

State Judges as Lieutenant-Governors

Rebecca Ananian-Welsh and George Williams

I Introduction

The Australian constitutional framework is grounded in a deep respect for the independence and impartiality of the judiciary. Judicial independence from the executive and legislative arms of government has been called a ‘keystone in the democratic arch’¹ and the ‘bulwark of the constitution.’² Seemingly at odds with this is the long-standing tradition of appointing senior judges to vice-regal roles. In the States, the appointment of the Chief Justice as Lieutenant-Governor dates back to at least the 1860s.³ As Lieutenant-Governor, the judge may be called on to confer awards, open or dissolve parliaments, assent to Bills, chair meetings of the Executive Council and perform a range of other executive functions as the Queen’s appointed representative. This remains common practice in New South Wales, Queensland, Tasmania, Victoria, and Western Australia. The sole exception is South Australia, where the appointment of the Chief Justice as Lieutenant-Governor has been abandoned in favour of selecting community leaders to take on the role.⁴

Even in the convention debates of 1898, delegates recognised the risk that appointing judges to vice-regal positions posed to public confidence in judicial independence. New South Wales politician William McMillan said:

[I]t does seem to me that although this custom may have been in vogue for years, and no difficulties may have arisen, that is no argument as a matter of principle ... [I]t has always shocked me to see a Chief Justice occupying the position, even temporarily, of a Governor of a colony, and at the same time sitting on the bench of the Supreme Court. It does seem to me that these two positions are utterly inconsistent.⁵

- 1 Australian Bar Association, ‘The Independence of the Judiciary’ [1991] (Winter) *Victorian Bar News* 17, 18 [2.2].
- 2 *Attorney-General (Cth) v The Queen; Ex parte Boilermakers’ Society of Australia* (1957) 95 CLR 529, 540-541.
- 3 Matthew Stubbs, ‘The Constitutional Validity of State Chief Justices Acting as Governor’ (2014) 25 *Public Law Review* 197, 199-200; David Clark, *Principles of Australian Public Law* (LexisNexis Butterworths, 2nd ed, 2007) 200; PR Eldershaw, ‘The Governor’s Office’ (1968) 15(3) *Papers and Proceedings of the Tasmanian Historical Research Association* 86, 109; Arthur Berriedale Keith, *Responsible Government in the Dominions* (Clarendon Press, 1912) vol 1, 94-95.
- 4 It is also practised in the Northern Territory, where the Chief Justice is appointed as Deputy to the Administrator: Rebecca Ananian-Welsh and George Williams, ‘Judges in Vice-Regal Roles’ (2015) 43 *Federal Law Review* 119, 130.
- 5 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 February 1898, 359 (William McMillan).

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