Chapter Five
The Role of State Governors: An Endangered Species?

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Australia's early Governors-General, and our State Governors until fairly recently, were in reality British civil servants. They were appointed by the Sovereign on the advice of British Ministers, and their first duty was to the British government. After the 1926 Imperial Conference, the Governor-General ceased to have any relationship with the British government: henceforth his constitutional relationship was to be with the Australian government, and it was to be the same as the King's relationship with the British government. Following a decision of the 1930 Imperial Conference, the Governor-General henceforth was to be appointed by the Sovereign on the advice of the Australian Prime Minister.[1]

State Governors, on the other hand, continued to be appointed by the Sovereign on the advice of British Ministers until the passage of the *Australia Act 1986*. Since the passage of that Act, State Governors have been appointed by the Sovereign on the advice of State Premiers, and have had the same constitutional position in relation to their respective State governments as the Governor-General has had in relation to the Commonwealth government since 1926.

The *Australia Act*, in sub-section 7(1), provides for the powers and functions of the Queen in respect of a State to be exercisable only by the Governor of the State, a provision which is analogous to that made by the Founding Fathers in 1901, in respect of the Governor-General, by s.61 of the Australian Constitution. By virtue of sub-section 7(4) of the *Australia Act*, the Queen may exercise any of the Governor's powers while she is personally present in a State. That provision is analogous to that made by the Australian Parliament when it passed the *Royal Powers Act 1953*, which enables the Queen to exercise any of the Governor-General's statutory powers while she is in Australia.

Under both the *Royal Powers Act* and the *Australia Act*, it is for the Prime Minister or a State Premier respectively to decide whether the Queen is to be advised to exercise a power held by the Governor-General or by a State Governor.

Under the Australian and State Constitutions, the Crown is the central feature of our system of responsible parliamentary government: its place is inside, not outside, the Parliament, unlike, for example, the United States Executive which is outside Congress; and, except for the prerogative or reserve powers, the Crown is subject to the laws made by Parliament – in other words, Australia is a constitutional monarchy, under which supreme power rests with the people and their elected representatives.

The vice-regal roles of Governor and Governor-General are essentially very similar, and much of what could be said about the one applies equally to the other. For example, it is to Sir Paul Hasluck, Governor-General from 1969 to 1974, and the fourth Australian to hold the office, that one State Governor, Richard McGarvie, Governor of Victoria from 1992 to 1997, has given the credit for bringing to the offices of Governor-General and Governor:

> "..... the markedly increased emphasis on the traditional role of maintaining a current working knowledge of the operations of government and, on occasions, giving encouragement or suggesting caution to a Minister regarding a proposed course of action".
>
> McGarvie has described Hasluck as:
>
> "..... the founding architect of modern governorship in Australia. His approach, outlined in his memorable lecture, *The Office of Governor-General*, showed an appreciation of the advantage of a watchful eye at the highest level, able to observe any signs of

departures from the integrity of operation of complex modern government and to bring them to the attention of the Ministers who have the political power to ensure that integrity. He saw the potential a Governor-General has for doing that in a way that entirely complies with convention and maintains good relations with Ministers. Sir Paul has left his stamp on governorship in Australia".[2]

It was Sir Paul who said of the vice-regal role that:

"The part played by a Governor-General in Australian government may vary with the personality and the qualifications of the Governor-General and on the way each occupant of the office chooses to interpret his role. Conceivably, a Governor-General could be a cipher, do whatever he was told to do without question and have little influence on what happened. I have spoken on the assumption that Governors-General will be active and I fervently hope that Australia in future will never have the misfortune to have an inactive one".[3]

Sir Zelman Cowen is on record as saying on more than one occasion that he strongly supported these and other views expressed by Hasluck about the vice-regal role.[4]

I return to McGarvie for his summation of the modern vice-regal role:

"From discussions, particularly at the annual Governors' Conferences, with those holding office in recent times, it is clear that the discreet but influential role personified by Sir Paul Hasluck is now widely followed in Australia. It is an important part of the Governors' and Governor-General's role of upholding Australia's democratic system".[5]

A Governor's duties fall generally into one of three categories – constitutional, ceremonial and community.[6] In the words of Dr Davis McCaughey, Governor of Victoria from 1986 to 1992, these roles "are intertwined: each supports the other".[7]

Probably the most important gubernatorial powers are those leading to the dissolution of the Parliament or a House of the Parliament, the holding of elections, and the appointment of a Premier and Ministers. These powers are generally exercised on ministerial advice from the Premier, but in special circumstances they may become the subject of the exercise of the reserve powers.

The reserve powers enable a Governor to refuse to dissolve Parliament, or to dissolve it without advice or contrary to advice; or to appoint a Premier without advice or contrary to advice. Though they are exercised very rarely, the existence of the reserve powers enables the Governor to ensure continuity of government, or resolve deadlocks in circumstances where the constitutional conventions and processes have broken down. In each case, either the Parliament at its next meeting, or the people at an ensuing election, have the opportunity to pass judgment on the Governor's decision to exercise the reserve powers.

But by far the major part of a Governor's constitutional powers and functions are exercised on ministerial advice, and that most frequently in Executive Council. It is as Governor-in-Council that the Governor discharges his role in the ordinary business of government, and exercises the many powers which Parliament has delegated to him by legislation – where Parliament has required the Governor-in-Council to take action which the Parliament has considered to be too important to be entrusted to a single Minister acting alone. These include such divers matters as the making of regulations under Acts of Parliament, the appointment or removal of senior public servants or other statutory officers, powers in relation to local government matters or Crown leases, the issue of proclamations – e.g., the proclamation of industrial diseases under workers' compensation legislation, or the licensing of landowners to do certain things on their land: and the list just goes on. Richard McGarvie has described a count of the Governor's powers in Victoria which was discontinued when the number had exceeded 4,000.[8]

In his 1999 *Sir Robert Menzies Oration*, Sir Guy Green, then still in office as Governor of Tasmania, identified what he described as three distinct models of the Governor's role in

relation to the taking of ministerial advice: the interventionist, the benign mentor, and the mechanical idiot.

Green saw the interventionist model as being represented by the Hasluck view of vice-regal office,[9] namely, a responsibility not only to satisfy himself as to the legality and regularity of the advice being given by the Executive Council, but to look behind that advice as well. In studying his Executive Council papers, which he required should reach him in time for him to read them before the meeting, Hasluck sought first to satisfy himself that the Executive Council had the constitutional or statutory power to make the decision being recommended; that the Minister making the recommendation was the competent authority to do so; and that any preliminary action required by law had been taken. These matters were expected to be stated in the explanatory memorandum that accompanied each Executive Council minute.

Hasluck also sought to satisfy himself that the recommendation was consistent with government policy or previous decisions; that it was in accord with established procedures; that, where necessary, the Attorney-General's Department and other involved departments, such as Foreign Affairs or Treasury, had been consulted; and that there was no conflict between his advisers – in short, that everything the Governor-General-in-Council was being asked to do was in accordance with the law and with due regard to precedent and obligation.[10]

I have already quoted from McGarvie to show just how influential Hasluck's views were on State Governors. To this I can add my own knowledge of the interest shown in federal Executive Council procedures by more than one State Governor when called upon to act as Administrator of the Commonwealth during an absence by the Governor-General.

Green's second gubernatorial model is the benign mentor, and he cites as his example a view taken by the High Court of the responsibilities of the Governor-in-Council. The case was *FAI Insurances Ltd v. Winneke*,[11] and Sir Henry Winneke, a former Chief Justice of Victoria, was the Governor of Victoria at the time. The Governor-in-Council had been advised to refuse the insurance company's application for the renewal of an existing licence to carry on a particular class of business, and the company sought a declaration that the refusal of its application was void on the grounds that it had not been given a reasonable opportunity to be heard before the Minister had made his recommendation, and that this had been a denial of natural justice. The High Court held that the Governor-in-Council was subject to the rules of natural justice, and that therefore the decision of the Executive Council to refuse the company's application was void. A majority of the Justices took the view that, while the Governor was bound, in the end, to accept and act on the advice of his Ministers in Council if they persisted, he nevertheless had the right to question the advice he had been given, to seek further information, and to ask his Ministers to reconsider their advice.

While some commentators have sought to draw a distinction between the Hasluckian interventionist and the benign mentor, with a view to suggesting that there is some great difference between these two roles and that Hasluck went too far, I believe that this is a distinction without a difference. I attended every one of Hasluck's meetings of the federal Executive Council over a period of three and a half years, first as Secretary to the Executive Council and then as Official Secretary to the Governor-General. He was the epitome of the benign mentor, particularly when, more than half way through his term of office, he was faced with a change of government consisting of brand new Ministers with not a skerrick of prior ministerial experience among them. To suggest that he was an interventionist who went too far is to misjudge him.

In 1982, eight years after Hasluck had retired as Governor-General, the High Court delivered its judgment in the *FAI Case*. The Court, by a majority of six to one, defined in some detail the duties which they imposed on the Governor when presiding at a meeting of the Executive Council. Their Honours defined those duties exactly as Hasluck had described them

more than thirteen years earlier.

Gibbs CJ held that the Governor-in-Council is not above the rule of law when exercising a statutory power; that the applicant company was entitled to a hearing before a decision adverse to its interests was made; and that such a hearing was not a matter for the Governor or the Executive Council but for the Minister or his officials.

Stephen J, who was then Governor-General designate, and who within two months would be Governor-General and presiding over an Executive Council, also held that the applicant company was entitled to learn of the ground of the rejection of its application, and to have an opportunity to combat those grounds; and that such a hearing was a matter for the Minister or his officials.

Mason J agreed with the views of his brother Justices about the prior obligation on the Minister to give the applicant company a hearing, and for the Governor-in-Council to accord the company natural justice. He also referred to the convention that required the Governor-General or a Governor to act in accordance with advice tendered to him by his Ministers and not otherwise, but then went on to say that:

> "It is not to be thought that the Queen, the Governor-General or a Governor is bound to accept without question the advice proffered. History and practice provide many instances in which the Queen or her Australian representatives have called in question the advice which has been tendered, have suggested modifications to it and have asked the Ministry to reconsider it even though in the last resort the advice tendered must be accepted".

Aickin J similarly referred to the obligation to provide a hearing before a statutory authority affected the rights of individual citizens, and specifically rejected the view, which had been expressed by the Full Court of the Supreme Court of Victoria in an earlier appeal in this case, that the Governor-in-Council had an unfettered discretion. He also referred to earlier decisions by the High Court and the House of Lords:

> "..... in which the Court proceeded on the footing that it may investigate the exercise of statutory powers by Ministers of the Crown in order to determine whether such exercise of power was authorised by statute or was otherwise within the lawful scope of the powers of the Minister".

Wilson J similarly covered the matters dealt with by his brother Justices. He then described the situation in which a Minister had given a fair hearing to an applicant against which he proposed to make an adverse recommendation, and said that:

> "His [the Minister's] submission to the Governor-in-Council will show on its face that the dictates of natural justice have been observed. Neither the Governor nor the members of the Executive Council who constitute the quorum on the particular day are required to go behind that assurance".

Then His Honour went on to observe:

> "That is not to say that the Governor may not ask questions of his Ministers, directed perhaps among other things to the observance in a proper case of the principles of natural justice. Hence the desirability of an assurance to that effect appearing on the face of the submission. It would be absurd to suppose that the principle of responsible government requires the Governor to act purely as an automaton. He may be described as a rubber stamp, in the sense that his executive acts are based, and necessarily based, on the advice that he is given. But his responsibility is to administer the executive government, and to do so with integrity, discretion and a complete absence of political partiality. … I see no reason why in a case where it appears to the Governor that some further consideration by the Minister or the Cabinet would be desirable he could not request that further consideration be given before he acts on the advice that is tendered to him. Let it be said that such action may well be infrequent, but the possibility of it

serves to illustrate the true function of the Governor-in-Council and the practicality of a legislative step which commits to him a decision which imports the requirements of natural justice".

Brennan J also agreed with his brother Justices on the right of the applicant company to natural justice; on the obligation on the Governor-in-Council to satisfy itself that the company had received it; and on the duty imposed on the recommending Minister. As Brennan put it:

> "The legislature must be taken to have in mind the ordinary processes of government when it creates a power to be exercised by the Governor-in-Council, and therefore to have intended that the Minister administering the Act will see to the observance of any conditions upon the exercise of a power before the Governor-in-Council is advised to exercise it".

It fell to Murphy J to provide the only dissenting voice in this case. In his view the appellants were not entitled to any relief. Murphy saw the Governor as coming under the third of Green's gubernatorial models – the mechanical idiot – which Green described as a figurehead, a rubber stamp, a cipher or automaton. Murphy held that:

> "In the absence of authorising legislation, there is no power in the courts to inquire into questions of good faith, observance of natural justice or other propriety of an act of a Governor-in-Council which is otherwise within power. Leaving aside the controversy over vice-regal 'reserved powers' the Governor is bound to take the advice tendered by his Ministers. Under our system of responsible government the decisions of the Governor-in-Council are formal. A Governor is sometimes given the courtesy of explanations but is not entitled to them. The decisions give effect to the will of the Cabinet. Thus in theory the Governor-in-Council, and in practice the Cabinet, is the highest political organ of the State".

Fortunately for our system of responsible parliamentary government under the Crown, and under the rule of law, Murphy's views of how Cabinets should operate and on the role of Governors were idiosyncratic and, as Green has pointed out, "unsupported by any legal analysis or citation of authority",[12] elements which were not lacking in the judgments of the other members of the Court. But then, as many of us will remember, Murphy as Attorney-General in the Whitlam Government was able to advise his Prime Minister and the federal Executive Council that a loan for $4 billion (or more than $61 billion in today's money) with a maturity term of 20 years could be described as a loan for temporary purposes, in order to circumvent the legal provisions relating to government borrowings and the Loan Council!

I have quoted at some length from the judgments in *FAI Insurances Ltd v. Winneke* because six of the seven Justices clearly supported the most widely accepted view of the Governor's role – the one which Green has described as the benign mentor. This model of the Governor-in-Council derives its authority from Walter Bagehot's often-quoted view of the Sovereign's rights under a constitutional monarchy – the right to be consulted, the right to encourage, and the right to warn. And Bagehot was quoted with approval by Aickin J in his judgement in the *FAI Case*.

I referred earlier to both responsible parliamentary government and the rule of law as elements of our system of government. Responsible parliamentary government requires that, ultimately, the Governor will accept the advice of his Ministers, but, as the High Court has told us, the ministerial advice must be in accord with the law. I turn again to the words of Sir Guy Green to sum up this section of my paper:

> "It is certainly the case that if one has regard to the principles of responsible government alone it can be persuasively argued that a Governor must always follow the advice of the Ministry. But the application of the principles of the rule of law leads to a different conclusion. The rule of law also imposes an obligation upon a Governor to see that the processes of the Executive Council and the action being taken are lawful and to refuse

> to act when they are not. That duty is not confined to refusing to be a party to an action which is unlawful in the sense of being contrary to say the criminal law but includes acts which are beyond powers or acts which are within power but are being exercised irregularly as was the case for example in *FAI v. Winneke*".[13]

Clearly there is no place for Murphy's mechanical idiot presiding over Executive Councils in our system of government.

I turn now to the other two categories of a Governor's duties – ceremonial and community.

A Governor's ceremonial duties range from opening State Parliament, attending Anzac Day and Remembrance Day observances, swearing in Ministers of the Crown and Supreme Court Judges, and holding investitures under the Australian honours system, to presenting awards for community organisations such as the Scouts and Guides, St. John's Ambulance Brigade, or the Winston Churchill Memorial Trust. Governors are also called upon to receive the Queen and other members of the Royal family, foreign Heads of State and foreign heads of government, their diplomatic representatives, and other national and international representatives, whenever such persons make official visits to their State. Increasingly, State Governors may also be asked by their governments to make official visits or lead delegations to other countries to further the special interests of their State, and to improve relations between their State and the State, Province or community to be visited. And Dr McCaughey has quoted one of his predecessors, Lord Norman, Governor of Victoria from 1879 to 1884, writing to his successor, Sir Henry Loch, Governor from 1884 to 1889, to say that "it would be a kind of High Treason for a Governor not to attend the Flemington Races".[14]

In spite of the importance of the Governor's constitutional and ceremonial duties, it is through the third category – his community duties – that the Governor is known to the people of his State. These community duties include speaking at, and opening, State, national and international conferences; presenting awards at major public gatherings, ranging from exhibitions and sports meetings to university graduations or meetings of learned societies and professional institutes; attending functions held by organisations of which he is a patron or a principal office-bearer; making official visits to regions or local government areas within the State; visiting farms and factories, schools and elderly citizens' centres, Aboriginal and migrant communities, fire and emergency service organisations, voluntary organisations, and areas hit by disasters of one kind or another.

In fulfilling his non-ceremonial duties out in the community, and in inviting community representatives to functions held at Government House, or in receiving them as callers, the Governor uses the status and prestige which the community attaches to his position to acknowledge the vast number of organisations, institutions and individuals who contribute to the well-being of our society, and by his interest and his presence and his hospitality, encouraging the continuation of these activities. As Sir Zelman Cowen said in his farewell speech to the National Press Club in Canberra in 1982, and was to repeat in retirement in many speeches about vice-regal office, a busy and active incumbent:

> "..... offers encouragement and recognition to many of those Australians who may not be very powerful or visible in the course of every day life, and to the efforts of those individuals and groups who work constructively to improve life in the nation and the community".[15]

Politics has been described as a game, with opposing teams called Government and Opposition, a book of rules called the Constitution, and an umpire called the Governor (or Governor-General). Like any other game, while the teams are playing according to the rules there is very little for the umpire to do, but when the game gets rough and the rules are broken, the umpire must blow his whistle and give a ruling. Fortunately for our democracy, this does not occur often, but it can and does happen, and no review of the role of the State

Governor would be complete without an examination of at least a few examples. For this purpose I have chosen three – two from Queensland in 1986 and 1987, and another from Tasmania in 1989.

Sir Walter Campbell, a former Chief Justice of Queensland, was Governor of that State from 1985 to 1992. Sir Joh Bjelke-Petersen was Premier from 1968 to 1987. In June, 1986, less than a year after Sir Walter had been sworn in as Governor, *The Courier-Mail* reported that:

> "The Queensland Governor, Sir Walter Campbell, apparently is not prepared to rubber stamp Government decisions. He has sought and been given an undertaking that more details will be provided about certain appointments requiring Executive Council approval".

The article went on to give more details about that particular issue, which related to appointments to statutory bodies, and concluded with the following:

> "When Sir Walter swore in Sir Joh's latest Cabinet … the ceremony was conducted at Government House. This was a departure from the old arrangement where the Governor drove to the Executive Building for the swearing-in. This was seen in some circles as an indication that Sir Walter was prepared to play a more independent role".[16]

Next day, under the heading *The Governor Makes a Point*, *The Courier Mail's* editorial expressed support for the Governor's action in seeking more information about appointments requiring Executive Council approval:

> "Sir Walter has acted properly in seeking additional information about such appointments. … At Executive Council the Governor's task is often made difficult by the sheer volume of submissions. … Quite clearly, whether the Governor involves himself, and the extent of his involvement, will depend greatly upon the background and training of the vice-regal representative of the time. … [Other incumbents] might generally be expected to be less involved, certainly less interventionist, than a former Chief Justice of the Supreme Court with a well-developed appreciation of political history".[17]

Three months later, by early September, 1986, the political climate in Queensland was warming up. Even *The Sydney Morning Herald* was moved to speculate that:

> "The Queensland Governor, Sir Walter Campbell, could be called upon to decide who will govern after the State election due next month, an expert in Queensland politics said yesterday. The associate professor in government at the University of Queensland, Dr Ken Wiltshire, said a 'protracted constitutional wrangle' could follow an election in which none of the three major parties won enough seats to govern in its own right – the outcome considered most likely in the coming poll".[18]

Clearly there would be no place for a mechanical idiot here.

Three weeks later *The National Times* weighed into the debate. Dr Chris Gilbert, senior lecturer in constitutional and administrative law at Queensland University, was reported to have said the Governor was "uniquely equipped to handle a constitutional crisis because of his reputation as an upright, honest man and his considerable legal knowledge. 'If he receives conflicting advice from various political leaders he can be his own man', Gilbert said".[19]

By the end of October, *The Australian Financial Review* reported that:

> "Queensland's political partisans and constitutional experts agree on two things regarding Governor Sir Walter Campbell: that he has huge discretionary powers, and will use them with trained impartiality and fairness".[20]

The Australian was less restrained, and waxed lyrical about the possibility of a hung Parliament:

> "Usually the Governor is a mere cipher … But if, as widely predicted, none of the political parties gets a majority on Saturday and no coalition can be formed, Sir Walter suddenly will become the most powerful man in Queensland. He will have the power of

a dictator, the command of a despot. … The Governor's power will be absolute; though, under the Westminster system he should act as an impartial referee – a check and balance – to ensure democracy is maintained".[21]

On election day, 1 November, 1986, *The Sydney Morning Herald* contained a detailed analysis of the political and constitutional possibilities by Peter Bowers, arguably one of Australia's most experienced political journalists. It opened up with:

"The Queen's man in Queensland, Sir Walter Campbell, is powerfully equipped to impose a constitutional solution if the politicians prove incapable of resolving a deadlocked Parliament arising from today's election".[22]

After reminding his readers of the 1975 dismissal of the Whitlam Government, and of Whitlam's incorrect view that the Governor-General was bound to accept his Prime Minister's advice, and no other, Bowers wrote:

"There is no doubt about the authority of the Governor to consult whom he pleases if his intervention is required to resolve a political deadlock".[23]

In the event, the election produced a decisive result and the Governor was spared any agonising decision-making. However, the comments about the Governor's capacity to act, and the speculation that he might have to, send us important messages about the significance of the office of Governor and of the qualifications and personal qualities of its incumbents.

If Sir Walter breathed a sigh of relief over the result of the election, his relief was only to last a year. By November, 1987 he not only had to consider the possibility of using his reserve powers – he actually had to use them. With the Fitzgerald Inquiry into political and official corruption soon to report, the Queensland government was in turmoil, culminating in the sacking of a number of Ministers by the Premier.

In an attempt to shore up his own support in Cabinet, Sir Joh had proposed to the Governor the sacking of five Ministers. The Premier sought to do this by resigning his commission, being recommissioned to form a new Government, and choosing a Ministry that would exclude his five opponents. The Governor refused to be used in this way to bring about the removal of the five Ministers until the Premier had received the approval to his proposal from the full Cabinet. After a stormy Cabinet meeting and a second visit to the Governor, the Premier retreated from his original plan and received His Excellency's approval to a restructured Cabinet, but only after the Governor had received separate advice from the Deputy Premier that the changes would have the backing of the present Cabinet.[24]

The morning of 26 November, 1987 saw newspaper speculation that Sir Joh would be removed that day as parliamentary leader of the Queensland National Party, that nevertheless he might not resign his commission as Premier, and that the Governor would have to dismiss him. Four days later Sir Joh Bjelke-Petersen resigned and Mike Ahern became Premier.[25]

One year later, with the Governor's consent and "in the interests of historical accuracy", Premier Ahern released correspondence relating to the events which I have just described. The documents show the role that the Governor played in refusing to accept Sir Joh's resignation and to issue him with a fresh commission as a device to sack five troublesome Ministers. In a letter dated 25 November, 1987 to Sir Joh, the Governor wrote:

"Should you resign as Premier, it may be that I may not recommission you as Premier unless I was of the view that you were able to form a new ministry and that you would be able to obtain the confidence and support of the Parliament. It would be wise for you to discuss with all your ministers your proposed restructuring of the Ministry".[26]

On the following day, 26 November, Mr Ahern wrote to the Governor to tell him that he (Ahern) had been elected parliamentary leader of the National Party. Attached was a schedule signed by National Party members of Parliament, including two of Sir Joh's formerly staunch supporters. Following Sir Joh's resignation four days later, Sir Walter asked Mr Ahern to form a government on 1 December. This was a classic case of the proper use of the reserve powers

to refuse to accept the advice of a Premier who could not demonstrate that he had the support of his colleagues and the Parliament.

My third example comes from Tasmania, where General Sir Phillip Bennett served as Governor from 1987 to 1995, and where Robin Gray was Premier from 1982 to 1989. Tasmania went to the polls on 13 May, 1989, and when the polls were declared on 29 May it was clear that no party could command the support of a majority of the Lower House, although the Liberal Party led by Robin Gray had the largest vote of any single party.

Both parties had fought the election campaign on the basis that, should they fail to get a majority in the House, neither of them would form a coalition with the Independents. However, once the results were in, the Leader of the Labor Opposition, Michael Field, claimed that he had the support of the Independents and could therefore form a Government. Just to confuse the issue, the Independents claimed that:

> "We have set out in a formal accord what is agreed. On all other matters, we have input into Cabinet, but if we do not agree with a particular measure, we will oppose it in the House. And it could be that some Greens Independents will oppose a particular measure and others will not. There is no party discipline – we are not a party, we are a new force in Australian and Tasmanian politics".[27]

This was hardly comforting to a Governor charged with the constitutional responsibility for ensuring the stability of any Government that he might commission.

The Premier, on the other hand, claimed the right to a fresh commission to form a new Government because he believed he would be able to command a majority in the Lower House, which was to meet on 28 June, just one month away. His Government began to attack the Labor-Independent alliance, on the grounds that it was contrary to pledges made by both parties during the election campaign not to enter into an accord such as the one they had now reached after the election.

In the meantime, Tasmanians were divided over whether the Liberal Premier should hold on to power, whether Labor should form a minority Government, or whether a new election should be called. A case could have been made for any one of these three options. For the Governor the dilemma was very real – does he accept his Premier's advice and continue him in office until Parliament is able to make the decision, or does he exercise the reserve powers, reject the Premier's advice, and invite the Leader of the Opposition to form a Government? And if the latter, what of the Green-Independents' qualified and ambiguous support? In the end, with Parliament shortly to meet, the Governor accepted the Premier's advice and commissioned him to form a new Government, on the clear understanding that his support would be tested in the Parliament.

Within 24 hours of Parliament meeting, the Gray Government lost a no-confidence motion in Parliament. The dissolving of Parliament and the calling of a fresh election was publicly canvassed by some Liberals, but the Governor was entitled first to see if he could get a Government out of the Parliament that had just been elected. In the event, the fresh election option was not pursued by the Premier. By convention, he should have resigned and left it to the Governor to see whether Labor and the Independents could obtain a majority on the floor of the House. Instead, he held on to office and took the unusual and unconventional step of asking the Governor to determine for himself whether Labor and the five Independents could form a viable government.[28]

So the Governor began a series of meeting with all of the protagonists. In the course of the day the Governor met twice with the Premier, three times with the Leader of the Opposition, and separately with each of the five Greens-Independents. Sir Phillip in particular sought clarification from Mr Field about several points of his proposed agreement with the Greens-Independents, and specific assurances in writing of stable government under the accord. Once His Excellency was able to tell the Premier that he (the Governor) had received the assurance of stability he was seeking from each one of the Greens-Independents, the

Premier submitted his resignation, and Michael Field was sworn in as Premier of a Labor-Greens minority Government.[29]

Clearly the Governor had become actively involved in the formation of a new government, "but a common view among constitutional experts [was] that his actions were impeccable".[30] Premier Gray's advice to the Governor right after the election, that he believed his Liberal Government could command a majority in the new Parliament, was flawed, but the Governor was right in accepting it. Once the Premier had lost the confidence of the House, the Governor's exploration of options was meticulous, exhaustive and correct, and there was no criticism from the Labor Party.[31]

A Governor who was a mere ornament or a "mechanical idiot", to use one of Sir Guy Green's labels, could not have achieved what Sir Phillip Bennet achieved. As Professor James Crawford, of the Sydney University Law School, put it:

> "The crucial test in Tasmania was how you tell someone has won an election. It underlines the fact that it is very difficult to come up with a set of rules that has no discretion".[32]

To which I would add, long live the reserve powers of the Crown!

I turn now to try and answer the question posed in the title of this paper – are State Governors an endangered species?

As we know only too well, holders of vice-regal office under our system of government, and under all of our Constitutions, federal and State, have real and important constitutional powers which go to the heart of the operation of governments and Parliaments. Sometimes they may be called upon to exercise those powers, and I have given some examples. They also are able to have an important influence on the community by their example, particularly by their attendance and their speeches at community functions, and by the functions which they hold at their respective Government Houses.

Given this combination of powers and influence, it doesn't require a great leap of imagination to realise that there will occasionally be a State Premier who might find it irksome to have to work under a Governor of independent mind, such as we have seen in Sir Walter Campbell and Sir Phillip Bennett, and who might be inclined to seek to appoint as Governor someone who might be, or could be persuaded to be, more malleable. Alternatively, to return to the sporting analogy which I used earlier, occasionally it will happen that the captain of one of the teams in the game of politics, fearful of what an umpire with an independent mind might do, might try to nobble the umpire, either before or during the game. This might be done, either by choosing a malleable umpire in the first place, or by taking the pea out of the whistle of an umpire who might be suspected of being of an inquiring and independent mind.

There have been a few State Governors who were chosen precisely because they were, or their Premier thought they were, either deficient in the required personal qualities, or because they could be persuaded to be malleable in their application. I have too much respect for vice-regal office to attempt to name any of these, but I am sure many of you will be able to think of some examples. The best we might hope for in such cases is that, if their term in office is to be nasty and brutish, it should also be short; or that, as sometimes has happened, they grow and mature in office, and end up by surprising those who chose them in the first place.

There have also been many State Governors who have followed in the great traditions of the office – men and women who have had the intelligence, the wisdom, the integrity and, if necessary, the courage to uphold their oath of office. It would be invidious to name a few and leave out others equally deserving, so I will leave you to think of your own examples. The best way for a Premier to nobble such Governors is to reduce or remove some of the resources and facilities available to them to do their job.

I have already recounted how Sir Walter Campbell exerted his influence early in his term by changing the previous practice of the Governor going to the Executive Building to swear-in Ministers, and instead requiring his Ministers to come to Government House. And it is generally the case that Ministers go to their respective Government Houses for their Executive Council meetings, except in Victoria where the Governor drives each week to the Old Treasury Building, and in New South Wales, where the meeting takes place in the old Chief Secretary's Office. It may be argued that history and tradition are being preserved because these meetings take place in what are described in both States as the Executive Council Chamber, but I believe the practice to be an unfortunate one. The place for Ministers to be received by their Governor is Government House.

The quickest and most effective way of nobbling a Governor is to evict him from Government House and make his job a part-time one. This was the device used by New South Wales Premier Bob Carr in 1996, though it was by no means the first time this strategy was considered or used.[33]

On 16 January, 1996 Carr announced that the next Governor of New South Wales would be former Supreme Court Judge Gordon Samuels; that the new Governor would not live or work at Government House; and that he would retain his appointment as Chairman of the New South Wales Law Reform Commission. In seeking to justify his decision to change the role of the Governor, the Premier said:

> "The Office of the Governor should be less associated with pomp and ceremony, less encumbered by anachronistic protocol, more in tune with the character of the people".[34]

Under the heading *His Part-time Excellency*, *The Sydney Morning Herald* reported that, in announcing these changes, the Premier said that the Governor would continue to live in his own home at Bronte, would operate with a reduced staff, and would attend few of the ceremonial and entertaining functions that traditionally occupy vice-regal time:

> "The changes reflect Mr Carr's determination to shed functions he considers excessive, irrelevant and unbecoming, although he said they involved no alteration to the Governor's constitutional role".[35]

It was also reported that, at the end of the press conference at which he had presented the next Governor, the Premier, in a smiling aside, had said, "That's one for Jack Lang".[36]

That smart-alec remark, and the Premier's comment that the shedding of so-called irrelevant functions involved no alteration to the Governor's constitutional role, reveal the hypocrisy and cynicism of the Premier's decision. A Governor's constitutional role – assenting to legislation and presiding at meetings of the Executive Council – would occupy only a few hours a week of his time. The rest of a full-time Governor's time, and that of his wife, would be devoted to public duties: attending functions all over the State, or hosting them at Government House, in order to encourage and show support for all those worth-while community activities that governments cannot or should not do, and generally responding to the community's requests, be they for patronage of an organisation, or for a speech or a visit or some other mark of recognition of service well done. What the Carr Government had really said to the people of New South Wales was that those of the Governor's duties which serve the government's needs would be retained, and those which serve the community's needs would be dispensed with. That was the real, the selfish, the insulting message which Mr Carr gave to the people of New South Wales.

The Premier also claimed that the changes would result in savings of about $2 million a year, but the following year the Auditor-General reported to Parliament that, far from saving money, the changes had meant that it was costing $600,000 more a year to run Government House since it had ceased to be the Governor's residence.[37]

In its editorial on the day after the Premier's announcement, *The Sydney Morning Herald* noted that:

> "There is an inconsistency in saying that the Office of the Governor should be 'more in tune with the character of the people' while reviewing, presumably with a view to cutting back, the number of ceremonial and social functions the Governor performs. If Mr Samuels withdraws, or is forced to withdraw, from such apparently mundane matters as opening country shows, or being patron of community organisations, it can hardly be said that he is bringing the office closer to the people".[38]

The editorial went on to point out that there are daily tours of the White House, in Washington, so it ought to be possible to give the public more access to Government House and its grounds without intruding greatly on the privacy of the Governor.

As the public is also able to visit the Queen's palaces and residences in the United Kingdom, Government House, Ottawa, and Government House, Canberra, the Premier's argument that the Governor needed to be evicted from Government House, Sydney in order to make it more accessible to the public is exposed for the falsehood that it really is. In fact, looking at the Governor's web pages on the New South Wales Government's web site, every use to which Government House and its grounds have been put over the past eight years could have been done with the Governor still living and working in Government House.

Needless to say, the State's longest serving Governor, Sir Roden Cutler, was not amused. He was reported as saying:

> "It's a political push to make way in New South Wales to lead the push for a republic. If they decide not to have a Governor and the public agrees with that, and Parliament agrees, and the Queen agrees to it, that is a different matter, but while there is a Governor you have got to give him some respectability and credibility, because he is the host for the whole of New South Wales. For the life of me I cannot understand the logic of having a Governor who is part-time and doesn't live at Government House. It is such a degrading of the office and of the Governor".[39]

If Sir Roden Cutler was not amused, neither were many of the citizens of New South Wales. Four weeks before the swearing-in of Gordon Samuels, a crowd of 15,000 protested outside Parliament House, blocking Macquarie Street in one of the biggest protests Sydney has seen,[40] and on the day before the swearing-in, a petition bearing 55,000 signatures was handed in, calling on the Premier to reconsider.[41]

Some sections of the media supported the downgrading of the office of Governor of New South Wales. Anything that angered monarchists and furthered the Keating push for a republic had to be a good thing, while the constitutional significance of the Premier's action seemed to elude them or be of no interest or consequence.[42] Yet three distinguished writers were able to see the wood for the trees.

Frank Devine wrote that:

> "Bob Carr, Premier of New South Wales, and Gordon Samuels, the State's new semi-governor, are acting too smart-arse for their own good – and, for that matter, the good of the republican movement".[43]

PP McGuinness wrote that:

> "To say that Paul Keating and Bob Carr do not love each other would be an understatement; they thoroughly detest each other, and if Keating loses the prime ministership at the next election he will certainly blame it on Carr's initiative in downgrading the status of the Governor of NSW".[44]

John Stone wrote that:

> "Mr Carr's breathtakingly arrogant move last week to downgrade and demean the role of the State Governor, thereby enhancing further his own far too powerful role of Premier, is all of a piece with Mr Keating's view (and Mr Carr's) of how government should be carried on".[45]

History records that seven weeks later Keating did indeed lose the prime ministership, and that

less than four years later the Australian people decisively rejected the Keating/Turnbull republic.

The Premier's agreement to the Governor-designate's request that he retain the chairmanship of the State's Law Reform Commission also came under fire. Not only did it raise questions of conflict of interest: it also raised questions of propriety. Could the Governor give the Royal Assent to legislation that he may have had a role in creating? Could the Governor hold another office of profit under the Crown? And even if he received no additional remuneration other than the vice-regal salary, could he preside over and take advice from the Executive Council and at the same time hold another statutory appointment that required the approval of the Governor-in-Council? Was there essential law reform work still to be done that required his particular expertise, or was it a device to fill in the days for a part-time Governor?

With the Opposition threatening to refer the dual appointment to the Independent Commission Against Corruption, and to recall the Upper House for a debate on the Samuels appointment, the Government closed down the Parliament by proroguing it, and announced that Mr Samuels would stand down as chairman of the Law Reform Commission.[46] At his swearing-in the new Governor declared that he would maintain the ceremonial functions the Premier had wanted shed, and the event was conducted with the traditional pomp and ceremony.[47] However, the Governor remained evicted from Government House and his office was established in downtown Macquarie Street, in rooms that had been used by Sir Henry Parkes as Colonial Secretary and Premier of New South Wales in the 1890s.

Climbing a flight of stairs in an old government building to call on the Governor may be all right for ordinary mortals, but when the Premier needed to have the Governor-in-Council sign the writs for the State elections that were to be held on 22 March, 2003, that was not good enough for Mr Carr. Accompanied by his wife and one of his women Ministers, the Premier provided a perfect photo opportunity for television and the press by "striding down the tree-lined avenue to Government House".[48] There the humbug was further compounded, again for the cameras, by holding the Executive Council meeting in what used to be the Governor's office but was no longer, and had not been for the past seven years.

Today, eight years on, New South Wales' Governor remains evicted from Government House; the second incumbent also lives in the suburbs and commutes to her down-town office; the promised cost savings and grandiose schemes for alternative uses of Government House have not eventuated; and it continues to be used, and the public has access to the house and grounds, in ways that would not preclude the Governor from living and working there, as indeed was the case in the past.

Has the office suffered from the downgrading? The answer has to be "yes". Is the damage permanent? The answer has to be "no", and nothing has occurred that would prevent a future government from returning the Governor to Government House. Furthermore, the damage which Premier Carr inflicted on the republican cause seems to have deterred any other State Premiers from trying to copy his example.

The vice-regal office is stronger and more resilient than the foolish whims of a mere politician, and it continues to be the constitutional umpire in the game of politics. The office of State Governor has been threatened, as it has been before and no doubt will be again, but it has not been endangered.

Endnotes:

1. For discussion of the vice-regal roles, see Sir Paul Hasluck, *The Office of Governor-General*, Melbourne University Press, Carlton, 1979; Richard E McGarvie, *Democracy: choosing Australia's republic*, Melbourne University Press, Carlton, 1999, pp. 16-75; and

Dr J Davis McCaughey, *The Crown at State Level*, being *The Eighth Hugo Wolfsohn Memorial Lecture*, La Trobe University, 12 October, 1993. See also Sir Guy Green, *Governors, Democracy and the Rule of Law*, being *The Sir Robert Menzies Oration*, The University of Melbourne, 29 October, 1999; and 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.

2. McGarvie, *op. cit.*, p. 26.

3. Hasluck, *op. cit.*, pp. 21-2.

4. See Sir Zelman Cowen, *The Office of Governor-General*, in *Daedalus: Journal of the American Academy of Arts and Sciences*, Volume 114, Number 1 (Winter 1985), pp. 141-144; Sir Zelman Cowen, *The Crown and its Representative in the Commonwealth*, an address to the annual conference of the Law Society of Scotland, Glen Eagles, 21 April, 1985, *passim*; Sir Zelman Cowen, *Reflections*, being *The William Walker Memorial Oration*, Gold Coast, Queensland, 15 September, 1991, p. 9; and Sir Zelman Cowen, *Leadership in Australia: The Role of the Head of State*, being *The Williamson Community Leadership Lecture*, Melbourne, 31 May, 1995, p. 7.

5. McGarvie, *op. cit.*, p. 26.

6. George Winterton, Professor of Law, University of New South Wales, has criticised my use of the word "constitutional" in this context on the grounds that it does not encompass powers conferred by statute. On the other hand, Dr Davis McCaughey and Richard McGarvie, both former Governors of Victoria, and Sir Guy Green, a former Governor of Tasmania and a former Administrator of the Government of the Commonwealth of Australia, use the word "constitutional" and comprehend it as also encompassing powers conferred by statute, as do I. Paradoxically, Winterton then goes on to describe "constitutional" functions as including powers exercised both alone and through the Executive Council, and it is in the Executive Council that vice-regal powers conferred by statute are exercised.
   In similar vein, another academic, Professor Greg Craven, Professor of Law, University of Notre Dame, has recently said:
   > "Of course, so long as Australia remains a monarchy, the Governor-General can never be more than a surrogate …".

   Yet in 1988, the Hawke Government's Constitutional Commission reported otherwise. The Commission had included as members three constitutional lawyers and two former heads of government, former Prime Minister Gough Whitlam and former State Premier Sir Rupert Hamer, both of whom had worked with vice-regal office holders, and the Commission had been advised by a committee headed by former Governor-General Sir Zelman Cowen. The Commission concluded and reported that the Governor-General is the holder of an independent office and "is in no sense a delegate of the Queen".
   Australia is indeed fortunate that we now have a body of writing by former holders of vice-regal office, at Commonwealth and State levels, to correct the errors of academics who pronounce on matters of which they have no personal knowledge or experience.

7. McCaughey, *loc. cit.*, pp. 2 and 10.

8. McGarvie, *op. cit.*, p. 282, note 50.

9. Green, *loc. cit.*, p. 2.

10. Hasluck, *op. cit.*, pp. 38-9.

11. (1982) 151 CLR 342.

12. Green, *loc. cit.*, p. 5.

13. *Ibid*..
14. Quoted in McCaughey, *loc. cit.*, p. 8.
15. See for example Cowen, *The Williamson Community Leadership Lecture*, *op. cit*., at p. 10.
16. Peter Morley, *Governor wants details of Cabinet Decisions*, in *The Courier-Mail*, 5 June, 1986.
17. Editorial, *The Governor makes a point*, in *The Courier-Mail*, 6 June, 1986.
18. Greg Roberts, *Governor likely key to Qld poll deadlock*, in *The Sydney Morning Herald*, 8 September, 1986.
19. Sally Loane, *Qld poll may put Governor in hot seat*, in *The National Times*, 28 September, 1986.
20. Ean Higgins, *Experts: The Governor would be impartial*, in *The Australian Financial Review*, 29 October, 1986.
21. Hugh Lunn, *The man who could rule with a single vote*, in *The Australian*, 30 October, 1986.
22. Peter Bowers, *Kerr's ghost haunts the Queensland Handicap*, in *The Sydney Morning Herald*, 1 November, 1986.
23. *Ibid*..
24. See Greg Roberts, *Joh's fight to the death*, in *The Sydney Morning Herald*, 25 November, 1987; and Rowan Callick, *Qld Governor tosses up his options under the Constitution*, in *The Australian Financial Review*, 26 November, 1987.
25. See Paul Lynch, *Sir Walter has power to dismiss Premier*, in *The Australian*, 26 November, 1987; and John Schauble and Christobel Botten, *The Age*, 26 November, 1987.
26. Quoted in Sonya Voumard, *Governor thwarted Bjelke, letters show*, in *The Age*, 17 December, 1988.
27. Quoted by Peter Smark, *The general sorts it out*, in *The Sydney Morning Herald*, 30 June, 1989, and *Gray's resignation spared Governor a constitutional dilemma*, in *The Age*, 30 June, 1989.
28. See Tom Burton, *Gray's resignation spared Governor a constitutional dilemma*, in *The Age*, 30 June, 1989; editorial, *Mr Gray's elegy, not democracy's*, in *The Age*, 30 June, 1989; and Andrew Darby, *Field sworn in as Premier: Gray offers the Governor his resignation*, in *The Age*, 30 June, 1989.
29. See Paul Austin and Christine McGee, *Gray out, Field in: Labor-Greens alliance wins Governor's nod*, in *The Australian*, 30 June, 1989.
30. Mike Steketee, *Governors and the majority*, in *The Sydney Morning Herald*, 18 July, 1989.
31. See Smark, *loc.cit.*; also Steketee, *ibid*..
32. Quoted by Steketee, *ibid*..
33. In February, 1984 the Governor-designate of Western Australia, Professor Gordon Reid, announced that he would live in and work from his home in the suburb of Nedlands, while using Government House for meetings of the Executive Council; but eventually he and his wife moved back into Government House, quietly and without publicity.
34. Quoted in editorial, *A Governor on the side*, in *The Sydney Morning Herald*, 17 January, 1996.

35. David Humphries, *His Part-time Excellency*, in *The Sydney Morning Herald*, 17 January, 1996.
36. Tony Stephens, *No pomp, but happy to serve the Queen*, in *The Sydney Morning Herald*, 17 January, 1996.
37. David Humphries, *Blow-out in costs for "empty" residence*, in *The Sydney Morning Herald*, 13 November, 1997.
38. *A Governor on the side, loc.cit.*.
39. *Ibid.*.
40. George Richards, *Era ends as door closes on Governor's home*, in *The Sydney Morning Herald*, 1 March, 1996.
41. Stephen Lunn, *Monarchists decry Carr's "republic by stealth"*, in *The Australian*, 1 March, 1996.
42. See for example Mike Steketee, *A popular decision with powerful symbolism*, in *The Australian*, 17 January, 1996; also Bernard Lane, *Less pomp eases path towards a republic*, in *The Australian*, 17 January, 1996.
43. Frank Devine, *Premier's house of cards*, in *The Australian*, 18 January, 1996.
44. Padraic P McGuinness, *Carr's coup d'état may also prove a fatal blow to Keating*, in *The Sydney Morning Herald*, 20 January, 1996, and *Carr may have signed two death warrants*, in *The Age*, 20 January, 1996.
45. John Stone, *Doing battle State by State*, in *The Australian Financial Review*, 25 January, 1996.
46. David Humphries, *Governor to quit second job for now*, in *The Sydney Morning Herald*, 27 January, 1996.
47. David Humphries, *New Governor gets back his pomp*, in *The Sydney Morning Herald*, 2 March, 1996.
48. Paola Totaro, *Carr wastes no time on the hustings*, in *The Sydney Morning Herald*, 1 March, 2003.