

# The powerful checks and balances in Australia's Constitution.



All nations have an immense power which is made up of its land and the people who inhabit it. It incorporates the law and those who uphold it. An individual controlling this power is called a dictator. The world has seen many dictatorships. Over the past few hundred years, a system was developed to better control this 'power' with various checks and balances. This system is called a Constitutional Monarchy where the Monarch, or Governor-General is checked by the Parliament and the Parliament is checked by the Monarch/Governor-General and the Courts and where all are checked by the people. It is a system that has been refined over the centuries and whilst there are many inadequacies, it does work as has been proven in Australia, which has had no civil wars or major constitutional crisis in its hundred years of existence as a constitutional monarchy.

Under our system, neither the Prime Minister nor the Parliament can seize control of the nation, simply because the power is permanently vested in the Crown.

Some people, who agree that this arrangement works, say: “*Why can't we keep the system but do away with The Queen?*” The problem is that a constitutional monarchy cannot work where all participants are elected, because the election process corrupts the participants.

In the United States of America, the President is elected by the people. To achieve an election he has to raise millions of dollars for his campaign. This means that he is beholden to major campaign contributors who may be individuals, or corporations.

Individuals are often rewarded by ambassadorships and corporations by favourable financial treatment.

In Australia, the Prime Minister may act in this corrupt manner but the Governor-General is hardly worth bribing because he exercises no government authority and the Prime Minister can request his dismissal if he is found to act beyond his ceremonial and constitutional duties, whereas if we had a president elected by the people, he or she would be a much more politically powerful individual and we could well see constitutional crisis after crisis.

If our constitutional system was not working, then that would be the time to risk a republic, but is it really worth throwing away what we have, just because many people do not understand our system, or worse because some show an antipathy towards the Queen and any association, however remote, with the United Kingdom?

### **Future constitutional fine tuning**

Should the Constitution ever be updated, after all it is a hundred years old, it would be appropriate to incorporate the conventional practices of having a Prime Minister and Cabinet as well as an Executive Council. The Constitution also incorporates a provision under Section 59 which states: “The Queen may disallow any law within one year from the Governor-General's assent, and such disallowance on being made known by the Governor-General by speech or message to each of the Houses of the Parliament, or by Proclamation, shall annul the law from the day when the disallowance is so made known.” This was incorporated as no one knew how the new Federal Parliament would evolve or the difficulties that may have eventuated. However, the process, under the Constitution worked smoothly and there were no problems at all. Consequently, there is no reason why this section should remain.

As the Australian Parliament found its feet and the Government became more competent in administering the nation, it, together with the Canadian

Government started to agitate for greater independence from the British Government, particularly at the Imperial Conference of 1926.

As a result of ensuing discussions, it was agreed that the Governor-General, although still to be appointed by the monarch, was thereafter to be nominated by the Government of the respective country. From 1901, by consensus of both the British and the Australian Governments, the Governor-General was recognised as their link between each. The Governor-General was also to assume the constitutional and ceremonial role of the monarch in Australia and thereafter the British Government was to have no jurisdiction over the Governor-General who was to accept the formal advice tendered to him by the Australian Government. This agreement was put into the Statute of Westminster and thereafter a High Commissioner, another term for an Ambassador, was appointed to represent the interests of the British Government and to liaise with the Australian authorities. Today all diplomats of ambassadorial rank to member nations of the Commonwealth are called 'High Commissioners'.

Whilst Federation gave Australia independence, it was as a result of the Imperial Conferences and the Statute of Westminster that saw this independence mature.

### **The Governor-General is our referee.**

It was impossible for both the Sovereign and the British (or Imperial) Government to be personally present everywhere and it was accepted for each country or state to be administered by a Governor. Sometimes a Governor was called an Administrator, and in the case of the Supreme Governor of India, a Viceroy. At the time of Federation, each state in Australia had a parliament and a governor, appointed by the British monarch. The governors each reported back to the British government as well as to the monarch.

Other than becoming a republic, our Founding Fathers could well have opted to become a separate Monarchy and invited a son of Queen Victoria to become the King of Australia. This was not an unreasonable thought particularly in view of the long distance from London, however, to have our own King, or as America does, its own President, was simply not worth the cost and a president was considered to be far too risky as any interference in the Government's running of the country could well have led to a political crisis. After all, under our system, it is the Parliament which is elected to govern, not the Monarch or the Governor-General.

These options were never seriously considered as under the Australian Constitution the role of the Governor-General is similar to a Trustee of the Constitution and the rights of the people and not in the administration of

the government. That is carried out by the cabinet and its chairman, the Prime Minister, otherwise termed the 'Head of Government'.

At the time of Federation and for a few decades thereafter the Governor-General was appointed by the British monarch following nomination by the British government. It was normal practice for the Governor-General to act as the liaison and to report to the British government and this process was accepted by the Australian government and parliament until the Imperial Conference of 1926, at which time the system was revised to accord to the independent sovereignty of Australia and other Realms.

Under our Constitution (section 61), "*The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative...*"

Our Constitution does not mention a Prime Minister or Cabinet because the Governor-General is advised by what is termed an Executive Council established by section 62 of the Constitution, which he chairs. The Executive Council is the equivalent of the Privy Council in the UK and comprises ministers and parliamentary secretaries but not, as in the UK, the Leader of the Opposition.

It is in this way that the Government can effectively manage the nation with the confidence of Parliament, which is elected by the people at regular intervals, currently every three years.

We have regular elections to enable the people to vote a Government out of office, should it lose their confidence. A prime responsibility of the Governor-General is to ensure that a Parliament goes to the people prior to the expiry of its term of office.

The Governor-General is the representative of the Queen. This does not mean that he, or she is the Queen's minion, but that he/she represents the institution of The Crown and as such assumes the role of effective Head of State. The Governor-General also has powers vested directly in him/her by the Constitution, including the position of Commander-in-Chief of the Armed Forces.

Unlike the period following Federation, for over seventy five years the Governor-General has not reported anything to the British government, for his dealings are solely with the Australian government. Nor does he report everything to Her Majesty and in fact does not answer to the Queen on matters of State nor does the Queen give instructions or even advice to the Governor-General.

The Governor-General can enact no law except "with *the advice and consent*" of both houses of our parliaments. This is the framework of our system.

The monarch, under our Australian Constitution, has no personal say in our affairs.

In this way, the ultimate power of the State is placed above party politics. The great strength in the existence of the Crown and its conventional political neutrality is that it denies ultimate power to others.

The Governor-General may be a political nominee, but the appointment is always that of the Queen. Once appointed Governor-General or Governor however, the appointee is thereafter as free from direction by politicians (or the Queen) as any judge. A Governor-General or Governor is not the puppet of the politician nominating him. He or she retains personal integrity to act above party politics when exercising the vice-regal powers as the Queen's representative, and stands in the same relationship to our houses of parliament as a constitutional monarch would do.

There are a number of ceremonial and social duties which are the responsibility of the Governor-General which are similar to a non-executive Head of State. A number of charities depend on the Governor-General's patronage and support. However, there are also constitutional duties which are far more important as the constitutional role of the Governor-General is similar to that of a trustee, ensuring that all the parties participating in the governing of the nation play fair by the people.

The website of the Governor-General lists his duties as:

- \* dissolves the Parliament and issues writs for new elections;
- \* commissions the Prime Minister and appoints other Ministers after elections;
- \* gives assent to laws when they have been passed by the two Houses of Parliament - the Senate and the House of Representatives;
- \* acts on the advice of Ministers through the Executive Council to issue Regulations and proclamations under existing laws; appoint Federal judges; ambassadors and high commissioners to overseas countries and other senior government officials; issue Royal Commissions of Enquiry; exercise the prerogative of mercy; and
- \* authorises many other executive decisions by Ministers such as raising government loans or approving treaties with foreign governments.

As Commander-in-Chief, the Governor-General has an important ceremonial role to play. He attends military parades and special occasions such as Anzac Day at the Australian War Memorial, and presents colours and other insignia to units of the Australian Defence Force.

There are many other ceremonial duties performed by the Governor-General. For example, he or she:

- \* receives and entertains visiting heads of state, heads of government and other prominent visitors to Australia;
- \* opens new sessions of the Commonwealth Parliament;
- \* receives the credentials of ambassadors and some high commissioners appointed to represent their countries in Australia;
- \* conducts investitures at which people receive awards under the Australian Honours system for notable service to the community, or for acts of bravery; and
- \* receives and formally entertains many Australian citizens and representatives of organisations active in the life of the community.

A major constitutional role of the Governor-General is to ensure that elections are held at or before the appointed time. Should a Prime Minister refuse to go to the people, then, unless the nation is in a state of war or national emergency, the Governor-General has no alternative but to dismiss the Prime Minister and appoint a caretaker Prime Minister who will agree to go to the polls.

Once the election has been held, the Governor-General then commissions the leader of the political party which has the most seats (or votes) in the parliament, (or the most likely to be able to control a majority of votes), to form a government. Thereafter the Governor-General must accept the advice of the Government and must assent to Bills passed by the Parliament, unless such Bills clearly contravene the Constitution, because once elected, that parliament speaks with the voice of the people. It has been considered that by himself, the Governor-General cannot determine whether any Bill contravenes the Constitution and must give Assent and allow the Opposition or other interested parties to take the matter to the High Court for judgment.

A Governor-General can, of course, express – in private - his concerns to the government. Many members of the public write in to the Governor-General and most receive a bland response. However, their views are considered and frequently taken up in private discussions with the Prime

Minister or Cabinet Minister concerned and often result in a Bill being amended. In fact, Australian Governors-General have returned Acts back to the parliament for amendment on no less than fourteen occasions. However, the decision of the government backed by a consensus in the parliament is paramount.

As with The Queen in the United Kingdom, the Governor-General may advise and caution the ministers, but contrary to the misguided notions of some 'barrack-room lawyers', a government cannot be overruled for to do so would be to overrule the majority will of the people.

### **The head of state must be independent.**

Debate on change to our constitution continues. This is to be expected in a free society. One such debate has been an unproductive argument over who is our head of state, leading to intense confusion on all sides.

When we federated into one nation in 1901, the term 'Head of State' was relatively unknown. However, over the past fifty years it has been commonly used in new countries to describe the individual who wields power within the respective nation. The reason why there is some confusion over the use of this term in Australia is because our system is different from republics. Ours is a constitutional monarchy with a sovereign represented by a Governor-General who also assumes independent powers under the Constitution. Our system is therefore one of many checks and balances where all those in authority keep a watch on the other and in this manner safeguard the interests of the people.

If we are to use the term 'Head of State' then the first or 'prime' Head is the Queen, but once she has appointed a Governor-General he (or she) assumes the position of the monarch in the country and the Queen thereafter plays no further part in administrative affairs. The reason why we say the Queen is the 'prime' head of state is because a major part of our constitutional checks and balances is that the Queen appoints and, when petitioned by the Prime Minister, has the power to dismiss the Governor-General.

The Prime Minister advises the Queen of the person he wishes to nominate for Governor-General and it is convention that the Queen always accepts the nomination. It may reasonably be asked 'Why do we need The Queen and why cannot the Prime Minister just nominate the Governor-General himself?' The reason, of course, is that if the Prime Minister was empowered to appoint and dismiss the Governor-General it would make that Office subservient instead of supervisory, as is the case at present where the Governor-General is allegiant to the Crown and therefore to the people and not to any politician. Whilst it is practice for the monarch to

accept the nomination of the prime minister, this does not mean that if a totally unsuitable nomination is made, it cannot be questioned. The procedure is a part of the checks and balances which make up our constitutional arrangements for the protection of the democracy of the people.

Constitutional experts say that we therefore have two heads of state, a de jure Head in the Monarch and a de facto Head in the Governor-General. However, few people can understand these terms and I prefer to say that The Queen is the 'prime' Head of State and the Governor-General the effective Head.

## **QUESTIONS:**

What makes up the 'power of a nation'?

Because we are a constitutional monarchy, what can the Prime Minister and the Parliament not do?

What changes were made regarding the Governor-General after 1926?

To what are the duties of the Governor-General similar?

Does being the Queen's Representative mean that the Governor-General is instructed by the Queen what to do?

Who is Australia's Commander-in-Chief?



Does the Governor-General ensure that elections are held at proper times?

Why does the Australian Constitution not mention a 'head of state'?

Who is the Prime Head of State?

Why?

Who nominates the person to be Governor-General?

Who appoints that person as Governor-General?

Why?