Chapter Five
The Governor-General is our Head of State

Sir David Smith, KCVO, AO

"Constitutional reform is a serious matter. Unlike ordinary law reform whose effects are confined to specific areas and which may be modified or repealed if it turns out to have been ill-advised, constitutional reform impacts upon the entire system of law and government and is virtually irreversible. It follows that we have an obligation not only to ourselves but to our descendants to consider any proposals to change the Constitution of the Commonwealth or a State rationally, deliberately and with a complete understanding of the nature of that which is being changed and of what the consequences of the change will be".[1]

The republicans are at it again, despite the hiding that they received in 1999, and despite the fact that the latest polling shows support for the republic has declined since 2001. A cross-party republican forum has been established in the Commonwealth Parliament, and *The Australian* newspaper has taken up the cause again, so the task is before us once more.

And what is it that these politicians and *The Australian* want to foist on us? They want us to become a republic, but they don't yet know what sort of republic. In fact there is no such thing as "a republic". The United Nations recognises 191 independent countries in the world, and more than half of them – 104 by my count – are republics. Most of these republics are different from each other, and none of them offers a better system of government than the one we have enjoyed on this continent for more than 150 years, and as a nation for more than a century. As former Chief Justice of the High Court, Sir Harry Gibbs, has reminded us, most of the world's monarchies are free and democratic societies, and most of the world's republics are not. So when we speak of a republic, we need to know what sort of republic. Just remember that both Mary Robinson and Saddam Hussein were republican Presidents.

When the republicans came to the 1998 Constitutional Convention they had ten different republican models on the table. By the end of the first week they had reduced the number to four, and by the end of the second week they had their preferred model – the one which the Australian people threw out neck and crop at the 1999 referendum.

After the referendum, the Australian Republican Movement produced six republican models for consideration, and by last year they had reduced the number to five. At this rate they should have their one preferred model in sixteen years' time. In the meantime they support the proposal put forward by Mark Latham when he was Opposition Leader, and now supported by his successor, Kim Beazley, and by *The Australian*, that a plebiscite be held to ask the Australian people whether they want a republic.

This plebiscite proposal is blatantly dishonest. It would simply ask us whether we want a republic, but it would not tell us what kind of republic we would get. It would violate the provisions of our Constitution, that require the Australian people to be given the full details of any proposal to alter the Constitution before we are asked to vote on it, and not afterwards.

It has been my experience that the republican campaign is led by people

who are ignorant of, or deliberately misrepresent, the provisions of our present Constitution, and the effect of the constitutional changes that they seek. They have done this by putting forward two reasons for our becoming a republic, both of which are simply not true.

Their first argument is that Australia must become a republic in order to become independent. But Australia has long been a fully independent nation. In 1985 the Hawke Government established a Constitutional Commission and charged it with carrying out a fundamental review of the Australian Constitution. Three of the Commission's members were distinguished constitutional lawyers – Sir Maurice Byers, former Common-wealth Solicitor-General and chairman of the Commission; Professor Enid Campbell, Professor of Law at Monash University; and Professor Leslie Zines, former Professor of Law at the Australian National University. The other two members were former heads of government – the Hon Sir Rupert Hamer, former Liberal Premier of Victoria, and the Hon E G Whitlam, former Labor Prime Minister of Australia. The Commission was assisted by an Advisory Committee on Executive Government under the chairmanship of former Governor-General, Sir Zelman Cowen.

One of the Commission's terms of reference required it to report on the revision of our Constitution to "adequately reflect Australia's status as an independent nation". In its final report, presented in 1988, the Commission traced the historical development of our constitutional and legislative independence, and concluded:

> "It is clear from these events, and recognition by the world community, that at some time between 1926 and the end of World War II Australia had achieved full independence as a sovereign state of the world. The British Government ceased to have any responsibility in relation to matters coming within the area of responsibility of the Federal Government and Parliament. ... The development of Australian nationhood did not require any change to the Australian Constitution".[2]

That report, it seems to me, effectively disposed of one of the propositions used by republicans when they try to argue that Australia needs to become a republic in order to become independent.

The second argument upon which the case for a republic is based is that the Queen, as well as being our Monarch, is also our Head of State, and that an Australian republic would give us an Australian Head of State. This proposition is also untrue. Furthermore, it is based on the equally untrue proposition that the Governor-General is nothing more than the Queen's representative, and has no independent constitutional role.

The fact is that the Australian Constitution gives the Governor-General two separate and distinct roles – one as the Queen's representative and another as the holder of an independent office. And this too was confirmed by the Hawke Government's Constitutional Commission in its 1988 report:

> "The Queen does not intervene in the exercise by the Governor-General of powers vested in him by the Constitution and does not Herself exercise those powers. ... Although the Governor-General is the Queen's representative in Australia, the Governor-General is in no sense a delegate of the Queen. The independence of the office is highlighted by changes which have been made in recent years to the Royal instruments relating to it".[3]

I shall return to those recent changes later in this paper.

The Queen plays an important role under our system of government as Queen of Australia,[4] as does the Governor-General as the Queen's representative and as the embodiment of the Crown in Australia. These separate and distinct roles are carried out without detriment to our sovereignty as a nation, and without detriment to our independence. To argue that the Queen is not Australia's Head of State does not in any way diminish the role that the Queen has in our Constitution and under our system of government as the Monarch. It is simply the case that she does not have, and therefore does not exercise, Head of State powers and functions.

The Australian Constitution does not contain the words "Head of State", nor was the term discussed during the constitutional debates which resulted in the drafting of the Constitution and its subsequent approval by the Australian people. In the absence of a specific provision in the Constitution, an examination of just who actually performs the duties of Head of State is a useful starting point in determining who occupies that Office.

These duties are performed by the Governor-General, and by the Governor-General only. The Sovereign's only constitutional duty is to approve the Prime Minister's recommendation of the person to be appointed Governor-General, or to approve the Prime Minister's recommendation to terminate the appointment of a Governor-General. The Governor-General is the Queen's representative, for that is how he is described in s. 2 of the Constitution, and that enables him to exercise the Royal prerogatives of the Crown in Australia. However, when he carries out his constitutional duties to exercise the executive power of the Commonwealth under Chapter II of the Constitution – the Chapter headed "The Executive Government" – and in particular under s. 61 of the Constitution, he does so in his own right, and not as a delegate or surrogate of the Queen.

Constitutional scholars, in their text books and in other writings, have referred to the Governor-General as Head of State, albeit on occasions prefixed by an adjective such as "constitutional" or "*de facto*".[5]

Prime Minister Gough Whitlam considered Governors-General Sir Paul Hasluck and Sir John Kerr to be Australia's Head of State, and ensured that when Sir John travelled overseas in 1975 he did so as Head of State, and was acknowledged as such by host countries.[6]

The media have referred to the Governor-General as Head of State for almost 30 years;[7] so much so that *The Australian*'s Editor-at-Large, Paul Kelly, was able to write two years ago:

> "Have Australians decided not by formal referendum but by informal debate that the governor-general is our head of state? ... Take the media eruption of calling the governor-general head of state, pursued in the papers, the ABC and commercial media. Simon Crean [then Leader of the Opposition] now refers to the office as the head of state".[8]

In recent years, scholarly commentators such as Richard McGarvie, formerly Governor of Victoria and a Judge of the Supreme Court of Victoria,[9] and Professor George Winterton, formerly Professor of Law at the University of New South Wales and now Professor of Constitutional Law at the University of Sydney,[10] joined the media in referring to the Governor-General as Head of State. And we have seen official Commonwealth Government publications, such as the *Commonwealth Government Directory*, now published as *A Guide to the Australian Government*, refer to the Governor-General as Head of State.

But all this is only anecdotal evidence; of much more significance in determining this important question is the legal evidence for the view that the Governor-General is our Head of State.

During 1900 Queen Victoria signed a number of constitutional documents relating to the future Commonwealth of Australia, including Letters Patent constituting the Office of Governor-General, and Instructions to the Governor-General on the manner in which he was to perform certain of his constitutional duties.[11]

Two distinguished Australian constitutional scholars, A Inglis Clark,[12] who had worked with Sir Samuel Griffith on his drafts of the Constitution, and who later became Senior Judge of the Supreme Court of Tasmania, and W Harrison (later Sir Harrison) Moore,[13] who had worked on the first draft of the Constitution that went to the 1897 Adelaide Convention, and who was Professor of Law at the University of Melbourne, expressed the view that the Letters Patent and the Royal Instructions were superfluous, or even of doubtful legality. They did so on the grounds that the Governor-General's position and authority stemmed from the Australian Constitution, and that not even the Sovereign could purport to re-create the Office or direct the incumbent in the performance of his constitutional duties.[14]

Unfortunately, British Ministers advising Queen Victoria failed to appreciate the unique features of the Australian Constitution, and Australian Ministers failed to appreciate the significance of the Letters Patent and the Instructions which Queen Victoria had issued to the Governor-General. Thus, between 1902 and 1920, King Edward VII and King George V were to issue further Instructions on the advice of British Ministers, and in 1958 Queen Elizabeth II amended the Letters Patent and gave further Instructions to the Governor-General on the advice of Australian Ministers.

In 1916, during a Canadian case before the Privy Council, Lord Haldane, Lord Chancellor of Great Britain and President of the Judicial Committee of the Privy Council, commented on the absence, from the *British North America Act*, of any provision corresponding to s. 61 of the *Commonwealth of Australia Constitution Act*.[15]

In 1922, during the hearing of an Australian case – an application by the State Governments for special leave to appeal to the Privy Council from the High Court's decision in the *Engineers' Case*[16] – Lord Haldane had occasion to make a similar observation when he asked, with reference to s. 61:

> "Does it not put the Sovereign in the position of having parted, so far as the affairs of the Commonwealth are concerned, with every shadow of active intervention in their affairs and handing them over, unlike the case of Canada, to the Governor-General?".[17]

Clearly Lord Haldane shared the view of our constitutional arrangements in respect of the Governor-General's powers which had been expressed earlier by Clark and Moore.

The views of Clark and Moore about the Governor-General's status under the Constitution, and the observations by Lord Haldane about s. 61, highlight one of the saddest aspects of the republican debate over the past decade or more. While much of the debate has concentrated on specific provisions in the Constitution, a major tactic has been to try and denigrate the entire document in general. But our Founding Fathers crafted and drafted a better Constitution than they have been credited with.

Although they were producing a Constitution for a Dominion that was not yet fully independent, they were also drafting a Constitution that would enable Australia to become a fully independent sovereign nation of the world, without one word of the Constitution needing to be altered. In particular, they gave to the Governor-General an additional independent constitutional position not given to any other Governor or Governor-General anywhere else in the British Empire. Sadly, it took Australian Governments eighty-four years to realise that fact, and I shall come back to the action taken by Prime Minister Bob Hawke in 1984 to resolve this issue.

The 1926 Imperial Conference of the Empire's Prime Ministers declared that the Governor-General of a Dominion would no longer be the representative of His Majesty's Government in Britain, and that it was no longer in accordance with a Governor-General's constitutional position for him to remain as the formal channel of communication between the two Governments. The Conference further resolved that, henceforth, a Governor-General would stand in the same constitutional relationship with his Dominion Government, and hold the same position in relation to the administration of public affairs in the Dominion, as did the King with the British Government and in relation to public affairs in Great Britain. It was also decided that a Governor-General should be provided by his Dominion Government with copies of all important documents and should be kept as fully informed of Cabinet business and public affairs in the Dominion as was the King in Great Britain.[18]

The 1926 Imperial Conference also made another decision which is of direct relevance to the contemporary debate in Australia. The Prime Ministers recognised that the Sovereign would be unable to pay State visits on behalf of any Commonwealth country other than the United Kingdom, and it was agreed that Governors-General of the various realms would pay and receive State visits in respect of their own countries. Buckingham Palace made it clear that it expected that Governors-General would be treated as the heads of their respective countries, and would be received by host countries with all the marks of respect due to a visiting Head of State. Canada exercised this right almost immediately and its Governors-General began visiting other countries the following year, 1927, but Australia waited until 1971, 44 years after Canada, to follow suit.[19]

The 1930 Imperial Conference resolved that, in appointing a Governor-General, the King should in future act on the advice of his Ministers in the Dominion concerned, and not on the advice of British Ministers as previously had been the case. It was also resolved that the making of a formal submission should be preceded by informal consultation with the King, to allow him the opportunity to express his views on the nomination.[20]

In 1953, in the course of preparing for the 1954 Royal visit to Australia, Prime Minister Robert Menzies wanted to involve the Queen in some duties of a constitutional nature, in addition to the inevitable public appearances and social occasions. It was proposed, in particular, that the Queen should preside at a meeting of the Federal Executive Council and open a session of the Commonwealth Parliament. As this was the first visit to Australia by a reigning Monarch, it was thought necessary to ensure that it was constitutionally in order for her to carry out these functions, and the Commonwealth Solicitor-General, Sir Kenneth Bailey, was asked for a legal opinion.[21]

In the matter of presiding at a meeting of the Federal Executive Council, the Solicitor-General advised that it would be necessary to arrange the business of the meeting with some care. His view was that such a meeting would not be able to exercise any of the statutory powers and functions conferred on the Governor-General in Council by Acts of Parliament, unless Parliament in the meantime were to pass an Act to empower the Queen in Council to exercise these functions.

By means of the *Royal Powers Act* 1953, Parliament did provide that:

> "When the Queen is personally present in Australia, any power under an Act exercisable by the Governor-General may be exercised by the Queen".[22]

The Act further provided that the Governor-General could continue to exercise any of his statutory powers even while the Queen was in Australia, and in practice Governors-General have continued to do so.

Special provision was also made to enable the Queen to open the Commonwealth Parliament. Section 5 of the Constitution provides for the Governor-General to appoint the times for the holding of sessions of the Parliament. In similar fashion, the Standing Orders of both Houses of the Parliament provide for the Governor-General to do certain things in relation to the Parliament. In 1953 both the Senate and the House of Representatives amended their Standing Orders to provide that, when the Queen is present in Australia, references to the Governor-General should be read as references to the Queen.[23]

Thus, although the Constitution and the Standing Orders of the Parliament confer the necessary powers and functions to preside over meetings of the Federal Executive Council and over the opening of Parliament on the Governor-General in his own right, and on him alone, the Queen is able to perform these functions of the Governor-General when she is in Australia, but only because Parliament legislated on the one hand, and amended its own Standing Orders on the other, to enable references to the Governor-General to be read as references to the Queen.

However, nothing could be done, except by way of a constitutional amendment under s. 128 of the Constitution, to delegate the Governor-General's constitutional powers to the Sovereign, and they remain exclusively with the Governor-General. As Sir Kenneth Bailey put it:

> "The Constitution expressly vests in the Governor-General the power or duty to perform a number of the Crown's functions in the Legislature and the Executive Government of the Commonwealth. In this regard, the Australian Constitution is a great deal more specific and detailed than is the earlier Constitution of Canada".[24]

The 1953 opinion by the Commonwealth Solicitor-General confirmed that the Governor-General is not the Queen's delegate in the exercise of his constitutional powers and functions, and explains why the Queen has never exercised any of these constitutional powers and functions, even when in Australia.

In 1975 the Commonwealth Solicitor-General, Mr (later Sir) Maurice Byers, gave Prime Minister Gough Whitlam a legal opinion in which he (the Solicitor-General) concluded that the Royal Instructions to the Governor-General were opposed to the words of the Constitution; that the Executive power of the Commonwealth exercisable by the Governor-General under Chapter II of the Constitution may not lawfully be the subject of Instructions; and that this had been the case since 1901.[25]

The Solicitor-General's first conclusion was that, as the Office of Governor-General was created by the Constitution, and as the Constitution also prescribed the nature and functions of the Office, Queen Victoria's Letters Patent, as amended from time to time, "were in many, if not most, respects unnecessary".

The Solicitor-General next referred to the Royal Instructions to the Governor-General that had been issued in 1900 and subsequently amended from time to time, and he concluded that they were not only anachronistic and unnecessary, but that they were also opposed to the words of the Constitution and therefore unlawful. Sir Maurice Byers went on to advise, in particular, that:

> "The Executive power of the Commonwealth exercisable by the Governor-General under Chapter II of the Constitution may not lawfully be the subject of Instructions".

The Solicitor-General's Opinion also dealt specifically with the widely-held but incorrect view that the Governor-General, because of the description of the Office as "the Queen's representative", could therefore act only as her representative, and he went on to refer, with approval, to the views expressed in the Privy Council by Viscount Haldane in 1916 and 1922 in relation to s. 61 of the Australian Constitution. He concluded his Opinion with: "I think no place remains for Instructions to the Governor-General".

As the 1953 and 1975 Opinions of the Commonwealth's Solicitors-General, and the 1988 Report of the Constitutional Commission, make clear, the reference in the Australian Constitution to the Governor-General as the Queen's representative is descriptive only, and does not define or limit his role as the holder of independent executive power in his own right as Governor-General.

The dismissal of the Whitlam Government on 11 November, 1975, two months after the Prime Minister had received the Byers Opinion, was to provide further evidence in support of all the legal opinions which had been given over the previous seventy-five years. Writing after the event, Governor-General Sir John Kerr, a former Chief Justice of New South Wales, said:

> "I did not tell the Queen in advance that I intended to exercise these powers on 11 November. I did not ask her approval. The decisions I took were without the Queen's advance knowledge. The reason for this was that I believed, if dismissal action were to be taken, that it could be taken only by me and that it must be done on my sole responsibility. My view was that to inform Her Majesty in advance of what I intended to do, and when, would be to risk involving her in an Australian political and constitutional crisis in relation to which she had no legal powers; and I must not take such a risk".[26]

After the Governor-General had withdrawn the Prime Minister's Commission, the Speaker of the House of Representatives wrote to the Queen to ask her to restore Whitlam to office as Prime Minister. In the reply from Buckingham Palace, Mr Speaker was told:

> "As we understand the situation here, the Australian Constitution firmly places the prerogative powers of the Crown in the hands of the Governor-General as the representative of the Queen of Australia. The only person competent to commission an Australian Prime Minister is the Governor-General, and the Queen has no part in the decisions which the Governor-General must take in accordance with the Constitution. Her Majesty, as Queen of Australia, is watching events in Canberra with close interest and attention, but it would not be proper for her to intervene in person in

matters which are so clearly placed within the jurisdiction of the Governor-General by the Constitution Act".[27]

As the defining Head of State power is the power to appoint and remove the Prime Minister, that reply confirmed, if confirmation were needed, that the Governor-General is indeed Australia's Head of State. Even so, it took another nine years before the matter of Queen Victoria's Letters Patent and Royal Instructions, as amended, was finally resolved.

On 21 August, 1984, on the advice of Prime Minister Bob Hawke, the Queen revoked Queen Victoria's Letters Patent relating to the Office of Governor-General, all amending Letters Patent, and all Royal Instructions to the Governor-General, and issued new Letters Patent which, in the words of the Prime Minister, would:

> "..... achieve the objective of modernising the administrative arrangements of the Office of Governor-General and, at the same time, clarify His Excellency's position under the Constitution. The new Letters Patent do not in any way affect the position of Her Majesty as Queen of Australia or diminish in any way the constitutional powers of the Governor-General".[28]

On the contrary, the new Letters Patent strengthened the constitutional position of the Governor-General by not purporting to create the Office, as the original Letters Patent had done, and by acknowledging the creation of the Office by the Australian Constitution. At long last, the Royal Instructions that should never have been issued in the first place were revoked. No new Instructions were issued and none is now in existence. The 1901 views of Clarke and Moore finally were vindicated, and the Governor-General was acknowledged to be what in fact he had always been, namely, the holder of an independent Office created by the Australian Constitution and not subject to Royal, or any other, instructions.[29]

The legal evidence for the view that the Governor-General is Australia's Head of State which I have just put before you is not new. I first put it on the public record in 1995 in a public lecture I gave in Parliament House, Canberra, in the Australian Senate's *Occasional Lecture Series*.[30] I said it again in 1997 in a paper I gave at a conference held at the Australian National University, Canberra, by this Society.[31] It was the subject of a number of my newspaper articles and letters to the editor during the 1998-1999 campaign on the constitutional referendum. And last year it was the subject of one of my submissions to the Senate's Legal and Constitutional References Committee during its *Inquiry into an Australian republic*,[32] and is the subject of a booklet published late last year by Australians for Constitutional Monarchy.[33]

As was to be expected, many republicans have expressed their disagreement with my views about the Governor-General. During the campaign for the 1999 constitutional referendum, two of my strongest critics were former Governor-General Sir Zelman Cowen, and former Chief Justice of the High Court of Australia, Sir Anthony Mason. Yet Sir Zelman described the Governor-General as the Head of State in an interview he gave in 1977, while he was Governor-General designate,[34] and he did so again in a major lecture he gave in 1995, almost thirteen years after leaving office as Governor-General.[35]

As for Sir Anthony Mason, he tried to ridicule my claim that the Governor-General is our Head of State in the course of a lecture he gave to the Law School at the Australian National University in 1998,[36] but the arguments he used were totally wrong. In seeking to demean and diminish the Governor-General's role

under the Constitution, Sir Anthony claimed that, when the Queen arrived in Australia, the Governor-General ceased to function and the Queen took over his duties. This is not true, for it has never happened. In support of this fiction Sir Anthony claimed to have discovered a "robust" constitutional convention that prevented the Governor-General from appearing in public with the Queen. This also is not true, for they have appeared together at public functions on many occasions. This former Chief Justice of the High Court discovered a constitutional convention that does not exist, and based his so-called discovery on precedents that have never occurred.[37]

Sir Anthony should have known that there is no such constitutional convention, robust or otherwise. Not only is there a painting hanging in Parliament House, Canberra, showing the Queen and the Governor-General together at the opening of that building in 1988, but the then Chief Justice, Sir Anthony Mason, was present as an honoured guest and was seated in the very front row!

The fact is that, over the past ten years, not one republican constitutional lawyer or academic has sought to rebut the evidence which I have documented. This obviously worried the Senate's Legal and Constitutional References Committee as it conducted its final public hearing on the republic. In desperation, one of the Senators asked a republican witness from the University of Canberra, Dr Bede Harris, if he could prepare a response to my 29-page submission. He produced a one-page response in which he concluded that the term "Head of State" is not used in the Constitution; that it is a political term that means whatever the user wants it to mean; and that it is a term without any constitutional significance![38]

In saying this Dr Harris was echoing an earlier statement by Professor George Winterton that "debate over the identity of Australia's Head of State is an arid and ultimately irrelevant battle over nomenclature".[39]

If only Professor Winterton and Dr Harris had offered up these confessions years ago, they and their colleagues would not have spent more than a decade of wasted effort making the Head of State issue the central plank in their republican platform. Professor Winterton's remarks in particular tell us what has long been apparent, namely, that the republicans have no response to the evidence that the Governor-General is our Head of State, and that they have finally realised that this has punched a big hole in their case for a republic. And we must continue to punch away at their case for a republic, for no republic, of whatever kind, is any substitute for the system of government which we have now. And no republic will give us our independence from Britain, or an Australian Head of State, for we already have both.

As Sir Guy Green put it in his 1999 Menzies Oration:

> "Constitutional reform is a serious matter. ... [I]f it turns out to have been ill-advised [it] impacts upon the entire system of law and government and is virtually irreversible".

The drafting and approving of our present Constitution was a noble and uniting enterprise in which all Australians became involved. Today, the republican campaign to alter that Constitution and to give us a vastly different system of government is mean-spirited and divisive, and is founded on misrepresentation and falsehood. It must not succeed.

Endnotes:

1. Sir Guy Green, *Governors, Democracy and the Rule of Law*, The Sir Robert Menzies Oration, 29 October, 1999, p. 1. Sir Guy Green, who was Governor of Tasmania when he gave the oration, has also held office as Administrator of the Government of the Commonwealth of Australia, and as Chief Justice of the Supreme Court of Tasmania.
2. Final Report of the Constitutional Commission, Australian Government Publishing Service, Canberra, 1988, p. 75.
3. *Ibid.*, p. 313.
4. *Royal Style and Titles Act* 1953.
5. See for example D A Low (ed.), *Constitutional Heads and Political Crises: Commonwealth Episodes, 1945-85*, The Macmillan Press Ltd, London, 1988; David Butler and D A Low (eds), *Sovereigns and Surrogates: Constitutional Heads of State in the Commonwealth*, Macmillan Academic and Professional Ltd, London, 1991, particularly Chapter IV, Brian Galligan, *Australia*; Brian Galligan, *A Federal Republic: Australia's Constitutional System of Government*, Cambridge University Press, Cambridge, 1995; and Stuart Macintyre*, A Federal Commonwealth, an Australian Citizenship*, a lecture in The Australian Senate's *Occasional Lecture Series*, 14 February, 1997.
6. Paul Kelly, *The Unmaking of Gough*, Angus & Robertson, Australia, 1976, p. 19.
7. See *The Canberra Times*, 8 December, 1977; *The Australian*, 23 June, 1995 and 6 September, 1996; *The Weekend Australian*, 24-25 June, 1995; *The Age*, 23 April, 2001; *The Daily Telegraph*, 24 May, 2001; *The Weekend Australian*, 2-3 March, 2002, to quote but a few examples.
8. Paul Kelly, *Top-level straightjacket*, in *The Australian*, 28 May, 2003.
9. Richard E McGarvie, *Are we lurching towards 'mediacracy'?*, *The Age*, 13 May, 2003.
10. George Winterton, *Echoes of 1975 as holes in the constitution are exposed*, in *The Sydney Morning Herald*, 14 May, 2003.
11. *Commonwealth Statutory Rules 1901-1956*, Vol. V, pp. 5301-3 and pp. 5310-12.
12. A Inglis Clark, *Studies in Australian Constitutional Law*, Charles F Maxwell (G Partridge and Co), Melbourne, 1901.
13. W Harrison Moore, *The Constitution of the Commonwealth of Australia*, Charles F Maxwell (G Partridge and Co), Melbourne, 1910. (First published in 1901.)
14. See also H V Evatt, *The Royal Prerogative*, The Law Book Company Limited, Sydney, 1987, p. 172. (First published in 1924 as H V Evatt, *Certain Aspects of the Royal Prerogative: A Study in Constitutional Law*.)
15. [1916] 1 A C, pp. 586-7. Quoted in H V Evatt, *The King and his Dominion Governors*, Frank Cass and Company Limited, London, 1967, p. 311. (First edition 1936.)

16. *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd*, (1920), 28 CLR 129.
17. Transcript of argument, pp. 22-3. Quoted in Evatt, *The King and his Dominion Governors*, *op. cit.*.
18. Christopher Cunneen, *Kings' Men: Australia's Governors-General from Hopetoun to Isaacs*, George Allen & Unwin, Sydney, 1983, p. 168. See also (Sir) Zelman Cowen, *Isaac Isaacs*, Oxford University Press, Melbourne, 1967, p. 191; and D J Markwell, *The Crown and Australia*, The Trevor Reese Memorial Lecture 1987, Australian Studies Centre, London, 1987, pp. 9-10.
19. As at March, 2005, Australian Governors-General had made 63 State and official visits to 38 countries. In 1987, Governor-General Sir Ninian Stephen, acting on the advice of the Australian Government, cancelled a proposed visit to Indonesia because President Suharto had said that he would not be present at the welcome ceremony, but would instead send his Vice-President. That year Sir Ninian made State visits to Thailand, China, Malaysia and Singapore. In each of these countries the Governor-General was received as a Head of State. Shortly after the Malaysia and Singapore visits, the Indonesian Government admitted that it had made a wrong decision, claimed that it had been wrongly advised by its officials, and said that it would treat our Governor-General as a Head of State on any future visit. That promise was honoured in 1995 during a State visit to Indonesia by Governor-General Mr Bill Hayden.
20. Cunneen, *op. cit.*, p. 179; and Cowen, *op. cit.*, pp. 197-8.
21. *Constitution, sections 1, 2, 5, 61, 62: Royal visit, 1954: Functions to be Carried Out by Her Majesty the Queen*, Opinion of the Commonwealth Solicitor-General (Sir Kenneth Bailey), 25 November, 1953.
22. The *Royal Powers Act* 1953 has been invoked on rare occasions, and then only for symbolic reasons. The last occasion was 2 March, 1986 when, in a public ceremony at Government House, Canberra, the Queen proclaimed the *Australia Act* 1986 to come into operation on the following day. This would otherwise have been done by the Governor-General at a meeting of the Federal Executive Council. The Act had been given the Royal assent by the Governor-General on 4 December, 1985.
23. See Harry Evans (ed.), *Odgers' Australian Senate Practice,* Tenth Edition, Department of the Senate, Canberra, 2001, p. 171; and I C Harris (ed.), *House of Representatives Practice*, Fourth Edition, Department of the House of Representatives, Canberra, 2001, p. 225.
24. This point may be illustrated by comparing a couple of sections of the Canadian and Australian Constitutions:

    Canada. Chapter III. Executive Power.

    > "9. The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen".
    >
    > "15. The Command-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in Canada, is hereby declared to continue to be vested in the Queen".

    Australia. Chapter II. The Executive Government.

    > "61. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's

representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth".

"68. The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative".

25. *Governor-General's Instructions*, Opinion of the Solicitor-General of Australia (Sir Maurice Byers), 5 September, 1975.
26. Sir John Kerr, *Matters for Judgement*, The Macmillan Company of Australia Pty Ltd, South Melbourne and Artarmon, 1978, p. 330.
27. *Ibid.*, pp. 374-5.
28. Statement by Prime Minister Bob Hawke in the House of Representatives, *Parliamentary Debates*, Vol. H. of R. 138, 24 August, 1984, p. 380. The Prime Minister tabled a copy of the new Letters Patent relating to the office of Governor-General, together with the text of a statement relating to the document, but for some unknown reason he did not read the statement to the House, nor did he seek leave to have it incorporated in Hansard. The statement was later issued by the Prime Minister's Press Office.
29. The 1984 Letters Patent were amended by the Queen on the advice of Prime Minister John Howard on 11 May, 2003. The amendment provided for an additional circumstance in which a Governor-General might not be able to perform the duties of the Office, thus resulting in the appointment of a person to administer the Government of the Commonwealth. The amendment did not alter the position in relation to the matters discussed above.
30. Sir David Smith, *An Australian Head of State: An Historical and Contemporary Perspective*, in *Papers on Parliament*, Number 27, March, 1996, Department of the Senate, Parliament House, Canberra, pp. 63-80.
31. Sir David Smith, *The Role of the Governor-General*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 8 (1997), pp. 167-187.
32. Sir David Smith, *Who is Australia's Head of State?*, Submission No. 20A to the Senate's Legal and Constitutional References Committee during its *Inquiry into an Australian Republic*. Copies of the submission are available from the Secretary to the Committee, Parliament House, Canberra, and it has also been published on the Committee's web site.
33. Sir David Smith, *The Governor-General is Australia's Head of State*, with a Foreword by John Stone, Australians for Constitutional Monarchy, Sydney, 2004.
34. Claude Forell, *The Fragile Consensus*, in *The Age*, 13 August, 1977.
35. Sir Zelman Cowen, *Williamson Community Leadership Lecture*, Melbourne, 31 May, 1995, p. 14.
36. Sir Anthony Mason, *The Republic and Australian Constitutional Law*, Australian National University Law School seminar paper, Canberra, 11 May, 1998.
37. For more detailed accounts of Sir Anthony Mason's many errors of law and of fact in his seminar paper, see Sir David Smith, *A Funny Thing Happened*

on the Way to the Referendum, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 10 (1998), at pp. 31-35; see also Sir David Smith, *Judicial Activism is Alive and Well, Even in Retirement*, in *Quadrant*, November, 2003, pp. 42-43.

38. *The Road to a Republic*, Report of the Senate's Legal and Constitutional References Committee, Parliament House, Canberra, August, 2004, p. 49.

39. George Winterton, *Who is Our Head of State?*, in *Quadrant*, September, 2004, p. 60. See also the reply to Professor Winterton's question in Sir David Smith, *Why the Queen is Not Our Head of State*, in *Quadrant*, November, 2004, pp. 52-54.