate that the Governor-in-Council could refrain from replacing tenured Judges of the Supreme Court as they retire and substitute in their stead acting Judges. The Bill does not stipulate that acting Judges are only to be appointed to deal with particular listing difficulties that arise from time to time. It follows that the Bill would seem to confer

on the Executive the power (in the words of the High Court in *NAALAP v Bradley*) to make acting appointments ‘so extensive as to distort the character of the [Victorian courts]’. Whatever the constitutional ramifications of such a power, it is objectionable in principle as it threatens the constitutional independence of the Supreme Court and of other Victorian courts.

Proposed s 80D(4), (6), (13) of the *Constitution Act*

An acting Judge ceases to hold office, subject to age restrictions, at the end of five years: proposed s 80D(6)(c). An acting Judge can only be removed from office on the same grounds as a tenured Judge (proposed s 80D(6)(d)). However, an acting Judge, although eligible for reappointment for a second (or subsequent) five year term, is not entitled to reappointment (proposed s 80D(6)(b)). Thus the continuation of the acting Judge in office depends on the Executive forming a favourable opinion of his or her judicial performance (or such other factors as the Executive deems it proper to take into account). In an age when judicial decisions can be the subject of intense public controversy, particularly where sentencing is concerned, how is the appearance of independence to be maintained when an acting Judge makes difficult and potentially controversial decisions near the end of his or her term? Might not critics detect, whether or not with any justification, a desire on the part of the acting Judge not to offend those who hold the power of appointment in their hands?

Proposed s 83(6)(aa) of the *Constitution Act*

The changes to judicial independence are even more marked when pension entitlements are taken into account. Under proposed s 83(6)(aa), if any Judge was **immediately prior to his or her appointment** an acting Judge, his or her service as an acting Judge is to count for pension purposes. Thus an acting Judge coming to the end of his or her five year term of appointment has a double incentive to be appointed a Judge of the Court:

- (i) the security of a tenured position;
- (ii) credit for five years service as an acting Judge for pension purposes.

An actuarial calculation would demonstrate that (ii) is effectively a notional sign-on bonus potentially worth, in the usual case, some hundreds of thousands of dollars. To critics of the Court and of particular decisions of the Court it may be hard to avoid the inference that an acting Judge appointed as a tenured Judge has been influenced in his or her work by the prospect of receiving credit for his or her service as an acting Judge for pension purposes.

The fact that acting Judges, unless immediately appointed to a tenured judicial position, receive no pension entitlements provides a powerful incentive to the Government of the day to appoint acting Judges rather than tenured Judges. If acting Judges are seen as a cheaper alternative than tenured Judges, Governments may well prefer the former. This of course increases the likelihood that the character of the Court will be distorted by the exercise of the power conferred by proposed s 80D(1).

Proposed s 80D(13) of the *Constitution Act*

The effect of proposed s 80D(13) is that an acting Judge must not engage in legal practice or paid employment ‘while undertaking the duties of a Judge’ unless the Attorney-General

approves. Although the language is not altogether clear, the provision appears to preclude an acting Judge, whether undertaking duties on a full-time or sessional basis (s 80D(4)), from any legal practice or paid employment without the Attorney-General's approval. The legislation does not incorporate any guidelines for the exercise of the Attorney-General's discretion. Moreover, it appears that the Attorney-General's approval may be obtained from time to time during the acting Judge's term of appointment.

The practical result is that an acting Judge may be beholden to the Attorney-General by reason of permission granted to continue in legal practice or may be seen to be beholden by reason of a request to the Attorney-General made at or about the time of a particular decision. Is the grant or refusal of approval to be made public? Is the Attorney-General to give reasons for a grant or refusal to grant permission? These are matters that will affect public perceptions of the independence of acting Judges.

If the Attorney-General approves an acting Judge conducting a legal practice, the difficulty arises that the acting Judge may be appearing before the very Court as an advocate on which he or she holds office as an acting Judge. That this is a realistic possibility is shown by the availability of sessional appointments for acting Judges (s 80D(4)). In any event, acting Judges given permission to engage in legal practice are very likely to be perceived as enjoying an advantage by reason of their appointment as acting Judges.

The criticisms of the legislation in this letter reinforce the view of the Judicial Conference of Australia that the proposed legislation is deeply flawed and should be reconsidered.

I should add that there may well be amendments which could be made to the Bill which would address the issues I have raised. I would be happy to meet with you at a convenient time to discuss the proposed legislation.

Yours sincerely,

**JUSTICE RONALD SACKVILLE
CHAIR**