

An Australian Head of State: An Historical and Contemporary Perspective ¹

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Today's lecture on the topic of 'An Australian Head of State: An Historical and Contemporary Perspective' follows the lecture given earlier this year by Senator Baden Teague on the topic of 'An Australian Head of State: The Contemporary Debate'.² In his lecture Senator Teague spoke of the Queen as our head of state and argued for her replacement by an Australian head of state. In his replies to questions after the lecture he spoke of the Governor-General as our head of state. The switch from Queen to Governor-General was entirely automatic and unselfconscious.

Senator Teague is not alone in his ambivalence. After Mr Bill Hayden's speech to the Royal Australasian College of Physicians earlier this year, the *Australian* published an edited version under the heading 'The Governor-General has made one of the most controversial speeches ever delivered by an Australian head of State'.³ The next day's editorial in the same newspaper said that 'it is perfectly appropriate at this stage of our constitutional development that the head of State address important issues of social policy'.⁴ These media references to the Governor-General as head of state are not just a recent phenomenon: for example, the

¹ I am indebted to the Dean of the Faculty of Law, the Australian National University, for his great courtesy in extending to me the hospitality of the Law School to enable me to carry out the research for this lecture and other writings. I am also grateful for the advice and help which I have received from members of the Faculty and Staff of the Law School. However, none of them is responsible for any of my views.

² Senator Baden Teague, 'An Australian Head of State: the Contemporary Debate', *Republicanism, Responsible Government and Human Rights*, Papers on Parliament, Number 26, August 1995, Department of the Senate, Canberra, 1995, pp. 19–33.

³ *The Australian*, 23 June 1995.

⁴ *The Weekend Australian*, 24–25 June 1995.

opening sentence of an editorial in the *Canberra Times* in 1977 was ‘We shall have today a new Governor-General, Sir Zelman Cowen, as our Head of State’.⁵

On 7 June this year the Prime Minister finally revealed his proposals for the republic.⁶ He told the House of Representatives that Australia’s head of state should be an Australian, but by the time he was half-way through his speech he, too, was using the term ‘Head of State’ to refer to the Governor-General.

The fact is that under our Constitution we have two heads of state—a symbolic head of state in the Sovereign, and a constitutional head of state in the Governor-General. A Canadian Governor-General, Lord Dufferin, in a speech given in 1873, provides us with an early example of a Governor-General being described as a constitutional head of state.⁷ The most recent description of the Governor-General as an Australian head of state was by Professor Brian Galligan, Professor of Political Science at the University of Melbourne, in his book *A Federal Republic: Australia’s System of Constitutional Government*, published only a few months ago.⁸

I propose, therefore, to talk about the roles of both the Sovereign and the Governor-General under our Constitution, and to discuss some of the changes which have occurred in each of these roles since Federation.

Our first Sovereign was Queen Victoria: her first duties were to issue Letters Patent assenting to the *Commonwealth of Australia Constitution Act 1900*, and to sign two assent copies of the Act itself, on 9 July 1900. On 17 September 1900 she issued a Proclamation declaring the first day of January 1901 to be the day on which the Federal Commonwealth of Australia was to come into being.⁹

On 29 October 1900, Queen Victoria signed another two constitutional documents: Letters Patent constituting the Office of Governor-General,¹⁰ and Instructions to the Governor-General.¹¹ Some commentators writing at the time thought that the Letters Patent

⁵ The *Canberra Times*, 8 December 1977.

⁶ *Commonwealth Parliamentary Debates*, vol. H. of R. 201, 7 June 1995, pp. 1434–41.

⁷ Lord Dufferin, then Governor-General of Canada, in a speech delivered at Halifax, Nova Scotia, in August 1873, described the Governor-General as ‘the head of a constitutional State, engaged in the administration of Parliamentary government’. Quoted by John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth*, Angus and Robertson, Sydney, 1901, p.700, and by L.F. Crisp, *Australian National Government*, Longman Cheshire Pty. Limited, Melbourne, 1978, p.400.

⁸ Brian Galligan, *A Federal Republic: Australia’s Constitutional System of Government*, Cambridge University Press, Cambridge, 1995, pp.21–2 and 245–7.

⁹ *Commonwealth Statutory Rules 1901–1956*, vol. V, p.5300.

¹⁰ *ibid.*, pp.5301–3.

¹¹ *ibid.*, pp.5310–2.

and the Instructions were superfluous, or even of doubtful legality.¹² However, between 1902 and 1920, King Edward VII and King George V were to issue further Instructions to the Governor-General,¹³ and in 1958 Queen Elizabeth II amended the Letters Patent and issued further Instructions.¹⁴

In 1975 the Commonwealth Solicitor-General provided the Prime Minister with a legal opinion that the Governor-General's constitutional powers could not properly be the subject of Instructions. Even so, it took another nine years before the matter was resolved. On 21 August 1984, on the advice of Prime Minister Hawke, Queen Elizabeth revoked Queen Victoria's Letters Patent and the 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'.¹⁵

The 1958 documents, to which I have already referred, had dealt with matters of minor detail, but they were very significant in the context of the evolution of Australia's constitutional arrangements. Previously, Australia's constitutional documents requiring the Sovereign's signature had been recommended and counter-signed by a British minister of state and sealed with the Royal Great Seal of the United Kingdom. Queen Elizabeth was the first Sovereign to sign such documents on the advice of, and bearing the counter-signature of, one of her Australian ministers of state, namely, Prime Minister Menzies, and to have the documents sealed with the Royal Great Seal of the Commonwealth of Australia. The right to have Australian constitutional documents prepared and issued in this way had existed since 1926, but Menzies was the first Australian Prime Minister to exercise that right.

Queen Victoria's Letters Patent had ordered that there should be a Great Seal of the Commonwealth of Australia, and that it should be kept by the Governor-General and used on Commonwealth documents signed by the Governor-General: Australian documents signed by the Sovereign were sealed with the Royal Great Seal of the United Kingdom. On 19 October 1955, on the advice of Menzies, the Queen issued a Royal Warrant whereby she authorised the Great Seal of the Commonwealth of Australia to be used as the Royal Great Seal of Australia whenever she signed a document that was counter-signed by one of her Australian ministers of state.

¹² A. Inglis Clark, *Studies in Australian Constitutional Law*, Charles F. Maxwell (G. Partridge & Co.), Melbourne, 1901, pp.54–7, and W. Harrison Moore, *The Constitution of the Commonwealth of Australia*, Charles F. Maxwell (G. Partridge & Co.), Melbourne, 1910, p.162.

¹³ *Commonwealth Statutory Rules 1901–1965*, pp.5312–4.

¹⁴ *Commonwealth Statutory Rules 1958*, pp.494–5.

¹⁵ Statement by the Prime Minister to the House of Representatives, *Commonwealth Parliamentary Debates*, vol. H. of R. 138, 24 August 1984, p.380. The Prime Minister tabled a copy of the amended 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.

This was not the first step taken by Menzies to strengthen the role of the Sovereign as Queen of Australia, and to remove British ministers and British processes from Australia's constitutional arrangements. In 1953, Menzies had introduced two bills into the Australian Parliament which formally designated the Queen as Queen of Australia. The first of these was the *Royal Style and Titles Act 1953*, which added the word 'Australia' to the Queen's style and titles.

At the Commonwealth Prime Ministers' Conference held in London in December 1952, the prime ministers of the United Kingdom, Canada, Australia, New Zealand, South Africa, Pakistan and Ceylon had agreed that the royal style and titles then in use were no longer in accord with current constitutional relationships within the British Commonwealth, and they decided that each member country would adopt a form that suited its own purposes. And so, by decision of the Australian Parliament in 1953, the Queen became Queen of Australia.

Popular mythology has it that it was Prime Minister Whitlam who did this with his *Royal Style and Titles Act 1973*, but that is simply not true. What Whitlam did was remove the words 'United Kingdom' and 'Defender of the Faith' from the 1953 style and titles as being no longer appropriate for use in Australia, but he added nothing to what was already there. He had wanted also to remove the words 'by the Grace of God', but the Queen would not hear of it.

The second Menzies bill which affected the Queen's constitutional position in Australia was the *Royal Powers Act 1953*. In preparing for the 1954 royal visit to Australia—the first by a reigning monarch—the Government wanted to involve the Queen in some of the formal processes of government, in addition to the inevitable public appearances and social occasions. But the Government's legal advisers suddenly discovered what had been apparent to some writers at the time of Federation.¹⁶ They pointed out that the Constitution placed all constitutional powers, other than the power to appoint the Governor-General, in the hands of the Governor-General and that he exercised these constitutional powers in his own right, and not as a representative or surrogate of the Sovereign. It was further pointed out that the Governor-General's statutory powers, that is, those powers conferred on him by legislation passed by the Commonwealth Parliament, were also conferred on the Governor-General in his own right and could be exercised by no one else—not even the Sovereign.

And so by means of the *Royal Powers Act 1953*, Parliament empowered the Queen, when she was personally present in Australia, to exercise any power under an Act of Parliament that was exercisable by the Governor-General. 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.

The *Royal Powers Act* has enabled the Queen to preside at three meetings of the Federal Executive Council at Government House, Canberra. She has also opened Parliament on three occasions, and held a Privy Council on five occasions. The Queen has also issued two assignments of powers to the Governor-General under section 2 of the Constitution, acting on each occasion with the advice of the Federal Executive Council. These documents were

¹⁶ See footnote 12.

countersigned by her Australian Prime Minister—Menzies in 1954 and Whitlam in 1973—and they were sealed with the Royal Great Seal of Australia.

It seems odd indeed that a Sovereign with such a record of direct involvement and participation in our processes of government, and all at the wish of the Australian Parliament and Australian prime ministers, from both sides of politics, could be described by the present Prime Minister as ‘not one of us’.

I turn now to an examination of the role of the Governor-General in Australia’s constitutional evolution. Professor L.F. Crisp, a former Professor of Political Science at the Australian National University, described it as the ‘keystone to the constitutional arch’.¹⁷ Sir Paul Hasluck, a former Governor-General, saw it as the highest office in the land¹⁸ and as the apex of Australian society.¹⁹ Sir Zelman Cowen, another former Governor-General, described it as the most exciting and the most challenging of all of his appointments in a lifetime of exciting and challenging appointments.²⁰ And former Senator and Minister of the Crown, Peter Walsh, has said that many members of the Australian Labor Party regard Bill Hayden’s outstanding record of service and leadership to the Party as having been tainted by his acceptance of the appointment as Governor-General.²¹ I find that a rather sad, if revealing, commentary.

Our early governors-general were British, and they were appointed by the Sovereign on the advice of British ministers. They were in reality British civil servants, and their principal duties and responsibilities were to the British Government. After Federation, the Governor-General’s office became the Australian Government’s channel of communication with Britain and with other nations.²²

In 1910 the Australian Government appointed its first High Commissioner to Britain. However, it was not until 1931, with the appointment of Sir Isaac Isaacs as our first Australian-born Governor-General, that the British Government appointed its first High

¹⁷ L.F. Crisp, *Australian National Government*, Longman Australia Pty Limited, Hawthorn, 1975, p.415. The description appeared in all editions and reprints from 1965 to 1975, but was omitted from the fourth edition published in 1978, its place being taken by an account of the 1975 constitutional crisis and criticism of the actions of Governor-General Sir John Kerr.

¹⁸ Sir Paul Hasluck, *The Office of Governor-General*, Melbourne University Press, Carlton, 1979, p.30.

¹⁹ *ibid.*, p.46.

²⁰ Sir Zelman Cowen, ‘Australia Day Address’, 26 January 1982; and ‘National Press Club Address’, 21 July 1982.

²¹ Peter Walsh, *Confessions of a Failed Finance Minister*, Random House Australia Pty. Ltd., Sydney, 1995, p.193.

²² Christopher Cunneen, *Kings’ Men: Australia’s Governors-General from Hopetoun to Isaacs*, George Allen & Unwin, Sydney, 1983, pp.12–13.

Commissioner to Australia: until that time its representative in Australia had been the Governor-General, who had often been compared to the head of a diplomatic mission.²³

In 1919 Prime Minister Hughes asserted that the time had come for Dominion governments not only to be consulted on the appointment of governors-general, but to have 'a real and effective voice in the selection of the King's representative'.²⁴ Prime Minister Barton had made a similar request nearly twenty years earlier, but Hughes went further, suggesting that Dominion governments should be able to submit their own nominations, including the names of their own citizens. Hughes' efforts met with some success when, in the following year, 1920, he was invited to choose Australia's next Governor-General from a list of three names provided by the Secretary of State at the Colonial Office. However, Hughes' choice was recommended to the King by the British Secretary of State.

In 1925 the appointment of Australia's eighth Governor-General was made in accordance with the procedure that Hughes had insisted upon in 1920, but by now all Dominion prime ministers were feeling dissatisfied with the process.

The matter of vice-regal appointments was raised again at the 1926 Imperial Conference. This time the prime ministers declared that the Governor-General of a Dominion was no longer to 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.²⁵

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 Governor-General began visiting other countries the following year, 1927, but Australia waited until 1971, forty-four years after Canada, to follow suit.

²³ *ibid.*, p.50.

²⁴ Quoted in *ibid.*, p.151.

²⁵ *ibid.*, p.168. See also (Sir) Zelman Cowen, *Isaac Isaacs*, Oxford University Press, Melbourne, 1967, p.191.

Early in 1930 Prime Minister Scullin was informed that the British Government would welcome an Australian indication of a suitable successor to the Governor-General.²⁶ The Cabinet considered the names of Sir Isaac Isaacs, then Chief Justice of the High Court, and Sir John Monash, a distinguished engineer and soldier who had been Australia's highest-ranking soldier in the First World War. The choice fell on Isaacs, formerly a member of the Victorian Legislative Assembly and State Attorney-General; a member of the 1897–98 Constitutional Convention; a member of the House of Representatives and Commonwealth Attorney-General; a Justice of the High Court; and now Chief Justice.

News of Cabinet's choice soon leaked out. Newspapers reported that the King would not accept the recommendation. Amid a welter of public controversy, objections were voiced to the appointment of an Australian rather than someone from the United Kingdom; to the appointment of someone who had been involved in politics in Australia; and to the promotion of a holder of judicial office, on the basis that judges should have nothing to hope for and nothing to fear from any government. The Leader of the Opposition in the Federal Parliament, Mr (later Sir John) Latham, took the view that, while the Commonwealth Constitution provided for Federal Executive Councillors to advise the Governor-General, there was no constitutional provision that would enable them to advise the King.

With some arguing that the 1926 Imperial Conference prevented the British Government from advising the King on the appointment of a Governor-General, and others arguing, as Latham did, that the Australian Government had no power to do so, it seemed that there was no one who could advise the King on the appointment. While all this was going on, the King himself was seeking a personal role in the appointment of governors-general which he had not possessed when the British Government had been responsible for these appointments, and which he would not have under the changes made by the 1926 Imperial Conference nor under the new arrangements which Australia was proposing to follow.²⁷ The fact that there were differences between the King and the Australian Government over the appointment of Isaacs was by now well known.

Against this background, the 1930 Imperial Conference resolved that, in appointing a Governor-General, the King should act on the advice of his ministers in the Dominion concerned. 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.

While in London, Scullin had discussions with the British Prime Minister, the King's Private Secretary, and the King himself. It was clear that the King was unhappy with the prospect of being represented by a local man. The chief concern was that such a person would inevitably be, or would become, involved in local politics, whereas a nominee from Britain would have no such involvement and could stand aloof from all politics in the same way as the King did at home.

²⁶ I am indebted to Sir Zelman Cowen, *op. cit.*, at pp.191–207, for details of the events leading to the appointment of Sir Isaac Isaacs as Governor-General.

²⁷ Lord Stamfordham, Private Secretary to King George V, quoted in Cunneen, *op. cit.*, p. 175.

The particular criticisms of Isaacs were that he had been in politics, even though it was twenty-five years ago; that he was not known personally to the King; and that he was seventy-five years of age. With the King conceding that he had no personal objections to Isaacs, and with Scullin insisting that an Australian should have the appointment, the King finally acknowledged that, as a constitutional monarch, he had no alternative but to accept Scullin's advice. However, the Buckingham Palace announcement of the appointment departed from precedent and was carefully worded so as to indicate the King's displeasure. Isaacs was sworn in as Australia's ninth Governor-General, and the first Australian to hold the office, on 22 January 1931.

The (Melbourne) *Age* welcomed the appointment and spoke highly of Isaacs.²⁸ The *Sydney Morning Herald* took the opposite view, expressing concern about possible damage to the Empire link and the possible bias of an Australia appointee, though it too praised Isaacs' personal qualities.²⁹ But the mould had been broken and a new constitutional precedent set. Henceforth, in Australia and throughout the Commonwealth, the appointment of governors-general, whether imported or native-born, would be made by the Sovereign on the advice of the Prime Minister of the country concerned. The *Canberra Times* summed up the position in its editorial on 8 December 1930: 'The present appointment is one, therefore, which should be regarded by constitutionalists as a constitutional triumph.'³⁰

From the British point of view, the problem was that, if governors-general were not to be appointed on the advice of British ministers, and if the King himself could not select his representatives, then they would be the nominees of the party in power in Australia, and, if called upon to exercise their prerogatives, their political impartiality was likely to be impugned.³¹ This was an interesting point of view, particularly if it was feared in London that Australian appointees might unduly favour the party that had appointed them, for the Australian experience has been to the contrary.

Isaacs was called upon several times to exercise constitutional functions in potentially politically troublesome circumstances, but he handled each situation impeccably. He also had to cope with the coming to office of an Opposition which had opposed his appointment. He handled that successfully and set a pattern for future incumbents who would be so placed. His term as the first Australian in the post has been described as one of the most important in the history of the office.³²

²⁸ The *Age*, 4 December 1930.

²⁹ The *Sydney Morning Herald*, 4 December 1930.

³⁰ Quoted in Cunneen, *op.cit.*, p.182.

³¹ *ibid.*, p.178.

³² *ibid.*, pp.185–8.

In the words of Dr Christopher Cunneen, Deputy General Editor of the *Australian Dictionary of Biography* and author of *Kings' Men*:

As Hopetoun had been the model for Isaacs' predecessors, Isaacs was to set the pattern for subsequent Australian-born governors-general...(He) was the fore-runner of a series of appointments of Australians which significantly altered the nature of the institution. Prior to Stonehaven the monarchical element in the Australian Constitution, exercised by British officials, was overtly linked with the protection of British interests. The 1926 Imperial Conference removed from the formal structure the justification for this supposition, and the term of office of Isaacs completed the process. When Isaacs passed constitutional judgement in areas of political discretion, he was acting as a local constitutional monarch, not because of any inclination to further the interests of the British government.³³

The controversy which had surrounded the Isaacs appointment as Governor-General erupted once more at the end of 1946 with rumours that the Federal Government proposed to recommend the appointment of Mr William McKell, then Labor Premier of New South Wales. This time, the fact that McKell was still actively engaged in state politics added a certain edge to the controversy. Opposition Leader Menzies bitterly opposed the appointment. In his view the Crown's neutrality, and the neutrality of the Crown's Governor-General, had to be above suspicion. He was concerned that, if the office of Governor-General became simply a political plum to be handed out to a party colleague, it would lead to a change of incumbent with every change of government, and to the office being degraded by being made the direct product of Australian party politics.³⁴

But once the appointment was made, Menzies told his party that they should now treat the new Governor-General with all the respect due to his office.³⁵ In 1951 Menzies invited McKell to extend his term of office and recommended him for a knighthood, both of which were accepted. Notwithstanding Menzies' view of the initial error of the appointment, he came to value his regular talks with McKell. He regarded him as a successful Governor-General who had performed the duties of his office extremely well, and he was able to look back on McKell's term of office with personal pleasure.³⁶

The *Sydney Morning Herald*, which had been critical of McKell's appointment in 1947,³⁷ praised his performance as Governor-General when commenting on the award of the knighthood in 1951,³⁸ although it still maintained its earlier view that the appointment of an Australian as Governor-General weakened the personal link with the Crown.

³³ *ibid.*, p. 188.

³⁴ *Commonwealth Parliamentary Debates*, vol.190, 20 February 1947, pp.19–21. See also Sir Robert Menzies, *Afternoon Light*, Penguin Books Australia Ltd., Ringwood, 1969, p.254.

³⁵ Menzies, *ibid.*, pp.254–5.

³⁶ *ibid.*, p.255.

³⁷ The *Sydney Morning Herald*, 3 February 1947.

³⁸ *ibid.*, 12 November 1951.

McKell's great moment in our constitutional history came in 1951 when he was asked by Menzies to grant him a simultaneous dissolution of both Houses of the Parliament. Although the non-Labor parties had defeated the Labor Government at the December 1949 general elections, Labor continued to control the Senate. After the Government's Commonwealth Bank Bill had been passed by the House of Representatives, the Bill had been returned by the Senate with unacceptable amendments: after its second passage through the House of Representatives, the Senate had referred it to a Senate Select Committee for investigation and report. The Government took the view that this was a 'failure to pass' the Bill, in terms of section 57 of the Constitution, while the Opposition argued that it was no such thing, being merely part of the process of the Senate's consideration of the Bill.

Menzies waited on the Governor-General. His request for a double dissolution was supported by opinions provided by the Attorney-General and the Solicitor-General. In the light of last week's twentieth anniversary of a certain event, it is interesting to note that, in his advice to the Governor-General, Menzies made it clear that the Governor-General was not bound to follow that advice, but was entitled to satisfy himself that the conditions required by section 57 had been established.³⁹ This was only the second double dissolution since Federation, and the Labor Opposition bitterly opposed it. Their view, which is also interesting in the light of 1975, was that the Governor-General should not accept the Prime Minister's advice but should seek independent legal advice from the Chief Justice of the High Court.⁴⁰ McKell, however, saw no need to call for independent advice, and he accepted the advice of his ministers.

Menzies has left us with an account of his method of complying with the decision of the 1930 Imperial Conference that the formal nomination of a Governor-General to the Sovereign should be preceded by informal discussion. Menzies felt that the Governor-General should not be completely unknown to the Queen. Secondly, because the Governor-General might well have to deal with political crises and with applications by governments for dissolutions of Parliament, it was most important that there should be no doubt about his impartiality.⁴¹ Menzies was to recommend the next four governors-general to the Queen. The first three were Sir William (later Lord) Slim, Lord Dunrossil and Lord De L'Isle, all British, but by 1965 he felt able to recommend an Australian, Lord Casey. Despite Casey's long career in politics, the announcement of his appointment was received with general approval, and without the public rancour which had accompanied the appointments of Isaacs and McKell. I like to think that it was Menzies' experiences with McKell which enabled him eventually to overcome his reluctance to expose the office to a serving local party politician.⁴²

³⁹ Sir Robert Menzies, *The Measure of the Years*, Cassell Australia Ltd., Melbourne, 1970, p.40. See also J.R. Odgers, *Australian Senate Practice*, Royal Australian Institute of Public Administration (ACT Division), Canberra, 1991, p.43; and (Sir) Zelman Cowen, Introduction to the Second Edition of H.V. Evatt, *The King and his Dominion Governors*, Frank Cass & Co. Ltd., London, 1967, p.xxvii.

⁴⁰ Cowen, *ibid.*, p.xxiv.

⁴¹ Menzies, *Afternoon Light*, pp.257–8.

⁴² *ibid.*, p.258.

Since Casey we have had an unbroken line of Australians in the office, and it is now unthinkable that it should be any different. Casey was followed by another politician, Sir Paul Hasluck, and his appointment, too, was received with general approval. He was followed in turn by Sir John Kerr, Sir Zelman Cowen and Sir Ninian Stephen; three non-political appointments which received widespread and bipartisan approval. It was not until Mr Bill Hayden's appointment was proposed in 1988 that we saw the re-emergence of public criticism from former political opponents. But like Menzies before him, the then Leader of the Opposition, John Howard, ceased all public criticism once the Queen had accepted her Prime Minister's advice and had approved the appointment. Over the ensuing seven years, the initial respect for the Queen's representative has grown into respect for the man himself, for, like his political predecessors, he has remained true to his oath (or should I say affirmation) of office.

As we look back over the record of Australian-born governors-general who have had political affiliations, either directly or indirectly, we find no reasons for the initial fears that they would act partially in favour of those who had appointed them. What we do find, ironically enough, is that the abuse heaped on the heads of Sir William McKell, Sir John Kerr and, quite recently, Mr Bill Hayden, came from the side of politics that had recommended their appointments. And these criticisms were not founded upon any alleged dereliction of duty or other constitutional impropriety, but upon the utterly improper belief that they had acted or spoken contrary to the interests and expectations of their former 'mates'. But I am running ahead of myself.

The event in Lord Casey's term of office as Governor-General which is of special interest is his action in providing Australia with a new prime minister, following the disappearance of Prime Minister Harold Holt, who had entered the sea at Cheviot Beach, Victoria, on Sunday, 17 December 1967, and had not re-appeared. Casey was confronted by two urgent constitutional questions which only he could decide, for without a prime minister there was no one else with any constitutional authority to give him advice. The first question was when should he assume officially that Holt was dead and issue a commission to a new Prime Minister: the second was to whom should he give that commission?⁴³

William McMahon was Deputy Leader of the parliamentary Liberal Party and had claims to succeed to the leadership and through it to become Prime Minister. But this could not be assumed: there were other senior Liberal ministers who would be powerful contenders, should they decide to enter the contest. On the other hand, Holt's Deputy Prime Minister was John McEwen, Leader of the Country Party (later to become the National Party), and it was McEwen who had always acted as Prime Minister, at the request of Holt, whenever the Prime Minister had been absent from Australia.

The thirty-six hours between Holt's disappearance and the Governor-General's decision saw scenes of feverish activity, first among the several Liberal contenders—particularly once it

⁴³ I am indebted to Alan Reid, *The Power Struggle*, Shakespeare Head Press, Sydney, 1969, pp.24–8 and 105–123, for details of the events leading to the appointment of John McEwen as Prime Minister to succeed Harold Holt.

was known that McEwen had said that the Country Party would not serve in a Coalition Government under McMahan—and then at Government House as the Governor-General consulted as widely as possible with ministers, the Government Whip, and the Secretary to the Prime Minister's Department. There was some criticism at the time that these discussions had taken the Governor-General into an activist role that went beyond the functions of his office, but Casey seems to have taken the view that he had a responsibility to maintain stability of government. In the end it was the Governor-General, and he alone, who made the decision to commission McEwen as Prime Minister. The swearing in took place on 19 December 1967, little more than forty-eight hours after Holt had disappeared.

This was a classic example of the exercise, by the Governor-General, of the reserve powers of the Crown to deal with a constitutional issue for which there were no constitutional provisions. Just to complete the story, the parliamentary Liberal Party met on 9 January 1968 to elect a new leader. From a field of four candidates John Gorton emerged the victor, with McMahan re-elected as Deputy Leader. McEwen submitted his resignation as Prime Minister to the Governor-General and advised His Excellency to commission Gorton.

Lord Casey was succeeded by Sir Paul Hasluck, who served from 1969 to 1974. It was during Hasluck's term that Australian prime ministers finally overcame their reluctance to allowing governors-general to represent Australia overseas. First Gorton, then McMahan, then Whitlam, asked Hasluck to undertake this duty. Thus in 1971 did Australia begin to do what Canada had been doing since 1927, in fulfilment of the resolution of the 1926 Imperial Conference, namely, have its Governor-General represent it in a foreign country as constitutional head of state.

On Saturday 2 December 1972 Labor won government after 23 years in opposition. Caucus would not be able to meet to elect the Ministry until the count had been completed. But Whitlam was impatient for office: there were decisions that he wanted to take immediately, so he came up with a unique proposal. On the Monday he asked the Governor-General to commission him to head a two-man government with his deputy, Lance Barnard, and on the Tuesday Hasluck did just that, swearing Whitlam into thirteen portfolios and Barnard into fourteen portfolios.

The proposal for a two-man government had given the Governor-General pause for thought, but not for long. The things that Whitlam wanted to do straight away as Prime Minister were not matters that required the approval of Parliament, which in the event was not to meet until 17 February 1976, just over two months away: they could be achieved by obtaining the approval of the Governor-General in Council, in his role as constitutional head of state, acting with the advice of his executive councillors, who were also his ministers of state. Whitlam knew that a quorum for a meeting of the Federal Executive Council was the Governor-General plus two ministers,⁴⁴ and that his two-man government could thus immediately secure executive authority to implement its most pressing policy and administrative changes. The Second Whitlam Ministry, with its full complement of ministers, was sworn in by the Governor-General two weeks later.

⁴⁴ This figure was set by the first Federal Executive Council at its second meeting on 12 January 1901 and has not been varied.

Sir Paul Hasluck was succeeded as Governor-General by Sir John Kerr, who served from July 1974 to December 1977. Kerr, who was appointed on the advice of Whitlam, was the first Australian-born Governor-General not to have held political office, and his appointment was warmly applauded by both sides of politics.

Whitlam wanted to enhance the status of the vice-regal office, so when an invitation arrived for the Governor-General to attend the coronation of the King of Nepal, Whitlam asked Kerr to extend his journey to include state visits to India, Pakistan, Afghanistan and Iran. In all, Kerr was to make state or official visits to eight countries, seven of them on the advice of Whitlam. On Whitlam's instructions, the Department of Foreign Affairs commenced planning for a journey that was to include state visits to Canada and Ireland. When the Senate decided on 15 October 1975 to refuse passage of the Government's Appropriation Bills these plans were cancelled.

Head of state visits play a significant part in developing and enhancing relationships between countries, and Whitlam saw such visits as an important function for the Governor-General. In this way Whitlam laid the foundation for recognition, at long last, of the value to Australia of such visits, and paved the way for the more extensive programmes of state and official visits undertaken later by Sir Ninian Stephen and Mr Bill Hayden on the advice of their respective prime ministers.⁴⁵

The other matter of constitutional significance which occurred during Sir John Kerr's term as Governor-General has had more than a fair run this past week, so I shall limit myself to saying just two things about it. The Senate, as an equal part of the Parliament with the House of Representatives, sought to exercise powers which were specifically given to it under the Constitution. Whitlam, with the security of numbers in the House of Representatives, was determined to smash forever the power of the Senate to obstruct money bills and thereby force a government to an early election, a power, incidentally, which he had previously maintained that the Senate did possess, and which he and his party had tried to use no less than 170 times during their twenty-three years in opposition.⁴⁶

Had Whitlam succeeded, he would effectively have brought about an amendment of the Constitution, though without the approval of the people, as required by section 128 of the Constitution. Kerr exercised the reserve powers of the Crown to bring about a general election for both Houses of the Parliament and to allow the people to pass judgement on the

⁴⁵ Because of Sir Zelman Cowen's wish to apply what he described as 'a touch of healing' to the office of Governor-General after the 1975 Dismissal, he thought it important that he should concentrate on travelling widely throughout Australia. As a consequence his only state visit, to Papua New Guinea, was made during his last month in office, and at the special request of the Governor-General and Government of Papua New Guinea.

⁴⁶ See Sir David Smith, 'The 1975 Dismissal: Setting the Record Straight', in *Upholding the Australian Constitution*, Proceedings of the Fifth Conference of The Samuel Griffith Society, April 1995, The Samuel Griffith Society, East Melbourne, 1995, pp.139–66. See also Sir David Smith, 'Myths and Legends: The Stuff of History (or 1975 Revisited)', the Canberra & District Historical Society's Fourth Nan Phillips Memorial Lecture, in *Canberra Historical Journal*, Canberra & District Historical Society Inc., New Series No. 29, March 1992, pp.2–9.

dispute between the two Houses. The Governor-General's action served to remind us that the reserve powers do exist, and may be used in those crisis situations for which there is no constitutional provision.

An important by-product of the Dismissal came about as a result of the decision by the parliamentary Labor Party to have the Speaker of the House of Representatives write to the Queen to ask her to overrule the Governor-General, to halt the democratic election process which had already been set in train under Australian law, and to restore Whitlam to office as Prime Minister. Mr Speaker was reminded by Buckingham Palace that the Australian Constitution placed all constitutional matters squarely in the hands of the Governor-General in Canberra, and that the Queen had no part in the decisions which the Governor-General must take in accordance with our Constitution. That reply confirmed, if confirmation were needed, that the Governor-General is indeed the constitutional head of state, and that in the exercise of his powers and functions he does not act as the representative or surrogate of the Sovereign.

The office of Governor-General lacks the majesty of monarchy, and that is no bad thing in the Australian context. It also lacks the power of presidency, and that, too, is a good thing in the Australian context. After all, in how many republics would the media be allowed to rank the head of government before, and not after, the head of state, as protocol and respect both require? In how many republics would the media refer to the wife of the head of government as the First Lady? In what other country would a council employee be allowed to erect street signs pointing to Admiralty House and Kirribilli House on the same pole, with Kirribilli House on top? It doesn't even qualify alphabetically. Is it ignorance? Is it apathy? Is it toadying to the Prime Minister? Or is it simply disdain and contempt for public institutions and public office holders? I do not pretend to know the answers, but I may be able to provide some clues.

In his 7 June speech on the republic, the Prime Minister quoted with approval from a speech which Sir Zelman Cowen had given the previous week. What the Prime Minister did not tell the Parliament was that, in the same speech, Sir Zelman had also spoken of prime ministers, including the present one, who sought to diminish the status of the Governor-General in public as compared with that of the Prime Minister.⁴⁷

Last month a Sydney newspaper launched a bitter personal attack on Mr Hayden. The stories were false, and the inferences drawn and the imputations made were untrue. It was a calculated dishonest campaign to demean the office of Governor-General, and to punish Mr Hayden personally. He had recently expressed some personal views on a number of community issues, and responsible sections of the media had welcomed them as useful contributions to informed public debate. But apparently some of his former colleagues thought otherwise, so out came the knives. So insidious and unscrupulous was the attack that the Governor-General felt obliged to speak out, while still overseas, to protect his office and himself.⁴⁸

⁴⁷ Sir Zelman Cowen, 'Leadership in Australia: The Role of the Head of State', Williamson Community Leadership Lecture, 31 May 1995.

Both in accordance with constitutional principle and under the Government's own Administrative Arrangements Order, it is the responsibility of the Prime Minister to answer in Parliament, and to the people of Australia, for the actions of the Governor-General. No expenditure by the Governor-General's office can take place unless it has first been approved by the responsible minister, namely, the Prime Minister, and the money has been appropriated by Parliament at the request of the Treasurer. No overseas travel by the Governor-General can occur except on the advice, and with the approval, of the Prime Minister.

That is why it is totally unacceptable for the Governor-General to be dishonestly misrepresented in the media and to be left to defend himself. That is the role of his ministers and, in particular, the Prime Minister. A spokesman was reported as saying that the Prime Minister had strongly backed Mr Hayden through his press office and would respond if asked in Parliament or at media door-stops. But a ministerial press officer has no constitutional relationship to the Governor-General: the Governor-General's constitutional authority and the nation's respect for the office and its incumbent are not properly protected in the bear pit of Question Time or the street theatre of a media door-stop. One does not have to look far for the reason for society's lack of respect for its leaders, its national institutions and its traditions.

I propose now to look at the main points in the Prime Minister's statement on the republic and test them in the light of the roles of the Sovereign as our symbolic head of state and the Governor-General as our constitutional head of state, as I have already described them.

Contrary to the Prime Minister's assertion, the Queen is indeed one of us, having been given the title 'Queen of Australia' in 1953 by the Australian Parliament. Under Australian law, foreign-born Australian citizens may retain dual citizenship, a right which is denied to Australian-born citizens. In the Prime Minister's republic, we could even have as our head of state a person who is also a citizen of a foreign country and who therefore owes allegiance to a foreign head of state. But, apparently, the Queen of the United Kingdom, the Queen of Canada, the Queen of New Zealand, the Queen of Papua New Guinea, to name but a few of her titles, may not also be the Queen of Australia. Dual citizenship is OK for foreign-born Australians, but not for Australian-born Australians and not for the Monarch!

The Prime Minister's next point was that we must have an Australian as our head of state. As I hope I have demonstrated, the Governor-General has been acknowledged as our constitutional head of state since Federation,⁴⁹ and we have had no one but an Australian in the office for the past thirty years.

The Prime Minister reminded us that the Queen is head of state to fifteen countries; that when she travels abroad she represents only the United Kingdom; and that the role of representing

⁴⁸ Television interview with the Governor-General by Laurie Oakes, 'Sunday', Nine Network, 22 October 1995; and telephone interview with the Governor-General by Geoff Kitney and Michael Millett, the *Sydney Morning Herald*, 26 October 1995.

⁴⁹ See footnote 7.

us abroad is ‘a role only an Australian can fill’. The clear implication was that this role is vacant and waiting to be filled. In fact, the role is not vacant, has not been vacant since 1926, and has only ever been filled by an Australian. Since 1971 our governors-general have made forty-nine state and official visits to thirty-two foreign countries, so there is no new path waiting to be trodden by a republican president.

In his 1993 book on the republic, Malcolm Turnbull made much of the fact that, in 1987, Sir Ninian Stephen, acting on the advice of the Australian Government, cancelled arrangements to visit 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 treated as a head of state. What Turnbull did not know was that the Indonesian Government said later that it had made a wrong decision, that it had been wrongly advised by its officials, and that it would treat our Governor-General as a head of state on any future visit. That promise was honoured during Mr Hayden’s visit earlier this year. In Turnbull’s view, the Indonesian President had quite rightly refused to treat the Governor-General as a head of state in 1987, but subsequent events had proved the wisdom of not allowing foreign governments, or Malcolm Turnbull, to interpret our Constitution for us.

The Prime Minister said that we are a sovereign nation in all respects bar one, and that the creation of an Australian republic would settle in our own minds, and in the minds of our neighbours, the question of who we are and what we stand for. He had obviously forgotten the findings of the Constitutional Commission which the Hawke Government had set up in 1985. It consisted of three very distinguished constitutional lawyers—Sir Maurice Byers, former Commonwealth Solicitor-General; Professor Enid Campbell, Professor of Law at Monash University; and Professor Leslie Zines, former Professor of Law at the Australian National University; and two former heads of government—the Hon. Sir Rupert Hamer, a former Liberal Premier of Victoria; and the Hon. E.G. Whitlam, a former Labor Prime Minister.

The Commission was asked to report on the revision of our Constitution to reflect Australia’s status as an independent nation.⁵⁰ In its final report, presented in 1988, the Commission traced the historical development of our constitutional and legislative independence, and concluded 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.⁵¹ The Commission found that the development of Australian nationhood did not require any change to our Constitution.⁵²

The Prime Minister spoke of the method of choosing a president. Popular election he dismissed as politicising the office, likely to result in a politician being chosen, and likely to give us a president who might be even more powerful than the Prime Minister. Instead, he opted for a president elected by a two-thirds majority of the Parliament. The Prime Minister

⁵⁰ *Final Report of the Constitutional Commission*, Australian Government Publishing Service, Canberra, 1988, p.1.

⁵¹ *ibid.*, p.75.

⁵² *ibid.*

seems not to understand the difference between a powerful office-holder who is appointed and one who is elected. Appointment, coupled with a sense of duty and obligation to the Crown, acts as a powerful restraint. Election, by whatever method, brings with it supporters, obligations, and the notions of a mandate and a power base. Warnings against this type of change were given in 1993 by former Prime Minister Bob Hawke and Governor-General Bill Hayden.⁵³

The Prime Minister has proposed that serving politicians, and those who have served within the preceding five years, would be ineligible for appointment as president. In these days of equal opportunity and non-discrimination, our Constitution would contain a provision which would discriminate against two categories of Australians, regardless of individual merit. We would also be entrusting the election of the president to the very people who had been deemed to be unfit to hold the office themselves.

None of the problems inherent in the Prime Minister's republican proposals exist under our present constitutional monarchy. Because of their sense of duty to the people and to the Crown, even politicians have been eligible to be governors-general. And because of their sense of duty to the people and to the Crown, governors-general nominated to the Queen by prime ministers have been acceptable to all sections of the community, whereas a president elected by whatever means would not be.

I should like to end with the words spoken by Sir Gerard Brennan at a ceremonial sitting of the High Court on 21 April 1995, following his swearing in as the tenth Chief Justice of Australia. Sir Gerard described the Oaths of Allegiance and Office which he had just taken as the making of two solemn promises for the performance of which he would be responsible to

the Court, to this country, and to his Creator, and then he said:

The first promise is a commitment of loyalty to Her Majesty the Queen, her heirs and successors according to law. It is a commitment to the head of State under the Constitution. It is from the Constitution that the Oath of Allegiance, which has its origins in feudal England, takes its significance in the present day. As the Constitution can now be abrogated or amended only by the Australian people in whom, therefore, the ultimate sovereignty of the nation resides, the Oath of Allegiance and the undertaking to serve the head of State as Chief Justice are a promise of fidelity and service to the Australian people. The duties which the oath imposes sit lightly on a citizen of the nation which the Constitution summoned into being and which it sustains. Allegiance to a young, free and confident nation, governed by the rule of law, is not a burden but a privilege.⁵⁴

Questioner — Would you like to comment on Mr Hayden being rejected as the Australian head of state by the Americans?

⁵³ Interview with the Governor-General by Mr. Bob Hawke, 27 July 1993.

⁵⁴ (1995) 69 *Australian Law Journal*, pp. 679–80.

Sir David — I have no knowledge myself, so I will have to rely on press reports. As I understand it, they sought some advice. If our Australian representatives abroad were doing their jobs, they would not have needed to. I think the Indonesian example is a classic case in point. The Indonesian Foreign Minister later apologised for the advice that he had been given by his officials.

Questioner — You have spoken at length of how quite independent we are now of the Queen and the United Kingdom and that the Governor-General is our effective head of state. Why don't we now take care of reality and catch up with the situation? We have been decades behind other countries. Why can't we be honest and truthful with the rest of the world and chop the Queen out of the Constitution?

Sir David — The great problem the republicans are having is in deciding by which method they will choose the president. Mr Keating has proposed that Parliament should make the choice. Polls tell us that an overwhelming majority of republicans would rather vote against the republic unless they get the choice.

In a speech here in Canberra last week, Mr Neville Wran, former Labor Premier of New South Wales, said the Prime Minister might have to rethink his proposal. Our Australian High Commissioner in London, Dr Neal Blewett, a former Labor minister, similarly said that the proposal might have to be reconsidered. The republicans are having a great argument about how they will get this president. For ninety-five years the monarch has provided us with an unarguable and uncontroversial method of getting that same person to do, as Mr Keating has said, precisely the same job.

Questioner — Isn't it the methodology that is the problem and not the objective?

Sir David — No. Again, I made the point that there is a difference between appointment to office and election to office. In an appointed constitutional head of state we have less to fear than we would have from an elected head of state, and Mr Hawke and Mr Hayden have agreed.

Questioner — I wonder if I could just follow up on that point. Are you saying that the monarch now selects the Governor-General?

Sir David — No, the Prime Minister selects; the monarch appoints.

Questioner — But you are saying that the justification for maintaining the links to the monarchy are through the Crown. Then you argue that the selection process, in terms of the republican argument, is the flaw in the argument. Surely the Queen acts on the advice of the Prime Minister and, therefore, what we do have, in effect, is a political appointment.

Sir David — Yes, we do have political appointments and the great magic of our present system is that we have been able to take five Australian former politicians out of politics and put them in a job. Then, to everyone's surprise, they acted non-politically. They were able to fulfil the job. You have a fair indication of what the problem would be if they were elected to office. The

Prime Minister's proposal is that former politicians should be barred for five years. We have not had to do that so far.

My point is that a person sitting at Yarralumla doing the constitutional head of state's duties day by day, knowing that he or she was responsible to a group of people—whether it was a small group or a large group—who had elected them, voted them into the job, would have a notion of a mandate, mates, people to please and people to satisfy. Someone who is appointed by the Crown, hitherto at least, has known that they do not have any of those obligations other than to the people of Australia.

It is the impact that the method of coming to office has on the person who sits at the desk at Government House that we ought to be worried about—the frame of mind of that person when they do their job on a day by day basis. Do you want them put there by a political process or do you want them put there by a process that keeps them honest? That is my point.

Questioner — I would like you to comment on Premier Bob Carr's intention to somehow change the relationship of the State Parliament to the role of Governor in New South Wales. I think the present Governor ends his appointment in February, and there is some speculation that Premier Carr would like not to appoint a Governor in the traditional sense but find a way of virtually phasing the Governor out and supplanting him with perhaps the State Chief Justice—all with the intention of moving towards a republic ahead of the people deciding whether they want a republic or not.

Sir David — I have expressed on other occasions, and I do not need to say it again now, my utter contempt for those who have a policy which they are not prepared to test by the proper method—that is, a referendum to change the Constitution—but who are, nonetheless, working assiduously to wind out the system.

If we are supposed to be a nation proud of our history and our culture and looking for our identity, I do not think we are going to gain that by subverting our Constitution. We have a right, as a sovereign people, to change it. We have made some changes and we have rejected other proposals. We have a right to change it, but I believe our politicians have a duty to observe the Constitution as it is, not as they would prefer it to be.

If they have a preference for a different constitution, they have a perfectly honest and open way of seeking our approval to change it. Until they do, I believe they have an obligation to live by our Constitution and not subvert it. I thought my final quote from the new Chief Justice of the High Court was appropriate to that point.

Questioner — I want to refer to the American situation at the present time where the government is without money and the public servants are not being paid. Would you like to comment on whether that situation could occur in a republic in Australia?

Sir David — I do not want to get involved in a debate on the American system of government, but I will repeat a comment that was made to me by a friend the other day. She said, 'I'll bet Bill Clinton wishes he had a Governor-General sitting in the wings.'