

# Is Talk of the Quality of Judging Sometimes Strained, Feigned or Not Sustained?

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## I Introduction

This chapter will come at the issue of the appointing of top judges somewhat circuitously. Before we ask how judges should be chosen, we need to consider what makes a good judge. That is in no way self-evident. Nor will it be answered identically by those with differing conceptions of the proper role of judges and what the task of interpretation entails. Yet, without an idea of the desired qualities and attributes to be held by our top judges, it is difficult to see the basis on which any process or procedure for appointing them can be evaluated. More bluntly stated, specifying ‘what we want’ (at least in broad terms) comes before we can argue over ‘what set of appointing procedures is most likely – on average, over time – to deliver that’.

So I will start there, with the qualities needed for good judging on a top court in a longstanding democratic country such as Australia. Later I will move to the judicial appointments question. There is, though, a qualification or proviso that I think affects both these questions (of who to appoint and of how) that I will discuss at the end of this chapter. Here I want only to foreshadow it.

Suppose you won a million dollars to go out and buy a new house. Given that you will only get one house it will typically be one where the weaknesses are minimised – not too small, not too far from work, not too ultra-modern or mock-Tudor, and so on. You, or most people at any rate, will opt for the best ‘conventional’ house you can find for the money.

Now suppose, instead, that you won twice the amount of money and had to use it to buy two houses. Almost no one in that circumstance would buy a second house nearly identical to the first. Instead, you would be looking to buy two quite different properties, ones that would complement each other. The criteria you brought to the task of buying two houses would differ, possibly wildly so, from those you brought to buying one. You would be less risk averse, taking more chances and overlooking

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\* John Gava, Dyson Heydon, Dan Priel and a sitting judge who prefers to remain anonymous all offered interesting and helpful comments on an earlier version of this chapter.

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