ADDRESS
ON THE OCCASION OF THE GRADUATION OF COURSE NO.27/83 OF THE JOINT SERVICES STAFF COLLEGE, CANBERRA ON TUESDAY, 21 JUNE 1983

THE GOVERNOR-GENERAL AS COMMANDER-IN-CHIEF

BY HIS EXCELLENCY THE RIGHT HON. SIR NINIAN STEPHEN, GOVERNOR-GENERAL OF THE COMMONWEALTH OF AUSTRALIA*

[*In this address, His Excellency The Right Honourable Sir Ninian Stephen, examines the meaning and implications of s.68 of the Commonwealth Constitution vesting in the Governor-General command over Commonwealth defence forces. By examining the historical experience of Australia and other Commonwealth countries with similar constitutional provisions, and by considering the intentions of the founding fathers of the Australian Constitution, His Excellency concludes that, since the establishment of responsible government in the colonies, the Governor-General acts as commander-in-chief solely on the advice of a responsible minister despite the fact that the Constitution is not expressed in such terms. However, although the Governor-General's role as commander-in-chief would thus seem to be a nominal one only, His Excellency emphasizes that the title reflects the close relationship of sentiment existing between the Governor-General and the armed forces of the Commonwealth.*]

'The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative' — so runs s. 68 of our Constitution, unaltered since 1900; indeed changed only as to two words, neither of any consequence, since the first draft of the Constitution was adopted at the initial convention of founding fathers on 9 April 1891, ninety-two years ago. And the words seem clear and unambiguous enough — 'The command in chief . . . is vested in the Governor-General': no mention of Chiefs of Staff, none of Ministers for Defence, of Cabinet or of Prime Minister. Instead all the panache of a Boulanger, a general on a white horse, at the head of his armies, with standard unfurled.

Yet pick up any text-book or learned journal article on Australian constitutional law and the martial vision fades. What you will read will be much along these lines: that s. 68 places 'the overall command of the armed forces in the hands of the Executive Government (*i.e.* Cabinet)'[1], that 'the forces locally raised and maintained are, in the words of Sir Henry Parkes, as much subject to the responsible government of the Colony as any other branch of the public service'[2]; or, in more colourful and rather emotive language, that 'to speak of the Governor-General as 'Commander-in-Chief' in the context of the modern defence structure

* This address first appeared in the *Defence Force Journal* in December 1983, and permission to publish it here is gratefully acknowledged.

[1] Lumb R. D. and Ryan K. W., *The Constitution of the Commonwealth of Australia* (3rd ed. 1981) para 494.

[2] Moore W. H., *Commonwealth of Australia* (1st ed. 1902) 222.

is almost meaningless' he being 'in effect no more than a glorified Patron of the Defence Forces'[3]. He may retain his white horse, you might think, if he will, but, in terms of military command, it will certainly prove no horse of war.

The contrast between the words of s. 68, appearing to confer supreme command in absolute terms, and the writings of constitutional lawyers is striking indeed; and it seems of some topical relevance that one should understand how it comes about that the splendidly wide sweep of military power which the express words of s. 68 exhibit is regarded by constitutional scholars as lacking in substance. That the subject is not of interest only to legal historians of an antiquarian bent, that to some the words of s. 68 are accepted at face value, unaffected by constitutional gloss, is shown by a sample of some modern statements, made in Federal Parliament and in journals devoted to defence matters, which turn on s. 68 and its effect.

In Federal Hansard of 30 March 1976 we read of the Governor-General's position as Commander-in-Chief of the Armed Forces being described as 'that very onerous position' which it is 'very dangerous for an appointed person . . . to hold'. Instead 'an elected person should make the decision as to whether the armed forces shall be used or, to use the vernacular, whether the button shall be pressed'[4]. Then in 1978, again in Hansard, we read of the enormous powers of the Governor-General, supported by reference to the fact that 'he is the Commander-in-Chief of the Armed Services'[5]. A year later a correspondent in the Defence Force Journal, on a very different tack but starting with the same assumption, writes of the creation in 1975 of the position of Chief of the Defence Force Staff as effecting a 'fundamental change' in the traditional relationship, the Government being 'introduced as an intermediary in the command chain between the Crown and the armed forces of Australia' so that no longer will the armed forces be 'commanded directly by the Crown without the intervention of the Parliament'[6]. In 1983, in one of the series of Canberra Papers on Strategy and Defence, one finds a distinction drawn between control and command and it is suggested that in relation to command the Governor-General's responsibility is that of 'ensuring that the armed services do not become a political tool of government . . .'. Writing of the independence of the Governor-General and of the example which, in this regard, the United Kingdom might provide, the writer continues:

> As an extreme example of this the Sovereign has power to influence or even to deny the use of the armed forces if it is clear that the government of the day intends that the armed services should be used for purely political ends of a domestic nature.

Section 68, he writes, 'should be read as vestment of a command authority exactly the same as that enjoyed by the Sovereign in the United Kingdom'; and later: 'But in the command sense the Minister has no part to play in the actual command of the armed services. The chain of command must be direct from the Senior Service Officer vested with command direct to the Governor-General'. The conclusion arrived at is that:

[3] (1979) 53 *Australian Law Journal* 804.
[4] Hansard 1976, House of Representatives, 1138.
[5] Hansard 1978, House of Representatives, 2496-7.
[6] (1979) 14 *Defence Force Journal* 8.

Parliament must control the armed services but command of the armed services must lie to the Governor-General acting without the advice of the Executive Council.[7]

Views much at variance are, then, to be found about the position of the Governor-General as commander-in-chief; they range all the way from 'no more than a glorified patron' to one who, as the ultimate possessor of the command function, waits, finger on the fatal button, for the report of the Senior Service Officer.

There may well have been some room for ambiguity surrounding the earlier, colonial models upon which the wording of s. 68 seems to have been based, and from which the styles and titles of early colonial governors in Australia derive. But about s. 68 itself and its effect there is, I think, on analysis, no ambiguity at all. It is not any question of the interpretation of s. 68 having changed over the eighty years or so of our federal history. It is rather that s. 68 has to be understood in its context. And by context I mean not merely the Constitution itself but the whole notion of responsible government as it was understood at Federation and is still understood. To reconcile the plain meaning which on their face the words of s. 68 bear with what is, I think, the true constitutional position in law of the Governor-General as commander-in-chief requires a look at the history of the thing: first at the changing military role of colonial governors over the centuries, changing in response to the need for co-ordinated defence, the growth of self government in the colonies and the withdrawal of British forces from those colonies; secondly at the specific Australian colonial experience and finally at the expressed intent of the framers of our Constitution, affected as it was by that experience.

It is no new phenomenon, this linking of the vice-regal office and that of commander-in-chief. It not only appeared in the various colonial Acts which in pre-Federation days created and regulated the separate armed forces of each of the Australian colonies;[8] much earlier still, in 1610, when a royal governor was appointed to England's first permanent colony, Virginia, he was to be 'principal Governor, Commander and Captain General both by Land and Sea', and was to be known as the 'Lord Governor and Captain General of Virginia'[9]. As royal colonies proliferated in the late 17th and 18th centuries the Governor customarily bore the title of 'Captain General' or 'Commander-in-Chief' as well as that of 'Governor' and he had actual command of the local forces. But his position in relation to British troops stationed in the colony was never wholly clear; the commanders of those British troops were wont to assert their independence and in the American colonies from the mid-18th century a general officer was regularly appointed commander-in-chief, regardless of the title bestowed by their commissions upon the governors of the various colonies.[10] In the latter part of the 18th century positive steps were taken to deprive colonial governors of active military command, although they retained their title as commander-in-chief.

In parallel with this development in the colonial Empire of the 18th century was the growing resistance of local legislatures to vice-regal control of the local

[7] Hartnell G., *Canberra Papers on Strategy and Defence* No. 27 (1983) Ch. 8.
[8] Clark I., *Australian Constitutional Law* (1901).
[9] Fletcher R., Nov. 1943 Vol. 2, No. 8, *Historical Studies, Australia and New Zealand*, 210.
[10] *Ibid.* 211.

colonial forces. In the long established colonies of the West Indies the popular assemblies were 'never willing to grant to the governors any great authority over the military resources of the islands'[11]. Thus colonial statutes made it illegal for governors to extend their power by recourse to a declaration of martial law without the assent of their assemblies.

In Canada and Jamaica, it is true, governors, if military men, were, towards the end of the 18th century, specifically put in command of the troops, local and Imperial, and could draw on the the Imperial paymaster general for some of the necessary expenditure.[12] But elsewhere governors, not so empowered, lacked substantial military power, despite their splendid military titles. The governor's authority over British troops remained far from clear.[13] Instructions prepared in 1764 had given to military commanders of British forces in the colonies, of whatever rank, and not to governors, control over the forces at their command whenever the military commander of the whole area, as, for example, the West Indies area, so directed, and this despite what might happen to be the superior nominal rank of any colonial governor for the time being. This led to difficulties during times of active hostilities, such as the Napoleonic wars. The course adopted as a war measure was to appoint to the West Indian colonies, thought to be targets of French aggression, governors who were in fact senior serving officers, able to combine the role of governor and true commander-in-chief. That worked well enough as a wartime measure but the peacetime military responsibility of the colonial governor remained a matter of doubt and some confusion during much of the 19th century.

Only with the coming of responsible government to much of the colonial Empire did a satisfactory solution begin to be worked out.[14] And by the end of the 19th century that solution had found expression in the Revised Regulations for the Colonial Service. They provided that 'The Governor of a colony, though bearing the title of Captain General or Commander-in-Chief, is not, without special appointment from Her Majesty, invested with the command of Her Majesty's regular forces in the colony'. They went on to say that in the event of hostilities 'the officer in command of Her Majesty's land forces assumes the entire military authority over the troops'[15]. To reach this position involved a deal of turbulent history, much of it springing from the Maori Wars. In New Zealand, during those wars conflicting views of the vice-regal role came to a head and in the outcome led to those regulations taking the form they did.

When, in 1840, Captain Hobson was appointed 'first Governor and Commander-in-Chief in and over our said colony of New Zealand . . . and of all forts and garrisons' he no doubt in truth exercised full command over the small force he had with him. In 1846 Grey became Governor-in-Chief and encountered difficulties with the Maoris; he assumed the role of supreme commander of both

[11] Manning H. T., *British Colonial Government after the American Revolution* (1966) 121.
[12] *Ibid.* 122.
[13] Fletcher *op cit.* 211.
[14] *Ibid.* 213.
[15] Revised Regulations for the Colonial Service 1892II, 10 and 11, now reproduced as at 1956 as Colonial Regulations Part II, regs. 105 *et seq.*

civil and military establishments, something that little pleased the early colonists, used as they were to the political rights and privileges enjoyed by British subjects.[16]

The colonists' aspirations were met when, in 1852, New Zealand received representative, and what turned out to be responsible, government on the British model, only control over native affairs being retained by the Imperial government. When further trouble with the Maoris subsequently broke out in 1860 the governor, Gore Browne, happened to be a military man, a colonel by rank, as well as nominal Commander-in-Chief, and the local commander of British troops, also a colonel, took his orders from him. However, when Major General Pratt arrived from Victoria to take charge of military operations he regarded himself, and not the governor, as supreme commander. In 1861, after conflict between them, both he and the governor were replaced.

The home government, ever mindful of its tax-paying electorate, grudged the expenditure of British funds on hostilities with the Maoris, yet, so long as it retained ultimate responsibility for native affairs, it could not well avoid it. The Governor, now once more Grey, soon found himself on good terms neither with his own New Zealand government nor with the commander of the 10,000 Imperial troops by that time in New Zealand. In 1865 Grey went so far as to himself lead an attack on a Maori strong point without consultation with the military commander, indeed in the face of his refusal to launch such an attack. Things went from bad to worse; the commander sought his own recall, which was granted, and the War Office observed that it was not 'any part of the functions of a civil Governor of a colony to take the personal direction of military operations in the field'[17]. Grey got on no better with the new military commander, whom he thought was ignoring him in the role which Grey claimed for himself as active Commander-in-Chief. The Colonial Office finally took decisive action. It regarded Grey's pretensions to military command as absurd. It resolved the position by deciding to withdraw all Imperial troops, at the same time leaving the New Zealanders to care for their own native affairs, using such forces as they might raise locally. These would be under the exclusive control of the local colonial Ministry.

No subsequent New Zealand Governor ever either claimed to be effective Commander-in-Chief of the armed forces or to interfere in the administration of native affairs as a matter of prerogative. Instead, as elsewhere in the Empire where responsible government was introduced, the local legislature assumed responsibility for its internal military affairs. The growth of colonial self government was seen by the Home Government as an opportunity to rid itself of the financial burden of supporting large bodies of troops overseas during peace-time. Effect could be given to the disinclination on the part of Britain to station Imperial troops anywhere in the colonies, India always excepted: here, as in so many other respects, India stands apart from the rest of the Empire. By the mid-1860s an Imperial policy had been adopted for the Empire's self governing colonies: there would be Imperial aid against perils brought about by Imperial policy, but those

[16] Fletcher *op cit.* 215.
[17] *Ibid.* 219.

colonies were expected to assume substantial responsibility for their own internal security and for a measure of their own external defence.[18] A final withdrawal of Imperial troops from New Zealand and Australia in 1870, and substantially from Canada in 1871, marked the culmination of this policy.

This absence of Imperial troops, following hard on the heels of the grant to so many colonies of responsible government, meant that the original circumstances in which colonial governors, as representatives of the Imperial Crown and government, might seek to act as true commanders-in-chief had wholly changed. No longer were there Imperial troops to command; the locally raised forces were raised from the citizens of self governing colonies whose legislatures paid for them, and whose elected responsible governments felt that it was they, and not the governor of the colony, who should have control of their own armed forces. The grant of responsible government was widely felt; governors found that, even when local legislation gave them powers to be exercised independently of the advice of their government, the result was an uneasy one. New South Wales provides an example. The Volunteer Force Regulation Act 1867, unlike similar legislation in the other Australian colonies, conferred upon the Governor certain powers over the Volunteer Force couched in such terms as required them to be exercised on his own responsibility and not on the advice of his Ministers.[19] But when the Governor so acted and, as a result, came into conflict with his colonial legislature he complained to the Secretary of State for the Colonies that it seemed incongruous that he should have that power, and a duty to exercise it, while not being responsible to a legislature which might disapprove of his mode of exercise.[20] Such a result seemed to the Governor undesirable; better, he thought, in such circumstances not to leave anything in the hands of the Governor personally.[21]

And, as we have seen in New Zealand, it was the grant to the responsible government of the colony of power over native affairs that effectively brought to an end attempts by New Zealand Governors to treat their title as Commander-in-Chief as more than merely 'honorific'.[22]

Surveying the situation in 1894, Alpheus Todd could say of the Home Government that 'it is in the highest degree unwarrantable to assume that any exception exists to the operation of the constitutional rule that requires that the Ministers of the Crown should be held responsible for the performance, by the Sovereign, of all acts of state'. He went on to say that the prerogatives of the Crown in relation to the army and navy were at first practically excluded from ministerial control but gradually became subject to the supervision of Ministers, it being now, that is, in the 1890s, 'obvious that any attempt on the part of the Sovereign to retain power, in respect to military administration or diplomacy, would be . . . inconsistent with constitutional usage'[23].

[18] Keith A. B., *The Sovereignty of the British Dominions* (1929) 128.
[19] Clark *op cit.* 263-71.
[20] Todd T., *Parliamentary Government in the British Colonies*, (2nd ed. 1894) 376-7.
[21] Keith A. B., *Responsible Government in the Dominions* (1912) iii, 1263.
[22] Fletcher *op cit.* 222.
[23] Todd *op cit.* 17.

And as the colonies acquired responsible government so it became clear that governors, whatever their titles might be, would, like the Sovereign in Britain, have to forego all independent command of colonial armed forces and act exclusively upon the advice of Ministers. Thus it was that, writing in 1928 and describing the situation of armed forces in the colonies during the second half of the 19th century, Sir Berriedale Keith could say that those armed forces were:

> regulated entirely by local Acts and directed on principles of ministerial responsibility. The Governor indeed held the position of Commander-in-Chief under his commission — the title in England was dropped in 1793, but has lingered on abroad — but this gave him no authority whatever of a military character.[24]

This having been the position established in the various colonies from which the colonial politicians who were the framers of our Constitution came, it would have been strange indeed had this gathering of civilians intended to give to the Governor-General, the Sovereign's representative in Australia, a military authority which the Sovereign herself lacked and which was not possessed by the Australian colonial governors with whom they had worked during their own political careers. That it was not their intention becomes apparent when one finds the very point to have been the subject of detailed debate during the final Constitutional Convention, held in Melbourne in 1898. That debate[25] reveals not only that all who spoke on both sides were agreed that the Governor-General's title as Commander-in-Chief should confer no more than titular command. It also reveals that the Governors of some of the colonies had in the past sought to exercise aspects of actual military command and that it had only been after a long struggle that they had been substantially restricted to titular command only.

A word on the subject matter of the debate, which involved many of the most prominent of the delegates. Alfred Deakin, who was to be the second Australian Prime Minister, had moved that, to place the matter beyond doubt, the proposed s. 68, then in substantially its present form, should be amended to include the words 'acting under the advice of the Executive Council'. He wanted it to be clear beyond question that, as Commander-in-Chief, the Governor-General should have no personal power but should act solely on the advice of his Ministers. In past years there had, he said, been instances in which Governors had exercised or attempted to exercise actual military command and control in the colonies; in Victoria that had been put to rights after what he called 'a great quantity of correspondence, some of it of an exasperating and exasperated character'. No risk, he thought, should be run of such assertions of power again being made after Federation by some Governor-General.

Barton, the first Prime Minister and later to become a justice of the High Court, opposed the amendment, not because he in any way disagreed with Deakin's view that the Governor-General should have only titular command, but because he thought that that was already the effect of the words as they stood. And so the debate ensued, both sides being agreed as to what was intended and being concerned only with whether or not it was sufficiently expressed. Two other future

[24] Keith A. B., *Responsible Government in the Dominions*, (2nd ed. 1928) ii, 973.
[25] *Convention Debates* (Melbourne 1898) 2249-64.

justices of the High Court, O'Connor and Isaacs, the latter of course also a future Governor-General, joined in the debate and ultimately the amendment was negatived. But the debate makes it clear that those taking part knew in detail, as one would expect, the whole history of the thing and that the Convention was at one in its view of what it was that s. 68 should prescribe as the role of the Governor-General as Commander-in-Chief.

It is useful to sum up this aspect by citing what those great contemporary commentators on the Constitution, Dr John Quick and Sir Robert Garran, wrote at the time in their landmark commentary published in 1901. They said of s. 68 that the command-in-chief is 'one of the oldest and most honoured prerogatives of the Crown, but it is now exercised in a constitutional manner', that is 'with the advice of his Ministry having the confidence of Parliament'[26].

The final transformation, this century, of Empire into Commonwealth served only to underline what had long been obvious and well-accepted about the role of Governor-General as Commander-in-Chief. It was at the Imperial Conference of 1926 that the full equality of status of each of the members of the British Commonwealth of Nations was recognized, as was the consequence that, in the words of one of the resolutions passed at that Conference, Governors-General, representing the Crown, held 'in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain . . .'. And you will recall what Alpheus Todd, some thirty years earlier, had said about the British Sovereign having already by then relinquished any independent control over the armed forces.

Once Australia became a co-equal member of the Commonwealth of Nations, with no vestige of colonial status, there remained no remnant of responsibility upon the Governor-General towards an Imperial government to exercise any particular role in relation to Australia's armed forces. These forces had long ceased to be Imperial and now the Governor-General had also ceased to have special links with the British, and formerly Imperial, government.

It seems clear that no question of any reserve power lurks within the terms of s. 68 and practical considerations make it essential, even were constitutional ones not also to require it, that the Governor-General should have no independent discretion conferred upon him by that section; as Professor Richardson points out:

> For example, the command of the armed forces, vested in the Governor-General under section 68, if exercised by him without, or contrary to, advice, could result in the non-observance of an Act of Parliament dealing with defence or be rendered ineffective in appropriate instances because Parliament had not voted the necessary moneys under sections 81 and 83 of the Constitution to support the activity embarked on by the Governor-General.[27]

For reasons which Quick and Garran describe as 'historical and technical, rather than practical or substantial'[28], and which were much discussed both in the Convention debate to which I have already referred and ever since,[29] s. 68, unlike

[26] Quick V. and Garran R. R., *The Annotated Constitution of the Australian Commonwealth* (1901) 713.

[27] Zines L., *Commentaries on the Australian Constitution* (1977) 52.

[28] Quick and Garran, *op cit.* 707.

[29] Most recently and extensively in Winterton G., *Parliament, the Executive and the Governor-General* (1983) 13 *et seq.*

many other references to the Governor-General in our Constitution, makes no reference to the Federal Executive Council. One may regret that considerations of elegance of drafting and, perhaps, fear of being regarded in Whitehall as constitutionally naive led to this omission and thus left room for misconceptions about the effect of s. 68.

It seems appropriate to conclude, before this military audience, with the words of a distinguished Australian whose life has been the law and whose love has been history, save in wartime when he saw distinguished service in high military command, both in the Middle East and in the Islands. Sir Victor Windeyer, formerly a Justice of the High Court and a Major General to boot, has written on this question and can very fittingly be allowed the last word, particularly since what he wrote has been adopted as authoritative by the Defence Review Committee's Report on the Higher Defence Organization in Australia.[30]

Sir Victor has this to say, writing in 1979 and speaking of the power to call out the Defence Force in peacetime:

> The question here depends on the Constitution, not on provisions of the Defence Act. Some provisions of the Constitution refer to 'the Governor-General in Council' — which section 63 stipulates is to be construed as the Governor-General acting with the advice of the Federal Executive Council: but other provisions refer simply to 'the Governor-General'. The distinction is significant. Section 68 states that 'The Command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative' — not in the Governor-General in Council. It follows that orders by the Governor-General to the Defence Force, including calling it out, are given by virtue of the authority of command in chief. That does not mean that His Excellency may act without ministerial advice. He must act on the advice of a responsible minister; but not necessarily by an Order-in-Council after a meeting of the Executive Council.
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> In the *Army Law Manual*, 1964 as amended in 1977, there is a chapter headed 'An Introduction to Army Law'. Paragraph 10 of this, after referring to section 68 of the Constitution — and in a minor way misquoting it — states: 'The effect of this provision in the Constitution is to vest in the Governor-General personally the ultimate executive authority over such Army as exists from time to time'. This is misleading if the word 'personally' be read as meaning without ministerial advice or concurrence. I prefer the statement in the Preface to *The Australian Military Regulations and Orders*, as originally published in 1927, paragraph 6: 'The command in chief thus vested in the Governor-General is not required to be exercised with the advice of the Executive Council, as are the powers conferred on the Governor-General by the Defence Act; but like all other prerogatives is exerciseable under the advice of a responsible minister'.[31]

Having given Sir Victor the last word, may I add a postscript? Purely titular my title of Commander-in-Chief may be, but it does reflect the quite special relationship that I believe exists between the Governor-General and the armed forces of the Commonwealth. It is a close relationship of sentiment, based neither upon control nor command but which in our democratic society expresses on the one hand the nation's pride in and respect for its armed forces and, on the other, the willing subordination of the members of those forces to the civil power. Thank you for all bearing so long with me as I have, I fear too discursively, explored some aspects of the significance of s. 68 of our Constitution.

[30] Final Report, October 1982, 329, note 21.

[31] Opinion, contained in Appendix 9 of Report by Mr Justice Hope on Protective Security Review, 281 (Parliamentary Paper 397/1979).