

JUDGES IN VICE-REGAL ROLES

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ABSTRACT

The Australian federation is built upon an enduring respect for the independence of the judicial arm of government. This is reflected in the principle that the judiciary should be kept separate from the legislature and executive. A practice seemingly at odds with these values is the appointment of senior judges to vice-regal offices. Despite this, the practice has attracted scant academic attention, and has never been challenged in the courts. In this article we examine the conferral of vice-regal roles on serving federal, state and territory judges. We ask, first, whether such appointments ought to continue to be made and, secondly, whether they are constitutionally permissible.

The judge, by the way, was the King; and, as he was wearing his crown over the wig ... he did not look at all comfortable, and it was certainly not becoming.

– Lewis Carroll, 'Alice's Adventures in Wonderland'.¹

I INTRODUCTION

On 12 November 2013, the 44th federal Parliament was officially opened.² After a Welcome to Country by Aboriginal people, Members and Senators made their way to their respective Houses to await the proclamation calling them together. Just after 10.30am, the Usher of the Black Rod knocked on the door of the House of Representatives and announced: 'Honourable members, the deputy of the Governor-General requires your presence'. Members made their way to the Senate Chamber, where the Chief Justice of the High Court, Robert French, awaited them in the President's chair. The Clerk of the Senate then read the Instrument of Appointment, in

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¹ Lewis Carroll, *Alice's Adventures in Wonderland* (Lee and Shepard, 1920) 163.

² Commonwealth, 'The Opening of Parliament' (Senate Brief No 2, Department of the Senate, Parliament of Australia, 2013) 7.

which Governor-General Quentin Bryce gave authority to her deputy, the Chief Justice, to open Parliament. In due exercise of that authority, Chief Justice French declared Parliament open and set about the task of swearing in Senators and members of the House of Representatives.³

The appointment of senior judges to vice-regal roles has a long history in Australia. Chief Justice French was the eleventh Chief Justice, and the 20th justice, of the High Court to act as deputy to the Governor-General in the opening of a federal Parliament.⁴ The first judge to perform this role was Sir Samuel Griffith in 1904.⁵ In some years, two justices of the High Court have been appointed as deputies for the occasion.⁶ The opening of Federal Parliament is merely one example of a serving member of the judiciary being appointed as the Monarch's representative in a vice-regal role. In most states, the position of Lieutenant-Governor is traditionally filled by the Chief Justice of the Supreme Court or, if he or she is unavailable, the next most senior judicial officer.⁷ Every year, state justices in vice-regal roles may be called upon 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. In the territories, judges are able to exercise similar vice-regal roles as Deputy or Acting Administrators, though such appointments tend to only occur in the Northern Territory.

Australia is built upon a respect for the independence and institutional integrity of judges. Judicial independence from the executive and legislative arms of government has been called a 'keystone in the democratic arch'⁸ and the 'bulwark of the Constitution'.⁹ Despite the conferral of vice-regal powers on judges standing in apparent contradiction to the separation between the judicial and executive branches, the practice has received little attention from commentators or the courts.¹⁰ We seek to

³ Department of the Senate, *Opening of the 44th Parliament* (12 November 2013) Parliament of Australia

<http://www.aph.gov.au/About_Parliament/Senate/Opening_of_44th_Parliament>; Rosemary Laing (ed), *Annotated Standing Orders of the Australian Senate* (Department of the Senate, 2009) 39-52.

⁴ Commonwealth, above n 2, 6-7.

⁵ *Ibid* 6.

⁶ *Ibid* 6-7. Between 1910 and 1943 the first sitting of each Federal Parliament was opened by two Justices of the High Court both acting as deputies to the Governor-General on all but one occasion (when Sir Isaac Isaacs opened parliament in 1917). On occasions when two deputies were appointed it seems that one swore in Members of the House of Representatives, and the other swore in Senators. See, eg, the description of the opening of Federal Parliament by Sir Frank Gavan Duffy and Sir George Rich in 1932: 'Federal Parliament Opened by Vice-Royalty', *Townsville Daily Bulletin* (Townsville), 18 February 1932.

⁷ Anne Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (Federation Press, 2006) 29.

⁸ Australian Bar Association, 'The Independence of the Judiciary' [1991] (Winter) *Victorian Bar News* 1 18 [2.2].

⁹ Fiona Wheeler, 'Original Intent and the Separation of Powers in Australia' (1996) 7 *Public Law Review* 96, 100, quoting *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 952 (Sir Edmund Barton). See also Judicial Integrity Group, *Commentary on the Bangalore Principles of Judicial Conduct*, UN Office on Drugs and Crime, Commission on Crime Prevention and Criminal Justice, (September 2007) 5.

¹⁰ Matthew Stubbs, 'The Constitutional Validity of State Chief Justices Acting as Governor'

remedy this gap. In this article, we examine the history and practice of appointing judges to vice-regal roles and ask, first, whether such appointments ought to be made and, secondly, whether they are constitutionally permissible.

We begin in Part II by examining vice-regal offices and powers in Australia and by discussing the traditional practices of appointing judges to these positions. In Part III, we consider three arguments as to why judges should not be vested with vice-regal powers. First, a vice-regal appointment may create a practical conflict between the judge's judicial and vice-regal responsibilities. Secondly, a conflict of interest might arise for a judge in the exercise of his or her judicial or vice-regal functions. Thirdly, the appointment of serving judges to vice-regal roles may erode public confidence in the independent administration of justice.

In Part IV, we turn our attention to constitutional limitations on the appointment of judges to extra-judicial roles, and ask whether the conferral of vice-regal roles on serving judges infringes the separation of judicial power derived from Chapter III of the *Constitution*. Constitutional constraints on the scope of judges' extra-judicial roles have evolved considerably since the mid-1990s.¹¹ A key development that occurred as recently as 2011 in *Wainohu v New South Wales* was the extension of constitutional limitations on permissible extra-judicial functions to judges in the states and territories.¹² This and other major developments in constitutional law regarding judicial independence from the executive branch highlight the need to re-assess existing practices in this area.

II VICE-REGAL OFFICES IN AUSTRALIA

A Vice-Regal Roles

In Australia, the Crown is represented by a Governor-General at the Commonwealth level,¹³ by a Governor in each of the states,¹⁴ and by an Administrator in the territories of Norfolk Island, the Northern Territory and the Australian Indian Ocean Territories of Christmas Island and the Cocos (Keeling) Islands.¹⁵ The Australian Capital Territory

(2014) 25 *Public Law Review* 197; Damien Cremean, 'State Chief Justices as Lieutenant Governors: Federal Jurisdiction' (2010) 18 *Australian Journal of Administrative Law* 3; Twomey, *The Chameleon Crown*, above n 7; Fiona Wheeler, "'Anomalous Occurrences in Unusual Circumstances'? Extra-Judicial Activity by High Court Justices: 1903 to 1945' (2013) 24 *Public Law Review* 125; Chief Justice Robert French, 'Executive Toys: Judges and Non-Judicial Functions' (2009) 19 *Journal of Judicial Administration* 5.

¹¹ *Grollo v Palmer* (1995) 184 CLR 348, 377 ('Grollo'); *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 ('Wilson').

¹² *Wainohu v New South Wales* (2011) 243 CLR 181 ('Wainohu').

¹³ *Constitution* s 61.

¹⁴ See, eg, *Australia Act 1986* (Cth) s 7; *Constitution Act 1902* (NSW) s 9A; *Constitution Act 1975* (Vic) s 6; *Constitution of Queensland 2001* (Qld) s 29; *Constitution Act 1889* (WA) s 50.

¹⁵ This position is intended to be the constitutional equivalent of a state Governor: David Clark, *Principles of Australian Public Law*, (LexisNexis Butterworths, 2nd ed, 2007) 197 [8.5]. See, eg, *Norfolk Island Act 1979* (Cth) s 5; *Northern Territory (Self-Government) Act 1978* (NT) s 32. For a brief history of the Northern Territory role, see National Archives of Australia, *Administrator of the Northern Territory* <<http://guides.naa.gov.au/records-about-northern-territory/part1/chapter2/2.6.aspx>>; Legislative Assembly of the Northern Territory, *History of the Northern Territory Parliament* <

does not have any such vice-regal representative. Instead, the Governor-General performs some of the functions of a Crown representative in that Territory,¹⁶ with the parliamentary oath administered by the Chief Justice of the Supreme Court or by a person authorised by the Chief Justice.¹⁷

The federal *Constitution* empowers the Governor-General to appoint a deputy (or deputies) on an ad hoc basis, to whom any or all of his or her functions may be delegated.¹⁸ It was as a deputy that Chief Justice French opened the 44th federal Parliament, his vice-regal powers being limited to those specified in the Instrument of Appointment read by the Clerk of the Senate. The Governor-General's power to appoint a deputy can equally be used to appoint a person to the role on an ongoing basis, however such appointments are rare.¹⁹

The Governor-General may also appoint an Administrator, who is responsible for administering the federal government as an acting Governor-General in the event of the Governor-General's death, incapacity, removal, or absence from Australia.²⁰ State Governors hold dormant commissions to act as Administrators of the Commonwealth. By convention, the longest serving state Governor acts as Administrator.²¹

State Governors may also appoint deputies who are responsible for exercising the Governor's powers in the event of his or her death, incapacity, removal or absence from the state. The key vice-regal deputy in a state is usually known as a Lieutenant-Governor. An Administrator may also be appointed to administer the state in the absence of a Governor and Lieutenant-Governor.²² Other positions such as Acting or Deputy Governor may also be created. In the Northern Territory, Norfolk Island and the Australian Indian Ocean Territories, where an Administrator instead of a Governor represents the Crown, Deputy and Acting Administrators may be appointed.²³

There is variation across the states and territories in respect of the titles and powers conferred on vice-regal deputies. Every state except Queensland has a Lieutenant-

parliament/history-of-nt-parliament.shtml#administrator>. For Administrators in the Australian Indian Ocean Territories, see Joint Standing Committee on the National Capital and External Territories, *Governance in the Indian Ocean Territories*, Parliament of Australia, 9-10, [2.3]-[2.4] <http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives/_committees?url=ncet/annualreports/report/chap2.pdf>.

¹⁶ See, eg, Legislative Assembly for the Australian Capital Territory, 'Standing Orders and Continuing Resolutions of the Assembly' (April 2014), 196: 'Where the Governor-General recommends amendments to an enactment, the amendments shall be printed, unless the Assembly otherwise orders, and a time fixed for taking them into consideration'.

¹⁷ *Australian Capital Territory (Self-Government) Act 1988* (ACT) s 9(2).

¹⁸ *Constitution* s 126.

¹⁹ Professor David De Kretser, Governor of Victoria, was made the Deputy to the Governor-General in July 2006: Clark, above n 15, 201 [8.9] citing Commonwealth, *Gazette*, No S137, 17 July 2006.

²⁰ Her Majesty The Queen, 'Letters Patent Relating to the Office of Governor-General of the Commonwealth of Australia' in Commonwealth, *Gazette: Special*, No S 179, 9 September 2008, clause III.

²¹ Peter John Boyce, *The Queen's Other Realms: The Crown and its Legacy in Australia, Canada and New Zealand* (The Federation Press, 2008) 119.

²² Clark, above n 15, 202 [8.10].

²³ *Ibid* 202 [8.9]. See, eg, *Administration Ordinance 1968* (Territory of Christmas Island) ss 7-8.

Governor. Anne Twomey traces this distinction to an entrenched provision in the Queensland Constitution that requires a Lieutenant-Governor or Administrator to be appointed by the Queen under Royal Sign Manual.²⁴ This provision may only be amended by referendum. It is, however, inconsistent with the prevailing interpretation of the *Australia Acts*, which requires a Lieutenant-Governor or Administrator to be appointed by the Governor, unless the Queen is physically present in the state. Queensland has avoided problems arising from this inconsistency, and the need for a referendum on the issue, by adopting the practice of appointing Deputy Governors and Acting Deputy Governors rather than Lieutenant-Governors or Administrators.²⁵

In the remaining states, a Lieutenant-Governor assists the Governor. Similarly, territorial Administrators are assisted by Acting and Deputy Administrators. However, practice may vary over time and between jurisdictions with respect to other deputy positions.²⁶

B Vice-Regal Powers

The Governor-General, state Governors and territorial Administrators may delegate any or all of their vice-regal powers. But what are these powers? Before outlining the scope of vice-regal powers in Australia, it is necessary to clarify a definitional point. Strictly speaking, the powers associated with these offices are not 'vice-regal' in nature, in the sense of the sovereign powers of the Crown being transferred to the office-holder. Rather, these powers are simply made exercisable by the office-holder according to his or her commission, Letters Patent, Instructions, the common law and legislation including the *Australia Acts*.²⁷ It was established in the nineteenth century that a colonial Governor was not a viceroy – even in an age where he or she would exercise actual executive power. As Sir John Quick observed in 1901:²⁸

The King's representative in the Commonwealth and in each of the States cannot ... be regarded as Viceroy, or as possessing sovereign power. His powers are limited by his instructions and are also necessarily limited by the Constitution of the State or the

²⁴ *Constitution Act 1867* (Qld) s 11A. The provision is one of six from the old Constitution that was 'referendum entrenched'. For this reason, when the Queensland legislature was drafting its new consolidated Constitution in 2002, it opted to leave those six provisions intact while repealing the rest of the 1867 Constitution to make way for the *Constitution of Queensland 2001* (Qld). See Explanatory Memorandum, *Constitution of Queensland 2001* (Qld) 4.

²⁵ Anne Twomey, 'The Effect of the *Australia Acts* on the Western Australian Constitution' (2013) 36 *University of Western Australia Law Review* 273, 284–6. For examples of deputy appointments made in Queensland in recent years, see: Office of the Governor, *Annual Report 2011–12* (30 September 2012), 2 <http://www.govhouse.qld.gov.au/_CMSImages/govhouse/pdf/2011-12%20Office%20of%20the%20Governor%20Annual%20Report.pdf>.

²⁶ For a description of the relevant law and practice in Western Australia, see: Grant Donaldson, 'Aspects of State Executive Powers' (2012–2013) 36 *University of Western Australia Law Review* 145, 160–3.

²⁷ *Australia Act 1986* (Cth) s 7; Clark, above n 15, 209 [8.21], citing *Cameron v Kyte* (1835) 3 Knapp 332, 346; *Hill v Bigge* (1841) 2 Moore 465, 476; *Musgrave v Pulido* (1879) 5 App Cas 102, 111.

²⁸ John Quick, *The Legislative Powers of the Commonwealth and the States of Australia with Proposed Amendments* (Harston, Partridge & Co. Printers, 1901) 226, citing *Musgrave v Pulido* (1879) 5 App Cas 102, 111; *R v Sutton* (1908) 5 CLR 789, 805 (O'Connor J). See also, William Edward Hearn, *The Government of England: Its Structure and Its Development* (George Robertson & Co, 2nd ed, 1886) 133.

Commonwealth as the case may be. In anything outside the exercise of the powers so limited he is in law no more than an individual subject of the King.

As the Governor-General, state Governors and territorial Administrators, as well as the broader community, refer to these offices and their powers as vice-regal,²⁹ we also have adopted that term.

The federal *Constitution* authorises the Governor-General to: exercise the executive power of the Commonwealth;³⁰ choose, summon and dismiss members of the Federal Executive Council;³¹ appoint ministers of state;³² recommend the appropriation of revenue or money;³³ and act as Commander-in-Chief of the armed forces.³⁴ In respect of Parliament, the Governor-General may dissolve, prorogue and summon Parliament;³⁵ issue writs for a general election of the House of Representatives;³⁶ grant or withhold royal assent to bills passed by the Parliament; return a bill to the Parliament with proposed amendments;³⁷ reserve a bill for the Queen to consider whether to grant royal assent;³⁸ and submit to electors a proposed law to alter the *Constitution* in cases where the two Houses of Parliament cannot agree.³⁹ Additional powers are granted to the Governor-General by royal documents such as Letters Patent, Instructions under the Royal Sign Manual, Assignments of Power, and Commissions, as well as through the common law prerogatives and by various statutes.⁴⁰ For example, the Governor-General holds the prerogative powers to grant mercy, declare war or peace and to enter into treaties.⁴¹ He or she is also granted power under section 72 of the *Constitution* to remove federal judges from office following a plea from both Houses of Parliament in the one sitting, citing proved misbehaviour or incapacity.

State Governors and territorial Administrators are vested with similarly broad executive powers through a combination of the federal *Constitution*,⁴² state and

²⁹ See, eg, NSW Department of Premier and Cabinet, *Vice Regal Guidelines* (14 May 2013) The Governor of New South Wales <<http://www.governor.nsw.gov.au/her-excellency-professor-the-honourable-marie-bashir-ac-cvo/vice-regal-guidelines/>>; Office of the Governor, *Vice-Regal Notes* (4 June 2014) Governor of Victoria <<http://www.governor.vic.gov.au/victorias-governor/vice-regal-notes>>; For references to vice-regal functions and activities in Annual Reports of the various Governors see, eg, Office of the Governor Tasmania, *Annual Report 1 July 2012 - 30 June 2013* (25 October 2013), 6 <http://www.govhouse.tas.gov.au/sites/default/files/annual-reports/annual_report_2012-2013.pdf> .

³⁰ *Constitution* s 61.

³¹ *Ibid* s 62.

³² *Ibid* s 64.

³³ *Ibid* s 56.

³⁴ *Ibid* s 68.

³⁵ *Ibid* s 5, including to dissolve both Houses of Parliament simultaneously and to convene a joint sitting of Parliament: s 57.

³⁶ *Ibid* s 32.

³⁷ *Ibid* s 58.

³⁸ *Ibid* s 60.

³⁹ *Ibid* s 128.

⁴⁰ An example of a statutory power vested in the Governor-General is the power to make regulations under the *Taxation Administration Act 1953* (Cth) s 18.

⁴¹ H V Evatt, *The Royal Prerogative* (Law Book, 1987) 118.

⁴² For instance, the power to fill casual vacancies in the Senate when the Parliament of the

territory constitutions,⁴³ statutes such as the *Australia Acts*,⁴⁴ the common law,⁴⁵ Imperial instruments⁴⁶ and conventional practice.⁴⁷ However, in the smaller territories the powers of the Administrator may be more constrained and uniquely adapted to the position of those territories in the federation. For instance, the Governor-General rather than the Administrator has the power to make ordinances for the Indian Ocean territories.⁴⁸

Twomey has described the role of the Governor as 'in part constitutional and in part representational'. She writes:⁴⁹

The constitutional role includes presiding at meetings of the Executive Council, appointing Ministers, issuing writs for elections, opening Parliament, assenting to laws and making regulations, proclamations and appointments, and in rare cases exercising the reserve powers. The representational functions of the Governor include representing the State at ceremonial occasions and community events, giving awards and congratulations, opening buildings and events, and educating citizens upon the system of government and the role of the governor.

Of particular relevance to our present inquiry is the capacity for state Governors to remove judges from office if certain requirements (such as misbehaviour or incapacity) are met.⁵⁰

Whilst the legal scope of state Governors', territorial Administrators' and the Governor-General's powers appear vast, in reality these powers are constrained by highly developed convention and practice.⁵¹ The Governor-General, Governors and Administrators act on the advice of their ministers.⁵² They may act contrary to this

State represented is not in session: *Constitution* s 15.

43 See, eg, *Constitution Act 1902* (NSW) s 10A (power to prorogue Parliament); *Northern Territory (Self Government) Act 1978* (Cth) s 15 (power to issue writs for elections).

44 See, eg, *Australia Act 1986* (Cth) s 7; *Corrections Act 1986* (Vic) s 51 (power to hear charges relating to prison offences).

45 For instance, the common law prerogative powers, including the royal prerogative of pardon or remission of sentences. See, Evatt, above n 41.

46 See, eg, Her Majesty The Queen, 'Letters Patent Relating to the Office of Governor of the State of Western Australia' (14 February 1986) cl VII (power to preside at meetings over Executive Council).

47 Such as the convention that Governors are required to act on the advice of the State Premiers and Cabinets, or the convention that a Governor must not take sides in an open political conflict: see Sir Walter Campbell, 'The Role of a State Governor' (Speech delivered at the Royal Australian Institute of Public Administration Queensland Division, 22 March 1988).

48 *Christmas Island Act 1958* pt III; *Cocos (Keeling) Islands Act 1955* pt III.

49 Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 622.

50 Ibid 625–6; Susan Kiefel, 'Judicial Independence' (Speech delivered at the North Queensland Law Association Conference, Mackay, 30 May 2008) 2; *Constitution Act* (NSW) s 53; *Constitution Act 1975* (Vic) s 77(4)(aaa); *The Constitution of Queensland 2001* (Qld) ss 60(1), 61; *Constitution Act 1934* (SA) ss 74, 75; *Constitution Act 1889* (WA) ss 54, 55; *Supreme Court (Judge's Independence) Act 1857* (Tas) s 1; *Judicial Commissions Act 1994* (ACT) s 5; Kathy Mack and Sharon Roach Anleu, 'The Security of Tenure of Australian Magistrates' (2006) 30(2) *Melbourne University Law Review* 370, 392–4.

51 Twomey, *The Constitution of New South Wales*, above n 49, 622.

52 This works the same way in the territories. See *Northern Territory (Self-Government) Act 1978* (NT) s 33; *Norfolk Island Act 1979* (Cth) s 11. The Australian Indian Ocean territories are not

advice, and so exercise a reserve power, such as to dismiss a prime minister or premier where they refuse to resign after being defeated in the lower house in a vote of no confidence. Such instances are, however, rare.⁵³

C Judges in Vice-Regal Positions

1 Deputies to the Governor-General

Judges exercise vice-regal powers at the federal level on an ad hoc basis as deputies to the Governor-General. The traditional scope of this role has been confined to the opening of the first (and occasionally the second) session of each federal Parliament by a Chief Justice or puisne justice of the High Court. There is no record of a judge exercising the functions of the Governor-General other than to open Parliament. The powers of a judicial deputy could potentially extend to any or all of the powers of the Governor-General, though this would represent a significant break with traditional practice.

The appointment of judges to serve in executive roles might have been prohibited by the *Constitution*. At the 1897–98 constitutional convention, Josiah Symon QC inserted the following clause 80 into the draft Constitution:⁵⁴

No person holding any judicial office shall be appointed to or hold the office of Governor-General, Lieutenant-Governor, Chief Executive Officer, or Administrator of the Government, or any other executive office.

Symon and other supporters of clause 80 were particularly concerned that federal judges ought not be appointed as deputies to the Governor-General. Delegates including Sir John Forrest and Sir Edmund Barton argued that the clause was necessary to protect the separation between the judicial and executive branches, a notion of particular importance in the federal sphere of government.⁵⁵

Delegates were in general agreement that the independence of the federal judiciary was of fundamental importance. However, some – such as Sir Isaac Isaacs and Charles Kingston – opposed the clause, arguing that the independence, expertise and experience of judges rendered them highly suitable candidates for vice-regal appointment.⁵⁶ Others who opposed the clause accepted that the practice of appointing judges to vice-regal roles undermined judicial independence,⁵⁷ but were

self-governed (though Christmas Island and the Cocos Islands do have local governments that operate in tandem with Commonwealth executive power there).

⁵³ The most infamous being the dismissal of the Whitlam government: see George Winterton, '1975: The Dismissal of the Whitlam Government' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 234–48. A prime example of a state Governor acting beyond the advice of his or her Executive Council was given in 1932 when Sir Philip Game, the Governor of New South Wales, dismissed the Government of Premier Jack Lang, having taken the view that Lang's attempt to thwart a federal Act was illegal.

⁵⁴ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 February 1898, 355.

⁵⁵ *Ibid* 356 (Sir John Forrest), 368 (Sir Edmund Barton).

⁵⁶ See, eg, *Ibid* 360 (Sir Isaac Isaacs), though for a number of delegates the primary reason to support the appointment of federal judges to a vice-regal office was that it was a far preferable option to drawing on state governors to fill these roles: See, eg, 359–60 (Sir George Reid).

⁵⁷ Clark, above n 15, 201 [8.9].

concerned about ambiguities in its drafting (for instance: would it impact existing practice in the states? And why should the clause fail to exclude others, like the President of the Senate, from executive office?).⁵⁸ Many opponents also considered it improper to tie the hands of the Crown or future Parliaments to make decisions as to who should hold vice-regal office.⁵⁹ In the end, the prevailing view of the delegates was that the issue of whether federal judges are suitable for vice-regal roles ought to be left to Parliament and the Crown to resolve.⁶⁰ As a result, the clause was struck out of the draft Constitution.

This debate meant that many of the framers of the *Constitution* voiced their belief that federal judges ought not be appointed to vice-regal roles in the same way as their state counterparts. This may well have influenced the decision soon after federation to restrict the scope of vice-regal powers vested in federal judges to the opening of the first session of Parliament.

2 *Deputies to the State Governors*

Judges have traditionally played a significant role in exercising vice-regal powers in the states. Chief Justices are typically appointed as Lieutenant-Governors and, along with senior puisne judges, may be appointed to other vice-regal roles such as that of Administrator or Acting Governor. In these positions, judges are called upon to exercise any or all of the Governor's powers for a brief or extended period.

This practice reflects the weaker separation of judicial power and closer adherence to Westminster traditions and constitutionalism that prevails in the Australian states. It also stems from the practicalities of colonial government. In the early days of the Australian colonies, the local British military commander would usually serve as Lieutenant-Governor. When the British withdrew their last troops from Australia in the late 1860s, the Governors turned to the Chief Justices and senior puisne judges to act as vice-regal deputies.⁶¹ The convention debates of 1898 allude to a belief amongst the colonial governments that very few individuals were considered to have the necessary expertise and independence from Parliament to fill vice-regal roles.⁶² As Henry Higgins argued in opposition to Simon's proposed clause 80:⁶³

Under the Victorian Constitution there are only three classes who are forbidden to take part in Parliament - Judges, convicts, and clergymen. Unless you have a Judge appointed I suppose you must take a convict or a clergyman to be Lieutenant-Governor.

⁵⁸ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 February 1898, 365 (Charles Kingston), 360 (Sir Isaac Isaacs).

⁵⁹ *Ibid* 365 (Charles Kingston).

⁶⁰ *Ibid*.

⁶¹ For details of some of the first Chief Justices to serve as Lieutenant-Governors, see: Stubbs, above n 10, 199–200. See also Clark, above n 15, 200 [8.7]; P R 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, 94–5. For a discussion of some of the practical effects of the vice-regal workload of colonial judges, see David Clark, 'The Struggle for Judicial Independence in Nineteenth Century Australia' (2013) 12 *Macquarie Law Journal* 21, 57–8.

⁶² *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 February 1898, 360 (Sir Isaac Isaacs), 369 (Sir George Reid), 373 (Sir Josiah Symon). Cf, discussion in Stubbs, above n 10, 200–2.

⁶³ *Ibid* 357 (Henry Higgins).

Thus, since colonial times, vice-regal roles in the states have tended to be conferred on judges, usually according to seniority. This practice has continued to the present day.⁶⁴ Today, Chief Justices hold the position of Lieutenant-Governor in Western Australia,⁶⁵ Victoria,⁶⁶ New South Wales⁶⁷ and Tasmania.⁶⁸ In Queensland, the Chief Justice and senior puisne judges fill the positions of Acting Governor and Acting Deputy Governor as required.⁶⁹ The shift away from the system of Lieutenant-Governors in Queensland has not detracted from the close relationship between the Queensland Governor's office and that of the Chief Justice. This was highlighted by the 2014 appointment of Paul de Jersey as the State's 26th Governor upon his retirement as Chief Justice of Queensland.⁷⁰ Whilst serving as Chief Justice, de Jersey regularly administered the State of Queensland as Acting Governor.⁷¹

A flexible approach has been adopted to the appointment of judges to state vice-regal offices. Indeed, a number of judges may consecutively administer a state as vice-regal deputies. For instance, during the Tasmanian Governor's absence between 22 August and 19 September 2012, the State was administered by the Lieutenant-Governor, Chief Justice Ewan Crawford, and then by Administrators Alan Blow and Peter Evans, each a senior judge of the Supreme Court.⁷² When Crawford retired as Chief Justice of Tasmania in April 2013, Blow succeeded him not only as Chief Justice but also as Lieutenant-Governor of Tasmania. To provide a further example, in the 2010-2011 financial year, Western Australia was administered on eight occasions by the Lieutenant-Governor, Chief Justice Wayne Martin; whilst Justices Michael Murray,

⁶⁴ Though not without breaks or variation, e.g. Clark, above n 15, 200-1 [8.8].

⁶⁵ Government House Western Australia, *The Hon Wayne Martin, Chief Justice of Western Australia* <<http://www.govhouse.wa.gov.au/governors-role-link/lieutenant-governor.html>>.

⁶⁶ Office of the Governor, *Role of the Lieutenant-Governor* (4 June 2014) Governor of Victoria <<http://www.governor.vic.gov.au/victorias-governor/role-of-the-lieutenant-governor>>.

⁶⁷ NSW Department of Premier and Cabinet, *Lieutenant Governor* (5 July 2013) Governor of New South Wales <<http://www.governor.nsw.gov.au/her-excellency-professor-the-honourable-marie-bashir-ac-cvo/lieutenant-governor/>>.

⁶⁸ Office of the Governor Tasmania, above n 29, 11.

⁶⁹ The Executive Council Handbook notes that 'if a Lieutenant-Governor was appointed, this would only mean that the Lieutenant-Governor would act as Governor in preference to a member of the judiciary': Queensland Government, *Absence of Governor* (27 August 2014) <<http://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/exec-council-handbook/meetings/absence.aspx>>.

⁷⁰ Amy Remeikis, 'Former Chief Justice Paul de Jersey Appointed Queensland Governor', *Brisbane Times* (online), 26 February 2014 <<http://www.brisbanetimes.com.au/queensland/former-chief-justice-paul-de-jersey-appointed-queensland-governor-20140226-33hf5.html>>; Robyn Ironside, 'Queensland Governor-Designate Chief Justice Paul de Jersey to Take \$85,000 Pay Cut', *Courier Mail* (online), 27 February 2014 <<http://www.couriermail.com.au/news/queensland/queensland-governordesignate-chief-justice-paul-de-jersey-to-take-85000-pay-cut/story-fnihsrf2-1226838678310>>.

⁷¹ See, eg, Office of the Governor, *Annual Report 2012-13* (30 September 2013), 2 <<http://www.govhouse.qld.gov.au/media/10047/GH-Annual-Report-2012-2013.pdf>> ; Office of the Governor, *Annual Report 2011-12* (30 September 2012), 2 <<http://www.govhouse.qld.gov.au/media/10035/2011-12-Office-of-the-Governor-Annual-Report.pdf>> .

⁷² Office of the Governor Tasmania, above n 29, 10.

Carmel McClure and John McKechnie acted as deputies to the Governor on a total of four occasions. When the Western Australian Governor, Dr Ken Michael, retired from the position on 3 May 2011, Chief Justice Martin and Justice Murray served consecutively as Administrators until Malcolm McCusker QC took up the Governorship on 1 July 2011.⁷³

In some cases, a Chief Justice has served long periods in vice-regal office. Chief Justice Sir Mellis Napier was Lieutenant-Governor of South Australia from 1942 until 1973. During this time, he administered the government on 179 occasions.⁷⁴ Moreover, a vice-regal deputy may be required to administer the state for an extended period. In the absence of a Victorian Governor, the Lieutenant-Governor Chief Justice Sir William Irvine administered the State of Victoria for three years, from 1934 to 1937, as the Imperial government refused to appoint any of the Australian-born Governors proposed by the Victorian government.⁷⁵

There is no requirement that the Lieutenant-Governor be a judge – in fact, any person may be appointed to this position.⁷⁶ In South Australia, a judge has not held the position of Lieutenant-Governor since Sir Mellis Napier retired from the position in 1973 (six years after his retirement as Chief Justice of South Australia).⁷⁷ The current South Australian Governor, Hieu Van Le, is the Chairman of the South Australian Multicultural and Ethnic Affairs Commission. Le was appointed as Governor after serving as Lieutenant-Governor since 2007, under Governor Rear Admiral Kevin Scarce.⁷⁸ Judges have, however, continued to be appointed as Administrators of South Australia from time to time.⁷⁹

⁷³ Governor's Establishment, *Annual Report 2010–11* (26 September 2011) Government House Western Australia, 4 <http://www.govhouse.wa.gov.au/images/download/10-11_full_annual_report.pdf>. For a useful table showing the total number of days that each state and the Commonwealth have been administered by a Lieutenant Governor or Administrator, see Stubbs, above n 10, 208.

⁷⁴ Clark, above n 15, 200 [8.7].

⁷⁵ Ibid 199 [8.6]. Twomey flags that this is the most common justification for these spaces between Governors, but that a number of other factors (notably, economic factors such as the Depression, wars during this period, and the relatively high expense of Governors as compared with Lieutenant-Governors) contributed to this situation: Twomey, *The Chameleon Crown*, above n 7, 30. Twomey goes on to note that the main controversies concerning the appointment of Governors during the first three decades of federation arose in Queensland, Tasmania and Western Australia: 31.

⁷⁶ See, eg, *Constitution Act 1975* (Vic) s 6A(2) and *Constitution of Queensland 2001* (Qld) s 40, neither of which impose any restrictions on who may hold the office of Lieutenant-Governor.

⁷⁷ There is no indication that this practice changed because of issues or problems arising from the judge's service as Lieutenant-Governor. Napier retired at age 85 and was succeeded by Sir Walter Russell Crocker: Office of the Clerk of the Parliaments and the Clerk of the Legislative Council, *Statistical Record of the Legislature 1836–2007* (24 April 2007) Parliament of South Australia, 2, Table A <<http://www.parliament.sa.gov.au/AboutParliament/From1836/Documents/StatisticalRecordoftheLegislature1836to20093.pdf>>.

⁷⁸ Government House South Australia, *Mr Hieu Van Le AO* <<http://www.governor.sa.gov.au/node/27>>. The 'fascinating' pairing of Scarce – a veteran from the Vietnam War – as Governor, and Le – a refugee from that same war who arrived on Australia by boat in 1977 – as Lieutenant-Governor was observed by

3 *Deputies to the Territorial Administrators*

In the territories judges may exercise vice-regal powers as Deputy Administrators but, in practice, this only tends to occur in the Northern Territory. In the Indian Ocean territories of Christmas and the Cocos Keeling Islands, and in the territory of Norfolk Island, judges are not traditionally appointed to vice-regal roles.⁸⁰ In the Australian Capital Territory, vice-regal powers tend to be exercised by the Governor-General, though the Chief Justice performs roles such as administering the parliamentary oath.⁸¹

At present, there are two persons who hold dormant vice-regal commissions in the Northern Territory. The first is the Chief Justice of the Northern Territory, Trevor Riley, who holds the dormant commission of Acting Administrator. The second commission is presently held by Patricia Miller, Director of the Central Australian Aboriginal Legal Aid Service who is appointed as Deputy Administrator.

The division of vice-regal powers in the Northern Territory is affected by the distance and difficulty of travelling between Darwin and Alice Springs. The Deputy to the Northern Territory Administrator is traditionally based in Alice Springs, allowing him or her to occasionally represent the office of the Administrator when it is not possible for the Administrator to be in Alice Springs. Unlike the states and other territories, the sharing of vice-regal responsibilities is thus shaped by geography and allows for the simultaneous exercise of vice-regal powers by different appointees in different parts of the Territory. Whilst the Chief Justice holds a dormant commission as Acting Administrator, traditionally the Deputy Administrator in Alice Springs is not necessarily a judge and may be a community member of significant standing who has contributed to the region.⁸²

III SHOULD JUDGES BE APPOINTED TO VICE-REGAL ROLES?

A Practical Conflicts

A compelling reason not to appoint judges to vice-regal roles is if such appointments undermine the judge's capacity to effectively fulfil both his or her judicial and vice-regal duties. The requirement that a judge exercise vice-regal powers may mean that he or she is not available to hear cases or to attend to other judicial duties such as writing judgments or, in the case of Chief Justices, managing the operational aspects of a court. Alternatively, the judge may be unable to dedicate sufficient time or energy to

national media: Australian Broadcasting Corporation, 'SA Governor and Lieutenant-Governor Fascinating Pairing', *The 7:30 Report*, 8 August 2007 (Mike Sexton) <www.abc.net.au/7.30/content/2007/s2000194.htm>.

⁷⁹ For example, in 2002 Justice John Perry performed this role, see Office of the Clerk of the Parliaments and the Clerk of the Legislative Council, above n 77, 2, Table A.

⁸⁰ For example, Catherine Wildermuth, a public servant, stood in from time to time for the then Administrator Brian Lacy during his absences. See, eg, Office of the Administrator Indian Ocean Territories, *Community Bulletin*, No A96/2011, 12 December 2011.

⁸¹ *Australian Capital Territory (Self-Government) Act 1988* (ACT) s 9(2).

⁸² The current Deputy, Patricia Miller, is an Arrente woman who was born in Alice Springs. Miller was appointed an Officer of the Order of Australia in 2004 for her service to the community as a significant contributor to debate on issues relating to native title, social justice, education, legal services, health and welfare, and the media. In that same year Miller was also announced as the Northern Territory's Australian of the Year.

the fulfilment of his or her vice-regal duties, thereby compromising that role and risking the reputation of the judiciary and of him or herself.

Practical conflicts for judges exercising vice-regal roles have not arisen at the federal level where judges have only been appointed as deputies to open Parliament.⁸³ In any event, the practice of obtaining a judge's consent for an extra-judicial appointment allows a judge to avoid any likelihood that such a role will give rise to a practical conflict capable of seriously impacting upon his or her capacities and reputation.⁸⁴

At the state level and in the Northern Territory, where judges hold the longer-term, more onerous positions of Lieutenant-Governor and Acting Administrator respectively, practical conflict is a larger concern. As mentioned above, Sir William Irvine administered the State of Victoria for three years, from 1934 to 1937, during the stand-off between the Victorian and Imperial governments over the Governor's nationality.⁸⁵ Possibly fearing a similar delay before a new Governor was appointed, on 18 January 1946 the Lieutenant-Governor of New South Wales, Sir Frederick Jordan, cabled the Secretary of State of Dominion Affairs in England saying that he could not effectively administer the government and fulfil his duties as Chief Justice for an indefinite period. Nonetheless, Sir Frederick continued to administer the State for almost eight months, until the Imperial government agreed to appoint an Australian as Governor, thereby allowing Lieutenant-General Sir John Northcote to take up the position on 1 August 1946.⁸⁶

Despite the concerns of Sir Frederick that the vice-regal role of Lieutenant-Governor could prevent him from fulfilling his judicial functions, there are no reports of a judge actually experiencing practical conflicts – even when the judge administered a state on numerous occasions or for a prolonged period. In the convention debates of February 1898, Higgins pressed the delegates to identify any instance in which 'the temporary appointment of a judge as Lieutenant-Governor has made any serious inconvenience?' Frederick Holder gave a quick 'No' to this request, and Sir John Forrest a 'Yes', but no further details were offered. This reflects the general lack of clarity amongst the delegates on this issue.⁸⁷

Today, there is little scope for practical conflicts to arise between a judge's judicial and vice-regal responsibilities. Lieutenant-Governors and other vice-regal deputies are rarely called upon to exercise their office for more than a short period. The need no longer arises for the office to be filled for the considerable time once taken for a Governor to return to England and a new Governor to arrive by ship.⁸⁸

⁸³ We note that this may be contrasted to the practice of the Chief Justice swearing Governors-General into office, which is not a vice-regal power as it could not be exercised by any viceroy. See Her Majesty The Queen, 'Letters Patent Relating to the Office of Governor-General of the Commonwealth of Australia' in Commonwealth, *Gazette: Special*, No S 179, 9 September 2008, clause III(d).

⁸⁴ On the importance of consent in the state context, see Stubbs, above n 10, 205–6.

⁸⁵ Clark, above n 15, 199 [8.6].

⁸⁶ Twomey, *The Constitution of New South Wales*, above n 49, 613–14.

⁸⁷ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 February 1898, 357 (Henry Higgins). Cf, Stubbs, above n 10, 200–2.

⁸⁸ Clark, above n 15, 199 [8.6]. Matthew Stubbs emphasises that 'It should not be assumed that the speed and ease of travel by air has removed the need for persons to serve as acting

If a practical conflict were to arise, this could in any event likely be avoided. In some contexts, the mechanism of consecutive appointments may be employed to permit the deputy to vacate the position out of practical necessity. This possibility is reflected in the consecutive appointments of Lieutenant-Governor Crawford and Administrators Blow and Evans during the Tasmanian Governor's brief absence in mid-2012.⁸⁹ Accordingly, a circumstance of unavoidable practical conflict is unlikely to arise, provided that there exists the capacity for consecutive vice-regal appointments, as is already the case in some jurisdictions. The simultaneous appointment of multiple vice-regal deputies will be more practicable in some jurisdictions, such as the Northern Territory, than others. For example, in New South Wales the appointment of a deputy to exercise vice-regal powers may be limited to instances in which the Governor and dormant commission holders are sick, incapacitated, or absent from the state.⁹⁰ Thus, in New South Wales, the re-organisation of business is the primary mechanism by which practical conflict may be avoided.

B Conflicts of Interest

It is difficult to imagine how a conflict of interest might arise for a High Court justice fulfilling the limited role of opening federal Parliament. If federal practice evolved such that more extensive vice-regal powers were conferred on federal judges, then conflicts of interest might present a more credible possibility. For judges exercising vice-regal powers in the states and in the Northern Territory however, there is a real danger that conflicts of interest will arise in the course of their vice-regal or judicial duties.

1 *Vice-regal consideration of judicial matters*

Conflicts may arise where a state judge, as Lieutenant-Governor for instance, is advised to act upon a matter which relates to the judiciary. Such matters may include the appointment, removal or disciplining of judges, the granting of pardons, or the remission of sentences. In an extreme example, the judge might be advised to discipline or suspend him or herself, or to pardon a prisoner whom he or she was responsible for sentencing.

In 1919, the Victorian Parliament considered this issue when parliamentary debate turned to a comment made by then Leader of the Opposition George Prendergast in *The Age* newspaper. Prendergast had said that:⁹¹

It will probably be necessary to get another Judge to take over some of the work now performed by the Chief Justice, in order to enable him to attend to his duties at Lieutenant-Governor.

Premier Harry Lawson accused Prendergast of attacking the personal integrity and work ethic of the judge. Prendergast's and, in subsequent debate, the Parliament's

Governor'. Stubbs argues that the present frequency with which judges act in the position of Governor in the states is sufficiently disruptive to create practical conflict: Stubbs, above n 10, 207–8.

⁸⁹ Office of the Governor Tasmania, above n 29. Similarly, The Hon Thomas Bathurst was sworn in as Administrator of the State of New South Wales on 1 June 2011 and as Lieutenant-Governor on 1 February 2012: NSW Department of Premier and Cabinet, above n 67.

⁹⁰ *Constitution Act 1902 (NSW)* ss 9C, 9D.

⁹¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 4 December 1919, 2922 (Sir Harry Lawson).

primary concern was in fact the conflict created by the judge's judicial role of trying of criminal cases and the vice-regal prerogative power of granting mercy. Parliament determined that while administering the state, the Chief Justice would not hear any criminal cases and, therefore, would not be called upon to exercise the royal prerogative of mercy in a case where he or she had presided at the trial.⁹²

The issue addressed by the Victorian Parliament was of special importance in an era when the death penalty was carried out for certain offences⁹³ and, thus, the question of the royal prerogative of mercy was often engaged.⁹⁴ More broadly, this experience demonstrates that it is possible – as well as necessary – to limit the capacities of a judge vested with vice-regal powers in order to avoid conflicts of interest. The resolution shows that the appropriate limitations may be either on the appointee's vice-regal role, or on his or her judicial functions. The limitations may also be time constrained – for instance, only applying when the deputy is actively administering the state. In short, attentiveness and flexibility is required in determining how a judge might avoid a conflict of interest arising in the course of fulfilling his or her vice-regal responsibilities.

In most cases, a conflict of interest arising for a vice-regal appointee could be dealt with by the reorganisation of Executive Council business to ensure that the matter of concern is saved for a later time when the Governor is presiding.⁹⁵ This would resolve most cases of potential conflict. However, delay may not always be an option. In circumstances where the deputy is administering the state for a prolonged period, it may be impracticable to delay executive action on a certain issue, such as the removal of a judge for incapacity or responding to a complaint against a judge for criminal wrongdoing. In these circumstances, the judge may be forced to act, or in some jurisdictions he or she may only be capable of avoiding the decision by leaving the state so as to allow another, perhaps non-judicial, deputy to exercise the power giving rise to the conflict of interest. To provide a further layer of protection for the judge's integrity, the delegation of vice-regal power to the judge could be limited so he or she lacks the capacity to perform functions that relate to judicial matters or otherwise present a conflict of interest.

2 *Judicial consideration of vice-regal matters*

A conflict of interest may also arise for a judge whose vice-regal actions later become the subject of legal dispute. For instance, a judge may be required to consider the validity of an Act which he or she assented to as a Lieutenant-Governor, or to exercise judicial review of an exercise of vice-regal power. The possibility of judicial review of vice-regal powers has been identified by Geoffrey Lindell, who argues that it is now open to those with standing to challenge the legality of at least the statutory powers exercised by vice-regal representatives.⁹⁶

⁹² Clark, above n 15, [8.8]. It seems odd that Parliament just discussed it and made a determination without some sort of docu

⁹³ See, Jo Lennan and George Williams, 'The Death Penalty in Australian Law' (2012) 34 *Sydney Law Review* 659.

⁹⁴ For discussion, see Clark, above n 15, 200 [8.8]; see also Victoria, *Parliamentary Debates*, Legislative Assembly, 4 December 1919, 2922–4 (Sir Harry Lawson).

⁹⁵ Twomey, *The Constitution of New South Wales*, above n 49, 670–1.

⁹⁶ Geoffrey Lindell, 'Judicial Review and the Dismissal of an Elected Government in 1975: Then and Now?' (2014) 38 *Australian Bar Review* 118.

An example of a court considering the exercise of vice-regal powers by a judge is found in the 1905 New South Wales case of *Clough v Bath*.⁹⁷ Charles Bath argued that a commission signed by the Lieutenant-Governor, Chief Justice Sir Frederick Darley, was invalid on the basis that Sir Frederick had signed the commission without the customary words 'by deputation'. This argument failed. Justice Pring held that, provided the deputation was valid and encompassed the power being exercised, the deputy could sign however he pleased.⁹⁸

There is little chance of an unavoidable conflict of interest arising for a vice-regal deputy in the conduct of his or her judicial functions. The case of *Clough* is one of very few instances of a vice-regal deputy's powers coming under direct consideration by the courts.⁹⁹ The exercise of vice-regal powers by judges is more likely to give rise to conflicts of interest on the basis that the judge is called upon to consider the validity of a statute to which he or she gave Royal assent. These conflicts of interest can be avoided by the assignment of another judge to the matter – a mechanism that is already employed to avoid conflicts of interest arising from a judge's private or other interests.¹⁰⁰

There is also little chance of a conflict of interest arising when a judge is required to consider an exercise of vice-regal powers by his or her Chief Justice or by a fellow judicial officer. No such conflict of interest was suggested in *Clough*, or in cases where a judge has exercised judicial review of a fellow judge's removal from the same court.¹⁰¹ In any event, judges routinely consider and rule upon each other's decisions without arousing public suspicion of a conflict of interest.¹⁰²

C Public Confidence

The strongest arguments against the appointment of judges to vice-regal roles point to the risk that such appointments may compromise the separation of the judiciary from the executive, and so undermine public confidence in the courts. The independence of the judiciary is a vital element in the Australian constitutional framework. Courts play

⁹⁷ (1905) 22 WN (NSW) 152 (SC).

⁹⁸ *Ibid.*

⁹⁹ See also *Collins v Black* [1995] 1 VR 409 concerning the challenge to vice-regal powers exercised by Chief Justice Sir John Young on the basis that he was not validly serving as acting Governor when he gave Royal assent to the *Road Safety (Miscellaneous Amendments) Act 1989* (Vic). Also, *Stewart v Ronalds* (2009) ALR 86, where a minister challenged his dismissal by Lieutenant-Governor Chief Justice James Spigelman (on the advice of the Premier). The Court held that it is not a function of the Court to question the fairness of the advice tendered by the Premier to the Lieutenant-Governor in respect of the composition of the Ministry, as to do so would assert an entitlement to scrutinise the substance of that advice, which is a quintessentially political question: [45]. For discussion of these cases and argument as to their impact on public confidence in the independence of courts from the executive, see: Stubbs, above n 10, 211–12.

¹⁰⁰ See, eg, Judicial Commission of New South Wales, *Code of Conduct*, [3], [10] <<http://www.judcom.nsw.gov.au/access-to-information/code-of-conduct>>. See also, discussion in HP Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2nd ed, 2013) 172–179; Twomey, *The Constitution of New South Wales*, above n 49, 670–1.

¹⁰¹ See, Spigelman CJ's discussion of this issue in *Bruce v Cole* (1998) 45 NSWLR 163.

¹⁰² Cf, argument by Stubbs, above n 10, 211–12.

a fundamental role in reviewing the legality of executive action and acting as a check and balance on the other branches of government. If the courts are no longer independent from the executive, their capacities to uphold constitutional limits on government power and to administer objective, equal justice will be undermined.

It is important to appreciate that the public perception as well as the reality of judicial independence is an imperative. As the United Nations' Judicial Integrity Group has identified, 'not only must justice be done, but it must be seen to be done'.¹⁰³ In the convention debates of 1 February 1898, New South Wales politician William McMillan recognised the risk that appointing judges to vice-regal positions poses to public confidence in judicial independence.¹⁰⁴

[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.

The overlap between judicial and regal roles has deep roots in Westminster history, recollecting times when the monarch was the ultimate court of appeal.¹⁰⁵ However, as McMillan's observations reflect, the practice of vesting these two categories of power in the same individual sits uncomfortably with modern notions of judicial independence, limited government and the separation of powers. As in the trial of the tarts in Lewis Carroll's 'Alice in Wonderland', quoted at the beginning of this article, the same individual representing both King and court has the potential to appear odd, even absurd.¹⁰⁶

Unlike practical conflicts or conflicts of interest, the voluntary nature of vice-regal appointments does not overcome the possibility of damage to public confidence in judicial independence. As Geoffrey Sawer observes,¹⁰⁷

[C]omplete judicial independence and impartiality ... may be prejudiced if judges are brought into close working associations with other branches of government and this peril is no less if the association is voluntary.

The exercise of a reserve power poses a particular risk to judicial independence as it

¹⁰³ Judicial Integrity Group, *Bangalore Principles of Judicial Conduct*, ESC Res 2006/23, UN ESCOR, 41st plen mtg, Agenda Item 14(c), E/RES/2006/23 (27 July 2006) cl 3.2. See also Stephen Parker, 'The Independence of the Judiciary' in Fiona Wheeler and Brian Opeskin (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 62; Judicial Integrity Group, *Commentary on the Bangalore Principles of Judicial Conduct*, above n 9, 77; Lee and Campbell, above n 100, 6, 308-15; Gerard Brennan, 'The State of the Judicature' (1998) 72 *Australian Law Journal* 33, 34; Anthony Mason, 'The Courts and Public Opinion' in Geoffrey Lindell (ed), *The Mason Papers* (The Federation Press, 2007) 94.

¹⁰⁴ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 February 1898, 359 (William McMillan).

¹⁰⁵ For discussion of this practice, see The Hon Lord Justice Brooke, 'Judicial Independence - Its History in England and Wales' in Helen Cunningham (ed), *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (Judicial Commission of New South Wales, 1997) 89.

¹⁰⁶ An example of apparent absurdity arising from the vesture of multiple roles on a single person (Chief Justice, Lieutenant-Governor, then Chief Electoral Commissioner) is recounted in: Peter Johnston, 'Tonkin v Brand: Triumph for the Rule of Law' in George Winterton (ed), *State Constitutional Landmarks* (Federation Press, 2006) 211, 228.

¹⁰⁷ Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 165.

involves a vice-regal officer acting independently of, or even contrary to, ministerial advice. This would almost certainly engender considerable controversy and so risk embroiling the appointee in political debate and criticism. In these ways, the reserve powers place the vice-regal appointee in a position starkly at odds with the traditional role of judges. The integrity of the judiciary rests on its apolitical nature. At its most fundamental level the judicial branch is subservient to, and bound by, the law of the land – courts do not enter into or resolve political debates by, for example, refusing to allow a fresh election upon the resignation of a minority government (as Governor-General Lord William Ward did in 1909 when he allowed a coalition of parties to form government) or dismissing a prime minister and forcing a federal election (as Governor-General Sir John Kerr did in 1975). If a judge exercised a reserve power in a vice-regal capacity, he or she could become the subject of partisan attack. This could greatly damage his or her standing as well as that of the court. One only need to look to the effect that Sir John Kerr's decision in 1975 had upon his reputation and public perceptions more generally of the office of Governor-General.¹⁰⁸

There have been a number of instances in which a Lieutenant-Governor has exercised a reserve power. For example, in 1911 a number of members of the New South Wales Parliament resigned, causing the McGowan Labor Government to lose its majority. William Holman, the Acting Premier, advised the Lieutenant-Governor, Chief Justice Sir William Cullen, to prorogue the Parliament pending by-elections. Sir William refused to do so, prompting the government to resign. Opposition Leader Charles Wade was then called upon to form a government. Wade agreed, on the condition that he would be granted a dissolution. The Lieutenant-Governor refused to grant this request and, thus, had to reinstate the previous Labor Government and prorogue Parliament as originally advised.¹⁰⁹ Further instances in which a Lieutenant-Governor refused to dissolve Parliament on the advice of his Ministers, thus bringing about the resignation of the Premier, occurred in Tasmania in 1904 and in New South Wales in 1913.¹¹⁰

There is no evidence that these instances of Lieutenant-Governors exercising reserve powers resulted in damage to public confidence in the courts, though it would not be unreasonable to suspect that the controversy surrounding these events may have attracted public critique of the judge's actions.¹¹¹ The risk exists that public confidence in the courts might be undermined in the future if further instances of Lieutenant-Governors exercising reserve powers were to occur. For example, during an interregnum between Governors in which a Chief Justice is administering the state as Lieutenant-Governor or Administrator, the government may lose a vote of no confidence and refuse to resign. In such a scenario, it is difficult to see how the vice-regal appointee could avoid exercising a reserve power and thereby risking public confidence in the judicial institution. To delay action may only heighten the crisis at

¹⁰⁸ See George Winterton, above n 53, 243–52.

¹⁰⁹ Anne Twomey, 'Cutting the Gordian Knot: Limiting Rather than Codifying the Powers of a Republican Head of State' (Papers on Parliament No. 51, Parliamentary Library, Commonwealth of Australia, 2009).

¹¹⁰ 'Tasmanian Parliament: Dissolution Refused. Ministry Resigns', *The Argus* (Melbourne), 7 July 1904, 6; 'Dissolution Refused: Labour Ministry Resigns. Mr Watt Sent For. The New Cabinet Discussed', *The Argus* (Melbourne), 20 December 1913, 21.

¹¹¹ Richard E McGarvie, *Democracy: Choosing Australia's Republic* (Melbourne University Press, 1999) 238–239.

hand and attract greater criticism. The risk of this kind of scenario occurring is low, but it remains a possibility.

More commonly, the powers exercised by a vice-regal deputy are constrained by the requirement that he or she acts on ministerial advice. Problems may arise, however, even where a judge exercising a vice-regal role does no more than follow the advice of his or her ministers. As William Trenwith argued in support of Symon's proposed clause 80 in 1898, acts performed by a Chief Justice in a vice-regal capacity:¹¹²

[W]ould be the acts of the Executive sanctioned by him ... [which is] a reason why the Chief Justice should not be placed in the position of having to perform an executive act in the performance of which he would have practically no option. The attaching of his signature to a proclamation would make him, at any rate mechanically, a party to it.

Trenwith's observation has been echoed in more recent descriptions of the Governor-General as a mere 'rubber stamp'¹¹³ for decisions of the Federal Executive Council, a description which applies as easily to the relationship between state Governors and Executive Councils. The vision of a senior judge acting as a 'rubber stamp' to executive decisions and exercising powers at the behest and instruction of the Executive Council, runs counter to the perception of judges as independent, impartial and capable of robust review of executive action.

Public confidence in the independence and impartiality of the judicature may also be damaged if a judge is advised to exercise a vice-regal power that he or she believes to violate the law or the *Constitution*. This scenario presents clear issues for anyone who is vested with vice-regal powers. On the one hand, as stated in an 1870 despatch to the Governor of New South Wales, the Governor has a 'plain duty to obey the law'.¹¹⁴ On the other hand, there is an argument that questions of illegality ought to be left to the courts to determine.¹¹⁵

For a judge exercising vice-regal powers, an illegal action carries the risk of undermining public confidence in the independence and integrity of the judicial institution. Ultimately, a judge placed in such a position would be advised to seek legal advice – a course of action taken by, for example, Lieutenant-Governor Sir Laurence Street following his objection to an Executive Council Minute that he believed to be pre-empting the will of Parliament.¹¹⁶ If legal advice allayed the judge's concerns then he or she could undertake the action without significant risk to public confidence in the courts. Alternatively, if the legal advice cautioned that the action may be illegal, then it would be up to the judge's discretion whether to refuse to act on the advice of his or her Ministers, or whether to act nonetheless and leave the question of illegality to be resolved by the courts. Whilst this scenario is far from ideal and carries

¹¹² *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 February 1898, 367 (William Trenwith).

¹¹³ *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 401 (Wilson J).

¹¹⁴ Alpheus Todd, *Parliamentary Government in the British Colonies* (Longmans, Green & Co, 2nd ed, 1893) 634–5, quoted in Anne Twomey, 'The Unrecognised Reserve Powers' (Speech delivered at the High Court Lecture Series, Canberra, 14 November 2012) 9.

¹¹⁵ See, discussion in Twomey, 'The Unrecognised Reserve Powers', above n 114, 9–11 and, by way of example, the approach to resolving the issues raised in *A-G (WA) v Marquet* (2003) 217 CLR 545.

¹¹⁶ Twomey, *The Constitution of New South Wales*, above n 49.

risks for the perceived integrity of the judge, it also allows for a flexible range of action. The judge may decide independently upon the best course of action, with a view to protecting the institutional integrity of the legislative, executive and judicial branches.

At the other end of the spectrum of vice-regal functions, Lieutenant-Governors, Administrators and other vice-regal deputies exercise highly visible, ceremonial and representational roles that involve speaking on behalf of the Crown at public functions. These representational and ceremonial powers reinforce the vision of the judge acting on behalf of, and at one with, the executive branch. In these ways, both the private and public vice-regal functions that may be conferred on a judge convey that the interests of the judge and the executive are aligned, and that the judicial appointee works closely with and acts at the behest of the executive branch.

It is important to note that it is only the most senior judges who are typically appointed to vice-regal offices. The Chief Justice of Australia usually opens the first sitting of federal Parliament as deputy to the Governor-General, and the Chief Justice of each of the states (but for South Australia) is almost always the Lieutenant-Governor or Acting Governor. In the Northern Territory it is the Chief Justice who holds a dormant commission as Deputy Administrator. The perceived independence of Chief Justices is particularly important to maintaining public confidence in the integrity of the judicial institution. The conduct of Chief Justices reflects directly on a court as a whole and, in a sense, sets the tone for the courts within a particular jurisdiction.

There are clear reasons why the conferral of vice-regal roles on judges risks undermining public confidence in the impartial administration of justice. There are also, however, strong counterarguments to this view. In particular, it can be argued that public confidence is not compromised by practices that have operated without scandal or controversy for more than a century. Public confidence may also have been maintained because of the impeccable integrity and strong public reputations of the judicial officers who have undertaken such roles.

Sir Isaac Isaacs, who later as a High Court judge acted as deputy to the Governor-General by opening Federal Parliament on eight occasions and then served as Governor-General himself,¹¹⁷ put arguments along these lines to the 1897–98 convention. He spoke in favour of the notion that the Chief Justice of the High Court could undertake some vice-regal functions:¹¹⁸

The Chief Justice will be perhaps the most independent man in the whole community. He will be placed altogether above the reach of party, and he will be in a position where he will seldom have an opportunity of doing anything of a strictly political nature. His duties will be mostly administrative but if his turn should come, I have not the slightest doubt he will act as fairly and impartially as Chief Justices have in the various states up to the present time.

As Sir Isaac recognised, there are certain qualities that a judge has that make him or her peculiarly independent from the other branches of government. First, a judge cannot be a member of Parliament – a point that was emphasised by other delegates.¹¹⁹ Secondly, judges enjoy security of tenure and remuneration, thereby affording them unique protections from corrupting influences. Thirdly, judges, and

¹¹⁷ Commonwealth, above n 2, '6.

¹¹⁸ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 February 1898, 360 (Sir Isaac Isaacs).

¹¹⁹ *Ibid* 357 (Henry Higgins).

especially Chief Justices, tend to be highly experienced in exercising independent and impartial review of government action.¹²⁰

In addition to these qualities, practice has developed in a manner that is sensitive to the need to maintain public confidence in judicial independence and impartiality. Not only are appointments consented to, but most appointments are limited to the conduct of specific or necessary vice-regal powers. Appointments may be flexible and can accommodate the concerns of the Lieutenant-Governor or other vice-regal deputy by allowing for the appointment of further deputies. Nowadays, when a judge is appointed to administer the state for the interregnum between Governors, he or she is no longer likely to administer the state for a prolonged period and, in most contexts, other deputies are likely to be appointed to assist either simultaneously or consecutively.

In the long history of judicial appointments to vice-regal roles, controversies have been extremely rare. Despite countless judges across Australia being vested with vice-regal powers over more than 150 years, there has never been a constitutional challenge to such an appointment, nor has there arisen a need to discipline a vice-regal deputy. Moreover, the long-term and widespread appointment of senior judges to vice-regal roles has not inhibited the development of robust separation of powers or judicial review principles, or detracted from the strong reputation of Australian courts as independent and impartial.

The Australian experience thus demonstrates that a judge is capable of being vested with both judicial and vice-regal roles whilst maintaining both the reality and appearance of independence and integrity. What is more, it may be argued that the conferral of vice-regal powers on a judge may even *enhance* public confidence in the system of government.¹²¹

An example is the Chief Justice of the High Court opening the first sitting of Parliament and swearing in new and returning parliamentarians. This age-old exercise of vice-regal power by a Chief Justice represents a ceremonial display of mutual respect between the three branches of government, and arguably reinforces existing constitutional structures and values. In the swearing of oaths to the Chief Justice as a deputy of the Governor-General, parliamentarians show visible respect for the executive *and* judicial arms of government, and for existing legal traditions and frameworks. By opening Parliament as deputy to the Governor-General, the Chief Justice is likewise recognising the legislative and executive arms of government in a ceremonial sense, and thereby reinforcing the sovereignty of Parliament and judicial respect for the institutions that create and execute the law. Similar arguments apply to the exercise of some of the ceremonial powers that may be exercised by Lieutenant-Governors and other vice-regal deputies in the states and territories, including in the opening, proroguing and dissolving of Parliament and the swearing in of new Ministers and public officials.

¹²⁰ George Winterton, 'Judges as Royal Commissioners' (1987) 10 *University of New South Wales Law Journal* 108, 112–16; Wheeler, "'Anomalous Occurrences in Unusual Circumstances"?' above n 10, 136; A J Brown, 'The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge' (1992) 21 *Federal Law Review* 48, 54.

¹²¹ This argument was canvassed in Winterton, 'Judges as Royal Commissioners', above n 120, 113.

D Should Judges be appointed to Vice-Regal Roles?

Policy considerations do not suggest the need for a clear rule against judges undertaking vice-regal offices. Practical conflicts and conflicts of interest can be appropriately dealt with by fairly simple mechanisms, which appear to already be in place. In particular, practical conflicts may be avoided by gaining the judge's consent to a vice-regal appointment and by ensuring that further deputies may be appointed. Conflicts of interest may also be avoided by reorganising executive or judicial business, restricting some of the functions that are likely to give rise to conflict and allowing for other deputies to be appointed.

On the other hand, the conferral of vice-regal powers on judges does pose a risk to public confidence in the courts. There are reasons to expect that the appointment of a judge to a vice-regal office such as Lieutenant-Governor or Administrator will undermine public perceptions of judicial independence from the executive. However, extensive experience indicates that the widespread and even prolonged appointment of state judges to vice-regal offices has not brought this about. Such a problem might arise though if a state judge acting in a vice-regal capacity is called upon to exercise a reserve power or a power that violates the law. Such scenarios have been rare and have not appeared to damage public confidence in the courts. However, the risk remains that a judge exercising vice-regal powers may be called upon to make a decision that attracts strong partisan criticism. In such a scenario, even the most prudent and respected judge may be unable to avoid the damage to his or her reputation and the standing of the courts that could follow from being embroiled in political controversy.¹²²

IV CONSTITUTIONAL VALIDITY

Chapter III of the *Constitution* has been interpreted to enshrine protections for the independence and institutional integrity of federal, state and territory courts. In the 1995 case of *Grollo v Palmer*,¹²³ the High Court identified two constitutional limits on the non-judicial functions capable of being vested in federal judges. First, the Court held that the judge must consent to the extra-judicial appointment. Secondly, the extra-judicial appointment must not be incompatible with judicial independence or institutional integrity.¹²⁴

It was not until 2011 that the High Court identified a limit on the scope of powers capable of being vested in state judges. In *Wainohu*, the High Court determined that state judges, like their federal counterparts, may not be vested with powers that are incompatible with judicial independence or institutional integrity.¹²⁵ The majority justices relied upon principles developed in the federal context, and applied them directly to determine whether the conferral of powers on a state judge were constitutionally valid.¹²⁶ Their Honours' reasoning also harnessed the *Kable* principle, which extends protections for judicial independence to courts in the territories as well

¹²² Richard E McGarvie, above n 111, 238–239.

¹²³ (1995) 184 CLR 348.

¹²⁴ *Ibid* 376 (McHugh J), 365 (Brennan CJ, Deane, Dawson and Toohey JJ).

¹²⁵ (2011) 243 CLR 181.

¹²⁶ *Wainohu* (2011) 85 ALJR 746, [94] (Gummow, Hayne, Crennan and Bell JJ), [21]–[43], and in particular, [39] (French CJ and Kiefel J).

as in the states.¹²⁷ Hence, it can be said that the same requirement of compatibility with judicial independence and institutional integrity limits the scope of Parliaments' capacity to confer extra-judicial roles on all Australian judges.¹²⁸

In *Grollo* the majority justices described three ways in which incompatibility may arise. First, the actual performance of the judge's judicial functions may be compromised as a result of a non-judicial function. Secondly, the personal integrity of the judge may be compromised or impaired by the non-judicial function.¹²⁹ Neither of the first two bases of incompatibility identified in *Grollo* have been applied in any case to date. Despite the facts in *Grollo* involving a clear conflict of interest for the judge, a majority of the High Court upheld the provisions on the basis that the conflict could hypothetically have been avoided by 'the adoption of an appropriate practice'.¹³⁰ This suggests that the first two grounds of incompatibility will only arise in those rare cases where a conflict is incapable of being avoided.

As discussed in Part III, a consenting judge appointed to a vice-regal position will be capable of avoiding practical conflicts and conflicts of interest. This may be achieved by re-organising executive or judicial business or, in some circumstances, by relying on another deputy to perform a power.¹³¹ These same factors suggest that the appointment of judges to vice-regal roles is not constitutionally invalid on the first two bases of incompatibility identified in *Grollo*.¹³²

The third form of incompatibility described in *Grollo* is 'public confidence incompatibility'. Public confidence incompatibility arises where the conferral of the non-judicial function diminishes public confidence in the independence and integrity of the judicial institution as a whole.¹³³ It is this form of incompatibility that has come to characterise jurisprudence in this area.

¹²⁷ See *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146.

¹²⁸ *Wainohu* (2011) 85 ALJR 746, [43] (French CJ and Kiefel J). See, Rebecca Welsh, "Incompatibility" Rising? Some Potential Consequences of *Wainohu v New South Wales* (2011) 22 *Public Law Review* 259, 263.

¹²⁹ *Grollo* (1995) 184 CLR 348, 364-5 (Brennan CJ, Deane, Dawson and Toohey JJ).

¹³⁰ *Ibid* 366.

¹³¹ In some jurisdictions this option may only be open if the judge is absent or incapacitated. See, eg, *Constitution Act 1902* (NSW) ss 9C, 9D.

¹³² Cf the argument put by Stubbs that the appointment of state judges as Lieutenant-Governors has the capacity to infringe the first basis of incompatibility identified in *Grollo*: Stubbs, above n 10, 206-8.

¹³³ *Grollo* (1995) 184 CLR 348, 365 (Brennan CJ, Deane, Dawson and Toohey JJ). The risk of public confidence incompatibility appears to arise despite varying judicial acceptance of 'public confidence' being an enforceable consideration. See *Nicholas v The Queen* (1998) 193 CLR 173, 197 (Brennan CJ), 275 (Hayne J). Contrast this with the opinions of the Gaudron, McHugh and Kirby JJ (two of whom were in dissent), who opined that the court's power to protect its own processes and maintain public confidence in the administration of justice was central to the constitutional conception of judicial power: 209 (Gaudron J), 224, 226 (McHugh J), 258 (Kirby J). See also, Wendy Lacey, 'Inherent Jurisdiction, Judicial Power and Implied Guarantees under Chapter III of the Constitution' (2003) 31 *Federal Law Review* 57, 76; *Wainohu* (2011) 243 CLR 181, 208 (French CJ and Kiefel J); Chris Steytler and Iain Field, 'The "Institutional Integrity" Principle: Where Are We Now, and Where Are We Headed?' (2011) 35 *University of Western Australia Law Review* 227, 231-2.

Public confidence incompatibility has been established in two cases. The most recent is *Wainohu*, in which the removal of the obligation on a judge to give reasons for an administrative decision was found to damage the institutional integrity of the New South Wales judiciary.¹³⁴ Crucial to this finding was the fact that the proceedings had the appearance of open court and formed an important precursor to a subsequent Supreme Court hearing.¹³⁵ The only other case in which incompatibility has been established with respect to an extra-judicial appointment is the 1996 case of *Wilson*.¹³⁶ In *Wilson*, the appointment of Federal Court Justice Jane Mathews as 'reporter' to a minister on whether certain areas should be classified as Aboriginal heritage sites was held to be invalid on the basis that it involved functions so entwined with the executive as to diminish public confidence in the judicial institution.¹³⁷

In *Wilson*, a majority of the High Court suggested a set of indicators to guide a determination of public confidence incompatibility. First, incompatible functions will be 'an integral part of, or ... closely connected with, the functions of the Legislature or Executive Government'.¹³⁸ Additionally, incompatible functions will be indicated by either reliance upon 'a non-judicial instruction, advice or wish', or the exercise of discretion on grounds not expressly or impliedly confined by law.¹³⁹ These indicators emphasise the independence with which the judge exercises the extra-judicial function: the judge must not be integrated into or controlled by the executive branch.¹⁴⁰

The appointment of judges to vice-regal roles appears to satisfy the indicia of incompatibility identified in *Wilson*. First, the vice-regal appointment integrates the judge within the executive government. This is clear when the judicial appointee is performing functions such as chairing Executive Council meetings.¹⁴¹ The appointee speaking on behalf of – and directly representing – the Monarch also satisfies this criterion of incompatibility. Even the ceremonial task of opening Parliament shows that the judge is acting as an integrated part of the executive. Secondly, a judge exercises vice-regal powers on executive instruction. He or she is in fact bound to act on the advice of the executive except in those rare instances when a reserve power is applied.

Despite clear reasons to suggest that the conferral of vice-regal powers on serving judges is incompatible with Chapter III of the *Constitution*, some High Court justices have indicated that a constitutional challenge to these appointments would fail. In *Kable v Director of Public Prosecutions*, McHugh J acknowledged the threat to judicial independence presented by the appointment of state judges to vice-regal positions – but his Honour singled out the appointment of Chief Justices as Lieutenant-Governors

¹³⁴ *Wainohu* (2011) 243 CLR 181.

¹³⁵ *Ibid* 192, 215, 218–20 (French CJ and Kiefel J). It was on this basis that the Court concluded the provision removing the obligation on the judge to provide reasons effectively rendered the entire *Crimes (Criminal Organisations Control) Act 2009* (NSW) invalid: 220 (French CJ and Kiefel J), 231 (Gummow, Hayne, Crennan and Bell JJ).

¹³⁶ (1996) 189 CLR 1.

¹³⁷ *Ibid* 26 (Gaudron J).

¹³⁸ *Ibid* 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

¹³⁹ *Ibid*.

¹⁴⁰ *Mistretta v United States* 488 US 361, 404 (1989), quoted in *Grollo* (1995) 184 CLR 348, 364–5 (Brennan CJ, Deane, Dawson, Toohey JJ).

¹⁴¹ Steytler and Field, above n 133, 254–5.

as an example of a valid extra-judicial appointment. He said:¹⁴²

No doubt there are few appointments of a judge as *persona designata* in the State sphere that could give rise to the conclusion that the court of which the judge was a member was not independent of the executive government. Many Chief Justices, for example, act as Lieutenant-Governors and Acting Governors. But, given the long history of such appointments, it is impossible to conclude that such appointments compromise the independence of the Supreme Courts or suggest that they are not impartial.

French CJ and Kiefel J drew upon McHugh J's statement in *Wainohu*. Their Honours referred to the appointment of Chief Justices as Lieutenant-Governors as a 'durable example' of the way in which the flexible separation of powers works in the states.¹⁴³ French CJ and Kiefel J then suggested that extra-judicial appointments with a 'long history' are likely to be constitutionally valid:¹⁴⁴

It is, however, important that the requirement of compatibility ... be approached with restraint ... Allowance must be made in assessing incompatibility for the long history in the States of the appointments of judges to extra-judicial roles, a history which predates Federation.

These statements suggest that the High Court may uphold the appointment of judges to vice-regal roles as an exception to the usual principles separating the judicial and executive branches. McHugh J's unflinching assertion, that it would be 'impossible' for even the most significant conferral of vice-regal powers on a judge – the appointment of Chief Justices as Lieutenant-Governors – to infringe the *Constitution*, has attracted some criticism,¹⁴⁵ but remains largely unquestioned.

Moreover, senior judges across Australia regularly consent to vice-regal appointments without, it seems, any hesitation.¹⁴⁶ Members of state and federal courts have expressed concerns over the conferral of other executive powers on judges. For instance, a well-known memorandum issued by the Chief Justice of the Supreme Court of Victoria, Sir William Irvine, stated that the judges of his Court should not serve on Royal Commissions. Sir William cited the need to maintain public confidence in the judiciary and the need for judges to avoid political controversy.¹⁴⁷ By contrast, in the over 150 years of judges being vested with vice-regal powers, there is almost no record of a judge expressing similar concerns.¹⁴⁸ Rather, judges have demonstrated a readiness to accept vice-regal roles, and no judge has suggested that such appointments ought to be the subject of review by the courts. One might presume then that the prevailing view within the judicial branch is that the exercise of vice-regal

¹⁴² (1996) 189 CLR 51, 117–18 ('*Kable*'). This dictum was later quoted by Kirby J in *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, [225].

¹⁴³ *Wainohu* (2011) 243 CLR 181, 197 (French CJ and Kiefel J). The text 'a durable example is the appointment from time to time of Chief Justices of the States as Lieutenant-Governors' appears in footnote 78.

¹⁴⁴ *Ibid* 212 (French CJ and Kiefel J).

¹⁴⁵ See, eg, Peter Johnston and Rohan Hardcastle, 'State Courts: The Limits of *Kable*' (1998) 20 *Sydney Law Review* 216, 230.

¹⁴⁶ Cf Chief Justices John Bray and Len King who each refused appointments to the position of Lieutenant-Governor of South Australia on separation of powers grounds: Stubbs, above n 10, 206.

¹⁴⁷ Wheeler, "'Anomalous Occurrences in Unusual Circumstances'", above n 10, 133.

¹⁴⁸ Stubbs, above n 10, 206.

powers by serving judges is in keeping with constitutional values and principles. Australian experience to date would certainly support such a view.

The comments from McHugh J, French CJ and Kiefel J make clear that the validity of the extra-judicial exercise of vice-regal powers rests on the historical foundations of the practice. This is in line with the High Court's broader approach to interpreting Chapter III of the *Constitution*. The Court has readily drawn on historic practice to determine the boundaries of the separation of governmental powers, acknowledging that the framers of the *Constitution* were concerned to ensure an independent and impartial judicial system, but were also interested in maintaining conventional practices.¹⁴⁹ For example, the High Court has recognised an exception to the strict separation of federal judicial power by permitting judicial functions to be vested in military courts martial on the basis that courts martial have traditionally exercised such powers.¹⁵⁰

The appointment of judges to vice-regal roles predated federation and has continued to the present day. In light of this history, not to mention the discussion of the issue by the framers and their rejection of a clause that would prohibit such appointments, it is unlikely that an argument that the appointment of a judge to a vice-regal role is unconstitutional would succeed. History, it seems, renders these potentially invalid conferrals of vice-regal powers, valid.

The occasion has not yet arisen for a court to decide whether the vesting of vice-regal power in a serving judge infringes the *Constitution*. It is possible that the views of McHugh J, French CJ and Kiefel J would not be shared by other judges. As Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ identified in *Wilson*, history alone does not determine whether a power is within constitutional limits.¹⁵¹

It seems that the criteria of incompatibility above expressed have not always been observed in practice. However, disconformity of practice with constitutional requirement is no inhibition against truly expounding the text and implications of the *Constitution*. Indeed, any practice of departure from the constitutional requirement makes the necessity to declare the requirement more imperative.

Nonetheless, the lack of any major controversy arising from the prolonged appointment of senior judges to vice-regal roles would suggest that a finding of constitutional invalidity is unlikely.

History has inherent limits as a basis for asserting constitutional validity. In *Lane v Morrison*,¹⁵² the High Court recognised that the exception to the separation of judicial

¹⁴⁹ Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 256; *R v Davison* (1954) 90 CLR 353, 368 (Dixon CJ and McTiernan J). Though care must be taken in drawing such conclusions: see Patrick Lane, *Lane's Commentary on the Australian Constitution* (Lawbook, 2nd ed, 1997) 467; *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, 11 (Jacobs J); *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 267 (Deane, Dawson, Gaudron and McHugh JJ); *R v Davison* (1954) 90 CLR 353, 368 (Dixon CJ and McTiernan J).

¹⁵⁰ See *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *White v Director of Military Prosecutions* (2007) 231 CLR 570. See also the High Court accepting parliamentary privilege as a further historical exception to the separation of powers: *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157. Matthew Stubbs has argued that if this historical exception requires a foothold in the text of the *Constitution*, one may be found in s 106: Stubbs, above n 10, 216–17.

¹⁵¹ *Wilson* (1996) 189 CLR 1, 20.

¹⁵² (2009) 239 CLR 230.

power enabling military courts martial to exercise judicial power would not support new developments beyond the boundaries of historical practice. On this basis, the newly instituted Australian Military Court scheme was struck down as an invalid vesting of judicial power in the executive branch, and the traditional system of courts martial was reinstated.¹⁵³ As this demonstrates, a potential consequence of history supporting the validity of judges exercising vice-regal roles is that any attempt to extend such roles beyond traditional bounds may violate constitutional limits. This could happen in a number of ways. Most clearly, it could be argued that the appointment of a federal judge to a vice-regal role beyond the opening of federal Parliament would be invalid. This argument would reflect the stricter approach to the separation of judicial power at the federal level.¹⁵⁴

In the states and in the Northern Territory, where judges have traditionally exercised a range of vice-regal powers even for extended periods, it is difficult to imagine a scenario that may go beyond these traditional boundaries and result in invalidity. However, if a judge was placed in an untenable position whereby he or she was unable to avoid a practical conflict or a conflict of interest (for instance, if the judge was forced into a vice-regal role for an extended period without his or her consent) this may be out of step with traditional practice and could give rise to a successful constitutional challenge. Ultimately, it is unlikely that even the exercise of a reserve power or a potentially illegal or unconstitutional power by a judge acting in a vice-regal capacity would violate the separation of judicial power derived from the *Constitution*.¹⁵⁵

V CONCLUSIONS

The appointment of senior judges to vice-regal roles has a long history in Australia. A Chief Justice or justice of the High Court has opened the first sitting of every federal Parliament since 1904 and, in the states, the practice of appointing the Chief Justice as Lieutenant-Governor dates back to at least the 1860s. We have sought to illuminate the history and practice of appointing judges to vice-regal roles and to examine the practical and constitutional impediments to such appointments.

Despite the appointment of senior judges to vice-regal roles standing in contrast to contemporary separation of powers principles, this study has revealed that there is no practical or legal impediment to the practice continuing within existing bounds. A practical conflict between the judge's judicial and vice-regal responsibilities could be avoided by ensuring that the judge consents to the appointment and that, where possible, additional persons may be appointed either consecutively or, as in the Northern Territory, to simultaneously fulfil vice-regal duties. Conflicts between the appointee's judicial and vice-regal interests could likewise be avoided by the re-organisation of executive or judicial business or, when necessary and appropriate, the exercise of vice-regal powers by another, perhaps non-judicial, deputy.

¹⁵³ See *Lane v Morrison* (2009) 239 CLR 230; *Haskins v Commonwealth* (2011) 244 CLR 22.

¹⁵⁴ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. For discussion see Rebecca Welsh, 'A Path to Purposive Formalism: Interpreting Chapter III for Judicial Independence and Impartiality' (2013) 39(1) *Monash University Law Review* 66, 71-73.

¹⁵⁵ For alternative conclusions as to the constitutional validity of state judges being appointed as Lieutenant-Governors, see Stubbs, above n 10; Cremean, above n 10.

The appointment of judges to vice-regal offices poses a more significant risk to public confidence in the independence of the courts from the executive branch. The judge may be seen as an integrated part of the executive government, acting as a rubber stamp for ministerial decisions. Moreover, if a judge were to exercise a reserve power or a power that violates the law or the *Constitution*, he or she may attract partisan criticism in a way that may undermine public confidence in the courts. However, history indicates that the exercise of vice-regal powers by judges within traditional bounds has not undermined public confidence. Despite countless appointments of judges to roles such as Lieutenant-Governor and Administrator in the states since colonial times, and as Acting Administrators in the Northern Territory, the reputation of the judiciary for the independent administration of justice has been maintained. Not once has the vice-regal appointment of a judge attracted significant criticism or controversy. Nonetheless, a contentious exercise of a reserve power poses a lingering risk, which could alter public perceptions of this role in the future.

History also has a strong role to play in assessing the likelihood of a successful constitutional challenge to the appointment of a serving judge to a vice-regal office. Chapter III of the *Constitution* has been interpreted to prohibit extra-judicial appointments that are incompatible with judicial independence or institutional integrity. The conferral of vice-regal powers on judges seems to violate this principle by integrating the judge within the executive branch, requiring him or her to act at the behest and instruction of the executive. Despite these factors providing a clear basis for constitutional invalidity, members of the High Court have indicated that the appointment of judges to vice-regal roles, such as Lieutenant-Governor in the states, is so fundamental a part of governmental practice in Australia that it is beyond constitutional question.

The apparent validity of appointments of judges to vice-regal offices is grounded in historical practice. This suggests that if these conferrals were to evolve or expand so as to pose new risks to judicial independence and institutional integrity, there may be scope for a court to strike down an appointment on constitutional grounds. Each such conferral of vice-regal power would need to be considered on its merits.