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# **Cutting the Gordian Knot: Limiting Rather than Codifying the Powers of a Republican Head of State\***

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The question of whether Australia should become a republic will no doubt, sooner or later, come to the forefront of public debate again. It is *not* an issue which I intend to address today. Instead, I have been asked to speak about the constitutional issues concerning transformation to a republic.

Many of these issues were thrashed out earlier, prior to the 1999 republic referendum. However, the loss of that referendum pushed the public debate towards consideration of a directly elected head of state. Opinion polls consistently show that of all republican models, Australians would prefer a directly elected head of state.<sup>1</sup> The Labor Party's Platform states that Labor will conduct plebiscites to establish support for an Australian head of state and the preferences of the Australian people for different forms of a republic.<sup>2</sup> All these factors suggest that when the republic next rises up the political agenda, it will be some form of direct election model that will be on the table. This means that new and much broader constitutional issues will need to be grappled with, and it is these that I propose to discuss today.

## **A directly elected head of state**

Personally, while I understand the attraction in having a say in who is our head of state, I cannot see the value of directly electing the head of state. First of all, the types of people who would make a good head of state are extremely unlikely to stand for election. Secondly, it is likely that only political parties or the very rich will have the money to run a national election campaign—reducing the choice for head of state. Thirdly, one really must wonder on what basis candidates would campaign. 'Vote for me because I behave well at funerals'? 'Vote for me because I know which knife and

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<sup>1</sup> John Warhurst, 'Trajectory of the Australian Republic Debate', Senate Occasional Lecture, 6 March 2009, published in this volume at p. 1.

<sup>2</sup> ALP National Platform and Constitution 2007, Chapter 11, para 23: [http://www.alp.org.au/platform/chapter\\_11.php#11constitutional\\_reform](http://www.alp.org.au/platform/chapter_11.php#11constitutional_reform).

fork to use at dinner parties and I can negotiate a cocktail party without spilling food down my shirt'? 'Vote for me because I have special ribbon-cutting skills and don't fall asleep while watching handkerchief-dancing or listening to interminable speeches'?

I have recently been reading the private letters of Sir Philip Game, who was Governor of New South Wales in the 1930s. After being in the job for 6 months he wrote to his mother-in-law that the two great skills needed to be Governor were the ability to give a speech at the drop of a hat on a subject about which you know absolutely nothing, and the ability to eat enormous meal after meal at official functions at all hours. He claimed that he had become an expert at leaving food on his plate without making it too apparent and said 'I have not yet had to put any scraps in my pockets but one never knows what it may come to.'<sup>3</sup> So perhaps the best claim to be head of state would be having the gift of the gab and the gob.

As Sir Philip Game later discovered, in some cases a Governor needs other skills, such as the knowledge and the experience to deal with a constitutional crisis. Engulfed in the global financial crisis of the Great Depression and faced with an unorthodox and intransigent Premier in Jack Lang, Game lamented in his letters home that he was not an economist or a constitutional lawyer and did not have the necessary knowledge or experience to perform his role adequately. Perhaps today we would see candidates for head of state claiming that they have the answer to our economic woes or superior knowledge about the reserve powers. A new niche market for constitutional lawyers and economists? Somehow, I doubt it.

It seems to me inevitable that those campaigning to be elected head of state would instead focus on political matters. Perhaps they would claim to be the champion of the underdog—to represent the views of rural Australians or indigenous Australians or battlers. It is likely that some candidates would go further, campaigning on particular issues—nuclear energy, climate change, a bill of rights or the end to Australian involvement in a war—and use their popular mandate to pressure the Government to adopt the policy. Some may even go as far as promising to refuse assent to a particularly controversial Bill or to direct the armed forces not to fight in an unpopular war, or even to dismiss an unpopular government.

Ultimately it would be irresponsible to set up a directly elected head of state with a popular mandate as a rival to the Prime Minister. It would be a recipe for future constitutional crises. That is why any proposal for a directly elected head of state would require the imposition of significant limitations on the powers of the head of state.

### **Codification**

One way of dealing with this problem is by codifying the reserve powers of the head of state. This would remove the head of state's discretion and set down rules by which his or her powers would have to be exercised. Attempts at codifying the reserve powers were made by the Constitutional Conventions of the 1970s and the

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<sup>3</sup> Letter by Sir Philip Game to Mrs Eleanor Hughes-Gibb, 17 September 1930: Mitchell Library Manuscript 2166/5.

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Constitutional Commission's Advisory Committee on Executive Power in 1987, although an absolute consensus remained elusive. The Republic Advisory Committee also addressed the subject in some detail in 1993, but the matter went no further.<sup>4</sup>

The problem with complete codification, however, is that while it gives certainty it also imposes inflexibility. It is impossible now to imagine every circumstance that might arise in the future where flexibility is needed. The risk with complete codification is that the rules it imposes might prove not only inappropriate but damaging in future circumstances. The genius of our current system is that it has allowed the executive to grow from being a dependent colonial administration to the government of an independent nation without the need for formal constitutional change. Uncertainty about the rules has the benefit that few have been prepared to provoke conflicts and push the rules to their limits as nobody knows what those limits might be. It is therefore wise to continue to permit some flexibility and discretion to allow for unforeseen circumstances and future growth.

### **Limiting the circumstances in which discretion might arise**

There is, however, an alternative way of approaching the problem. Back in the 1980s when the *Australia Acts* were being negotiated, the States found that they were having difficulty in convincing the Queen that she should be advised directly by State Ministers with respect to State matters. Her Majesty was concerned that she would receive conflicting advice from different sets of Ministers. Instead of trying to codify the question of who advised the Queen on particular issues, the States decided that it would be more sensible to remove or delegate most of the Queen's powers so that the question of who advised her would only arise in two very limited cases—namely the appointment and removal of a State Governor.<sup>5</sup> Powers with respect to granting assent to reserved bills and disallowance were terminated so that no question of conflicting advice could arise, and other powers formerly exercised by the Queen were delegated to the Governor, except when the Queen was personally present in the State.<sup>6</sup> By reducing the field of potential conflict, concerns over how the remaining powers were exercised were also reduced. The Queen was eventually satisfied and the *Australia Acts* 1986 were passed.

A similar approach could be taken with respect to the powers of the head of state. By eliminating many of the most controversial circumstances in which those powers might otherwise be exercised, the powers of the head of state would be much more confined, but a degree of flexibility could still be retained to deal with unforeseen circumstances. Examples of this approach can be found in a number of Australian States where the Governor has much more limited discretion than the Governor-General.

### **Dissolutions and dismissals**

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<sup>4</sup> Republic Advisory Committee, *An Australian Republic—the Options*. Canberra, AGPS, 1993, pp. 88–116.

<sup>5</sup> See further: A. Twomey, *The Chameleon Crown—the Queen and Her Australian Governors*. Sydney, The Federation Press, 2006, Ch 19.

<sup>6</sup> *Australia Acts 1986* (UK) and (Cth), ss 7–9.

The greatest controversies concerning the exercise of discretionary power by vice-regal representatives in Australia have concerned the grant or refusal of a dissolution and the dismissal of a government, followed by a dissolution. The dismissal of the Lang Government in 1932 and the Whitlam Government in 1975 come most readily to mind, but there are other cases where a Governor has demanded the resignation of a Premier, such as that in Victoria in 1952. There are also numerous examples of vice-regal representatives refusing a Premier's advice to grant a dissolution when a Government has lost the confidence of the lower House or could not obtain supply, including three at the Commonwealth level in 1904, 1905 and 1909, and in the States at least<sup>7</sup> seven in New South Wales, one in Queensland, two in South Australia, four in Tasmania, one in Western Australia and a grand total of ten instances in Victoria, the most recent being in 1952.<sup>8</sup> Most of those cases arose before the political party system became stable, when there were shifting majorities and governments not infrequently lost power through no confidence motions. However, the discretion to refuse an early dissolution remains.<sup>9</sup>

In New South Wales, South Australia and Victoria, however, the powers of the Governor with respect to dissolutions and dismissals have been significantly limited in scope because of the introduction of fixed four year terms. In these States the election date is now fixed by the Constitution.<sup>10</sup> This largely eliminates the Governor's discretion to grant or refuse a dissolution. Specific exceptions are provided for, so there is a mechanism for changing the date where it clashes with another event or it is not possible to hold an election because of a natural disaster or for some other reason.<sup>11</sup> More importantly, if a vote of no confidence in the Government is passed by the Assembly, and within a specified period there has been

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<sup>7</sup> Accurate figures are not possible because there may have been instances in which dissolutions were refused which were not made public.

<sup>8</sup> On the various crises, see: Charles Parkinson, 'The 1875 Constitutional Crisis in Victoria', *Journal of Australian Colonial History*, vol. 3, no. 2, 2001, p. 81; E. Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth*. Toronto, OUP, 1968; J.B. Paul, 'Governors and Politicians: the Australian States principally in the 1940s and 1950s' in D.A. Low (ed.), *Constitutional Heads and Political Crises*. Basingstoke, Eng., Macmillan, 1988, pp. 37–56; J. Fajgenbaum and P. Hanks, *Australian Constitutional Law*. Sydney, Butterworths, 1972, pp. 84–5; R.S. Parker, *The Government of New South Wales*. St Lucia, Qld, Queensland University Press, 1978, p. 178; and A. Twomey, *The Constitution of New South Wales*. Sydney, The Federation Press, 2004, pp. 646–9. On examples of the blocking of supply, see: J. Waugh, 'Deadlocks in State Parliaments', in G. Winterton (ed.), *State Constitutional Landmarks*. Sydney, The Federation Press, 2006, pp. 198–210.

<sup>9</sup> *Bignold v Dickson* (1991) 23 NSWLR 683, 686 (Kirby P).

<sup>10</sup> *Constitution Act 1902* (NSW), ss 24 and 24A; *Constitution Act 1934* (SA), ss 28 and 28A; *Constitution Act 1975* (Vic), ss 38 and 38A. See also the Northern Territory where the election date is now fixed by legislation: *Electoral Act 2004* (NT), ss 23–26A; and Australian Capital Territory which has fixed terms set by s 100 of the *Electoral Act 1992* (ACT), with the exceptions set out in ss 16 and 48 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth). See further the UK Institute for Public Policy Research's proposed Constitution for the UK which provides for fixed four year terms but early elections if there is a vote of no confidence in the Government. In this case the monarch is required to dissolve the House of Commons within seven days—there is no allowance for a change of government without an election: Institute for Public Policy Research, *A Written Constitution for the United Kingdom*, London, Mansell, 1991, p. 73.

<sup>11</sup> *Constitution Act 1902* (NSW), s 24B(4); *Constitution Act 1934* (SA), s 28(3); *Constitution Act 1975* (Vic), s 38A(2).

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no vote of confidence in the Government, then the Assembly may be dissolved by the Governor before the four year term expires.<sup>12</sup>

The Governor cannot dissolve the Assembly on this ground unless the precise terms of the exception are met, but if they are met, then the Governor appears to retain a discretion as to whether or not to grant a dissolution.<sup>13</sup> It may be the case that a new Government can be commissioned and govern until the next scheduled election. In New South Wales, some direction is given to the Governor as to the matters that he or she must take into account in exercising this discretion, such as whether the Legislative Assembly has expressed confidence in an alternative government.<sup>14</sup>

In NSW there is an additional ground that may trigger a dissolution, being the rejection or delay of the grant of supply by the Legislative Assembly.<sup>15</sup> Neither the South Australian nor Victorian Constitution contains such an exception, but presumably if the Assembly were prepared to reject supply, which would amount to an implied vote of no confidence, it would be prepared to pass an express vote of no confidence in the Government.

The Victorian and South Australian Constitutions contain further exceptions that permit the Governor to dissolve the Assembly before its four year term expires, where there are deadlocked Bills.<sup>16</sup> South Australia has two such exceptions. The first deals with Bills that are declared by the House of Assembly to be 'Bills of special importance'. If they are not passed within two months by the Legislative Council, then they become triggers for an early election. However, they cannot be stockpiled and the trigger only lasts for one month. If it is not exercised, it expires.<sup>17</sup> The other South Australian exception is its double dissolution procedure, which involves a Bill being passed by the Assembly and rejected by the Council in two successive Parliaments. Outside these express exceptions, the Victorian and South Australian Governors have no power to dissolve the Legislative Assembly.

In New South Wales deadlocked Bills may be dealt with by holding a referendum on the Bills concerned, rather than an early election as in Victoria and South Australia.<sup>18</sup> However, in New South Wales there is also an inadequate constitutional provision that attempts to preserve some of the Governor's reserve powers.<sup>19</sup> Section 24B(5) of the NSW Constitution provides that the Governor is not prohibited from dissolving the Legislative Assembly in circumstances other than those mentioned, despite any

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<sup>12</sup> *Constitution Act 1902* (NSW), s 24B(2); *Constitution Act 1934* (SA), s 28A; *Constitution Act 1975* (Vic), s 8A. Note that the South Australian provision does not expressly set out a period for the reversal of the vote.

<sup>13</sup> *Constitution Act 1902* (NSW), s 24B(1); *Constitution Act 1934* (SA), s 28A(1); *Constitution Act 1975* (Vic), s 8(2).

<sup>14</sup> *Constitution Act 1902* (NSW), s 24B(6).

<sup>15</sup> *Constitution Act 1902* (NSW), s 24B(3)—this includes failure to pass supply by the time that the Governor considers that it is needed. See also the equivalent Northern Territory provision: *Electoral Act 2004* (NT), s 25.

<sup>16</sup> *Constitution Act 1934* (SA), s 28A and s 41; and *Constitution Act 1975* (Vic), s 65E.

<sup>17</sup> See, in contrast, the deadlock provision in s 57 of the Commonwealth Constitution, under which deadlocked bills have in practice been stockpiled for use in a later double dissolution.

<sup>18</sup> *Constitution Act 1902* (NSW), s 5B.

<sup>19</sup> *Constitution Act 1902* (NSW), s 24B(5).

advice of the Premier or Executive Council, 'if the Governor could do so in accordance with established constitutional conventions'. The problem here is that the Governor has never had a power to dissolve the Legislative Assembly without advice. If, for example, the Governor decided to dismiss the Government, as Sir Philip Game did in 1932, he or she would withdraw the commission of the existing Premier (which has the automatic effect of dismissing all Ministers) and then commission a new Premier on the condition that the new Premier advise the Governor to dissolve the Legislative Assembly so that an election could be held. There is no 'established constitutional convention' of the Governor dissolving the Legislative Assembly without the advice of the Premier. Hence, the NSW provision is ineffective. This may be why no other jurisdiction has emulated it.

If the Governor of Victoria, South Australia or New South Wales decided to dismiss a Government by withdrawing the commission of the Premier and appointing a new Premier (who did not hold the confidence of the Assembly), then the Governor could not dissolve the Assembly on the advice of that new Premier. The only option would be for the Assembly to pass a vote of no confidence in the new Government, which would then permit the Governor to dissolve the Assembly and hold an election.<sup>20</sup>

So these provisions do not work perfectly, but they show that there are ways in which a Constitution can regulate events so that they do not result in circumstances where the head of state is placed in the position of having to contemplate the exercise of reserve powers. If the Commonwealth Constitution provided for fixed four year terms with exceptions for an early election in the case of (a) a successful vote in the House of Representatives of no confidence in the Government; (b) a deadlocked Bill giving rise to a double dissolution; or (c) the dismissal of the Government by the head of state in accordance with established constitutional conventions, then the discretion of the head of state would be significantly limited, although not completely terminated, as there would still be a capacity to dismiss a Government that persisted in illegality or that refused to resign after losing an election.

### **The blocking of supply**

For such provisions to operate effectively, one must also deal with the still sensitive issue of the power of the Senate to block supply. It needs to be recognised that in five of the eight State and Territory legislatures, there is no possibility of supply being blocked by an upper House. This is because in Queensland, the Northern Territory and the Australian Capital Territory, there is no upper House and in NSW and Victoria the Legislative Council cannot effectively block supply. While in NSW and Victoria the Legislative Council still has the *power* to reject or suggest amendments to any Bill appropriating revenue or moneys for the ordinary annual services of Government, the Legislative Assembly may present the Bill to the Governor for assent without the Legislative Council's agreement.<sup>21</sup>

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<sup>20</sup> As Selway and Taylor have both pointed out, this procedure is likely to extend rather than diminish the controversy: B. Selway, *The Constitution of South Australia*. Sydney, The Federation Press, 1997, p. 60; and G. Taylor, *The Constitution of Victoria*. Sydney, The Federation Press, 2006, p. 135.

<sup>21</sup> *Constitution Act 1902* (NSW), s 5A; *Constitution Act 1975* (Vic), s 65.

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If one looks back to the constitutional crises that have occurred in the last two centuries in Australia, many have involved a failure to obtain supply or problems with deadlocked Bills that the upper House has refused to pass. Workable deadlock provisions and limits on the powers of the upper House to block or unduly delay supply are key factors in avoiding circumstances in which the head of state might otherwise be called on to exercise reserve powers. We need to move beyond the rights or the wrongs of what happened in 1975 to consider adopting a system that currently operates uncontroversially at the State level.

This does not mean that the Senate need be neutered or lose its effectiveness. Despite its loss of the power to block supply in 1933, the NSW Legislative Council has proved to be one of the most powerful, and dare I say, aggressive Houses of any Parliament in the country. There are more ways to bring a government to account than threatening to block supply. Consideration could be given to strengthening some of the Senate's powers to bring governments to account as a trade-off for the loss of the power to block or delay supply.

It is true that the combination of fixed term Parliaments and the loss of the Senate's power to block supply would mean that there would be very limited grounds upon which there could be a change of government in between elections. In NSW there have been many recent complaints about being stuck with the Government until the next election in 2011. This has resulted in 'fixed four year terms' receiving some distinctly bad press. However, even if the term is not fixed, an unpopular government is rarely inclined to commit hara-kiri by going to the polls early, just as it is unlikely to cause an early election under the fixed term system by voting no confidence in itself (or more realistically, as occurred in Germany in 2005, abstaining from voting when a vote of no confidence is held, in order to permit an early election).<sup>22</sup> Nor does the vice regal representative have the power to dismiss a government just because it is no longer popular or might be considered incompetent,<sup>23</sup> regardless of whether there are fixed or flexible terms. Hence the current debate on this subject seems to be misconceived.

Indeed, there remains a strong trend towards fixed four year terms in Australia. The Northern Territory has just introduced fixed four year terms in its *Electoral Act*, adopting the NSW approach.<sup>24</sup> The Western Australian<sup>25</sup> and Tasmanian Governments

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<sup>22</sup> The German Federal Constitutional Court has twice upheld the validity of an early election by this means, but Taylor has argued that the manufacturing of a vote of no confidence would be grounds for the Governor to refuse a dissolution: G. Taylor, *The Constitution of Victoria*. Sydney, The Federation Press, 2006, pp. 125–6. The UK Institute for Public Policy Research has proposed, as a means of discouraging such acts, that the term of the newly elected Parliament be the remainder of the term of the previous Parliament: Institute for Public Policy Research, *A Written Constitution for the United Kingdom*, op. cit., p. 73 (cl 60.4).

<sup>23</sup> Note, however, the anomaly in the ACT where the Governor-General may dismiss the Assembly early if it is incapable of effectively performing its functions or is conducting its affairs in a grossly improper manner: *Australian Capital Territory (Self-Government) Act 1988* (Cth). Presumably the Governor-General would act on the advice of Commonwealth ministers in doing so.

<sup>24</sup> *Electoral Amendment Act 2009* (NT).

<sup>25</sup> The Western Australian Legislative Council already has fixed terms, but the Legislative Assembly does not (although in practice the desire for simultaneous elections imposes practical limits on the flexibility of elections for the Legislative Assembly).

have also recently committed to fixed four year terms and are in the process of consulting on the proposed terms of such a change. This would leave only Queensland and the Commonwealth with flexible three year terms.

If at the Commonwealth level, the Senate could not block supply, preventing a repetition of a 1975-style crisis, and there were fixed electoral terms, with provision for an early election in the case of deadlocked bills or successful motions of no confidence in the House of Representatives, this would eliminate much of the discretion that the head of state might otherwise be able to exercise.

### **Appointment of the prime minister**

Apart from dissolutions and dismissal, the main other area in which a level of discretion is exercised by vice-regal representatives is in choosing who to appoint as the Prime Minister or Premier.

The convention is that the vice-regal representative appoints as head of government the person who holds the confidence of the lower House of Parliament. Usually the identification of this person is simple and there is therefore no need for any exercise of discretion. However, where there is a hung Parliament or a governing coalition breaks up or a governing party splits, or the head of government dies, or a party loses confidence in its own leader, then difficult questions sometimes arise. In Australia there have been examples of all these occurrences.

For example, in 1916 when the Labor Party split over conscription, the Labor Premier of NSW, William Holman, was abandoned by his Party, which elected a new Labor leader and moved a vote of no confidence in the Government. The Opposition leader, Charles Wade, moved an amendment deferring the resolution of the motion of no confidence because of the war. The Governor, Sir Gerald Strickland, concluded that Holman did not have the confidence of the Legislative Assembly and sought his resignation. On that fateful date of 11 November (this time in 1916), the newspapers declared ‘Sensational Political Development—Governor dismisses Premier’. Holman objected that the Governor had no grounds to require his resignation as the vote of no confidence had not been passed. The Governor argued that Holman had been elected as a Labor Premier and no longer had the support of the Labor party and should therefore resign. Holman argued that until he was defeated on the floor of the Legislative Assembly, he was not obliged to resign, and the British Government agreed. The Governor was forced to back down and Holman and Wade formed a Ministry that continued to govern.<sup>26</sup>

Sometimes coalitions break down, leading to difficult decisions for vice regal representatives. For example, in Victoria in 1935 the United Australia Party and the Country Party campaigned as a coalition and won the election. However, before Parliament sat, the Country Party was convinced by the Labor Party to withdraw from the coalition. The Governor commissioned the leader of the United Australia Party, Sir Stanley Argyle, to form a Government, but as soon as Parliament sat, the Government was defeated on a confidence motion by the Country Party with Labor Party support. Blainey has described the Governor as being so surprised by what had

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<sup>26</sup> See A. Twomey, 2006, *op. cit.*, pp. 58–9.



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occurred that he delayed a few days before requesting the leader of the Country Party, Albert Dunstan, to form a Government.<sup>27</sup> The Governor only acted after having received in writing from the Labor Party a commitment to support the Country Party in government.

Other difficulties have arisen for vice-regal representatives when Premiers or Prime Ministers have died suddenly in office. For example, at the Commonwealth level Lyons, Curtin and Holt all died in office, leaving the Governor-General with the dilemma of who to appoint Prime Minister until the relevant party could elect a new leader. This choice can be controversial if it is seen as giving an advantage to a person who intends to seek the leadership. Thus in 1967 after Harold Holt's disappearance, the Governor-General appointed John McEwen, the leader of the National Party, as Prime Minister, rather than William McMahon, who was the deputy leader of the Liberal Party, pending an election for leadership of the Liberal Party.

Sometimes a Premier or Prime Minister may lose the support of his or her own Cabinet or party. In November 1987, Joh Bjelke-Petersen tried to sack five members of his Cabinet as he struggled to retain its support. He proposed resigning and being recommissioned so that he could reform his Cabinet, but the Governor warned Bjelke-Petersen that he might not be recommissioned unless the Governor was satisfied that he could form a Ministry which retained the confidence of Parliament.<sup>28</sup> Bjelke-Petersen was later deposed as party leader but initially refused to resign as Premier, saying that it should be a matter for Parliament to decide. Soon after, he resigned from office without any need for vice-regal intervention.

More recently, in 2008 Morris Iemma lost the support of caucus. He resigned as Premier. What would have happened if he had resigned as Premier and advised the Governor to recommission him with a new Cabinet? Should the Governor had done so and waited to see if Iemma was defeated on the floor of the Legislative Assembly, or should she have commissioned someone else who had the support of the party and therefore a majority on the floor of the Parliament? The same dilemma arose in New South Wales in May 1927. The Premier, Jack Lang, sought a dissolution, but when the matter was brought to a full meeting of the Executive Council, the rest of the Executive Council overruled Lang and voted against it. The Governor, Sir Dudley de Chair, asked Lang to resign his commission and then commissioned him to form a new government on the condition that it act as a caretaker government and an election be held as soon as possible. This occurred and Lang lost the election.

In the case of a hung Parliament, leaders have sometimes advised the vice-regal representative to let them test their support on the floor of the lower House first, before appointing someone else to govern. This occurred in 1968 in South Australia where the balance of power was held by an independent who had announced his support for the Opposition. The Governor agreed to wait until Parliament was recalled

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<sup>27</sup> G. Blainey, *A History of Victoria*. Port Melbourne, Vic., Cambridge University Press, 2006, p. 198.

<sup>28</sup> See: G. Winterton, 'The Constitutional Position of Australian State Governors' in H.P. Lee and G. Winterton, *Australian Constitutional Perspectives*. North Ryde, NSW, Law Book Co, 1992, p. 303; and B. Galligan, 'Australia', in D. Butler and D.A. Low, *Sovereigns and Surrogate*. London, Macmillan, 1991, pp. 85–92 .

to test confidence. The Government was defeated on the Assembly floor and the Opposition Leader then appointed Premier.<sup>29</sup> Similarly, in Tasmania in 1989, after an election produced a hung Parliament, the opposition parties reached an accord that would have given them a majority in the Legislative Assembly. The incumbent Premier, Robin Gray, advised the Governor that he should continue in office, forming a minority government. The Governor accepted his advice and swore in a new Gray ministry. As soon as Parliament met, a constructive vote of no confidence in the Government was passed, with the House of Assembly declaring that it had confidence in the Opposition Leader, Michael Field. Once the Governor was satisfied that Field could form a government, he told Gray of his conclusions. Gray then resigned and advised that Field be appointed as Premier.<sup>30</sup>

This use of the legislature to resolve the question of whom to appoint as head of government is one way of limiting the circumstances in which a republican head of state might face exercising discretion. This method has already been adopted in the Australian Capital Territory where the Assembly, rather than a vice-regal representative, determines who becomes the Chief Minister. Section 40 of the *Australian Capital Territory (Self-Government) Act 1988 (Cth)* states that at the first meeting of the Assembly after an election, the Members shall choose one of their own to be the Chief Minister. If there is a vacancy in the office of Chief Minister while the Assembly is not sitting, the Presiding Officer is required to call a sitting of the Assembly as soon as practicable so that a Chief Minister can be chosen. If a motion of no confidence in the Chief Minister is passed, then the Assembly must choose a new Chief Minister. This, in effect, demands a constructive motion of no confidence, which declares no confidence in the existing Chief Minister and confidence in another person as Chief Minister.

The British Institute for Public Policy Research, in proposing a written Constitution for the United Kingdom, also suggested that the Prime Minister be elected by the House of Commons and appointed by the monarch on the report of the Speaker as to the outcome of the election.<sup>31</sup> Failure to appoint a Prime Minister, according to that draft Constitution, would amount to a trigger for an early election, if there were a fixed four year term system of government.<sup>32</sup>

Such provisions ensure that the leader of the Government is the person who holds the confidence of the lower House. If a similar provision were included in the Commonwealth Constitution, it would have the effect of ensuring that the identity of the Prime Minister was determined by Members of the House of Representatives, rather than by party members. This could be significant where there is a minority Government, allowing Members from other parties potentially to dictate the identity

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<sup>29</sup> See further: J. Fajgenbaum and P. Hanks, *Australian Constitutional Law*, op. cit., pp. 71–4.

<sup>30</sup> For a detailed account, see: G. Winterton, 'The Constitutional Position of Australian State Governors' in H.P. Lee and G. Winterton, *Australian Constitutional Perspectives*, op. cit., pp. 304–14; and B. Galligan, 'Australia', in D. Butler and D.A. Low, *Sovereigns and Surrogates*, op. cit., pp. 92–7. See also a similar occurrence in Ontario: R. Brazier, *Constitutional Practice*, 3<sup>rd</sup> ed., OUP, 2001, pp. 49–50.

<sup>31</sup> Institute for Public Policy Research, *A Written Constitution for the United Kingdom*, op. cit., pp. 55 and 58 (clauses 36.1 and 41.1).

<sup>32</sup> *Ibid*, p. 73 (cl 60.2).

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of Prime Minister against the wishes of his or her own party. It would also affect those political parties that prefer grass-roots members to have a say in choosing their leader.

A third consequence would be that clear-cut elections would not give rise to an immediate change of government—there would be a delay while counting was finalised before Parliament could be called to determine the new Prime Minister. While there would be some disadvantages in such a delay (and a need for strong caretaker-government conventions to apply in the interim) there might also be some advantages. United States elections take place over two months before the formal change in administration, giving new leaders time to catch their breath, plan, form a cabinet, be briefed, employ staff and prepare for government. Having a chance to switch gears from campaigning to governing and commencing to govern when refreshed and prepared, may not be a bad thing.

### **Summoning and proroguing the Parliament**

If such a provision were to be adopted, it would also be necessary to have a mechanism to ensure that that Parliament could be summoned and recalled so that a change in Prime Minister could not be avoided by the incumbent Prime Minister delaying Parliament from meeting. At the moment, s 5 of the Commonwealth Constitution places in the Governor-General's hands the power to appoint the times for holding sessions of Parliament. This power is normally exercised on the Prime Minister's advice. It also provides, however, that after any general election, the Parliament shall be summoned to meet not later than thirty days after the return of the writs. If the appointment of the Prime Minister were to be determined by the House of Representatives, it would be advisable to summon the Parliament earlier. In the ACT, the Assembly is required to meet within 7 days of the results of a general election.<sup>33</sup>

Another critical issue is prorogation. Currently, s 5 of the Constitution provides that the Governor-General may prorogue Parliament. There is no limit on the length of prorogation, except for the fact that Parliament must sit at least once every twelve months, so that prorogation could not validly exceed 12 months in duration.<sup>34</sup> The Governor-General prorogues Parliament upon the advice of the Prime Minister. However, there may be discretion in the Governor-General to refuse to prorogue the Parliament if the purpose of prorogation is the avoidance of a motion of no confidence.<sup>35</sup>

This situation recently arose in Canada. The Conservative Party had formed a minority government with Stephen Harper as Prime Minister after the general election in October 2008. It introduced budgetary measures which none of the other parties were prepared to accept. The Liberal Party and the New Democratic Party reached an agreement to bring down the Conservative Government by a vote of no confidence, with the intention of forming their own minority government, which would be supported on issues of confidence by the Bloc Québécois. On 4 December 2008,

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<sup>33</sup> *Australian Capital Territory (Self-Government) Act 1988* (Cth), s 17.

<sup>34</sup> Commonwealth Constitution, s 6.

<sup>35</sup> H. Evans (ed), *Odgers' Australian Senate Practice* 11<sup>th</sup> ed, Canberra, Department of the Senate, 2004, p. 499; G. Taylor, *The Constitution of Victoria*. Sydney, The Federation Press, 2006, pp. 131–2.

before Parliament was scheduled to meet, the Prime Minister, Stephen Harper, asked the Governor-General to prorogue Parliament until 26 January 2009. To this, she controversially agreed. It prevented Harper from facing a no confidence motion in the interim. By the time Parliament resumed in late January, the Liberal Party had a new leader, new budget measures were introduced by the Conservative Party that satisfied the concerns of the Liberal Party, and Harper's Conservative Government survived.

Although Canadian commentators had claimed there was no precedent for such matters throughout the Commonwealth, there have been some precedents in Australia concerning discretion about prorogation. In New South Wales in 1911, the McGowan Labor Government lost its majority through the resignation of Members. The Acting Premier, William Holman, advised the Lieutenant-Governor to prorogue the Parliament until by-elections were held. The Lieutenant-Governor refused and the Government resigned. The Governor called on the Opposition Leader Charles Wade to form a government. He agreed, but on the condition that he would be granted a dissolution. This was also refused by the Lieutenant-Governor, who then had to reinstate the previous Labor Government and prorogue Parliament as originally advised.<sup>36</sup>

In October 1971, the Western Australian Governor was faced with a similar dilemma. The Speaker of the Legislative Assembly had died, leaving the Labor Government with 25 seats and the Opposition with 25 seats. Once Labor appointed a replacement Speaker, it would have lost its majority and the Opposition threatened to hold a motion of no confidence in the Government, in the hope that it might lead to a general election. The Western Australian Premier, John Tonkin, advised the Governor, Sir Douglas Kendrew, to prorogue the Parliament until after the by-election was held. The Governor did so, but sought advice from the British Foreign Secretary as to whether he had acted appropriately. The Foreign Secretary replied that the Governor had acted within his powers, but was not prepared to comment on the merits of his action.<sup>37</sup>

If the appointment of the Prime Minister is to be determined by the House of Representatives, rather than the head of state, then there needs to be a mechanism by which a majority of the House of Representatives can require its recall from an adjournment or summons for a new session when the House is prorogued, in order to deal with the issue of confidence in the Prime Minister. In the Australian Capital Territory the Assembly must meet within 7 days of a request by a specified number of Members.<sup>38</sup> Such a provision would need to be inserted in the Constitution if the head of state's discretion were to be removed.

## Other powers

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<sup>36</sup> See also: A. Twomey, *The Constitution of New South Wales*. Sydney, The Federation Press, 2004, p. 465; and Michael Hogan, 'The 1913 Election' in M. Hogan and D. Clune (eds), *The People's Choice*. Sydney, Parliament of NSW, 2001, vol. 1, pp. 121–2.

<sup>37</sup> See A. Twomey, 2006, *op. cit.*, p. 78.

<sup>38</sup> *Australian Capital Territory (Self-Government) Act 1988* (Cth), s 17. See also Standing Order No 54 of the NSW Legislative Assembly, which requires the Speaker to recall the House during an adjournment upon the petition of an absolute majority.

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Apart from the established reserve powers of vice-regal representatives concerning appointments, dissolutions and dismissals, the real risk of a directly elected head of state with a perceived ‘mandate’ is that he or she will exercise discretion with respect to other powers such as royal assent to Bills, the command of the armed forces, the decision as to whether to put a Bill to a referendum, and the like.

Winterton has rejected the notion that the power to give royal assent is a reserve power,<sup>39</sup> although some have suggested that it may be. The main argument here is that the vice-regal representative, as the last bastion of constitutional protection, should be entitled to refuse assent to a Bill that extended the life of the Parliament or abolished Opposition parties or otherwise irreparably undermined the democratic system.<sup>40</sup> While this may be a relevant argument in places where there is no entrenched Constitution, it is not relevant at the Commonwealth level in Australia where any attempt to change the term of the Parliament would require a referendum and any legislation that breached the express and implied constitutional requirements of responsible and representative government would be held invalid by the courts.

While there may still be arguments as to whether a vice-regal representative should refuse assent to a Bill if so advised by Ministers (as opposed to acting solely on the advice of the Houses of Parliament),<sup>41</sup> no question should arise as to whether he or she has a personal discretion to refuse assent simply because he or she objects to a Bill.<sup>42</sup> Section 58 of the Constitution currently states that when presented with a Bill for assent, the Governor-General ‘shall declare, according to his discretion, but subject to this Constitution, that he assents...,’ withholds assent or reserves the Bill for the Queen’s pleasure. It would therefore be important to clarify in the Constitution that when a republican head of state receives a Bill for assent he or she must act either on the advice of the two Houses of Parliament (with relevant variations for referendum bills and bills arising from joint sittings) or upon ministerial advice, but that no personal discretion is involved.

Section 58 also contains a clause that permits the Governor-General to return a Bill to Parliament, transmitting with it ‘any amendment which he may recommend’. This is intended to accommodate circumstances in which an error is discovered in a Bill so that it can be corrected before assent. By convention, this power is only ever exercised upon ministerial advice, but this would need to be made clear in a republican

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<sup>39</sup> G. Winterton, ‘The Constitutional Position of Australian State Governors’ in H.P. Lee and G. Winterton, *Australian Constitutional Perspectives*, op. cit., p. 293.

<sup>40</sup> V. Bogdanor, *The Monarchy and the Constitution*. Oxford, Clarendon Press, 1995, pp. 120–35; R. Brazier, ‘The Monarchy’ in V. Bogdanor (ed.) *The British Constitution in the Twentieth Century*. New York, Oxford University Press, 2003, pp. 81–3; and F.A.R. Bennion, ‘Modern Royal Assent Procedure at Westminster’ (1981) 2 *Statute Law Review* 135, at 138.

<sup>41</sup> See further: A. Twomey, ‘The Refusal or Deferral of Royal Assent’ (2006) *Public Law* 580; P. Boyce, *The Queen’s Other Realms*. Sydney, The Federation Press, 2008, p. 55; Andrew Heard, *Canadian Constitutional Conventions*. Toronto, OUP, 1991, p. 37.

<sup>42</sup> Note that Canadian Lieutenant-Governors have occasionally reserved or refused assent to bills to which they have personally objected. See further: Andrew Heard, *ibid*, pp. 35–9; and J.T. Saywell, *The Office of Lieutenant-Governor*. Toronto, Copp Clark Pitman, 1986, p. 222.

Constitution, lest a directly elected head of state started using it to suggest his or her own proposed amendments.<sup>43</sup>

Finally, a provision ought to be included to make it clear that apart from the extremely rare circumstances in which reserve powers may be exercised, the head of state is obliged to act in all matters on the advice of his or her responsible ministers.<sup>44</sup>

## Conclusion

If we are to have a directly elected head of state, then part and parcel of that change ought to be a broader constitutional change that has the effect of limiting the circumstances in which that head of state could ever exercise discretionary powers. Hence proposals for a directly elected head of state should also be addressing matters such as fixed four year terms, the Senate's power to block supply, the election of the Prime Minister by Parliament and the removal of any discretion with respect to assent to Bills.

As you could no doubt tell by my opening, I am not keen on the idea of a directly elected head of state. However, I am strongly of the view that if this is a likely outcome, then there is an obligation upon constitutional lawyers, such as myself, to contribute ideas to ensure the best possible form for our future Constitution. In that spirit, today's address is part of my contribution to the forthcoming debate.



**Question** — Thank you Anne. I particularly enjoyed all the examples of the use of the reserve powers at the state level, many of which I was unaware of, and I think many people are unaware of just how prevalent these exercises are. I have two questions. With regard to altering the power of the Senate to block supply at the federal level and the potential of dismissing a government on that basis, I wonder if there is a different or perhaps a better way and that is to retain the power of the Senate to block supply but prevent any dismissal on that basis. This is the American system where you can have a blockage of supply and you have a political crisis, but without any potential for dismissal resulting from that, and it resolves itself in the US through political means, but without having any potential impact upon the powers of the upper house.

The second question comes to your end point where you talk about direct election. I wonder whether you see your model of limiting the powers rather than full

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<sup>43</sup> Such a provision has been used more freely in British Columbia where Heard notes that 88 bills have been returned with recommended amendments: Andrew Heard, *op. cit.*, p. 36; and J.T. Saywell, *op. cit.*, p. 221.

<sup>44</sup> See the *Constitution Alteration (Establishment of Republic) 1999* which if passed would have included in s 59 of the Constitution a statement that 'The President shall act on the advice of the Federal Executive Council, the Prime Minister or another Minister of State; but the President may exercise a power that was a reserve power of the Governor-General in accordance with the constitutional conventions relating to the exercise of that power.' Such a provision would need to be refined if there were to be a directly elected head of state and the circumstances in which the reserve powers could be exercised were to be curtailed.

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codification as being sufficient for a direct election model. Whether you think that goes far enough to reign in, limit, circumscribe, the powers of a directly elected head of state, or whether in fact you would need to go a bit further and deal with some of the residue that is left. It was just a little unclear as to whether you think this was it if we ended up with a debate of that kind.

**Anne Twomey** — They are good questions. Yes, if you have got fixed term elections then you need somehow to deal with the issue of what happens if supply is blocked in the upper house. As you say, the examples I was drawing from were existing examples in the states, which is why I was referring to what happens in New South Wales and Victoria. South Australia, interestingly, and it's a little bit strange in their constitution, but as best as I can tell its upper house still has power to block supply, and does have a fixed four year term. I was asking a South Australian colleague how then you deal with those potential problems with an upper house blocking supply and whether that would lead to difficulties or not. I don't think they have ever really sorted that out in South Australia, although I suspect that it might partly be resolved by those bills of special importance. If you made your bill for the ordinary annual services of government a bill of special importance, then you could trigger an early election if the upper house blocked supply, if that's what you want to do. So that's another way of dealing with it. But I think you are right. You could specifically have something in there saying that the head of state can't dismiss the prime minister on grounds of a failure to pass supply by the upper house and leave it to a political answer, a political conclusion. Taking out that one element of risk in the game, and both sides knowing that they really need to reach an agreement or otherwise they themselves will become unpopular once people are not receiving their pay cheques; that itself is another possible option, so I think that's certainly another one on the table.

As to whether all of this is sufficient or if you need more, well it was all I could think of, so it probably is, in my view, sufficient, although maybe if I sat and thought about it more I might think of something else. Really I was just trying to add another perspective to the debate on this by drawing on what had already been done in state constitutions, to add different ideas to the notion of full codification. I think it is very important if you went the direct election route to have a provision that makes clear that the constitutional provisions that could otherwise be seen as giving the head of state very broad powers in relation to the armed services and assent to bills and all those sorts of things are subject to convention, that they need to be acted upon, on advice. In the future, under a different constitution, with a directly elected head of state who says 'I have a mandate, I have been elected by the people on this basis', those sorts of conventions could be seen to be no longer relevant, because it is a new system. So you need to tie down those conventions one way or another, either by some form of codification, by saying you have to take advice on these points, or by removing the risk of discretion being used. Someone pointed out to me that a couple of the other constitutions, the one of Trinidad and Tobago and the one of Jamaica, have a fair bit of codification of the reserve powers in them. It is interesting to see that even those constitutions where they allegedly completely codify do still have elements of discretion there, and I think you ultimately need some element of discretion underneath it all, just to deal with bizarre emergencies that might happen in the future.

**Question** — Thank you. How do they deal with the situation in Ireland?

**Anne Twomey** — Good question. The three constitutions that were raised with me were Trinidad and Tobago, Jamaica and Ireland, and I read the first two and I didn't get much time to look at the third one, Ireland. It is the most obvious one. They did a fair bit of codification there, too, in Ireland. From recollection, there are provisions that expressly say that you have to act on advice on doing X, Y and Z, and again, the idea is to remove the more discretionary elements with respect to their head of state.

**Question** — Is this a Scots or an English question?

**Anne Twomey** — In the United Kingdom there are all sorts of fascinating issues with respect to devolution in relation to Scotland and Wales and Northern Ireland. What's known as the 'English question' there is whether England itself should have its own separate legislature or whether in the United Kingdom Parliament, when voting with respect to matters that concern English things, like education and the like, where education issues have already been devolved in Scotland, members of the United Kingdom Parliament who come from Scotland should be able to vote on English matters. That would lead to all sorts of difficulties if they couldn't because you have a Scottish Prime Minister, Gordon Brown, who then wouldn't be able to vote on most of the things that his government does in England, which would cause all sorts of problems.

The United Kingdom has all sorts of interesting issues with regard to Scottish questions and English questions. Today however I was addressing Australian questions, but if you want to know more about the Scottish question and the English question and how it would fit in to a similar type of written constitution, I would recommend that book called: *A Written Constitution for the United Kingdom* which was published by the Institute for Public Policy Research in the United Kingdom, which does deal with all those issues, in a similar vein to the way I was describing them today.

**Question** — Well I understood we were following the Westminster system but it's nothing like it is it? Why do we have so much government in this country, why don't we get rid of the states and have bigger local government areas? It seems to me that that is a question that should be looked at in the Constitution entirely. What's your opinion about having less government?

**Anne Twomey** — One of the benefits of federalism is that we can learn and see from examples, in this case, constitutional examples of the states when we are adopting things at a national level. Looking at things like fixed 4 year terms, you see them starting off in one parliament and see which bits work and which bits don't then, then move over to South Australia and to Victoria and look at their variations. Some people might say that 'the Victorians have actually done it better, maybe we should adopt their version', and that's one of the benefits of federalism.

To give you the longer answer, there is actually going to be a public debate on this in Sydney in May. It is being run by the IQ<sup>2</sup> organization, and I am actually one of the people in the debate. I am on the side of retaining the states. If you want to come, or listen, it's going to be held in Angel Place sometime in May.



