CONFIDENTIAL.

COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION.

MEMORIAL FROM THE JUDGES.

The Judges wish to thank the Attorney-General for the opportunity of discussing with him on Friday last 6th April, 1956, all aspects of the appeal from the decision of the High Court in the Boilermakers' Case and for the frankness with which the Attorney answered questions and gave information on the proposals to be considered by the Government relating to the creation of the two different tribunals mentioned in the draft Petitions for special Leave to Appeal which were discussed and considered by the Judges and the Attorney-General.

2. These proposals as thus explained, if adopted, would vitally affect those Judges to be appointed to the tribunal described in the Petition as a Commission in relation to their status, the Court and office to which they were appointed and to the efficiency with which their important and burdensome tasks could be performed.

3. From what was said by the Attorney and from published matter in the press and industrial periodicals, it appears that these proposals will be considered almost immediately by the Government and statements similarly made as to any proposed legislative changes to be submitted to the Parliament.

4. The Judges would be in an embarrassing situation if the Government made its decision on these proposals and statements were made as to the decision, without the Judges having been heard as to their position in the event that such decision would materially affect them in the manner indicated.

5. It is in these circumstances that the Judges as a matter of urgency request the Attorney to submit this Memorial to the Prime Minister for his consideration. In this regard it is pointed out that the urgency of time and the necessity for the Judges to devote themselves to the consideration and decision

of the matters now before them in public hearing make it not possible for this Memorial to be in form and detail less cursory than it is. The urgency, the necessity for hearings to continue without interruption and the geographical separation of the Judges have prevented more than a minimum of joint consideration on the matters mentioned.

6. However, the Judges make the following observations without amplification, both because of the circumstances mentioned and because of the official and personal knowledge which the Prime Minister has.

7. The Judges were appointed as Judges, and Judges of a Superior Court of Record,* with life tenure, and, on their understanding and that of the Governments of the day which appointed them and that of the High Court itself at the times of their appointment, as Judges appointed under Chapter III of the Constitution. The relationship of the said decision of the High Court, and the appeal therefrom to the Privy Council, to the problem will be shortly mentioned hereafter.

8. The proposals described to the Judges by the Attorney were for the creation of a new Federal Court to exercise judicial functions arising under the Conciliation and Arbitration Act and of a new Commission to exercise the arbitral and non-judicial functions under the Act. These two bodies (one a Court and the other specifically described as not being a Court) would replace the present Court to which all the Judges were appointed for life.

9. The proposals went on to suggest that three of the Judges should be appointed to the Court and the remainder to the Commission.

10. The Judges point out that if that suggestion were implemented there would immediately occur a vital change in status

* Two were appointed to a Court of Record later made a Superior Court of Record. Five were appointed to the Superior Court of Record.

between the Judges appointed to the Court on the one hand and those appointed to the Commission (expressly named as not a Court) on the other hand.

11. In the last paragraph the Judges refer not only to the change in status under the Constitution that would occur as between Judges all originally appointed with identical status, but to the additional change that would have been deliberately made by the legislature in that the Judges appointed to the Commission would cease to be members of a Court at all. It will be remembered that the decision of the majority of the High Court was that the legislature could have arbitral functions performed by a Court even if that Court were not created under Chapter III of the Constitution.

12. The Judges have not been informed of any good reason for the proposed changes, nor are they able to think of any such reasons; indeed, on the contrary, they consider that the making of the changes would be most harmful to the carrying out of the tasks which they have hitherto performed.

13. However, the view of the Judges is that if the Government felt compelled as a matter of policy to decide that two distinct tribunals should be created, both should be designated Courts so that at the least all seven Judges should retain office in a Court and that their comparative designations, and those of the bodies to which they might in future belong, should not be altered to the unnecessary detriment of some of them. In this regard it is hardly necessary to stress that those who would suffer would be performing tasks at least as important and exacting as those who would not.

14. The proposals continued to suggest that, in addition to the change in the arbitral tribunal from a Court to a Commission, the Judges appointed to the latter would be prohibited from wearing robes of office and forbidden the assistance of counsel except by permission of the parties.

114. The experience of the Judges shows that the essential requirements of the successful working of any arbitration system are that all parties should be fully heard, that an impartial system should be given, and that all parties should be willing to abide by the decision. The view of the Judges is that the enjoyment by the members of an arbitral tribunal of the style and status of Judge has been shown in Australian practice to contribute powerfully to the fulfilment of all these requirements.

15. The Judges have worn the wigs of Judges for many years. It would naturally involve them in some personal humiliation to have those wigs removed from their heads by Act of Parliament, but their objections to the changes suggested to the Government go much more deeply than personal feelings.

16. The Judges hold the strongest possible view that the change in the designation of the Court, coupled with the last two proposals, would mean the degrading of the Judges appointed to the Commission from the position of Judges in any sense of that title at all.

17. In addition, and just as importantly and emphatically, they are of opinion gained from their experience and in the light of past prohibitions, that they could not adequately perform the task of adjudicating, which of course must be performed judicially, with the denial of the best assistance available to them. This is particularly so in the performance of the tasks required now to be performed by three or more Judges, and which it is proposed should be performed by the President and two or more Deputy Presidents, namely the fixation of the Basic Wage, Standard Hours, and the other nation-wide matters set out in section 25. The submission made by learned counsel for the Commonwealth in the present proceedings has only to be perused for this fact to be recognized.

18. The Judges have heard from time to time suggestions that lack of formality, absence of what is called legalism and the presence of lay advocates alone to assist the Court, would in some undefined manner assist in the process of arbitrating on these matters. The experience of the Judges at the Bar and on the Bench forces them to reject these suggestions. They assert that their proceedings are not conducted with undue formality and that the matters which require their adjudication require not only the devotion of trained minds to the task but the assistance of trained minds. As for "legalism", whatever that means, they point out that the sphere in which they perform their task requires, as the history of High Court decisions shows, high regard to the ever-present

questions of constitutional limitations on power and the manner of its use. The Judges assert that the substitution of informality for trained assistance in these particular tasks would not be a help but a positive hindrance. There have also been suggestions that lay advocates would save time in comparison with counsel. The experience of the Judges is that these suggestions are not correct. Nor does the nature of the task of say fixing a Basic Wage for the Australian community, based on a comprehensive survey of the economic life of that community, allow of a speedy decision. Such a task with all the advantages of trained assistance has been, and is being found to be, of a most exacting nature.

19. The Judges also point out in relation to the suggested appointment of some of them to a body which would not be a Court in any sense that they would not have accepted at the time of their appointment to the present Court, which was specified as being for life, an appointment to a Commission or similar body not being a Court. In this regard, five of the seven present Judges gave up judicial office in a State to accept the office of Judges of this Court and the others similarly relinquished large and remunerative legal practices.

20. Among other matters affecting their position that the Judges desire should be considered by the Government in relation to the proposed appointment of some of them to a Commission and the abolition of the present Court, is the effect of such changes upon the appeal to the Privy Council and also the possible prejudice to the position of those Judges should the appeal succeed in that they may have ceased to be Judges of a Court created under Chapter III, either should the Court have been abolished or should they not have retained their membership of it. The Judges urge that the pendency of the appeal above should require the retention of their present status.

21. The Judges thank the Attorney for this opportunity of putting their views to the Government and, in the light of the fact that for some time past other persons and bodies have evidently

had and availed themselves of such opportunity, consider it proper that the Judges should do so now before it may be too late. They think they should take this opportunity, although they are mindful of the delicacy of their present situation in relation to the Government in view of their present part-heard hearing on national matters in which the Government itself has intervened through counsel for the Attorney-General.

22. Finally the Judges wish to say that, as at present advised, they would find it extremely difficult to feel that a strong sense of duty would compel them to accept appointment to the Commission if it were set up in the manner and with the title and prohibitions proposed.

9 APR 1956