

Parliament, the Executive and Vice-Regal Reserve Powers: Heading Off Crises in a Closely Tied Parliament *

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Harry Evans and 1975

One of the most striking aspects of the 1975 dismissal controversy is the enormous risk that was involved. The crux of the crisis was the failure to secure the passage of supply and the risk to the economy and public sector workers when the government ran out of money. If the parliament had been dissolved without supply having been passed, it would have caused the very financial crisis that Kerr was seeking to avoid by the dismissal of the Whitlam Government. It was therefore essential that supply be secured before the parliament was dissolved, on the day of the dismissal.

Knowing this, Harry Evans, as a young officer of the Senate, took the view that the governor-general would not dismiss the prime minister, because the risk of failing to secure the passage of supply was too high.¹ There were procedural tactics that could have been used by the Labor Party to delay the passage of supply in the Senate, as the Coalition had already done, so that the House of Representatives could continue to operate and force the governor-general to respond to its vote of no confidence in the Fraser Government. Harry therefore bet a colleague that Kerr would not dismiss Whitlam. He lost.

The question remains, however, how did Kerr anticipate that Fraser would be able to secure supply once it was known that the Whitlam Government was dismissed? How could Kerr possibly have guessed that upon being dismissed, Whitlam would go back to the Lodge for lunch rather than go to parliament and tell his Senate colleagues? The likelihood of that happening must have been infinitely small, even though it did in fact happen. Perhaps Kerr had read Whitlam better than generally believed—that despite weeks of speculation about the possibility of the dismissal of the Whitlam Government, speculation that had even led Senate officers to bet on it occurring, Whitlam's overwhelming hubris had caused him to give no serious contemplation to this prospect or how tactically to deal with it or thwart it. Further, Kerr must have reasoned that Whitlam's contempt for the Senate and belief in the supremacy of the

* This paper was presented at the annual Harry Evans Lecture at Parliament House, Canberra, on 4 November 2016. The Harry Evans Lecture commemorates the service to the Senate of the longest serving Clerk of the Senate, the late Harry Evans.

¹ Harry Evans, '1975 Revisited – Lost Causes and Lost Remedies', in Michael Coper and George Williams (eds), *Power, Parliament and the People*, Federation Press, Sydney, 1997, pp. 157–8.

House of Representatives would cause him to focus solely on the House and not realise the crucial role of the Senate. If that was Kerr's reasoning, he was surprisingly prescient but nonetheless engaged in a high-risk enterprise. It could have so easily failed and ended up with Whitlam being reinstated to office and Kerr either being forced to resign or dismissed.

Harry Evans concluded², and I agree, that it was most likely that neither Kerr nor Whitlam had fully thought through how the parliamentary aspects would work in conjunction with the reserve powers. That is why, in this Harry Evans lecture, I thought it was timely to explore the interaction between parliament and the reserve powers, particularly in the context of a government with an extremely slim majority in the House of Representatives. By doing the anticipatory war-gaming, it may avert circumstances arising where the exercise of the reserve powers might be contemplated.

The other important observation to make is that back in 1975 we had a rather unsophisticated view of the reserve powers—some powers were put in a 'reserve powers box', others were not, and the only guidance as to when a reserve power could be used was derived from irregular and unsatisfactory precedents. After thinking about this a lot over the past few years, I would argue that we should avoid boxes and focus instead upon the constitutional principles at play and how conflicts between them ought to be resolved. The power to summon or prorogue parliament might therefore be regarded as a reserve power, but only in circumstances where its exercise supports or reinforces constitutional principles such as responsible and representative government.

Accidental vote of no confidence

Given the tight numbers in the current House of Representatives, what are the constitutional ramifications if a vote of no confidence in the Turnbull Government is passed by the House of Representatives simply due to the absence of government members, be it because they left early for home, or the pairing system has broken down, or government members are otherwise absent due to illness or other reasons? Would the government have to resign? Could it advise a dissolution? How should the Governor-General respond?

The general principle of responsible government is that a government defeated in the lower house must either resign or advise a dissolution, and that if it proceeds to govern without the confidence of the lower house, then the governor-general is entitled to exercise the reserve power to dismiss it. There is an exception, however,

² *ibid.*

where a loss of confidence appears to be temporary only. In such a case the governor-general should give the government a reasonable amount of time to establish the restoration of confidence on the floor of the House, by way of a vote of confidence in the government.

This view was put by Sir John Madden when he was Chief Justice and Lieutenant-Governor of Victoria. He said:

The Governor does not, of course, use his authority to dismiss his Ministers except in a case where they have really and permanently lost the confidence of the House, but persist notwithstanding in retaining their offices. In a case where they have only technically and temporarily lost their majority the Governor would, I venture to think, always await the Premier's resignation, if he saw fit to tender it, or would treat the vote carried against him as something unreal and accidental.³

The same principle is reflected in laws for fixed-term parliaments in some of the Australian states. After a vote of no confidence in the government and before the governor takes any action with respect to dissolving parliament, there is a period of eight days during which the government has the opportunity to restore confidence.⁴

There have been occasions, however, where an accidental loss of confidence has brought down a government. The classic case is the King-Byng affair in Canada in 1926. In 1925, Mackenzie King's Liberal Government lost its majority at the election, but continued to govern as a minority government with the support of the Progressives. After a scandal in the customs department, with a censure motion against him pending, King sought a dissolution from the Governor-General, Lord Byng. Byng refused it as the previous election had only been held eight months ago. King then resigned and the Governor-General appointed the Conservative leader, Arthur Meighen, as Prime Minister. At that time, Meighen held the support of the Progressives. Meighen's government survived several votes on confidence issues, but fell by one vote when a pairing arrangement was broken. The member who breached the arrangement claimed that he had dozed off in the chamber and voted by accident before realising that he had been paired.⁵

While Meighen could have argued that this was no more than a technical defeat and sought to carry on, he instead requested a dissolution. This was because he actually

³ Memorandum by Sir John Madden, Lieutenant-Governor, to Mr George Elmslie, Premier, 19 December 1913: Public Records Office of Victoria VPRS 7571/P001/18.

⁴ See, for example: *Constitution Act 1902* (NSW), s. 24B; *Constitution Act 1975* (Vic), s. 8A.

⁵ Roger Graham, *Arthur Meighen – A Biography*, vol. II, Clarke Irwin, Toronto, 1963, p. 445.

wanted a dissolution, as it would have been difficult to carry on governing in minority with the precarious support of the Progressives.⁶ The Governor-General, with no one left who could form a government, granted the dissolution to Meighen, causing a significant controversy.

If an accidental defeat on confidence occurred in relation to the Turnbull Government, just four months after the double dissolution election on 2 July 2016, and the Prime Minister requested the Governor-General to dissolve the parliament, should the Governor-General do so? While for the most part vice-regal representatives tend to grant dissolutions as and when requested by their responsible advisers, they do have a well-recognised reserve power to refuse to do so. It is commonly accepted that one ground upon which a governor-general may refuse a request for a dissolution is that it is too soon after the previous election. Here, the principle of representative government applies. The vote of the people should be respected and the elected parliament given a reasonable opportunity to function. It is also recognised that frequent elections are costly, cause disruption for the community and will not necessarily give rise to a different result. The voters should not be required to keep going back to the polls until they ‘get it right’ according to the view of the prime minister.

So how long after an election is a sufficient period before a new election can justifiably be called? The Canadian Governor-General, Adrienne Clarkson, when faced with a minority federal government in 2004, took the view that it would be irresponsible to agree to the holding of an election within six months of the previous one, but that after that she would probably grant a request.⁷ Looking across the various precedents, the first six to nine months is the period in which a dissolution is most likely to be refused.

If, however, there is no one else who can form a government, then the prime minister has the governor-general over a barrel. If, as in the case of the King-Byng affair, the Turnbull Government were to be refused a dissolution upon suffering an accidental defeat on confidence and it resigned, then it would be unlikely in the present parliament that the opposition could form a government, particularly once the Coalition’s numbers were restored to full strength after whatever accident that had caused its defeat had ended. To appoint the opposition leader as prime minister and then grant him an election would be inappropriate, as Lord Byng discovered in 1926, with the better course being the restoration of the former government and the grant of a dissolution to it.

⁶ The Progressives had also strongly objected to the tactic of appointing temporary ministers in order to avoid the requirement that they resign and seek election once appointed as ministers. Hence there may also have been a substantial loss of confidence in the Government.

⁷ Adrienne Clarkson, *Heart Matters*, Viking Canada, Toronto, 2006, p. 192.

On this basis, in the face of an accidental defeat in the parliament, even though a request by the Prime Minister for a fresh election would be unconscionably early, the Governor-General would most likely grant it (unless he could persuade the Prime Minister to withdraw the request and continue governing), given that it would be unlikely that any other government could be formed that would maintain the confidence of the House in its current composition.

Temporary loss of confidence pending by-elections

Another possible scenario is that the current government could lose its majority in the lower house due to the death or resignation of two or more of its members. What can be done in those circumstances to fend off defeat in the House pending by-elections which the government may have a good chance of winning? The common course here is for the prime minister to advise the governor-general to prorogue the parliament until after the by-elections, so that any confidence motion can be dealt with by a full complement of members in the House.

Does the governor-general have a reserve power to reject advice to prorogue parliament? Prorogation has not traditionally been placed in a 'reserve power box', but in recent years there has been growing acceptance, especially after the Canadian controversy of 2008, that in some circumstances the governor-general may refuse advice to prorogue parliament. This includes cases where a government has lost confidence and is trying to avoid accountability to parliament. In form, therefore, a request by the prime minister to the governor-general to prorogue parliament to avoid a vote of no confidence pending the holding of by-elections, would fall into the category where prorogation could be denied. However, here the key is again the temporary nature any loss of confidence. It would be absurdly costly and disruptive to change government at the point that members die or resign and then restore the previous government once the by-elections are held and safe seats have been filled by candidates from the same party. Moreover, the principle of representative government would also support the argument that all places in the House should be filled before it decides on such a critical issue as confidence in the House.

This is so, as long as the by-election is held as soon as reasonably practicable and the resignation is not simply a tactic used to avoid or delay a pending vote of no confidence. Such manipulation occurred in Tuvalu in 2012–13, where first there was a six-month delay in holding a by-election to fill a seat when the government had lost majority support. Following that, the government simply did not reconvene parliament, so that there could not be a vote of no confidence in it. The Governor-General eventually broke the impasse by exercising a controversial reserve power to summon parliament to sit, against the wishes of the Prime Minister. The Minister of

Health then resigned his seat and the Speaker announced that there could be no vote on the issue of confidence while a constituency lacked representation.⁸

The controversy escalated, with the prime minister advising the Queen to dismiss the Governor-General because of his exercise of a reserve power and the Governor-General then dismissing the Prime Minister. This ‘race to the palace’ showed, incidentally, that the governor-general always wins, because his or her action has immediate effect in sacking the prime minister, while the palace instead engages in ‘masterly inactivity’ and then discards any advice of a prime minister who has since been dismissed. The Tuvalu Parliament was again summoned by the Governor-General, in a further exercise of the reserve powers, the house voted no confidence in the dismissed government and a new government was formed.

A somewhat less tumultuous example occurred in Western Australia in 1971. The Tonkin Labor Government lost its majority when the Speaker died. It sought the prorogation of the house until the by-election was held. Here, unlike in Tuvalu, there were no unconscionable delays in holding the by-election and no strategic resignations. The Governor granted the prorogation in the circumstances (especially because it was a safe seat), but considered that he had a reserve power to refuse to do so.⁹

The British Foreign Secretary, when asked for his views, observed that the decision of whether or not to prorogue was a matter within the Governor’s ‘personal discretion’.¹⁰ The Governor’s official secretary also told the press that the Governor was not bound to act on advice in such matters.¹¹ In exercising his discretion to support the Premier’s request for the prorogation of parliament, the Governor took into account that the last general election had been very recently held, so a fresh one was not warranted and that any loss of confidence was likely to be of a temporary nature.¹²

A third example of interest concerns the McGowan-Holman Labor Government in New South Wales in 1911. Labor had a slim majority which was lost when two of its country Labor members resigned their seats in protest at a decision concerning rural

⁸ Affidavit of Eselealofa Apinelu, Attorney-General of Tuvalu, ‘Statement of Facts’, 1 August 2013, *In the matter of the Constitution of Tuvalu*.

⁹ See further: Gerard Horgan, ‘Prorogation as a Partisan Tool: The Western Australia Experience’, 28 September 2012: http://www.academia.edu/4721026/Prorogation_as_Partisan_Political_Tool_The_Western_Australia_Experience.

¹⁰ Letter by Sir A Douglas Home, Foreign Secretary, to Sir D Kendrew, WA Governor, 13 December 1971: TNA: FCO 24/1037.

¹¹ *The Weekend News*, 8 October 1971, quoted in: Peter Johnston, ‘*Tonkin v Brand*: Triumph for the Rule of Law’ in George Winterton (ed), *State Constitutional Landmarks*, Federation Press, Annandale, 2006, p. 232.

¹² Athol Thomas, ‘Has Mr Tonkin been a cad?’, *Canberra Times*, 16 October 1971, p 9.

leaseholds. Holman survived an initial vote of censure thanks to another sleeping member who was counted as voting on the side of the chamber on which he happened to be slumbering. Unable to secure an adjournment, he advised the Lieutenant-Governor to prorogue parliament until after the by-elections. The Lieutenant-Governor, Sir William Cullen, who was also the Chief Justice, refused.¹³

Holman then calculated that a tactical resignation of the government would be better than a defeat on the floor of the house. He concluded, correctly, that the opposition leader would struggle to govern, as he would have to rely upon the independents, and that the Lieutenant-Governor would not grant the opposition leader a dissolution while there was an undefeated alternative government waiting in the wings, especially as the last general election had only been held eight months ago. Holman's plan succeeded. The opposition leader was unable to form a new government and the Lieutenant-Governor was therefore forced to reinstate Holman and grant him his prorogation until the by-elections were over.

Holman faced all sorts of woes in maintaining his majority. He next managed to lose it when his majority of one toppled over the balustrade of a staircase in Parliament House while attempting to avoid a Hansard reporter, and ended up in hospital.¹⁴ On this occasion, his government survived by pairing the fallen member with the opposition's aptly named Mr Fell. When the pairing system was later threatened by the opposition, Holman publicly claimed that they would wheel the injured member into the house on his bed from the hospital next door so that he could vote. The opposition immediately backed down as the photo opportunity would be too powerful. Hence the pairing system survived.¹⁵

Holman's pairing experience suggests that undermining the conventional courtesies of the parliament may not be a wise course for an opposition. It can lead to a public backlash and the impression that the opposition is not fit to govern. Moreover, Holman's prorogation experience suggests that if the Turnbull Government lost its majority through the death or resignation of two or more members, it could reasonably seek the prorogation of the House until the by-elections were held, assuming this was done without undue delay. While the Governor-General would have a reserve power to reject such advice, it would be wise for him to accept it if there were no real prospects of the opposition forming a government that held the confidence of the House and the government was likely to win the by-elections.

¹³ See further: Anne Twomey, 'How to Succeed in a Hung Parliament', *Quadrant*, vol. 54, no. 11, November 2010, p. 39.

¹⁴ 'Accident at Parliament House', *Sydney Morning Herald*, 25 August 1911, p. 7; 'Accident to Mr Meehan, Sydney', *The Brisbane Courier*, 25 August 1911, p. 5.

¹⁵ W. Holman, 'My Political Life', reprinted in: M Hogan (ed), *The First New South Wales Labor Government 1910–1916*, UNSW Press, Sydney, 2005, p. 53.

Imposition of an early election against the wishes of the cabinet

If a prime minister is facing imminent defeat within his or her party, can he or she call an early election, against the wishes of ministers and the parliamentary party, as a means of imposing discipline on the parliamentary party and galvanising support for his or her leadership position? Jack Lang tried this when Premier of New South Wales in 1927. He asked the Governor for a 'dissolution in secret'.¹⁶ What he meant was that he wanted to pressure his cabinet colleagues by showing them that he had in his pocket the governor's agreement to a dissolution. The Governor said he would only act publicly, not in secret. He consulted the Chief Justice (as was standard practice, pre-1975). The Chief Justice noted that while the prerogative of dissolving parliament belonged to the Governor, he doubted whether it would be wise to exercise it, other than in exceptional circumstances, against the wishes of a majority of the Executive Council.¹⁷

The Governor therefore insisted that the matter be put before the full Executive Council. Only Lang, and possibly one other minister,¹⁸ voted in favour of a dissolution, with all the rest opposing it. The Governor accepted the view of the majority and did not grant a dissolution at that stage. Instead, he encouraged Lang to resign as Premier so that he could be reappointed and form a new ministry. This was done on the condition that Lang would advise a dissolution as soon as new electoral rolls were prepared.¹⁹

This was an unusual approach and it is unlikely that a vice-regal officer would call a full meeting of the executive council today to ask its members to state whether or not they agreed to an election. These days it is regarded as being up to the prime minister, rather than the cabinet, to determine the election date (in the absence of fixed-term elections).

If, however, it was clear that the prime minister no longer held the support of a majority of his parliamentary party, and was therefore likely no longer to command the confidence of a majority of the house, then the governor-general might well hesitate before acting upon advice from the prime minister to dissolve parliament, as the prime minister's responsibility to parliament would be in doubt.

¹⁶ Sir Dudley de Chair, *Memoirs*, Vol VI, Imperial War Museum ('IWM'), 98.

¹⁷ Letter by Sir Philip Street to Sir Dudley de Chair, 25 May 1927: IWM DEC/5.

¹⁸ De Chair, in his memoirs, stated that only Lang wanted a dissolution: Sir Dudley de Chair, *Memoirs*, Vol VI, IWM, 98–9. In Lang's account, he was supported by one other minister: J T Lang, *I Remember*, McNamara's Books reprint, Sydney, 1980, p. 325.

¹⁹ See further: Anne Twomey, 'Sir Dudley Rawson Stratford de Chair' in David Clune and Ken Turner (eds), *The Governors of New South Wales 1988–2010*, Federation Press, Annandale, 2009, pp. 468–9.

When Sir Joh Bjelke-Petersen lost the support of his parliamentary party in November 1987, the Governor warned him that if he sought to resign and be reappointed, as Lang had done 50 years before, the Governor might decline to reappoint him. While the Governor was not prepared to dismiss Sir Joh from office, in the absence of a vote of no confidence in him upon the floor of the house, he might well have hesitated to grant Sir Joh a dissolution if he had advised it. Indeed, the Governor had been given a legal opinion, prepared at the request of the National Party in October 1987, in anticipation that Sir Joh would seek a dissolution against the wishes of his party and ministry. The opinion contended that the Governor should refuse advice to dissolve parliament if it was given by the Premier contrary to the wishes of the Executive Council and a majority of the house.²⁰ If the issue had arisen, however, delay in dealing with it, rather than outright refusal, would have been all that was needed as the existing political pressures would soon have resolved the issue without the need for any exercise of the reserve powers.

Royal assent to a bill passed against the government's wishes

Another scenario, this time raised by my students, is what would happen if a private members' bill to implement same-sex marriage passed in the House of Representatives, due to one or more Liberals crossing the floor, passed the Senate and was presented to the Governor-General for assent? Imagine that the National Party members of the Coalition demanded that the Prime Minister advise the Governor-General to refuse assent to the bill, or face the termination of the Coalition agreement, sending the Liberal Party into minority government. Could the Prime Minister rightly tell the National Party members that it would be unconstitutional to advise the Governor-General to refuse assent? What would the Governor-General do if he received advice to refuse assent to the bill?

This scenario raises the as yet unresolved question of whether the grant of royal assent is a legislative act or an executive act. Is the governor-general, in giving assent to bills, acting upon ministerial advice, as part of the executive, or the advice of the two houses, as part of the parliament? In practice, it is the clerks on behalf of the presiding officers of parliament who present bills to the governor-general for assent. Apart from a certificate from the attorney-general that there is no legal impediment to giving assent to the bill, there is no ministerial advice to the governor-general to assent. Assent does not occur in executive council and there is no counter-signature indicating ministerial responsibility for the decision, as is otherwise the case in relation to formal acts by the governor-general.

²⁰ Opinion by G L Davies and C D Gilbert, 'Ex Parte: National Party of Australia Queensland – Joint Opinion', 12 October 1987.

Judicial authority on the issue is inconclusive. While some reference is made in cases to the Governor-General acting as part of the ‘Crown in Parliament’ when granting royal assent,²¹ much of the commentary is unfocused or contradictory. For example, in a 2015 Canadian case,²² Rennie J stated that royal assent is ‘the final stage in the legislative process’ and that it is given on behalf of the Queen in Parliament.²³ He then observed:

In granting assent, the Governor General does not exercise an independent discretion. He acts on the advice of the Prime Minister. Assent must be given to a bill that has passed both Houses of Parliament; to withhold assent would be inconsistent with the principle of responsible government.²⁴

These statements are potentially contradictory. If assent cannot be withheld to a bill that has passed both houses, then presumably the governor-general is not bound to act upon the advice of the prime minister in relation to assent if, for example, the prime minister advises the governor-general to refuse assent to a bill that has been passed by both houses.

At a more fundamental level, this issue raises a clash between the principles of representative government and responsible government. Under representative government, the people elect their representatives, and it is the votes of these representatives in the parliament that must prevail. Under responsible government, the governor-general acts upon the advice of his or her ministers who are responsible to parliament for their actions.

Where ministers advise the deferral or refusal of assent because a serious error in a bill has been identified after its passage but before assent²⁵, then these principles can be reconciled because it is likely that a majority of the parliament, or at least the lower house when there is a majority government, would also support such a deferral or refusal of assent in order to allow the error to be corrected rather than immediately come into force.

²¹ See, eg: *Re Scully* (1937) 32 Tas Law R 3, 30 (Clark J); *Eastgate v Rozzoli* (1990) 20 NSWLR 188, 193 (Kirby J); and *Kirmani v Captain Cook Cruises Pty Ltd* (1985) 159 CLR 351, 455 (Dawson J).

²² *Galati v Governor-General of Canada* [2015] FC 91 (Federal Court, Canada).

²³ *Galati v Governor-General of Canada* [2015] FC 91, [43]–[45] (Rennie J).

²⁴ *Galati v Governor-General of Canada* [2015] FC 91, [46] (Rennie J).

²⁵ Note that if commencement of the Act or the relevant provision can be deferred, then this is the appropriate course to take. But if the Act commences upon the grant of assent, and the effects of the error are both deleterious and unable to be adequately compensated for, then deferral of assent until corrective legislation can be passed, might be appropriate.

For example, in 1898 the Lieutenant-Governor of Ontario refused assent to a bill that contained an error and the Journals of the Legislative Assembly recorded that this was done on ministerial advice, ‘it being understood that the Legislative Assembly also desires such withholding of assent thereto’.²⁶

However, where the reason for ministers advising the refusal of assent to a bill is that the government was defeated in the lower house on the bill, this brings into question their responsibility and suggests that the principle of representative government should prevail, given that ministers cannot claim to command the confidence of the lower house, at least with respect to this particular bill.

The principle of responsible government is a two-way street—while the head of state must act upon the advice of responsible ministers, ministers must maintain their status as responsible to parliament in order to be entitled to give that advice. The whole *raison d’être* of responsible government is to give primacy to parliament by ensuring executive accountability to it. It would seem illogical, therefore, for the principles of responsible government to be relied upon to override the will of parliament.

This point has also been made by Nick Barber in the United Kingdom. He argued that:

The point of the convention on royal assent is to uphold the primacy of the democratic element of the constitution in the making of law. But just as it would be undemocratic to allow one person – the Monarch – to veto legislation, so too it would be undemocratic to give this power to the Prime Minister. In short, when presented with a bill that has passed through Parliament in a proper manner, the duty of the Monarch is to give assent – irrespective of the advice of her Ministers. There is no room for discretion. On its best interpretation, this is what the convention requires: if the Monarch were to accept the advice of her Prime Minister on this issue, she would be acting unconstitutionally.²⁷

An example of a government advising the refusal of assent to a bill passed without its support arose in New Zealand in 1877. The Prime Minister, Sir George Grey, advised the Governor to refuse royal assent to a land bill. The bill had been introduced by the previous government, but continued in its progress under Grey’s government and had been amended in a manner contrary to the government’s wishes. Grey advised the Governor, Lord Normanby, to refuse assent.

²⁶ Ontario, *Journals of the Legislative Assembly of the Province of Ontario*, vol. 31, 17 January 1898, p. 188.

²⁷ Nick W. Barber, ‘Can Royal Assent be Refused on the Advice of the Prime Minister?’, UK Constitutional Law Blog, 25 September 2013, <http://ukconstitutionallaw.org>.

The Governor rejected this advice. He noted that ministers were entitled to oppose the bill in parliament, but he could not see why they should be able to defeat it at the assent stage if they could not do so in the parliament. Grey then refused to provide the governor with the legal advice authorising him to assent to the bill. The Governor escalated the crisis by declining to give assent to an appropriation bill. Grey capitulated and signed the document and the Governor gave assent to both bills.²⁸

Grey complained to the British Secretary of State, arguing that the Governor was constitutionally obliged to act on his advice and had failed to do so. The Secretary of State for the Colonies supported the Governor in declining to act upon advice to refuse his assent.²⁹

This is, of course, a very old example. It is very difficult, however, to find a more recent example³⁰ because in practice governments that are defeated in parliament do not advise the refusal of assent to the relevant bill. This may be because the government's defeat on the bill is regarded as a vote of no confidence, causing the government to fall, or because advising the governor-general to refuse assent to a bill passed by both houses may be so politically provocative that it would cause a vote of no confidence in the government. A third reason might be because of the uncertainty about whether or not the governor-general would accept such advice and concern that giving such advice may be regarded as 'unconstitutional', escalating a sense of political crisis. As the Canadian scholar Andrew Heard has noted, 'Cabinet ought not to advise a normative refusal of assent in the first place'³¹ and that, because it is breaching convention in doing so, its advice ought to be rejected. Finally, if a government's advice is rejected by the governor-general, there is also a line of argument that the government is then obliged to resign, meaning that the giving of such advice would be a high-risk manoeuvre.

If, therefore, a bill was passed against the wishes of the government, be it a same-sex marriage bill or any other, it would be most unwise to advise the governor-general to refuse assent to it. Allegations would be made that the government was disrespecting the parliament and acting in breach of constitutional principle, which would build a sense of crisis. Moreover, the governor-general may well take the view that he is

²⁸ John E. Martin, 'Refusal of Assent – A Hidden Element of Constitutional History in New Zealand', *Victoria University of Wellington Law Review*, vol. 41, no. 1, 2010, p. 72.

²⁹ Alpheus Todd, *Parliamentary Government in the British Colonies*, Longmans, Green & Co., 2nd ed, 1894, p. 664, referring to a despatch dated 15 February 1878.

³⁰ There are more recent examples where a bill has been passed by one government, but a new government has been sworn in before assent has been given—see the *Bills Annulment Act 1935* (NSW). This, however, is a different situation.

³¹ Andrew Heard, *Canadian Constitutional Conventions – The Marriage of Law & Politics*, 2nd ed., OUP Canada, Toronto, 2014, p. 72.

required to act upon the advice of the houses, rather than a defeated government, in such circumstances. The rejection of the government's advice would lead to calls for the government to resign or at least for an election to be held. The reason why there are so few examples of such advice being given is, therefore, that in most cases it would have potentially dire consequences for the government.

An exception may occur, however, where a bill breaches the Constitution. This might arise in circumstances where, for example, the bill includes or increases an appropriation and it was introduced in the Senate, contrary to the requirements of section 53 of the Constitution, or failed to be supported by a message from the governor-general, recommending the purpose of the appropriation, contrary to section 56 of the Constitution. Here, two further constitutional principles arise—the rule of law and the separation of powers.

On the one hand, the rule of law requires the executive and the parliament to obey the Constitution. On the other hand, the separation of powers requires that the courts, rather than the executive, adjudicate upon constitutional validity. On that basis, if the matter was justiciable, assent should be given and constitutional validity left to the courts to determine.

But if, as in the case of sections 53 and 56 of the Constitution, the breached constitutional provisions were regarded by the courts as non-justiciable, because they concern internal parliamentary matters with which the courts should not interfere, then an interesting question arises as to whether the governor-general, as the guardian of the Constitution and the last standing point of authority that could prevent an unconstitutional bill from becoming law, should refuse assent on this ground, either with or without the advice of the government. There is no authoritative answer to this question, and any answer would be likely to depend upon the circumstances—such as the potential harm that may be caused by the bill and the likely consequences of its passage. In this case, if the governor-general refused assent to such a bill, not only would this be consistent with the rule of law, but it would also, arguably, support another aspect of the principle of responsible government, that the financial initiative rests in the hands of the government that is responsible to the parliament.

A controversy arose in relation to such a bill in 2011³², during the Gillard Government's hung parliament. The bill would have changed the eligibility provisions for rural students to access the youth allowance, which would have had the effect of increasing expenditure on the allowance under an existing standing appropriation. The bill was initiated in the Senate and was not the subject of a message by the Governor-General. While there may well be arguments between the houses about whether a bill

³² Social Security Amendment (Income Support for Regional Students) Bill 2011 (Cth).

of this nature triggers the application of sections 53 and 56, what is interesting for present purposes is that the House of Representatives chose not to vote upon the bill, due to its concerns about whether it met the constitutional requirements.³³ This was so even though the government did not hold a majority in the House of Representatives and the cross-bench members had rural students in their electorates who would have benefited from the bill. This is the way that such disputes ought to be resolved—within the parliament, not in the courts or at Government House. However, this does not mean that the system will always work in this way, so the governor-general's role and powers may well become crucial in the future.

The doctrine of necessity

A final challenging scenario, raised by another of my students, concerns the role of the governor-general in restoring constitutional governance when for some reason government slips outside the Constitution and cannot otherwise be restored by orthodox legal routes. This sounds like the type of thing that only arises in countries subject to coups, such as Grenada or Fiji, where the doctrine of necessity has been used to support actions by the governor-general to restore representative government. Nonetheless, a scenario in which it could have happened occurred in Australia immediately before the last federal election.

There was a constitutional challenge to the validity of provisions in the Commonwealth Electoral Act which provide for the electoral rolls to close a week after the issue of the election writs. It was contended in the *Murphy* case³⁴ that the closure of the rolls breached a requirement in the Constitution that the houses of parliament be 'directly chosen by the people', as it excluded significant numbers of people from voting. A similar issue had arisen in the *Rowe* case before the 2010 election.³⁵ There the complaint was that in 2006, the law had been amended to remove a seven-day grace period to enrol after the issue of the writs. The court, in *Rowe*, struck down the validity of the 2006 amending law, leaving in existence the prior provisions of the Commonwealth Electoral Act, that closed the rolls seven days after the issue of the writs. As this was a perfectly workable alternative, there was no problem.

However, in the 2016 *Murphy* case, there was no amending law to strike down. The argument was that the Constitution required the rolls to stay open all the time until

³³ Note the assertion by Coalition members that the government could choose not to present the bill to the Governor-General for assent: Commonwealth, *Parliamentary Debates*, House of Representatives, 21 February 2011, p. 602 (Mr Pyne). This is incorrect, as it is parliamentary officers who present the bill to the Governor-General.

³⁴ *Murphy v Electoral Commissioner* [2016] HCA 36.

³⁵ *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

polling day, so that people could enrol on the actual day of the election. The Commonwealth Electoral Act had never provided for this. The problem was therefore one of severance and workability. Could the provisions in the Commonwealth Electoral Act, if held invalid, be severed from it, leaving a workable electoral law, or would it have been necessary for the High Court to hold the entire Act invalid? The Commonwealth initially argued that severance was not legally possible, so that the entire Commonwealth Electoral Act would have to be struck down as invalid if the court accepted that the Constitution required the rolls to remain open until polling day.

The Commonwealth later backed down from this position. Why? Because it has drastic consequences. The *Murphy* case was heard by the High Court after parliament had been dissolved. In the ordinary course, if the High Court struck down the whole of the Commonwealth Electoral Act as invalid, then parliament could quickly re-enact it with altered provisions that permitted the rolls to stay open. But if parliament is dissolved and cannot enact a new electoral law, and if there is no law under which to hold an election, then there is a major problem. There can be no new parliament until there is an election, and there can be no election unless the parliament enacts a new electoral law. How could such an impasse be broken?

In such a case, the doctrine of necessity would come into play. It confers on the governor-general such powers as are necessary to restore constitutional governance and representative government. There would have been at least two possible options. One would have been for the governor-general to have exercised a reserve power to summon the previous parliament, allowing it to sit for the purpose of passing a revised electoral law, in order to allow the election to take place.

If that was not regarded as advisable or practicable for timing reasons, the second option would have been for the governor-general, with the agreement of both the government and the opposition, to instruct the electoral commissioner and all relevant public servants to proceed with the election according to the previous electoral law, as adjusted by agreed changes that comply with the Constitution's requirements as set out in the High Court's judgment, regarding keeping the rolls open. This would be based upon a firm commitment by the government and the opposition that, regardless of who won the election, such a law would be enacted in the next term of parliament with retrospective effect to apply to the election period and that the governor-general's actions would be validated. The Commonwealth Parliament has power to make laws with retrospective effect, as long as it does not alter the application of the Constitution.³⁶

³⁶ *R v Kidman* (1915) 20 CLR 475; *University of Wollongong v Metwally* (1984) 158 CLR 447.

As it happened, the High Court did not accept that the Constitution requires the electoral rolls to remain open until polling day, so the question of whether the provisions could be severed, and the effect upon the election did not arise. It would also be most unlikely that a prudent High Court would throw the country into such a constitutional crisis in the middle of an election campaign when the parliament was dissolved. However, it is useful at least to consider the plan B, if such events do arise, so that there is general acceptance of the role the governor-general can take in such circumstances and that the reserve powers can be used in a positive way to create a path back to constitutionality.

Conclusion

While it is always the best policy for governments to avoid the circumstances in which the application of reserve power may arise, it is also a useful exercise to think through the possibilities of what might occur and how the powers of the governor-general and the parliament might interact. In the end, it is the responsibility of all constitutional players—parliamentarians, ministers, judges and the governor-general—to uphold the same constitutional principles. If everyone is working to the same end, with the same understanding of these principles and how they apply, then crises should be able to be avoided. The better the understanding we have of these constitutional principles, and the powers and roles of each of the institutions of government, the less likely we will be to face constitutional upheavals such as the 1975 dismissal.



Rosemary Laing — Thank you very much Anne. That was fabulous and I think Harry would have enjoyed that immensely. The thought at the end that having the numbers may not be enough sometimes is well worth thinking about. Very sobering.

Question — I was thinking about what I could put to you that is in the tradition of Harry Evans. My question relates to what discretion the governor-general has if the prime minister puts to him or her that he wants a dissolution because the government has become unworkable because of the role of the Senate. Now I have a vague recollection that some years ago Malcolm Fraser sought a dissolution on those grounds. I think Sir Ninian Stephen initially declined and there was a second letter—I think I probably drafted the second letter—which was more strongly worded and used the terms that government had become unworkable because of the role of the Senate. What is the discretion of the governor-general in those circumstances and how well does it relate to the formal requirements for a dissolution?

Anne Twomey — That is a fantastic question because yesterday I spent my time in the National Archives and the file I was actually reading was precisely that one! I was looking at the 1983 double dissolution election and the advices and controversy between Malcolm Fraser and Sir Ninian Stephen. So I was actually reading that letter or that series of letters yesterday! The first thing to note is that section 57 of the Constitution, which is the one that deals with double dissolution elections, is slightly different because it is all set out in detail in the Constitution and the High Court has held that the detail of it is justiciable. So it is something where a governor-general when deciding to grant a double dissolution does have to be satisfied that the various requirements that trigger the double dissolution have been met. So that is different from your ordinary dissolution. This is much more statute based and specific.

What was interesting was that Sir Ninian took a tentative view, although not a final view, that he also had to be satisfied that, not only was there a trigger for a double dissolution, but that he should be satisfied that the parliament had become unworkable. So that is the advice he sent Malcolm Fraser back to consider and give him. Sir Ninian actually said that he was satisfied with that advice. But in a wonderful file note I was reading yesterday, where he explained his thinking on all this, he said there are two strains of thought on this particular issue. You could either take the view of Sir Samuel Griffith when he was Chief Justice back in the early days of federation saying that you did have to be satisfied that parliament was unworkable. Or you could take the view of H.V. Evatt that, so long as the conditions were satisfied, that was enough and you had no discretion in relation to this. In explaining his view, Sir Ninian said: 'I didn't have to make a final decision as to whether to choose Griffith or Evatt because in the circumstances I was satisfied that the Senate had made the parliament unworkable. Therefore I did not have to make that invidious choice.' So Sir Ninian left open that question and that is a question that remains as to whether or not you have to satisfy the governor-general of that unworkability point. We do not have any further decision on that but I think it is quite interesting that if you look at Sir Ninian's own record of his views on that he gave equal weight to both sides of the argument and decided, as a good judge does, that, if I don't have to decide, that is probably a good thing.

Question — That was an inspiring address and a great tribute to Harry. My question is a simple one. You referred to justiciability in relation to the courts not interfering with the internal workings of parliament. If the two senators who are currently in dispute have their roles terminated here, would any legislation they passed be justiciable? Is it possible there was a flawed vote and the courts would interfere?

Anne Twomey — Again, another really interesting question. I was talking to Rosemary about this a bit earlier. To the extent that we have any authority on the proposition—there is only one case and it is only what lawyers call ‘dicta’: it is not something that decided the case; it is just an observation in the case—the court took the view that you were a senator until such time as your seat was vacated and therefore any voting you did in the meantime would not be held to be invalid. So the courts would not go back and look at the votes and say, ‘You have to take that person out because they were disqualified.’ That is also consistent with the English approach—that is, you cannot go behind the parliamentary roll. As far as they are concerned, you cannot go behind the list of votes and, so long as parliament itself says that the vote has been passed, the courts there won’t look behind it either. If somebody challenged that, the court could change its mind. That is always a possibility, but I think a fairly remote one because courts would also appreciate that you could cause absolute chaos by going and doing that. If you found that someone who had been voting in the parliament for two years was there invalidly, you would have to invalidate everything prior to that. Given the catastrophic nature of that kind of decision, my suspicion is that, if you did try to overturn it, the courts would not be interested in taking that path. I am reasonably confident that the courts will not go back and look at laws passed with the vote of someone later held to be disqualified.

Question — I was interested in your survey of situations where, perhaps in days gone by, state governors have conferred with chief justices because they hold the position of lieutenant-governor when the governor is not able to act, in a sense being a deputy governor for practical purposes. It just raised with me the question that there is no such similar arrangements at the federal level. The chief justice is not the lieutenant governor and obviously the administrators come in when the governor-general is away. I wonder if it would be your view that because of that arrangement a governor conferring with a chief justice at the state level would have a legitimacy that just does not arise at federal level?

Anne Twomey — Rosemary, you have a very informed audience! Fabulous questions! You are right that at the state level it is different because the lieutenant-governor is a judicial officer. Since the trauma of 1975 and the many attacks on Sir Garfield Barwick because of the advice, and later in relation to Sir Anthony Mason as well, most judges now take the view that they just won’t be involved in advising on that, either at the state level or at the Commonwealth level, simply because of concerns about how that would now fit in with the separation of powers. That is now more justified than it was in 1975 because now we have changes in our legal system in relation to the separation of powers. To get technical, we have a whole lot of cases about judges acting as *persona designata* and what they can and what they can’t do and whether it is incompatible with being a judge and all the rest of it. We have a

huge amount of jurisprudence that has happened since 1975 that potentially makes it more dangerous for a judge to advise because the issue may be regarded as justiciable in a way that wasn't the case in 1975.

So in answer to your question, although you are right that as lieutenant-governor they do have a closer connection with governors, and they do talk informally I understand just as a matter of general principle about these sorts of things, they also disappear very quickly when a crisis is in play and try not to advise in relation to those, simply because of the issues about the separation of powers and the like. Regardless of the federal or state level, judges in Australia are reluctant to be involved. Interestingly, however, if you contrast this with Canada, judges still are involved there in advising on those sorts of things. At the federal level in Canada it is the chief justice and judges of the Supreme Court who do fill that role, unlike in Australia. They are much more relaxed about it in Canada and other jurisdictions, but because of our 1975 trauma we are much more reluctant to have judges involved these days.

Question — I want to follow up on the scenario advanced by your student about the passage of private members' legislation against the wishes of a government. Surely that would be prima facie evidence of loss of confidence by parliament in that government and the government should then resign. Has there been an example in recent times of private members' legislation on a significant issue being passed against the wishes of the government?

Anne Twomey — I think there have been. I think you would probably find some examples in the United Kingdom during their minority government where legislation was passed against the wishes of the government. Often it is the case in a hung parliament that amendments and the like can be passed that the government is not terribly thrilled about. Among votes you lose in the parliament there is a distinction between votes on matters of confidence and votes that aren't on matters of confidence. Now, in the case of my student's scenario about the same-sex marriage bill, it may well be the case that some members of the government might take the view that it is a matter of conscience, that there should have been a free vote, and cross the floor, but it isn't a permanent loss of confidence. It falls into that temporary category because for the rest of the time they are going to keep voting with the government—'It is just that we crossed the floor once; it doesn't mean the end of the government because the next time and the time after that and the time after that we will be voting for the government.' It becomes critical, however, if the government says, 'This is a bill that is an issue of confidence and if we get defeated on this then we will have to resign.' Sometimes that is done as a threat. I think Tony Blair said that if he had lost the vote on the Gulf War he would have resigned. When David Cameron lost the Brexit campaign, although that was a referendum not a parliamentary vote, he

did resign. So there can be occasions where there are issues of confidence and the government will fall, but there can be other occasions where the government itself still has support and can continue to govern even though the particular circumstances of a private members' bill are such that it could be passed.