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July 1988

**Legislation by Proclamation
Parliamentary Nightmare,
Bureaucratic Dream**

Anne Lynch

**The Discharge of Senators
from Attendance on the Senate upon a
Dissolution of the
House of Representatives**

John Vander Wyk

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NOTE

This issue of *Papers on Parliament* contains two papers dealing with subjects which, at first sight, might be regarded as somewhat technical: the fixing of the time of commencement of statutory provisions by means of proclamations, and the wording of the proclamations dissolving the House of Representatives.

As the papers clearly show, however, these two matters are of central concern in any consideration of the position of Parliament in the system of government as it now operates.

Provisions for legislation to commence on a day to be proclaimed, as the first paper shows, are being used more frequently, and amount to a significant delegation of legislative power to the executive government, with the executive having the power to determine whether legislation passed by the elected Houses will ever come into effect. This delegation of legislative authority is different in kind from the familiar type of delegation by means of the regulation-making power discussed in the first paper in this series, but it is no less important and worrying.

The second paper shows how a misinterpretation of precedents by an executive government, careless of proper parliamentary forms and not concerned to preserve the constitutional position of Parliament, can lead to a distortion of constitutional practice.

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Legislation by Proclamation Parliamentary Nightmare, Bureaucratic Dream

by Anne Lynch

Introduction

In September 1987, a great parliamentary sensation occurred. During question time, the Opposition in both Houses asked the Government whether, assuming the passage at a joint sitting of the Australia Card Bill — the subject of the simultaneous dissolution of the Senate and the House of Representatives which gave rise to the July election — its operation could be rendered nugatory because the making of regulations to bring the Act into operation could be nullified if the Senate, as a House with the capacity to disallow such regulations, chose so to do. The Leader of the Opposition in the Senate (Senator Chaney) tabled, by leave, an opinion from a retired public servant, Mr Ewart Smith, indicating that the effect of the regulation-making power contained in the Bill would be as described. After consideration of the opinion, the Government conceded that there was no way to overcome the consequences Mr Smith had indicated.

Despite the consistent efforts of the Regulations and Ordinances Committee over the past half-century or more, and despite, too, the valiant efforts of the youthful Scrutiny of Bills Committee, this event was arguably the first time that public attention has been focussed on the dramatic implications of the almost disregarded technical clauses of legislation. As with all abstruse, legalistic provisions of the

law, the mechanisms which make the law operative tend to be ignored, as much by legislators as by the purveyors of information to the public. As the Australia Card instance proved, however, such ignorance (in both senses) can be a ghastly mistake.

Proclamation of Acts

During discussions on the ramifications of the Australia Card legislation, mention was made that the problem could have been avoided if the provisions of the Act had come into operation by proclamation, rather than by regulation. The 'what might have beens' were, of course, of the hand-wringing variety; if, however, attention were to be drawn to a little-known byway of Senate history, the complacent assumption that, in all future legislating, resort to proclamations will solve all problems might not be well-founded. With a realisation of the higher stakes involved, the attention of legislators might, sooner rather than later, be focussed on the technical, enabling provisions of Acts.

Indeed, such a realisation has to some extent already occurred. In the report of Senate Estimates Committee D of October 1986, the following comments were made:

Proclamation of Acts

The Committee was concerned to learn of the lengthy delays that have occurred in proclaiming the *Public Lending Rights Act 1985* and the *Protection of Movable Cultural Heritage Act 1986*, neither of which has yet been proclaimed.

The Committee appreciates that there can sometimes be a number of legitimate reasons for not proclaiming or delaying the proclamation of legislation. The Department explained to the Committee that the delays in these cases result from the Department having to prepare a gazette notice for the Minister to spell out the operation of the Public Lending Rights scheme and to develop a national cultural heritage control list. The Committee does not regard these explanations as satisfactory for the following reasons:

- (i) There has been a considerable period of time since the Bills were introduced into Parliament. The Committee expects that if Regulations or any other actions need to be prepared consequent upon the passage of the Bills, such preparation would have commenced following their introduction or indeed in conjunction with the original drafting. The legislative history of

each Bill was as follows:

Public Lending Rights Act 1985

House of Representatives:	Introduced	17 April 1985
	Passed	9 May 1985
Senate:	Introduced	9 May 1985
	Passed	6 December 1985
Royal Assent:		16 December 1985

Protection of Movable Cultural Heritage Act 1986

House of Representatives:	Introduced	27 November 1985
	Passed	18 February 1986
Senate:	Introduced	11 March 1986
	Passed	1 May 1986
Royal Assent:		13 May 1986

In respect of the Protection of Movable Cultural Heritage Act, the Department indicated that it hoped the legislation will be proclaimed towards the end of 1987 two years after its introduction in Parliament!

- (ii) The effectiveness of the Senate's capacity to review the Public Lending Rights Bill was reduced due to the Bill being pushed through the Senate's Committee of the Whole stage on the last sitting day in 1985, with the Government claiming its passage was urgently required.

The Committee is aware that there are a considerable number of Acts and sections of Acts awaiting proclamation. The Committee regards this situation as complete derogation of responsibility by departments and Ministers in allowing such a volume of legislation to remain inoperative. The Committee will be closely monitoring legislation with similar commencement provisions which are the responsibility of departments within the Committee's purview.

When the Appropriation Bills were being considered in the Senate on 17 November 1986, Senator Puplick expanded upon the issues raised in the Report. In illustrating his point, he gave quite horrifying examples of outstanding proclamations some dating back as far as six years and, reflecting the

comments of Estimates Committee D, made the particularly pertinent point that, in relation to one of the Acts on which the Committee had commented the *Public Lending Rights Act 1985*:

We were told when the Bill was debated in this chamber that the amendments the Opposition sought to make to the legislation could not be made, that the Bill was an urgent Bill which could not be amended by the Senate in December 1985 because the House of Representatives had adjourned for the year and the Government was not prepared to recall it to deal with amendments which the Senate might have been persuaded to make.

The Committee took up the point again six months later, and in addition reported in equally trenchant terms on the Lemonthyme and Southern Rain Forests Commission of Inquiry Bill a Bill which was regarded as so urgent that the Senate needed to sit on a non-scheduled sitting day to ensure its passage. The Committee reported as follows:

Proclamation of Acts

The Committee expressed concern in its October 1986 Report at the lengthy delays in proclaiming the *Public Lending Rights Act 1985* (Royal Assent 16 December 1985) and *Protection of Movable Cultural Heritage Act 1986* (Royal Assent 13 May 1986), thereby leaving the legislation inoperative. These Acts have still not been proclaimed.

The Department indicated that it took 'some time longer than anticipated' to finalise the details of the *Gazette* notice required for the Public Lending Rights scheme and, as a result of this delay, it was not possible to proclaim the Act in time to commence this financial year. The Department advised the Committee that, as there are major advantages in commencing the scheme at the start of an annual funding cycle, proclamation of the Act was delayed for 12 months and will now occur on 1 July 1987.

The Committee was, however, assured by the Department that 'there has been no disadvantage at all to the people under the PLR scheme, either for the authors or the publishers. The payments have continued.'

In respect of the Protection of Movable Cultural Heritage Act, the Committee was informed that an Interim National Cultural Heritage Committee had been appointed and was actively working towards a proclamation date of 1 July 1987. The Committee's concerns at the effect of this delay were acknowledged by the Department in the following exchange:

Senator Newman You recognise that, with this long lead time between the passing of the legislation and the proclamation, you are running all sorts of risks of things disappearing that you would have wanted to list, presumably.

Mr McArthur The Committee is well aware of the risk. We are not too sure how valid it is, but there certainly is a risk of losing things.

Hansard, 16 April 1987, p. D13.

The Committee has again raised this issue as it is concerned, first, that the Senate's programming and consideration of certain legislation is being curtailed when it is claimed that passage of a particular Bill is urgently required when subsequent administrative actions clearly indicate there is no urgency, and secondly, that administrative delay may result in undesirable, if unintended, additional effects.

The effects on Senate programming were also highlighted by the passage of the Lemonthyme and Southern Forests (Commission of Inquiry) Bill. The Senate sat on Friday 3 April, not previously a scheduled sitting day, specifically to deal with this Bill. It subsequently received Royal Assent on 16 April and as at 6 May has still not been proclaimed.

The Senate subsequently met on 28, 29 and 30 April; and 1, 4, 5, 6 and 7 May. The Lemonthyme Act was proclaimed to come into effect on 8 May — a refreshingly short time given the general pattern of the proclamation device — but nonetheless the resort to proclamation was unfathomable given the declared urgency and straightforwardness of the legislation.

Background to Disquiet

As with all matters of this nature, in the case of proclamations the genesis of the realisation of their significance lay in work undertaken in a number of areas previously. In 1980 it was noticed that provisions which left to the executive the option as to whether, and if, enactments of the Parliament should begin to operate were, with increasing frequency, displacing the three most common ways of declaring the law of the Commonwealth; that is, by laws effective from the date of Royal Assent; by laws to come into effect on a specific date declared in the legislation; and by laws which come into operation 28 days after Royal Assent.

Increasingly, it was discovered, recourse was had to the words, usually contained in clause 2 of a bill, 'This Act shall come into operation on a day to be fixed by Proclamation'. Such a provision means that there is a discretion in the executive to suspend indefinitely the operation of laws passed by the Parliament. The consequences of this are many:

- (a) what, in effect, the Parliament is doing is delegating its most important function, that of legislating, to the executive to implement the will of the people as expressed through its parliamentary representatives. Thus, in practical terms, it places in the hands of the bureaucracy an enormous power to gainsay or even override the wishes of the people;
- (b) if legislation is passed without a time limit set on its implementation, it provides encouragement because there is no pressure to have structures and administrative details in place by a defined date to the bureaucracy to be tardy in implementing schemes determined by Parliament;
- (c) it can be a method of window dressing, so that the executive can declare that an Act of Parliament has been passed in order to help a disadvantaged group within a community without ever having to mention that there is no intention to implement the proposals contained therein because of, for example, a lack of money;
- (d) it can also be used as an instrument of blackmail for example, 'we will pass this legislation, but will not bring it into effect until you, the citizen, behave in a particular way which we do not like'; and

- (e) finally, and in my view most significantly, the failure to proclaim a law whether in whole or, as now more frequently and insidiously occurs, in part leaves those with a need to be concerned about what the law is in a state of constant indecision and doubt. It is, one might have thought, reasonable to expect that the law is known to operate as a result of its passage through all three constituent parts of the Parliament; that is, by passage of a bill through the House of Representatives and the Senate and Assent by the Governor-General. This together with a known date of operation alone gives certainty to the law.

Present position

While, in the early days of commencement of acts by proclamation, the intentions of the draftsmen were perfectly reasonable a provision of this nature was regarded as a departure from the norm, Royal Assent, etc., and was used only when, for example, complex regulations could not be finally prepared until enabling legislation was authorised by the Parliament in recent years the practice of using proclamations has become an art form. As indicated in paragraph (e), among the worst features of recourse to proclamation is that it is no longer confined to Acts as a whole, but even to sections, subsections or paragraphs of Acts.

A few random examples might suffice to illustrate the point. The *Nursing Homes and Hostels Legislation Amendment Act 1986* contains the following commencement provisions:

2. (1) Section 30 shall be deemed to have come into operation on 5 June 1985.
- (2) Sub-sections 5(1) and (2) shall be deemed to have come into operation on 22 October 1986.
- (3) Sub-sections 5(3) and (4) shall come into operation on 6 May 1987.
- (4) Sections 7, 16, 17, 21 and 22, sub-section 25(2) and sections 34, 35, 37 and 38 shall come into operation on such day as is, or on such respective days as are, fixed by Proclamation.

(5) The remaining provisions of this Act shall come into operation on the day on which it receives Royal Assent.

Sections 16, 17, 21, 34, 35 and 37 came into effect on 1 May 1987; section 68 was operative from 24 April 1987, and the remaining provisions specified in the commencement provision still await proclamation.

The commencement provisions of the *Sales Tax (Exemptions and Classifications) Amendment Act 1987* also deserve to be quoted in full:

2. (1) Subject to this section, this Act shall come into operation on the day on which it receives the Royal Assent.
- (2) Sub-sections 3(1) and 4(1) shall be deemed to have come into operation on 1 July 1987.
- (3) Sub-sections 3(4) and 4(4) shall come into operation on a day to be fixed by Proclamation.
- (4) Sub-sections 3(5) and 4(5) shall come into operation on the day on which the *Customs Tariff Act 1987* comes into operation.

And it seems surrealistically appropriate that a succession of Acts relating to the Public Service bureaucracy should have the most complex and confusing commencement clauses of all. I quote the *Public Service Reform Act 1984* as an exemplar of the some half-dozen Public Service Acts passed in the last six years:

2. (1) Sections 1, 2, 3, 4 and 7, sub-sections 29(1) and (3), sections 107 and 108, Parts III and IV and sections 15, 138, 142, 144 and 149 shall come into operation on the day on which this Act receives the Royal Assent.
- (2) Section 21, sub-section 29(2), sections 32, 33 and 35, sub-sections 37(1) and 38(1), sections 39, 40 and 41, sub-section 43(1), sections 44 and 46 to 50 (inclusive), sub-section 56(1), section 59, sub-sections 87(1), 96(2), 97(4), 99(3), 100(2), 104(2) and 105(2), section 106, sub-sections 109(2), 110(3) and 130(2) and section 157

shall come into operation immediately after section 27 of the *Public Service Acts Amendment Act 1982* comes into operation.

(3) Section 13 and sub-sections 97(1), 100(1), 105(1), 109(1) and 130(1) shall come into operation immediately after section 15 of the *Public Service Acts Amendment Act 1982* comes into operation.

(4) The remaining provisions of this Act shall come into operation on such day as is, or on such respective days as are, fixed by Proclamation.

The further complication contained in the last two examples, which link the operation of sections and subsections of the Acts with the operation of other Acts (often with their own provisions not effective until a day to be proclaimed), makes the process of discerning what the law is even more labyrinthine.

Unfortunately, these examples are not atypical.

A Matter of Principle

When the matter first arose in the early 1980's, the Parliament was concerned that, given the large amount of legislation that commences on a date fixed by proclamation (which is often a considerable time after assent), it was difficult, and time consuming, to keep a check on whether certain Acts, or sections thereof, had commenced to operate. While this suggests a pragmatic reason for concern, there was also a matter of high principle involved. Given that the Parliament had, in effect, delegated its legislative authority to the executive, the principle which underlay its desire to be notified that legislation was operative was a question of courtesy and proper constitutional relations between the Crown and Parliament. In February 1982, therefore, the then President of the Senate wrote to the Leader of the Government in the Senate, requesting that the Government consider introducing a mechanism whereby proclamation dates of Acts, or sections thereof, might be notified to the Parliament. The response of the Leader indicated that the Government would be willing to provide a computer printout of the proclamation dates to assist in record keeping.

As was pointed out at the time, however, the point at issue was not whether the information could be ascertained, albeit with some difficulty, but rather the formal

notification to the Parliament that the executive had exercised a legislative authority on the Parliament's behalf. During the next 18 months, discussions continued between officers of the various departments involved the Senate, the Secretary of the Federal Executive Council (an officer of the Department of Prime Minister and Cabinet), the Attorney-General's Department and officers of the Australian Government Publishing Service who have responsibility for publishing Proclamations in the Australian Government Gazette.

In the meantime, however, Senator Peter Rae, a Senator with a deep understanding of the constitutional relationships between Parliament, the executive, and the Governor-General, gave the following notice of motion:

I give notice that, on the next day of sitting, I shall move That an Address be presented by the Senate to His Excellency the Governor-General, as follows:

MAY IT PLEASE YOUR EXCELLENCY

We, the Senate of the Commonwealth of Australia in Parliament assembled, desire to present the following address:-

The Senate

- (a) noting the Constitutional responsibilities of the Queen, the Senate and the House of Representatives in relation to the passage of all proposed laws of the Commonwealth;
- (b) noting that each constituent part of the Parliament of the Commonwealth advises the others of agreement, amendment, and assent, as the case may be, to all such proposed laws; and
- (c) noting that substantial numbers of laws which pass both Houses of the Parliament and receive the Royal Assent provide that such laws or provisions thereof shall come into operation on a day to be fixed by Proclamation, requests your Excellency to notify each House of the Parliament of each

Proclamation which is made to specify a day on which an Act of the Parliament or any provision thereof shall come into operation.

The purpose of the notice was to make the point, in what the Senator regarded as a constitutionally proper way, that the Governor-General as, in effect, the legislature's delegate might deem it appropriate to advise the Parliament of the completion of the legislative process. Although the notice of motion was never moved, it unquestionably provided both the focus of and the impetus for this important issue, and subsequently arrangements were made for all proclamations of this nature to be tabled in each House of the Parliament.

The first such proclamation was tabled in December 1983. On tabling, the Deputy President made the following statement to the Senate on behalf of the President:

I refer to the Proclamation by His Excellency the Governor-General which has just been tabled by the Clerk. This is the first occasion on which the proclamations of commencement dates of Acts have been tabled in the Parliament.

This procedure has been adopted following initiatives by the Senate and is designed to inform honourable Senators of what, in many cases, might be considered to be the completion of the legislative process. It also provides a formal means of ensuring that all gazettals of proclamations are recorded appropriately within the Parliamentary Records.

Honourable Senators would be aware that the date of the Governor-General's Assent to an Act is already reported in the Senate, and this new procedure will complement this practice.

In conclusion, I wish to thank the Government for its assistance in facilitating the introduction of what I consider to be a most important procedure.

Further Questions

The Government having satisfactorily recognised that part of the constitutional principle which entitles the Parliament to be advised that the legislative process is now complete, other questions remain still to be resolved. As indicated earlier,

there are many reasons why recourse to proclamation should be made only in extremely limited circumstances. Also mentioned has been the fact that the Parliament, in relinquishing its legislative authority to the executive, is giving up a basic right, and its most important function – that of legislating.

The resort to legislation by proclamation has been increasing rather than diminishing, culminating in a most extraordinary provision contained in a ridiculously named Act of the Parliament: the Laying Chicken Levy Act of 1988. In this case, not merely has Parliament delegated its power to legislate to the executive – which in theory at least is responsible and accountable to the Parliament – the commencement provision of the Act provides as follows:

2. (1) This Act commences on a day to be fixed by Proclamation.

- (2) The day fixed by Proclamation for the purposes of subsection (1) shall not be a day earlier than the day recommended to the Minister by the Australian Council of Egg Producers.

One would hope that the legislators were so taken up with the hilarity of the title of the bill that the provision escaped their attention. The alternative explanation that it is acceptable that legislative authority to bring the law into operation be handed over to a body, however well-intentioned, without any accountability to the Parliament – is terrifying.

A further point: at least by the process of notification, the Parliament, and one would hope through the Parliament the people, is now informed as to what legislation is operative and, concomitantly, which laws people are expected to obey. The question arises as to whether an executive to which legislative authority has been delegated should give an account of its stewardship concerning those laws which are not yet operative, and the reasons for the delay. As the Reports of Estimates Committee D, quoted earlier, have indicated, at least some members of the Parliament are aware of this problem. It may be that, if sufficient impetus is generated by the work of that Committee, advice to the Parliament on that matter, comparable to the notification of proclamations, might be forthcoming.

Conclusion

One might be tempted to suggest that the matters here raised are evidence of a desire to cut down more trees or to empire-build. 'Make work' notions are often

attractive to the bureaucracy generally, and maybe even the Senate bureaucracy might be accused of having caught the disease. However, the theme of this paper has been the delegation, perhaps thoughtlessly, by the Parliament to the second arm of government of its primary function of law-making. That delegation should not be given lightly; nor should those to whom it is entrusted treat it with disdain.

The principle of certainty under the law can be assured only if the law is known and disseminated, in the least complicated way. The obscurantism of general legislative provisions is bad enough. To be forced to hunt through documentation other than the Act to establish whether a law is operative is appalling. It has been a long-established dictum that ignorance of the law is no excuse for transgression. With the myriad of difficulties placed in the way of even the experts in law in establishing what *is* the law, justice demands that the dictum might well need to be superseded. I would suggest, however, that the more desirable and effective method of avoiding the problem is to prevent it at the source during the passage of a Bill through the Parliament.

The Discharge of Senators from Attendance on the Senate upon a Dissolution of the House of Representatives

by John Vander Wyk

Introduction

This paper contends that the practice by which the Governor-General purports to discharge Senators from attendance on the Senate during a dissolution of the House of Representatives has no historical basis and arises from a misreading of early British and Australian dissolution proclamations. The paper then asks whether there is, nevertheless, a constitutional basis for the practice, and concludes there is not.

In his proclamation dissolving the House of Representatives at noon on 26 October 1984, the Governor-General also purported to 'discharge' Senators from attendance on the Senate as from that time and date 'until the day appointed for holding the next session of the Parliament'.

This represents the recent practice, and it is based upon a misconception.

United Kingdom practice

In the United Kingdom, Parliament is 'dissolved' in the sense that a parliamentary

period, measured by the life of a particular House of Commons, has ended, either by effluxion of time or by proclamation. Elections for the House of Commons must follow, and a new Parliament will result. Prorogation of Parliament is, in the United Kingdom, a prerogative act of the Crown by which all business is suspended for a time until the Parliament is once more summoned to meet. It ends a session of the Parliament without ending the Parliament, although the effect of a prorogation is to terminate all the current business of the Parliament.

At the turn of the century, the practice in the United Kingdom at the end of a Parliament was to prorogue for a short period and then, before that period expired, to dissolve the Parliament by proclamation.

The model for the first Australian dissolution proclamation was probably the proclamation dated 17 September 1900 which dissolved the United Kingdom Parliament with effect from 25 September 1900. The proclamation first recites that the Parliament 'stands prorogued to Saturday the Twenty-seventh day of October next'; it then dissolves the Parliament and goes on to state that 'the Lords Spiritual and Temporal, and the Knights, Citizens, and Burgesses, and the Commissioners for Shires and Burghs, of the House of Commons, are discharged from their Meeting and Attendance on the said Saturday the Twenty-seventh day of October next'.

The duty of attendance from which the Lords and Members of the Commons were discharged was that of coming on the day to which the Parliament stood prorogued. The reason for the discharge was that the prorogation to that day was superseded by the dissolution.

Early Australian practice

The wording of early Australian dissolution proclamations of necessity had to differ in some respects from those of the United Kingdom because of differing constitutional requirements, but the form of the proclamation was essentially the same. Thus, the first Australian dissolution proclamation, dated 23 November 1903, recites that the Parliament 'stands prorogued until the 24th day of November, 1903'; it then dissolves the House of Representatives [*not* the Parliament, as in the United Kingdom] and goes on to state: 'And I [the Governor-General] do hereby discharge the Honourable the Senators from attendance on the 24th day of November, 1903'. The key points to note are that:

- (a) the *Parliament* stood prorogued to 24 November
(the prorogation proclamation having been

issued on 11 November¹);

(b) the House of Representatives was dissolved on 23 November;

(c) Senators were discharged from attendance on 24 November, the date to which the Parliament stood prorogued.

Thus, the clear intention of the provision relating to Senators was to discharge them from a duty of attendance on the date to which Parliament stood prorogued.

The second Australian dissolution proclamation, dated 5 November 1906, followed the same pattern as the first: Parliament stood prorogued to 9 November 1906, the House of Representatives was dissolved on 5 November, and Senators were discharged from attendance on 9 November, the date to which Parliament stood prorogued.

The April 1913 Proclamation

A variation occurred in the third dissolution proclamation, dated 11 April 1913. On this occasion the House of Representatives was declared to be dissolved on the same date to which the Parliament stood prorogued; that is, 23 April 1913. Senators were discharged from attendance 'on that date', the relevant provision reading thus: 'and I discharge honourable Senators from attendance on that date'.

The coincidence of dates intrudes an element of ambiguity in that the reference to the discharge of Senators from attendance 'on that date' could be interpreted as referring to the date of dissolution of the House of Representatives rather than the date to which Parliament stood prorogued. Such an interpretation would, of course, be incorrect in the light of the express wording of previous United Kingdom and Australian proclamations.

Subsequent dissolution proclamations were worded in substantially the same way as that of 1913. In each case the date of dissolution of the House of Representatives and the date to which Parliament stood prorogued were the same, and in each case Senators were discharged from attendance 'on that date'.

1. Parliament was prorogued on 22 October to 14 November 1903; Parliament was further prorogued on 11 November to 24 November.

The September 1928 proclamation

In 1928 a major departure from previous practice occurred when the House of Representatives was dissolved without Parliament having been previously prorogued. At the time of the dissolution proclamation, which was dated 27 September 1928, the Senate stood adjourned to a time and date to be fixed by the President.

The wording of the dissolution proclamation reflected this departure from previous practice, there no longer being any reference to the prorogation of Parliament. However, the provision discharging Senators from attendance remained. The wording of the relevant provision was:

Now therefore I, the Governor-General aforesaid, do by this my Proclamation dissolve the House of Representatives as on and from the ninth day of October, One thousand nine hundred and twenty-eight, and I discharge Honourable Senators from attendance on that date.

The 1928 wording was maintained in the dissolution proclamations of 1929 and 1931. In 1934 the reference in the preamble to the power of the Governor-General to prorogue the Parliament was also omitted, no doubt to reflect the then current practice of not proroguing the Parliament prior to a dissolution of the House of Representatives.

This history makes it clear that the retention in dissolution proclamations of the provision discharging Senators from attendance is, in the absence of a prorogation requiring their attendance at a future date, an error, one which probably resulted from a misreading of the dissolution proclamations issued between 1913 and 1928.

The ambiguity of the reference to 'on that date', where the date in question was the date of dissolution of the House of Representatives and the date to which the Parliament stood prorogued, is most likely the cause of the misreading.

The decision not to prorogue Parliament prior to a dissolution of the House of Representatives should have resulted in the removal from subsequent dissolution proclamations of the provision discharging Senators from attendance. This did not occur.

The September 1937 Proclamation

Two important changes appeared in the wording of the dissolution proclamation dated 16 September 1937. The first change was in the wording of the preamble, which was altered to refer, for the first time, to the Governor-General's power under section 5 of the Constitution to 'appoint such times for holding the sessions of the Parliament as he thinks fit'.

The second change was in the provision discharging Senators from attendance. In the 1937 proclamation Senators were discharged from attendance not only on the date of dissolution of the House of Representatives, but were declared to be discharged until the commencement of the next session. The form of words used was as follows:

and I discharge Honourable Senators from attendance on that date and until the day appointed for the commencement of the next Session of the Parliament.

This formula, with slight variations, has been used since. The wording of the dissolution proclamation dated 26 October 1984, for example, was as follows:

Whereas section 5 of the Constitution of the Commonwealth of Australia provides that the Governor-General may, by Proclamation, dissolve the House of Representatives:

Now therefore I, Sir Ninian Stephen, the Governor-General of the Commonwealth of Australia, by this Proclamation dissolve the House of Representatives at noon on Friday, 26 October 1984.

And I discharge Senators from attendance as from that time on that date and until the day appointed for holding the next session of the Parliament.

The intention of this formulation appears to be to prevent the Senate from meeting as a body during the time that the House of Representatives is dissolved, but in the absence of a prorogation of Parliament prior to the dissolution of the House of Representatives there does not appear to be any basis for discharging Senators from attendance at all. The discharge from attendance originally belonged to the prorogation and should have been dropped from dissolution proclamations when the practice of a prior prorogation was dropped. Its retention is not supported historically.

A Constitutional Basis?

Is there, nevertheless, a constitutional basis for the retention of the discharge provision?

The most relevant provision of the Australian Constitution is section 5. This provides as follows:

The Governor-General may appoint such times for holding the sessions of the Parliament as he thinks fit, and may also from time to time, by Proclamation or otherwise, prorogue the Parliament, and may in like manner dissolve the House of Representatives.

After any general election the Parliament shall be summoned to meet not later than thirty days after the day appointed for the return of the writs.

The section makes no direct reference to a power of the Governor-General to discharge Senators from attendance upon a dissolution of the House of Representatives. The power, if it exists, has to be inferred from the section. The provision upon which such an inference might be based is that which empowers the Governor-General to 'appoint such times for holding the sessions of the Parliament as he thinks fit'.

In the United Kingdom, a session is normally ended by a prorogation, hence the Westminster practice of proroguing Parliament prior to its dissolution. A dissolution of the Parliament may occur in the United Kingdom without a prior prorogation, during an adjournment of both Houses, and the session is then regarded as having ended upon the issue of the dissolution proclamation, but such occasions are infrequent. In either case a new session starts with the commencement of the new Parliament.

The customary view in Australia has been to regard a session as ending either upon a prorogation of the Parliament or a dissolution of the House of Representatives. This view appears to have resulted from the direct application of Westminster practice to Australia, but it takes no account of the fact that the Australian situation is different in a key respect, namely, that the Australian Constitution established the Senate as an independent body with a continuing existence. Section 5 of the Constitution empowers the Governor-General to dissolve only the House of

Representatives, whereas in the United Kingdom the Parliament is dissolved. The only circumstance in which a dissolution of the Senate occurs is in the event of a legislative deadlock under the provisions of section 57. The continuous character of the Australian Senate and its different origin as a federal House, in contrast with the House of Lords, make the direct application of Westminster practice inappropriate.

On the few occasions since 1900 where the United Kingdom Parliament has been dissolved without a prior prorogation, the dissolution proclamation has discharged the Lords and Members from further attendance, but the discharge has followed from the fact that both Houses, which previously stood adjourned, formally ceased to exist. A direct analogy cannot be drawn from this situation because, in the Australian context, only the House of Representatives ceases to exist. Analogy with Westminster practice would produce an Australian dissolution proclamation in which Members of the House of Representatives, but not Senators, were discharged from further attendance.

Section 5 of the Australian Constitution empowers the Governor-General to appoint times for the commencement of sessions of the Parliament, but it does not explicitly empower him to terminate sessions of the Parliament, other than by prorogation. This power, if it exists, would have to be read into the meaning of the section. Such a reading, it is submitted, is not supported within the overall context of the Constitution, particularly the Senate being a body with a continuous existence. If this is so, then the decision in 1928 not to prorogue Parliament prior to a dissolution of the House of Representatives also removed the only opportunity for the Governor-General to suspend the operations of the Senate during a dissolution of the House of Representatives.

While a session of Parliament must have an end as well as a beginning, it is suggested that in the situation of a continuing Senate, and in the absence of a prorogation, a session should be regarded as terminating not when the House of Representatives is dissolved but on the day prior to the commencement of a new Parliament, as marked by the meeting of a new House of Representatives. This would also more accurately reflect the situation whereby the Senate, since federation, has claimed the right to exercise and exercised a number of its powers while the House of Representatives is dissolved, and has reserved its position in regard to the exercise of its full range of powers.² The Senate now regularly

2. The Senate's power to meet during a dissolution of the House was declared most recently in the following Resolution, passed by the Senate on 22 October 1984:

That the Senate declares that where the Senate, or a committee of the Senate which is empowered to do so, meets following a

provides, for example, for its committees of inquiry to meet 'notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives', and a number of committees have done so without challenge.

The discharge from attendance of members of both Houses of the Parliament is a Westminster practice which, at the turn of the century, resulted from the prorogation of a Parliament prior to its dissolution. When the Parliament was dissolved, both Houses ceased to exist, and thus the members of both Houses had to be released from their obligation to attend on the day to which the Parliament had previously been prorogued. In Australia, pursuant to section 5 of the Constitution, and ignoring for present purposes the deadlock provisions of section 57, it is only the House of Representatives, not the Parliament, which is dissolved. The Senate continues in existence; it is in a different situation from that of the House of Lords.

The 'organic whole' theory that the two Houses live and die together is an incorrect application of a United Kingdom practice to a constitutionally different Australian situation. The practice may have appeared appropriate in the case of a prorogation of the Australian Parliament, although even then it does not give due recognition to the Senate's independent and continuing role, but it is entirely misapplied in the situation of a dissolution of the House of Representatives only. There appears to be no constitutional basis for Senators to be discharged from attendance on the Senate during a dissolution of the House of Representatives.

dissolution of the House of Representatives and prior to the next meeting of that House, the powers, privileges and immunities of the Senate, of its members and of its committees, as provided by section 49 of the Constitution, are in force in respect of such meeting and all proceedings thereof.

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