## Chapter Two

## The Role of the States in High Court Appointments

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### 1. Introduction

If a federal system is to work well, the appointment of judges to its highest constitutional court cannot be the exclusive province of one level of government. The division of legislative power between the Commonwealth and the States means that both levels of government have a vital interest in the appointment of High Court Justices who will determine the distribution of that power. The community at large also has a profound interest in the appointment of those who decide these issues. This is because of the manifest advantages of a federal system as a form of governance.

The advantages of a federal system would seem too obvious to require elaboration, if they were not questioned so frequently in Australia. To restate them is unlikely to convince the doubters. However, it will give friends of the federal system cause to reflect upon the importance of that system, and the crucial role of the judiciary who interpret and apply the Constitution creating that system.

Hence, in part two of this paper I briefly review the advantages of a federal system. In part three, I describe the present process of consultation between the Commonwealth and the States in the appointment of High Court Justices. This description will be followed, in part four, by a consideration of the constitutional framework of a number of other federations in respect of appointments to their federal judiciaries. In the final part, I argue that the most workable and most easily adopted model for State involvement in appointments to the High Court is that proposed by the Queensland Government in the 1980s.

### 2. The advantages of a federal system

In the political sphere, because a federal system divides power, it imposes a powerful limitation upon arbitrary government. [2] In an American context, Justice O'Connor of the United States Supreme Court stated in *New York v. United States* that "the Constitution divides authority between Federal and State governments for the protection of individuals", and that "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front". [3] She observed in her opinion that "federalism secures to citizens the liberties that derive from the diffusion of sovereign power", [4] so that "[i]n the tension between Federal and State power lies the promise of liberty". [5]

It is important not to underestimate the protection of rights offered by the functioning of a healthy federal system. Federalism implicitly protects individuals because it prevents an excessive accumulation of power in either level of government. In Australia, governmental power is divided among numerous governments, each of limited powers. Furthermore, the party holding a majority of seats in the Federal and State Lower Houses seldom dominates the Upper Houses. These institutional factors are powerful limitations upon arbitrary government.

Alexander Hamilton long ago recognised the potency of a federal division of powers in discouraging oppression. Commenting on the American Constitution before the introduction of its Bill of Rights by a series of amendments, he wrote that "the Constitution is itself, in every rational sense, and to every useful purpose, a Bill of Rights". [6] Thus, for Hamilton, the absence of a Bill of Rights in the American Constitution did not matter because its careful federal division of powers in itself protected against governmental tyranny. A similar perception likely prompted the statement of Sir Harry Gibbs that:

> "[t]he most effective way to curb political power is to divide it. A Federal Constitution, which brings about a division of power in actual practice, is a more secure protection for basic political freedom than a bill of rights". [7]

Furthermore, federalism offers benefits in the economic and social spheres. Federalism permits social and economic experimentation by State governments without risk to the whole nation. [8] Federalism can enhance economic efficiency through competition between the States. [9]

While a great deal is at stake for the Australian States when appointments are made to the High Court in Australia, unlike many other federations, there is no constitutional acknowledgment of those interests.

## 3. **The existing minimalist model**

Existing involvement of the States in High Court appointments is minimal. There is no constitutional requirement that the States be involved in any way in appointments to the High Court. The Constitution provides that the Justices of the Court are appointed by the Governor-General in Council, [10] i.e. the Commonwealth executive.

For the first seventy-eight years of Federation there was no formal consultation whatsoever with the States concerning High Court appointments. Finally, in 1979 the new *High Court of Australia Act* created a formal process of consultation. [11] Section 6 of that Act stipulates that:

> "Where there is a vacancy in an office of Justice, the Attorney-General shall, before an appointment is made to the vacant office, consult with the Attorneys-General of the States in relation to the appointment".

The Act thus imposes on the Commonwealth Attorney-General an obligation "to consult" with the Attorneys-General of the States before making an appointment to the High Court.

The verb "to consult" is not defined in the Act. Until recently consultation was limited to asking State Attorneys-General for suggestions as to who might be appointed, followed by discussion of those persons. [12] More recently the Commonwealth Attorney-General consented to a State request to identify and to discuss prospective appointees that the Commonwealth was actively considering. [13]

The consequences of non-compliance with this statutory requirement would not necessarily invalidate an appointment. It has been argued that the statutory requirement would be construed as directory only, so that as long as the constitutional requirement of appointment by the Governor-General in Council was satisfied, an appointment would be valid. [14] Thus, provided the provisions of the Constitution with regard to the appointment of High Court judges are adhered to, the appointment would be validly made. The exceedingly frail nature of the existing consultation procedure is thus apparent.

## 4. **Procedures for appointing federal judges in other federations**

### **(i) The United States**

Presidential nominations of prospective appointees to the United States Supreme Court and other federal courts are subject to the approval of the United States Senate. [15] The Senate consists of two Senators from each State. [16] Senators were originally chosen by State legislatures, [17] but since 1913 have been chosen by the people of each State. [18]

The influence of the individual States upon appointments to the United States Supreme Court is slight. Nonetheless, the general attitude of prospective appointees towards federalism is likely to be influential in Senate consideration of a nomination.

It is at the level of the lower federal judiciary that the influence of State interests is most apparent in the United States. This is due to the tradition of `senatorial courtesy'. By this tradition, to gain approval of his nominee to a federal District Court, the President must gain the approval of Senators from the State in which the District is located rather than the Senate as a whole. [19] So in practice Federal District judgeships are chosen by the Senators of the State in which the District is located. As John F Kennedy put it, in such cases, "it's senatorial appointment with the advice and consent of the President". [20]

Appointments to the federal Circuit Court of Appeals are also subject to strong regional influence because the Circuits are primarily groupings of contiguous States. [21] The influence exercised by the States here, however, is a regional influence, and the influence of individual States is accordingly diminished.

Given that the United States Senate has operated relatively effectively as a States House, the American model of Senate approval of appointment would not be an appropriate one for Australia to follow, because in Australia the Senate does not in any meaningful sense operate as a States House. [22] The prediction made by J M Macrossan at the Sydney Convention in 1891 that "[t]he influence of party will remain much the same as it is now, and instead of members of the Senate voting, as has been suggested, as States, they will vote as members of parties to which they belong" [23] has certainly been fulfilled. The Senate would be unlikely to provide more effective representation of State interests in this respect than it has in other respects.

**(ii) Canada**

By statute, at least three of the nine [24] judges [25] of the Canadian Supreme Court must be appointed from the judiciary or Bar of Quebec. [26] Similar statutory requirements apply even to the lower level of the federal judiciary. At least ten of the maximum of thirty-one [27] judges [28] of the Federal Court must also be appointed from the judiciary or Bar of Quebec. [29]

In recent years there have been proposals to enhance and to constitutionally entrench provincial involvement in appointments to, and representation on, the Canadian Supreme Court. These proposals, however, did not seek to constitutionally entrench provincial representation on, or participation in the making of appointments to, the Federal Court.

The first such proposal was the Meech Lake Accord. [30] It was struck in June,1987 between the Canadian Prime Minister and the Premiers of the ten Provinces. In the end the Accord lapsed, failing to be ratified by the requisite number of Provinces within the stipulated three year time limit. The Accord proposed to amend the *Constitution Act* 1867 [31] to greatly strengthen provincial influence upon appointments to the Supreme Court. The statutory requirement that at least three of the nine [32] judges of the Supreme Court be drawn from the judiciary or Bar of Quebec was to be constitutionally entrenched. [33]

Each provincial government was to be able to submit to the federal Minister of Justice the names of potential appointees who had been admitted to the Bar of its Province. [34] The actual appointment of Supreme Court judges was to be made by the Governor-General in Council. [35] However, except where the Chief Justice was appointed from among the sitting members of the

Court, the federal government would have to appoint a person from among those nominated by the Provinces who was also acceptable to the federal government. [36]

Where the appointment of a member of the Quebec judiciary or Bar was necessary to fulfil the requirement of three judges drawn from the Quebec judiciary or Bar, the federal government would have to appoint a person who had been nominated by the government of Quebec. [37] In the case of other vacancies, the federal government would have to appoint a person nominated by a provincial government other than that of Quebec. [38]

Under the Accord, these gains made by the Provinces in securing a provincial role in the making of appointments to the Supreme Court would have been subject to a very stringent amending procedure. Amendments to the new constitutional provisions dealing with the Supreme Court would have been contingent upon the approval of the Canadian Parliament and of each provincial legislative assembly. [39]

The Meech Lake Accord highlights an important lesson concerning the appropriate system for appointments to the Australian High Court. The Accord was one-sided because, excepting appointments of the Chief Justice from among sitting judges, no prospective appointees would be the suggestion of the federal government. [40] Both State and Federal governments must be available as credible countervailing influences balancing each other, precisely because it is "[i]n the tension between Federal and State power [that] lies the promise of liberty". [41] Even if the Australian States were to be given some form of veto over High Court appointments, that would not give them a power to propose names. Such a system, while a considerable improvement upon the current situation, would still preserve to one government only the power to suggest names.

Like the Meech Lake Accord, the second proposal, known as the Charlottetown Accord, was never adopted. It was rejected by 55 per cent of the population in a referendum. Under the Charlottetown Accord, the Constitution was to be amended to require the federal government to choose judges of the Supreme Court from lists submitted by the provincial governments. [42] Should no candidate submitted by the provincial governments be acceptable to the federal government, interim appointments were to be made. Interim appointments could also be made in the case of provincial delay in submitting lists of candidates. [43] Amendments to this system of appointment were to be made only with the agreement of seven Provinces, together representing 50 per cent of the population. [44]

The requirement that three of the nine members of the Supreme Court must come from the Quebec judiciary or Bar [45] could only be amended by unanimous agreements of the ten Provinces. [46] All provincial governments would take part in nominating the judges drawn from those admitted to the Quebec Bar. [47]

**(iii) Germany**

The involvement of the German Länder in the appointment of judges to the Federal Constitutional Court is very significant indeed. Half of the members of that Court are appointed by the *Bundesrat*, [48] which is much more truly a States' House than the Australian Senate. The *Bundesrat* is composed of members of the Land governments, appointed by and subject to recall by the Länder. [49] Through the *Bundesrat* the Länder participate in the legislative process and administration of the Federation. [50] Finally, Land Ministers participate in the selection of judges for other federal courts. [51]

While there is much to admire about the German federal system, the major difficulty is that there is no chance whatsoever of it being emulated in Australia. No federal government in Australia would ever propose, or be likely to secure the passage of, a referendum offering the States as much countervailing power as the German States possess in the *Bundesrat.*

**(iv) Malaysia**

The Malaysian Constitution provides for consideration of the views of the States in making appointments to federal courts. The judges of the Federal Court, [52] the Court of Appeal [53] and the High Courts [54] are appointed by the King, acting on the advice of the Prime Minister, after consulting the Conference of Rulers. [55] Each State of the Federation is represented in the Conference of Rulers. [56]

There are additional duties of consultation preceding appointments to the federal judiciary sitting in the States of Sabah and Sarawak. Before advising the King as to the appointment of the Chief Judge of the High Court in those States, the Prime Minister must consult the Chief Minister of each of those States. [57]

Like the Canadian Constitution, the Malaysian Constitution expressly accommodates specific regional interests. In each country there exist compelling reasons for this difference of treatment. In Australia there are no such compelling reasons for treating different States differently. Indeed the Australian Constitution evinces a strong disapproval of discrimination between the States. [58]

From the foregoing discussion of the methods of appointment of judges to the apex constitutional courts of other federations, it is clear that other federations tend to provide for rather greater accommodation of State interests in making such appointments than does the Commonwealth Constitution.

While the federations discussed provide to varying extents for representation of provincial interests in making appointments to lower federal courts, in Australia this would be much less urgent than is the case with High Court appointments. Hence the procedure which should be supported would be limited to High Court appointments and would not apply to the other federal courts.

5. **The Queensland remedy**

In Australia many suggestions have been made from time to time for giving the States a role in the appointment of High Court judges. These suggestions are found in the reports published by the Australian Constitutional Convention and its Judicature Sub-Committee, and the Constitutional Commission. These suggestions include, but are not limited to, a Victorian proposal that appointments 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 that appointments be made on the recommendation of a judicial commission consisting of the Federal and State Attorneys-General.

However, the most workable and most easily adopted model for State involvement in appointments to the High Court is that proposed by the Queensland government in the 1980s because it accommodates both State and Federal interests, and is not open to the objections of one-sidedness that can be made to the Meech Lake proposals.

Under the Queensland proposal, upon a vacancy occurring on the High Court bench, the Commonwealth Attorney-General asks the State Attorneys-General for suggestions of possible appointees. The Commonwealth itself may then submit suggestions of potential appointees for the scrutiny of State Attorneys-General.

From this consultation the Commonwealth would gain a clear idea about which candidates met with State approval or disapproval. High Court vacancies could only be filled by prospective appointees of whom the Commonwealth government approved and of whom three (or more) State governments had expressed positive approval or had not expressed an opinion upon. [59]

Since this proposal did not require the positive approval of a majority of States, it would be workable in practice. It should not be an insurmountable obstacle for the Commonwealth to find

a prospective appointee acceptable to itself and approved, or at least not objected to, by three State governments.

Not surprisingly, the Constitutional Commission appointed by the then federal government dismissed the Queensland proposal. In doing so the Constitutional Commission said that it would "give undue prominence to a balancing of regional considerations" and would produce "compromise candidates". [60]

The Commission's objections are specious, for the following reasons. First, as for the charge that the Queensland proposal would "give undue prominence to a balancing of regional considerations", our survey of the practice of appointment in other federations shows that it is customary in a federal system to give due prominence to a balancing of regional considerations. Other federations do so through constitutionally-mandated State involvement in the making of appointments to federal courts. Australia does not, but should learn from the experience of its own and other federal systems and adopt a mechanism which is adapted to local political conditions.

Secondly, as for the allegation that the Queensland proposal would lead to the appointment of "compromise candidates", that is not necessarily a bad thing. After all, the idea of a federal system is to balance State and federal interests. In such a system, compromise ensures that neither State nor federal interests go wholly unsatisfied.

In contrast, the present system merely tends to produce appointees who are sympathetic to the claims of one level of government and who are frequently unacceptable to the other. Were the system of appointment skewed as broadly in favour of the States as the present system is in favour of the Commonwealth, those favouring the *status quo* on appointments might see how dubious a one-sided system of appointment is. After all, both levels of government have interests at stake in judicial appointments. It is just that at present the interests of only one level of government have been accommodated in appointments.

In a significant statement, the Constitutional Commission indicated that its disapproval of State involvement in the appointment of High Court judges rested upon a belief that only one level of government should be involved in the selection process:

> "[I]t should be for one government alone to take the responsibility for Court appointments, and this includes High Court appointments. There should be no shirking of the responsibility by the argument that the decision was in fact a joint decision and, therefore, that no one in particular can be called to account by either a legislature or the public." [61]

Why would objections be made to the involvement of more than one level of government in the making of appointments to the High Court? One does not need to look far to discover the reason. In his excellent paper *Reforming the High Court,* published last year by The Samuel Griffith Society, Professor Craven accurately identified the motivations of those rejecting State participation in the appointment process. He wrote:

> "In fact, the issue of State involvement in the High Court appointment process has been a very sensitive one for antifederalists. They have hotly opposed any suggestion of a consultative process that goes beyond mere tokenism, for the precise reason that it might indeed result in a Court less sympathetic to the ambitions of central power. This tendency is, perhaps, well-illustrated by the haughtiness of the rejection by the Constitutional Commission of Queensland's not unreasonable proposal that the consent of three States be required for a High Court appointment." [62]

Contrary to the Constitutional Commission's arguments, in my opinion the Queensland proposal would substantially enhance the workings of Australia's federal system by giving the States a meaningful role in the appointment of High Court Justices.

In order to guarantee such a role for the States, it would be necessary to entrench these procedures within the Constitution through constitutional amendment. An amendment to the *High Court of Australia Act* would not result in lasting benefits for Australia. Assuming its constitutional validity, a statutory modification to the procedure of appointment could be, and almost inevitably would be, removed by any incoming government unsympathetic to the preservation and improvement of the federal system. To attain the benefits of the Queensland proposal in a more assuredly permanent manner, the Constitution would have to be amended in accordance with s.128 of the Constitution.

Since such a proposed amendment would be aimed at curtailing rather than expanding central power, it would have far more favourable prospects for adoption than have many proposals submitted to referenda This is especially so given the special federally based majorities required for the passage of a referendum. The power of putting such a proposed amendment to the people lies in the Commonwealth Government. Never has there been a more opportune time (or greater need) for the making of such proposals to the people.

6. **Conclusion**

In Australia the urgency of constitutional change has been constantly pressed upon us for some years now. However, reform of the process of federal judicial appointments has not been part of the agenda of urgency. In my view, however, the Australian federal system could have no better anniversary present, as we near the centenary of Federation, than the reform of appointments to the High Court.

**Endnotes :**

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2. See Moens, G A, *The wrongs of a constitutionally entrenched Bill of Rights* , in M A Stephenson and Clive Turner (eds), *Australia: Republic or Monarchy? : Legal and Constitutional Issues* , University of Queensland Press, 1994, pp. 248Ä49.

3. *New York v. United States* (1992) 505 US 144 per O'Connor J, for the Court at 181Ä82.

4. *New York v. United States* (1992) 505 US 144 per O'Connor J, for the Court at 181Ä82, quoting *Coleman v. Thompson* (1991) 501 US 722 per Blackmun J, dissenting at 759. See also *Gregory v. Ashcroft* (1991) 501 US 452 per O'Connor J, for the Court at 458 and Madison, J., Federalist No. 51, *Federalist Papers* , ed. Clinton Rossiter (1961), p.323.

5. *Gregory v. Ashcroft* (1991) 501 US 452 per O'Connor J, for the Court at 459. See also *United States v. Lopez* (1995) 115 S Ct 1624 per Kennedy J, concurring at 1638. Contrast perhaps Toohey, J, *A government of laws, not of men ?* (1993), 4 Public Law Review 325, p.236.

6. The Federalist No. 84, in Benton, W (ed), *The Federalist* (Encyclopaedia Britannica, 1989), p.253.

7. Gibbs, Sir Harry, *Courage in constitutional interpretation and its consequences: one example* (1991) 14 University of New South Wales Law Journal 325Ä26.

8. E.g., *New State Ice Co v. Liebmann* (1932) 285 US 262 per Brandeis J, dissenting at 311.

9. 9. Kasper, W, *Competitive federalism : may the best State win*, in *Restoring the true republic* , Centre for Independent Studies (1993), pp.60Ä66.

10. *Constitution* , s.72(i). Constitutional questions concerning this section are canvassed by J A Thomson, *Appointing Australian High Court Justices: some constitutional conundrums* , in P H Lee and G Winterton (eds), *Australian Constitutional Perspectives* (Law Book Company,

1992), p.251.

11. The procedure was earlier followed in considering the vacancy filled by Sir Ronald Wilson: see *Appointment of a Western Australian Justice of the High Court* (1979), 53 Australian Law Journal 471Ä72.

12. Constitutional Commission, *Australian Judicial System Advisory Committee Report* (1987), p.74; Appendix C to Judicature Sub-Committee, Second Report to Standing Committee, May, 1985, p.34, in *Proceedings of the Australian Constitutional Convention, Brisbane, 29 July Ä 1 August, 1985* (1985), vol.II; Judicature Sub-Committee, Second Report to Standing Committee, May, 1985, p.8, in *Proceedings of the Australian Constitutional Convention, Brisbane, 29 July Ä 1 August, 1985* (1985), vol.II.

13. Craven, G., *Reforming the High Court* in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 7 (1996), p.40.

14. Appendix B to Judicature Sub-Committee, Second Report to Standing Committee, May, 1985, p.31, in *Proceedings of the Australian Constitutional Convention, Brisbane, 29 July Ä 1 August, 1985* (1985), vol.II.

15. *US Constitution* , Art II s.2, cl.2.

16. *US Constitution* , Amendment XVII.

17. *US Constitution* , Art I s.3, cl.1.

18. *US Constitution* , Amendment XVII.

19. Beth, L P, *Politics, the Constitution and the Supreme Court* (Harper and Row, 1962), p.101.

20. Quoted in O'Brien, D M, *Storm Center: the Supreme Court in American Politics* (WW Norton, 1986), p.52.

21. The territory of each State is within the jurisdiction of one of eleven Circuit Courts of Appeal: see the map in Cohen, M L and Olsen, K C, *Legal Research* (5th ed.) (West, 1992), p.31.

22. See e.g., Sawer, G, *Federation under strain* (Melbourne University Press, 1977), pp.124, 128; Howard, C, *The Constitution, power and politics* (Fontana, 1985), p.166; Howard, C, *Australian federal constitutional law* (3rd ed.) (Law Book Company, 1985), p.96; Hamer, D J, *Towards a valuable Senate* , in *The Constitutional Challenge* (Centre for Independent Studies, 1982), p.60. Compare Galligan, B, *A Federal Republic* (Cambridge University Press, 1995), pp.68Ä69.

23. *Convention Debates, Sydney, 1891* , p.434, quoted by LaNauze, J, *The making of the Australian Constitution* (Melbourne University Press, 1972), p.44. There were other such predictions in the Debates: see e.g., *Convention Debates, Adelaide, 1897* , pp. 173Ä75, 297Ä98.

24. *Supreme Court Act* , s.4(1), Consolidated Statutes of Canada, c SÄ26.

25. `Judge' includes the Chief Justice: *Supreme Court Act* , s.2(1), Consolidated Statutes of Canada, c SÄ26.

26. *Supreme Court Act* , s.6, Consolidated Statutes of Canada, c SÄ26.

27. *Federal Court Act*, s.5(1), Consolidated Statutes of Canada, c FÄ7.

28. `Judge' includes the Chief Justice and Associate Chief Justice: *Supreme Court Act*, s.2 (1), Consolidated Statutes of Canada, c FÄ7.

29. *Federal Court Act*, s.5(6), Consolidated Statutes of Canada, c FÄ7.

30. The text of the Accord appears in Behiels, M D (ed), *The Meech Lake Primer* (University of Ottawa Press, 1989), pp.539Ä46 and in Blaustein, A P and Flanz, G H, *Constitutions of the countries of the world: Canada* (Oceana Publications, 1991), 217.

31. This Act was formerly known as the *British North America Act* 1867 (30 & 31 Vict c 3 (Imp), reprinted RSC 1985, App II No 5), the title being changed by the *Canada Act* 1982 (1982 c 16) (UK).

32. The number of Supreme Court judges (including the Chief Justice) was to be set at nine by s.101A(2), *Constitution Act* 1867, proposed to be added by *Constitutional Amendment* 1987, s.6.

33. Section 101B(2), *Constitution Act* 1867, proposed to be added by *Constitutional Amendment* 1987, s.6.

34. Section 101C(1), *Constitution Act* 1867, proposed to be added by *Constitutional Amendment* 1987, s.6.

35. Section 101A(2), *Constitution Act* 1867, proposed to be added by *Constitutional Amendment* 1987, s.6.

36. Section 101C(2), *Constitution Act* 1867, proposed to be added by *Constitutional Amendment* 1987, s.6.

37. Section 101C(3), *Constitution Act* 1867, proposed to be added by *Constitutional Amendment* 1987, s.6.

38. Section 101C(4), *Constitution Act* 1867, proposed to be added by *Constitutional Amendment* 1987, s.6.

39. Section 41, *Constitution Act* 1867, as proposed to be amended by *Constitutional Amendment* 1987, s.9.

40. McConnell, W H, *The Meech Lake Accord: laws or flaws ?* (1988), 52 Saskatchewan Law Review 115, p.132.

41. *Gregory v. Ashcroft* (1991), *op.cit.*

42. Consensus Report on the Constitution, Charlottetown, 28 August, 1992, para. 19.

43. *Ibid*.

44. *Ibid.*, para. 57.

45. *Ibid.*, para. 18.

46. *Ibid.*, para. 57.

47. *Ibid.*, para. 19.

48. *Basic Law of the Federal Republic of Germany*, Art. 94(1).

[48]. *Ibid* ., Art. 51(1).

[49]. *Ibid.* , Art. 50.

[50]. *Ibid* ., Art. 95(2). These courts are the Federal Court of Justice, the Federal Administrative Court, the Federal Finance Court, the Federal Labour Court, and the Federal Social Court: *ibid* ., Art. 95(1).

[51]. *Federal Constitution of Malaysia* , Art. 121(2), as amended by the *Constitution (Amendment) Act* 1994 (A885) s.13. The Federal Court was formerly called the Supreme Court of Malaysia. It was renamed in 1994.

[52]. *Federal Constitution of Malaysia* , Art. 121(1B), as amended by the *Constitution (Amendment) Act* 1994 (A885) s.13.

[53]. *Ibid* ., Art. 121(1).

[54]. *Ibid.* , Art. 122B(1).

[55]. *Ibid.* , Art. 38(1) and Fifth Schedule.

[56]. *Ibid.* , Art. 122B(3).

[57]. E.g., *Constitution* s.99; *Queensland Electricity Commission v. Commonwealth* (1985) 159 CLR 192.

[58]. Appendix C to Judicature Sub-Committee, Second Report to Standing Committee, May, 1985, pp.36Ä37, in *Proceedings of the Australian Constitutional Convention, Brisbane, 29 July Ä 1 August, 1985* (1985), vol.II.

[59]. *Final Report of the Constitutional Commission* (1988), Vol. I, p.401. See also Constitutional Commission, *Australian Judicial System Advisory Committee Report* (1987), p.74 and Appendix B to Judicature Sub-Committee, Second Report to Standing Committee, May, 1985, p.32, in *Proceedings of the Australian Constitutional Convention, Brisbane, 29 July Ä 1 August, 1985* (1985), vol.II.

[60]. *Final Report of the Constitutional Commission* (1988), Vol. I, p.402.

[61]. Craven, G., *Reforming the High Court* in *Upholding the Australian Constitution* , Proceedings of The Samuel Griffith Society, Volume 7 (1996), p.42.

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