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a different tune

Trusting Mr Hulls - a judgement call

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Compulsory voting is a uniquely Australian solution to the slow but apparently inevitable devaluation of democratic governance. In the Ukraine, Iraq, the reborn nations of the former USSR and new nations, such as East Timor, the people risked their very lives to vote. Australians cast their ballots to avoid being fined.

What are they voting for? 'The government', the man or woman on the street says, without any real understanding that 'government' is the seat of a three-legged stool. The law-making body they can choose is one support, to which the second, an executive of Ministers and their appointed functionaries, is constitutionally accountable. The third is the judiciary, not elected nor politically beholden, which decides what made laws mean, and whether they were properly made and lawfully applied.

Australians are political cynics. e.e. cummings would probably speak for most, with his famous remark that, 'A politician is an arse upon which everyone has sat except a man.' Perhaps that was why, in Western Australia last weekend, every woman candidate supported by Labor's Emily's List won her seat - there is a residual perception that women are trustworthier, I think. The return of the West's unpopular, under-performing Labor government was helped, too, by the haughty ineptitude of Opposition leader, Colin 'Can't Add' Barnett, and his grand, mad plan for a Kimberly-Perth canal.

If the people don't trust visionaries - like Latham - and, because of their debt-ridden homes, opt for the security of incumbents - Howard read that right - then the vitality of all three of the institutions of state becomes critically important. Without an active parliament of people's representatives, and without access to courts to test the lawfulness of the actions of those who control the enormous resources of the state, there is no check on the executive part of government and its embodiment in 'great men' who, as Lord Acton said, are 'almost always bad men': the more famous part of the quotation is that power corrupts, and absolute power corrupts absolutely.

Political parties limit our choice of Parliamentary candidates, it's true, and who enters parliament, so they also decide whom it appoints as the political executive, and that executive also appoints our judges. What preserves the courts from political partisanship? The rule of law and the 'black letter' legal training of those in the pool from which such choices are made: their legal ethics, and the fundamental principle that the judiciary is independent: judges' unwavering belief that these principles and the integrity of the judicial hierarchy remove any threat to judges' jobs, or mortgages.

That is why the Victorian Attorney General's proposal to change the rules about the permanency of judicial appointments to the states' highest courts, and how judges can feel accountable, are so remarkable.

Three years ago Rob Hulls cut through the Victorian old-boy networks that had historically ensured the homosocial (it means 'self-replicating', not gay) reproduction of the judiciary through limiting the pool of would-be judicial appointees to conservative, masculinist self-referential informal selection processes. He advertised for applicants for judicial appointment, including as Chief Justice, emphasizing his government's willingness to appoint from traditionally overlooked groups in society, such as women, Aboriginal and ethnic minorities. Good on him; and good on him, too, for making law firms who want government work prove that they do not continue to discriminate against women lawyers, a chronic habit of similar origin.

Welcome, too, are his new rules for making judges accused of misbehaviour or incapacity subject to independent review by a panel chosen from a standing committee of judges of Victorian and federal courts, and for codifying the grounds for removal, while preserving the constitutional power in the Victorian Parliament to make the final decision. In the more complex legislative society of the 21st century it is absolutely proper to set up an independent tribunal to monitor judicial behaviour.

But his current plans to allow not just himself - a good lawyer with a brain, integrity and a social conscience - but any succeeding Attorney General to appoint temporary judges, are truly worrying.

Yes, there is a problem with managing the vast traffic of work in the courts. It would be tempting to appoint 'contract workers' to deal with it. But judging is not like other work. In other 'civil' legal systems, such as Europe, judges are public servants who are appointed, promoted and disciplined as such. Our common law system enshrines a separate judicial power and the principle of judicial independence, which is firmly based on security of tenure until a fixed retirement age (it used to be for life: I once watched an octogenarian High Court judge snooze right through an appeal: seventy is an improvement.)

The benefits of being a judge are much less now. Judicial status has been diminished by the plethora of statutory 'tribunals' - some sad appointees behaving like 'mini-me' judges though they are appointed by administrators, some for very short terms, and expected to implement government policy - and the disparity between the vast incomes of private lawyers and what are now relatively paltry judicial salaries (one of the few benefits left is a generous retirement pension.) Judicial status has been crippled, too, by other Attorneys Generals than Mr Hulls making, or allowing to go unanswered, political and media

attacks on judges and court decisions - former Federal AG Daryl Williams QC's silence when High Court Justice Michael Kirby was targeted was the foulest recent example.

Mr Hulls' bill would give the Attorney General of the day power to appoint as many temporary judges as are 'necessary' (which is undefined) 'for transacting the business of the court' - for five years, extendable for a further five years. Temporary judges would not enjoy the judicial pension. Perhaps that is why they could even be given permission to continue in private legal practice at the same time.

What needs to be understood is this. Judges make decisions that are sometimes controversial and unpopular on laws and issues that affect powerful vested interests, including governments, which are often involved in litigation and which, these days, distribute their legal work to a competitive private legal profession, keen to oblige.

It is a fact of human nature that a person interested in reappointment - or a better-resourced permanent appointment - or indeed future government work, will be tempted to curry favour with the boss.

A principle is at stake.

Power shifts, Attorney Generals change and quotidian intentions can't be legislated or entrenched. In the 1990s, under the Kennett government, then Attorney General Jan Wade dismissed the judges of the Accident Compensation Tribunal by abolishing the court and neglecting to comply with the, until, then virtually unquestioned convention that she appoint its judges to other permanent courts. She made no distinction between this and the removal of other statutory office-holders, such as the Director of Public Prosecutions and indeed the Commissioner for Equal Opportunity, as I was at the time - whose independent decision-making powers vexed the government of the day. Mr Hulls objected intensely then. He should keep the faith now.

About the author

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Published Comments

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Dear fellow readers of the New Maltilda,

It is curious that the shadow Attorney-General, Andrew McIntosh, while being highly vocal in his criticism of the notion of part-time judges and what he sees as erosion of judicial independence, violation of the principle of separation of powers etc. nevertheless continues to maintain that Victorians have no need for a comprehensive legislative document, such as a charter of rights or a bill of rights similar to that recently enacted in the ACT..... Kurt Esser, Barrister.

KURT ESSER

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