

1975 Revisited: Lost Causes and Lost Remedies*

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Being a mere callow youth and a relatively junior officer during the great 1975 crisis, my part was essentially that of an observer. The only occasion on which I rose to the more exalted status of a participant was when I served subpoenas on Maurice Byers and Clarrie Harders, two of the public officers who were summoned by the Senate in the middle of 1975 to give evidence about the government's overseas loan-raising activities. These two gentlemen, who were certainly not callow youths at that time and are now even further removed from that condition, are also participants in this conference. As is well known, they appeared in answer to the subpoenas but declined to give evidence in accordance with the government's claim of crown privilege (as it was then called). Perhaps they will mark the occasion of this conference by telling us the evidence that they could have given. Having been an observer, I offer the following observations on the basis of a large amount of hindsight, but hindsight, of course, is unavoidable.

The events of 1975 attract a great deal of anecdotage. I would like to recount an anecdote with a serious point to it. One of the major problems with the events of 1975 is that they diverted attention from the parliamentary work of the Senate and the importance of that work as a safeguard in the system of government. When the Senate resumed after the luncheon suspension on 11 November 1975, the first business dealt with was not the appropriation bills, the delay of which by the Senate had precipitated the deadlock between the Senate and the government, and the passage of which then so surprised the

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Leader of the Government in the Senate and his colleagues, who had not been told of the lunchtime dismissal of the government. Several other things occurred, the most important of which was a statement by the chairman of the Senate Standing Committee on Regulations and Ordinances, Senator Devitt (Labor, Tasmania). Senator Devitt, on behalf of the committee, had given a notice of motion to disallow certain Postal Services Regulations and Postal By-laws. He informed the Senate that the committee had objected to provisions in these instruments of delegated legislation which would have conferred on postal officers a very wide discretion to open and dispose of mail. The committee regarded the legislation as unduly infringing the rights and liberties of citizens, in particular, the right to privacy of mail. Senator Devitt reported that the responsible minister had agreed to amend the regulations and by-laws so that mail could be opened only on reasonable suspicion of contravention of law or other specified grounds, and so that mail would be disposed of only in accordance with a court order. Senator Durack (Liberal, WA), a member of the committee, drew attention to the importance of the undertaking given by the minister, and the manner in which the committee had protected the rights of the citizen. Senator Devitt's notice of motion was withdrawn on the basis of the undertakings given by the minister. Only then did the Senate, after receiving another bill from the House of Representatives, proceed to consider and speedily pass the appropriation bills.

This episode provided, on a day on which other events monopolised attention, an illustration of the importance of the power of the Senate to disallow delegated legislation and the scrutiny of that legislation by the committee on behalf of the Senate. Were it not for that power and that scrutiny, delegated legislation would escape parliamentary control, and the ability of ministers to make laws without parliamentary sanction would be virtually unlimited. Such checks and controls which the system of government places on executive power must not be forgotten when the events of 1975 are reconsidered.

Turning to those events themselves, three aspects of them impress me most. Two of these aspects were obvious to me at the time, and one is apparent only by comparison with more recent developments.

The first feature of the affair which impressed me at the time was that the opposition parties in the Senate had not worked out the possible consequences of their blocking the appropriation bills should the prime minister refuse to go to an election. He had given plenty of indication that he would not follow the precedent he set in 1974 and call an election in response to the opposition's demands. Consideration should therefore have been given to the possible consequences of such a situation. Among those consequences was that, if the Governor-General dismissed the government and commissioned the Leader of the Opposition to form a government on the basis that an election would be advised, the outgoing government could take a number of procedural steps to frustrate that course of action. In particular, they could prevent the passage of the appropriation bills, or at least make their passage legally very dubious. The opposition do not appear to have thought through what their position would then be. I happen to know that they were forewarned, privately and orally, of this potential situation on at least one occasion, but did not allow the warning to influence their course of action.

Because of the possible consequences of the prime minister refusing to go to an election, I did not think, before October 1975, that the opposition would seek to block the appropriation bills. When this occurred, I did not think that the Governor-General,

whatever else he might do, would dismiss the government and commission the Leader of the Opposition on the basis of an undertaking to pass the bills. In fact, I had a wager with one of my colleagues that neither of these things would happen (I no longer make wagers; remember that I was only a callow youth). It may seem that these beliefs indicate extreme naivety, but they were based not on ignorance but on a consideration of matters which the principal players in the drama appeared not to have considered.

The second remarkable feature of the events is that, the Governor-General having taken the step which I believed he would not take, the outgoing government appeared also not to have worked out the possible consequences or the further course of their strategy. They may have regarded their dismissal as unthinkable, but it is amazing that, as experienced politicians, they had not formulated a parliamentary strategy to follow if the unthinkable happened. It is well known that the Leader of the Government in the Senate and his Senate colleagues were not told of the dismissal of the government during the lunchtime suspension, and were therefore taken by surprise by the speedy passage of the appropriation bills. It is amazing that they did not find out about the dismissal during the 20-odd minutes that Senator Devitt and Senator Durack took to make their statements of such great parliamentary importance. It is therefore obvious that allowing the passage of the appropriation bills was not a preconsidered strategy, it was an accident. The outgoing government might have decided, as a matter of political strategy, not to use the Parliament to trip up the incoming prime minister and the Governor-General, but it is clear that they had not considered the matter.

These two aspects of the affair demonstrate that the parliamentary procedural elements of political events can be of crucial importance, but are often forgotten by the political participants.

The third notable feature of the events, which appears only by comparison with recent times, is that nobody sought formal written advice of the possible parliamentary and procedural consequences of the prime minister refusing to go to an election, although they had almost a month between the blocking of the bills and 11 November to do so. If the same situation were to occur now, senators of all parties and none would certainly seek a written memorandum on the possible parliamentary and procedural consequences. Someone amongst them would almost certainly make the advice public, and it would then become known and would probably influence the actions of the participants and therefore influence the course of events. A culture of openness, if it has not come to executive government to the extent some would have us believe, has certainly affected the Senate.

The possible consequences to which I have referred were publicly canvassed by my predecessor immediately after 1975, so that it would be difficult to ignore them now. Apart from any other considerations, a repeat of the events of 1975 could not occur because the same circumstances could not be duplicated, particularly the circumstance of the two antagonists embarking on their respective courses apparently blind to a large part of the possible outcomes of their actions.

Turning to the constitutional significance of the events of 1975, they undoubtedly reveal a gap in Australia's constitutional order, in that there is no constitutionally regular method of dealing with the situation which then arose, that is, the majority of the Senate refusing to pass the appropriation bills until the government submitted itself to an

election (this is not a new-found view on my part, but was expressed in print in 1982). The situation brought two constitutional principles into conflict, the principle that a government cannot carry on if the Parliament refuses it the necessary funds, and the principle that a government with the support (i.e., control) of the House of Representatives is entitled to continue to advise the Governor-General and to remain in office without re-election. The Governor-General elected to give the first principle precedence over the second, but another Governor-General, on advice at least as persuasive as that received by Sir John Kerr, could have decided that the second principle is the more important. (It must not be forgotten that in 1970 Mr Whitlam also thought that the first principle should prevail over the second; he called on the then government to go to the polls following the defeat in the Senate of its states receipts duties legislation.) Neither the written constitution nor the wider constitutional order determines this question, which famously arises from the combination by the framers of the Constitution of federalism (encompassing true bicameralism) and cabinet or responsible government.

In spite of all the outpouring of words and print on 1975, proposed solutions to this gap in the constitutional order have not been as thoroughly analysed as they should.

The favoured solution of some, of course, is that the Senate should be deprived of its power to reject annual appropriation bills (or 'supply', as it is loosely called). That so-called solution has not been thought through by its proponents, either at a purely technical level or at a wider constitutional level. On the technical level, no one has yet explained how, if an appropriation bill could be passed without the consent of the Senate, the government could be prevented from including an appropriation in every bill and thereby passing all its legislation without that consent (there are ways of attempting to solve this problem, and ways in which a government could get around the solutions, and so on ad infinitum). On the higher constitutional level, the advocates of this 'reform' never consider that it would simply make absolute the power of the already overpowerful executive government, which has a stranglehold on the House of Representatives and which, without the Senate, would not be subject to any parliamentary restraint whatsoever. Such a situation would allow ministers to legislate virtually by decree. The parliamentary control over delegated legislation, to which Senator Devitt's and Senator Durack's statements on 11 November 1975 are enduring monuments, would be a thing of the past, as a Senate without power over primary legislation would hardly be conceded control over delegated legislation. The 'elective dictatorship' would be complete.

Perhaps the most remarkable things about the events of 1975 are the facts which are now conveniently forgotten or ignored. One such set of facts relates to the solution to the constitutional problem. Not only is there a solution which closes the gap in the constitutional order, without ceding total legislative power to the ministry, but such a solution was actually formulated as a bill and passed by the Senate in 1982. In that year, Senator Gareth Evans introduced the Constitution Alteration (Fixed Term Parliaments) Bill. The bill would have provided that the House of Representatives could not be dissolved, other than in a double dissolution under section 57 of the Constitution, unless it expressed lack of confidence in the ministry and was unable, within a specified time, to express confidence in an alternative ministry. In the event of an early election, either by early dissolution of the House of Representatives or by double dissolution under section 57, the House then elected would continue only until the end of the fixed

parliamentary term. Although these provisions would not have absolutely prevented the Senate seeking to force a government to an election where the grounds for a double dissolution were in place, there would be such an enormous disincentive to doing so that such a course would not be a feasible proposition. A government elected in such circumstances would have to face the electorate again within a short time at the end of the fixed term. (It is to be noted that the Fraser Government unsuccessfully put forward in 1977 a constitutional amendment, a version of the so-called simultaneous elections proposal, which his party had previously opposed, in an attempt to avoid another election in late 1977 or early 1978, when the next half-Senate election was due.) As well as solving the problem of 1975, the 1982 bill would have redressed the constitutional balance somewhat by taking away the power of the prime minister to go to an early election at a politically convenient time, again not by direct prohibition but by a prohibitive disincentive to such a course.

The bill as introduced by Senator Evans contained provisions removing the Senate's power to reject appropriation bills, but it was accepted that the presence of those provisions was merely a gesture. The bill was amended to remove those provisions, and was not only passed by the Senate but passed with the support of all the non-government senators and of several government senators who dissented from their government's resistance to the bill. It was not surprising that the then government allowed the bill to die in the House of Representatives, but it was speedily reintroduced in the Senate after the new Labor government took office in 1983. Had the bill been passed by the then Parliament and put to a referendum, its chances of passage would have been very high, as it would have been supported by all parties other than the opposition and by a considerable number of dissident opposition senators. The latter circumstance would probably have prevented the opposition campaigning vigorously against it at the referendum, and public opinion polls showed 75 per cent support for the proposal. In what was described as an act of breathtaking cynicism, the government dropped the bill. The prime minister, it was said, preferred to keep his power of deciding when elections would be held, and to do so sacrificed the best opportunity of solving the problem of 1975.

In view of these events, no further complaints about what happened in 1975 should be entertained, as those most likely to do the complaining had it within their grasp to prevent a repeat of 1975 and at the same time to bring about a highly desirable constitutional reform.

The 1982 bill having been abandoned in these disreputable circumstances, it is probably just as well that no other solutions to the 1975 problem have been pursued. Any such solutions, in the unlikely event that the electorate were gullible enough to accept them, probably would have entrenched executive control of Parliament and saddled Australia with a Queensland or New Zealand system of government, and we would now, like the New Zealanders, be desperately seeking solutions to executive dictatorship.

After all this time, it is to be hoped that we are wiser in constitutional matters. Certainly there appears to be a greater appreciation of the need for constitutional balance. The proposal for Australia to become a republic has supplanted the search for a solution to 1975 as the great constitutional issue. The task of genuine constitutionalists is to ensure that proposed constitutional changes do not dismantle constitutional safeguards but enhance them.