

THE ROLE AND APPOINTMENT OF AUSTRALIAN GOVERNORS

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I propose to deal with the relatively little known, but unique, role of Australian Governors in our governance process and the method of their appointment in the current and possible future circumstances. I will also mention briefly in that context what takes place in this regard in other former British colonies in the Asia Pacific Region.

For ease of reference, when referring to Australian Governors, I will not distinguish between State Governors on the one hand, and the Governor-General on the other. All of them have similar powers and restraints, although, as Sir Paul Hasluck recognised, the personality and qualifications of a Governor plays a role in the way each interprets the Office. I will also use the terms Governor and Governor-General interchangeably, as I will with Prime Minister and Premier. The question is often put, as though a negative answer to it is a foregone conclusion: Why do we need a Governor at all? I suggest that an understanding of the role makes plain that the Office is essential to the maintenance of our democratic governance framework and to the development of the aspirations of our community.

Much of the Governor's work is performed without publicity or knowledge by the wider community. That many of the Governor's functions are not more widely known is not surprising given that schools do not teach the subject, it is not a topic that is studied at the university, and usually a Governor's activities are of little interest to the media. The Governor is, in

essence, a background figure whose exercise of powers is of no real interest to the media until there is a risk that our constitutional process is endangered, as was the case, for example, in 1975. Nevertheless, as I will describe later, the Governor is effectively a hedge against constitutional impropriety by the government. Thus, no news of the Governor's public participation in the governance process tends to indicate that the government of the day is complying with democratic requirements.

An Australian Governor is not only the Queen's representative here but is also the effective Head of State with considerable executive powers that are bestowed by the *Constitution* and other relevant legislation that are essential to our democratic system of government, such as the power to dissolve Parliament, appoint the Prime Minister, give assent to Bills passed by both Houses of Parliament thereby converting them into law, and many other like functions. In essence, the Governor is the nominal chief executive of the State. But as is so often the case in the British-based constitutional arena, these powers are far from absolute. By a binding convention, they can only be exercised in accordance with the decision of the elected Government, usually voiced through the Premier or other relevant Minister. It is this convention that ties the exercise of these powers to the decision of the voters who elected the government.

In order better to understand the role of our Governors it is helpful to look at the evolution of that Office. It is the oldest part of the machinery of government in Australia and has undergone the most substantial change of any public office in our country, having been established in 1788 with the arrival of the First Fleet. The powers that Arthur Phillip held initially as a Viceroy

have since been distributed amongst the Governor, Parliament, Executive Government and the Courts.

With the advent of responsible government of the Australian colonies in the 19th century, the position of the Australian Governors became an ambivalent one until Australia became a Dominion following the Imperial Conferences of 1926 and 1930. Before that occurred, Governors had to balance the advice given to them by the locally elected Ministers with the responsibility of representing the government of the United Kingdom. Since the Imperial Conferences England no longer dictated policy to its former Australian colonies, and relevantly for present purposes, our Prime Ministers and Premiers assumed the sole entitlement to recommend to the Monarch who was to be appointed Governor. Thus in 1931, for example, Sir Isaac Isaacs was the first Australian to be appointed Governor-General of Australia on the recommendation of the Australian Prime Minister (albeit against the wishes of King George V).

A critical development in this area was the passing of the Australia Act of 1985 by the Commonwealth and United Kingdom Parliaments, essentially in matching terms, and corresponding State Acts that followed. So far as is relevant for present purposes, they formally entrenched the Governors as the effective Heads of State including the practice of the Queen appointing Australian Governors only on the advice of the Head of Government, be it Prime Minister or Premier. Save for this power of the Monarch in our governance system, these Acts completed the effective detachment of the Australian system of government from that in the United Kingdom and some say that from that point Australia became a Monarchical Republic.

So how do Australian Governors maintain our democratic framework — what is their role in that regard? In broad terms, the Governors perform two primary functions: one that is based on constitutional responsibilities and the other involves engagement with the community. Both are important to our community.

Turning first to the constitutional role, so far as is relevant that can be summed up as facilitating and ensuring the proper working of our Parliamentary democracy. In practical terms, the Governor does this by overseeing the workings of the government of the day to ensure that it acts within its constitutional boundaries and the Rule of Law. This is done through a process known as Governor in Council by which the government of the day implements its major agenda.

As the name suggests, the Governor in Council is made up of the Governor as chair and senior Ministers who are members of the Executive Council. In Victoria, for example, the Governor usually meets with four Executive Council Ministers every Tuesday morning and they deal with recommendations of various Ministers as to the implementation of government business. A similar process takes place at the Federal level and in other jurisdictions.

There are many Acts of Parliament that delegate to the Governor in Council the power to deal with Ministerial recommendations relating to the implementation of the business of the government which Parliament considers to be too important to be handled by the recommending Minister alone. Those powers include, for example, the power to make various regulations, proclamations and administrative orders regarding the appointment or dismissal of important statutory officers and appointment of judges, just to mention some.

Thus, a wide range of government work is dealt with by the Governor in Council process. As I mentioned, each item of business springs from a recommendation of a Minister, and one of the Governor's responsibilities in that regard is to be satisfied that the Minister's recommendation to the Executive Council was made within power and on a proper basis. This means, of course, that the Governor has to examine all the material on which the Minister has based the recommendation to the Council in order to determine if it has been properly made. This is usually done by the Governor over the weekend and Monday by going through the papers that have been delivered on a Friday for attention at the forthcoming Governor in Council meeting.

Obviously enough, in carrying out this function, the Governor is not concerned with the wisdom of the Minister's proposal, or about issues of politics or public policies; these are matters for the elected government. Similarly, it is for the Courts ultimately to determine the validity or otherwise of the exercise of the power. On occasions, the Governor requires further information about the Minister's proposal in order to be satisfied of its propriety. In that event, the matter is dealt with in the first instance by the Clerk to the Executive Council, and if that does not lead to a resolution of the query the Minister calls on the Governor to clarify the concern. In my experience, Ministers have always been forthcoming in responding helpfully to any query that I had in that context.

Other main constitutional duties of the Governor include giving assent to Bills so as to convert them into Acts, calling an election, dissolving the legislature and swearing in the Premier or Prime Minister and so on. These duties are carried out by the Governor in accordance with the well-established and accepted conventions, usually on the advice of the Premier.

Although the Governor is bound by convention to exercise the powers only on Ministerial advice, as Walter Bagehot said in *The English Constitution*, the Governor has certain important rights when dealing with the government and its Ministers. Essentially, they are the right to be consulted by the government on issues that the Governor considers of importance to the State or the issue at hand, the right to counsel the Premier about the propriety of proposed government action and the right to warn the Premier of the consequences of the proposed course. Such a warning may include, in an exceptional case, a warning of the possibility of the Governor exercising the reserve power. Obviously enough, such warning would be given rarely, having regard to the fact that this power is only to be exercised where there is no alternative, in order to ensure that government acts in accordance with accepted democratic requirements.

Turning to the Governor's second primary role, that of engaging with the community, this function is, without doubt, the most time-consuming one and usually involves not only the Governor, but also his or her spouse. They engage with the community so as to promote attitudes that support democracy, create a strong community and encourage citizens to achieve their best. In exercising this role, the Governor seeks to facilitate social cohesion, mutual respect and confidence amongst members of the community. As Sir Zelman Cowen said, it is through such contacts that the Governor can offer encouragement and recognition to many Australians, some of whom may not be very powerful or visible in the course and bustle of everyday life, and thus applaud the efforts of individuals and groups who work constructively to improve life in Australia. Most of them are, of course, volunteers.

One of the ways in which the Governor engages with the community is through his and her spouse becoming patrons of community organisations. For example, my wife and I were jointly and severally patrons of well over 160 such organisations, nearly all of which were made up of volunteers, or largely so, and which we supported in various ways.

The Governor also holds receptions at Government House to recognise valuable community work by individuals or groups, such as the Order of Australia events, and encourages numerous activities that benefit the community and its volunteer organisations.

The Governor is also involved throughout the year in many ceremonies which instil the shared values of a democratic community and confidence in its operations. Thus, the Governor gives the main public address on Australia Day and Anzac Day and attends many events of importance to the community throughout Victoria such as, for example, unveiling in a regional town statues of three winners of the Victoria Cross who came from the region.

Furthermore, as part of such duties, the Governor travels extensively throughout Victoria and speaks with local communities so as to ensure that it is appreciated that he or she is Governor for the whole of Victoria, not just Melbourne. Such visits include going to areas of development, as well as those that have been affected by natural disasters such as bushfires and floods, or significant economic downturn. When making such visits, the Governor represents the whole community in expressing support for those in the regions and sharing sympathy with those who have suffered from devastations. It is a way of expressing the bond between all Australians in times of trouble.

Furthermore, the Governor often travels overseas on behalf of the State as its effective Head of State in order to develop and strengthen international relationships between Victoria and overseas jurisdictions in areas such as trade, cultural exchange, education and so on.

To sum up, the Australian Governor is the only holder of public office who plays a key role in ensuring that government adheres to constitutional propriety in conducting its operations. He or she also actively engages with the community so as to encourage its members to achieve their potential and to thank those who helped others who find it difficult to cope in a society that seems to be becoming less concerned with the wellbeing of others.

Before concluding, I will touch briefly on the current process of appointing our effective Heads of State and how that might be done should Australia become a Republic. Just to be clear, however, I do not intend to advocate here what course of action we should take in that regard. This complex topic deserves a much more detailed and considered analysis than one that I can provide here as a tail end of a discussion centred around the role of Australian Governors. But my guess is that, in any event, nothing will happen in terms of a referendum until the 'Voice' issue has been settled.

In considering the appointment of Governors it is necessary to appreciate the unique position of our States, more particularly, the retention by them after Federation of direct links with the Crown, thus entitling them to procure the appointment of their respective Governors through the recommendation of their Premiers. As Professor Anne Twomey explains so clearly (*The Chameleon Crown*, 2006, 18-19):

Federation did not transform Australia into an independent sovereign nation. It merely consolidates six colonies into one federated larger colony ... They had not sunk to the position of the Canadian Provinces, which were subordinated to the Canadian Federal Government. The Constitutional Convention (here) had deliberately rejected the subordination of State Governors to the Governor-General and the severance of direct links between the States and the United Kingdom. The States therefore regarded themselves as “sovereign within their sphere.”

It is well known that the current process of the Queen appointing our Governors on the recommendation of the Head of Government has been seamless and, as far as I know, has not involved politics. If one compares this with a like situation in Canada and India, for example, where the role of their Head of State is similar to that of Australian Governors in terms of fundamentals, there are major differences.

First, the President of India is not appointed but is elected by a body akin to an Electoral College, which is primarily made up of many Federal and State Parliamentarians and other stakeholders. Often, if not usually, this engenders public disputes, often along party lines. This is unsurprising given that the Electoral College is made up of a large number of people from cross-sections of various parts of India and various political factions and groups.

Secondly, the Provincial Governors in Canada and India are appointed by the Head of State: the President in India and the Governor-General in Canada. Importantly, in each case the appointment is made on the recommendation or direction of the Central government of the day. Thus, the Premier, or Chief

Minister, of the Province has no final say as to who is to be the Provincial Governor, or on the matter of his or her termination.

Given our present stable and effective position in relation to the appointment of our effective Head of State, I suggest that it is important not to rush to embrace constitutional models operating overseas which have direct elections of the Head of State and which appear to work satisfactorily there. These models may not be appropriate here, such as the model in India. For completeness, I mention in this context that comparison with Ireland may not be helpful either because, amongst other matters, the President there does not have the executive powers of our Governor-General. A like observation can be made in relation to Malaysia (which is also a Federation based on the Westminster system) where the Head of State, the King, is elected on a rotating basis every few years from the Sultans of the various Provinces (which avoids political controversy). It is to be remembered that our governance process in that regard is unique to Australia.

When considering whether Australia should change the process of appointing its Governors, and in that context effectively sever completely its ties with the British Crown, it is vital to ensure that whatever form that separation takes it does not put at risk the quality, strength and safeguards of our democracy, which is one of the oldest, most stable and most successful in the world. As I have mentioned, its form is unique to Australia and has been moulded for almost two hundred years to the Australian context.

As many of you will recall, almost 20 years ago serious consideration was given in Australia to whether we should become a Republic. In the result, at the 1998 Constitutional Convention four principal models for such change were eventually put forward concerning the changing of the

appointment of our Head of State: known respectively as the Turnbull, Gallop, Hayden and McGarvie models.

Time does not permit a detailed consideration of these proposals, but I will briefly mention some of their features, beginning with those that are common to them all. First, they were concerned only with the position at the Federal level. Next, the Head of State, no matter under which model he or she was elected or appointed, was to have essentially the same powers as the present Governor-General and was to be bound essentially by the same conventions that now operate in respect of that Office.

Unsurprisingly, there were sharp differences between the four proposals. Under the Gallop model, for example, the Head of State was to be elected by Australian voters from no less than three candidates selected by a two-thirds majority of a joint sitting of the Commonwealth Parliament. The Hayden model allowed any citizen to stand for election for the office if he or she was endorsed by at least 1% of enrolled Federal voters. Under the Turnbull model candidature was to be open to all registered Federal voters and a Short List Committee, to be established by the Commonwealth Parliament, was to prepare a list of candidates for consideration by the Prime Minister. Then, the Head of State was to be appointed by a two-thirds majority of a joint sitting of the Commonwealth Parliament on a motion of the Prime Minister and seconded by the Leader of the Opposition.

In the case of these three models, the Head of State would be known as 'President'. There were other differences between these proposals on matters such as tenure and the question of dismissal, which are not necessary to discuss here.

The McGarvie model contemplated the fewest changes in this regard. It proposed the establishment by the Commonwealth Parliament of a Constitutional Council comprising the most recently retired Governor-General, Chief Justice of Australia and State Governor. The appointment (and dismissal) of the Head of State was to be made by the Council on the advice of the Prime Minister, who would choose the candidate from citizens nominated for that Office by Australian individuals or organisations.

In my view, none of these proposals is without difficulty. In particular, the two models that call for direct election of the Head of State create the risk, as Sir Samuel Griffith said during the Convention debates, of politicising the office. As most of you know, the Conventions rejected the proposal for an elected Governor-General.

Another difficulty with the 'election' model is that as a matter of reality most candidates seeking to be elected President are likely to have been supported by a political party or a special interest group, so there would be a real risk that once elected the party or group would have at least some influence over them. Moreover, a directly elected President would be the only high office holder in Australia to have been elected by voters, so there is the real risk that this process may produce a political Head of State. Furthermore, over time he or she may become potentially a powerful rival of the Prime Minister in at least some political affairs. Elections give authority and authority gives effective power!

The Turnbull model also risked politicising the process through the contemplated deal-making between the Prime Minister and the Leader of the Opposition. Moreover, labelling our Head of State as 'President' under the three models to which I have referred would risk creating an expectation that the holder

of the Office would increase his or her direct participation in governance activities, at least some of which are commonly performed by the Prime Minister.

Most importantly, I think, all the three models would discourage people of considerable public reputation in the community, like the late Sir Ninian Stephen or Sir Paul Hasluck, from standing for office.

It seems to me that *if* there is a popular move in Australia for it to make its own appointment of the Head of State, the simplest (known) model to adopt would be that of the late Richard McGarvie, a former Supreme Court Judge and Governor of Victoria which, as I have mentioned, contemplates an effective substitute of the Constitution Council for the current role of Her Majesty without involving political parties in that process and without it risking disrupting the presently enjoyed democratic process.

As I said earlier, the question of Australia becoming a Republic without putting at the risk our present democratic process warrants a more careful and comprehensive analysis than I have been able to provide here, given the constraints of time.

Nevertheless, I hope that my brief summary of the possible options for the appointment of an Australian Head of State gives a broad picture of what may be involved in seeking to remove totally the Monarchy from our present Constitutional governance model.

