# Chapter Seven
# The Role of the Sovereign

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It is sometimes said, based perhaps on Matthew, that by their words shall ye know them.[1] The words of our Sovereign describe exactly her mission in life, a mission to which she has remained faithful. What is surprising is that it is only now that many in the media and in politics are realizing that The Queen means what she says. And unlike many in modern political life, The Queen believes that an oath sworn on the Bible is an act of considerable significance and should be honoured. She has always kept to the promises she made when she came of age and when she was crowned and anointed. An abdication merely because of age was always out of the question and never contemplated – except in media speculation.

On her 21st birthday, The Queen indicated how she intended to fulfil her role in life:

"I declare before you all that my whole life, whether it be long or short, shall be devoted to your service and the service of our great imperial family to which we all belong".[2]

More recently, she gave an indication of her strong faith when she said:

"For me the teachings of Christ and my own personal accountability before God provide a framework in which I try to lead my life. I, like so many of you, have drawn great comfort in difficult times from Christ's words and example. I believe that the Christian message, in the words of a familiar blessing, remains profoundly important to us all:

> 'Go forth into the world in peace, be of good courage, hold fast that which is good, render to no man evil for evil, strengthen the faint-hearted, support the weak, help the afflicted, honour all men…'

It is a simple message of compassion… and yet as powerful as ever today, two thousand years after Christ's birth".[3]

And again, after 9/11, she told the American people:

"Grief is the price we pay for love".[4]

The Queen, who has reigned over us for more than one half of the life of the Commonwealth of Australia, attracts, and rightly attracts, the admiration of the people of Australia. The reaction in Melbourne at the Opening Ceremony of the Commonwealth Games , when the 80,000 or so present joined with Dame Kiri Te Kanawa in singing not only Happy Birthday, but in standing to sing the few bars of the Royal Anthem the censorious organizers permitted, is testimony to that.[5]

We have been blessed with a Sovereign who has never put a foot wrong, who has never embarrassed us, who does her duty, and whom we do not pay and never will pay.[6] In brief, her service has been impeccable. The Queen is now as revered as she was when she first came to Australia.

And yet, it is a little appreciated fact that the Crown, the oldest institution in the nation, remains central to and permeates our constitutional system, which is one of the world's most successful. Nevertheless, the place of the Crown and therefore The Queen in our constitutional system remains under challenge, but certainly not to the degree the republican media claim and indeed crave.

The national newspaper, *The Australian*, has apparently decided that it will no longer be the standard bearer of republicanism, a role it feverishly pursued in the 1999 referendum campaign. That role has since passed to *The Sydney Morning Herald* and *The Age*, the latter ironically still published under some variation of the Royal Coat of Arms. Both claim a majority of Australians are in favour of a republic.[7] This is a view common in republican circles, but it does not accord with the sort of evidence normally considered persuasive.

For example, the Newspoll taken on 13-15 January, 2006 indicates that support for some unspecified republic has fallen to 46 per cent. The poll also purports to show the proportion of the respondents who are strongly in favour of a republic on this occasion falling to 27 per cent.[8] It is likely that a good proportion of even the latter would, in a referendum, vote against a specific republican model.

The reason is that in a contested referendum the people are by law furnished with a substantial document containing arguments from both sides in the Parliament on the detailed constitutional changes proposed

– provided there is a division of opinion there. Accordingly, the vote will be preceded by a wide-ranging debate in the media. The voters will by then have been exposed to discussion of such matters as the cost of change, the safety of the specific model, comparisons between that model and the present Constitution, and the difficulty (some would say the impossibility) of successfully grafting a republic onto a Constitution which is intrinsically monarchical.

In addition, the media forget that the decision to conduct an opinion poll on any subject is of course no indication in itself of the interest of the nation in that subject. That published polling on republicanism in Australia has hitherto almost always been commissioned by those with a republican agenda indicates where the interest in republicanism is strongest.

It is clear the rank and file Australian is probably not greatly interested in the subject. For this we have the testimony of none other than the erstwhile leader of the republican movement, Mr Malcolm Turnbull. During the 1999 referendum campaign, he lamented that at precisely the time when interest in it should have been high, it was low. He observed in his diary, just four months out from the referendum:

"We have Buckley's chance of winning. Nobody's interested".

Unfortunately, this information only became public after the referendum when the diary was published.[9]

Yet this was at a time when the nation was approaching a series of events nominated by the republicans as the most auspicious for substantial change to the Constitution and the Flag – the Centenary of federation, the new Century, the millennium and the 2000 Sydney Olympic Games.

The conclusion must be that an opinion poll posing a question on support for some undefined republic cannot be indicative of the way people will vote in any subsequent referendum.

At this point it is worth recalling that polling indicates that support for republicanism is strongest among the middle-aged. This contradicts a common assumption in the republican movement that the advent of some sort of republic is only a matter of time. The fact is that polling indicates support for republicanism declines among the young.

In November, 1999, the Morgan Poll found 54 per cent in favour of a republic, about 10 percentage points more than in the referendum itself. In February, 2005, in response to the question, "In your opinion, should Australia remain a MONARCHY – or become a REPUBLIC with an elected President?", 40 per cent of all respondents on the electoral roll were in favour of the monarchy, 52 per cent in favour of a republic and 8 per cent undecided. By way of contrast, 50 per cent of respondents aged between 14 and 17 years were in favour of the monarchy, 37 per cent in favour of the republic and 13 per cent undecided.[10]

The threshold for constitutional change in Australia is high, but not impossibly high. This was the carefully considered choice of the founders of our nation, one which was expressly approved by the people. Change must be approved by a double majority, both nationally and federally; that is, by a majority in a majority of States. Only Parliament, or in special circumstances, either House (but from a practical view only the House of Representatives) can institute a referendum – there is no provision for a citizens' initiative.[11] As this must be by way of a Bill, details of the precise changes are apparent before the vote. As the seminal constitutional text argues, these requirements are not to prevent change as such, but only to prevent change being made in haste or by stealth. Above all the intention is to encourage proper debate, and to delay change unless and until there is strong evidence that the change is "desirable, irresistible and inevitable".[12] Given that most proposed changes have been either to increase federal powers, or perceived to reduce the federal nature of the Constitution, it is not surprising that only eight out of forty-four referenda since Federation have been approved.

Republicanism in Australia is not a recent phenomenon. A 19th Century version involved a nationalist and racist campaign, which disappeared with the movement for Federation. In the mid-20th Century, the Communist movement planned that Australia become a people's republic in the East European style. The present republican movement only achieved political impetus when its agenda was espoused by a former Prime Minister, Paul Keating, as government policy.[13]

Notwithstanding strong media and political support, with the republicans given a free hand to draft the changes proposed, a referendum to graft a republic onto the federal Constitution was defeated in a landslide in 1999, both nationally and in all States. It is unlikely that another referendum, at least one held in the near future, would succeed.[14]

According to the former republican leader, Malcolm Turnbull, now a Parliamentary Secretary, another referendum:

"… should not be put up for another vote unless there is a strong sense in the community that this is an issue to be addressed NOW…In addition, in order to be successful a republic referendum needs to have overwhelming support in the community, bipartisan support politically and, in truth, face modest opposition. A republic referendum should not be attempted again unless the prospects of success are very, very high…… I do struggle to see how a republic referendum could get the level of support it needs to win during the reign of the present Queen".[15]

Turning Australia into a republic would be a more significant change than many believe. Some years before republicanism came onto the serious political agenda, an eminent constitutional lawyer, Professor P H Lane, argued that rather than attempting piecemeal amendment, that is the grafting of a republic onto the existing Constitution, republicans would be better advised to propose a new Constitution.[16] This advice remains ignored by most republicans.

This is not to say Australia could not become a republic. But those who propose change have a moral duty to understand what they are doing, and to propose change which will ensure that the constitutional system is not damaged. Unfortunately, the republican movement has a record of failing to ensure that it is always well informed on matters crucial to its campaign. During the 1999 referendum, it became clear that the republican Minister charged with advancing the republican change, and the republican leadership, were unaware of the process by which a member of the Commonwealth of Nations changing to a republic may seek to remain within that organization.[17] And again, it was surprising that in publishing an attack on the Governor-General, Major-General Michael Jeffery, a former head of not one, but two Commonwealth departments, demonstrated that he seriously misunderstood the role and function of the Federal Executive Council.[18]

In anticipation of achieving a republic, the republican agenda has been to minimize or even to hide the role of the Sovereign in the Constitution. Yet the Crown is the nation's oldest institution, and is central to the constitutional and legal system.

To an extent, any success in minimising or hiding the role of the Sovereign has been a side-effect of the debate over the Head of State, a debate which has been condemned by a prominent republican constitutional lawyer as arid and irrelevant.[19] The debate arose because the principal republican argument for a republic has been the need for an Australian Head of State.

This is not a term used in any of the constitutional documents of the nation, nor was it of general public usage when it was first introduced to the debate. Its origin is as a diplomatic term, the usage of which is governed by international law. The term "Head of State" gradually replaced the previous generic term" prince" which, with an increasing number of republics in the 19th and 20th Centuries, had become inappropriate. As such there can be no doubt that under international law an Australian Governor-General is undoubtedly a Head of State.[20]

The entirely separate argument that the Governor-General is the constitutional Head of State has been presented by Sir David Smith in a major work, which to date has gone virtually unanswered, and curiously, has been little reviewed by a media otherwise obsessed with republicanism.[21] A compromise view, one advanced by the current Prime Minister, is that the Governor-General is the "effective Head of State".

The effect of this debate has been to emphasise the considerable constitutional functions of the Governor-General, and to compare them with those of the Sovereign, whose principal constitutional functions are to appoint and remove the Governor-General and the Governors.[22] It would be a serious mistake to conclude that the exercise of these functions is the only involvement of the Sovereign in the Australian constitutional system.

The purpose of this paper is to attempt to provide an outline of that role.

**The King's two bodies**

The Sovereign is at the very centre of our constitutional system. Those great Commonwealth constitutional authorities, the Canadian Dr Eugene Forsey and the Australian Dr HV Evatt, long ago conclusively demonstrated the important and crucial role of the Sovereign's representative as a constitutional guardian.[23] This is but one aspect of the monarchy.

The organizing principle of government in Australia, and in the other fifteen Commonwealth Realms, is monarchical.[24] As in Canada, so in Australia, its pervasive influence has moulded and influenced her courts, her laws, her Parliaments, her executives at both levels of government, State or Provincial and federal, her armed forces, her diplomacy and her public or civil services.[25] Sir Robert Menzies put it succinctly: "The

Crown remains the centre of our democracy".[26]

The Sovereign is at one and the same time both a natural person, as well as being the office itself. This might have had its roots in classical antiquity.[27] This is expressed in the ancient maxims *Dignitas non moritur*, or *Le Roi ne meurt jamais*, and in the exclamation on the demise of the Monarch, "*Le Roi est mort. Vive Le Roi!*" ("The King is Dead. Long Live the King!"). The consequence is that immediately on a demise of the Monarch, in the twinkling of an eye, the successor becomes the Sovereign, and the Crown continues without any interregnum.

So, under our ancient law, the Sovereign has not one, but two bodies. The Sovereign has both a body natural and a body politic. We understand something of this in other places. There is a Minister for this or that, and the office continues whoever fills it. There is a Bishop of such and such, and the bishopric continues after the incumbent goes. It is even more so with the Sovereign, who will reign for life except in the most exceptional circumstances. The Sovereign is a natural person, but he or she is also the office.

An important point is that there cannot be a break, there cannot be an interregnum: the clearest example is in the reign of Charles II beginning immediately after the death of Charles I.[28] An interregnum would have been too dangerous. It could have led to doubt, to uncertainty and to instability on a demise of the Crown. It might even have led to insurrection and civil war. So the succession has to be immediate, and for that, the successor has to be known, either presumptive or apparent. Accordingly, the acclamation on the demise of the Monarch is: "The King is dead . Long Live the King!".

The doctrine of the King's two bodies is an ancient principle, well expressed in *Calvin's Case* in 1608:

> "For the King has in him two Bodies, viz., a Body natural and a Body politic. His Body natural…is a Body mortal, subject to all Infirmities that come by Nature or Accident, to the imbecility of Infancy or Old Age, and to the like defects that happen to the natural Bodies of other People.
>
> "But his Body politic is a Body that cannot be seen or handled, consisting of Policy and Government, and constituted for the Direction of the People and the Management of the public Weal, and this Body is utterly devoid of Infancy, and Old Age, and the other Defects and Imbecilitities, which the Natural Body is subject to, and for this Cause, what the King does in his Body politic, cannot be invalidated or frustrated by any Disability in his natural Body".[29]

This is central to our constitutional law. It is perhaps more easily understood today if we refer to the King's body politic as the Crown.[30] We find this usage in the Preamble to the *Commonwealth of Australia Constitution Act*, 1900 (Imp.). This was the act of the Imperial or British Parliament which formally constituted the Commonwealth of Australia.[31] The Preamble recites that:

> "Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:.....".

The use of the words "the Crown" to describe the Sovereign's body politic was, as Maitland says, of relatively recent use at the time of Federation.[32] While the word "Crown" is used in the Preamble, the Constitution then uses the word "Queen". But the many references to the "Queen", while referring at that time to Queen Victoria, also refer to her body politic. This is confirmed by the terms of section 2 of the *Constitution Act*, which provides that the provisions of the Act "referring to the Queen shall extend to Her Majesty's heirs and successors…".

Once it is understood that the references in the Constitution include a reference to the King or Queen in his or her body politic, that is the Crown, and now the Australian Crown, much of the mischief which has been made about that document evaporates. For example, if we take the key sections, section 2 and section 61, and read them using more current terms and in the light of the latest constitutional developments, the intention becomes crystal clear:

> 2. A Governor-General appointed by the Sovereign shall represent the Australian Crown in the Commonwealth….
>
> 61. The executive power of the Commonwealth is vested in the Australian Crown, and exercisable by the Governor-General. The executive power extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

(This is not a suggestion for any constitutional amendment. It would be foolish to amend a document to take into account transient and misleading interpretations. This is merely an explanation of the meaning of those sections.)

The conclusion is that the many references in the Constitution to The Queen are references to the Sovereign in his or her body politic, which today we would refer to as the Australian Crown. The Crown is more than the office of the Governor- General and the offices of the Governors. It is the ancient but evolved Leviathan which permeates not only the Constitution in the narrow sense – the federal Constitution – but also those of the States as well as the broader constitutional system under which we are governed.[33]

The need to understand that the Governor-General is the representative of The Queen's body politic, that is the Crown, is not limited to Australia.

As long ago as 1945, the private secretary to the Canadian Governor-General, Shuldham Redfern, observed:

> "It is often said the Governor-General is the personal representative of the King. It would be more correct to say that he is the official representative of the Crown, for there is a difference between representing a person and representing an office held by a person".[34]

This conclusion is understandable, given the phenomenon the Canadian authority, Professor David E Smith, refers to as the separation of the person of the Monarch from the concept of the Crown in Canada.[35] This not only involves the absence of the Monarch and her court, but also the more recent policy of the Canadianisation of the Crown.

This conclusion may go further than is necessary. It is one thing, and a correct thing too, to emphasise that a Governor-General is the representative of the Crown. But it is not "more correct" to say so. While it is clearer to modern ears, that does not make it "more correct". Indeed, it would be incorrect to deny or underplay the fact that the Governor-General is, constitutionally, as much the personal representative of the Sovereign as of the Crown. While we can distinguish the Crown from the person of the Sovereign, we can never divorce them. Not even demise in the Monarch, or an abdication, can do that.

Not only can we not have the Crown without the Sovereign, we cannot retain some sort of facsimile of the Crown if we remove the Sovereign from our Constitution. This is the fundamental flaw of republican minimalism.

This is why the many proposals for change to some form of a republic hitherto have all failed at the threshold. As Canadian Professor David E Smith observes, in any Canadian republic, some alternative concept would have to fill the void of the absent Crown, and none of the proposals attempts this.[36]

The most facile republican model in Australia has been the celebrated "tippex" solution advanced by the Australian Republican Movement and the Keating government.[37] The proponents argued that Australia could be converted into a republic by the simple act of whitening out the words "Queen", "Crown" and "Governor-General" and replacing them all with the word "President". But as Justice Lloyd Waddy pointed out, this attempted "overthrow of the entire theoretical basis of the law and practice of the Constitution is, to put it mildly, somewhat more complex".[38]

As seen from Canada, the case for substantial constitutional change advanced in recent years in Australia has been based on one simple *desideratum*: to get rid of The Queen.[39] Professor David E Smith asks the obvious question: "Why such an unsophisticated rejection?"[40] This of course is not the place to ascribe reasons, but it is the place to wonder why, outside of the ranks of Australia's constitutional monarchists, the extreme narrowness of the Australian republican *raison d'être*, and its likely consequences on the constitutional fabric, are ignored.

Although the "tippex" solution has been formally abandoned , the republican movement has advanced little further from this simplistic approach. Indeed the official position of the republican movement since the referendum is curious. It is that they now have no republican model. Yet they still demand what the republican leader and author, Mr Thomas Keneally, correctly indicated would be "the biggest structural change to the Constitution since Federation".[41] It is indeed unusual, to say the least, to demand change of such a proportion, but then to admit that the proponents of change, including a Senate committee, have absolutely no idea of what change is envisaged![42]

This refusal to focus upon a model is probably a tactic to paper over significant differences among republicans, and to encourage endorsement of the republican movement's campaign for a cascading series of plebiscites and a referendum at the federal and presumably at the State levels.[43] A leading republican politician, Senator Marise Payne, who originally endorsed this process, changed her position significantly in a Senate committee report after Professor Greg Craven had persuaded her that this would necessarily lead to the model in which the President is directly elected.[44] As a result, Senator Payne asks that the proposal for a second federal plebiscite be abandoned, but that the first federal plebiscite be retained.

Whether or not this further division between the republican politicians is resolved, the demand for major change, without specifying that change, is not only curious, it is worse. What is being demanded is that the Australian people cast a vote of no confidence in one of the world's most successful Constitutions, without knowing what, if anything, is to fill the vacuum. It is difficult to imagine a more irresponsible proposal.

The flaw in all this involves a refusal to countenance the existence of that vast institution at the heart of the constitutional system, the Crown. Hitherto all significant proposals for republican change have been based on this denial, and involve an attempt to graft a republic onto an intrinsically monarchical constitutional system. Note that I refer to the broader constitutional system, of which the Australian federal Constitution is but a part.

The point is that in the way it was drafted, in the way in which it was approved, and in the way it which it has allowed Australia to develop and to play a significant role in the world in the defence of freedom, the Australian Constitution must be counted among the world's most successful.[45] Nevertheless, change to a particular republican model is possible, if that were the considered wish of the Australian people. What is not possible is change to "a" republic. The Constitution, wisely in my view, does not permit this vagueness. Those who say they are republican but have no idea of the sort of republic they want have just not taken the first essential step in the debate – determining precisely what is to be changed, and why.

Nor is a republic inevitable. As we are famously informed , the only things inevitable are death and taxes. Those of an age will recall a view proclaimed by many, including those who did not wish it to be so, that some form of socialism was inevitable – if not Stalinism, then at least that brand of socialism that requires that the commanding heights of the economy be publicly owned. Those who propose a socialist future are now a small minority, and even fewer would say today that socialism is inevitable.

**The essential aspects of the Australian Crown**

The Australian Crown, the King or the Queen's official body, is, as it were, a Leviathan at the very centre of the Australian constitutional system. Yet not only do republicans almost fail to see it, but the Australian Crown is also treated superficially in the academy. This seems to be true even in those subjects offered in the nation's schools and universities which are relevant, such as civics, history, political science and constitutional law.

Even when the Crown is recognized, it is more often than not as an anachronistic historical curiosity, a jumble of separate and unrelated offices, each of which it is assumed could easily be converted into a republican sinecure having no relationship one with the other.

This approach is more erroneous than, and just as dangerous as, seeing an iceberg as only its visible tip. This is analogous to dividing the tip of that iceberg into seven pieces and then saying each is unrelated not only to the others, but also to the vast part of the iceberg under the waves which is being ignored. Whether we like it or not, the Crown remains the nation's oldest institution, above politics, central to its constitutional system, and with the High Court, the only institution which straddles the component parts of the Commonwealth, State and federal, and looking outwards through the personal union of the sixteen Crowns and across the Commonwealth of Nations. It was essentially under the Crown that Australia attained its full independence.[46]

So before we talk about its removal, we have to understand what it is.

Why is it that the Leviathan is not so much misunderstood, but not even seen? Is it just ignorance, or is it something more sinister? Rather than attempting an answer, let us look at certain important aspects of the Crown.

**The Queen-in-Parliament**

First the Australian Crown is part , and an inherent part, of each of the Parliaments. Each one is The Queen-in-Parliament. This is so even where the enacting formula has been twisted to remove any reference to The Queen.[47]

(This is yet another example of creeping republicanism where the politicians choose to ignore the peoples' clear decision in 1999 to remain with the constitutional system, and attempt to hide the Crown. Explanations for this behaviour could involve an obeisance to some nominal republicanism. Or it could constitute an Orwellian attempt to remove the Crown from the peoples' memory, thus making it easier to effect change in the future. Alternatively, and what is sinister, creeping republicanism could involve an attempt to neutralise the Crown as a potential check and exercise on power, as the eviction of the Governors from Government House in New South Wales was, according to its author.[48])

Royal Assent is normally given on advice that the Bill has passed Parliament, and not as one commentator, who headed two government departments, says, in the Executive Council.[49] This is an important point. It means that the "auditing" role the Crown plays in the executive government, discussed below, will not arise when bills have passed through Parliament and are presented for the Royal Assent. That said, the Crown will need to be assured that the Bill has been passed as required by the relevant Constitution. When it was proposed in some quarters in 1975 that the Appropriations Bills held in the Senate be presented to the Governor-General for assent without passing the Senate, there is no doubt that Royal Assent would have been refused. As a leading British constitutional authority observed:

> "The doctrine that the Sovereign is required to act on the advice of the ministers presupposes that ministers themselves act within the framework and presumptions of constitutional government".[50]

It seems inconceivable today that Royal Assent would ever be refused. But before 1975, it seemed unlikely that the Crown would ever withdraw the commission of a Prime Minister enjoying the confidence of the lower House. And we do know that as late as 1914, the Sovereign contemplated refusing assent to a Bill. In a letter to *The Times* just before that, the great constitutional authority, AV Dicey indicated that the power to refuse assent had a particular function:

> "Its repose may be the preservation of its existence, and its existence may be the means of saving the Constitution itself on an occasion worthy of bringing it forth".[51]

It should be noted that this was in relation to the British Parliament, which is not constrained by a written Constitution.

Another aspect of the Crown as an integral part of each Parliament is the recognition by the Crown of an important office in any Westminster parliamentary system, that of the Leader of Her Majesty's Loyal Opposition. While opposed to much of what the government is doing, the Leader is not – at least until the recent outbreak of republicanism – opposed to the Sovereign. As leader of the largest party in the lower House not in government, he or she will normally be an alternative leader of Her Majesty's Government if the government loses office. The office of Leader is recognized, respected and supported, hence strengthening the essentially democratic nature of the polity, and the fact that the Crown is of no party.

**The Crown as the executive**

Unlike the Parliament, of which the Crown is a constituent part, the Crown is the executive. The Cabinet is an informal political body having no formal constitutional status. In the 1999 referendum, this was presented by the republican movement as some sort of constitutional flaw or oversight. It is nothing of the sort. That the Cabinet, consisting only of the leaders of the majority, has no executive power is a protection, and not a disadvantage. In the Westminster system, as the founders intended it to apply in Australia, its recommendations are subject to an independent audit.

While the Crown will normally act on the advice of Her Majesty's ministers, this does not mean the Crown is a mere automaton or rubber stamp. I shall leave to later those powers, the reserve powers, where the Crown may, at its discretion, act without or even contrary to advice. There are two other aspects of the Crown's role as the executive which are worthy of mention.

The first is that in receiving ministerial advice, the Crown may exercise any or all of the three traditional rights of the Sovereign famously identified by Bagehot: the right to be consulted, the right to advise, and the right to warn.[52] From this, Sir William Heseltine has laid down three propositions: that the Queen has the right, and the duty, to express her opinions on government policy to her Prime Minister, that the Sovereign must act on the advice of the ministers, and that the communications between them should remain entirely confidential.[53] As those communications are kept confidential, it is of course difficult to ascertain the extent of the influence of the Crown. We do however know from Australian experience of some occasions when vice-regal advice and warnings have improved subordinate legislation, for example the proclamation of the Royal and National Anthems in 1984.[54] Usually such instances never become public.

The second aspect of this role of the Crown as the executive involves an examination of this function as a check and balance on the exercise of power. Accordingly, Sir Guy Greene argues that it is wrong to declare the viceroy a mere rubber stamp, or a "mechanical idiot".[55] He points out that to say that viceroys should not take a certain action, unless they have been advised to do so, is not the equivalent of saying that they must always take that action when they are advised to do so. He writes that a tendency to gloss over the distinction between saying that a viceroy may not act without advice, and saying that a viceroy must always accept advice, has been productive of much confusion in discussions about this issue.

This does not require the viceroy in council making a legal determination of the lawfulness of what is proposed as if it were a court. Rather, the council should undertake what can be usefully described as an "auditing" role.[56] What is required is that it be demonstrated, to the satisfaction of the viceroy, that the question of legality has been addressed and satisfactorily answered. He suggests that this could be assured if each item on the agenda always includes:

- A clear statement of precisely what it is that the viceroy is being asked to do.
- A reference to the source of the power to take that action.
- Particulars of any conditions which need to be satisfied before that power can be exercised.
- Explicit assertions by a Minister stating how those conditions have been satisfied.

Should any one of these requirements not be satisfied, the consequence would be that the viceroy could not be satisfied about the legality or propriety of the proposed action, and would have a duty to postpone the item or even to refuse to accept the advice.

He adds that a viceroy should not refuse to accept advice unless the proposed action was clearly unlawful or there had been a failure by a Minister or the Executive Council to provide information about an aspect of the advice which was crucial to the determination of whether it was unlawful.

**The Crown as the fountain of justice**

No less an authority than Blackstone, probably revered more in the United States than elsewhere, explains that "justice is not derived from the king, as from his free gift; but he is the steward of the public…He is not the spring, but the reservoir…".[57]

In England, from time immemorial, this authority has been exercised by the King or his substitutes. The Crown has acted as the fountain of justice in Australia from the time of the first settlement in 1788.[58] Since the Glorious Revolution the judges are no longer appointed "at pleasure", rather they enjoy tenure during good behaviour as determined by the Parliament.[59] This, and the fact they are appointed by the Crown, assures their independence. This independence preceded the grant of responsible government to the Australian Colonies in the 19th Century.[60] Appointment of the judges is by the Crown – they are "Her Majesty's Judges", they are not the judges of the government in power at the time of their appointment. By their allegiance to their Sovereign – even if they inappropriately declare themselves to be republican, they cannot unilaterally dispense with their allegiance – their loyalty is clearly and publicly to the Crown as steward or trustee for the people.

Contrast that with, say, the United States, where election or Senate confirmation politicises the judge.

**The Crown is the fountain of honour**

The Sovereign is "the fountain of all honour and dignity" and enjoys the sole right of conferring all titles of honour, dignities and precedence. Formerly most honours were awarded on the advice of the Prime Minister and the Premiers. The Order of Australia was instituted not by statute but by Letters Patent under the royal prerogative, and has since replaced most imperial honours except those in the personal gift of the Sovereign.

From this concept comes the ceremonial role of the Crown which is an important part of the life of the community. This extends to the recognition of achievement, of service and of bravery, and the lending of the dignity of the Crown to important events in the life of the nation and its many communities. The important feature is that this comes from the institution which is above politics, and that the involvement of the Crown is in no way partisan, or subject to a perception that this is for some party political advantage. While there is a grey area between those ceremonial functions best left to the Crown, and those which the politicians may undertake, given the respect Australians notoriously decline to accord to their elected representatives, there is an advantage both for the people, and the nation, that the great national occasions be presided over by the Crown, the institution which so clearly provides leadership above politics.

Those who have attended an investiture at one of the Government Houses, or have been present at an event of considerable importance to Australians, whether in the great seaboard cities or in some distant community, will be well aware not only of the respect but of the warm welcome Australians will normally accord to a viceroy who is seen as above the political fray, and who is perceived as seeking no personal or political advantage by his or her participation. On these occasions Australians are united, and not divided by party politics, surely a desirable result. This is the Australian Crown at its most visible, which clearly enjoys the widest approbation.

It was surprising then that in 1996 the then Premier of New South Wales, the Hon Bob Carr, proposing that a new Governor be brought closer to the people, evicted him and his successors from Government House and announced a significant reduction in his ceremonial role. In addition, the Governor was to continue as the head of a statutory authority charged with giving the government advice on law reform, surely a constitutional heresy. This, and any reduction in the ceremonial role, was abandoned when the Opposition threatened a reference to the Independent Commission against Corruption. Mr Carr has since revealed that he evicted the Governors to demonstrate that they should see the position as only ceremonial, and to ensure that they would never use the reserve powers which he claimed no longer existed.[61]

The role of the Crown as the fountain of honour and in its ceremonial role emphasises and gives visual form to the allegiance which all owe to the Crown, and the reciprocal relationship which the Crown has with the people as the trustee of its powers and influence. In offering leadership beyond politics, the Crown is seen as intimately connected with those values and standards which are the essential context of a civilised society. One of the pillars of ours is in our Judeo-Christian values, which from the settlement in 1788 have set the context in which the nation has developed both internally and in its many involvements beyond the seas.[62] As Edmund Burke declared:

> "We know, and, what is better, we feel inwardly, that religion is the basis of civil society, and the source of all good, and of all comfort….".[63]

In the United Kingdom, The Queen is the Defender of the Faith, and the Supreme Governor of the Church of England, which is established in England and Wales. In Australia there is no established church, but it is worth recalling that the preamble to the *Constitution Act*, 1900 ( Imp) recites that the people of the several Colonies "humbly relying on the blessings of Almighty God", had "agreed to unite in one indissoluble Federal Commonwealth under the Crown". When that was submitted to a wide consultation process before the referenda to approve the Constitution, this provision attracted very strong public and political support.[64]

This link in no way suggests the exclusion in any way of those who are of other religions or, indeed, of no religion; it is that the settlement was under the Crown, which was and remains intimately linked not only with the rule of law and in particular the common law, and with the English language, but also with our Judeo-Christian values, and that together these have formed the Australian nation.

**The Crown as the employer of the Public Service**

The Crown is the employer of the public or civil service, and not the ruling political party. The loyalty of the public servant must therefore be to the non-political Crown and not to the politicians. This enforces the obligation of the public servant to act within and according to law, and to provide advice not influenced by and indifferent to political considerations. The emergence of a non-partisan public or civil service coincided with the withdrawal of the Crown from political activity and the emergence of the constitutional monarchy as we know it. In advice which was equally applicable to Australia, Walter Bagehot argued that in 1867, to assure popular rule, there were only two constitutional models available to Canada: the British or the American constitutional model.[65] Not only did he think a non-partisan public service did not prevail in the US, he believed it was impossible.[66] The contrast between the public services of the Commonwealth Realms and those of the US remains, even if in Australia in recent years there has been some regrettable blurring in the higher echelons. Few would doubt that the ideal should remain of a public service beyond political influence, and that this has been one of the benefits of the emergence of the constitutional monarchy.

A constitutional monarchy is a fertile field for an independent public service because it is designed to allow an easy transfer of political power, the Prime Minister being untenured and at all times dependent on the confidence of the lower House.

**The Command in Chief of the Armed Forces is vested in the Crown**

Under the federal Constitution, defence is effectively a federal power.[67] The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General "as the Queen's representative".[68] Were this to be drafted today, the section might have provided that the command in chief is vested in the Governor-General "as the representative of the Australian Crown". But this would in no way change the meaning. It would however stress that the representation is that of the Sovereign's political body, the Crown as well as that of the Sovereign's natural body. That the loyalty of the armed forces is to their personal Sovereign is a benefit and maintains their purity from any party political taint.

The strength in separating the command in chief from both the operational command and questions of ministerial responsibility is threefold. First, the Governor-General must be assured that he has the power to act as advised, and that any conditions on the exercise of that power have been fulfilled. Second, the loyalty, the allegiance of the troops is to the Crown, and not to an ephemeral and transient party political power. Finally, in the extreme case where the civil or political power collapses, the Governor-General may, and as the sole repository of legal power would be bound to, act.[69] As the representative of a Crown which is above politics, he or she could be expected to exercise that power without the influence of political considerations.

**The Crown as the ultimate constitutional guardian**

According to Sir Zelman Cowen, the reserve powers of the Crown include the power to dismiss a ministry, to grant or refuse dissolution, and to designate a Prime Minister.[70] Few legal observers would deny the existence of the reserve powers, although in controversial cases there is a debate as to the manner and time of their use.[71] In Australia, these powers are exercisable at the federal level by the Governor-General. They are not reviewable by the courts, not being justiciable, nor is it for The Queen to review their exercise.[72] It is therefore inappropriate for a viceroy to discuss their exercise in advance with the Sovereign.

In addition, it is relevant at this point to recall that The Queen of Australia can alone exercise certain important powers of the Crown. These relate to the appointment and dismissal of the viceroys. This is normally done on advice tendered in writing in an original document, but there is argument that this too is in the nature of a reserve power.[73] Certainly there are indications that it would be an error to regard The Queen as an automaton, assenting without question to advice, particularly that relating to a dismissal.[74]

The existence of these powers is an important constitutional check and balance on the exercise of power.

But to the extent that the exercise of the reserve powers is controversial, could this imperil their future exercise? In other words, are they in the nature of a wasting asset?[75] Lord Byng's refusal of a request for dissolution of the Canadian House of Commons in 1926 was controversial, but this pales in comparison with Sir John Kerr's withdrawal of Prime Minister Whitlam's commission in 1975. Sir David Smith has demonstrated, beyond serious argument, that the withdrawal was a proper exercise of the reserve power, an action strongly and regularly advocated by Mr Whitlam himself while in opposition.[76] Indeed in 1975, Sir Garfield Barwick, the then Chief Justice of Australia, went so far as to advise that more than a discretion, the Crown has a positive obligation not to retain Ministers who could not produce supply.[77]

In this context it should be recalled that republicanism only came onto the serious political agenda in Australia because of the conjunction of two phenomena. First we had the interpretation the politicians and media were prepared to advance about the dismissal, and second, the strong antipathy Prime Minister Paul Keating displayed towards the monarchy.

As to the interpretation of the dismissal, not only the dismissed Prime Minister, but also the principal political beneficiaries of the event, sooner or later, joined in the extraordinary action of actually attributing blame to the constitutional monarchy for their very own actions. In relation to the beneficiaries, this was even more extraordinary as the action taken, the dismissal of the Prime Minister, was precisely the action which they had asked, and at times insisted, the Governor-General take.

While such behaviour is consistent with the modern trend of people seeking some way of divesting themselves of any personal responsibility for those actions which one may regret, it can only strengthen the disdain the community has concerning its elected representatives. In any event, all the leaders of the political parties in the House of Representatives at the time, the Honourable Edward Gough Whitlam, the Right Honourable Malcolm Fraser and the Right Honourable Doug Anthony campaigned vigorously in favour of the republic proposed in the 1999 referendum.[78] (More recently the former Premier of New South Wales, Mr Bob Carr, referring to Mr Whitlam's dismissal, went so far as to declare that the reserve powers do not exist. He admitted that his decision to expel the Governors of New South Wales from Government House in 1996 was to demonstrate to them that they were no more than ceremonial rubber stamps.[79])

In this re-interpretation of the dismissal, the politicians have been assisted by an agenda-driven media. Lord Deedes, the former editor of the London *Daily Telegraph*, wrote of the 1999 referendum, that he had rarely attended elections in any democratic country where the press had displayed "more shameless bias".[80]

Given this demonstrated propensity of the political and media establishment to come together to change historical fact found to be inconvenient, in this case to shift the blame for their own acts to the Crown,

it is little wonder that one constitutional scholar has asked whether the Crown could easily absorb another such crisis, "however justifiable the Governor's decisions might be from a purely legal point of view".[81]

This is in no way to deny the importance of the reserve powers, particularly the power to withdraw the commission of an errant Prime Minister. It would be an exaggeration to draw an analogy with the cold war nuclear deterrent and the phenomenon of mutually assured destruction. But the likelihood for mischief in its portrayal of any exercise by the political class must disturb constitutionalists, whether they want change or not.

The crisis in 1975, which Sir David Smith rightly categorises as a political and not a constitutional crisis, was the product of two politicians unwilling to compromise. It should be recalled that Mr Whitlam in Opposition had asserted that any Prime Minister refused supply by the Senate should resign.[82] Had he done this there would have been no crisis. And had Mr Fraser waited until the next election, he would have enjoyed a victory untainted by accusations that he had behaved shamefully.[83]

**The Crown as the linchpin of the Federation**

As the Dominions rose to equality with the United Kingdom, and moved from self government to independence, the impact on the Crown was fundamental, and probably not fully appreciated. The Imperial Crown, once indivisible throughout the old Empire, devolved into separate Crowns for each of the Dominions which became, in modern parlance, the Realms. It is unlikely that any other constitutional system would allow such an evolutionary development. As Professor David E Smith concludes, republics are created; monarchies, particularly the British ones, emerge and evolve through the sharing of power.[84] The move to independence was achieved more under the Crown than by imperial legislation.[85]

Under the *Constitution Act* 1900 (Imp.) the Colonies became the States of the new Commonwealth operating under their pre-existing Constitutions.[86] Unlike Canada, the Governors of the Australian States are not appointed by the Governor-General acting on the advice of the federal government. This is a role the Australian States were never prepared to grant to the federal government, preferring to live with the increasing anomaly of recommendations on such matters being formally made through the British ministers.[87] The States were not even prepared to accept a process whereby the Premiers' recommendations would be conveyed to The Queen through the Governor-General. They clearly trusted the British more than the federal government. It is said the impasse was only broken by The Queen indicating that she would not object to receiving recommendations on these matters from the Premiers. This process has now been given effect by the *Australia Act* 1986 (UK and Aus), which formally terminated the power of the Imperial or British Parliament to legislate with respect to Australia.[88]

An extraordinary feature of the proposal in 1999 to graft a republic onto the Constitution was that the Commonwealth of Australia would become a republic, but that for the time being at least, the States would remain constitutional monarchies. This was notwithstanding the fact that the Attorney-General, the Hon Daryl Williams, QC (and indeed a former Chief Justice, Sir Anthony Mason, who campaigned for an affirmative vote in the referendum) had earlier described this as a constitutional "monstrosity".[89] Notwithstanding the fact that the Republic Advisory Committee had concluded that the federal and State Constitutions could be changed by one referendum, the Committee recommended the piece meal approach of only grafting a republic onto the federal Constitution. This was no doubt based on the political calculation that a referendum was more likely to be passed if it did not compel all States to change, rather than on sound constitutional principle.

Strangely, no regard was had to the fact that the Australian Crown is one and indivisible. While the once indivisible imperial Crown had devolved into separate Crowns for each of the Dominions or Realms, there is no evidence that it had divided further into State Crowns. There is nothing akin to the *Balfour Declaration* or the *Statute of Westminster* which would give authority for such a further division.

But at the time of the republican campaign, the constitutional monarchy came to be occasionally described by republicans under the curious term, a "heptarchy". This is a term best known from the association of the seven English kingdoms from the fifth to the seventh Centuries. This derivation should have warned the politicians about the danger of proceeding to dismantle the entity to which they owed some duty of care, that entity presciently declared to be "indissoluble" in the preamble to the *Constitution Act*.[90]

How could this "Federal Commonwealth under the Crown" remain indissoluble if the Crown were to divide, or had divided, into seven Crowns, as the referendum model assumed? Could not the six State Crowns become, if they wished, independent countries, as the old Dominions had? Indeed, at the Constitutional

Convention in 1998, the Premier of Western Australia had warned of the danger of secession. And in August, 1999, Mr Robert Ellicott, QC cautioned that if the republic referendum were passed, "it could split the nation".[91]

In contrast with their predecessors, the State politicians were unusually trusting of one Commonwealth proposal concerning the 1999 referendum. Under the *Australia Acts*, the position of the Governor in each State is entrenched and can only be changed if all eight Parliaments agree.[92] In other words, any one State, as well as the Commonwealth, enjoys a veto over attempts to remove the representative of the Crown in any other State. At the request of the Commonwealth, all State Parliaments rushed through legislation, with little debate, and one suspects, little understanding, to remove the veto in the event of the referendum being passed.[93] There was of course no urgency for this legislation, which in any event proved to be superfluous.

As a Canadian constitutional authority notes, any transition to a republic would have immense implications for the States.[94] The late former Chief Justice, Sir Harry Gibbs, observed that the legal complexities involved go to the very heart of Federation.[95] On one view, the changes the subject of the 1999 referendum would not only have severed the constitutional link between the States and The Queen, they would have empowered the Commonwealth to reconstitute the tenure, powers and manner of appointment of the State Governors.[96]

Clearly, a transition to a republic would terminate the only Australian institution straddling the Commonwealth and the States, apart from the High Court. The existence of this venerable institution, the Crown, enables the States, through their direct access to the Sovereign, to ensure their Governors can not be reduced to mere federal officers. What, if anything, would have succeeded to the Crown in this respect under the referendum proposal in 1999 was not clear, but at some later stage would no doubt have needed to be clarified. Until then the position was not clear under the changes, perhaps deliberately so.

**The personal union and the Australian Crown.**

The Australian Crown is separate and independent from the Crowns of the other sixteen Commonwealth Realms.[97] The relationship is a personal union, well known in international law, and in the history of the British Empire. From the reign of George I to George IV, a personal union existed between the Crowns of Great Britain and Hanover.[98] Today, the personal union in our Crowns is one aspect of our very close relations with countries such as the UK, New Zealand, Canada and Papua New Guinea.[99]

In the '80s and '90s it was fashionable to downplay the links with the UK, a former Prime Minister even gratuitously insulting her in the Parliament.[100] As the fourth largest economy, one of the most powerful military powers, a permanent member of the United Nations Security Council, a major European Union power, and also favourably disposed to Australia, it was difficult to understand this action. The personal union keeps us close to the countries closest to us. This is not something we should lightly abandon.

**The Head of the Commonwealth**

The Queen is Head of the Commonwealth. No one has put her contribution in this role more clearly than the thirteen year-old Australian youth ambassador, Harry White did at the opening of the 2006 Melbourne Commonwealth Games:

> " Your Majesty, during the past 54 years of your reign you have been the glue that has held us all together in the great Commonwealth of Nations in good times and bad times. The love and great affection that we all hold for you is spread across one third of the world's population in our Commonwealth".[101]

The Commonwealth is one international organisation which maintains minimum standards as to continuing membership. While Zimbabwe remains suspended from the Commonwealth (it claims to have withdrawn), a glance at the membership and chairmanship of the defunct UN Human Rights Commission will indicate that different standards apply there. The Commonwealth brings together countries which are close legally, politically, linguistically and in sport, and which accept certain minimum standards of democratic governance and respect for human rights. Although occasionally disparaged in the media, Australia would be most unwise not to seek to play a significant role there.

It is true that the Commonwealth encompasses both constitutional monarchies and republics. But if there were to be another referendum, let us hope that the Minister responsible first understands the process whereby a member changing from a realm to a republic seeks to remain in the organization, but also ensures that there would be no objection from the other members, any one of which has an effective veto in the event of change.[102]

**Our heritage**

The Crown, our oldest institution, is thus at the very centre of our constitutional system, linking us to the other Realms and to the Commonwealth of Nations . It is part of the heritage handed down to us by the British, including the rule of law, the common law, our Judeo-Christian values, and responsible government under the Westminster system. This heritage allowed Australia to be the success story of the 20th Century.[103] This may offend the cultural relativists, but it is established that colonisation by the British, compared with that of other powers, has usually been of considerable advantage to the colonised. According to a study by researchers from Harvard and the University of Chicago, former British colonies rank among some of the world's best administrations.[104] Of the top ten, five were based on the common law, which strongly defends property and individual rights. Apart from Switzerland, there were four Scandinavian countries, whose constitutional systems have been influenced by Britain.

Constitutional monarchies, through their structure, avoid those four republican perils : excessive rigidity, as in the American system, which is reduced to near paralysis whenever the President is seriously threatened with impeachment; political conflict and competition between the Head of State, Prime Minister and Ministers , a hallmark of the French Fifth Republic (an inherently unstable model curiously followed in a number of countries); extreme instability, which often haunted the Latin versions of Westminster; and regular resort to the rule of the street to solve conflict, which permeates those systems which live under the shadow of the French revolution.

Another measure of relevance is the UN Human Development Index (HDI). This is a comparative measure of poverty, literacy, education, life expectancy, childbirth, and other factors in most of the countries of the world. It is a standard means of measuring well-being, especially child welfare. The HDI is contained in a Human Development Report which is published annually. In every year, constitutional monarchies make up most or all of the leading five countries, and a disproportionate number of the leading ten, fifteen, twenty and thirty countries. No constitutional monarchy comes into any of the corresponding lists at the other end. The results are so consistent it would be difficult to dismiss this as a mere coincidence. This corroborates the results of the research at Harvard and Chicago.

These matters are not of course conclusive against fundamental constitutional change in Australia. They do support the contention that those who would change are under a duty not to hide or ignore the Crown, but as a first step, to understand its role and function in our constitutional system. The behaviour of politicians who attempt to hide or suppress the symbols of the Crown is at best ignorant and ideologically driven, occasionally spiteful and, at worst, sinisterly indicative of a wish to remove these checks and balances on their exercise of power, as we have seen in relation to the eviction of the Governors from Government House in New South Wales.

Once those who propose change demonstrate an understanding of the role and function of the Crown, they are then under a duty to the Australian nation to develop sound reasons for change and, most importantly, to develop a model which is, in all respects, as sound as the constitutional system which has ensured the extraordinary success that is the Commonwealth of Australia. To seek change without understanding, and change without knowing what that change should be, is consistent with a view that the electorate is naïve, easily manipulated and gullible. It was precisely against such a campaign that the founders devised the procedure for change by way of a referendum under s.128 of the Constitution.[105]

**Australianising the Crown**

While Canadianisation of the Crown became formal government policy under the Trudeau Government, Australianisation has been a piecemeal process.[106] Indeed the Australian Constitution had, from its adoption, and almost unnoticed, made a significant step towards Australianisation. This was done by a measure unprecedented in the Empire – the placing of the exercise of the executive power of the Commonwealth in the hands of the Governor-General.[107] Another unprecedented measure was to grant to the new Commonwealth of Australia the power to change its own Constitution.[108]

In any event the trend over the years has been to move further down the path of Australianising the Crown, vesting more authority and status in the Governor-General, but still as representative of the Crown. An important measure has been to declare to foreign governments and international organizations that the Governor-General is the Head of State, and should be accorded that dignity.[109]

If Australianisation means that the Governor-General may do things in Australia and beyond the seas

which are consistent with his or her role of representing and exercising the powers of the Australian Crown, there can surely be no objection. This is after all consistent with the formula in the *Balfour Declaration* made in the early part of the 20th Century that:

> "…it is an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor-General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any Department of that Government".[110]

But this does not mean that the office should take on a character different from and inconsistent with the Crown in a constitutional monarchy. We are becoming accustomed to hearing from some in the vice-regal-elect that during their office their agenda will be to concentrate on some or other worthy cause. Too often this is dangerously close to a political agenda, however worthy. This is not an appropriate vice-regal vocation: that vocation is to provide leadership beyond politics. How can they provide this if their agenda is even tangentially political? The vice-regal-elect should first acquaint themselves with the office before announcing some or other agenda.

A former Governor-General, Sir William Deane, devoted much of his term to the advancement of the interests of Australia's indigenous people. At most times it was possible to conclude that this interest had not become political, that he was in no way challenging government policy but was engaged in taking a well intended interest in the indigenous people. On one occasion he was criticised by a national newspaper for arranging direct access to The Queen without referring the request to the government.[111] But after he left office, Sir William became openly critical of government policy, sometimes harshly so. The unfortunate result was that, retrospectively, he confirmed in the minds of many the criticism of those who said he had in fact crossed the line while in office.

This experience justifies the proposition that even after he or she leaves office, a Governor-General should be careful never to compromise the office. Speaking in favour of a republic seems inappropriate for one who has represented the Crown, but to do so in office is, at the very least, a most inappropriate entry into politics, apart from being an act of gross disloyalty to the Sovereign to whom the viceroy has sworn allegiance.

In Canada, in order to overcome what he saw as public indifference to the office of Governor-General, a former incumbent suggested that the Governor-General henceforth have greater freedom to express his personal ideas and even that he be made chairman of a new Senate. Another suggestion was that the Governor-General, outside of the extraordinary circumstances referred to above, should be able to refuse assent to legislation.[112]

Apart from a Governor-General being free to speak on matters clearly not on the political agenda, all of these proposals are inconsistent with the concept of constitutional monarchy. They may well flow from the mistake of seeing the office, consciously or subconsciously, as separate and autonomous from the Crown. This is not so – the office can have no existence apart from and independent of the Crown.

A viceroy is the representative of the Crown, nothing less – and nothing more. As Walter Bagehot observed:

> "We must not bring The Queen into the combat of politics or she will cease to be reverenced by all combatants; she will become one combatant among many".[113]

Obviously, this advice applies equally to a viceroy.

**Governor-General and Governors without a Sovereign**

While accepting the considerable, indeed central role of the Crown in our history and our constitutional system, it is sometimes argued that we could retain all the benefits of the Crown while dispensing with the Sovereign.[114] Many, if not most of the forms of republics proposed at the 1998 Constitutional Convention and since then purport to do this. This is particularly true of the minimalist models which may even go so far as to retaining the name of Governor-General. One model proposes that the role of appointing and dismissing the viceroys be the responsibility of a council of eminent persons, acting on political advice, instead of the Sovereign.[115]

The proposition that the Crown could effectively be retained without keeping the Sovereign is completely

fallacious. This is not merely because we would lose the impeccable standards set by Queen Elizabeth II, however fortunate we have been to know these during her reign.

Her Majesty's dedication, her personal standards and her sense of judgment are celebrated, and rightly so. Indeed, a viceroy in a quandary as to what behaviour would be appropriate could do no better than ask himself or herself: "What would The Queen do in a case like this?".

The fundamental, unavoidable and insoluble problem for such republican models is that without The Queen, there can be no Crown. And not only would the offices of the viceroys who are above politics disappear, so would the fountain of honour, the fountain of justice, The Queen in Parliament, the Crown as the auditing executive, the Crown (rather than the governing party) as the employer of the public service, the Crown as the Commander in Chief; in sum, the whole vast institution which is above politics and which has been with us since the settlement in 1788. This institution, under which we received self-government under the Westminster system, under which we federated and under which we became independent, would disappear forever. And all of this, in every aspect would fall to the politicians.

Neither the vice-regal appointments council of the eminent, consisting of gender balanced selected former viceroys and chief justices, as has been suggested in Australia, nor a college consisting of the 150 Companions of the Order of Canada, as suggested for that realm, could possibly replace the Crown.[116] Either would perform the functions of appointing or electing the President, and removing him – and there is no guarantee they would do either well. But they would not replace the Crown. The proponents do not, for example, propose that the Army should owe allegiance to the council or to the college, or that Her Majesty's judges should become their rotating eminences' judges, or the judges of the College of Companions.

These proposals recall that of the Abbé Sieyès, who wished to create a "grand elector" in the French 1799 Constitution for the Consulate. This was designed to replace the monarch he had helped first make constitutional, and later send to the guillotine. As Walter Bagehot observed, it was "absurd… to propose that a new institution, inheriting no reverence, and made holy by no religion, could be created to fill the sort of post occupied by a constitutional king in nations of monarchical history".[117] So in an Australian republic, the new republican office of the President, whether or not appointed by a council of the eminent, and whether or not elected, could never replace the Crown as an equally vast institution above politics. Indeed, this is not even suggested. Instead, the proponents choose to ignore the issue.

The question therefore has to be asked of all these proposals to graft a minimalist republic onto our constitutional system: where would all of the powers, and protections of the Crown – apart from the appointment and dismissal of the viceroys – fall? Into whose lap? The answer is, of course, the politicians' lap, the same politicians who are already concentrated in the closely linked and controlled executive and legislative arms of government. In the American republic, the politician in the executive and the politicians in the legislature are at least quarantined and isolated one from the other, the founders believing, rightly, that the resulting adversarial relationship would act as a check and balance against the abuse of authority. They were aware of the truth of Lord Acton's dictum before he enunciated it: "Power tends to corrupt and absolute power corrupts absolutely".[118]

As Canadian Professor David E Smith notes, in a minimalist republic a powerful executive would become that much more powerful.[119] And that was written before he had the opportunity to examine the specific terms of the model presented to the Australian people in 1999. This was famously criticised as offering the only known republic where it would be easier for the Prime Minister to dismiss the President than his cook.[120]

The alternative model, that of filling these offices by election, would merely turn the incumbents into politicians.

The consequence of the vice-regal offices being cast adrift would not therefore be that they would become Crowns. They would not have – and could not have – two bodies. We, and the judges, the armed forces and the public servants, would and could owe them no allegiance. They would become republican sinecures to be filled either by servants of the politicians or by even more politicians. In their ceremonial role, to the great loss of the nation, the public would know that they were either politicians or servants of politicians, and treat them accordingly.

**Conclusion**

The obvious requirement of any attempt to graft a republic onto the present Constitution is that the result

would have to be as good as, if not better than the present system, which is undoubtedly among the world's most successful.

Republican efforts so far must lead to the conclusion that not only is it difficult, it is impossible to graft a republic onto our constitutional system, which is a federal Commonwealth in the Westminster form, and maintain the benefits which flow from its subtleties, its sophistication and its elegant refinement.

The result will be flawed, and seriously so. The balance between the political and the non-political would be irretrievably lost.

This is not to say that Australia could not become a republic, if that were the considered and overwhelming wish of its people. Australia is after all one of the world's oldest continuing democracies. Any decision to become a republic would not of course be the result of a vague question put in an opinion poll commissioned by some organisation with a clear penchant and agenda for change , often only for the sake of change. Those who say the question in 1999 was the wrong question do not appreciate a fundamental principle of the Constitution – that constitutional change should not be made in haste or by stealth. Change to a republic would have to be by referendum, after a proper debate on what precisely was being proposed, and where the people had decided that the proposed change was desirable, irresistible and inevitable.

In fact, a transition to a republic would be so fundamental that it is arguable that the process chosen for the formation of the Commonwealth – the agreement of the people of each of the States, and not a majority of States, to unite in one indissoluble federal Commonwealth under the Crown – should be repeated. That said, the prospect of a referendum for change to some or other republic being approved with majorities in only four or even five States is most unlikely.

The point of this paper is that the republicans have not yet satisfied the threshold for obtaining change – knowledge of, and an understanding of the role, the function and the vastness of the Australian Crown, and a willingness to admit and discuss this. But that is only the beginning. They must then persuade their fellow citizens of the failings of this institution, and how, in all respects, the Australian Crown will be replaced in a republican model which is at least as good as, if not better than the present constitutional system.

**Endnotes:**

1. Matthew, 12,37: "For by thy words thou shalt be justified, and by thy words thou shalt be condemned".

2. Speech at Capetown , 21 April, 1947.

3. Christmas Speech to The Commonwealth, 2000.

4. *Daily Telegraph*, London, 21 September, 2001.

5. The Premier of Victoria asserted to Parliament that the Australian Royal Anthem, *God Save The Queen*, would not be played, but on the following day the organisers said eight bars would be played in a tribute, and that this had been long planned. This was in clear breach of protocol: *Proclamation* by the Governor-General, 19 April, 1984, *Commonwealth of Australia Gazette* No. S 142 dated 19 April, 1984.

6. No allowance is paid for services as Queen of Australia. The Commonwealth government absorbs the costs of Royal Tours, or Homecomings. These are significantly increased by the attribution of security costs. While there are regular attempts to create controversy over these costs, this is rarely repeated in relation to the numerous visits Australia receives from foreign dignitaries, and the security costs involved in protecting foreign diplomats. It should also be noted that The Queen is not "paid" for her services as Queen of the UK. The household receives grants to perform this role properly. At the commencement of each reign it is the practice of the new Sovereign to surrender certain revenues in return for this. The UK government profits substantially from this arrangement.

7. E.g., *The Sydney Morning Herald,* 26 January, 2006, Australia Day, *The Australian republic must rise again*; *The Age,* 19 March, 2006, *Let's not wait for King Charles. The republic matters now*. Neither paper appears to have published letters challenging this assertion.

8. http://www.newspoll.com.au/image_uploads/cgi-lib.14743. 1.0101_republic.pdf.

9. Malcolm Turnbull, *Fighting for the Republic,* Hardie Grant, South Yarra, 1999, p.111.

10. http://www.roymorgan.com/news/polls/2005/3835.

11. *Constitution*, s.128.

12. J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, reprinted by Legal Books, Sydney,1995, p.11.

13. David Flint, *The Cane Toad Republic*, 1999, Wakefield Press, Kent Town (hereinafter "Flint, *Republic*") pp. 9-11.

14. No issue put to the people again – some up to five times – has ever succeeded, although judicial interpretation has made some further referenda unnecessary : Flint, *Republic*, pp. 160-161.

15. What constitutes "modest opposition" may be considered in the context of the 1967 referendum on the "nexus" between the House and the Senate. The only opposition came from the small Democratic Labor Party. The referendum was defeated, gaining an affirmative vote of 40.25 per cent and approved only in NSW. In 1999, the referendum was supported by a great part of the media, and most sitting politicians with the notable exception of the Prime Minister and a small minority of Ministers. The No campaign was led by the Vote No Committee consisting of constitutional monarchists and independent republicans, and chaired by Kerry Jones, the Executive Director of Australians For Constitutional Monarchy, which separately rallied over 50,000 supporters to work in the campaign across the nation: see http://www.norepublic.com.au; Kerry Jones, *The People's Protest,*2000, ACM Publishing, Sydney.

16. PH Lane, *Lane's Commentary on the Australian Constitution*, 1986, Law Book Company, North Ryde, p. 4.

17. Flint, *Republic*, 186-194; note that this was at a time when the then Malaysian Prime Minister had blocked Australia's involvement in other international groups.

18. Sir David Smith, *Head of State: The Governor-General, the Monarchy, the Republic and the Dismissal*, 2005, Macleay Press, Sydney ( hereinafter "Smith, *Head of State*"), pp.83-84.

19. George Winterton, *Who is Our Head of State?*, *Quadrant*, September, 2004, p. 60.

20. Flint, *Republic*, pp 37-48.

21. Smith, *Head of State*, pp. 257-281; see also David Butler and DA Low, *Sovereigns and Surrogates*, 1991, St. Martin's Press, New York.

22. *The Constitution; Australia Act*,1986 (Cth.); note also the *Royal Powers Act*, 1953.

23. *Evatt and Forsey on the Reserve Power* (a complete and unabridged reprint of HV Evatt, *The King and His Dominion Governors*, 2nd ed, 1967, and E A Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth*, 1968: reprint together with a new introduction by Dr Forsey), Legal Books, Sydney, 1990.

24. David E Smith, *The Invisible Crown: The First Principle of Canadian Government,* University of Toronto

Press, Toronto, 1995 (hereinafter "Smith, *Crown*"), p. 5.

25. *Ibid*..

26. Sir Robert Gordon Menzies, *Afternoon Light*, Cassell, Melbourne, 1967, p. 267.

27. Ernst H Kantorowicz, *The King's Two Bodies,* Princeton University Press, Princeton, 1957, Seventh Paperback Publishing, 1997.

28. This was not a lawful execution, the "trial" being by a "court" which was not lawfully established.

29. Edmund Plowden, *Commentaries or Reports* (London, 1816). The case is referred to by Coke, Rep., vii, 10 (*Calvin's Case*).

30. While admitting the word is convenient, FW Maitland warned against not so much using it, but not enquiring who may actually exercise the particular Crown power: FW Maitland, *The Constitutional History of England*, Cambridge University Press, 1950, p. 418. He also writes that the substitution of "the Crown" for "the King" is "much more modern than most people would believe": *The Crown as Corporation*, *Law Quarterly Review*, April, 1901.

31. 63 & 64 Victoria, chapter 12.

32. FW Maitland, *op. cit.*.

33. Lord Bolingbroke's definition is particularly useful:
> "By constitution, we mean, whenever we speak with propriety and exactness, that assembly of laws, institutions and customs, derived from certain fixed principles of reason ... that compose the general system, according to which the community has agreed to be governed".

34. *Records of the Canadian Governor-General's Office*, Redfern memo No. 4.7, referred to in Smith, *Crown*, p. 123.

35. Smith, *Crown*, p. 25.

36. David E Smith, *The Republican Option in Canada, Past and Present*, University of Toronto Press, Toronto, 1999 (hereinafter "Smith, *Republic*"), p. 232.

37. Lloyd Waddy, *The Republic: Will Blinky be the Only Bill?*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 4 (1994), pp. 251-280.

38. *Ibid*..

39. Smith, *Republic*, p. 14.

40. *Ibid*..

41. David Flint , *The Twilight of the Élites*, 2003, Freedom Publishing, North Melbourne (hereinafter "Flint, *Élites*"), p. 105.

42. Senate Legal and Constitutional Committee, *The Road to a Republic*, 31 August, 2004 (hereinafter "*Road to a republic*").

43. *Ibid*., pp. 113-115.

44. *Ibid*., Additional comments by Senator Marise Payne, Deputy Chair.

45. *Ibid*., pp. 27-52.

46. Leslie Zines, in the Commentary to HV Evatt, *The Royal Prerogative,* 1987, Law Book Company, Sydney, pp. C1-C2.

47. E.g., the legislative formula currently used in WA is: "The Parliament of Western Australia enacts …".

48. See *The Crown as the Ultimate Constitutional Guardian*, pages 191-194 of this paper.

49. Smith, *Head of State*, pp. 83-84.

50. Vernon Bogdanor, *The Monarchy and the Constitution*, Clarendon Press, Oxford, 1999, p. 65.

51. Letter to *The Times*, 15 September, 1913; Bogdanor, *op.cit*., p. 112.

52. Walter Bagehot, *The English Constitution*, 1867.

53. Letter to *The Times* on 28 July, 1986; see Bogdanor, *op.cit*., p. 71.

54. *Proclamation* by the Governor-General, 19 April, 1984, *Commonwealth of Australia Gazette* No. S 142 dated 19 April, 1984; *The Australian Constitutional Defender*, No.3, Autumn, 2006.

55. Sir Guy Greene, *Governors, Democracy and the Rule of Law*, *The Sir Robert Menzies Oration*, University of Melbourne, 29 October, 1999; see also *FAI Insurances Ltd v. Winneke* (1982) 151 CLR 342. For convenience, the term "viceroy" is used to indicate either the Governor-General or a State Governor or both, as appropriate.

56. Flint, *Republic*, p. 51; Flint, *Élites*, p. 32.

57. William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769*, Chicago: University of Chicago Press, 1979, 1:257.

58. *The New South Wales Charter of Justice, Letters Patent*, 2 April, 1787, UK.

59. Not at the beginning of the Glorious Revolution in 1688, but by the *Act of Settlement* 1700, 12 and 13 Will 3 c 2 (UK).

60. Because of public statements made by politicians and others on the 150th anniversary of the Eureka Stockade in 2004, it is appropriate to point out that the process of granting responsible government had begun before and had nothing to do with that event.

61. See *The Crown as the Ultimate Constitutional Guardian*, pages 191-194 of this paper.

62. Flint, *Élites*, chapter 2: *The Success Story of the Twentieth Century: The Australian Federation.*

63. J Quick and R Garran, *op.cit*., p. 287.

64. *Ibid*., pp. 287-290; but see s. 116 of the Constitution.

65. Smith, *Crown*, p. 156. It is arguable that these remain the only two options feasible today for either Canada or Australia. The others are the French Fifth Republic, which has been adopted extensively, notwithstanding its obvious flaws, and republican versions of the Westminster system which are invariably inferior and do not seem to prevail in periods of stress, e.g., the French First, Third and Fourth Republics.

66. Walter Bagehot, *The English Constitution* (1867), Oxford World's Classics Edn, Oxford University Press, Oxford, p. 44.

67. The Constitution provides that a State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force: s. 114.

68. The Constitution, s. 68.

69. In 1983, the Governor-General of Grenada, Sir Paul Scoon, found himself in this situation. He exercised his authority to invite forces from other Caribbean states and the United States to restore order.

70. Evatt, *op.cit.*, p. xv.

71. Cf. the opinion of the Hon Bob Carr, former NSW Premier, at page 193 of this paper.

72. Flint, *Republic*, p. 93.

73. Bogdanor, *op.cit.*, p. 286; Flint, *Republic*, p. 142.

74. *Ibid.*; see also Brendan Sexton, *Ireland and the Crown*, Irish Academic Press, Dublin, 1989.

75. Smith, *Crown*, pp. 30, 31.

76. Smith, *Head of State*, ch.10.

77. Smith, *Crown*, p. 129.

78. Mr Whitlam and Mr Fraser even joined together in television advertisements based on the Labor Party's "It's Time" advertising in 1972.

79. *The Sydney Morning Herald,* 8 November, 2005, *Whitlam leaves past behind with gifts from high time and low*; see also Smith, *Head of State*, pp. 174-181.

80. *Weekly Telegraph*,10-16 November, 1999.

81. Smith, *Crown*, p. 32.

82. Smith, *Head of State*, ch. 10.

83. Perhaps there is a solution which is consistent with the Westminster system. Such a solution might lie in allowing a recall election. This is typically a three stage process, with the final two stages taken simultaneously. The first stage is a petition signed within a prescribed time by a minimum percentage of electors, say, 10 or 12 per cent. (For example, the 2003 California recall resulted in voters replacing sitting Democratic Governor Gray Davis with Republican Arnold Schwarzenneger. The percentage required for the petition is based on the number who voted in the last election. The recall of representatives is permitted in some other US States and in British Columbia.) This is followed by a vote open to all electors to determine whether an election should be held. For convenience, a ballot for the election is held at the same time, although this could subsequently be found to have been unnecessary.
The recall election has been adapted to a Westminster parliamentary system, that of the Canadian Province of British Columbia. In practice, successful recall elections are rare, but it is arguable that if this mechanism had been available in Australia in 1975, the Opposition would have concentrated on investigating its availability rather than in refusing supply. The legitimacy of its use, successful or not , would be difficult to challenge. This is in no way a proposal to remove, amend, codify or reduce the reserve power to withdraw the Prime Minister's or Premier's commission. This power would still exist and would remain available for use against an errant Prime Minister or Premier.

The attraction of the recall election is that it is not inconsistent with the Burkian concept that democracy under the Westminster system is not direct but representative. Edmund Burke expressed this principle succinctly:

> "Your representative owes you, not his industry only, but his judgement; and he betrays, instead of serving you, if he sacrifices it to your opinion". (Edmund Burke, 3 November, 1774, *Speeches at His Arrival at Bristol* (1774), in *The Oxford Book of Political Quotations*, ed. Anthony Jay, Oxford University Press, Oxford, 1996.)

This proposal for a provision for recall elections may thus be distinguished from other proposals for direct democracy and which involve initiatives by the citizenry, usually known as CIRs (Citizen Initiated Referenda). As these are intended to have direct legislative effect, they involve an exception to the Burkian principle.

84. Smith, *Republic*, p. 95.

85. Leslie Zines, *loc. cit.*, pp. C1-C2.

86. Section 6; *The Constitution*, sections 106-109.

87. Flint, *Republic*, pp. 181-182.

88. Sub-section 7(5).

89. Flint, *Republic*, p. 180.

90. The kingdoms were Kent, Essex, Wessex, Sussex, Northumbria, East Anglia, and Mercia.

91. Flint, *Republic*, p. 184.

92. Sections 7, 15.

93. *Australia Acts (Request) Act*, 1999.

94. Smith, *Republic*, p. 220.

95. *A Republic: The Issues*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 8 (1997), 1.

96. Smith, *Republic*, p. 221.

97. *Sue v. Hill* (1999) 199 CLR 462.

98. As women could not succeed under the Salic law, this personal union ended on the accession of Victoria as Queen in 1830.

99. Indeed, the Preamble to the *Constitution Act* leaves open the possibility of the entry of New Zealand and other Pacific territories into the Commonwealth of Australia.

100. *The Australian Constitutional Defender*, No 3, Autumn, 2006.

101. ABC Radio, AM, Thursday, 16 March, 2006. "Who authorized this tosh?", demanded Mark Baker, opinion editor, *The Age*, 17 March, 2006.

102. Flint, *Republic*, pp. 186-194.

103. Flint, *Élites*, pp. 27-52.

104. *The Daily Telegraph*, Sydney, 4 November, 1998.

105. J Quick and R Garran, *op.cit.*, p. 287.

106. Smith, *Crown*, p. 45.

107. Smith, *Head of State*, pp. 85-116. Other unprecedented aspects of the Constitution were that it was approved by the people and that the power of amendment was vested in Australians.

108. *Constitution*, s.128.

109. *Ibid.*; Flint, *Republic*, pp. 37-48. Unlike Canada, the Australian government does not appear to have requested The Queen to act as Queen of Australia in any foreign country.

110. Imperial Conference, 1926, *Inter-Imperial Relations Committee: Report, Proceedings and Memoranda*, E( IR/26) Series (the "Balfour Declaration").

111. Smith, *Head of State*, pp. 326-327.

112. Smith, *Crown*, pp. 110-115.

113. Bagehot, *op.cit.*, p.54.

114. Richard E McGarvie, *Democracy: Choosing Australia's Republic,* Melbourne University Press, Carlton South, 1999.

115. *Ibid.*.

116. In 1992, an editorial in the Canadian newspaper, the *Globe and Mail*, proposed that The Queen be succeeded by a Head of State elected for life by the 150 Companions of the Order of Canada: Smith, *Crown*, p. 5.

117. Bagehot, *op.cit.*, p. 45.

118. Lord Acton, letter to Bishop Mandell Creighton, 3 April, 1887, in *The Oxford Book of Political Quotations*, ed. Anthony Jay, Oxford University Press, Oxford, 1996.

119. Smith, *Republic*, p. 219.

120. Flint, *Republic*, pp. 137-149.