

CONFIDENTIAL

GOVERNOR-GENERAL'S OFFICE

Subject ***THE GOVERNOR - GENERAL'S***
PERIODIC CONFIDENTIAL REPORTS
TO THE QUEEN. PART 4.

RELATED PAPERS

DESCRIPTION	FILE No.	DESCRIPTION	FILE No.

INDEX CLASSIFICATION

SUBJECT	INITIALS
NAME	

Government House,
Canberra. 2600.

22 September 1976

Dear Martin,

This short letter is of a different kind from our usual correspondence.

I recently had occasion to remake my will. This resulted in my realising that something should be done about my papers. These include, amongst other things, documents relevant to my Governor-Generalship, especially the crisis. They include a lot of diary notes, records of conversations and draft chapters of possible future books. Also included, of course, is my copy of the correspondence between us.

I would want to appoint literary editors to look after all my other papers, and as you would expect, I am under some pressure from libraries to leave my papers in their custody to be opened at some future time fixed by me. The Australian National Library is, of course, the strongest candidate.

I can make the appropriate decisions about papers which are exclusively mine, but our correspondence falls into a different category. We talked to some extent about this in London and you made the obvious point that this correspondence will have to be under embargo for a very long time.

One thing that worries me is, that if I were to die in the relatively near future - indeed whenever I die - someone has to have the custody and control of our letters. Do you have any suggestions about this? I would not wish to leave this correspondence in Government House. Each Governor-General takes with him such material. Having regard to the probable historical importance of what we have written, it has to be, I think, preserved at this end as well as in the Palace. I assume that your records there are carefully preserved.

The alternatives appear to be to allow it to go into the custody of my literary editors, unopened and fully embargoed with instructions for it to be deposited in a bank or some other safe place, or to let it go to, say, the National Library completely embargoed for whatever period of time you suggest.

.../2

I think I should get this matter settled so that there is no doubt what is to be done with this correspondence in the event of my death.

I mentioned in my letter of yesterday's date a short letter I wrote directly to Her Majesty. On reading it through I noticed that I had used the word "usual" when I meant to use the word "unusual" I was interrupted before altering it and in due course in the hurry of getting the letters ready for the bag, I forgot to do so. I wonder if you would be kind enough to mention this little point to The Queen?

Yours sincerely,

JOHN R. KERR

Lieutenant Colonel the Right Honourable
Sir Martin Charteris, G.C.V.O., K.C.B., O.B.E.,
Private Secretary to The Queen,
Buckingham Palace,
LONDON ENGLAND



21st September 1976

Your Majesty,

Madam,

I am taking the liberty of writing a personal despatch relying on your generous indication at lunch at Sandringham that I may do so on occasions when it seems appropriate on matters not involving a recommendation for approval of some kind.

As Your Majesty is aware I have continued my previous method of reporting through Sir Markie Shorten. My correspondence with him has included, in his letters, some indications of Your Majesty's good wishes to my wife and myself and of approval of the general course of conduct I have been following. A desire has grown in me, which I hope is acceptable to Your Majesty, to express on behalf of my wife and myself our humble and deep appreciation of what Sir Markie has said to us and of course I am strengthened greatly by his letters and what they contain, as expressing Your Majesty's views.

My experiences during the last year have educated me profoundly about our institutions and the Monarchy and have reflected in my

having come to the conclusion that the Monarchy as it exists under Australian conditions is not only unworkable but is essential to our continued political health. My own personal commitment to this fact of men and to your Majesty has deepened as each month has passed.

There will inevitably be discussion in Australia about constitutional amendment. But it will only be on the left wing, indeed on the far left that suggestions of fundamental change will be made. Our constitution is very hard to alter, mainly because the great majority of Australians want it to remain as it is, with all its imperfections. There will be little if any constitutional change.

I am deeply indebted to Your Majesty for the honour of having been appointed to represent you here in these ^{un}usual times. The privilege of having done so has also I believe enabled me to serve my country in a way I could hardly have expected to do.

Whatever the future may hold I

remain, and will ever remain, anxious to do whatever may seem to Your Majesty to be best in the interests of the Monarchy. Of course I must have regard to the interests of Australia and to what the Government, according to the Prime Minister's advice, has on such a personal matter as continuing to act as Your representative or withdrawing. I must retain the right, as I do, to act as you wish.

I apprehend from what Sir Monckton has said that no question has yet arisen as to which I should be feeling the need to set a different course in Your Majesty's interest but should the occasion arise I should like to give my humble assurance that, as new Governors General can always be found, my desire would be to assist in accordance with your judgment of what is needed. I have the honor to remain Your Majesty's most humble obedient servant John R. K. R.

Government House,
Canberra. 2600.

21 September 1976

Dear Martin

Your press may well have told you that there have been some top level administrative changes in Australia.

The Prime Minister finally got around to a decision that Mr Menadue should go from his department and he has been appointed to be our Ambassador in Japan. Menadue is very much interested in Japan. Indeed, I have heard him described as a most pro-Japanese Australian. He seems to have been willing enough to go.

Shann who is our Ambassador in Japan is to replace Jack Bunting in London. I am sad about Jack's position. I have seen him several times since his return to Australia. He was himself confident that he would be going back to London and that no change would be made for the next six months. According to his London medical advice he needed six months to discover whether his voice would improve satisfactorily. However, the doctors out here appear to have taken a different view, although one cannot help but think that the need to find a place for Shann became an element in the situation.

Shann is an extroverted and able diplomat, more typically Australian than Jack Bunting but he has himself well under control and should, I think, do quite well in London. I shall undoubtedly see him before he leaves. Jack will be returning to London to tidy up his personal files, and you will doubtless see him.

In existing circumstances you may find it helpful to get to know Shann as he will be there well before the Royal Visit and informal relations with our High Commissioner could be helpful to you. I believe he would adapt to last year's events a sufficiently pragmatic and indeed supportive attitude and I shall try to ascertain whether this is so before he leaves.

Menadue is to be replaced in the Prime Minister's Department by Mr Carmody who has a reputation of being a tough minded bureaucrat who leaves politics to the politicians and sets his hand to carrying out their policies, whatever their political party.

.../2

He has not been in the inner circle of top permanent heads. There is here a well known group, all of whom are members of the Commonwealth Club, where they regularly dine and lunch together. The inner group, has in the past, consisted of Sir Frederick Wheeler (Treasury), Sir Arthur Tange (Defence) and Sir Alan Cooley (Public Service Board). In his day, Jack Bunting was a leader within this group.

Carmody has never belonged to it and has never had a policy department. He has a reputation of being an able innovative administrator. I do not know whether he is a member of the Commonwealth Club, but he certainly goes there infrequently if he is.

The Prime Minister told me that Carmody was his personal choice but he was fortified by the approval of Sir Alan Cooley and also of a leading elder statesman - an administrator-academic - Sir John Crawford, both of whom recommended Carmody. The Prime Minister thinks his attitude to last year's events will be quite satisfactory.

Menadue never attempted to join, in a personal and friendly way, in the Commonwealth Club group. He was invited to join the Club and agreed to let his name go forward in the days of Mr Whitlam but then asked for it to be withdrawn. It seems likely that he felt bound to tell the then Prime Minister of the invitation and found that the idea was frowned upon. Mr Whitlam believed that policies were made over lunch by the top permanent heads. This I do not believe happened or happens but, of course, they talk about current activities and problems to their mutual advantage and that of the country.

Another change which is to take place is that the permanent head of the Foreign Affairs Department, Mr Renouf, is to go to Washington and our Ambassador in Washington, Mr Parkinson, is to take over as permanent head. Renouf apparently blotted his copy book by talking too freely to journalists when the Prime Minister was in China.

All of these changes, so far as I can judge the position, are congenial to me. I know Mr Carmody but not well. He is calling upon me this afternoon and I shall have a good talk with him. If there is any need to add to this letter as to Carmody I shall do so by way of postscript.

The next thing I should like to mention, with equal diffidence to that which characterised my last reference to it, is the position about Sir John Guise. I attach two clippings.

.../3

I have no doubt that the first was a leak from Sir John Guise himself. It contains some speculation, as you will see, that Sir John cancelled his official visit to Australia because he refused to stay with me. Later this story was denied as the second clipping indicates.

I cannot help but take into account in considering my own position here, developments in Papua New Guinea which may affect me personally, or my office.

A very good friend of mine who is an authority on Papua New Guinea has informed me that there are some very irrational elements in Sir John Guise's activities at the present time. He has strong support in Papua but not in New Guinea and appears to be increasingly anxious for real personal power, even if the price were to put himself at the leadership of a Papuan secession movement.

My friend who knows Sir John very well says the latter is convinced that Australia would go on paying for a fragmented Papua New Guinea, "Australia will pay for half dozen Papua New Guineas if it has to".

A theory has been apparently canvassed in Port Moresby that his attempt to go on an official tour, when he made it, was to embarrass the Prime Minister. You will remember that 15 September was the first anniversary of independence and it is thought that Sir John's visit to Australia may have been planned deliberately to enable him to be out of the country and in Australia at the time of the independence celebrations, or at least to enable him to threaten to be out of the country. This absence, it has been suggested to me, might in his mind have given a powerful fillip to the Papuan breakaway movement and other breakaway movements.

He wanted to have some kind of official recognition of his visit, whilst staying at a motel but my informant says that he undoubtedly would not have wanted to stay with me because I arouse in him "certain paranoid fears". Why this is so, if it is so, no one seems to know.

Last night a member of the Papua New Guinea Legislative Assembly was in Government House at a reception which I gave for delegates from the Commonwealth Nations of the Australasian and South Pacific regions to the Third Australasian Parliamentary Seminar. A member of Parliament from Papua New Guinea who is a European by race - I am not sure where he stands

.../4

in Papua New Guinea politics though he seemed to be a supporter of the Prime Minister - said that it is understood that Sir John is going to resign in March, almost certainly after Her Majesty's visit. It is well known that he is already campaigning in his old electorate.

There seems to be no reason to be concerned about the visit to Papua New Guinea, but I am a little concerned about any rise to power afterwards by Sir John Guise. I do not think this is likely. Somare remains, as well as one can judge, strong. He would have liked to have his election before The Queen came in the hope that she would have been willing to open Parliament in Port Moresby but apparently political considerations caused him to wait until the visit is over.

Mrs Thatcher has been with us in Australia and has had a successful trip. I gave a luncheon party yesterday in her honour. Most of the guests were associated in one way or another with the Liberal Party, although there was a reasonable sprinkling of leading citizens. Her visit is a private one.

You will doubtless have seen press reports about the various things she has been doing and saying. She is staying in Canberra with Sir Donald Tebbit your High Commissioner here. The Australian Liberal Party leaders were delighted about her visit. There is a text of her main speech, if you are interested in having it, that seems to set out some of her fundamental philosophical positions.

Mr Whitlam was invited, as he always is for protocol functions, to a dinner which is to take place tonight in honour of the Prime Minister of Bahrain. His secretary regretted on his behalf that he would not be able to be present "on this occasion". David Smith had the impression, perhaps erroneously, that the words "on this occasion" were slightly emphasised by the secretary. One wonders whether he is moving a little in a direction which would enable him to be present at dinner in Government House during Her Majesty's visit.

Yesterday for the first time in history, the Leader of the Opposition or his representative failed to be present at the Annual Congress of the Returned Services League, which I opened as I also did last year. I was made a Life Member of the Returned Services League, joining very distinguished company including His Royal Highness The Duke of Edinburgh, His Royal Highness The Prince of Wales, Viscount De L'Isle and Lord Casey.

.../5

When asked about his absence, which was criticised by the President of the Returned Services League, he said that he some time ago had to refuse because of another commitment. It is possibly a good sign that Mr Whitlam is finding it more difficult to say that he is staying away from such occasions because of a Labor Party boycott.

Recently there was a celebration by the Air Force Association in Sydney from which Mr Wran, the Premier, absented himself. I was not invited and hence not present, but when the invitation was made by telephone to Mr Wran, a member of his staff who dealt with it, asked the question whether the Air Force Association was one of which I was patron. When told that that was so, the officer said the Premier would not be present. The Premier himself, however, when asked about it did not base his absence publicly upon any connection that I may have with the Air Force Association, but said that these matters of attendance at such functions were left to his staff.

It may be very difficult for members of the Labor Party to boycott all functions and activities of organisations of which I am patron, whether I am there or not. I am patron of 15 ex Service organisations and a very great number indeed of the leading institutions in Australia. However, as things stand, the Labor Party boycott in the South operates, though it does not do so in most of Queensland, nor in many parts of Western Australia.

My wife and I have just got back from a trip to North Queensland, which took in Cairns, Townsville and the Atherton Tableland, together with an agreeable visit to Lizard Island. There was not the faintest sign of a demonstration in the North. It was the same in Broadbeach in the Gold Coast, where I was present at a pleasant dinner organised by the Duke of Edinburgh Award Council. We have therefore had a quiet time in the last couple of months but we can expect some real demonstrations during the next month or two.

The new intelligence organisation is working very well and, apart from what is being done for the Prime Minister and myself, the most careful attention is going to be paid to the Royal Visit.

There has been speculation in Australia again about His Royal Highness The Prince of Wales. I attach some clippings from today's papers. This subject is not canvassed in Australia unless something

.../6

breaks in London and it is somewhat unfortunate that this should happen in London because it forces the Prime Minister, whilst making favourable comments about the possibility of Prince Charles coming to us, to say that is not likely to be happening in the near future.

There was a poll published in the Bulletin of last week which indicated that 49 per cent of people are in favour of my staying on, 34 per cent in favour of my going and 17 per cent did not know enough of the matter to express an opinion. Speaking for myself and being somewhat biassed, this seems to me to prove that only 34 per cent positively want me to resign and 66 per cent either want me to stay or do not care. I send you a copy of this poll because in it you will see some figures about the public attitude to The Prince of Wales as Governor-General.

The figures are low but in my opinion this is due simply to the fact that the favourable opinions as regards myself for the moment outweigh any real thinking about my successor. I think you know my own view that The Prince of Wales would be very welcome out here if things are handled properly at the appropriate time, but I can see from the Palace's point of view that the whole exercise has to wait the course of future events and Her Majesty may not wish it to happen at all.

I am attaching three new articles for your collection on the constitutional crisis. One article is on the Senate's power to reject money bills by Professor J. Richardson of the Australian National University Law School. This is, I think, a definitive article to which there is no answer. It has been quite well received. It contains the theory upon which I acted so far as the Senate's power is concerned.

The second article is a very well written, indeed, I think a rather elegant contribution by Mr E.J. St John, Q.C. St John used to be a Liberal member of Parliament but fell out with Mr Gorton when he was Prime Minister, seriously quarrelled with him and ended up losing his seat. He was, and is, an able barrister and a first class lawyer. His article contains some interesting psychological material on Mr Whitlam, who is, or rather was, an old friend of his. They were at St Pauls College, Sydney University together. His insight into the Whitlam character, is I think, very good.

The third is an article by Mr H.V. Hodson, formerly, I understand, editor of the Sunday Times.

.../7

This was published in the Round Table which you perhaps saw and therefore you might not need to have it. I found it quite interesting.

As you will see, I am not sending you the effusions of the other academics who are in the grip of Labor ideology. A lot of what they write is in my opinion erroneous and I have no doubt it will all gradually be put right by real scholars whose view is not distorted by politics. When this happens, the exposition of their criticisms will be summarised in the articles containing the refutation.

If, however, you are interested in receiving the growing pile of articles in which attempts are made to produce in an ex post facto way constitutional criticisms of last year's events, I shall have a set of these documents put together. However, my recommendation would be that you accumulate in your files articles which show why I did what I did. These as time passes will expound and answer the criticisms.

An illustration of an argument destroyed will be found in Richardson's article in which he simply demolishes what had previously been said by Sir Richard Eggleston to the effect that the Senate has no power to reject supply.

Please do not think for a moment that I send you this material expecting you to read it, unless you are minded to do so. It simply seems to me to be desirable for the Palace to have in its files an accumulation of relevant and scholarly material on last year's crisis.

I am told that there is now no intention to hold a referendum this year on the matters previously mentioned to you. This is so for a number of reasons including lack of time to organise it, but the combination of Labor opposition and some doubts about the wisdom of having a referendum at all have caused the Prime Minister to hold his hand and to rethink the position next year.

You have asked about an organisation called S.A.C.K. Its full title is the Society for Asserting the Constitution over Kerr and so far as we can ascertain it is really the work of a solitary woman - or Ms as she styles herself.

Notwithstanding that Ms Harriett Swift calls herself the organisation's National Secretary, there is no evidence of any wide-spread support for or interest in her activities. In her work for a

.../8

public relations organisation she has access to the Parliamentary Press Gallery and is thus able to distribute her frequent press releases very widely. But even the Press Gallery does not seem to be particularly interested, and she is very rarely reported.

One of her first stunts was to write to prominent people - and in particular those listed in "Who's Who" - to say that she had noticed that they had not been invited to Government House lately; to suggest that the Governor-General should not overlook such a distinguished person in compiling his guest list; to say that this shows lack of judgement and therefore unsuitability to hold the Vice-Regal Office; and enclosing an application form inviting the prominent figure to join her organisation. Our information is that this campaign did not exactly produce a flood of new members.

Her next gambit was to launch a public appeal inviting supporters to contribute to a fund which would make up the difference between the Governor-General's salary and the Governor-General's pension, thereby making it worth my while to resign. Contributions to this fund were to be forwarded to the Secretary of the Federal Executive Council, care of the Department of the Prime Minister and Cabinet. This has produced a fund which ground to a halt at the \$21 mark - mostly in postage stamps. Needless to say, I am not yet ready to claim either my pension nor the S.A.C.K. organisation's supplement.

Her latest activity is to name periodically her Vice-Regal Guest-of-the Week. Under the rules of this game she nominates from the list of guests published in the Vice-Regal column someone who has enjoyed my hospitality at Government House or Admiralty House and invites her supporters to write abusive letters to the guest-of-the-week expressing displeasure at their acceptance of my invitation. Two people marked out for this distinction by Ms Swift received respectively seven and two such letters - once again evidence of a very ineffective national campaign.

Ms Swift herself achieved notoriety at the time of The Queen's Birthday Parade at the Royal Military College. She stood by the side of the road near the entrance to the College and threw an egg at the Rolls Royce as my wife and I drove by. She subsequently appeared in Court and was fined \$10 - the maximum penalty - for offensive behaviour.

I am sorry to have given you such a lengthy description of inconsequential and insignificant activities, but I thought you would want to know just how little impact this so-called national organisation

is having. No one here seems to take Ms Swift seriously nor pay much attention to anything she says or does.

I have written and I am sending in the same bag a personal despatch to Her Majesty The Queen. You may remember I mentioned earlier that I would like to do this. I shall in that letter express the humble duty and loyalty of my wife and myself to Her Majesty, whose visit is getting closer. We both look forward to it with happy expectation.

Yours sincerely,

JOHN R. KERR

Lieutenant Colonel the Right Honourable
Sir Martin Charteris, G.C.V.O., K.C.B., O.B.E.,
Private Secretary to The Queen,
Buckingham Palace,
LONDON ENGLAND

MIRRORVIEW

Charles a busy boy

Most Australians will agree that it would be nice to have Prince Charles as our next Governor-General.

But at the moment the prospect is little more than the germ of an idea at the back of Mr Fraser's mind.

A brief look at the Prince's work load shows it's unlikely to be any more than that in the foreseeable future.

For a start, Charles will have his work cut out organising his mother's Silver Jubilee celebrations next year.

And there's the possibility the Queen will decide 25 years on the throne is enough, and hand the crown to her eldest son.

Add to this the prospect of his marriage and it's clear the Prince is very heavily committed.

There is no doubt Charles has a soft spot for Australia. He admits his years at Timbertop played a significant part in his education.

But that wouldn't help him handle the politically explosive post of Governor-General.

There are too many die-hards who would relish the chance of making it tough and embarrassing for the Prince.

All these apparently insurmountable obstacles make it unlikely we'll ever see Prince Charles in the viceregal post.

At the same time, Australians would be delighted to welcome him as often as he cares to visit us. And he can bring Davina.

CHARLES



PRINCE CHARLES.

WON'T COME

*The Daily Mirror
Tuesday
21 September 1976*

From TREVOR KAVANAGH in Canberra

Prince Charles will not be Australia's next Governor-General.

The Government moved quickly today to deny fresh reports from London that Charles intends to cut short his naval career and move into Government House, Canberra.

It is believed the royal family would not allow the heir to the throne to take up the appointment while the post continues to be the subject of political controversy.

The powers of the Governor-General have been a hot point of controversy since Sir John Kerr's sacking of the Whitlam Government.

No pressure

The Prime Minister, Mr Fraser, said today "it would be very nice to have a member of the royal family based here."

He said that although the appointment was a possibility, it was unlikely to happen in the near future.

Senior Government

Move barred after Kerr storm

officials emphasised that such a move could not take place unless Sir John Kerr decided to resign.

But no pressure would be exerted on the Governor-General to do so.

"There is certainly no question of Sir John being moved at the behest of the Government," said one source.

"He is there until he decides to go."

The role of Governor-

General is believed to be an unlikely choice for Prince Charles because of his youth.

The Prince has shown during his years in the royal navy that he loves a life packed with action and adventure.

He has become a pilot, parachutist and skin-diver, as well as a skilled seaman.

The position of Governor-General requires



MR FRASER: "very nice" but no . . .

much formality and a continuous list of engagements.

Charles has already made it clear he does not want to follow the example of King Edward VII, and live a life of luxurious inactivity.

In his own words, he is looking for a future with "real purpose."

"I want to earn my keep," he has told his family.

THE Sun says

NO HEIR TRANSPLANT

THE balloons are going up again in London. They say Prince Charles for Australian Governor-General.

One columnist tips him to get the job before long.

His newspaper says Charles could learn something about kingship here.

This is one floated rumour which Australians — officials and public — should bring down with a thud.

Charles in Canberra would break the strong and worthwhile tradition of putting our own top men into the job.

It is too late to hark back to the high noon of Empire when night has fallen on it.

Also, too close a liaison between Australia and Prince Charles would be embarrassing for both.

It would be a double mistake by Buckingham Palace and the Australian Government to have Charles here while the nation debated the constitutional powers of his office.

Even while that question is being sorted out the question will rise of whether we want a Governor-General at all.

Should we — and the debate is already simmering — become a republic? We do not think so, but that is the kind of family argument you don't inflict on guests.

Trip off: No to a G-G bed

From GEOFF WALSH

CANBERRA. — A planned Australian visit by the Papua New Guinea Governor-General, Sir John Guise, has been cancelled.

It has been called off because Sir John Guise refused to stay with the Australian Governor-General, Sir John Kerr, during the visit.

The Foreign Affairs Department yesterday confirmed there had been plans for a visit recently that fell through.

A department spokesman said there was a standing invitation for Sir John to visit Australia.

Government sources said Sir John Guise had planned a low-key unofficial visit.

But Australian officials

insisted the visit should be a full state tour.

The PNG Governor-General decided against the visit after diplomatic pressure that he stay with Sir John Kerr during the visit.

Protocol demands that visiting heads of state stay with the Governor-General during Australian visits.

The Canadian Secretary of State for External Affairs, Mr Allan MacEachern, visited Australia last week and left before having seen Sir John Kerr.

Before coming to Aus-



• Sir John Guise

tralia, Mr MacEachern had called on the NZ Governor-General and the heads of state in Malaysia and Singapore.

A Government House spokesman said a meeting between Mr MacEachern and Sir John Kerr had been impossible because of their programs.

Governor won't be Kerr guest

CANBERRA.— A planned Australian visit by the Papua New Guinea Governor-General (Sir John Guise) has been cancelled.

It has been called off because Sir John refused to stay with the Australian Governor-General (Sir John Kerr).

The Foreign Affairs Department confirmed yesterday that plans for the visit fell through recently.

A spokesman said there was a standing invitation to Sir John to visit Australia.

Government officials said Sir John-Guise had planned a low-key unofficial visit, but Australian officials insisted the visit should be a full State tour.

Protocol

The Papua New Guinea Governor-General decided against the visit after diplomatic pressure that he stay with Sir John Kerr during the visit.

Protocol demands that visiting Heads of State stay with the Governor-General during Australian visits.

Sir John Guise has not visited Australia since Papua New Guinea was granted independence on September 16 last year.

Personal relations between the two Governors-General have never been friendly.

Political observers at the independence celebrations last year reported friction between them.

The Canadian Secre-

tary of State for external affairs (Mr. Allan MacEachern) visited Australia last week and left before having seen Sir John Kerr.

Mr. MacEachern had, before coming to Australia called on the New Zealand Governor-Gen-

eral and the Heads of State in Malaysia and Singapore.

A Government House spokesman said a meeting between Mr. MacEachern and Sir John Kerr had not been possible because of their programmes.

Governor delays trip

PORT MORESBY (AAP-Reuters). — Papua New Guinea's Governor-General (Sir John Guise) has confirmed that he has postponed a visit to Australia later this month.

WEST AUSTRALIAN - 15 September 1976

Guise halt explained

PORT MORESBY, Tues: Papua New Guinea's Governor-General, Sir John Guise, has confirmed that he has postponed a visit to Australia due to have begun later this month.

However, Sir John last night denied an Australian newspaper report that the trip was postponed because he did not want to stay with the Australian Governor-General, Sir John Kerr.

Sir John Guise said he wanted his Australian visit to be low key. The original dates had clashed with another duty "of greater national importance"—the opening of an airstrip at Rossel Island in his home province of Milne Bay.

"The island is isolated and the people always feel out on a limb," he said.—AAP.

G-G prince? No, says PM

A SPOKESMAN for the Prime Minister, Mr Fraser, last night denied reports that Prince Charles would be Australia's next Governor-General.

He also said Mr Fraser had no intention yesterday of making a statement on the matter.

Earlier, Buckingham Palace spokesman said Mr Fraser would make a statement on whether Prince Charles would replace Sir John Kerr.

The spokesman said: "We have no knowledge that Prince Charles may replace Sir John Kerr as Governor-General of Australia."

I understand Mr Fraser is making a statement on that tonight."

AAP reports that the Daily Express in a front-page article had suggested that the Queen might name Prince Charles as Governor-General if the Royal

The Daily Express said the prince's decision to quit the Navy had nothing to do with Miss Davina Sheffield, 25, but added that it would be more appropriate if a governor-general were married.

The palace spokesman said the prince 27, would leave the Navy by the end of this year or early next.



Prince Charles



Prince Charles

Prince Charles to leave Navy

LONDON, Monday. — Prince Charles is to leave the Royal Navy within a few months, a Royal Family spokesman said today.

The spokesman made the comment after reports appeared in British newspapers saying Prince Charles, a lieutenant in command of the 360-tonne minehunter Bro-nington would be leaving at the end of the year. This was sooner than expected.

A spokesman at Buckingham Palace said: "We have always said the Prince would leave the Navy at the end of this year or the beginning of next."

The Daily Telegraph

and the Daily Express carried similar reports that an early departure from active service would give the Prince more time to concentrate on his appointment as chairman of a committee to organise celebrations to mark Queen Elizabeth's 25 years as Monarch next year.

The newspapers also cited reports suggesting that he might be appointed Governor-General of Australia.

The British Broadcasting Corporation said today that the Australian Prime Minister, Mr Malcolm Fraser, had denied reports that the Prince might be appointed Governor-General of Australia.

(AAP/Reuter)

Nice to have Charles as G-G — Fraser

SPECULATION that Prince Charles may be Australia's next Governor-General heightened yesterday when the Prime Minister, Mr Fraser, said the prince would be "very welcome."

"It would be very nice to have a member of the royal family based here," Mr Fraser said.

But he added although such an appointment was possible, he thought it unlikely in the near future.

Mr Fraser said reports from Britain that Prince Charles, now that he has decided to leave the navy, may take up the appointment was "just speculation."

Prince Charles' decision to leave the navy at the end of this year — 12 months earlier than previously planned — also strengthened reports that he was planning to marry soon.

In London the Daily Express said it was unlikely Prince Charles was leaving the navy simply to marry his 25-year-old blonde girlfriend, Davina Sheffield.

THE AUSTRALIAN, TUESDAY 21 SEPTEMBER 1976

HOSTILITY

"He could easily marry and remain in the navy as his father did," the paper said. "But if he were appointed to a senior governor-generalship it might be more appropriate for him to be married first."

Prince Charles was expected to remain in the navy until next year. But now will leave within a few months.

Buckingham Palace has been worried that the continuing furore over the action of the Governor-General, Sir John Kerr, last November may mar the Queen's visit to Australia next year.

Although Sir John will not accompany the Queen during the visit — only meet her on her arrival and farewell her — there have been reports of planned demonstrations by groups wanting to show the Queen their hostility to Sir John.

THE MELBOURNE AGE, TUESDAY 21 SEPTEMBER 1976

'No G-G Charles'

CANBERRA. — The Prime Minister, Mr. Fraser, yesterday quashed reports that Prince Charles could replace Sir John Kerr as Australia's Governor-General.

A spokesman for Mr. Fraser said speculation surrounding Sir John and Prince Charles was baseless.

"There is no suggestion that Sir John step down in the near future," the spokesman said.

The spokesman said Mr. Fraser had directed him to "can" the story as quickly as possible after Mr. Fraser was approached by a foreign journalist for comment.

"This is an artificial situation where the speculation provokes the denial, the denial is made into another story," the spokesman said.

The Dismissal of the Whitlam Government*

The constitutional justification for the dismissal of the Whitlam Government lay in the inability of that Government, in November 1975, to maintain supply, and Mr. Whitlam's refusal, despite that inability, to recommend a dissolution of Parliament.

The action of the Governor-General, in these circumstances, in dismissing Mr. Whitlam, and dissolving Parliament, was taken in accordance with the law and conventions of the Australian Constitution.

The unconventional and extraordinary thing was Mr. Whitlam's refusal to recommend a dissolution of Parliament, despite his Government's inability to maintain supply. It was this action, and not that of the Governor-General, nor that of the Senate, which was improper, and contrary to convention. Yet by some extraordinary sleight of hand Mr. Whitlam managed, whilst glossing over his own serious fault, to create in many breasts a very real measure of doubt, if not the unwavering certainty, that what was done, first by the Senate, and later by the Governor-General, constituted a serious breach of convention, and indeed much worse.

Despite all that has been said and written already on the subject, by the professedly learned and the confessedly unlearned, the organisers of

this Seminar have thought it appropriate to present the matter for further discussion here tonight; and we the participants have accepted their invitation in the hope perhaps that we can throw further light on the subject matter.

For myself, I would think that our time here will have been wasted unless, as a result of our discussions, plain men were able to listen to our words, or read them later, and gain plain answers to their questions. We cannot of course expect everyone to agree with our answers; but, hopefully, they will at least understand them, and will not walk away in disgust, feeling that their country's Constitution is an arcane mystery which they cannot penetrate.

For unless in matters of such basic importance we can give clear answers, so that he who runs may read, then either the Constitution itself, or we ourselves, shall have failed them sadly. The Constitution is still, basically, what it appears at first sight to be, namely, a simple, lucid document dealing with large matters. We must not be daunted by professors, or the lawyers, from applying our own minds in the first instance to the simple words of the Constitution itself.

There are only three matters of vital importance in considering the constitutional justification for the dismissal of the Whitlam Government. They are, first, the Senate's refusal of supply; secondly, the attitude taken up by Mr. Whitlam when faced with the refusal of supply; and thirdly, the action of the Governor-General in dismissing Mr. Whitlam, dissolving Parliament, and commissioning Mr.

Fraser to form a caretaker government.

In considering these matters we are faced with questions of law, with matters of convention or alleged convention, and matters of political judgment. We have not come here to debate political matters as such, though the dividing line, in constitutional questions, between politics, on the one hand, and law or convention, on the other, is sometimes hard to draw.

It will be my thesis here tonight that the matters in question have been made to appear far more difficult than need be; that basically they are capable of explication by reference to the black letter law of the Constitution itself, and elementary textbooks of English and Australian constitutional law; and that contrary to the impression which has been created in the last nine months, those sources give us very clear and certain answers to our questions — answers which I say plainly at the outset are in accord with the action of the Senate, unfavourable to Mr. Whitlam and his Government, and in agreement with the action of the Governor-General.

Yet I do not believe that future historians will even begin to understand our constitutional crisis of 1975 unless they understand something of the then Prime Minister, and his extraordinary impact on the people of his time. I for one do not propose to debate the events of 1975 in some kind of artificial legal vacuum, from which we exclude any discussion of the character and personality, and the actions, of the man who brought it all about, and the effect of his conduct upon others. We are

* This is a slightly revised text of an address delivered at the Constitutional Seminar held at the University of New South Wales on the 16th August, 1976, under the auspices of the University of New South Wales Law School and The Constitutional Association of Australia.

The writer claims no copyright in this work, and it may be reproduced in whole or in part provided the source is acknowledged.

surely deceiving ourselves if we pretend that these matters can be entirely absent from our minds when we come to discuss the constitutional questions to which the actions of Mr. Whitlam gave rise.

Mr. Whitlam is undoubtedly a man of very great talents. I regard him as a remarkable innovative thinker, a man who did much, particularly over the period since 1969, to enlarge the parameters of our political philosophy. If he had possessed the leadership qualities to match his charisma; if he had had the discretion to match his audacity and his vision, there is no limit to what Mr. Whitlam might have achieved.

As it was, he stood us upside down; he revolutionised our thinking in many ways; in some ways for better, and in other ways for worse; the effects of what he did will remain with us for generations; and he caused a serious rush of blood to many heads, which distorted their good judgment, as I shall show, in quite remarkable ways.

Surely no-one but Gough Whitlam could have behaved as he did in the crisis of 1975, yet carried so many people with him; or persuaded so many people who should have known better that he was the man in the right whilst everyone who opposed him was completely, invariably and wickedly in the wrong.

I shall have more to say of Gough in due course, for as I have said, I believe an understanding of his character and conduct, and his role, to be an essential key to the whole affair.

But let us return, meanwhile, to the first essential matter for consideration, the Senate's refusal of supply.

Sir Richard Eggleston's argument is based, in the main, on the provisions of Section 53, which he reads in a manner different from that which had always previously been accepted, or indeed that in which it is interpreted by the High Court and the majority of constitutional pundits, of whatever political persuasion, or of none, to this day.

I propose to meet Sir Richard on that ground — the language, that is, of Section 53 itself.

But first, of course, we must take Section 53 in the context of the Constitution as a whole: a Constitution which begins in S.1 from the all-important foundation for all our thinking on the subject of our Parliament:

"1. The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called "The Parliament", or "The Parliament of the Commonwealth.""

Exactly. To anyone familiar with the British Constitution, or even to those who are not, it must be very clear from the provisions even of this Section 1, standing alone, that the concurrence of all three — the Queen (or her representative), the Senate, and the House of Representatives — were necessary before the legislative power of the Commonwealth could be said to have been validly exercised: this is further confirmed by the provisions of Sections 57 and 58.

A necessary corollary is that any one of them, by refusing their concurrence in whatever manner or form, could prevent legislation being validly enacted. (One appreciates, of course, that the Governor-General, as the Queen's representative, will not normally refuse his concurrence, but one is speaking now of what is necessary to legal validity).

One starts, therefore, with the self-evident proposition that, quite apart from Section 53, the Senate possessed the same powers, by virtue of Section 1, to refuse supply as to decline its consent to any other legislation. If, therefore, we are to find that power to refuse supply curtailed it must be by express provision, contrary to the clear implication from Section 1, and from the analogy which is naturally furnished to us by the British Constitution, as it then existed, with which the Australian people were quite familiar (which then required the consent of the Queen, the Lords, and the Commons, for the enactment of legislation by the British Parliament).

But Section 53, so far from purporting to curtail the power to refuse supply, actually went out of its way to provide in its last sentence that "Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws." And although earlier provisions of the Section prohibited Senate amendment of money Bills, and prohibited also the origination of certain Bills in the Senate, there was no prohibition whatsoever of anything else.

If it had been intended that the Senate should not have power to reject supply Bills, nothing would have been simpler than to say so. But of course it would not have stopped there; in view of Section 1 the Constitution, to be really effective, would need in such case to have stipulated how a supply Bill could become law despite the Senate's failure to concur. The fact that the Constitution made no such provision is eloquent demonstration that no such result was intended.

The men who drafted the Constitution were not fools, by any means. It is quite futile to attempt to read into these simple provisions a drastic limitation on

the powers of the Senate which the framers of the Constitution never chose to express, for the good reason that they never intended it.

Further demonstration of the equal status of the two Houses is provided by Section 49, which provides that "The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the Committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth."

The falsity of the analogy with the House of Lords, (and indeed the even falser analogy with the House of Lords, not as it then existed, but as it stood after the English Parliament Act, eleven years after the adoption of our own Australian Constitution), is clearly demonstrated by the provisions of Section 49.

If then we turn from the words of the Constitution itself to the history of the Convention debates, we are further reinforced in the view we have adopted after considering the plain words of Sections 1, 53 and 49, which I have quoted above.

Perhaps I may be permitted to quote what I had to say on this subject of Senate power in a public statement I made as early as the 22nd October, 1975. After dealing briefly with the Senate's clear legal power to refuse supply, and referring to Sections 1 and 53, I proceeded to deal with the alleged "convention" which was then being propounded by Mr. Whitlam and some academic supporters, as follows:

Is there any convention that the Senate, though possessing the undoubted legal power, should never reject money Bills?

A "convention" is simply a usage which has gained such universal acceptance that it is regarded as wrong to depart from it. An example is the convention that the sovereign or his representative must normally act on the advice of his ministers. There is no convention in Australia that the Senate should never reject money Bills. It is for the person alleging any such convention to prove its existence — by showing almost universal agreement amongst text writers and politicians, past and present, to that effect.

There is no such common agreement. On the contrary, the Senate's right to reject was clearly intended by the founding fathers of the Constitution and has ever since been accepted as such by text writers and by most politicians, (including Mr. Justice Murphy when he was Attorney-General under Mr. Whitlam, and Mr. Whitlam

himself: see later).

Authors: Quick and Garran, in their classic work on the Constitution, tell us (at pp. 131 & 139) how, after much debate, the Constitutional Convention adopted a draft Bill which "embodied what was subsequently referred to as the 'compromise of 1891'. The Senate was given equal power with the House of Representatives except that Appropriation Bills and Taxation Bills were to originate in the House of Representatives alone; and that the Senate was forbidden to amend Taxation Bills or Bills 'Appropriating the necessary supplies for the ordinary annual services of the Government', or to amend any Bill 'in such manner as to increase any proposed charge or burden on the people'."

Quick and Garran tell us that in the draft Bill of 1897, the "so-called 'compromise of 1891' was set aside"; in particular "the provision that the Senate should not amend Bills imposing taxation was struck out altogether". (p.169) However, when the matter came to be debated, then — "commenced the last great debate on the Money Bill clauses — a debate which, thought it occupied but two days, was certainly the most momentous in the Convention's whole history . . . The real debate began with an amendment by Mr. Reid to insert a prohibition against the Senate amending laws imposing taxation and thus revert to the 'compromise of 1891'. He was prepared (he said) to give the Senate — "not as an antiquated power, never to be used, but as a real living power" — the right of rejection; but the power of moulding finance (thatis, by amendment) "must be with the House of Representatives". (My emphasis) (Quick & Garran, p.172).

Sir George Reid's amendment to the draft Bill, reintroducing the prohibition against amendment of Money Bills, but with the declared intention of preserving the right of rejection "not as an antiquated power, never to be used, but as a real living power", was duly carried by the Convention and, of course, was embodied in the present Section 53.

In their annotations on Section 53, Quick and Garran say (at p.673) that subject only to the exceptions expressly referred to in Section 53 (that is, power to originate, or to amend), "the Senate has co-ordinate power with the House of Representatives to pass all Bills or to reject all Bills. Its right of veto" (say the authors) "is as unqualified as its right of assent". See also Harrison Moore, 2nd. ed., pp.144,145.

The men who debated these grave matters were not babes in the wood. They knew full well that in giving to the Senate this power to reject supply, as a "real living power", they were giving it the opportunity to bring down a Govern-

ment by refusing supply — as upper houses had done before, in State legislatures, and as they were to do again in the decades that followed. And this view of the matter has been accepted to this day, both by politicians and text writers. The best of these modern authorities is the standard work by Mr. J.R. Odgers, the Clerk of the Senate, who says, in his *Australian Senate Practice* at pp.308, 309:—

"There can be no question that the Senate has the power to refuse Supply." . . . "It may be argued that in a system of responsible government an Upper House should not resist unduly the People's House in matters of finance. Perhaps the practice at Westminster will be instanced. There, when a money Bill is sent to the House of Lords and that House fails to pass it within one month without amendment, it is presented for the Royal Assent, notwithstanding that the Lords has not agreed to the bill.

"What that argument forgets is that the Senate has the power, and it was given its great financial powers because the Senate has a different responsibility than a Second Chamber like the House of Lords. Great Britain is a unitary state. Australia, however, is a federation of states, and a principle of federation is the near equality of the two Chambers of the legislature — with a Senate or States House constituted in such a way that the interests of the States may be protected against the House of Representatives or national assembly which is elected on a population basis.

"The only restrictions on the exercise by the Senate of its financial powers are the restraint which it traditionally exercises and the electoral sanction. A Senate which used its powers capriciously could suffer only one fate — punishment at the ballot-box. But a Senate, which correctly interprets the mood of the electorate, has a quite remarkable annual opportunity — by refusing to join in the grant of Supply — to bring about the dissolution of the House of Representatives and the resignation of the Government which that House virtually appoints. (My emphasis).

"This greatest of the Senate's powers has never been used. But like the latent power to imprison persons for breach of Parliamentary privilege, it is there to be brought out and used when circumstances warrant."

Nothing could be clearer. Nowhere does Odgers suggest that the Senate's refusal of supply would be a breach of any law or convention; on the contrary, he reports the power as one which, though never yet exercised, is still a "real living power".

Mr. Whitlam and Senator Murphy (as he then was), have also at other times boldly affirmed the Senate's right to refuse supply, and the consequent necessity for the Government to face the people at an election: see speech by Mr. Whitlam, House of Representatives, 12th June, 1970, pp. 3495,6; and by Senator Murphy, Senate proceedings 18th June, 1970, p.2651; and the conduct of Senator Murphy when refusal of supply was threatened in 1974.

Let us then have an end to these self-serving suggestions that the power is "dead", which should be seen for what they are, merely a colourable excuse to avoid an election.

22nd October, 1975

Nothing that has been said or published since, (and I have read a great deal of it), has persuaded me to change in the least particular what I said there. I have yet to see a single authority quoted to support the view so eagerly put forward last year that there was a "convention" that the Senate must not refuse supply. Yet a convention for which there is no authority; a convention which indeed contradicts the highest authorities; a convention contradicted by the past words and conduct of the man who now seeks to rely on it; a convention that contradicts the plain words of the Constitution itself; a convention that is, out of keeping with the clear words and intentions of the founding fathers; why, such a convention must be a very rare bird indeed: we had best shun it.

Of course when we come to the politics of the matter — the political question whether the Senate should have exercised in 1975 the power which it had possessed, but never exercised, in the 75 years since Federation — there you have room, admittedly, for a great difference of opinion. But if there was a gulf, as I believe there was, at the time, between the thinking of many vocal academic lawyers and the great, but for the most part silent, majority of practising lawyers, this can be explained easily enough.

I believe the academics failed to appreciate the degree of concern for Australia's future sincerely felt by responsible people throughout Australia, many of whom, like myself, had voted for a change in 1972, and some of whom had still voted for the return of Labor even in 1974. They were rightly concerned about the Gair affair and the loans affair, and all that had followed — the sacking of senior Ministers for the deception of Parliament, and so on. Side by side with that was the well-justified concern for the serious inflation, unemployment, and economic mismanagement, and the apparent trend towards

Quadrant, September, 1976 65

nationalisation without electoral mandate which was becoming evident in many ways.

Add to this our apprehension that Australian democracy itself was increasingly endangered by this increasingly wild man, Gough Whitlam — more and more the demagogue, less and less the responsible statesman.

From much of this the academic community was sheltered, but practising lawyers were necessarily very conscious of it. They had not the time, perhaps, nor the inclination, to write letters to the press about it, but they had a strong gut feeling that the Senate was at last justified in doing what it did, and that the strong action of Sir John Kerr, to match Mr. Whitlam's intransigence, represented our last chance to pull Australia back from the brink before the processes set in train by the Whitlam Government became irreversible.

Extraordinary measures (entirely within their legal powers, but never previously employed), were called for, both on the part of the Senate and the Governor-General, by an extraordinary phenomenon, Edward Gough Whitlam, and his extraordinary conduct.

Historians of the future will need to appreciate this aspect of the matter also if they are to understand the reactions of the Opposition parties, and the majority of the Australian public, in the events of 1975.

I have taken some little time in dealing with this first matter, the powers of the Senate, for unless we start with the right answer to that question, the whole of our thinking on the constitutional crisis of 1975 will go astray.

Some of our respected academic community, having begun on the wrong foot, never subsequently managed to get into step in the great constitutional debate.

If we start on the left foot, appreciating that the Senate was acting entirely within its powers, there is no difficulty in realising that Mr. Whitlam was merely wrong-headed and insincere in his stubborn refusal to yield, his decision to "tough it out", to "smash" the Senate, and his self-righteous proclamations of solitary virtue in refusing to resign.

And of course it follows that we shall see the final decision of the Governor-General as the inevitable and necessary consequence of Mr. Whitlam's intransigence: more of this below.

But if instead of "Left-Right-Left", one starts with the mistaken idea that the Senate was exceeding its powers, one proceeds naturally enough to the next mistaken assumption — that Mr. Whitlam was justified in his refusal to resign — and hence that the Governor-

General acted improperly in finally dismissing him. (This is of course, something of a *non sequitur*, for there are good grounds for arguing that the Governor-General had no proper concern with the rights and wrongs of Senate refusal of supply; his simple ground for action being the inability of the Prime Minister, for whatever reason, to maintain supply. Still, it seems fairer and more realistic to allow that the Governor-General might properly have some regard to the genesis of the matter.)

This analysis reveals I believe the crucial necessity of a proper appreciation at the outset of the very first question that arose for consideration, namely the power of the Senate.

Our attitudes to this question were naturally coloured by our pre-conceived ideas in relation to certain collateral matters. Our answers to constitutional questions can be strongly influenced by our own emotional reactions, however much we may wish the contrary. If one is an innate centralist, impatient of the powers of the States, one naturally deplores the exercise of significant power by the Senate. If one still remained sympathetic to Mr. Whitlam and his Government, even in October 1975, despite all the aberrations of the previous year, again one would tend to deplore the steps taken to remove him, and could find all kinds of reasons for maintaining his so-called "right" to continue to govern.

None of us can claim to be entirely free of these motivations when arguing matters of constitutional law. That is why it is so important to go back to the actual words of the Constitution, and to consider them in their natural meaning, aided by the observations of learned authors who wrote at a time when they were able to consider the matter free of the bias which naturally afflicted so many of us in 1975. Having done so, there can be no doubt as to our answer to the first crucial question.

Let me return now to the second and third matters I mentioned earlier, namely, Mr. Whitlam's attitude when faced with the refusal of supply; and the consequent action of the Governor-General.

Despite all that has been said and written with such vehemence on these two aspects of the matter, I have never myself thought there could or should be much doubt as to the impropriety of the one (that is, Mr. Whitlam's attitude) nor the complete propriety of the other (the action of the Governor-General), provided (as I have said), that one starts on the correct foot, with a clear appreciation that the Senate was acting entirely within its powers in refusing supply.

I digress here for a moment to say that in my view the time is overdue for us to speak and write of Mr. Whitlam as he is. "*Nothing extenuate, nor set down aught in malice.*" This man is merciless when he comes to castigate others, as he so often does. Is it not time that we should speak of him with equal forthrightness, in language appropriate to his conduct? If we do, then whilst continuing to acknowledge, and not losing sight of his great talents, perhaps even his greatness, in certain aspects, we shall have to say that we are ashamed of some of his wildest words, and can only regret the way in which he reacted to the events of the 11th November last. By the way in which he reacted to the Senate's refusal of supply, and to his dismissal, he demeaned this country, himself and the office he had previously held, and disgraced his leadership of a great party.

If the Senate was within its powers in refusing supply, as it clearly was, how must we describe the action of Mr. Whitlam in deciding to "tough it out", his refusal to resign, or to recommend a dissolution, and his reactions to his dismissal — "Kerr's cur", "Nothing can save the Governor-General", and so on? Were these the words and conduct of a great statesman? Or must we not say they were more like the actions of a larrikin, and the language of a lout?

For what it really means is this: that he was prepared to set the Constitution at naught, and to plunge the nation into economic and social chaos, so that he could remain in power, contrary to the will of the Australian people whom he had once professed to lead. (His realisation that the people wanted him out is quite patent from the attitude he took when faced with a refusal of supply in 1975, as compared with his conduct, faced with a similar situation, in 1974).

We can not even accord to him the justification of a sincere belief that he was in the right; the contrast between his words and attitudes in 1970 and 1974, and those he struck in 1975, if they are dispassionately compared, will demonstrate quite clearly that he did not, in 1975, genuinely believe his own propaganda.

If only we start on the correct foot, then — accepting, as it is meet and right for us to do, the clear words of the Constitution and the unanimous opinion of the best writers, that the Senate undoubtedly possessed the power which it exercised for the first time in 1975 — there was no possible justification for a genuine democrat who loved his country maintaining a right to govern without supply — with the illegality, the desperate shifts and stratagems to maintain his position, the dislocation, the danger of revolution

and civil strife, that this could quickly entail, unless effectively resolved. See in this regard the Constitution, S.83.

By this conduct Mr. Whitlam placed the Governor-General in a position where he must eventually, unless he was a mere cipher, feel obliged to cut the Gordian knot by dismissing the Prime Minister, dissolving Parliament, and giving the Australian people the opportunity once again to decide whether they were prepared to trust their future in the hands of Edward Gough Whitlam, or whether they wanted him out.

It is quite clear from the uncontradicted words of the Governor-General that Mr. Whitlam was quite adamant throughout. As Sir John Kerr put it in the letter to Mr. Whitlam of the 11th November, 1975 which accompanied his official statement:—

"You have previously told me that you would never resign or advise an election of the House of Representatives or a double dissolution and that the only way in which such an election could be obtained would be by my dismissal of you and your Ministerial colleagues."

"As it appeared likely that you would today persist in this attitude I decided that, if you did, I would determine your commission and state my reasons for doing so. You have persisted in your attitude and I have accordingly acted as indicated." (My emphasis)

I do not believe we have paid sufficient attention to this letter. Amongst all the rodomontade, Whitlam has never denied the statements contained in this the Governor-General's letter.

It is quite clear, therefore, that his attitude was quite uncompromising; indeed one might truthfully say it was truculent and intransigent.

Furthermore, it is clear from the letter than even if the Governor-General never gave Whitlam the "ultimatum" of which we have heard so much, he did give him a last opportunity to extricate himself from the corner into which he had so deliberately painted himself. "As it appeared likely that you would today persist in this attitude I decided that, if you did, I would determine your commission and state my reasons for doing so. You have persisted in your attitude . . .".

What need or justification was there for an ultimatum? Here was the Prime Minister of Australia flatly declaring his intention "never" to resign or advise an election, and maintaining that "the 'only' way in which such an election could be obtained would be by

my dismissal of you and your Ministerial colleagues". The Governor-General gives him a last opportunity to withdraw from this position; the Prime Minister, nonetheless, "Persisted in this attitude".

And now he and his supporters try to tell us that the Governor-General should have given him an ultimatum: "Advise an election within such and such a time or I shall dismiss you", or some such.

There are several good reasons why the Governor-General would have been both out of order and unwise if he had so acted.

For one thing, Mr. Whitlam would have had every justification to stigmatize this as most improper behaviour on the part of the Governor-General. What, had he not, the Prime Minister of Australia, told the Governor-General in uncompromising terms that he would never resign and that the only way in which an election could be obtained would be by his dismissal? Had he not persisted in this attitude, despite the opportunity given him on the 11th November to withdraw from this position? Was he not entitled to be taken at his word? Was not the Governor-General entitled to take him at his word? What need or justification was there for any ultimatum — which could be construed as an insult, or blackmail, in the teeth of the Prime Minister's insistence that he would never advise an election?

There is another matter, too, and that is the expected reaction of Mr. Whitlam if any such ultimatum had been given. Even those who are partial to the Whitlam view of events are prepared to agree that, faced with such an ultimatum, Mr. Whitlam would almost certainly have attempted to riposte by having the Governor-General sacked before he could act.

Let us put ourselves for a moment in Sir John Kerr's shoes. Let us assume in his favour that, good lawyer as he was and is, he believed like most everyone else that the Senate did possess the legal power, which it had exercised, to refuse supply; that there was no substance in the contention that refusal of supply was a breach of a convention of the Constitution; and that it had become his duty to dismiss the man who flatly refused to advise an election or to resign in these circumstances, and had persisted in the attitude that the only way to obtain an election was by his dismissal.

Was Sir John Kerr not then entitled, in his lonely eminence, to take the short way to the solution which Mr. Whitlam had forced upon him?

Nothing required him to behave like a fool, or to run the very real risk of Mr. Whitlam exacerbating the crisis by an appeal to the Queen or, for that matter,

by an attempt to inflame public opinion by the strictures, which he would quickly have constructed, on the Governor-General's "grossly improper" attempt to "blackmail" him into submission. One can hear the accents of synthetic Whitlam indignation which such an event would have called forth.

There is a maxim upon which Mr. Whitlam and Sir John Kerr might well have pondered during the anxious days of late October and early November 1975: *Salus populi est suprema lex*; the public safety is the highest law.

For Mr. Whitlam it should have pointed out his duty to resign, when it became obvious that he could no longer govern with an assurance of supply; and equally for the Governor-General the ancient maxim could well have provided a beacon to guide him in exercising his legal power of dismissal and fulfilling the duties imposed upon him by Section 61 of the Constitution to execute and maintain the Constitution and the laws of the Commonwealth.

Was the Governor-General within his rights in dismissing Mr. Whitlam and forcing an election when Mr. Whitlam refused to resign or advise an election? Of course he was; if the Governor-General could not do that much in the circumstances, there would not be very much point in having such an office at all.

Here again the issue has been obscured by much contentious argument. Let us try to clarify it.

Once again let us look first at the Constitution itself, and then at the conventions which govern the exercise of the powers which it confers.

"Section 2. A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him."

"Section 5. 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."

"Section 28. Every House of Representatives shall continue for three years from the first meeting of the House, and no longer, but may be sooner dissolved by the Governor-General."

"Section 61. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of

the laws of the Commonwealth."

"Section 62. There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure."

"Section 63. The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council."

"Section 64. The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish."

"Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth." (My emphasis, throughout).

Of course, these provisions were intended to be exercised not capriciously, but in accordance with constitutional convention: see below. But the first thing to note is that the Governor-General had the legal power to act as he did, both in dismissing Mr. Whitlam, and in dissolving Parliament.

In dissolving Parliament, in this instance, the Governor-General acted not pursuant to Section 28, by dissolving the House of Representatives alone, but pursuant to Section 57, by granting a double dissolution.

I decline to be drawn tonight into yet another line of argument, as to whether it was proper for the Governor-General, as I believe it was, to act pursuant to Section 57, by dissolving both Houses, or whether he should have dissolved the House of Representatives alone, pursuant to Section 28. This is a matter for separate debate. One thing is very clear to me; if the Governor-General had acted pursuant to Section 28, and dissolved the House of Representatives alone, instead of acting pursuant to Section 57, he would certainly have been trenchantly criticised by Mr. Whitlam for that decision; Mr. Whitlam would then have complained that he had been deliberately deprived both of the opportunity to win a Senate election, and the opportunity to have his "stock-piled" Bills passed into law.

And it is notable that Whitlam made no complaint at the time that Section 57 had been utilised; this is something that has been dredged up, *ex post facto*, like so much else, by his enthusiastic supporters. This is not an essential part of our debate tonight; it is a red herring; let us not chase after it, for in so doing we may lose sight of the essential elements in our argument.

Very well, then: it is clear that the Governor-General possessed the legal power to do what he did. But was it in accordance with convention that he should do so? Of course it was; and no-one knew it better than Mr. Whitlam himself.

He had told the Governor-General that the only way in which an election could be obtained would be by his dismissal: see the Governor-General's letter, above referred to. That does not sound like someone who claimed that no such power existed.

Mr. Whitlam learned his constitutional law, as I did, from Sir John Peden at the Law School of the University of Sydney in the late thirties. Our principal textbook was Dicey's *Law of the Constitution*, and a very good textbook it is. And we were certainly aware of Evatt's book, *The King and His Dominion Governors*. Gough was a great admirer of Evatt, and was thoroughly familiar, one may be sure, with the story of Game's dismissal of Jack Lang.

Within the parameters of our Constitution and textbooks such as these, Gough Whitlam, even as a young law student, quite apart from his later studies, would have been quite familiar with the concept of a Prime Minister or Premier resigning because of a failure to maintain supply, and of the Sovereign or his local representative dismissing a Prime Minister or Premier for that reason, or for the actual or anticipated illegality involved in attempting to govern without it: cf. Dicey, 8th ed., pp. 450 and following.

Our circumstances are different, of course. The powers of the Governor-General, unlike those of the English sovereign, are spelt out, to some extent, in the express words of the Constitution itself, which I have quoted. And the Senate is, and was clearly intended to be, a far more potent chamber than the House of Lords, with powers equivalent, for most purposes, to those possessed by the House of Representatives itself.

Yet despite these differences there was I believe an intuitive feeling here in October/November 1975, both amongst people who had learned their constitutional law at Law School, and perhaps never looked at it since, and amongst those who had studied and practised in the field, that the Governor-General possessed the power to do what he ultimately did. There was no precedent exactly in point, it's true, either for Mr. Whitlam's refusal to resign, in the circumstances, nor for the Governor-General's dismissal of him. The reason for lack of precedent exactly in point is clear enough. It lay in the fact that the precise circumstances of 1975 were unprecedented, in that this was the very first time that the Senate,

this uniquely Australian body, with its unique powers, not identical with those of any other second chamber in the British Commonwealth, had exercised its undoubted power to refuse supply.

But for all that the case fell clearly within established principle: namely, that a Prime Minister should resign, or be dismissed by the sovereign or his representative, if he is unable to maintain the ordinary services of government, through his failure to retain the confidence of the legislature.

In some polities (such as the United Kingdom since the Parliament Act of 1911), this can only occur through a failure to retain the confidence of the lower house; but in others, such as some of the Australian States, and the Commonwealth of Australia, in which either house may refuse supply, the principle extends quite clearly to cases where the Premier or Prime Minister has lost the support of either house.

There is a further salutary principle it is well for us to remember, and it is this: a person or body which possesses a power has not only the right, but the duty, to exercise it, whenever that person or body considers, in good faith, that the purposes for which the power was conferred require it.

This principle has obvious application to the action of the Senate in refusing supply. The principle applies also of course to the action of the Governor-General.

What was it that S.28 said, again? "Every House of Representatives shall continue for three years from the first meeting of the House, and no longer, but may be sooner dissolved by the Governor-General." And the Constitution also provides, as we have seen, that Ministers of State and members of the Federal Executive Council shall hold office during the Governor-General's pleasure, which means, of course, that he has power to dismiss.

Why were these powers conferred upon the Governor-General? The reason is clear enough. The purpose for which the Governor-General was invested with the power to dissolve Parliament, and to dismiss Ministers, even the Prime Minister and his Government, was to introduce an element of elasticity into a system which might otherwise prove too rigid, and perhaps give way under strain. It was to provide not for the ordinary case, but for the extraordinary cases that may occur, in which government has become unworkable, for one reason or another, unless the power is exercised — as, for example, happened in 1975 — a case, that is, where a Government had lost the means to govern, but refused to go.

The Governor-General in such case had the right and the duty to exercise

the powers conferred on him by the Constitution for that very kind of purpose — thus giving the Australian people an opportunity to decide how they wished the matter to be resolved.

Surely no-one but the extraordinary Mr. Whitlam could have persuaded so many people that the Governor-General's performance of his obvious duty, in these circumstances, was "undemocratic".

There can be no question of the Governor-General's right and duty to act as he did, somewhere along the line. The only real question might be just when he should have acted. This was a matter for nice judgment. Sir John Kerr chose an appropriate time — a time when supply was about to run out and a complete deadlock was apparent, but a time when an election could still be held before Christmas 1975. Anything much sooner would have been too soon; anything much later might well have been too late.

Sir John Kerr deserves the gratitude of all Australians for doing what he did when he did it. If vindication were needed, it was to be found in the resounding verdict of the Australian people, given on the 13th December, 1975, exactly one year from the day on which the \$4,000 million loan-raising for "temporary" purposes was approved by the Executive Council — an event which undoubtedly set the course for many of the unfortunate events that had followed, and led us on ineluctably, by fateful steps, to the events of November/December 1975.

At least amongst those who were not confused as to the Senate's right to refuse supply there was no doubt that Sir John Kerr acted consistently with his power and his duty in dismissing the Whitlam Government on Remembrance Day, 1975.

I have said before, and I say again,

that Mr. Whitlam in my belief became in November 1975 a grave threat to Australian democracy. It seemed to me and to many of us at that time that we were on the brink of civil unrest of the gravest kind. The action of the Governor-General on the 11th November and the good sense of Labor leaders other than Mr. Whitlam were perhaps all that saved us from this grave possibility of disaster.

Viewing him soberly one would have to say that despite his great abilities Mr. Whitlam's judgment is weak at the moments when he needs it most. He is obviously a poor judge of men, and knows little of the real art of government, let alone good economic management, when put to the test.

His conduct in the loans affair was discreditable to him. The folly of his participation through people like Hartley and Fischer in the Iraqi breakfast affair almost passes belief. A serious deterioration is apparent in his speech, his judgment, and his standards of conduct in recent years.

Mr. Whitlam may not have changed the Constitution, nor forced his new interpretations of it upon us, but we should recognise that he has brought about a permanent and unfortunate change in its future working, for all that.

For one thing he has made it difficult, though not of course impossible, for a Senate controlled by Labor ever to refuse supply, despite its clear legal right to do so. Secondly, he has made it difficult, though not of course impossible, for any Labor Prime Minister of the future to resign or to advise an election, if supply shall be refused — for such a one would now be accused, for sure, of "selling the pass". Thirdly, he has ensured, probably, that Labor will always see to it in future that a mere

cipher is appointed as Governor-General if and as soon as they gain office; and that cipher will find it very difficult, though not of course impossible, in the climate that Mr. Whitlam has created, to exercise his legal power to dismiss the Prime Minister, or to dissolve Parliament, despite a Senate refusal of supply.

Merely to recite these things as I have done illustrates the singular impact of this remarkable man.

He did not in the event succeed in holding on to power, nor in smashing the Senate, nor in changing the interpretation of the Constitution, nor establishing new conventions for its working. But what he did succeed in doing was introducing a permanent distortion in the future operation of our Constitution, and dividing our society, and endangering our civil polity in a way and to a degree in which it has never previously been threatened.

These are the things we shall have to learn to live with in the difficult years to come.

Mr. Whitlam successfully demonstrated the fragility of our democracy, and has seriously fractured the consensus which previously bound us together.

We have perhaps gained something from the events of 1975. We have a better understanding of our Constitution, for one thing. Perhaps there is a new appreciation of its virtues. Despite some faults it has served us remarkably well.

The Constitution and the democratic way of life we in this country have enjoyed under its provisions for the last seventy-five years are in the long run more important to us than the pyrotechnics of Gough Whitlam, or the bitter arguments he has raised around the Constitution and the public men of our time.

R.G. Hay

An Epiphany in a Picture Theatre

Mousey, as you have said, an indifferent sort of light-brown,
Undistinguished, as you claim:
But, caught in the beam from the projector,
Your hair shone with the sheen of platinum:
So does your else ordinary self catch a glamour
From the illusion illuminating my mind.

Quadrant, September, 1976 69

The Legislative Power of the Senate in Respect of Money Bills

BY J. E. RICHARDSON*

On 16th October, 1975, the Senate deferred consideration of Appropriation Bill (No. 1) 1975-1976 and Appropriation Bill (No. 2) 1975-1976, passed by the House of Representatives, recommending an appropriation of the Consolidated Revenue Fund for the services set forth in the Bills. On the same date, in response, the House of Representatives by resolution affirmed that the Constitution, and the conventions of the Constitution, vested in it the control of the supply of money, and that the Senate had grossly violated the roles of the respective Houses. The Senate maintained its refusal to pass the Bills, leading the Representatives to repeat in resolutions on 21st and 28th October that the Senate was acting contrary to established constitutional convention.

On 22nd October, 1975, the Senate by resolution stated that it had the right and duty to exercise its legislative power as it saw fit, bearing in mind the seriousness and responsibility of its actions, and that there was no convention, and never had been a convention, that it should not exercise its constitutional powers.

On 4th November, 1975, the Solicitor-General for the Commonwealth, Mr. Byers Q.C. furnished a document which was handed to the Governor-General.^{1a} The document suggested that a convention existed and asserted that an examination of the provisions of the Constitution supported a conclusion that the Senate's power to reject supply should not be "untrammelled by convention or practice". As the crisis developed, several well known professors in the field of constitutional law threw in their lot, and

stated that the Senate's attitude was in grave breach of a constitutional convention.^{1b}

Then a number of constitutional lawyers publicly doubted or denied that the Senate had the legal power, in any event, to reject a Money Bill. The foremost lawyer denying that the Senate could reject an Appropriation Bill was Sir Richard Eggleston, former Judge of the Australian Industrial Court, and a notable authority on Federal constitutional law. He expressed his views in two letters published in a Melbourne newspaper.² In his first letter, Eggleston relied entirely on the construction of the language employed in s. 53 of the Constitution. His second letter supported his conclusion by reference to draft clauses of that section considered at the Convention Debates in the 1890s.³ Other lawyers, openly sympathetic to Eggleston's views, added little or nothing to his arguments.

^{1b} See, e.g., a letter in *The Canberra Times* of 11th October, 1975, of Professors Sawyer, Zines, Castles and Howard.

² *The Age*: the first letter appeared on 27th October, 1975, and the second on 5th December, 1975.

³ The Constitution of the Commonwealth, including s. 53, is contained in the *Commonwealth of Australia Constitution Act*, 1900 passed by the Imperial Parliament at Westminster. Although it is part of an Act of that Parliament, the Constitution was drafted by representatives of the Australian colonies, who met in a series of Convention Debates in the 1890s. The first Convention was held in Sydney in 1891 under the presidency of Sir Henry Parkes of New South Wales. Forty-five delegates, seven from each Australian colony and three from New Zealand, attended. After a session of nearly six weeks, the Convention adopted a draft Bill to constitute the Commonwealth of Australia. The various colonial Parliaments did not, however, submit the proposed Constitution to referendum as intended. In 1897, a further Convention assembled at Adelaide, attended by ten representatives of each colony, except Queensland. C. C. Kingston, Premier of South Australia, was President. A second session of the Convention was held in Sydney in 1897, and a third session in Melbourne in 1898. The Convention drafted another Bill to constitute the Commonwealth. Following a referendum in which the draft Constitution failed to receive a sufficient affirmative vote in New South Wales, the Premiers of all six colonies met in Melbourne in 1899 and modified the draft Constitution in a few respects, not relevant to the present subject. With but one further modification made in England, the British Parliament passed the *Commonwealth of Australia Constitution Act* in 1900. In this article, the Convention Debates will be referred to as follows:

* Barrister and Solicitor (Vic. & A.C.T.), Barrister-at-Law (N.S.W.); Robert Garran Professor of Law, Australian National University, Canberra.

^{1a} The document bore in type the names of the Attorney-General, Mr. Enderby Q.C. and Solicitor-General, Mr. Byers Q.C. It is understood that Mr. Enderby handed the document to the Governor-General for background information. The status of the document is unclear. It probably should not be treated as a formal opinion of a Law Officer, but the views expressed in it were, it is understood, the views of Mr. Byers. For convenience, the document is referred to in the text as the joint opinion.

The continued refusal of the Senate to grant supply caused a unique constitutional crisis to arise in the Federal Parliament, culminating in the dismissal of the Prime Minister, followed by a simultaneous dissolution of the Senate and the House of Representatives.⁴

CONSTITUTIONAL POWER

The substance of s. 53

Section 53, as its marginal heading shows, deals with the powers of the Senate and House of Representatives as separate Houses in respect of legislation. It consists of five separate paragraphs.

The first three paragraphs qualify the Senate's legislative power in relation to financial measures. They do so as follows:

(a) The first paragraph states that proposed laws, that is to say Bills, "appropriating revenue or moneys, imposing taxation" must not originate in the Senate, which, of course, means that they must originate in the House of Representatives. Such measures are known in the Commonwealth Parliament as Money Bills.⁵

(b) The second paragraph states that the Senate "may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government". By virtue of the fourth paragraph, however, the Senate may return any such Bill to the House of Representatives, requesting, by message, the omission or amendment of any provision, and it is within the discretion of the House of Representatives as to how it should deal with the request.

(c) The third paragraph states that the Senate "may not amend any proposed law so as to increase any proposed charge or burden on the people". There is no right to request the House of Representatives to consider an amendment which would have the effect of increasing a proposed charge or burden.

The fifth and last paragraph of s. 53 reads:⁶

"Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws."

Section 53 does not expressly state that the Senate has power to reject Bills which it is not competent to amend, and none of the exceptions upon power in the section purports to deal with the power of rejection.

The power to reject a Bill

The argument that s. 53 deprives the Senate of its power to reject a Money Bill is derived from the fourth paragraph of s. 53. The mere power of the Senate to request the House of Representatives to amend a Money Bill, together with the power of the House to deal with the request as it thinks fit, is, according to the argument, hardly consistent with the idea that the Senate is still left with power to throw out the whole measure.

As mentioned, s. 53 does not refer to the power of the Senate to reject a Bill at all. For that matter, neither does it state that the House of Representatives may reject a Bill originating in the Senate. However, s. 1 of the Constitution is important. It vests the legislative power of the Commonwealth

⁴ Section 53 reads:

"53. Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.

The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.

The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.

The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws."

Official Report of the National Australasian Convention Debates, Sydney, 1891: "Convention Debates, Sydney, 1891."

Official Report of the National Australasian Convention Debates, Adelaide, 1897: "Convention Debates, Adelaide, 1897."

Official Record of the Australasian Federal Convention, Second Session, Sydney, 1897: "Convention Debates, Sydney, 1897."

Official Record of the Debates of the Australasian Federal Convention, Third Session, Melbourne, 1898: "Convention Debates, Melbourne, 1898."

⁵ The Governor-General dismissed the Prime Minister, Mr. Whitlam, and all the ministers in the Labor Government on 11th November, 1975. The Governor-General dissolved the two Houses on the same date. As to these events, and the relevant documents, see 49 A.L.J. 645-652.

⁶ J. R. Odgers, *Australian Senate Practice* (4th ed., 1972), at pp. 312-313.

in a Federal Parliament, consisting of the Queen, a Senate, and a House of Representatives. In creating a bicameral legislative system, s. 1 does not distinguish between the legislative functions of the two Houses, and the necessary implication is, reading the section by itself, that the Senate should enjoy equal power with the House of Representatives to approve, amend or reject a proposed law.

If there are any exceptions to Senate legislative power, they have, therefore, to be found in specific provisions, such as the first four paragraphs of s. 53. According to Eggleston, the last paragraph of s. 53 does not contain any necessary implication of the right to reject Money Bills. His view was that s. 53 dealt with the powers of both Houses in respect of all legislation, and, if the earlier paragraphs of the section meant that the Senate had no power to reject a Money Bill, the last paragraph could not confer that power. The argument not only reads words of limitation into s. 53 which are not there, but overlooks the vesting of legislative power in both Houses in s. 1, as described.

It is to be noted that the second and third paragraphs of s. 53 each begin with the words "The Senate may not amend". The third paragraph denies power to amend any proposed law, "so as to increase any proposed charge or burden on the people", and it includes a law appropriating revenue or money for other than the ordinary annual services of the Government. The second paragraph refers only to laws making appropriations for such ordinary annual services. The fourth paragraph of the section confers a right on the Senate to suggest to the House of Representatives omissions or amendments as to the measures described in the second paragraph, that is, which include Bills appropriating money for the ordinary annual services of the Government. But quære whether any similar right is conferred in relation to the measures described in the third paragraph.⁷ It has not been argued that the third paragraph precludes the Senate from rejecting any proposed law to which the paragraph refers. It is illogical and a peculiar construction of language, in this situation, to read the fourth paragraph as by implication denying the Senate the power to reject a proposed law described in the second

paragraph, whilst the power to reject a proposed law in the third paragraph remains.

In any case, s. 58 disposes of any doubt as to the Senate's position. The section reads:

"58. When a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion, but subject to this Constitution, that he assents in the Queen's name, or that he withholds assent, or that he reserves the law for the Queen's pleasure.

The Governor-General may return to the house in which it originated any proposed law so presented to him, and may transmit therewith any amendments which he may recommend, and the Houses may deal with the recommendation."

Apart from s. 128, there is no provision in the Constitution providing for the Royal assent to a Bill which has been passed by only one House. As s. 1 indicates, the Constitution established a bicameral Legislature, and the clearest of language would be required to provide that on some occasions legislative power should be vested in one House. Section 128 is an example of a special provision which uses the clearest of language.⁸

It remains to be said that Quick and Garran, in *The Annotated Constitution of the Australian Commonwealth*, published in the first year of Federation, stated⁹ that the Senate had co-ordinate power with the House of Representatives to pass all Bills or to reject all Bills. Its right of veto, they observed, was as unqualified as its right of assent.

The history of s. 53 during the Convention Debates

As Sir Richard Eggleston stated, it is permissible in legal proceedings to refer to the successive draft Constitutional Bills in order to ascertain the meaning of the eventual text adopted. Eggleston submitted that a comparison of the various drafts, which resulted in the present form of s. 53, supported his conclusion.

⁷ Under the second paragraph of s. 128, it is possible for a proposed law to alter the Constitution which has been passed by only one House to be submitted to a referendum of electors. If the requisite majorities of electors vote in favour of the proposed law, the measure must then be presented to the Governor-General for the Queen's assent.

⁸ J. Quick and R. R. Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), at p. 673.

⁹ Apparently, however, the House of Representatives has accepted requests for amendments falling within the third paragraph; Odgers, *op. cit.*, at pp. 313, 340-343, 346-348.

According to the argument, the first draft clause, produced by the Convention in 1891, stated that the Senate "shall have equal power with the House of Representatives in respect of all proposed Laws, except Laws imposing taxation and Laws appropriating the necessary supplies for the ordinary annual services of the Government, which the Senate may affirm or reject, but may not amend".¹⁰ The concluding language of the clause was repeated in the drafts considered at the Adelaide and Sydney sessions of the Convention in 1897. However, the draft as finally adopted by the third session of the Convention, held at Melbourne in 1898, was the section as it now reads. Thus, the provision giving the Senate express power to affirm or reject a Bill imposing taxation or an Appropriation Bill was omitted. According to the argument, the omission of these words is significant.

There is also a second argument. What was left after the settlement of the draft in 1898 was a provision giving the Senate power to return a Money Bill to the House of Representatives with a request for omission or amendment which that House could deal with according to its own discretion. According to Eggleston, the retention of this formula in 1898 would not make sense if the Senate had an unfettered discretion to reject supply. The power to reject must, in practice, confer power to compel the acceptance of amendments.

It is submitted, however, that it is not right to say that the provisions of the fourth paragraph would not make sense if the Senate possessed the power to reject an Appropriation Bill. As was pointed out by Sir John Forrest during the Melbourne Debates,¹¹ there was a difference between the power of suggestion and the power of amendment. A suggestion left the House of Representatives free to decline to implement the suggestion, so that the responsibility of throwing out the Bill rested with the Senate. In the other case, the Senate would send the Bill amended to the House of Representatives, and the responsibility of throwing out the Bill then rested with the House of Representatives, and not the Senate. Thus, the power to suggest amendments is consistent with the retention of the power to reject

the measure in the event of the repudiation of the suggestion.

At the Melbourne session in 1898, the debate was confined entirely to the role of the Senate in requesting the omission or amendment of any provision of the proposed law passed by the House of Representatives. The debate concerned a suggestion of Mr. George Reid, Premier of New South Wales, that the Senate should not have the power even to suggest amendments, but his proposal for amendment was negatived. It was in the course of the debate on Mr. Reid's suggestion that Sir John Forrest made the observations referred to above. Plainly, it follows from Sir John Forrest's view that the Senate was considered to retain the power of rejection. A similar view was expressed on the same occasion by Mr. Henry Bournes Higgins of Victoria (later Mr. Justice Higgins of the High Court of Australia), who asked that, if a suggestion from the Senate was not accepted, whether the Senate was bound down to the duty of simply accepting or rejecting the whole Bill.¹²

The argument that the omission of the words conferring an express power to reject Money Bills was consistent with the intention of the founders also ignores one of the major issues constituting an obstacle to Federation. It was obvious from the outset, as indicated in the preliminary resolutions of Sir Henry Parkes,¹³ that Federation would be impossible unless each of the colonies was accorded equal representation in the Senate. Some of the colonies claimed, however, an equal power for the Senate in financial matters, and, as Quick and Garran point out,¹⁴ this claim was the subject of the real battle of the 1891 Convention, which resulted in what was known as the "compromise of 1891". Under the 1891 draft, the Senate was given equal power with the House of Representatives, except that Appropriation Bills and Taxation Bills were to originate in the House of Representatives alone, and that the Senate was forbidden to amend Taxation Bills appropriating supplies for the ordinary annual services of the Government, or from amending any Bill so as to increase any proposed charge or burden on the people. As part compensation, the Senate was given, with respect to Bills which it might not

¹⁰ Convention Debates, Sydney, 1891, at pp. 953-954.

¹¹ Convention Debates, Melbourne, 1898, Vol. II, at p. 1999.

¹² *Ibid.*, at p. 1996.

¹³ Convention Debates, Sydney, 1891, at p. 23.

¹⁴ Quick and Garran, *op. cit.*, at p. 13.

amend, a power to suggest amendments.¹⁵

When the Convention Debates resumed at Adelaide in 1897, the Convention was faced with a new draft Constitutional Bill produced by the Constitutional and Drafting Committee. The Committee had restored some of the Senate's powers relating to Money Bills before the adoption of the compromise in 1891, for example, by striking out the provision that the Senate should not amend proposed laws imposing taxation. Reid moved an amendment to restore the compromise,¹⁶ and the ensuing debate occupied two days, concluding in a narrow majority supporting Reid's amendment.¹⁷ It is almost inconceivable that representatives, at least of the smaller colonies, would later let pass, without comment, an amendment to s. 53 understood as depriving the Senate of the power to reject a Money Bill or a Bill imposing taxation.¹⁸

Almost all the participants in the Constitutional Conventions were either members of Parliament or had at one time been members. All were familiar with the operation of bicameral colonial Legislatures and even a casual perusal of the Debates shows the preoccupation of most of the founders with the Federal parliamentary structure, including the provision for the settlement of deadlocks.¹⁹ There was absolutely no suggestion during the concluding Melbourne session that by a re-arrangement of cl. 54, which is now s. 53, the Senate should be deprived of the power of rejecting a Money Bill. Such a subject was far too important to be dealt with per silentium by the Drafting Committee of the Convention.²⁰

In *Victoria v. The Commonwealth*,^{20a} the High Court was concerned with the question whether the *Petroleum and Minerals Authority Act 1973*

was a measure in respect of which a disagreement had occurred according to the procedural requirements of s. 57. The Court held by majority that the Act was invalid because the Senate had not rejected or failed to pass the Bill on two occasions in accordance with the section. Although it was not necessary to the decision, Gibbs J. observed^{20b} that the Senate could reject any proposed law, even one which it could not amend. Stephen J. also said^{20c} that the Senate could reject outright any Bill, even a Money Bill. Mason J. said^{20d} that, apart from the limitations on Senate legislative power expressly described in s. 53, the Senate and the Representatives had equal legislative power. None of the other three judges in the case expressed a view on the point, but there was nothing in their judgments to indicate that they took a contrary view.

The relevance of s. 57 of the Constitution

Though the veto power of the Senate may be absolute under s. 53, it is subject to review by the procedure set out in s. 57 of the Constitution. Section 57 sets out the conditions which have to be satisfied in order to constitute a disagreement between the two Houses, and then provides machinery for the resolution of a disagreement. The machinery involves, first a dissolution of the two Houses, followed by elections for both Houses. If the new House of Representatives again passes the proposed law, and the disagreement continues, the Governor-General may convene a joint sitting of the members of the two Houses, and, if the proposed law is affirmed by an absolute majority of the total number of members of the two Houses, it is deemed to have been duly passed by both Houses, and the Bill must then be presented to the Governor-General for the Royal assent.

Section 57 is introduced by the words "If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree". The choice of the words "any proposed law" strongly suggests that s. 57 applies also to laws which, by virtue of the second paragraph of s. 53, the Senate may not amend.

There is no doubt that the intention of the founders was that s. 57 should apply to any proposed law, including Bills dealing with financial

¹⁵ The Convention Debates are not admissible in court as evidence of the meaning of a section of the Constitution; *Tasmania v. The Commonwealth* (1904) 1 C.L.R. 329, at 348 per Barton J. However, the entire debates are consistent with the plain literal meaning of the last paragraph of s. 53, and either House could employ the record of the debates in seeking an agreed construction of their respective powers under s. 53, as to which, see *infra* at nn. 10-11.

¹⁶ Convention Debates, Adelaide, 1897, at p. 485.

¹⁷ *Ibid.*, at p. 575.

¹⁸ For the discussion in 1891, see Convention Debates, Sydney, 1891, at pp. 706-755.

¹⁹ For example, the record of the Sydney session in 1897 is 1,110 pages. More than 400 pages are taken up with the debate on s. 57 alone.

²⁰ The Convention Debates are replete with acknowledgments by speakers that the Senate was regarded as having power to reject Money Bills, as the subsequent references in the text of this article will show. See, e.g., *infra*, at nn. 7-10.

^{20a} (1976) 50 A.L.J.R. 7.

^{20b} *Ibid.*, at 21-22.

^{20c} *Ibid.*, at 30.

^{20d} *Ibid.*, at 37.

matters, as well as with Bills relating to other subjects. Consideration of a deadlocks clause occupied more time in the Convention Debates in 1897-1898 than any other provision of the Constitution. A major debate on the inclusion of the clause occurred in Sydney on 15th September, 1897. On that date, the Leader of the Convention, Mr. Barton, said:²¹

"... It is a question whether provision should be made for deadlocks in that sense of the term alone. I am rather inclined to think that any provision which has to be made might rightly only be made for that class of deadlock — that a stoppage which arises on any matter of ordinary legislation, because the two houses cannot come to an agreement at first, is not a thing which is properly designated by the term 'deadlock', because the working of the constitution goes on — the constitutional machine proceeds notwithstanding a disagreement. The machinery of government does not come to a stop, because it is only when the fuel of the machine of government is withheld that the machine comes to a stop; and that fuel is money."

After the conclusion of the debate on s. 53, and a few days before the final session of the Convention in Melbourne in 1898 ended, the form of s. 57 was virtually settled, except that the proposed clause required a three-fifths majority at a joint sitting instead of an absolute majority, as required by the section now.²² Higgins sought, though without success, to remove the three-fifths requirement, and in the course of the debate the following observations were made:²³

"Mr. Higgins: ... Let the Queen's Government be carried on is the essential first condition to be achieved. Suppose you have an Appropriation Bill carried in two sessions, and rejected by the Senate.

Mr. Dobson: Is that possible?

Mr. Kingston: You will have to wait for a double dissolution to get your Appropriation Bill.

Mr. Higgins: Keep an Appropriation Bill in your mind, because I am putting the most awkward case which can arise, and it is quite possible that it may arise. The Senate has full power to reject an ordinary Appropriation Bill if its suggestions are not accepted. Suppose that after an Appropriation Bill has been passed in two sessions the Senate persists in saying — 'We will

not have it', the next step is to be a double dissolution, an appeal to the people, and an appeal to the states. If after the elections the two Houses are still irreconcilable, they are to meet together as one body and to decide the matter in dispute by a majority of three-fifths. There might be 90 members in the joint body, 60 of them being members of the House of Representatives, and 30 members of the Senate, and, under this provision, unless 54 members voted for the Appropriation Bill it could not be passed. I ask honorable members — I do not care whether they are liberals or conservatives, whigs or tories, members of the labor party or socialists — is this a state of things which, as practical men, we should allow to exist? If 53 members voted for the Appropriation Bill and 27 members voted against it, are we to allow the Bill to be thrown out and the whole of the civil service to be disorganized? All I want is that, to attain some kind of finality, we should let the majority rule."²⁴

References to the application of s. 57 to Appropriation Bills, as indicated in the above-mentioned quotation from the Convention Debates, also show that many of the participants in the discussions contemplated that the Senate might, in some circumstances, employ its constitutional powers to reject any proposed laws,

²¹ In his work, *Australian Senate Practice*, op. cit., the Clerk of the Senate, Mr. J. R. Odgers, actually expresses the view (at pp. 23-24) that s. 57 was not intended by the founders to apply to all Bills, but only to financial measures. Odgers relies primarily on what he describes as "a most able speech" by Senator Pearce of Western Australia in 1914. Odgers states that, notwithstanding contrary views expressed by Quick and Garran, Senator Pearce's contention received authoritative support from Barton's observations quoted above in the text. Barton was, in fact, referring only to the technical expression "deadlock". The marginal heading to s. 57 refers to "Disagreement between the Houses". In *Cormack v. Cope* (1974) 48 A.L.J.R. 319, the High Court unanimously dismissed a challenge to the validity of a joint sitting of the two Houses following the double dissolution granted on 11th April, 1974. The six Bills to be considered at the joint sitting were not Money Bills. It was not argued by counsel for the plaintiffs that s. 57 did not apply to all proposed laws, and no point on the matter was taken by any judge of the Court. Menzies J., in describing the operation of s. 57 (at 325-326), stated that the section operated upon any proposed law. In the subsequent case of *Victoria v. The Commonwealth* (1976) 50 A.L.J.R. 7, the High Court held that the *Petroleum and Minerals Authority Act* 1973, which had been passed at a joint sitting of the two Houses following a double dissolution granted in 1974, was invalid. If any doubts remained, the decision unequivocally dispels any suggestion that the Senate cannot reject Bills other than financial Bills.

There were many statements made during the Convention Debates to indicate that the founders intended s. 57 to apply to any proposed law. See, e.g., the comments of C. C. Kingston, Convention Debates, Melbourne, 1898, Vol. II, at pp. 2123-2124, and Henry Dobson, *ibid.*, at pp. 2128-2130.

²² Convention Debates, Sydney, 1897, at p. 620.

²³ The substitution of an absolute majority for a three-fifths majority occurred at the Premiers' Conference in 1899.

²⁴ Convention Debates, Melbourne, 1898, Vol. II, at p. 2224.

including Money Bills. This is an important conclusion, relevant to the consideration of the question as to whether there is a convention that the Senate should not reject a Money Bill, including a Bill for the ordinary annual services of the Government.²⁵

Section 57 owes its presence in the Constitution to the extensive powers of veto accorded to the Senate, including the power to reject Money Bills. In 1891, the Convention rejected a proposal by Mr. Wrixon of Victoria, following the writing into cl. 54 of the South Australian *modus vivendi*, that there should be a clause to provide for a joint meeting of the two Houses if the House of Representatives declined to meet a Senate request.²⁶ The discussions connected with s. 57, which began at Adelaide in 1897, and continued in Sydney and Melbourne, showed the concern of many of the founders that the Senate, in the light of its complete power of veto, could be tempted to take more drastic action than colonial upper Houses. It was considered that s. 57 would operate as a deterrent upon the Senate.²⁷

THE ROLE OF THE PARLIAMENT IN THE INTERPRETATION OF S. 53

Since the first four paragraphs of s. 53 refer to proposed laws, as distinct from laws passed by the Parliament, it seems very unlikely that the provisions will give rise to a matter which can be determined in any legal proceedings in a court, including the High Court of Australia, to which all matters arising under the Constitution or involving its interpretation may come. Supporting dicta expressed by various judges in the High Court have been accepted without criticism.

In *Osborne v. The Commonwealth*,²⁸ Griffith C.J. observed:²⁹ "Secs. 53 and 54 deal with 'proposed laws' — that is, Bills or projects of law still under consideration and not assented to — and they lay down rules to be observed with respect to proposed laws at that stage. Whatever obligations are imposed by these sections are directed to the

House of Parliament whose conduct of their internal affairs is not subject to review by a Court of law."³⁰

In *Victoria v. The Commonwealth*,³¹ Gibbs J. observed:³² "... The first four paragraphs of s. 53 deal with the respective powers of the two Houses of the Parliament in relation to the initiation or amendment of proposed laws of certain kinds. It is understandable that those paragraphs may be regarded as relating to matters of procedure within Parliament with which the courts are not concerned. Section 57, on the other hand, provides a special means of legislation by which in certain cases laws may be enacted without passing through both Houses of Parliament. Where it is asserted that a law has been passed by the extraordinary means allowed by s. 57 it is competent for the court to enquire whether in fact the method of legislation allowed by that section has been adopted, and whether the provisions of the section that govern legislation by that method have been observed."³³

If the paragraphs are not justiciable, they amount in substance to rules governing parliamentary practice, being directed to the regulation of the relationships between the two Houses, a matter which is solely their concern. Even if the Senate were to amend a proposed law which it is not competent to amend, as long as the Bill was passed by both Houses and received the

²⁵ See also per Barton J. at 351-352.

²⁶ (1976) 50 A.L.J.R. 7.

²⁷ *Ibid.*, at 28.

²⁸ The last paragraph of s. 53 may, it is submitted, give rise to a justiciable issue, e.g., where the claim is that a law, not having been the subject of ss. 57 or 128, was not passed by the Senate. As can be seen from the text, Gibbs J. left this question open in *Victoria v. The Commonwealth*, loc. cit. A challenge that a law had not been passed by the two Houses of Parliament as required would raise a question as to the locus standi of the plaintiff. In *Cormack v. Cope*, loc. cit., two senators challenged the validity of an impending joint sitting of the two Houses convened by the Governor-General pursuant to s. 57. Barwick C.J. held that the senators had locus standi, but Menzies, Gibbs, Stephen and Mason JJ. specifically refrained from expressing an opinion. Therefore, it must be uncertain whether a senator would have locus standi in proceedings involving the last paragraph of s. 53. In *Cormack v. Cope*, of course, the joint sitting had not at the stage of the institution of the legal proceedings met for the purpose of voting upon the proposed laws which had been the subject of disagreement between the two Houses. In *Victoria v. The Commonwealth*, loc. cit., High Court was concerned with the question whether the Petroleum and Minerals Authority Bill 1973 was a measure in respect of which a disagreement had occurred according to the procedural requirements of s. 57. It seems clear from the case that a State would have locus standi in a challenge based on the last paragraph of s. 53.

²⁹ See also Convention Debates, Melbourne, 1898, Vol. II: the observations of Forrest at pp. 2109-2110, 2247; Reid at pp. 2161, 2233-2237; McMillan at p. 2147 and compare at p. 2165; Trenwith at p. 2165; Isaacs at p. 2179; Downer at p. 2240.

³⁰ See J. E. Richardson, "Federal Deadlocks: Origin and Operation of Section 57", (1962) 1 *Tasmanian University Law Review* 706, at 719.

³¹ *Ibid.*, at 716-731.

³² (1911) 12 C.L.R. 321.

³³ *Ibid.*, at 336.

Royal assent, its validity could not be impugned by reference to s. 53.

There are two further relevant consequences. First, it is possible for the two Houses to adopt a construction of the four paragraphs which it may be speculated is a construction that a court would not be likely to adopt.³⁴ Second, since the paragraphs deal with constitutional practice, no question occurs of excluding from consideration the record of the Convention Debates leading to the inclusion of the paragraphs in the Constitution, as would arise in a case before the High Court involving the interpretation of justiciable provisions of the Constitution.³⁵

IS THERE A CONVENTION THAT THE SENATE SHOULD NOT REJECT A PROPOSED LAW THAT IT MAY NOT AMEND?

At the beginning of the constitutional crisis, it was asserted in some political and academic quarters that the refusal of the Senate to pass the Appropriation Bills constituted a grave breach of constitutional convention.

According to the letter signed by the four academic lawyers,³⁶ "the unwritten rule in question in the present situation is the convention that the control of the supply of money to the Government, which determines the Government's continued existence, should rest with the lower House. Only the lower House, where Governments are made, should have the power to break them".³⁷ The joint opinion of the Attorney-General and Solicitor-General, already mentioned,³⁸ did not go so far, but it referred to the many Appropriation Bills and Supply Bills passed by the Senate on occasions when the Government did not have a majority of senators as suggesting the existence of a convention. The Goddess of Wisdom may have sprung *uno ictu* of full stature from the brains of her begetters, but any convention regulating the relationships of the two Houses of the Commonwealth Parliament is not born from a state-

ment of reasons, however impressive they may be. The begetters of a constitutional convention can only be the bodies of persons upon whom it will operate, and, whatever additional criteria are needed to demonstrate the existence of a convention, at least there must be evidence of its acceptance by them. This is acknowledged in the joint opinion.

According to *Halsbury*,³⁹ the existence of some conventions is certain, and they can be accurately defined, for example, that the Sovereign should not refuse to assent to a Bill passed by both Houses of Parliament. The nature, and even the existence, of others was subject to varying degrees of doubt, for example, those regulating the part to be played by the Sovereign in choosing a Prime Minister when there was no clear majority in the House of Commons. Further, according to *Halsbury*,⁴⁰ "to be a genuine convention, a rule or principle must be regarded as binding; but here again there may be doubt, not only whether it is not a mere convenient practice, but also when a rule of practice turns into a binding convention".

It is submitted that an examination of the historical background to s. 53 and of constitutional events before and after Federation not only fails to substantiate the claim that a convention exists, but provides positive grounds for rejecting the assertion.

What is a convention of the Constitution?

It is largely through the influence of the famous English constitutional lawyer, Professor A. V. Dicey, that the expression "convention" has become accepted to describe a constitutional obligation, obedience to which is secured, even though the obligation does not amount to a rule of law which the courts will enforce by judicial process.⁴¹ In 1885, according to Dicey,⁴² conventions or constitutional understandings were mainly

³⁴ In 1952, Professor K. H. Bailey, Solicitor-General for the Commonwealth, furnished an opinion which suggested that the expression "ordinary annual services of the Government" was wide enough to include non-recurring capital items. In an equally-divided free vote, the Senate, in effect, rejected the interpretation; See Odgers, *op. cit.*, at pp. 325-328.

³⁵ See n. 15, ante.

³⁶ See n. 1, ante.

³⁷ The word "them" is taken to refer to "Governments".

³⁸ See n. 1, ante.

³⁹ *Halsbury's Laws of England*, 4th ed., vol. 8, at pp. 540-541.

⁴⁰ *Ibid.*, at p. 541.

⁴¹ Dicey was not the inventor of the expression "convention". The Convention Debates of 1891 contain a rare reference to it. Sir John Downer of South Australia observed during the debate on s. 53:

"... The law of the constitution, as was well said by Bourinot in his essay on Canadian federation, consists, not merely of the letter of the law, but also of what he calls the convention of the law—understandings superadded to the law which in strictness he says are not the law at all; but which still have all the force and authority of the law, because they are the basis on which the law is made. . . ." (Convention Debates, Sydney, 1891, at p. 715.)

⁴² A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (1st. ed., 1885, Ch. XIV).

rules governing the exercise of the Crown's prerogative. They had one ultimate object, namely, to secure that Parliament, or the Cabinet, in the long run, gave effect to the will of the electors, the majority of electors being the true political sovereign of the State.⁴³ Thus, a ministry placed in a minority by vote of the House of Commons had, in accordance with constitutional practice, a right to demand a dissolution of Parliament by the Crown. This was in essence an appeal from the legal to the political sovereign.⁴⁴

Dicey acknowledged that there were some constitutional conventions dealing with the relationships between the House of Commons and the House of Lords, in particular, in the case of a conflict, to determine the point at which the House of Lords should give way to the lower House.⁴⁵ Dicey considered that the point at which the Lords had to yield, or the Crown intervene, was properly determined by anything which conclusively showed that the House of Commons represented on the matter in dispute the deliberate decision of the nation.⁴⁶

As we have seen, the first four paragraphs of s. 53 deal with proposed laws and the respective powers of the Senate and House of Representatives in relation to them. In substance, the paragraphs amount to rules of parliamentary practice. If the Constitution had not included the provisions of s. 53 dealing with the relationships between the Senate and House of Representatives, it is probable that some constitutional conventions or understandings between the two Houses would have arisen. However, s. 53 is a legislative provision, and may be compared with the provisions of the *Parliament Acts*, 1911 and 1949 of the United Kingdom defining the respective legislative powers

of the House of Lords and House of Commons.⁴⁷

The historical background to s. 53

In the Australian colonies before Federation, several incidents occurred involving the constitutional relations between upper and lower Houses. The most notable occurred in Queensland, Victoria and South Australia.

Queensland: In Queensland, in 1885-1886, the question arose whether the nominee Legislative Council should be guided by the then practice of the House of Lords in England of not amending Money Bills. The question was referred to the Privy Council. The Privy Council stated, without giving reasons, that the Legislative Council did not have the right to amend Money Bills. The Convention Debates of 1891 contain a reference to the Queensland incident. According to Sir Samuel Griffith,⁴⁸ then Premier of Queensland, probably the Privy Council decided on the ground that the Queensland Constitution was framed exactly upon the analogy of the English Constitution, namely, an elected lower House and a nominee upper House. Griffith continued: "But it is quite certain that in framing a federal constitution we cannot afford to leave any question of that kind to be fought out between the two Houses, or to be referred to the Privy Council."

Victoria: The best known incident in Victoria occurred in 1877, when the Legislative Council laid aside the Appropriation Bill providing for the payment of ordinary items of expenditure because the Bill included a provision for the payment of members of Parliament.⁴⁹ The Legislative Council

⁴³ A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed., 1961, with introduction by E. C. S. Wade), at pp. 422-423, 429-431.

⁴⁴ Dicey also observed (Dicey, 10th ed., op. cit.), at pp. 433-437, that a dissolution of the House of Commons was allowable or necessary whenever the wishes of the legislature were, or might fairly be presumed to be, different from the wishes of the nation. He considered that the convention was established by events in 1784 and 1834 in which, he said, the King in each instance dismissed a ministry which commanded the confidence of the House of Commons.

⁴⁵ Dicey, 10th ed., op. cit., at pp. 427-428.

⁴⁶ *Ibid.*, at p. 432. The situation in England, of course, no longer rests on convention. See the *Parliament Acts*, 1911 and 1949 (U.K.).

⁴⁷ In the United Kingdom, some writers have suggested that there is no real difference between law and convention, or, if there is a distinction, it is unintelligible. For a description of these views, see Colin R. Munro, "Law and Conventions Distinguished", (1975) 91 L.Q.R. 218. The author concludes that conventions are quite separate from laws, and, though not all laws can be enforced in a court, generally laws can be enforced. Conventions are not handled in courts in the same way. As Munro has observed, the controversy in the United Kingdom has occurred mainly because there is no written Constitution or Federal system, and the control of the Government has depended largely on Parliament and on the observance of conventions, such as ministerial responsibility. The Commonwealth Constitution, on the other hand, is obviously law. The operation of some of its provisions, notably those concerning the Parliament and the role of the Executive Government, depends on constitutional understandings. The distinction between law and convention is both clear and intelligible.

⁴⁸ Convention Debates, Sydney, 1891, at pp. 377-378.

⁴⁹ The first dispute arose in 1865. It was settled after a conference between the two Houses; see *Stevenson v. The Queen* [1865] 2 W.W. & a.B. 143 (L.).

had an express power under s. 56 of the *Constitution Act* of Victoria to reject, but not alter, Money Bills, but the Assembly claimed to control financial matters, free from interference by the Council.

The issue was eventually the subject of compromise in 1878 by the Assembly withdrawing the objectionable item in the Appropriation Bill and passing a separate Bill for the payment of members. Writing in 1891, Edward Jenks, Dean of Law at Melbourne University,⁵⁰ observed that the settlement left the question of principle or convention undetermined. Jenks mentioned that the opinion of the Imperial Government had been sought, and he concluded that the resultant "legal" position was that the Legislative Council continued to be entitled to reject any Bill, whether containing money grants or not. In 1877, members of the Legislative Council were elected on a severely restricted franchise, whereas at least any male of the age of twenty-one resident in Victoria was qualified to vote in the Election of members to the Legislative Assembly.⁵¹

The South Australian "Compact" of 1857: The most relevant inter-House dispute in an Australian colony before Federation occurred in South Australia in 1857. The *Constitution Act*, 1855-1856 of South Australia established a bicameral Legislature consisting of a Legislative Council and a House of Assembly. The House of Assembly was elected by adult male suffrage, but members of the Council were elected by inhabitants with property qualifications. Shortly after the first Parliament of South Australia assembled in 1857, a violent dispute arose between the two Houses as to the Council's power to amend financial measures. The *Constitution Act* restricted the power of the Council to initiate certain financial measures, but the Act did not place any restrictions on the Council's power of amendment.

The occasion of the dispute was an amendment made by the Council to the Tonnage Duties Repeal Bill, which had originated in the Assembly. The lower House considered that the two Houses should stand in the same relation to each other as the House of Lords and the House of Commons, but the Council rejected the assertion, claiming there was no analogy between itself and the House

of Lords. Eventually, the two Houses evolved a *modus vivendi*, which became known as the "Compact of 1857". The Compact consisted of three resolutions passed by the Council which the Assembly agreed to adopt "for the present". The three resolutions were as follows:

"That this Council further declares its opinion that all Bills, the object of which shall be to raise money, whether by way of loan or otherwise, or to warrant the expenditure of any portion of the same, shall be held to be Money Bills.

That it shall be competent for this Council to suggest any alteration in any such Bill (except that portion of the Appropriation Bill that provides for the ordinary annual expenses of the Government); and in case of such suggestions not being agreed to by the House of Assembly, such Bills may be returned by the House of Assembly to this Council for reconsideration — in which case the Bill shall either be assented to or rejected by this Council, as originally passed by the House of Assembly.

That this Council, while claiming the full right to deal with the monetary affairs of the Province, does not consider it desirable to enforce its right to deal with the details of the ordinary annual expenses of the Government. That, on the Appropriation Bill, in the usual form, being submitted to this Council, this Council shall, if any clause therein appear objectionable, demand a conference with the House of Assembly, to state the objections of this Council, and receive information."⁵²

As can be seen, the second paragraph of the Compact stated, in relation to Money Bills, other than an Appropriation Bill for the ordinary annual expenses of the Government, that the Council should be competent to suggest any alteration to such a Bill, but that the Council would not amend the Bill, and would either assent to or reject the Bill as originally passed by the House of Assembly. This was the first occasion in Australia in which the device of suggested alteration is to be found.⁵³

⁵⁰ The text of the three resolutions is taken from G. D. Combe, *Responsible Government in South Australia* (1957), at p. 90. The relevant resolutions of the Legislative Council and House of Assembly are also set out in Quick and Garran, *op. cit.*, at p. 672.

⁵¹ Combe observed, *op. cit.*, at p. 91: "The device of the 'suggested' or 'requested' amendment in Money Bills, which our first Parliamentarians evolved so ingeniously, has had paid to it that sincerest form of compliment which is imitation. It was adopted in Western Australia (1899), in the Commonwealth Act (1900), and in Victoria (1903)."

⁵² E. Jenks, *The Government of Victoria (Australia)* (1891), at pp. 256-258.

⁵³ *Ibid.*, at pp. 250-254.

Various speeches made during the Convention Debates in 1891 freely acknowledged that the South Australian "Compact" provided the basis for cl. 55. For example, Thomas Playford of South Australia said:⁵⁴ "... We have, however, adopted a system which has been in operation in one of the colonies for many years, with very happy results. Therefore we have just as much right to say that by adopting the South Australian compromise which has worked so well for so many years, we have adopted a compromise which will work well for the commonwealth of the future, as we have to say that if we had adopted the American system, which I contend exists under different conditions and apart from responsible government, it also would have worked well. I do not know that I need say anything more on the subject. I only trust that it will be found that within the next four or five years at the outside, the federation of the colonies, either on the basis that we have laid down here, or on a somewhat similar one, will become the law of the land for all Australia."

The South Australian "Compact" was intended to describe how, in practice, the Legislative Council would exercise its full legal powers to deal with Money Bills. Where the Bill took the form of an Appropriation Bill to provide money "for the ordinary annual expenses of the Government", it was agreed, in the third paragraph of the "Compact", that the Council would not consider it desirable to enforce its right to deal with the details of the measure, but would simply, where a clause was objectionable, demand a conference with the House of Assembly. In the case of other Money Bills, the second paragraph states that the Council might suggest an alteration to such a Bill,

and, in the event of the House of Assembly declining to comply with the suggestion, the Council reserved to itself the right either to assent to or reject the Bill in its original form.⁵⁵

A comparison of the terms of the "Compact" with s. 53 is enlightening. It must have been obvious to the draftsmen, in 1891, that they, too, could have included a clause allowing a Bill appropriating money for the ordinary annual services to be simply passed or rejected by the Senate. However, they chose to adopt the formula of the second paragraph of the "Compact," applying the *modus vivendi* there specified for other Money Bills to Bills appropriating moneys for the ordinary annual services of the Government of the Commonwealth. In other words, the *modus vivendi* adopted in the second paragraph of the "Compact" of 1857 was the procedure adopted in what is now s. 53 in relation to proposed laws appropriating revenue for the ordinary annual services of the Government, the type of Bill excluded from the second paragraph of the "Compact". In these circumstances, there is no basis for a suggestion that, as at 1900, there was a convention that the Senate should not reject a Bill which it could not amend.

In 1897, in successfully moving the reinstatement of the 1891 compromise regarding s. 53, Reid, who had consistently opposed the creation of a Senate with legislative power equal to that of the House of Representatives, said: "... I say under a system of responsible government there must be only one financial House. Any other system is fraught with disaster, but, at the same time, I am willing that the Senate should have — not as an antiquated power never to be used, but

⁵⁴ Convention Debates, Sydney, 1891, at p. 922. It is of interest that in 1857 the Premier of South Australia was Richard Baker. He attended the 1891 Debates as a South Australian delegate, being at the time a member of the Legislative Council of the colony. A difference of opinion occurred during the Convention between Playford and Baker as to how the South Australian Assembly had in fact treated suggestions from the Council in relation to Money Bills. See Convention Debates, Sydney, 1891, at pp. 743-744. According to Baker, suggestions by the Council on money matters were ignored. Sir John Bray, also of South Australia, accused Baker of having displayed "lamentable ignorance" of what was going on in the Parliament of the colony; see, *ibid.*, at p. 743. As Quick and Garran, *op. cit.*, mentioned, at p. 672, Baker later presented a paper to the Federal Convention in Adelaide in 1898 fully explaining the South Australian "Compact". For other references to the South Australian "Compact", see Convention Debates, Sydney, 1891, at pp. 719, 726-729, 741-744, 746.

⁵⁵ The adoption of the language of the South Australian "Compact" will also explain why the 1891 text of s. 53 (then cl. 55) used the South Australian language, which expressly states that the Council, would, if its suggested amendment was not accepted by the Assembly, either assent to or reject the Bill as originally passed by the Assembly. The *Constitution Act* 1855-1866 did not place any restrictions on the Council's power to amend any Bill, and the Council was simply saying, in the second paragraph of the Compact, that it reserved the right to exercise its legal power under the *Constitution Act*. In the Commonwealth Constitution, no section, apart from s. 53, deals with the general power of either House to pass or reject a Bill, but it is necessarily implied in ss. 1 and 58. As finally drafted, s. 53 may, therefore, be regarded as exhaustively expressing the limitations upon the Senate's power. The last paragraph of the section may, then, be regarded as ensuring that the power of rejection, apart from the exceptions specified in the previous paragraphs, continues to be vested in the Senate.

as a real living power — the right of rejection. We know that in the old country it has ceased to be a right by disuse; but I quite agree that in this compact the Senate should have not an abstract right, but an absolute right, and be perfectly entitled to use it, to throw out a Bill when it is stamped with such a serious wrong or injustice as to cause the Senate to feel itself justified in so throwing it out. This is the only interference with the finances that I should allow to the Senate, namely, the right of preventing a gross wrong or injustice, and any attempt to allow it to play a more active part in the finances of the Commonwealth than I have mentioned will, in my opinion, be a serious mistake. . . ."⁵⁶

Moreover, the earlier comments concerning the relevance of s. 57 in the interpretation of s. 53 show that the founders certainly had in mind that a deadlock might occur in respect of an Appropriation Bill.

Operation of s. 53 since 1901

The passage of Appropriation and Supply Bills: In their joint opinion, referred to ante, the Attorney-General and Solicitor-General listed the Appropriation and Supply Bills passed since 1913 when the Government of the day did not have a Senate majority. These occasions were in the years 1913, 1930, 1931, 1957, 1958 and all years from 1962 to 1975. According to the joint opinion, since the Senate had never exercised the particular power, this was a fact suggesting that the convention existed.

In 1951, the second double dissolution in federal history occurred when the Senate rejected the Commonwealth Bank Bill introduced by the Menzies Government. The Government was returned to office at the ensuing elections and was repeatedly re-elected until 1972. There were numerous measures in addition to financial measures which, had the Senate rejected, might have caused the Government to seek a further double dissolution. The fact that the Senate did not reject an Appropriation or Supply Bill during this period is as much open to the interpretation that it did not wish to force the Government to the polls as to the interpretation that it provides evidence of the existence of a convention.

The joint opinion, as indicated, also refers to earlier years, namely, 1913, 1930 and 1931. In

1913, the Labor Government was narrowly defeated at the general election for members of the House of Representatives, but remained in control of the Senate. This was a short-lived Parliament, preoccupied with party deadlocks, during which twenty-three Bills were defeated or laid aside or lapsed.⁵⁷ There was only one budget during the life of the Parliament, which was ended in 1914 by the first double dissolution in Federal history.

In 1929, the Bruce-Page Nationalist-Country Party Government was heavily defeated at the general election. The incoming Scullin Labor Government, however, was faced with a Senate in which the Opposition parties had a substantial majority. The party battle in Parliament resolved itself initially into a question as to how far the Labor Government would go to satisfy Senate majority opinion, and how far the Senate majority would go in meeting Government desires in order to avoid provoking a double dissolution. From the beginning, the Government had to combat the ravaging effects in Australia of a world-wide economic depression. Bruce himself warned his party that it was imperative that the Senate should not by precipitated action allow the new Government to blame it for its inability to govern.⁵⁸ By 1931, the Government began to think about a double dissolution,⁵⁹ but the party was demoralised by internal dissension and inability to evolve an economic policy to combat the depression. One-quarter of the total Australian workforce was unemployed. Financial policies were largely makeshift until the reluctant adoption by the Government of the Premiers' plan in 1931. The plan involved a substantial reduction of Government expenditure and some increased taxation. The Government's acceptance of it was thought to be a victory for the Opposition.⁶⁰

Report of the Constitution Review Committee in 1959: In 1956, the two Houses of the twenty-second Parliament appointed the Joint

⁵⁷ G. Sawyer, *Australian Federal Politics and Law 1901-1929* (1956), at pp. 113-115.

⁵⁸ These events are recounted in an unpublished thesis, Peter Cook, *The Scullin Government 1929-1932*, a copy of which is held by the Library of the Australian National University. For Bruce's views, see pp. 123-124.

⁵⁹ *Ibid.*, at pp. 120-121.

⁶⁰ For an account of the economic depression and its political consequences, see F. Alexander, *Australia since Federation* (2nd ed., 1972), Ch. IV.

* Convention Debates, Adelaide, 1897, at p. 485.

Committee on Constitutional Review. The Committee comprised senators and members of the House of Representatives belonging to the different political parties represented in both Houses.⁶¹

The Constitution Review Committee, as it was called, submitted reports in 1958 and 1959 suggesting, among other things, an amendment to s. 57 of the Constitution. Part of the proposed amendment to s. 57 dealt with conditions of deadlock arising in respect of money measures, that is to say, Bills imposing taxation or appropriating revenue for the ordinary annual services of the Government. In 1959, the Committee reported as follows:

"181. The provision of finance by the Parliament is essential for the maintenance of responsible government. The Commonwealth is called upon to provide moneys for multifarious purposes, and the inability of the government to obtain the passage of its financial legislation, except perhaps by use of the leisurely processes of the existing section 57, could produce most unfortunate and harmful consequences, particularly in view of the interlocking of the finances of the Commonwealth and the States. Section 83 of the Constitution inhibits the withdrawal of money from the Treasury of the Commonwealth except under appropriation made by law.

182. The Committee considers that it should not be necessary for the House of Representatives to have to pass financial measures for a second time following a failure to obtain the approval of the Senate to the measure submitted in the first instance. It also considers that the time which has to elapse under the provisions of the present section before a deadlock arises is unduly long in the case of financial measures.

183. The Committee recommends that a deadlock should be deemed to arise in respect of a proposed law dealing with financial matters if, during any session of the Parliament, the Senate has not, at the expiration of thirty days from the

receipt of the measure from the House of Representatives, passed the proposed law or the proposed law with any amendments it has requested and which the House of Representatives has accepted. At the end of the period of thirty days it should be immediately possible to initiate action with a view to obtaining a resolution of the deadlock."⁶²

The necessary assumption of the Committee's observations was that the Senate was not precluded by constitutional convention from exercising its legal powers with respect to Money Bills, and there is not a word reported in the records of the Committee's deliberations to indicate that any member of the Committee was of opinion that there was any constitutional convention or practice restricting the Senate in the exercise of its constitutional power to reject a Money Bill.

Speeches in Parliament: Reported speeches in the Parliament do not substantiate the claim. Thus, on 18th June, 1970, in the course of debate on Bills passed by the Representatives dealing with States' receipts duties, the Leader of the Opposition in the Senate⁶³ stated: "... For what we conceive to be simple but adequate reasons, the Opposition will oppose these measures. In doing this the Opposition is pursuing a tradition which is well established, but in view of some doubt recently cast on it in this chamber, perhaps I should restate the position. The Senate is entitled and expected to exercise resolutely but with discretion its power to refuse its concurrence to any financial measure, including a tax bill. There are no limitations on the Senate in the use of its constitutional powers, except the limitations imposed by discretion and reason. The Australian Labor Party has acted consistently in accordance with the tradition that we will oppose in the Senate any tax or money bill or other financial measure whenever necessary to carry out our principles and policies. The Opposition has done this over the years, and in order to illustrate the tradition which has been established, with the concurrence of honourable senators I shall incorporate in Hansard at the end of my speech a list of the

⁶¹ The membership of the Committee was as follows:

House of Representatives: The Prime Minister and the Leader of the Opposition ex officio, Messrs Calwell (A.L.P.), Downer (Lib.), Drummond (C.P.), Hamilton (C.P.), Joske (Lib.), Pollard (A.L.P.), Ward (A.L.P.) and Whitlam (A.L.P.).

Senate: Senator Spicer (Lib.) (Chairman), succeeded by Senator O'Sullivan (Lib.), Senators Kennelly (A.L.P.), McKenna (A.L.P.) and Wright (Lib.).

⁶² Report of the Joint Committee on Constitutional Review, 1959, at p. 28. The Committee recommended three alternative means of attempting settlement of a deadlock; see the Report at pp. 30-34.

⁶³ Senator Murphy.

measures of an economic or financial nature, including taxation and appropriation bills, which have been opposed by this Opposition in whole or in part by a vote in the Senate since 1950."⁶⁴

Speaking on Appropriation Bill (No. 1) 1970-1971, the leader of the Opposition in the House of Representatives⁶⁵ stated: "Let me make it clear at the outset that our opposition to this Budget is no mere formality. We intend to press our opposition by all available means on all related measures in both Houses. If the motion is defeated, we will vote against the Bills here and in the Senate. Our purpose is to destroy this Budget and to destroy the Government which has sponsored it."⁶⁶

The practice of other Parliaments

The case for the emergence of such an alleged convention in part seeks support from constitutional practice in England and the Australian States. But conventions are not rules of the game simply to be borrowed from other jurisdictions. They must arise indigenously as clear understandings between the two Houses of Parliament involved. The precedents of other jurisdictions have to be closely examined in the light of their own particular circumstances, and their utility as precedents in the solution of a constitutional problem in the Federal Parliament is dependent upon a precise assessment of the relevant facts. There are no axiomatic authorities, but merely individual precedents which may or may not provide a solution to a particular constitutional problem.⁶⁷

Thus, conventions governing the relationships of the House of Lords and House of Commons in England before the enactment of the *Parliament*

Act, 1911 (U.K.) are virtually worthless. If the electorate is taken to be the political sovereign in England, then political sovereignty is expressed only through the House of Commons. In Federal Australia, the Federal electors, as the political "sovereign", are represented in both the House of Representatives and the Senate. There is only one body of electors.

There was reference during the constitutional crisis in 1975 to the disagreement in Victoria in 1947, in which the Legislative Council's refusal of supply to the Labor Government attracted public criticism by the former Chief Justice of the High Court, Sir Isaac Isaacs. However, despite repeated constitutional crises in Victoria in both the nineteenth and twentieth centuries, there has been little modification of the legislative powers vested in the Legislative Council. As one commentator has said, once the Legislative Council successfully asserted its position in 1947, the threat of the Council to refuse supply has become a standard part of Victorian political equipment.⁶⁸ It is to be noted that Isaacs considered it material to his argument that the Legislative Council was elected by "a privileged minority".⁶⁹

Reasons for a convention depriving the Senate of the right to exercise its legal power to reject a Money Bill

This article has been concerned to show that the history of the drafting of s. 53 during the Convention Debates and the examples of disagreements occurring between two Houses of Australian colonial Parliaments before Federation fail to support the contention that there should be a convention precluding the Senate from rejecting a Money Bill. It has been further submitted that the history of the relationships of the two Houses of the Commonwealth Parliament since Federation also does not support the claim. It remains to consider various reasons put forward in justification of a convention.

⁶⁴ Cth Parl. Debs, (Senate) Vol. 44, at p. 2647. See also the observations of the Leader of the Opposition in the House of Representatives on 1st October, 1970 in respect of the same legislation: Parliamentary Debates, (H. of R.) Vol. 70, at pp. 1971-1972.

⁶⁵ Mr. Whitlam.

⁶⁶ Cth Parl. Debs (H. of R.) Vol. 69, at p. 463.

⁶⁷ See M. C. Harris and J. R. Crawford, "The powers and authorities vested in him", (1969) 3 *Adelaide Law Review* 303, at 316-317. The article is concerned with the discretionary authority of State Governors, and the power of dissolution in the circumstances of the election in 1968 for the 39th Parliament of South Australia. In examining the scope of the powers of the Governor of South Australia, the authors were critical of advice which the Governor received from some quarters attempting to apply conventional situations of other legislative systems to South Australia.

⁶⁸ *The Government of the Australian States*, S. R. Davis ed., Ch. III — "The Government of Victoria" — by A. F. Davies, at pp. 218-219. The Legislative Council again rejected supply in 1952, bringing down the McDonald Country Party Government: see J. I. Fajgenbaum and P. Hanks, *Australian Constitutional Law* (1972), at pp. 25, 84-85.

⁶⁹ Moreover, as Isaacs also noted, the intention of the Legislative Council was to force the resignation of the Government, and hence an election, not on a Senate issue but the issue of bank nationalisation, which the Federal Labor Government was seeking to achieve.

According to the professors in the field of constitutional law, already mentioned,⁷⁰ there were two reasons for the alleged convention: first, that "the lower House can claim to be more properly representative of the people"; second, that "the assertion by the upper House of the power to force an election introduces a gravely destabilising factor into the parliamentary system".

House of Representatives as more representative of the people: It was stated that the House of Representatives had "more equally sized electorates" and all members of the House of Representatives were elected at the same time, whereas half the number of senators retired every three years.⁷¹ Finally, casual vacancies were filled in the House of Representatives by by-election,⁷² whereas casual vacancies might be filled in the first instance in the Senate by a State Parliament.⁷³ Assuming that the House of Representatives is "more properly representative of the people", the given reason is not one which finds a place in the history of deadlocks between two Houses of the Australian colonial Parliaments. Disagreements between two Houses of Parliament in Australia have arisen where the lower House has been properly described as the "popular" House, but the upper House could not lay any such claim.⁷⁴ In

England, the conventional position which may be considered to have been written into the *Parliament Act 1911* (U.K.) involved an elected lower House and a hereditary or non-elected House of Lords.

The reason disregards the fact that the Senate is elected by the same body of electors as elect members of the House of Representatives. In the case of the Senate, the electors vote directly as people of the State,⁷⁵ whereas the members of the House of Representatives are directly chosen by the people of the Commonwealth, the number of such members to be, as nearly as practicable, twice the number of senators.⁷⁶

Although the argument was not put, the Constitution requires that each of the original States should have equal representation in the Senate,⁷⁷ whereas the number of members of the House of Representatives chosen in the States must be in proportion to the respective numbers of their people.⁷⁸ However, where the same universal franchise operates to elect members to both Houses, it also accords with the principles of representative government that in a Federal system the States should be equally represented in one of those Houses. The Constitution was obviously drafted on this assumption, and the provisions in relation to representation have remained unchanged.⁷⁹

⁷⁰ See n. 1b, ante. All four signatories are well known constitutional lawyers, two of whom, Professors Sawyer and Zines, are this author's colleagues. It is not wished to treat a letter to newspapers, apparently signed at short notice, as the equivalent of a scholarly article. However, the letter presented arguments and reasons not appearing in the opinion of the Solicitor-General, and it received widespread publicity. It is felt, therefore, that it is now appropriate to assess the substance of the letter.

⁷¹ Constitution ss. 7, 13, 24.

⁷² Constitution, s. 33.

⁷³ Constitution, s. 15.

⁷⁴ Fajgenbaum and Hanks, *op. cit.*, at p. 124, summarise the legislative structures of the colonial Parliaments at Federation as follows:

"By the end of the nineteenth century each of the six Australian colonies possessed a largely autonomous legislature, consisting of two Houses and the Governor. In four of the colonies the Lower House (Legislative Assembly) was elected on the basis of male adult suffrage. Female suffrage had already been introduced in South Australia and Western Australia; it came to New South Wales in 1902, Tasmania in 1903, Queensland in 1905 and Victoria in 1908.

In New South Wales and Queensland the Legislative Councils were still nominee bodies, and those of South Australia, Tasmania, Victoria, and Western Australia continued to be elected on a property franchise. In each colony the Lower House could be described as 'popular'; the Upper House tended to represent the interests of property and capital — a representation which frequently brought the two Houses into conflict. . . ."

⁷⁵ Constitution, s. 7.

⁷⁶ Constitution, s. 24.

⁷⁷ Constitution, s. 7.

⁷⁸ Constitution, s. 24.

⁷⁹ The fact that all members of the House of Representatives are elected at the same time, whereas only half the number of senators are elected every three years, does not, it is submitted, mean that the House of Representatives is more properly representative when the body of electors is the same. In 1891, the Convention Debates began with the introduction by Sir Henry Parkes of the Federal resolutions. In furtherance of the principles embodied in the resolutions, Parkes proposed that the Senate should have "a perpetual existence combined with definite responsibility to the electors": see *Convention Debates*, Sydney, 1891, at p. 23. When the Debates resumed in Adelaide in 1897, Edmund Barton, Leader of the Convention, also proposed that the Senate should have a perpetual existence: see *Convention Debates*, Adelaide, 1897, at p. 17. It was assumed throughout the Convention Debates that the Senate should not be dissolved in the manner of the House of Representatives. The further supporting argument leading to the filling of casual vacancies in the Senate is of little consequence in attempting to show that the House of Representatives is more representative. Under s. 15 of the Constitution, the occupant holds the place only until the next election of the members of the House of Representatives, or the next election of senators for the State, whichever first happens. Section 15 is also a federal clause recognising the interests of the States in the structure of the Senate.

A forced election as a gravely destabilising factor. The second reason was that the assertion by the upper House of the power to force an election introduces a destabilising factor into the parliamentary system. Whether this is so, and whether recent events have demonstrated the validity of the argument, are not questions within the scope of this paper. Repeated or reckless use by the Senate of its legislative power, like so many other powers of government, could be capable of producing serious instability in government. Dicey observed in his classical work on the Law of the Constitution that in the long run constitutional conventions serve the purpose of ensuring that the will of the political sovereign prevails.⁸⁰ Where the Senate uses its power to reject a Money Bill, in terms of Dicey's treatment of constitutional understandings, the Government may seek the dissolution of the House of Representatives. The electors would then have an opportunity to determine whether the Senate's action was reckless. Otherwise, however, opinions in these matters depend more on subjective assessment than objective analysis.

Relationship of ss. 28 and 53 of the Constitution: According to the joint opinion of the Attorney-General and Solicitor-General, referred to ante, to treat the Senate's power to reject supply as untrammelled by convention or practice⁸¹ means that s. 28, which envisages that the House of Representatives will normally enjoy a term of three years, and s. 53 are deprived of their intended harmonious co-operation.⁸² Section 28 is nothing more than a clause fixing the maximum term of the House of Representatives, and its counterpart appears in the Constitution of every Australian State. The section expressly contemplates the possibility of earlier dissolution. As to s. 53, it is clear from the history of the drafting of the section discussed earlier in this paper, that it was not intended by the founders that the presence of s. 28 should prevent the Senate from exercising its powers to reject a proposed law of

the House of Representatives under s. 53. If valid, the argument could equally be put that the existence of s. 28 should affect the operation of s. 57, whereas it is clear from the Convention Debates that the primary concern of many of the founders was that s. 57 should provide a means of settling deadlocks over financial measures.

Responsible government: Another argument expressed in various ways in the joint opinion relates to the principle of responsible government pervading the Constitution.⁸³ It is agreed, with respect, that the initiative in regard to Money Bills undoubtedly rests with the House of Representatives by virtue of s. 53. This was clearly the intention of the founders. Further, it is agreed that, since s. 56 requires an Appropriation Bill to be accompanied by message of the Governor-General, the Executive Government is in control of the introduction of such measures. It is also plain that the principle of responsible government permeates the Constitution, and that the primacy enjoyed by the House of Representatives in relation to Money Bills is consistent with the principle.

It is necessary to ask, however, what is meant by responsible government. The joint opinion referred to a joint judgment of four judges of the High Court in the *Engineers' Case*.⁸⁴ The judgment quoted with approval the observations of Lord Haldane as a member of the House of Commons at the time of the introduction of the Bill to constitute the Commonwealth of Australia. According to Lord Haldane, there was a fundamental difference between the Commonwealth Constitution and the Constitution of the United States. This was the institution of responsible government, "a government under which the Executive is directly responsible to — nay, is almost the creature of — the Legislature". The Legislature to which Lord Haldane referred consists, of course, of the Senate and the House of Representatives, and both are elected chambers.

The joint opinion also recalled that there were several Australian Federalists who, in 1891, objected to the application of the cabinet system of executive government to a Federation. A summary of the Federalists' views appears in the

⁸⁰ See n. 42, ante.

⁸¹ In the course of the constitutional crisis, the Senate did not suggest that it was untrammelled. According to the resolution of 22nd October, 1975, the Senate considered that it should exercise its legislative power, "bearing in mind the seriousness and responsibility of its actions".

⁸² Opinion, par. 35.

⁸³ Ibid., pars. 28, 33-37.

⁸⁴ (1920) 28 C.L.R. 129, at 146-147 per Knox C.J., Isaacs, Rich and Starke JJ.

treatise by Quick and Garran.⁸⁵ The joint opinion referred to the summary, including the statement in relation to a true Federation: "that the State House would be justified in withdrawing its support from a ministry of whose policy and executive acts it disapproved; that the State House could, as effectively as the primary Chamber, enforce its want of confidence by refusing to provide the necessary supplies." The opinion then concludes that the defeat of the objections of these Federalists involved, in the minds of those responsible for the Constitution, rejection of the notion that the Senate would "enforce its want of confidence by refusing to provide the necessary supplies".

Once again, it has to be said that the Convention Debates relating to ss. 53 and 57, already described, do not disclose any such rejection, but that the sections sought to reconcile the power of the Senate to reject any proposed law with responsible government.

As already mentioned, the major debate on s. 53 (then cl. 55) was in 1891. The debate occurred at a late stage of the Convention after it had been decided to write the British system of responsible government into the draft Constitution. The primary concern of the debate was whether s. 53, incorporating the principles of the South Australian "Compact of 1857", was acceptable to the colonies wishing to see the Senate function as a House representing the States. There were two opposing camps: first, those who believed that the Senate's legislative powers should be altogether the equal of those of the House of Representatives;⁸⁶ second, there were those who thought that the system of responsible government would not work properly with two Houses of completely equal legislative power.⁸⁷ The second group won the day in a vote of 22-16.⁸⁸

The participants in the debate on the side of the majority were perfectly willing to see the incorporation of the principles of the South Australian "Compact" as giving expression to their

thoughts on responsible government.⁸⁹ It was not suggested by anyone that the Senate should not have the power to reject a Money Bill, nor was there any mention of specific restrictions which might be placed upon the use of the power of rejection.⁹⁰ As Quick and Garran observed, after discussing the origin of s. 53,⁹¹ apart from the qualifications on its legislative power expressed in s. 53, the Senate's right of veto is as unqualified as its right of assent.⁹²

THE FUTURE

Since s. 53 probably leaves it to the Houses to determine their respective legislative positions, it is not inconsistent with the section for a constitutional convention to emerge restricting the Senate from the full exercise of its legal powers with respect to Money Bills. The growth of the party political system of parliamentary government since Federation has made it difficult for conventions regulating the relationships of the two Houses to evolve. In the light of the powers given to the Senate at Federation and the expectations as to their use, mere party political attitudes adopted for convenience in a prevailing situation do not provide an acceptable basis for the emergence of a convention. In any case, the events of 1975 have thoroughly inhibited any such development.

Section 53 incorporates as constitutional provisions rules governing the relationship between the two Houses which the founders considered to be in essence conventional understandings in colonial Parliaments, such as South Australia. If a

⁸⁵ For example, Bird, *op. cit.*, at pp. 728-729; Playford, *op. cit.*, at pp. 734-735; Hackett, *op. cit.*, at pp. 741-742; Bray, *op. cit.*, at pp. 743-744.

⁸⁶ When the clause was taken up again at Adelaide in 1897, the purpose of the debate was to ensure that the agreement reached in 1891 should not be undone by strengthening the Senate's position in regard to proposed laws imposing taxation. There was, again, no suggestion that the Senate should regard its legal powers in relation to Money Bills as being nominal. See, for instance, the remarks of Reid quoted in the text *supra*, at nn.16-17. Reid certainly did not wish to see the Senate as a House of equal legislative power but, as the quotation shows, he still conceded that the Senate could, in some circumstances, properly reject supply.

⁸⁷ Quick and Garran, *op. cit.*, at p. 673.

⁸⁸ Further, the draft Constitution produced by the 1891 Convention provided not for the direct election of senators by Federal electors, but instead that senators should be directly chosen by the Houses of the Parliament of the several States: Commonwealth of Australia Bill, Ch. I, cl. 9. See Convention Debates, Sydney, 1891, at p. 946.

⁸⁹ Quick and Garran, *op. cit.*, at pp. 706-707.

⁹⁰ For supporters of this attitude, see the following references in the Convention Debates, 1891: Thynne at pp. 726-727; Forrest at p. 733; Downer at pp. 748-749.

⁹¹ Those who expressed this view in the Convention Debates, 1891, included Bird at pp. 728-729; Playford at pp. 733-735; Hackett at p. 741; Bray at pp. 744-745.

⁹² Convention Debates, Sydney 1891, at p. 755.

convention is to be grafted onto s. 53, it will have to emerge in a way which leaves no room for any doubt whatsoever about its existence. It will have to flow from a consensus of opinion displayed within the Senate in which senators are not constrained by allegiance to political parties from expressing themselves in a particular way. Section 53 has expressly defined relationships between the Senate and the House of Representatives. The Parliament Acts do the same thing for the House of Lords and House of Commons in England. If the Senate's legal powers are to be curtailed, the more obvious course of action is to bring it about by constitutional amendment. In 1959, the Joint

Committee on Constitutional Review, referred to, ante, recommended that, if the House of Representatives passed a Money Bill and the Senate had not passed the Bill after thirty days from the measure being transmitted to it, it should be open to the Government, in effect, to convene a joint sitting of the two Houses to determine the fate of the measure. At present the prospect is poor of achieving either a convention or a constitutional alteration, but either, and especially the second, would safeguard the Governor-General in future against the embarrassment and odium of becoming involved in the uneasy politics of obtaining money for government.

Restraint of Trade in the High Court

BY J. D. HEYDON*

*Quadramain Pty. Ltd v. Sevastapol Investments Pty. Ltd.*¹ is the first decision of the High Court on the *Trade Practices Act* 1974-1975 (Cth). It is of fundamental importance both for the common law restraint of trade doctrine and for the application of s. 45 of the Act. As often happens, it came before the Court in an indirect way.

In 1969 a landowner, Berowra Heights Hotel Pty. Ltd. ("Berowra"), owned two pieces of adjoining land ("lot 1" and "lot 2"). In 1969 it transferred lot 2 to Holloway Sackville (Australia) Pty. Ltd. ("Holloway"). The transferee covenanted for itself and its assigns, in effect, that the land transferred would not be the subject of an application for a licence under the *Liquor Act*, 1912 (N.S.W.) or whereby liquor might be sold on the land. Lot 2 was to be developed as a shopping centre and lot 1 was used as the site of a hotel. The benefit of the restriction was declared to be appurtenant to lot 1. In 1972 Holloway transferred lot 2 to Metropolitan Investments Pty. Ltd., which later leased part of lot 2 to Sevastapol Investments Pty. Ltd. ("Sevastapol"). In 1974 Berowra transferred lot 1 to Quadramain Pty. Ltd. ("Quadramain"). In 1975 a notice of intention to apply for a conditional spirit merchant's licence in relation to a shop on lot 2 was filed. Proceedings

were then instituted by Quadramain to prevent any application for a liquor licence being made, and to prevent the burdened land being used for the sale of liquor. It was common ground that the benefit and the burden of the restrictive covenant ran with the two pieces of land within the rule in *Tulk v. Moxhay*,² the covenant having been noted on the relevant Certificate of Title.³

The defences relied upon by the defendant Sevastapol that the covenant was void as being in unreasonable restraint of Sevastapol's trade, and was further unenforceable as infringing s. 45 (1) and (4) of the *Trade Practices Act*.⁴ The plaintiff responded by pleading that the defence failed to allege that the restraint had or was likely to have a significant effect on competition within s. 45 (4) of the Act;⁵ that the restraint did not in fact have

² (1848) 2 Ph. 774; 41 E.R. 1143.

³ This was not disputed in the judgments except by Jacobs J., who doubted whether the covenant could be said to benefit the covenantee's land, to "touch and concern" it, rather than merely to benefit his trade on that land; see p. 486. On p. 486 it seems that the word "covenantor" should be "covenantee".

⁴ Section 45 (1) provides: "A contract in restraint of trade or commerce that was made before the commencement of this sub-section is unenforceable in so far as it confers rights or benefits or imposes duties or obligations on a corporation."

⁵ Section 45 (4) provides: "A contract, arrangement or understanding that is not of the kind referred to in sub-section (3) [i.e. one fixing prices] is not in restraint of trade or commerce for the purposes of this Act unless the restraint has or is likely to have a significant effect on competition between the parties to the contract, arrangement or understanding or on competition between those parties or any of them and other persons."

* M.A., B.C.L. (Oxon.); Professor of Law, University of Sydney; Commissioner, Law Reform Commission of New South Wales.

¹ (1976) 50 A.L.J.R. 475.

THE ROUND TABLE
APRIL 1976

THE CONSTITUTIONAL CONSEQUENCES OF MR. WHITLAM

PRECEDENTS AND PREROGATIVE POWER

H. V. HODSON

"It is the undoubted prerogative of the Crown to dissolve Parliament, but . . . it is, of all the trusts vested in His Majesty, the most critical and delicate."

Edmund Burke

"The enormous increase in the power of the Cabinet, and especially of the Prime Minister, raises the question whether the reserve powers of the Crown to force or refuse a dissolution may not be one of the few safeguards against dictatorship by the leader of the junta wielding for the moment the power of office."

Eugene A. Forsey

"Moves for the abolition of Upper Houses in Australia indicate a growing resentment by political parties against any constitutional restraints upon their power to apply their policy, irrespective of whether or not particular measures have been canvassed at the election which gave them their majority."

F. A. Bland

THE constitutional eruption of November last in Australia, when the Governor-General dismissed the Prime Minister, Mr. Gough Whitlam, is of much more than passing or solely Australian interest—and this is not only because the campaign subsequently conducted by Mr. Whitlam and the Australian Labour Party against the Queen's representative could imperil the monarchical form of government in that country. For the prerogative power of the head of state, which was used and called in question, is of great constitutional importance in all countries with systems of government of the British type; and that is true whether the national head be the Queen herself or a Vice-Monarch or a President. Indeed, as will be noted later, one of the key constitutional cases elucidating the exercise of the prerogative occurred in a presidential country, Pakistan, while still a member of the Commonwealth.

The extent and nature of prerogative power may also prove to be highly important in the future progress of devolution in the United Kingdom, in

THE CONSTITUTIONAL CONSEQUENCES OF MR. WHITLAM

regard particularly to the appointment, dismissal and constitutional rights of a Scottish Executive responsible to a Scottish Assembly.

The course of events must first be briefly recalled. In the Australian House of Representatives the Labour Party had a majority of five, secured in a general election in May 1974; in the Senate it had at best an equality, at worst a minority of two. The Senate refused to pass the government's appropriation Bills, partly at least in an effort to force a general election which the Opposition believed they could win, on the score both of alleged economic mismanagement by Labour and of certain scandals which had caused the dismissal of one Cabinet Minister and the resignation of another. Mr. Whitlam refused either to advise a dissolution or to accept a proposed compromise, involving an immediate election for half the Senate (whose members are elected triennially for six-year terms) and a promise of an election for the Lower House by June 1976. He claimed to be able to continue governing with such financial resources as his government could procure.

On November 11, 1975, the Governor-General, Sir John Kerr, a former Chief Justice of New South Wales and until then a personal friend of Mr. Whitlam, dismissed him from office and called on the Leader of the Opposition, Mr. Malcolm Fraser, to form a government. Mr. Fraser, having promptly secured supply by passage of the necessary Bills through the Senate, immediately advised, and was granted, a double dissolution. On the same day the House of Representatives passed a vote of no confidence in the Fraser administration, and the Speaker was despatched to the Governor-General to ask for a reversal of his decision. But he and Mr. Whitlam found themselves beaten by a short head, Parliament having been already formally dissolved.

The result of the general election on December 13 was a resounding defeat for Labour. The Liberal-Country Party coalition secured majorities of sixty-nine in the Lower House and six in the Senate.

The powers of the Senate are plainly laid down in the constitution of the Australian Commonwealth. While it cannot amend tax Bills or those appropriating revenue for the service of government, it can propose amendments to the other House, and, if they are not accepted, can reject the Bill. Otherwise, the powers of the two Houses are, in general terms, constitutionally equal. The constitution further provides a means of resolving legislative conflict between the two Houses, namely, that after a dissolution of both a majority at a joint sitting prevails. Thus the Senate was unquestionably within its legal rights in refusing to pass the appropriation Bills and awaiting a double dissolution to break the deadlock.

Such was the letter of the law. Its spirit might be thought more arguable. The Australian Senate, like that of the United States, is structured to give equal weight to each of the constituent States. Historically, however, it has always acted as a subordinate chamber, and it has been effectively dominated by the party system rather than States' rights. Since its members

THE CONSTITUTIONAL CONSEQUENCES OF MR. WHITLAM

are elected (proportionally) on the same franchise as the Representatives. It has a claim to be as democratic as the other House. "The fact that the Senate is elected directly by adult franchise does not mean, however," writes one authority (L. F. Crisp), "that any such action" (as obstructing or rejecting measures of government business) "by a Senate majority hostile to the government is any the less an affront against the essential democratic principle of majority rule." In a different context (an hereditary Upper House), the British House of Commons resolved in December 1909

that the action of the House of Lords in refusing to pass into law the financial provision made by the House for the service of the year is a breach of the Constitution and a usurpation of the rights of the Commons.

Nevertheless, the Australian Senate's power to reject money Bills, as well as others which it can amend, must be regarded as a deliberate provision of the written constitution, so that, if its action in this affair was party-political, it was certainly constitutional.

The deadlock was not broken in the manner provided because Mr. Whitlam refused to advise the double dissolution required. Must a Governor-General, in whose hands lies the formal prerogative to dissolve, accept the advice, positive or negative, of a Prime Minister in office on dissolving Parliament? That is the first question to be considered. Australia itself provides three early instances (in 1904, 1905 and 1909) of refusal by the Governor-General to dissolve Parliament when so requested by the Ministry of the day. But much has changed since then. Requests for a double dissolution in Australia in 1914 and 1951 were granted despite hesitations on the part of the Governors-General, and again in 1974 to Mr. Whitlam himself. Since 1926 Governors-General have no longer been agents of the Crown advised in part by Ministers responsible to the Imperial Parliament, as was the case until the Statute of Westminster 1931. Furthermore, the weight of constitutional principle has shifted, with fresh interpretations and new precedents.

Precedents in Canada, Pakistan and Britain

EXPOSITORS of British-type parliamentary institutions still argue about the implications of "the Byng incident" of 1926. Lord Byng, Governor-General of Canada, refused a dissolution to Mr. Mackenzie King, whose government, though shaken by an administrative scandal, had a parliamentary majority. When Mr. King thereupon resigned, Lord Byng invited the Leader of the Opposition, Mr. Arthur Meighen, to form a government, which though defeated in the House of Commons was granted a dissolution. In the consequent general election, Mr. King made the use—or misuse, as he claimed—of the Governor-General's prerogative power a major issue, and won a decisive victory.

The Canadian authority (E. A. Forsey) who has published the most detailed analysis of that case holds that Lord Byng acted constitutionally

THE CONSTITUTIONAL CONSEQUENCES OF MR. WHITLAM

throughout. Others, including Dr. Evatt, the Australian judge, have been more doubtful. Some people contend that Mr. King's subsequent electoral triumph gave the quietus to an ancient but long dormant royal right to reject advice on a dissolution from a Ministry in office; but political consequences do not by themselves alter constitutional law.

The dissolution power was extensively reviewed in two judgments of the Supreme Court of Pakistan (Moulvi Tamizuddin's case and Special Reference No. 1 of 1955), following Governor-General Ghulam Mohammed's dissolution of the constituent assembly and entrustment of emergency governmental powers to Prime Minister Mohammed Ali, who could not have carried on in face of the assembly's divisions. Chief Justice Munir pronounced that, "speaking generally, he (the Governor-General) has ceased to possess the right of exercising the reserve powers of the King against the wishes of the Dominion Government". Declaring the dissolution lawful, however, he said:

"The free exercise of a discretion or prerogative power at a critical juncture is essential to the executive government of every civilised country, the indispensable condition being that the exercise of that power is always subject to the legislative authority of Parliament *ex post facto*."

Sir John Kerr's exercise of prerogative power could clearly be justified by there being "a critical juncture". The proviso about subsequent legislative validation could not, of course, be fulfilled, in respect of the dissolution, by the dissolved Parliament itself. In respect of his dismissal of the Prime Minister, it was not fulfilled in advance of dissolution, but a Parliament under imminent sentence of death was hardly competent to judge the issue, and in any case the decisive election result may be taken as *ex post facto* validation by the ultimate arbiter, the people.

A *locus classicus* in the United Kingdom occurred in the dispute over Irish Home Rule in 1914. King George V strongly pressed a dissolution upon Mr. Asquith, quoting Bagehot on the Crown's prerogative power to dissolve. His Majesty had very strong grounds: the two Houses of Parliament were in conflict, and the Home Rule Bill threatened civil war in Ireland. Mr. Asquith refused, and the King made no move to over-rule him. Although the outbreak of war averted a final confrontation, it is plain from the correspondence that the King had no real intention of dissolving without the Prime Minister's advice. Mr. Asquith told him quite correctly that an alternative course was open to him, to change his advisers. Although, the Prime Minister said, the King undoubtedly possessed the right to dismiss his Ministers, even when they held a majority in the House of Commons, it had not been exercised since the days of William IV, whose action at the time of the Reform Bills did not make an auspicious precedent. If the King were to dismiss the government he might render the Crown "the football of contending factions". This, declared Asquith, would be "a consti-

THE CONSTITUTIONAL CONSEQUENCES OF MR. WHITLAM

tutional catastrophe which it was the duty of every wise statesman to do the utmost in his power to avert”.

Sir John Kerr, however, did take that alternative course last November. The constitutional rectitude of his action must be distinguished from its political sagacity. The relevant circumstances were very different from those of Britain in 1914. It was a case not of hazardous and divisive Cabinet policies but of the imminence of breakdown of government for want of finance. Mr. Whitlam was refusing the remedy provided by the constitution for such occasions of deadlock, although he himself had declared in 1970, when the boot of office was on the other foot, that the government should resign when a major taxation Bill was defeated in the Senate.

In such circumstances the initial duty of the Sovereign or the Sovereign's proxy is to promote efforts to break the impasse by negotiation. This George V did in calling the abortive Buckingham Palace all-party conference on the Irish problem. This Sir John Kerr, too, did in backing a compromise proposal. When Mr. Whitlam still stood fast, the Governor-General was not only entitled to intervene, but indeed may be said to have had a duty to do so. His courage cannot be gainsaid. Bagehot remarked, a century ago, that “the first desire of a colonial governor is not to get into a ‘scrape’”. Sir John was not so timid.

Consultations by the Governor-General

WHOSE advice, if any, should the Governor-General have taken on the question of dismissing a Prime Minister and replacing him with one who would give the required advice on dissolution? At the time it was argued in some quarters that as the Queen's representative Sir John ought to have consulted her and not to have exercised the Crown prerogative without her approval. That argument is explicitly contradicted both by precedent and by leading authorities, going back even to days before responsible government in the Dominions was complete. The Queen herself told the Speaker of the Australian House of Representatives, in reply to his message of protest, that the prerogative powers of the Crown had been clearly placed in the hands of the Governor-General and that it would be quite improper for her to intervene.

“The effective head of state in a parliamentary system”, wrote two eminent Oxford authorities on these matters, Professor D. P. O'Connell and Mr. J. M. Finnis, in a letter to *The Times* (November 25, 1975), “is bound to consult his law officers at all stages of a constitutional crisis up to the time when he decides that he is constitutionally required to reject this advice”. Sir John Kerr did indeed have the opinions of both his law officers, one of whom was a Minister, the other a civil servant. “Equally he must be entitled to seek other opinion on the question whether the advice of Ministers is to be rejected or not.” Sir John, in fact, consulted the Chief Justice of Australia. For that course there was an exact prece-

THE CONSTITUTIONAL CONSEQUENCES OF MR. WHITLAM

dent. In 1914 Governor-General Sir Ronald Munro-Ferguson consulted Chief Justice Griffith when Sir Joseph Cook, the Prime Minister, having a precarious majority in the House and none in the Senate, deliberately provoked a deadlock and asked for a double dissolution. The Chief Justice gave the following advice (*italics mine*):

"The power of double dissolution should be regarded as an extraordinary power, to be exercised only in cases where the Governor-General is *personally satisfied, after independent consideration* of the case, either that the proposed law as to which the Houses have difference of opinion is one of such public importance that it should be referred to the electors of the Commonwealth for immediate decision . . . or that there exists such a state of practical deadlock in legislation as can only be ended in that way. As to the existence of either consideration, *he must form his own judgement*. Although he cannot act except upon the advice of his Ministers, he is not bound to follow their advice but is in the position of *an independent arbiter*."

In 1975 Chief Justice Barwick replied to Sir John Kerr:

"First, the Senate has constitutional power to refuse supply to the government of the day. Secondly, a Prime Minister who cannot ensure supply to the Crown, including funds for carrying on the ordinary services of government, must either advise a general election (of a kind which the constitutional situation may then allow) or resign. If, being unable to secure supply, he refuses to take either course, Your Excellency has constitutional authority to withdraw his commission as Prime Minister."

The advice could hardly have been clearer.

Some critics have argued that it was improper for the Governor-General to seek the advice of the Chief Justice of Australia, and for the latter to give it, because, they contend, the Chief Justice presides over the court which eventually might have to pass judgment on the legality of the Governor-General's conduct. But this is surely to misunderstand the matter. The prerogative power is, of its nature, not subject to judicial review. No action could lie against the Governor-General for his exercise of it. As all the precedents show, the challenge is to be made not in the courts but in the political arena. A civil case might possibly be brought, based on denial of the legality of something done in consequence of a prerogative act, but if such a case had ever survived the lower courts and reached the High Court of Australia the Chief Justice could have excused himself from trying it, the court having six other Justices.

The somewhat ambiguous last sentence in the quotation from Chief Justice Griffith's opinion in 1914 appears to imply that while the Governor-General may refuse a dissolution against Ministerial advice, he cannot impose one without the advice of Ministers who will take responsibility. Authority emphatically agrees. This ruled out one option otherwise apparently open to Sir John Kerr—to dissolve against Mr. Whitlam's advice but without first dismissing him.

THE CONSTITUTIONAL CONSEQUENCES OF MR. WHITLAM

Anson and Dicey, among others in earlier times, held unequivocally that the King had the right to dismiss Ministers and appoint others who would accept the responsibility of advising him to dissolve Parliament, even though they did not have a majority. Asquith, as recorded above, never challenged the King's constitutional right so to act, though he warned strongly of the political consequences. As to that aspect, the classic precedents of 1784, when George III dismissed Fox and North, and 1832, when William IV dismissed Earl Grey, had opposite results; for at the subsequent elections, whereas Pitt triumphed, Grey and the Whigs were vindicated. Mr. Fraser stepped into Pitt's shoes, not Grey's.

In 1932 Governor Sir Philip Game dismissed Mr. John Lang, Labour Premier of New South Wales, charging him with having acted contrary to law, and commissioned Mr. Bertram Stevens to form a Ministry, although the latter had only twenty supporters (thirty-five in alliance with the Country Party) in a House of ninety. In the consequent election Stevens won a handsome victory. Mr. Justice Evatt, though generally inclined against exercise of the prerogative, and though criticising Sir Philip Game's action on the ground that there was an alternative remedy in court action against the alleged illegality and a possible injunction against the Lang Government, did not deny the Governor's power to act as he did. Asking himself "Was the Governor constitutionally correct?", he answered: "No judgment can be pronounced until what is constitutionally correct is defined by competent authority." As Evatt wrote elsewhere, "each constitutional controversy as to the actual or threatened use of the royal prerogative should be regarded in the light of the particular circumstances ruling at the time".

There remains the question whether Sir John Kerr was constitutionally correct in granting Mr. Fraser a double dissolution after the latter had suffered an adverse vote in the House. No Cabinet, let it be said, has an unqualified *right* to a dissolution. In the nature of things, a request for a dissolution often comes from a Cabinet defeated in Parliament, as a result of deaths, defections, by-elections or the withdrawal of third-party support, and the constitutional right to grant it notwithstanding such defeat is unchallenged. It would have been wrong, on authority, to accept such advice while a vote of censure was pending or under debate: so much emerged from the Byng incident. But once the vote had shown that the new government was unable to carry on, as Mr. Meighen's was unable in Canada in 1926, or Mr. Stevens's was unable in New South Wales in 1932, the request had to be considered in the light of Chief Justice Griffith's dictum and of the facts of the case. Sir John Kerr was presumably "personally satisfied", on "his own judgment, that there existed such a state of practical deadlock in legislation as could only be ended" by a double dissolution. No one could sensibly argue that the deadlock could be ended either by restoring the *status quo ante* or by calling on some third person to form an Administration. Again there was no constitutional fault.

To sum up: on the word or consensus of the best authorities,

THE CONSTITUTIONAL CONSEQUENCES OF MR. WHITLAM

1. A Governor-General cannot dissolve Parliament without Ministerial advice.
2. He may dismiss a Ministry in circumstances which seem to his judgment to require such action, though they are limited in nature.
3. He is entitled to accept advice on a dissolution from a minority Ministry, but not while a vote of censure is still before the House.
4. The objections to his taking either course 2 or 3 are not legal but are bound up with the political consequences.
5. A Governor-General takes personal responsibility for his prerogative decisions, and must accept the odium or credit for their consequences until vindicated by vote of Parliament.

The Attitude of Mr. Whitlam

SIR John Kerr has been criticised for not telling Mr. Whitlam himself what he intended to do and weighing the Prime Minister's reaction. The explanation canvassed by the press was that if he had done so Mr. Whitlam would have turned the tables by dismissing him before he had time to dismiss Mr. Whitlam. That supposed prognostication raises constitutional as well as political issues. A Governor-General is appointed by the Crown on the advice of the Prime Minister (*e.g.* of Australia) and can be removed in the same way. His commission is signed by the Queen and counter-signed by the Prime Minister; consequently its withdrawal must bear the same signatures. The Queen, before acceding to a request from a Prime Minister for recall of her representative, would be entitled, in Bagehot's famous words, to be consulted and to encourage or warn, whether or not she was bound eventually to accept his advice. Even that last point is arguable. Professor Brady, a leading Canadian authority, wrote in connection with the Byng incident: "The discretion of the Crown . . . helps to ensure that neither Parliament nor King is a mere creature of the Cabinet"—as the Crown's representative would be if his recall depended solely on the say-so of the Prime Minister. It would, furthermore, be reasonable and proper for the Queen to ask to hear the views of the victim of a proposal for recall. When the Queen had assented, the instrument would have to be drawn up and despatched for counter-signature. The notion that all this could be done by a five-minute telephone call, in the middle of the English night, before the Governor-General had time to act under his lawful commission, seems far-fetched. In his letter of dismissal to Mr. Whitlam, Sir John Kerr wrote:

"You have previously told me that you would never resign or advise an election of the House of Representatives or a double dissolution and that the only way in which such an election could be obtained would be by my dismissal of you and your ministerial colleagues. . . . You have persisted in your attitude and I have accordingly acted as indicated."

Having made up his mind that he must exercise his prerogative power, Sir John could have had no constitutional obligation whatever to seek again ministerial advice that he already knew.

THE CONSTITUTIONAL CONSEQUENCES OF MR. WHITLAM

So the story reveals no legal error or conflict with constitutional rectitude. Nevertheless it is more questionable in terms of political judgments. The Australian Senate may be criticised for exerting, in the interests of party warfare, its legal power to refuse passage of appropriation Bills. The then Opposition parties can be criticised for deliberately engineering the deadlock in order to provoke a premature general election. Mr. Whitlam and his Cabinet can be legitimately criticised for refusing to advise the means provided by the constitution for resolving the deadlock, and still more for rejecting the compromise proposed. Sir John Kerr can perhaps be criticised for acting without prior public explanation on matters which vitally concerned the working of democracy in Australia. But these are aspects of the affair which, like its immediate electoral and parliamentary aftermath, are primarily the concern of the people of Australia rather than outside critics.

A consequence which does concern all Commonwealth observers, however, is the bringing of the Crown (through its representative) into the forefront of highly polarised party strife. The Queen herself, properly aloof, has not been so tainted. But the acceptability of a quasi-monarchical constitution in Australia (and by inference elsewhere) has been put in jeopardy. That being so, it may be well to heed Mr. Justice Evatt's dictum that "it is desirable to re-examine some of the constitutional rules and practices whereby, both in Britain and in the self-governing Dominions, doctrines of overwhelming importance are treated as being too vague to be defined at all, or, if defined, defined in an unsatisfactory manner, and never regarded as enforceable by the courts of law".

Evatt lists certain areas of uncertainty, including the extent to which and the conditions under which, the Sovereign or its representative has the right to refuse a dissolution of Parliament to Ministers; the power of dismissal of Ministers possessing the confidence of the majority of the popular assembly; and the power to insist upon a dissolution against the wishes of Parliament and Ministers alike. This article should suffice to show how unsatisfactory it is to rely, in such matters, either on varied and sometimes conflicting precedents or on bookish exponents of constitutional law who may contradict each other and even (as Berriedale Keith did) themselves.

How can such a re-examination be conducted, and what should be its objective? To reduce the constitutional rules to substantive written law is not the answer to the latter question. The existence of written constitutions, far from precluding controversy and litigation as to the interpretation of the law, has often encouraged it. Since the essence of the problem is the exercise by the Crown of judgment upon particular circumstances which cannot be foreseen, there must be left room for judgment. The objective, therefore, is not to eliminate such judgment but to ensure that it is circumscribed by agreed and well understood limits or guidelines.

The matter is clearly not one for any single nation of the Commonwealth but for all those which inherit the British type of constitution. If the need

THE CONSTITUTIONAL CONSEQUENCES OF MR. WHITLAM

for clarification is accepted, a special Commonwealth expert conference might be suggested. (A Royal Commission on an all-Commonwealth basis would be too cumbersome to set up and too slow in operation.) Better still, the governments of all the countries concerned might agree upon a remit, in simple and broad terms, to the Judicial Committee of the Privy Council, reinforced for the purpose by the presence of all Chief Justices of those countries and advised by their law officers and other competent authorities. Most evidence and argument could be submitted in writing. The object should be, not the formulation of legal minutiae, but a declaration of the principles that should govern the exercise of the prerogative on occasions of dispute, such as those in the Kerr-Whitlam case.

SELECT BIBLIOGRAPHY

- The English Constitution, by Walter Bagehot. (Second edition, 1872.) Kegan Paul, 1925.
- The Law of the Constitution, by A. V. Dicey. Macmillan, 1893.
- The Constitution, Administration and Laws of the Empire, by A. Berriedale Keith. Collins, 1924.
- Consultation and Co-operation in the British Commonwealth, compiled by Gerald E. H. Palmer. Oxford University Press, 1934.
- The British Empire: a Report on its Structure and Problems by a Study Group of the Royal Institute of International Affairs. Oxford University Press, 1937.
- The Royal Power of Dissolution of Parliament in the British Commonwealth, by Eugene A. Forsey. (Toronto) Oxford University Press, 1943.
- Democracy in the Dominions, by Alexander Brady. University of Toronto Press, 1947.
- Parliamentary Government in the Commonwealth: a Symposium, edited by Sydney D. Bailey. Hansard Society, 1951.
- King George V, by Harold Nicolson. Constable, 1952.
- The Statute of Westminster and Dominion Status, by K. C. Wheare. (Fifth edition.) Oxford University Press, 1953.
- The Parliamentary Government of Australia, by L. F. Crisp. (Second edition.) Longmans Green, 1954.
- The King and his Dominion Governors, by H. V. Evatt. (Second edition.) Frank Cass, 1967.



BALMORAL CASTLE

7th September, 1976

My dear John

I have recently returned from my holiday and can now take up again my correspondence with you, which is one of the most interesting and agreeable aspects of my official life!

I find I have not as yet answered your letter of 5th August and this letter is designed to do that as well as to reply to your letter of 31st August, which The Queen still has on her desk.

Thank you for shedding light on Section 57 of the Constitution. I confess that I had not hitherto understood its full implications; nonetheless, I would not have fallen into the error of believing that you produced a double dissolution in reliance upon the existence of the twenty-one stored up Bills: but then I had better sources of information than the commentators who took this view!

Thank you also for sending the coloured photograph of the Coat of Arms designed for you by my old friend, Garter. The Queen has seen this and is well content with it.

I now turn to your letter of 31st August, which began with an account of the demonstration against Mr. Fraser and the 'Comedy of Errors' which surrounded it. From your own point of view I think there is a silver lining in this particular cloud. It will make the Prime Minister more immediately conscious of the reality of what you have been subjected to and, by a broadening of the base of the attack, some heat will be taken off you personally.

On the credit side of the ledger we have Mr. Whitlam's statement about demonstrations at the time of The Queen's visit which I think was as good as could have been hoped for. Your estimate of how Caucus will react when it comes to consider his position as Leader of the Party next June is most interesting. I suppose his real strength lies in that there is no obvious heir apparent.

I fear you have had a difficult and trying time. I have no doubt, however, that you are adopting the right course and it is certainly one which has The Queen's approval.

Her Majesty sends her best wishes to you both.

*Yours ever
Martin*

P.S. We have had a letter from an organisation called the "Society for Asserting the Constitution over Kerr". I shall be most grateful for anything you can tell me about it: does it cut any ice?

me

His Excellency the Governor-General of Australia.

Government House,
Canberra. 2600.

9 September 1976

My dear Martin,

I should like to let Her Majesty know of a recent development in relation to His Excellency the Governor-General of Papua New Guinea.

We were suddenly asked whether we could arrange an official visit to Australia by the Governor-General. The time proposed was only a couple of weeks ahead and it was intended that the visit should take place early in September.

The Department of Foreign Affairs was reluctant to issue an invitation for such a visit at such short notice and it would have been extremely inconvenient for us to have taken on a full official visit in the circumstances. I was told that there was another reason why Foreign Affairs were reluctant to agree. They have had information that Sir John Guise may resign in the not too distant future and they were concerned that he might choose the period during which he was in Australia to announce his intention of resigning. The suggestion is that he is going to stand in the next election, put himself at the head of a group of Papuan candidates in various Papuan electorates.

Consequently, everything was done to make it difficult for Sir John Guise to persist in his stated wish to make an official visit to Australia at the time.

It was thought that by discussions with his Prime Minister, Mr Michael Somare, the position could be achieved that the Prime Minister would advise him against coming under such circumstances. However, the Prime Minister said that it was really up to Australia to decide whether or not to invite him and he did not feel able to advise the Governor-General not to accept such an invitation if it was made.

I took the view that if he was to come it had to be a full official visit, with full protocol, that he could not have it both ways by electing to call the visit an official visit but not accepting all the responsibilities of a guest of honour under such circumstances.

.../2

I believed, myself, that he would find it extremely uncongenial to go through an official visit. He was told what the protocol would require and I understand that he said that he had no intention of staying in any Government House. He wanted to stay at a motel in one of the capital cities and did not want any protocol. Under those circumstances, once he saw that it was quite impossible for an official visit to be conducted in such a way, he decided not to come.

I mention all of this because I feel you may have other sources of information about Sir John Guise's intentions and it is not my business to deal with anything except matters which affect me or may possibly affect Her Majesty. If Sir John Guise as Governor-General does intend to resign, as I was told may well be the case, and if there is to be an election in Papua New Guinea soon after Her Majesty's visit, then it could be that Sir John Guise might feel the need to resign before the visit in order to get his campaign under way.

I must emphasise, of course, that I know nothing about his intentions or about current Papua New Guinea politics. I provide Her Majesty with this information because of the way events developed on a matter affecting Australia and I am sure you would have your own way of getting further information if Her Majesty as Queen of Papua New Guinea needs to have it.

The second thing I should like to mention is the general situation in the country from the economic point of view.

I had a long talk with Sir Frederick Wheeler. This was based partly upon my desire to get his assessment on the Budget and its prospects as a matter of general interest, but also because I have a personal interest in assessing what may be the popularity or unpopularity of the Government by the end of the year and by early next year up to the time of Her Majesty's visit.

Sir Frederick, of course, not being able to read the future, is not able to contribute a great deal by way of prediction, but is generally of the view that the economy has turned the corner. He believes that there will be further improvement, that gradually decisions will be made in the board rooms to undertake further investment and that this will gradually cause the unemployment to diminish, perhaps after a further temporary rise. He believes that gradually inflation

.../3

PERSONAL AND CONFIDENTIAL

3.

will flatten out, and thinks that all this will be visible by the middle of next year. In the meantime, his view is that everybody has, if I may use the phrase - "to sweat it out".

His own personal opinion is that demonstrations against me are demonstrations against the system, are controlled by a small group of militants who can turn them on and off as they wish, but that there is some reason to believe that they will not continue as a serious problem. However, he agrees that if things go wrong with the Budget and the economy, it could get a bit worse.

We have not had any serious demonstrations lately. We are going to North Queensland for ten days and I believe things will be very quiet up there.

There is one other matter that I feel that I should mention. I had intended to do this sometime ago. You may remember that when it was planned that I should visit London in November last, one subject that the then Prime Minister had asked me to take up was the question of the Instructions from The Queen to the Governor-General and the Letters Patent. David Smith mentioned this to you when he was in London.

At the time I believe your advice was that if those matters were to be discussed the ground would have to be prepared in advance. The Prime Minister asked for an opinion from the Solicitor-General on the constitutional problems involved in the Instructions and the Letters Patent and he received an opinion, a copy of which was sent to me in September 1975 by Mr Menadue with the Prime Minister's approval.

As things turned out the trip was cancelled and the subject of Instructions forgotten until the crisis was resolved. The present Government have not raised it again and I have no doubt will not do so. Nevertheless, the opinion which I received will be of interest to you in case at some future time some future government may wish to put views to The Queen based on the opinion and leading to a request that new Instructions be drawn, or no Instructions given at all, or other changes made. I am enclosing a copy of the opinion for the information of Her Majesty. She will be able to judge whether the details of the opinion need engage her attention. There is a summary of it at the beginning.

Another matter that could come up is the question of precedence. I have always in Whitlam's day, as your files would show, objected myself to Privy Councillors and Knights being completely removed from the table of precedence. I, of course, accepted his advice and put to The Queen that the present table of precedence should be adopted on the advice of the Prime Minister.

.../4

PERSONAL AND CONFIDENTIAL

PERSONAL AND CONFIDENTIAL

4.

I propose to mention this matter to the present Prime Minister. Now that he has revived the British honours system and obviously attaches importance to knighthoods and privy councillorships, I suppose he will want to advise The Queen to change the order of precedence again by putting Privy Councillors and Knights back into a position similar to that originally held by them.

I shall refrain from raising this with the Prime Minister immediately in case there is some consideration which should be taken into account from the point of view of Her Majesty. There is no urgency about it. You may care to indicate whether there would be any embarrassment if the previous decision on the precedence of Privy Councillors and Knights were to be reversed.

I should mention that my staff at Government House is being strengthened.

I am to have a Deputy Official Secretary, a Mr McElligott, a copy of whose curriculum vitae I attach. He is to be a Deputy Official Secretary in the full sense of the word, with responsibilities ranging over the whole area covered by David Smith. One or other of them will probably travel with me and they will be able to handle the duties of the office between them.

One reason why I wanted to have this extra office is to give David Smith some relief. For the last twelve months he has been working practically night and day trying to cope with all the things that have been happening.

I reaffirm to The Queen the loyalty and humble duty of my wife and myself.

Yours sincerely,

JOHN R. KERR

Lieutenant Colonel the Right Honourable
Sir Martin Charteris, G.C.V.O., K.C.B., O.B.E.,
Private Secretary to The Queen,
Buckingham Palace,
LONDON ENGLAND

PERSONAL AND CONFIDENTIAL

CURRICULUM VITAE - D.P. McELLIGOTT

Name: Daniel Philip McELLIGOTT
Date and Place of Birth: 26 May 1925,
Cork, Ireland
Marital Status: Married, three sons.
Address: 29 Marrakai Street, HAWKER. ACT 2614.

Academic Qualifications:

1972 : B.A. Australian National University

Membership of Societies:

1972- : Foundation member of Australia/Japan Society,
Canberra Branch.
1971 : Member of Australian Institute of International
Affairs, Canberra Branch.
1972-3 : Councillor, Australian Institute of International
Affairs, Canberra Branch.
1974 : Vice-President, A.I.I.A., Canberra Branch.
1975- : President, A.I.I.A., Canberra Branch.

Field of Interest: International Relations with specific
reference to South East Asia.

Present Position:

Acting Assistant Secretary, External Relations and Defence
Branch, The Department of the Prime Minister and Cabinet,
Canberra.

Other Positions:

1943-1946 : Royal Air Force Air Crew
1946-1966 : Commissioned Officer, Royal Air Force Regiment,
United Kingdom, Egypt, Malaysia, Singapore,
Burma, Palestine, Cyprus and Aden.
1967-1969 : The Treasury, Canberra, Commonwealth Public
Service.
1970- : The Department of the Prime Minister and
Cabinet, Commonwealth Public Service.



25 SEP 1975

THE DEPARTMENT OF
THE PRIME MINISTER AND CABINET

TO GOVERNOR-GENERAL

CANBERRA, A.C.T. 2600

24 September 1975

Your Excellency,

You asked to see the Solicitor-General's opinion relating to the Governor-General's Instructions.

... Enclosed is a copy of the papers forwarded by Mr Byers to the Prime Minister.

The Prime Minister knows, and is happy, that I am forwarding these documents to you.

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'J. Menadue'.

(J.L. Menadue)
Secretary

His Excellency the Honourable Sir John Kerr,
A.C., K.C.M.G., K.St.J., Q.C.,
Government House,
CANBERRA A.C.T. 2600



SOLICITOR-GENERAL OF AUSTRALIA

CANBERRA

The Prime Minister:

Herewith the opinion requested of me relating to the Governor-General's Instructions.

2. My conclusion is that no place remains for Instructions to him. I set out below a summary of the reasons leading me to that conclusion:

- (A) that the constitutional function of the Governor-General's Instructions are to regulate the mode of exercise of authorities conferred on him by the Crown acting as the Executive Head of the United Kingdom. The course of constitutional development has, in my view, rendered them anachronistic. In addition I think they are opposed to the words of the Constitution in respect of which my conclusions are summarised immediately below;
- (B) that the Executive power of the Commonwealth exercisable by the Governor-General under Ch.11 of the Constitution may not lawfully be the subject of Instructions;
- (C) that the authorities or prerogatives conferred by sections 5, 57 and 128 are conferred only upon the Governor-General and also may not lawfully be the subject of Instructions;
- (D) that section 2 insofar as it confers a discretionary power of assignment upon the Queen operates only outside Ch.11 and sections 5, 57 and 128. An illustration of an assignable power is the appointment of Governors of the States. Any power or function so assigned may not lawfully be the subject of Instructions;
- (E) that the conclusions in (A), (B) and (C) above do not depend in any respect upon constitutional development since 1901;

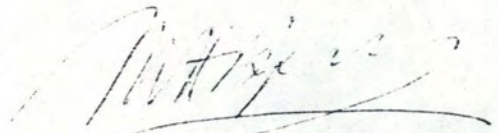
../2

2.

(F) that Australia's constitutional development since 1901 affords an independent and additional ground for the conclusion that no part of the Executive power exercisable under Ch.11 may properly be the subject of Instructions and for treating the Executive power under that Chapter as having for many years past and prior to 1954 extended to the appointment of diplomatic representatives by the Governor-General. That development does not affect my conclusions upon sections 5, 57 and 128. But should those conclusions be wrongly arrived at, the development would deny that the subject matter of those sections and of section 2 may now properly be made the subject of Instructions.

3. Unless interest compels you, I think it is unnecessary to read the remainder of the opinion.

5 September, 1975



M.H. Byers

GOVERNOR-GENERAL'S INSTRUCTIONS

OPINION

The Commonwealth of Australia Constitution Act was assented to on 9 July, 1900. Covering Clause 4 provided that the Commonwealth should be established and the Constitution take effect on and after the day appointed (1 January, 1901). Covering Clause 3 empowered the Queen at any time after the proclamation declaring that the peoples of the former colonies were united in a Federal Commonwealth under the name of the Commonwealth of Australia, to appoint a Governor-General of the Commonwealth. That office was created by section 2 of the Constitution and its nature and functions are constitutionally prescribed. Notwithstanding these Constitutional provisions, it was apparently thought desirable to constitute that office by Letters Patent and to make provision in them for the Governor-General to be "Commander in Chief in and over our Commonwealth of Australia" as well as for a number of other authorities and duties expressly dealt with by the Constitution. That the Letters Patent were in many, if not most, respects unnecessary hardly admits of serious question. They do, moreover, even as amended in 1958, provide that the Governor-General is authorised and commanded to do and execute, in due manner, all things that shall belong to his said command and to the trust reposed in him

"according to the several powers and authorities granted or appointed him by virtue of the Commonwealth of Australia Constitution Act 1900, and of these Letters Patent and of our Commission appointing him and according to such Instructions as may, from time to time, be given to him by Instrument passed under Our Sign Manual and the Royal Great Seal of our said Commonwealth and countersigned by one of Our Ministers of State for Our said Commonwealth, and to such laws as are from time to time in force in Our said Commonwealth."

2. The Commission appointing Sir John Kerr given on 26 June, 1974 likewise subjects his authorities and their exercise "to such Instructions as Our Governor-General and Commander-in-Chief for the time being may have received or may hereafter receive from Us". Those Instructions were issued on 29 October, 1900, 11 August, 1902, 29 March, 1911 and 19 December, 1920.

3. The Prime Minister has requested my opinion on the constitutional function of the Governor-General's instructions and on the question whether such instructions are necessary at this point in Australia's constitutional development.

4. It is my view:

- (A) that the constitutional function of the Governor-General's Instructions are to regulate the mode of exercise of authorities conferred on him by the Crown acting as the Executive Head of the United Kingdom. The course of constitutional development has, in my view, rendered them

anachronistic. In addition I think they are opposed to the words of the Constitution in respect of which my conclusions are summarised immediately below;

- (B) that the Executive power of the Commonwealth exercisable by the Governor-General under Ch.11 of the Constitution may not lawfully be the subject of Instructions;
- (C) that the authorities or prerogatives conferred by sections 5, 57 and 128 are conferred only upon the Governor-General and also may not lawfully be the subject of Instructions;
- (D) that section 2 insofar as it confers a discretionary power of assignment upon the Queen operates only outside Ch.11 and sections 5, 57 and 128. An illustration of an assignable power is the appointment of Governors of the States. Any power or function so assigned may not lawfully be the subject of Instructions;
- (E) that the conclusions in (A), (B), and (C) above do not depend in any respect upon constitutional development since 1901;
- (F) that Australia's constitutional development since 1901 affords an independent and additional ground for the conclusion that no part of the Executive power exercisable under Ch.11 may properly be the subject of Instructions and for treating the Executive power under that Chapter as having for

many years past and prior to 1954 extended to the appointment of diplomatic representatives by the Governor-General. That development does not affect my conclusions upon sections 5, 57 and 128. But should those conclusions be wrongly arrived at, the development would deny that the subject matter of those sections and of section 2 may now properly be made the subject of Instructions.

5. I turn first to the question of the constitutional function of the Governor-General's Instructions. The effect of the Instructions upon an act done in breach of them is still the subject of dispute. Sir Kenneth Roberts-Wray suggests that Instructions have the force of law and calls in aid to support his contention the provisions of section 4 of the Colonial Laws Validity Act: Commonwealth and Colonial Law (1966) pp.146-149. Mr Swinfen has expressed a contrary view and suggests that even in the case of a Governor an assent given in breach of the Instructions is effective: (1968) Juridical Review 21. Whichever of these two views be correct is perhaps academic, for it would seem a startling proposition, assuming the existence of Instructions to the Governor-General relating to his assent to legislation, that a breach of them could in some way invalidate legislation of the Parliament. I do not think this tenable although the Colonial Laws Validity Act would not apply to such legislation. The approach of the courts has rather been that in the case of a viceroy, a breach of his Instructions would not invalidate any of his actions and that in the case of a colonial governor

or governor of a dependent territory the function of the Instructions is to indicate the ambit within which the authority given to him by his Commission or other authorising instrument may be exercised: Musgrave v. Pulido (1880) 5 A.C. 102 at 109-111. Thus cases where a Governor exceeds the authority which the Commission gives him and his Instructions regulate, result in the invalidity of the governor's action; Toy v. Musgrave (1888) 14 V.L.R. 349 at 429; Eshugbayi Eleki v. Government of Nigeria (1931) A.C. 662 at 672. This result is now cured save to the extent to which the Instructions are contained in Letters Patent or instruments authorising the government to assent to legislation by section 4 of the Colonial Laws Validity Act 1865. However, I think it clear that modern constitutional practice in relation to Dominions and States recently assuming responsible government has been opposed to regulation of the authority of the Governor-General or Governor, as the case may be, by Instructions from the Crown. Thus, as from 1947 the Governor-General of Canada has had authority to exercise all the Crown's prerogative both internal and external. And in the case of Jamaica, Trinidad, Tobago, Malta, Barbados Mauritius, Fiji, and The Bahamas, the functions of the Governor-General have been treated as regulated by the Constitutions alone. I should think myself that the Conferences of 1926 and 1930 have rendered superfluous in the case of Governors-General of a Dominion the control by Instructions of the Executive powers of the Governor-General. I shall mention this in detail later when I deal with the question of the effect of Australia's constitutional development upon the continued existence of those Instructions to which I have referred above.

6. I turn to consider the second question by reference to the Constitution. Section 61 vests the Executive power of the Commonwealth in the Queen. The section provides:

"The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth."

7. The Constitution binds the Crown. The Constitutional prescription is that the Executive power is exercisable by the Governor-General although vested in the Queen. What is exercisable is original Executive power: that is, the very thing vested in the Queen by section 61. And it is exercisable by the Queen's representative, not her delegate or agent. The language of sections 2 and 61 had in this respect no contemporary parallel and suggests (as section 61 makes clear) a viceregal status. So much was suggested by Harrison-Moore in 1900: see LXI L.Q.R. 24 at 37. The same view has also been expressed by the present Chief Justice of Australia more than once in argument and is implied in his observations in Victoria v. The Commonwealth (1971) 122 C.L.R. 353 at 379. It is, I should have thought now at the least clearly correct and is to be preferred to Harrison-Moore's later view: The Constitution of the Commonwealth 2nd edition (1910) p.161. Instructions purporting to give the Executive power or to confine or govern its exercise may no more issue to the Governor-General than they may to the Queen herself. Over that field the statute is both sufficient and preclusive.

8. The Executive power of the Commonwealth may be exercised only on the advice of the Queen's Ministers of State for the Commonwealth. The Governor-General appoints those Ministers (section 64) and he is advised by the Federal Executive Council in the government of the Commonwealth" (section 62). No Instructions may lawfully touch his receipt or pursuit of their advice in that government.

9. Nor is it possible to read section 2 of the Constitution (to which I shall later return) as permitting at discretion an assignment of powers or functions in the field covered by section 61. Sections 5, 57 and 64 but emphasise that the Governor-General is, by the Constitution, endowed with the Prerogative wherever the Constitution operates. To that operation, save for section 2, Instructions are neither permissible nor effective.

10. When delivering the judgment of the Judicial Committee in Bonanza Creek Gold Mining Co. v. The King (1916) 1 A.C. 566, Viscount Haldane dealing with the contention that the Governor-General and Provincial Governors in Canada possessed a viceregal authority, said after referring to the terms of the British North America Act:

"There is no provision in the British North America Act corresponding even to s.61 of the Australian Commonwealth Act, which, subject to the declaration of the discretionary right of delegation by the sovereign in Ch.1, s.2, provides that the executive power though declared to be in the sovereign, is yet to be exercisable by the Governor-General." supra at p.586.

11. He returned to this topic during the argument for special leave to appeal to the Judicial Committee from the decision of the High Court in the Engineers' Case. His Lordship said:

"Under sec.61 it is declared 'The Executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative and extends to the execution and maintenance of this constitution and of the laws of the Commonwealth'. No doubt that does not take away the powers of the Governors of the States as representing the Sovereign within their limits, but does it not put the Sovereign in the position of having parted, so far as the affairs of the Commonwealth are concerned, with every shadow of active intervention in their affairs and handing them over, unlike the case of Canada, to the Governor-General?": H.V. Evatt, The King and His Dominion Governors Second Edition (1967), p.311.

12. I think the view thus interrogatively expressed is right. It does no more than give effect to the language of section 61 which, read with the principle of responsible government in mind, places the Crown in relation to the Government of the Commonwealth in exactly the same position with regard to its Ministers of State for the Commonwealth as it stands to its United Kingdom advisers in relation to the government of the United Kingdom. The further step taken by the Constitution is the substitution of the Governor-General for the Queen to perform for her her part in that relationship.

13. I do not wish to suggest that this substitution is total. It could well be that the Monarch when in Australia may exercise the Executive power vested in her by section 61 even though it is also exercisable by the Governor-General. And the language of sections 2 and 126 suggests that he may

only exercise the Queen's Executive power by virtue of section 61 when he is in Australia. By whomever exercised, however, the only advisers are those mentioned in sections 62 and 64. And, of course, "the execution and maintenance of this Constitution" includes the maintenance of section 74. 

14. This interpretation of section 61 is supported, I venture to think, by other provisions of the Constitution as yet unmentioned. The nation which the Constitution brought into being was not like other colonies. Indeed, it may be doubted whether Australia ever legally was a colony although, no doubt, particularly in its foreign affairs, it accepted that position. The Vondel Correspondence evidences this: see the passages quoted in The King v. Burgess; Ex parte Henry (1936) 55 C.L.R. 608 at 685. For by section 51(xxix) and (xxx) the Parliament was given power to legislate for Australia's external affairs and its relations with the islands of the Pacific. Such an authority never lay within the colonial competence of that time. Again, section 75(i) indicates that the High Court was to possess jurisdiction in "all matters arising under any treaty". It thus implies, as does section 51(xxix), that Australia was regarded as possessing the competence to enter into treaties. Of course, it did not do so for almost a quarter of a century. But the Constitution clothed it with that capacity in 1901. That consideration yields the conclusion that the Executive power exercisable by the Governor-General

pursuant to the provision of section 61 has, for many years past, extended to the appointment of envoys and ambassadors. It arose when Australia became an international State.

15. The reason is that section 61, in its reference to the execution and maintenance of the Constitution, involves the establishment of relations at any time with other countries including the acquisition of rights and obligations upon the international plane: R. V. Burgess; Ex parte Henry (1936) 55 C.L.R. 608 at 643-644. The same idea has recently been expressed by Mason J. in Barton v. The Commonwealth of Australia (1974) 48 A.L.J.R. 161 at 169 in these words:-

"The Constitution established the Commonwealth of Australia as a political entity and brought it into existence as a member of the community of nations. The Constitution conferred upon the Commonwealth power with respect to external affairs and, subject perhaps to the Statute of Westminster 1931 and the Balfour Declaration, entrusted to it the responsibility for the conduct of the relationships between Australia and other members of the community of nations, including the conduct of diplomatic negotiations between Australia and other countries. By s.61 the executive power of the Commonwealth was vested in the Crown. It extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth. It enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibility vested in it by the Constitution. It includes the prerogative powers of the Crown, that is, the powers accorded to the Crown by the common law."

16. The surrender by the Queen of the prerogative power of appeal on inter se questions (section 74 of the Constitution) is a further indication of the unique character given to the Commonwealth of Australia by its Constitution. That the section was one of those enacted to give effect to the foundation "of an Australian Commonwealth embracing the whole continent with Tasmania, having a national character, and exercising the most ample powers of Commonwealth government consistent with

allegiance to the British Crown" (Baxter v. Commissioners of Taxation (N.S.W.) (1907) 4 C.L.R. 1087 at 1108) seems obvious enough. A cursory reading of the judgments in Baxter's Case (supra) at 1105-1118, 1147-1152 shows that in an area central to the working out of federal questions the Judicial Committee ceased to have jurisdiction to advise Her Majesty. A necessary, but perhaps even as yet unrealised, corollary was that the Crown's United Kingdom Ministers were likewise deprived on that topic of authority to advise her, even on the petition of a State. See in this respect The Commonwealth v. The State of Queensland (Transcript of argument p.190-191).

17. It would, of course, follow from what I have said above that I would regard as unnecessary the assignments by the Queen to the Governor-General in 1954 and 1973 of authority to appoint diplomatic representatives. Such an authority is exercisable by the Governor-General as from the possession by Australia of an international personality and so exercisable by virtue of section 61 of the Constitution.

18. Yet the Executive power exercisable by the Governor-General pursuant to section 61 covers the entire area within which the Parliament may speak as legislator and the Executive may act either in pursuing its authority to enforce the laws of the Commonwealth or its authority to execute and maintain the Constitution, including Australia's international activities and international representation. There is therefore little or nothing to which instructions, general or particular, may validly speak.

19. On 3rd December, 1925 Mr Amery informed the New South Wales Government that "established constitutional principles require that the question (of the Governor's exercise of his constitutional powers) should be settled between the Governor and the Ministry. Consequently, I do not feel able to give you (i.e. the Governor) any instruction": (The King and His Dominion Governors, p.127). He later informed the House of Commons:

"Since there seems to be some misconception as to the position of the Secretary of State in relation to matters of this kind, I should like to take this opportunity of making it clear that, in my view, it would not be proper for the Secretary of State to issue instructions to the Governor with regard to the exercise of his constitutional duties." supra p.128.

These remarks apply a fortiori to the Governor-General. They afford an additional ground arising from constitutional propriety of the incompatibility between the issue of instructions and the exercise by the Governor-General of his constitutional duties under section 61.

20. Section 2 of the Constitution envisages, I would think, that powers other than those which section 61 embraces may be assigned by the Queen as Constitutional Head to the Governor-General. It may perhaps be that section 2 should be read as a provision inserted to cover unforeseen eventualities. In the passage I have quoted from the decision of the Judicial Committee of the Privy Council, the Board describes it as a declaration of a discretionary right of delegation by the sovereign. Yet I should have thought it clear that nothing in section 2 might constrain the operation of section 61

even as that section is expanded in its operation by the course of Australia's constitutional development. It may, of course, be that those responsible for the drafting of the Constitution, conscious as they were of the Canadian Constitution regarded an assignment by the Queen of her authority to appoint the Governors of States as an example of a power or function to which section 2 could apply. The expression "but subject to this Constitution" in section 2 may be intended to confine the exercise by the Governor-General of his assigned powers to an exercise in the Commonwealth. But bearing in mind that the Constitutions of the States were, at the lowest, continued and constrained by sections 106, 107 and 108 of the Constitution such an assignment would, I think, fall within it. Such a power, if assigned, would, of course, be exercisable by the Governor-General on advice of the Ministers of State for the Commonwealth. The view I have taken of section 2 and its relation to section 61 (but not, of course, the illustration I have chosen) was expressed by Inglis Clark in 1905: Constitutional Law p.65-6. Further, constitutional propriety does not permit instructions, even to the Governor of a State as to his constitutional duties.

21. I would think it clear that sections 5, 57 and 128 confer upon the Governor-General alone the authorities to which they relate. The authorities contained in section 57 and perhaps in section 128 would, I think, probably be ones exercisable only by the Governor-General in the sense that the Queen may not exercise them. It is perhaps unnecessary to express a concluded view on this, but I do think it clear that the language of the sections I have referred to, again read

bearing in mind the grant by the Constitution to the Nation which it created of a system of responsible government, is inconsistent with the regulation of the powers so conferred in any form by means of Instructions. I think that conclusion follows from the language of the Constitution itself which is an enactment of the Parliament of the United Kingdom and one which binds the Crown of the United Kingdom.

22. What I have said before places little reliance (save, perhaps, to illustrate an expansion of section 61) upon constitutional development since 1901. Reference to it, however, serves but to confirm the approach to the relevant constitutional provisions that I would take and to afford an additional and independent basis for the conclusions that approach requires.

23. The Report of the Inter-Imperial Relations Committee of the Imperial Conference of 1926 declared that the Governor-General of a Dominion is now the "representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any department of that Government": Imperial Conference, 1926. Summary of Proceedings Cmd. 2768, p.16.

That Committee also described the position and mutual relations of Great Britain and the Dominions in these terms "They are autonomous Communities within the British Empire, equal in status, in no way subordinate to one another in any aspect of their domestic or external affairs, though united by a common

allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations." ibid. p.14.

24. The passage I have just quoted in speaking of Governors-General and the Crown selected the words "representative of the Crown" as aptly describing their relationship. Yet in 1901 section 2 of the Constitution had referred to the Governor-General of Australia as "Her Majesty's representative in the Commonwealth" and section 61 as "the Queen's representative". In each case the language of the 1926 Committee was anticipated, as was, in my view, the relationship, although, it may be, not then fully realised in all its implications.

25. The Conference of 1930 concluded that the following statements in regard to the appointment of Governors-General would seem to flow naturally from the new position of the Governor-General as representative of His Majesty only.

"1. The parties interested in the appointment of a Governor-General of a Dominion are His Majesty the King, whose representative he is, and the Dominion concerned.

2. The constitutional practice that His Majesty acts on the advice of responsible Ministers applies also in this instance.

3. The Ministers who tender and are responsible for such advice are His Majesty's Ministers in the Dominion concerned.

4. The Ministers concerned tender their formal advice after informal consultation with His Majesty.

5. The channel of communication between His Majesty and the Government of any Dominion is a matter solely concerning His Majesty and such Government. His Majesty's Government in the United Kingdom have expressed their willingness to continue to act in relation to any of His Majesty's Governments in any manner in which that Government may desire.

6. The manner in which the instrument containing the Governor-General's appointment should reflect the principles set forth above is a matter in regard to which His Majesty is advised by His Ministers in the Dominion concerned:" Imperial Conference, 1930. Summary of Proceedings. Cmd. 3717, p.27.

26. Although the Conference refers to the "new position of the Governor-General as representative of His Majesty only", section 61 proceeds upon the basis that, at least in regard to Australia's internal affairs, such was the position for Australia in 1901, subject perhaps to section 59. It is difficult to imagine upon what Constitutional basis a law with respect to Australia's external affairs might have been disallowed before 1926. After all, to give but one example, Australia on 23 November, 1922 and 5 July, 1923 deposited with the League of Nations Instruments of ratification of Protocols of Amendments to Articles 6 and 12 of the Covenant of the League. Such instruments were justified by the powers conferred by section 61 and assumed an Australian membership in the community of Nations. The advice tendered in respect thereof could only constitutionally have been that of Australian Ministers.

27. Dealing with the Canadian crisis of 1926, Dr Evatt wrote "No doubt it should be accepted that since 1926 the functions of the Governor-General are to be regarded as assimilated to those of the King. Such a fact excludes the possibility of general or particular instructions to the Governor-General by the British Government, the Governor-General not being in any sense its 'representative or agent' indeed, not being even one of 'the parties interested'":

The King and His Dominion Governors (supra) at p.60. The "exclusion", I should have thought, in the case of the Governor-General of Australia is at least equally true. It flows from the Conferences of 1926 and 1930, applicable alike to Australia and Canada, and, to the extent necessary, introduced into their law by adoption of the Statute of Westminster.

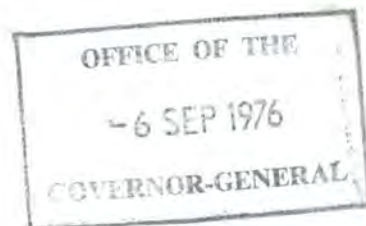
28. It is unnecessary to repeat here what I have said in paragraph 5 as to more recent constitutional developments. For these reasons I think no place remains for Instructions to the Governor-General.

5 September, 1975

M.H. Byers
Solicitor-General of Australia



BALMORAL CASTLE



28th August, 1976

My dear Governor-General,

Thank you for your letter of 18th August to Martin Charteris who is at present on leave.

I have shown your letter and the press cuttings to The Queen and Her Majesty has asked me to thank you for sending them and to say that she was greatly interested to read them.

We have followed the budget closely and certainly share your hope that it will stimulate business and investment. On the whole, it seems to have had a good reception.

The Queen has read carefully your comments about possible election dates and has noted that it seems likely the Prime Minister may wait until December 1978 for the House elections even if this means facing a half Senate election in May 1978.

The Queen was particularly glad to hear that the Prime Minister considered there was a falling off of oppositional activity in regard to yourself. We do hope that this trend will continue.

It was encouraging to see from the clippings that Mr. Whitlam apparently does not intend to organise demonstrations during The Queen's stay in Australia in March. Perhaps he has calculated, as I

certainly did, that this would not do his party any good in the long run!

Warm good wishes. I am only sorry that I shall not be one of the Royal Party next year.

Yours sincerely,
Philip Snow

His Excellency
the Governor-General of Australia.

Government House,
Canberra. 2600.

31 August 1976

My dear Martin,

This should be a relatively short note to let you know in a broad kind of way how things are here.

You will probably have read that at Monash University on 23 August the Prime Minister ran into a serious demonstration and was in fact caught in the building where he was supposed to be speaking and his function interrupted. He was forced into a small room under the stage and was unable to get free for an hour or more.

There was a great "comedy" of errors. The State Police and the Federal Police have different radio frequencies. The State Police remained off the campus but allegedly ready to come if needed. The university authorities appear to have been afraid of having the police on campus and did not invite or permit them to enter in advance of the trouble.

The Prime Minister's small group of Federal Police were equipped with their own radio system and were with him. One of the team was ready with two instruments so that he could receive and transmit messages on the Federal frequency and relay them if necessary to the State Police outside the university. However, one of his sets did not operate properly and there were no means of communication, so far as the police were concerned, between the two teams.

As far as I can gather it was a fairly ugly demonstration. The Prime Minister says that it seemed to have nothing to do with me, the slogans being all relevant to economic policy, the budget, medibank and so on.

I would not want you to conclude that things are anywhere near as bad as this incident might lead you to believe. The whole organisation of the visit to Monash University was messy and every mistake that could occur did occur. The students were accordingly not "contained".

As a result, the Prime Minister now understands by direct experience what these demonstrations, involving students, can be like. He has stepped up energetically the arrangements for handling security for himself, for me

.../2

and for other Ministers or persons who might be expected to be on the receiving end of the activities of protesting groups, especially where violence may be expected. He has arranged for the appointment of a special person at a high administrative level to take over this task full-time and a Mr. Flemming has been brought back from retirement to do this. I have met him and he seems a bright and able person. I believe that this will make a difference.

Mr Whitlam has issued a statement (clipping attached) indicating opposition to violence. This is the strongest statement he has so far made on this subject.

The Prime Minister and I were both present at a ceremony in Sydney on 27 August when the Prime Minister was installed as Father of the Year. I was invited as a former Father of the Year and had accepted the invitation partly to test the temperature. This had happened some months before and before the worst demonstrations occurred. It was decided to leave things as they stood.

There was an expectation that a big demonstration would take place on the first occasion when the Prime Minister and I were in the same place in public. The scene was at the Wentworth Hotel Sydney. There was, however, a relatively minor demonstration. As an indication of what happened I attach a copy of the Police Report. I naturally do not wish to burden you with a series of documents like this, but one sample may help you to appreciate the kind of situation into which we are running as seen through police eyes rather than by the media.

I still regularly face demonstrations of a relatively minor kind wherever I go. The students are on vacation at the present time and things may be different after they return. However, traditionally, the third term of the academic year is not a demonstrators' term. The students are getting ready for their examinations and are more realistic in their approach to their careers, being unwilling to run as much risk of not being able to sit for their examinations. Third term, therefore, can be far less troublesome than second term. However, there are one or two problems about November as you know, especially the fact that the first anniversary of the dismissal has to be got through on the 11th. As far as my wife and I are concerned, life is tolerable and we are in good spirits.

I shall let you have an appreciation of the development of the economic debate after I have had a conversation, which I expect to have within the next few days, with Sir Frederick Wheeler, the Secretary of the Treasury. It will, I think, be better for me to wait for the benefit of a briefing from him. Parliament is not sitting this week. The Budget debate will resume next week in the two Houses of Parliament. Sir Frederick should be in a position to give me an appreciation of the Budget strategy and how it is expected to work out.

.../3

The overall position, therefore, appears to be that the economic position is not very clear but the militant persons demonstrating are continuing to do so. My assessment is that things are quietening down. We have to get through the rest of this year and to get ready for Her Majesty's visit. I believe that no one will want to be responsible for trying to organise trouble on the eve of that visit.

In the June after The Queen's visit Mr Whitlam has to face his Eaucus again on the leadership issue. If by June next year it is thought that the Labor Party could have a chance, say nine months later, of winning the Federal Election, he could be challenged for the leadership. If, however, the view is that Labor cannot win the next election, the Labor Party may let him lead it to defeat and deal with the leadership question after the next election. The Ministers to whom I talk believe that the Labor Party is still in great internal difficulty but that the way the economy goes could determine its chances of recovery.

There could be two or three State elections in the next 6-9 months, so that electoral tactics will be important and economic circumstances therefore significant.

My wife and I have some more travelling to do in North Queensland and other places. We are not at all concerned about Queensland.

Sir Robert Menzies has invited me as his guest of honour at a large dinner of the Scots community in Melbourne. He is President of this group. He told me the other day, when we called upon him, that he intends to make a strong speech apparently on the constitutional question. I do not think the press will be present but the group is a significant group of Melbourne citizens. He was in good form when we called. My wife had the opportunity for the first time of meeting Sir Robert and Dame Pattie. Both were very supportive and helpful and Sir Robert said some pleasant things.

This letter is not meant to do much more than keep up the flow of information in a broad way.

We would both be grateful if you would assure Her Majesty that we express as always, sentiments of humble duty and loyalty.

Yours sincerely,
John

Lieutenant Colonel the Right Honourable
Sir Martin Charteris, G.C.V.O., K.C.B., O.B.E.

VISIT OF GOVERNOR-GENERAL AND PRIME MINISTER FRASER TO
WENTWORTH HOTEL - 27/8/1976

At 12.00 noon today ten demonstrators and about sixty onlookers were present outside the Wentworth Hotel where the Prime Minister and the Governor-General were due to attend a luncheon to bestow the "Father of the Year Award".

At 12.25 p.m. an unidentified male person with an Australian accent telephoned the Wentworth switchboard and said: "There is a bomb in the ballroom due to go off in 15 minutes".

The ballroom had been previously searched and the call was treated as a hoax.

At 12.25 p.m. the Prime Minister arrived and at that time about 100 persons, including about twenty-five demonstrators were outside the hotel. The demonstrators and some onlookers booed when Fraser arrived but at least an equal number of persons cheered him. There were no incidents.

At 12.45 p.m. the Governor-General and party arrived and at this time about two hundred persons were present including about thirty-five demonstrators (30 outside and 5 inside the Wentworth foyer). No anti-Kerr placards were displayed. However, there was one placard with the words "Dinki di Aussies support John and Malcolm".

As the Governor-General entered the hotel about one-third of the 200 persons present booed, jeered and shouted "Sack Kerr". However the remainder supported the Governor-General and cheered and clapped. There were no incidents.

At 2.25 p.m. the Governor-General and party departed the hotel and again there were shouts of "Sack Kerr" from about twenty demonstrators who were present outside. However, there were no incidents.

At 2.30 p.m. the Prime Minister departed to shouts of "Zeig Heil" but again there were no incidents.

The Sydney Morning Herald, Friday, Aug 27, 1976

Whitlam hits out at mob violence

CANBERRA, Thursday.—The Leader of the Opposition, Mr Whitlam, has strongly condemned displays of violence in demonstrations.

Bricks thrown at the Monash University demonstration against Mr Fraser last Monday and at Sir John Kerr's Rolls-Royce earlier, were "completely unforgivable," he said tonight.

But that was the only violence which had occurred in demonstrations.

On the ABC television program *State of the Nation*, Mr Whitlam criticised the Prime Minister for posing as a hero — "surrounded by great hordes of police."

Also on the program Mr Whitlam strongly discounted speculation that he would replace Mr Chris Hurford with Bill Hayden as shadow Treasurer.

He said there was no one in the Labor caucus who was a threat to him as leader and he reaffirmed

his desire to see Mr Hawke in Federal Parliament.

Tonight was the first time Mr Whitlam had stated publicly his complete opposition to violence in demonstrations. But he said there had only been two cases of it, anyway, both of which he regarded as "completely unforgivable."

"But I've had beer cans thrown at me in paper bags — and I don't pose as a hero because of it," he said.

"I don't like it; I obviously fear that one might hit you on the eye or get you on a vertebra.

"But I don't pose as a hero; I don't try to make political capital out of it.

"There were very many against me — there were some pretty rugged demonstrations at Baulkham Hills during the Galston business and in Forrest Place in Perth . . . and Warragul in Victoria . . . and in Hobart.

"But I don't seek to exploit these situations or provoke the people who come along to those occasions."

FRIDAY, 27 AUGUST 1976

Whitlam hits at Kerr, PM demos

CANBERRA. — The Opposition Leader, Mr. Whitlam, last night condemned violent demonstrations against the Governor-General, Sir John Kerr, and the Prime Minister, Mr. Fraser.

He said the throwing of a brick during Monday's rowdy demonstration against Mr. Fraser at Monash University was "completely unforgiveable".

But Mr. Whitlam criticised the Prime Minister for exploiting the demonstration politically and provoking the people who took part.

"All this publicity — he's going back to Monash surrounded by hordes of police. Great hero," he said.

Mr. Whitlam said he had been subjected to some "pretty rugged" protests himself while he was Prime Minister between 1972 and 1975.

"But I didn't trail my coat, I didn't bleat about it, I didn't exploit it," he said.

"I've had beer cans thrown at me in paper bags."

Mr. Whitlam said he didn't "pose" as a hero because a can

From PHILLIP McCARTHY

might hit him in the eye or vertebra.

Mr. Whitlam, speaking on the ABC's *Face The Nation*, said Mr. Fraser did not have the parliamentary charisma or ability of either Mr. McMahon, Mr. Snedden or Mr. Gorton.

"Mr. Fraser's strength is in the conservative circles outside the Parliament," he said. "Mr. Fraser really ignores the Parliament. He seeks occasions and contacts. He wants to impress outside the Parliament."

When questioned on the possible entry of Mr. Bob Hawke into Parliament, Mr. Whitlam said he did not regard anyone as a threat to himself as parliamentary leader.

He did not intend to replace Mr. Chris Hurford as Labor's Treasury spokesman despite Mr. Bill Hayden's continuing strong showing in the financial debate.

"I expect that if the elections for the House of Representatives are in May, 1978, Hurford will bring down the Budget in August of that year."

Fraser trapped in wild uni crush



Picture: PETER CHARLES

Round One to the protesters. The crowd cheers as a pale, grim-faced Prime Minister, Mr. Fraser, and his reinforced police bodyguard are forced to retreat after trying to barge through demonstrators trapping them in Monash University's Alexander Theatre yesterday.

The Prime Minister, Mr. Fraser, was trapped in a basement office for an hour yesterday by 1000 protesters at Monash University.

Mr. Fraser's aides and bodyguards were kicked, punched and showered with glass when demonstrators smashed a door.

The Prime Minister's Press officer, Mr. Alistair Drysdale, said later that Mr. Fraser had been "shaken and visibly upset". The Prime Minister was unhurt.

The protest was organised by a group of students, the Movement Against Welfare Destruction, who said it was "pure hypocrisy" for Mr. Fraser to open a non-Liberal financed building after his Government had slashed social welfare and education spending.

At one point, Mr. Fraser — pale and grim, — was trapped motionless for about two minutes in the chanting, shoving mass. A

By GERRY CARMEN, JOHN RENTSCH
and TOM JACOB

cordon of police tried unsuccessfully to open a foyer door from the Alexander Theatre.

Mr. Fraser was forced to shuffle backwards about 10 metres as his bodyguards retreated. He could not turn round because he was so tightly surrounded by police.

Mr. Fraser was at the university to officially open a new \$800,000 centre for handicapped children. The demonstrators stopped him unveiling a plaque at the Dinah and Henry Krongold Centre for Exceptional Children.

In other incidents at the demonstration:

● The State Minister for Immigration and Ethnic Affairs, Mr.

Jona, was jostled as protesters tried to drag him from his car when he arrived.

● A glass door was smashed as Mr. Fraser entered the theatre through a back door.

● Part of the opening ceremony was cancelled when police told Mr. Fraser's aides they could not guarantee his safety on the campus.

Protesters began banging violently on two exit doors closest to the stage when the opening ceremony started in the theatre.

Aboriginal and migrant groups, and trade unionists, supported the student group's action.

Just before he started speaking Mr. Fraser was handed a note

from Mr. Drysdale that police could not guarantee his safety.

It said: "George cannot guarantee your safety. You should refer to this in your speech — A."

Mr. Drysdale's note included a suggested inclusion for the speech "Unfortunately it appears that because of the size and irrationality of the crowd outside I have been advised that it will not be possible to walk over to formally open the Krongold Centre."

Mr. Fraser added: "If it is not safe for me to go to the Krongold Centre, then I don't know who will be."

Mr. Fraser blamed the Builders' Laborers Federation for the demonstration.

Mr. Fraser said members of the BLF had gone to building sites throughout Melbourne yesterday morning inciting workers to go to Monash.

Continued — 3.



Students try to mob Kerr

SYDNEY. — Several hundred students clashed with a huge contingent of police during a protest against the Governor-General, Sir John Kerr, at the University of New South Wales yesterday.

Punches were thrown and several demonstrators knocked to the ground.

About 350 students tried to mob Sir John and Lady Kerr after the Governor-General had opened the 29th annual International Welding Seminar.

Three students arrested after violent scuffles with police were later charged with offensive behavior and resisting arrest. They will appear in court today.

The chanting students surged forward when Sir John and Lady Kerr arrived at the university's Clancy Auditorium. They were held back by police.

A rotten tomato hurled at the Kerrs narrowly missed them, splattering the concrete at their feet.

The students burned an effigy of Sir John and kept up a constant chant of "Kerr and cops off campus".

At one stage the demonstrators heckled a university security officer as he was raising a Union Jack on a nearby flagpole.

FROM PAGE 1

Fraser is trapped in crush

Mr. Jona, representing the Premier, Mr. Hamer, at the opening, said later he had evidence of the BLF recruiting attempts.

"It's a disgusting display by a minority of university students strengthened by people outside the campus," he said.

Mr. Jona said his official car had been dented as he arrived. Demonstrators had also tried to pull him from the vehicle.

Protesters occupied the new centre and unveiled the plaque while Mr. Fraser was still in the theatre.

The crowd also burnt a pipe-smoking, axe-wielding effigy of Mr. Fraser.

Demonstrators then broke into the back of the theatre and occupied the stage, cutting short the speeches.

The police quickly moved Mr. Fraser to hiding as protesters appeared from behind the backdrop.

They hid him in the office beside the men's lavatory.

The first attempt to get Mr. Fraser out of the building, using a cordon of Commonwealth Police buffered by State Police reinforcements, was blocked by the crowd.

He then walked quickly downsteps to the safety of the manager's office.

Demonstrators shouted they had won round one and chanted: "The people united will never be defeated".

A demonstrator started waving a theatre sign reading: "Performance in progress".

PERSONAL AND CONFIDENTIAL

Government House,
Canberra. 2600.

18 August 1976

Dear Martin,

Thank you for your two letters of 3 and 5 August 1976.

There is a large bundle of clippings with this letter but do not be dismayed. There are a couple of special reasons and I say something about them later.

We had the Budget yesterday and the country has not yet reacted in any detail to it. There were the usual editorial comments this morning. Some papers call it a big business budget and some a deflationary budget. The press was, on the whole satisfactory. The stock market rose. It represents a departure from big government spending as a policy and from the ideology of expensive welfare programmes. There appear to be no increases in taxes. Business gains in various ways to inspire confidence.

The Prime Minister himself before he left for his overseas trip indicated that it would not be a horror budget. It remains to be seen how things will shape. I have not myself had a meeting with him since his return. He arrived in Canberra just as my wife and I were leaving for the Snowy Mountains area. Since our return from there he has been involved in the final Budget activities and we have had commitments in Sydney. I am, however, to see him tomorrow and I shall get his own reactions to the way in which the Budget has been looked at.

I know that he is hoping that it will stimulate business and investment. This may happen but most people think that we shall have to wait a year or so for a real upturn, especially in the case of unemployment.

It seems to me that the Prime Minister has a difficult problem to deal with on the subject of timing the next election. I appreciate your difficulty in understanding his point about a referendum involving the bringing together of the next election for half the Senate and the next election for the House.

The problem is that the next election for half the Senate must take place before about May 1978

.../2

PERSONAL AND CONFIDENTIAL

PERSONAL AND CONFIDENTIAL

2.

and the next election for the House must take place by about December 1978. He will not want to have the half Senate election as a trial run for the main election upon which the fate of the Government could turn. The reason for this is that a half Senate election does not affect the fate of the Government and accordingly people could, as they do in byelections on many occasions, criticise the Government without destroying it. If this does happen, of course, it gives great heart to the political opponents of the Government. The half Senate election would not affect Senate numbers so as to take control out of the Government's hands, whatever happens, but it could, by producing a kind of anti-Government atmosphere, affect the general politics of the country.

The Prime Minister has been looking for a way to delay the half Senate election till about December. He cannot do this under the Constitution as it stands. The delay would enable him to have the benefit, as I said in my earlier letter, of a 1978 Budget before he goes to the people with his Government at stake. It seems to me unlikely that he will be able to make the constitutional change to permit this. He may, therefore, be forced to bring his 1978 election for the House of Representatives forward to May 1978 so that he can have the one election for half the Senate and for the House, with the control of the Government at stake in that election. The difficulty about this is that the 1977 Budget by May 1978 may have lost some of its shine and this may force consideration of a yet earlier election. It is possible, therefore, that he may decide to have the election for half the Senate as early as December 1977. This will raise the question in his mind whether he should have an election for both the House and half the Senate soon after the 1977 Budget.

I have not discussed these matters with him. They are very much a matter of political tactics and depend upon the extent to which recovery has occurred. If by December 1977 there is sufficient recovery and he is able to bring in an attractive 1977 Budget, I suppose it is possible that he may decide to go to the people early.

I am speculating about this because it is not irrelevant to other questions which have been discussed in recent correspondence between us. It will be very interesting, from many points of view, for us to know whether after the next election, whenever it is held, both the House of Representatives and the Senate are to be in the same political hands for the ensuing three years.

At the moment it seems likely that, whenever the election is held, this will in fact be the case,

.../3

PERSONAL AND CONFIDENTIAL

having regard to the enormous majority that the coalition parties have in the Lower House, but, of course, politics here and in other places today are very volatile. It cannot be taken for granted that the coalition parties will necessarily win the next election. They will certainly control the Senate after the next election, whatever happens, so technically speaking, there would always be the risk of another constitutional crisis if the Labor Party wins an election in the Lower House next time around. I do not need to spell out the implications of this in connection with some of the areas of discussion in which we have been engaging.

As to my own position, there have been few demonstrations of any significance at all and life has been reasonably quiet. This will probably not continue but that in itself is a matter about which we cannot feel any certainty.

Mr Whitlam has come back in a mood in which he is saying very little about me or about 11 November. He is said to be in good form and to be in a mood to concentrate his attack upon the Government.

He made a very strong and serious onslaught upon the Chief Justice and the High Court of Australia in the recent seminar of academics and others held in Melbourne. This seminar was dominated by academics opposed to what happened on 11 November. In his main speech the Leader of the Opposition left me more or less alone. He appears to have concentrated his criticism upon the Chief Justice and the High Court of Australia.

Mr Fraser who spoke at a Black Tie Dinner at the seminar, defended very strongly what had been done in denying Supply and by me and so did the Attorney-General. He floated the idea of a constitutional amendment on the Senate's powers on Supply as previously outlined by me. The media comment predicted that such an amendment would be opposed by the Australian Labor Party and would fail. The Australian Labor Party has said the only amendment it would support would be removal of the Senate's powers.

I am enclosing some clippings on the seminar. The discussion seems to be taking on a more "academic" tone.

There was a second seminar held at the University of New South Wales, also attended by academics. I enclose a clipping about the main speeches at this second seminar. Amongst the clippings are a few others which may be of interest.

Included are a series of articles by Robert Darroch on the State Governors and the Vice-Regal office

.../4

with alleged comments of approval by the Governors, who were apparently interviewed, on my action last year. I was asked to grant an interview for the series but did not do so. This series of articles is bulky but with the Royal Visit coming up you may care to know what has been said in a nationally circulating newspaper.

It is, I know something of a burden for you to try to keep up with the atmosphere of Australian discussion about the constitutional matter as reflected in the press, but someone on your staff will doubtless be able to go through the clippings and to select for you, and if necessary for Her Majesty, the odd one in which there may be special interest.

Before I despatch this letter in the bag tomorrow, there may be a few more observations which I can conveniently make as a result of my conversations with the Prime Minister.

19 August 1976:

I have just had an hour's conversation with the Prime Minister who seems to be reasonably relaxed about the Budget and who believes that unemployment will gradually fall next year.

He seems to be doubtful whether the economy will have sufficiently recovered by the end of next year to enable him to contemplate an election in December 1977. On the whole I judged his present attitude to be that he may be forced to wait until December 1978, even if he has to face a half Senate election in May 1978. All these matters though, are from his point of view, fairly speculative because everything depends upon how the economy progresses. The Prime Minister is still giving thought to the possibility of a referendum.

He seems to think that there is a falling-off of Oppositional activity so far as I am concerned but he rather expects that things will continue, possibly with some diminishing of vigour. He and I are to be at the same place publicly in the near future when he is to be declared the Father of the Year. I am to be the principal guest as a former Father of the Year. We shall see what happens on that occasion.

We had a preliminary discussion about the programme for The Queen's visit but, of course, it is too early to go into details on this. I suppose Her Majesty has not yet had an opportunity to apply her mind to the draft programme. I am hoping that she may also be able to include an investiture and a garden party in the Canberra programme, but understand the considerations which will need to be applied to her long Australian tour. I gather that Mr Heseltine is coming out later in the year and I look forward to some conversations with him.

.../5

PERSONAL AND CONFIDENTIAL

5.

May I ask you to assure Her Majesty of my very deep gratitude and that of my wife for the observations you have made in your recent letter about the friendly attitude towards us in the Palace and we, of course, reaffirm our loyalty and humble duty.

Yours sincerely,

JOHN R. KERR

Lieutenant Colonel the Right Honourable
Sir Martin Charteris, G.C.V.O., K.C.B., O.B.E.,
Private Secretary to The Queen,
Buckingham Palace,
LONDON ENGLAND

PERSONAL AND CONFIDENTIAL

NO DEMOS FOR QUEEN - WHITLAM

From LAURIE OAKES

SYDNEY. — There should be no demonstrations in the Queen's presence, the Opposition Leader, Mr Whitlam, said yesterday.

He said he believed there would be no demonstrations in front of the Queen when she visited Australia next March.

"The Queen has done nothing political," Mr Whitlam told a press conference.

"The Queen's behavior has never been obnoxious.

"The Queen has carried out her role as well as any person could, or ever has.

"She deserves to be shown respect and affection, as she has been shown on all her previous visits."

Surprised

Mr Whitlam, who returned from an overseas tour on Wednesday, was obviously surprised and annoyed when told by journalists that several groups had said they would demonstrate during the Queen's visit to show her their disapproval of the Governor-General, Sir John Kerr.

Mr Whitlam dismissed the suggestion that Australia's constitutional dispute could be solved by the appointment of Prince Charles in place of Sir John.

He said the real issue was not who should be Governor-General, but the problem of a Senate which claimed the power to cut off the money supply of an elected government.

He said that the next meeting of the constitutional convention — in Hobart in October — would consider amendments he had suggested to make it clear the Senate did not possess such power.

Mr Whitlam said he did not believe missiles should be thrown under any circumstances in demonstrations against Sir John.

"But the fact is Sir

John Kerr acted the role of a politician last November, and no politician can expect to be immune from criticism or even abuse if his actions are sufficiently obnoxious," he said.

A great percentage of the Australian population believed the Governor-General's actions when he dismissed the Labor Government last November were obnoxious.

But the Queen had nothing to do with this and would be in Sir John's company only when she arrived at Fairbairn base in Canberra and when she left.

"Obviously Prince Charles would make a better Governor-General than Sir John," Mr Whitlam said.

"The public would respect Prince Charles.

"There are, however, many other suitable, honorable, sensible persons with a sense of propriety and no delusions of grandeur who could do the job well.

"But it is really by-passing the issue to concentrate on the personality of the Governor-General.

"The real issue is whether we in Australia are to allow our democratic processes to be disrupted by pretensions on the part of the Senate.

• Continued Page 2.

"The Sun"

Melbourne

Friday, August 6,

1976

No demos for Queen: Gough

• From Page 1.

"If Prince Charles were Governor-General, or anybody else, in succession to Sir John Kerr, you could still have the situation arising where the Senate could defer supply."

"As long as that situation continues we cannot be sure of having stable government in Australia.

"The question of appointing Prince Charles to the post of Governor-General sidesteps the issue.

"It is the relation of

the Senate and the House of Representatives which is at the base of the problem."

Mr Whitlam said that if he was re-elected as Prime Minister in 1978, he would adopt exactly the same approach as he

had last October and November.

"But on that occasion the Governor-General will follow the proprieties and the precedents," he said.



Prince Charles . . . attracted to idea.

The next G-G?

A counter to the latent threat of Australian republicanism

done to change the role of the Governor-General, or at least to depoliticise it, the historic consequences of the dismissal would lead to the Governor-General being elected to make his position the democratic equal of Parliaments.

"An elected Governor-General could only weaken ties with the Crown and would be the first big step towards republicanism."

Developing this argument, the quickest and most painless way of depoliticising the role of Governor-General would be to appoint Prince Charles to the job.

The prospects of Prince Charles being involved in a political crisis are remote, if only because the prospects of a hostile Senate again blocking Supply within the next 10 years are remote.

Moreover, Prince Charles's presence would be a restraining influence on political leaders, who would think twice before involving a member of the Royal Family in a political crisis.

Although he might have the authority to dismiss an Australian Government, Prince Charles could hardly exercise a power the Queen herself did not have.

Perhaps the main drawback to Prince Charles becoming Governor-General is not that he is too young but that he is single — and too vulnerable. But, as nothing will eventuate for at least two years, Prince Charles, now 27, might well be married by then.

Not that many Australian mothers with eligible daughters would regard Prince Charles's bachelorhood as a handicap. Imagine the scheming that would go on to get their daughters introduced to a man whom most women would regard as the most eligible bachelor in the world.

★ ★ ★
Sir John Kerr to announce his retirement in mid-1978, followed a few months later by the announcement that Prince Charles will be the next Governor-General.

Sir John to step down early in 1979 and Prince Charles to be ensconced in Yarralumla by mid-1979.

CANBERRA COMMENTARY

by Peter Bowers

Mr Snedden, then Leader of the Opposition, put the proposal to Prince Charles when he last visited Australia in October, 1974.

Mr Snedden raised the subject conversationally because, as Opposition Leader, he had no authority to make an official offer.

But had he won the double-dissolution election held five months earlier — and he lost by only a handful of votes — Mr Snedden had resolved that he wanted Prince Charles to be the next Governor-General — that is, the next after Sir John.

It was essentially a long-term plan because Sir John had been sworn in only three months earlier and traditionally the Governor-General serves five years unless he chooses to resign earlier.

Mr Snedden had a special concept of the role Prince Charles would fulfil. It was

intended that he would bear the title of Regent and Governor-General of Australia. Mr Snedden saw the title of Regent as more symbolic than decorative, although he believed the heir to the British Throne should be recognised with more than the standard title of Governor-General.

Since becoming Prime Minister Mr Fraser is said to have become increasingly enthusiastic about Prince Charles being Governor-General — an enthusiasm shared by one or two of Mr Fraser's closest advisers, who can see a lot of political mileage in the announcement being made a few months before the next election for the House of Representatives, due in late 1978. The announcement would come before the election but Prince Charles would not take up the appointment until the following year. Thus the maximum electoral advantage would be gained without compromising Prince Charles.

There is no possibility of Sir John resigning this year, or even next year, to make way for Prince Charles. If anyone is more determined than Sir John that he should remain in office, it is Mr Fraser, who has a vested interest in seeing that the

Governor-General ignores the demonstrators and sees out his full term. If Sir John were to quit earlier, it would amount to an admission that he was wrong in dismissing the Whitlam Government.

And if Sir John was wrong, the legitimacy of Mr Fraser's Government is thrown into question. It is also in Mr Fraser's interest to retain Sir John as a focal point for protest and as a diversion from the Government's own shortcomings. It will be a sorry day for Mr Fraser if Mr Whitlam forgets the Governor-General and directs his full splenetic fury at the Government.

Mr Snedden's concern about heading off an incipient move towards republicanism in Australia is more relevant today than it was two years ago. The view that the events of November 11 have given new life and hope to the until-now politically insignificant republican minority is not limited to Mr Whitlam and some Labor supporters. The view, though not the enthusiasm, is shared by several Liberal MPs.

"We are trying to pretend," said one Liberal MP, "that nothing has been changed by an appointed Governor-General dismissing an elected Government."

"But, unless something is

★ ★ ★
THAT scenario is more than an interesting talking point among Mr Fraser and his advisers. While 1978 is too far off for anything to have been firmly decided, what can be said with certainty is that the three principals involved — the Queen, Prince Charles and Mr Fraser — are attracted to the idea.

A lot can happen in the intervening two years, but right now Prince Charles is an even-money bet to become the twentieth Governor-General of Australia.

Prince Charles has been sounded out about accepting the post, not by Mr Fraser, but by his predecessor, Mr Snedden.

Friday, August 6, 1976

Whitlam opposes royal tour protests

By PETER BOWERS, Political Correspondent

The Leader of the Federal Opposition, Mr Whitlam, declared yesterday his strong opposition to demonstrations against Sir John Kerr during the Queen's visit next March.

"The Queen has done nothing political," Mr Whitlam said at his first press conference since his return on Wednesday from his overseas tour.

"The Queen's conduct has never been obnoxious.

"The Queen has carried out her role as well as any person could or ever has," he said.

He had been asked if he believed there should be no demonstrations during the Queen's visit.

A change in tactics

"As I said before she will be shown respect and affection as she has been shown on all her previous visits, and she deserves to be, and I am certain she will be."

He was asked should there be a moratorium on demonstrations against Sir John during the royal visit.

While expressing his personal opposition to demonstrations in that period, Mr Whitlam stopped short of calling for a halt to protests against the Governor-General.

"I said in my view there will be no demonstration against the Queen. That's all I want to say about it," he said.

The Opposition Leader revealed a significant change in tactics by switching the main thrust of his attack from Sir John to the Senate which triggered the crisis last year by blocking the Labor Government's Budget.

Asked about speculation that Prince Charles would be the next Governor-General, Mr Whitlam said: "Obviously he would make a better Governor-General than Sir John. The public

But this, he added, was bypassing the issue.

"The real issue is: Are we in Australia to allow our democratic process to be disrupted by pretensions on the part of the Senate?

"And if Prince Charles was Governor-General, or anybody else were Governor-General in succession to Sir John Kerr, you could still have this situation arising where the Senate could defer Supply.

"As long as that situation continues we will not be sure of a stable Government in Australia."

The real issue

The real issue, he said, was the relationship of the Senate and the House of Representatives which was the base of the problem.

He was certain that no future Governor-General would act as Sir John had acted in dismissing the Labor Government on November 11.

Would a future Labor Government take on a Senate which blocked Supply? "Certainly," said Mr Whitlam, "no doubt about that, whatsoever."

While he did not believe things should be thrown at the Governor-General the fact was that Sir John had acted the role of a politician last November.

"And no politician can expect to be immune from criticism or even abuse, if his actions are sufficiently obnoxious, as a very great percentage of the Australian people find Sir John's action to have been," Mr Whitlam added.

Asked to comment on statements by two anti-Kerr groups that there would be demonstrations against Sir John during the visit, Mr Whitlam said: "My view is there will be no demonstration in the presence of the Queen."

Asked whether he was unshaken in his resolve to lead the Federal Labor Party into the next election for the House of Representatives, due late in 1978, Mr Whitlam said: "Utterly and beyond."

Further report of press conference, picture, Page 4.

Labor and the Constitution

WHITLAM ATTACKS BARWICK

'Secret advice ... breach of the duties of his office'

Here are excerpts from the speech by the Federal Opposition Leader, Mr. Whitlam, when he opened the Melbourne University Law School seminar on Australia's constitution.

Labor's period in government was a period of intense constitutional litigation, mainly sponsored by conservative State Governments. Challenges to our legislation caused delays in much-needed reforms, delays compounded by the High Court itself; but in the final analysis we won every major challenge to our exercise of power.

The record of my Government before the High Court on matters of constitutional significance is a highly successful one. So I hope I shall not be thought churlish if I complain about aspects of the High Court's decisions and precedures. I have, however, become increasingly concerned about some aspects of the approach of the court and its implications for the future government of this country.

My first concern relates to the tendency, particularly of the present Chief Justice, to base decisions on constitutional glosses and unstated assumptions. His extra-judicial invention of the doctrine of caretaker governments in the Westminster system is only the most notorious manifestation of the Chief Justice's bent.

Let me make it clear at the outset that I have long felt that the Australian Constitution would have been better interpreted over the years if the court had based its decision more on an understanding of the philosophical basis of our political system and of the realities of its operations in practice, and less on the precise words of a text written long ago for a different world.

"I believe that governments and litigants have a right to know what factors other than the words in the text will be taken into account. If they did they would be able to present arguments on them. I further believe that personal doctrines should not be elevated above the combined experience of many years of constitutional interpretation.

When the Chief Justice, Sir Garfield Barwick, finds support for the proposition which he wishes to adopt in the express words of the Constitution, he defers to no-one as a strict textualist.

However, when the text is not so helpful, the Chief Justice can find the most surprising interpretation by reliance on what he regards as having been the purpose of the provision.

There are a number of cases where the Chief Justice has sought to create a new constitutional doctrine to underpin his interpretation of the Constitution, often without the support of his brothers. This tendency first became obvious in cases relating to the freedom of interstate trade (Section 92).

What is novel is his refusal to accept the Dixon formula for the application of Section 92 or to replace it with one of his own. Instead we are left with an ill-defined concept of burden in a free yet legally regulated society, and the Chief Justice's self-confident belief that he can recognise a breach of Section 92 when he sees one. That recognition is presumably based on non-legal considerations of his own to which the rest of us are regrettably not privy.

The result is an ad hoc approach to the application of Section 92 and a new lease of life for it at a time when it has increasingly less relevance to the problems of regulating and planning a modern national economy.

My second concern about the judiciary and the Constitution relates to procedural shortcomings of the High Court during our period in government. The constitutional litigation conducted during the last three years was characterised by inordinate delays between the completion of argument and the delivery of the judgment.

To give one example among many, the argument in the Seas and Submerged Lands Act Case — the offshore case — was completed on April 16, 1975. The judgment was delivered on December 17, 1975. The problem was not so novel nor the judgments so profound as to require eight months

for the judgment to be prepared. Delays of this order cause needless uncertainty and concern about the state of the law.

In this particular instance it had a major impact on the exploration activities of an important industry. In other instances delays in the Court caused delays in the delivery of services and benefits to the people and the implementation of social reforms. There can be a number of reasons for such delays, some of them justified.

But when they are as frequent and as lengthy as they have been in recent years they expose the Court to allegations of improper practice.

Indeed, some commentators have suggested that the High Court was deliberately delaying its judgments in constitutional cases until the next important constitutional case had begun so as to render changes in the membership of the Court difficult to effect. Whether this suggestion is justified or not is less important than the fact that the Court has exposed itself to such suspicions.

There is also a tendency in the present High Court for some judges to behave more like barristers than judges during the argument of cases. I do not think it is an exaggeration to say that after the first day of most of the important constitutional cases argued before the Court it was not only clear which way certain judges were leaning but what reasons they were intending to adduce in support of their judgment.

I believe that in the interest of giving at least the appearance of justice being done, judges ought to endeavor to listen to the arguments put forward by counsel and consider them on their merits.

I am concerned at the extent to which the High Court has been involved in political matters. The Chief Justice's decision to tender secret advice to the Governor-General last November — and to do so without first informing and consulting his colleagues — was, in my

view, a breach of the duties and responsibilities of his office.

The advice given by the Chief Justice was, in my opinion, at the very least inadequate and probably wrong. His decision to bring the High Court into the subsequent debate over the events of November 11, 1975 by giving a Press conference, demeaned his office in a manner none of his predecessors would have contemplated. These are serious charges and I do not make them lightly.

People who know me, know of my great respect — some would say too great respect — for judicial office. However, the decision to involve the Chief Justice in political events was his, not mine. He must now accept the fact that he has entered the political arena and his views must be canvassed in the terms appropriate to that arena.

Let me explain each of these charges in turn. I believe that the Chief Justice was wrong to give advice. Certainly in his judicial capacity the Chief Justice has no power to give advisory opinions.

There is also the point that, despite the Chief Justice's protestations to the contrary, the subject matter of his advice could readily have come before the High Court.

The Governor-General was profoundly concerned at the High Court's repudiating his decision and probably sought the Chief Justice's opinion not because he thought that his own actions could not be reviewed by the court but because he thought that they might. I believe that at the very least the Chief Justice ought to have consulted his brother judges on such an important question.

The title of Chief Justice does not necessarily confer on the incumbent greater wisdom or independence than that enjoyed by his brother judges.

Let me assure you that the consultation with the Chief Justice in 1975 was not done with prime ministerial approval; indeed, it took place without the knowledge and against the advice of the Prime Minister.

Not only do I believe that the Chief

Justice was wrong to give advice; I believe that the advice he gave was wrong and inadequate.

First, as already explained, the assertion in the advice that the matter was non-justifiable is certainly wrong.

Secondly, the Chief Justice cannot simply dissociate himself, as he purports to do, from the political consequences of his advice. Indeed, those political consequences, given all the circumstances, ought to have been important considerations in formulating the advice tendered.

Thirdly, the Chief Justice asserts, without any supporting argument, that a supply deadlock ought to be resolved by the resignation of the Prime Minister. There is no precedent for such a proposition in Westminster parliamentary democracies; there is no support for it in the express terms of the Constitution.

Fourthly, and above all, the Chief Justice asserts as a secure proposition of constitutional law, and virtually without adducing any arguments in support, that the Senate has constitutional power to refuse to pass a money bill or to refuse Supply to the Government. Given the controversy raging at the time, that assertion was, as Professor Howard has said, "breath-taking in its audacity".

I have always strongly believed that Australia's nationhood requires that its judicial system should be entirely free from the supervision of the Court of another country, sitting in another country, composed of judges appointed by the government of that other country and delivering its judgments in the form of advice to the Head of State of that other country.

To that end I believe the High Court should be the ultimate court of appeal from all decisions made within the Australian legal system. The alternative not only diminishes our nationhood but creates the possibility of two streams of authority.

Accordingly, my Government introduced the Privy Council (Appeals from the High Court) Act 1975, which had the effect of preventing appeals from the High Court on Federal matters. We also attempted to abolish all appeals to the Privy Council, but the Opposition, which had previously protested its support for the High Court as the ultimate court of appeal, opposed the legislation in the Senate and it was not enacted.

Legal obstruction and judicial intervention were by no means the most drastic methods used to block the Labor Government's programme. For that we must look to the parliamentary arena. The past three years were a time of extraordinary upheaval. The third and fourth double dissolutions since Federation occurred in that time. More bills were defeated in the Senate during those three years than in all the other years since Federation. Supply was deferred for the first time since Federation, and then, within 18 months, deferred for the second time.

Government legislation was subjected to a degree of obstruction without precedent in our system. The Speaker of the House of Representatives was ignored by the Queen's representative in a manner never before seen in Australia or any other Westminster system.

For the first time the Chief Justice tendered private advice to the Governor-General without the knowledge of the Prime Minister. For the first time in our history — and for the first time since responsible government came of age in any Westminster system — the Queen's representative dismissed a Prime Minister.

Any one of these events taken alone would have been a development of momentous constitutional importance. Taken together, they constituted a fundamental threat to parliamentary democracy. Given the nature of that threat and the coalition of interests which brought it about, the Labor Party and its supporters acted with remarkable restraint after November 11, 1975. I stand amazed at our own moderation.



"The Sun"

Friday, 6 August 1916

EDITORIAL

CURTAIN THE RAGE

MR WHITLAM is at last acknowledging the true cause of last November's crisis which still bitterly divides Australians.

The real issue, he says, is the power of the Senate to block the Government's supply of money.

The job now is to make it possible for elected governments to govern in the House of Representatives.

This concession to reason seems to take some of the heat off the Governor-General, Sir John Kerr.

It suggests that much of the abuse Sir John has faced for nine months was misdirected.

It shows how disastrous would have been his forced resignation in confusing the constitutional issue.

Slowly and mercifully the issue is being steered towards its proper target and away from Sir John.

The change should lead to debate and redefinition of the powers of Senate and Governor-General.

It should also let the Labor Party get on with its job in Opposition.

The debate is not a party political one.

Liberals and Laborites equally should be concerned with the continuing threat to stable government inherent in present Senate powers.

That doesn't mean discussion will be well-mannered.

But there should be less of the mud-slinging which Sir John has suffered with such dignity.

The Herald

Melbourne, August 9, 1976

The debate begins

THE magnitude of the constitutional problem still to be solved by Australians was clarified at the exhaustive weekend seminar organised by the Melbourne University Law Faculty to mark the 75th anniversary of federation. Intertwined political and legal issues that precipitated the crisis of government last November were separated in contributions by many of the leading specialists in Australian constitutional law.

There was of course no "decision," but public discussion has been intelligently stimulated for the Senate powers issue that will come before the Constitutional Convention in October.

The content and mood of the Prime Minister's speech at Saturday night's seminar dinner confirm that the Government will almost certainly oppose a major change — although the power that the Senate has newly demonstrated can strike indiscriminately at Labor and non-Labor governments alike. But Mr Fraser's presence implied tacit agreement with the conviction that now is the time to talk constructively and sanely about reducing the ambiguity of Senate powers.

He threw out the significant hint of favoring "a constitutional device" that would secure an automatic election if Supply were denied in Parliament. The Prime Minister should tell us more. Does he agree, for example, that this could precipitate national six-monthly elections if governments failed to control both the House of Representatives and the Senate?

The ultimate task of making the Australian parliamentary system function in the fashion that all political groups had accepted until 1974-75 — that governments are made and paid in the popularly-elected House of Representatives — can be fulfilled only by cool and rational determination to define and restrain the role of the Senate. The removal of Sir John Kerr now would displace a personality — not the issue.

**THE GREAT
CONSTITUTIONAL
CRISIS DEBATE**

Labor's Senate Supply stance 'belated'

By ROBERT DARROCH

MR Whitlam's conversion to the principle that the Senate could not reject Supply was belated and smacked of political expediency, the Federal Attorney-General, Mr Ellicott, said yesterday.

On at least four occasions, he said, Mr Whitlam had accepted that the Senate had the power to do exactly what it did last year. The occasions were:

IN 1959, when he supported a report accepting the existence of the Senate's power to reject Supply.

IN 1970, when he said of the Budget: "We will vote against the bill here and in the Senate. Our purpose is to destroy this Budget and the Government which sponsored it."

IN 1974, when he accepted the existence of the power when acceding to the April double dissolution decision.

IN 1975, when he said: "If there is again a refusal of Supply there will certainly be an election. We see some marvellous issues to fight on, not the least Medibank."

Mr Ellicott was replying to a paper delivered at the Constitutional Seminar in Melbourne by Professor C. Howard, Hearne Professor of Law at Melbourne University. Professor Howard strongly attacked Liberal Party actions in the crisis of October-November last year.

Mr Ellicott said Professor Howard's remarks were biased and political. He disagreed with much of what he said and quoted several authorities in support of his case.

Mr Ellicott said most great constitutional authorities believed that a government without Supply must resign and face the people.

The Labor Government had asserted that the power to reject Supply was inconsistent with responsible government. The framers of the Constitution did not think so — quite the contrary.

INDEPENDENCE

"I believe the framers of the Constitution clearly had the question of reserve power well in mind," he said. "It recognised that there were times when the Governor-General had to make a decision himself, even though the responsibility for it would be accepted by advisers."

"If it were not for the reserve powers the Governor-General would be a mere automaton to do the bidding of a Prime Minister. This was, and is, the Whitlam view."

It was not known what passed between Mr Whitlam and the Governor-General, except that the Governor-General in his letter said: "You have previously told me that you would never resign or advise an election of the House of Representatives or a double dissolution."

Mr Ellicott said he could not believe that Sir John Kerr would have written that had it not been true.

"Our country's chief lament about these events must be that Prime Minister Whitlam did not act like a statesman, for that is what the occasion demanded," Mr Ellicott said.

Mr Ellicott said there were 12 points that would have influenced Sir John Kerr. These were:

61. The Senate had power to reject or defer Supply:

2. Even if there were an argument to support the convention against deferral or rejection the Governor-General

CONTINUED PAGE 3

LABOR "SPLIT COURT" — PAGE 3

FRASER DEFENDS KERR — PAGE 3

SENATOR McCLELLAND

— PAGE 7

"The Australian"

Monday, August 9, 1976

Whitlam Senate Supply stance attacked

FROM PAGE 1

was bound by what the Constitution said.

3: There was strong support for the view, on a reading of the Constitution, that he had the reserve powers of dismissal and dissolution.

4: Mr Whitlam and ministers were emphasising by word and action the seriousness of the lack of Supply. Mr Whitlam was asserting that he would not have an election for at least a year, that he was going to smash the Senate, and making it clear that he would not resign.

5: By early November the Government was making overtures to the banks to arrange payment of public servants and public accounts. Some of the banks apparently received advice that these arrangements could be illegal.

The device suggested could be temporary only and could not cover all situations of government. There had to be a moment of truth.

6: By early November it was apparent that the ordinary Supply was to run out by late November.

7: A request for an election for a half-Senate was delayed until November 11, and it was at least a reasonable view that such an election would not provide a clear solution to the problem.

8: The Senate was strongly maintaining its attitude and offers of compromise had been discussed and rejected between leaders. The Solicitor-General suggested that the Senate had already failed to pass the bills.

9: It was clear that if an election was to be held before Christmas, a decision had to be made around November 11-13. If not held then it would be difficult to hold such an important election before late February.

10: At no time had interim Supply been sought by the Prime Minister, as he could have. Indeed, on the morning of 11 November, he had made it clear that he would neither seek nor accept interim Supply even during a half-Senate election.

"The Australian"

Monday, 9 August, 1976.

11: One previous Governor-General had sought advice from a Chief Justice and another had recently said it was proper. The Chief Justice, in fact, advised that the Senate and the Governor-General had the powers in question.

12: On November 11 Mr Whitlam himself confronted the Governor-General with a decision on a half-Senate election. The fact that it was a day for a decision was confirmed.

Mr Ellicott asked the lawyers and constitutional experts present what, knowing that in a month the country would probably be facing financial chaos, they would have done.

"These are considerations and questions which you need to carefully ponder before you pass judgment," he said. "If you pass harsh judgment and acclaim the demagogue I believe you are not only unjustly condemning a man who to this time had had an unblemished record of public service."

"You are also undermining the office he holds and playing into the hands of elements bent on undermining our basic fabric. The lawyers of Australia have a very heavy responsibility."

PM's referendum hint

Comment Allan Barnes

Fraser's plan to change system

Guardedly, but quite deliberately, the Prime Minister, Mr. Fraser, has unveiled his "masterplan" for avoiding a repetition of the events which divided Australian society on November 11 last year.

Mr. Fraser's scheme is aimed also at removing the Governor-General from the political firing line in any future deadlocks over Supply between the House of Representatives and the Senate.

And, importantly, it would eliminate one of the main barriers to a proposition being seriously considered by the Prime Minister — the appointment of the Queen's eldest son, Prince Charles, as the next Governor-General of Australia.

The only problem is that Mr. Fraser's "solution" is in total contradiction to the views of Labor supporters about the events leading to Mr. Whitlam's dismissal from office last November.

For that reason, the plan is most unlikely ever to get the degree of public support which would be needed to write it into law.

Idea 'floated'

In classic political style to test public reaction without firmly committing himself, Mr. Fraser "floated" his idea at a dinner held at Melbourne University on Saturday night as part of a weekend seminar in the Australian constitution.

Although the organisers from the University Law School had expected Mr. Fraser's speech to take a generalised non-partisan view of our first 75 years of federation, the Prime Minister launched into a strong defence of the actions of the Senate in blocking the Labor Government's budget and Mr. Whitlam's subsequent dismissal by Sir John Kerr.

Mr. Fraser said — quite correctly — that the framers of the Constitution deliberately gave the Senate equal power with the House of Representatives in all matters except money bills.

Continued — 5.

Move to prevent block on Supply

By JOHN JOST

The Prime Minister, Mr Fraser, has foreshadowed a possible referendum to prevent a repetition of last year's political crisis.

He suggested at the weekend that a referendum could be held to change the Constitution so that a general election would automatically be held if the Senate blocked Supply to the Government.

If such a referendum succeeded the way would be clear to appoint Prince Charles as Governor-General, a keen desire of Mr. Fraser's.

Mr. Fraser's public airing of the suggestion follows recent speculation that the Government is considering an early referendum to change the Constitution.

There is no chance of the Prince accepting the Vice-Regal post if there is a possibility of his becoming embroiled in a constitutional crisis such as the Governor-General, Sir John Kerr, was last year.

Mr. Fraser made the suggestion before 300 judges, lawyers, academic lawyers and politicians at a banquet at Melbourne University on Saturday.

Alternative

They had been attending the university law school's Federal Anniversary seminar on "The Labor Government and the Constitution."

Referring to the sacking of the Whitlam Government on November 11, last year, Mr. Fraser said Sir John had no choice but to dismiss Labor, appoint the interim Fraser administration, and force an election.

"The only alternative would be an appropriate constitutional device which would secure an automatic election if Parliament denied Supply," Mr. Fraser said.

"If governments who cannot secure Supply were to attempt to stay in office, Government and Parliament would become unworkable and the country paralysed.

"If the Prime Minister of

the day is not prepared to recommend either of these courses of action, the Governor-General is forced as a last resort to use his power under the Constitution."

This remark was greeted by some booing and hissing from the audience — a surprising reaction from such a conservative group.

The two-day conference was attended by lawyers and judges including the Federal Attorney-General, Mr. Ellicot, the High Court's Mr. Justice Murphy, and Mr. Justice Stephens, the Commonwealth Solicitor-General, Sir Richard Eggleston and Mr. Maurice Byers.

Mr. Ellicot yesterday afternoon clashed with Sir Richard Eggleston over the dismissal of the Whitlam Government, claiming the Senate had a right to block the Budget and that Sir John Kerr had to dismiss the Labor Government.

Sir Richard, formerly the Chief Judge of the Commonwealth Industrial Court, replied that the Senate acted wrongly in blocking the Budget.

● Seminar report — 11

The Age

Monday, August 9, 1976

Fraser's plan to change system

"In the case of money bills, they gave the Senate the power to defer or reject Supply, but not the power to initiate money bills," he asserted.

This remark brought some critical interjections from a section of the dinner-suited lawyers attending the dinner, who were aware that the Constitution gives the Senate the right to reject money bills or to request their amendment by the House of Representatives, but specifically forbids the Senate itself from making such amendments and makes no reference to the tactic of deferral used by the non-Labor Senators last year.

In fact, at least one distinguished participant in the seminar, Sir Richard Eggleston, former chief judge of the Commonwealth Industrial Court, argued at the weekend that the Senate had acted quite outside its Constitutional powers in continuing to defer the Budget until Mr. Whitlam agreed to a general election.

This view did not faze the Prime Minister. He asserted bluntly that the Senate had acted constitutionally and that the "Constitutional consequence" of its action was that the Prime Minister "must go to the people".

"A Government that tries to rule without the Senate's approval for its expenditure is trying to rule without Parliament," Mr. Fraser said.

The Prime Minister won some ironic applause from the more antagonistic of his audience when, later in his speech, he made the same assertion as Mr. Whitlam that "in all normal circumstances, the Governor-General must accept the advice of his Prime Minister and Ministers".

But the applause turned to derisive laughter when Mr. Fraser added: "However, in exceptional circumstances, when either one of the Houses has deferred or rejected Supply and when the Prime Minister, despite this, tries to stay in

FROM PAGE 1

office, the Governor-General is forced to act.

"In these exceptional circumstances, the Governor-General can only meet his constitutional obligations—which are there for the benefit of the people—by establishing the conditions in which an election will be held, and the people's will determined."

The interjections from some of the diners after this much-debated assertion may have led to some of the audience missing Mr. Fraser's next point — the critical element in his whole speech.

"The only alternative (to the Governor-General acting as Sir John Kerr did) would be an appropriate constitutional device which would secure an automatic election if Parliament denied Supply," he said.

This is the nub of Mr. Fraser's thinking on the issue. It involves the prospect of a referendum aimed at amending the Constitution.

Such an amendment would, as Mr. Fraser said, remove the onerous task of intervening from the shoulders of the Governor-General.

But Mr. Fraser's plan, while neatly letting the Governor-General off the hook in the event of a future clash over funds between any Government and an antagonistic Senate, also would, in effect, endorse the unprecedented action of his party last year.

Entrenched Labor supporters would never vote for such a change.

To the contrary, they would argue that if this section of the Constitution were to be amended in any way at all, it should be to make it completely clear that the Senate does not have the right to deny Supply to a Government in any circumstances.

Kerr forced to act says Fraser

This is an edited text of the address by the Prime Minister, Mr. Fraser, at the Federal Anniversary seminar — The Labor Government and the Constitution — at Melbourne University this week end.

Tonight I would like to talk about the Federal system and particularly about its relation to current Australian society, about the Parliament, the Senate and the Crown.

The decision to establish a Federal system in Australia was based on a number of inescapable features of the Australian situation.

The facts of geography — particularly the fact of distance between the major areas of settlement; the existence of well-developed administrations in the colonies with their own ways of handling local problems; the distinctive colonial State orientations on major policy issues and the likelihood that without a Federal system the densely populated regions would not pay sufficient attention to the needs of the more sparsely settled regions.

Alongside these features which imposed the need for a constitutionally guaranteed distribution of power, there were a number of national interests — such as defence, currency, immigration, posts, inter-colonial trade — which would be most effectively handled by a national government.

Since Federation we have had considerable success in overcoming the tyranny of distance. Improvements in communication have helped the formation of nationwide responses on national political matters.

Yet the States remain as vital realities. Each maintains its own distinctive political tradition. Each remains, to a large extent, a genuine regional community, with its own media, its own industrial interests, its own social life, its own organisations and associations.

Since Federation there has been a great shift in power towards the Commonwealth Government. This shift is primarily a consequence of the fact that the legal and financial arrangements of the Australian federation gave the Federal Government opportunities.

Opportunities which political interest and circumstances encouraged it to seize.

The Australian drift towards centralism was not in tune with developments in other modern democratic federations. Even the model of the unitary state — Great Britain — seemed to be moving towards a more effective recognition of regions.

The drift towards centralism created its own inefficiencies — particularly in the duplication of administrative agencies and the growth of a large central bureaucracy.

Moreover, this drift ran completely counter to the kind of society where a real decentralisation of power is required if people's needs are to be met in ways most sensitive to those needs.

This is not only because Australia remains a country where the States largely reflect a genuine regionalism. The need for devolution of power is all the greater because of increased education, some of the changes taking place in public attitudes and in political skills and awareness.

There is a widespread call these days for all our institutions to be more responsive — for those affected by decision to be able to participate effectively in the process leading to decision.

A reasonable degree of financial autonomy is a guarantee that the distribution of government power envisaged in the Federal model remains a reality.

One of the enormous merits of a properly operating federal system is that in the longer run it should contribute significantly to the quality of Australian government.

It is for these reasons that the present Commonwealth Government has initiated the most far-



reaching reform of the Federal arrangements since Federation.

We believe that effective government requires Commonwealth State and local governments to take decisions appropriate to their own spheres, with matters properly concerning more than one government being decided by genuine consultation and co-operation.

The main features of our reforms are readily summarised: States and local governments will be given a substantial degree of budgetary independence through access to a percentage of personal income tax revenue.

We propose that each State will have the discretion to impose a surcharge or allow a rebate on the total personal income tax of that State.

There are a number of people who don't like our Federalism proposals. They are usually people who think they know what is best for others and who want to impose conformity on Australia.

Federalism does not provide an attractive way of organising the power of government for those who think they have all the answers to the problems of their fellow citizens.

Federalism implicitly rejects the view that there is one right solution for all circumstances, for all communities.

The belief that a few people know how to solve all our problems, and that they are justified in drastically truncating the capacities of other individuals and communities to achieve their goals is a dangerous one.

Our founding fathers recognised this and created an institutional system in which the diversity required for the effective development of Australia would be protected.

They wanted the Senate to be strong and effective and gave it equal power with the House of Representatives in all matters excepting money bills. In the case of money bills they gave the Senate the power to defer or reject supply.

To suggest that the Senate's restrained use of its constitutional power to withhold supply somehow establishes a convention more powerful than the provisions of the Constitution is, I believe, nonsense.

The Senate's power exists in the Constitution, and has been acknowledged by a wide range of authorities.

The Constitution also imposed great and at times onerous obligations on the Governor-General's office.

With their commitments to the basic concepts of parliamentary government, it would have been inconceivable to the Founding Fathers that a government might ignore the cardinal parliamentary convention that a government unable to pass supply through the Parliament must go to an election.

The blunt fact is — a fact on which parliamentary supremacy over the executive has always been founded — that a government without money cannot rule. Money is the life blood of government — without it, a government will die.

If governments who cannot secure supply were to attempt to stay in office, government and parliament would become unworkable and the country paralysed.

Normally this would not happen.

The Prime Minister of the day would advise the Governor-General that someone else should be appointed or that an election be called.

If the Prime Minister of the day is not prepared to recommend either of these courses of action, the Governor-General is forced as a last resort to use his power under the Constitution.

In all normal circumstances the Governor-General must accept the advice of his Prime Minister and Ministers. However, in exceptional circumstances when either one of the Houses of Parliament has deferred or rejected Supply and when the Prime Minister despite this tries to stay in office the Governor-General is forced to act.

In these exceptional circumstances, the Governor-General can only meet his constitutional obligations — which are there for the benefit of the people — by establishing the conditions in which an election will be held, and the people's will determined.

The only alternative would be an appropriate constitutional device which would secure an automatic election if Parliament denied Supply.

I hope nobody will support the contention that Parliament ought not to maintain control over the supply of money to the Executive.

It was an attempt to achieve just that that compelled the Governor-General to act as he did.

We should spare a moment to think of the difficulty of the decision which the Governor-General was forced to make. It should also be noted that the Governor-General did not put himself in the position. He was placed in it by his Government.

In these circumstances the Governor-General has a right to expect from others — particularly his advisers — reasonable and rational discussions of the constitutional issues, free from all threats of sanction of dismissal. That as we know, was not the case.

A servant of the constitution who discharges his constitutional obligation in a situation fraught with the greatest difficulties is worthy of the highest regard.

Through the 75 years of our Federation, there have been some shifts in the balance and division of power. Those of a Liberal philosophical persuasion believe that there should be a maximum devolution of power to the public — they are increasingly well educated, critical and concerned with politics.

In achieving devolution and fostering participation we will get a greater awareness of what government can or cannot do.

Encouraging the maximum effective participation by people in the political process fosters a realistic appreciation of the limits and possibilities of government action.

Federalism makes possible the most effective devolution of power, the most effective responses by government to peoples' needs, and develops the competence and understanding of the citizens on which democracy always depends.



Judges get a political rating

Australia's seven High Court judges showed consistent patterns of voting on "overtly political cases" in the Whitlam years, according to a Sydney law professor.

Professor A. R. Blackshield, of the University of New South Wales, presented the seminar with a "scalogram" ranking the seven judges ideologically according to their recent decisions.

The Chief Justice, Sir Garfield Barwick, was placed on the extreme "anti-Labor" end of the spectrum with Mr. Justice Gibbs.

Mr. Justice Murphy, formerly Labor's Attorney-General, was placed on the extreme "pro-Labor" end of the scale.

Mr. Justice Jacobs and Sir Edward McTiernan were placed next to him on the "pro-Labor" side of the scale, while Sir Ninian Stephen was placed next to Sir Garfield and Mr. Justice Gibbs on the "anti-Labor" side.

Mr. Justice Mason was described as "the swinging voter".

11 test cases

Professor Blackshield based his ratings on each judge's decision on eleven contentious pieces of legislation referred to the court during the life of the Labor Government.

He said he agreed with the Opposition Leader, Mr. Whitlam, that Sir Garfield's recent judgments wavered from legalism to sweeping interpretations — but added that this was a "schizophrenia" common to judges generally.

"But we can't accuse Murphy of a pro-Labor bias without equally accusing Barwick of an anti-Labor bias. And the reverse is also true," Professor Blackshield said.

"High Court attitudes to the Labor Government did not reflect party loyalties, but rather different outlooks on the law and the Constitution."

"Given the varied outlooks that exist in any society, it is better that a wide spectrum of these outlooks be reflected in the country's highest court."

Court may intervene over seats

The High Court may intervene to demand a redistribution of Federal electorates in some States within the next two years, a Monash University lecturer suggested yesterday.

Mr. P. J. Hanks, a senior lecturer in law, said the court might rule the present Federal distribution unconstitutional if the present imbalance between seats got worse.

The majority of the court ruled last December that section 24 of the Constitution set limits to the variation in size between one seat and another, he said.

Only Mr. Justice Murphy was prepared to specify what he saw this limit as being, the other judges simply indicating that it had not yet been reached.

But there were indications that a majority of the court might draw the line at a point not too far beyond the present inequality of voting power, Mr. Hanks said.

Coalition 'right on loans breach'

The coalition parties were right to claim Labor's bid to raise \$4000 million in loans from Mid-East sources breached Commonwealth-State financial agreement.

But the breach was "not so much a spectacular breach of the Federal constitutional compact as an extension of that unilateral style of decision-making in loan raising matters" typical of Federal Governments "for decades past".

This opinion was submitted in a paper to the Federal anniversary seminar by two senior law lecturers from Melbourne University, Mr. Gareth Evans and Mr. Michael Crommelin.

Mr. Evans was actually seconded at one stage by the Labor Government to advise the Attorney-General's department. He was the organiser and convenor of this weekend's conference.

"Why it (the Labor Government) chose not to consult with the State members of the Loan Council at the outset must remain a matter of political speculation."

But, they said, the Loan Council had since its inception been very much the creature of the Commonwealth rather than the States.

Mr. Evans and Mr. Crommelin argued that the loan bid should have received Loan Council approval.

Speculation

All attempts to raise loans must be submitted for approval unless they are for temporary purposes, defence purposes or are "conversion, renewal or redemption" loans.

It would have been hard to sustain the Whitlam Government's claim that the loan was for temporary purposes because the repayment period was 20 years.

They said there had been considerable speculation on what was the real object of the expenditure.

"It is now well established that the contemplated outlays were all for major national development projects; uranium enrichment in the Northern Territory, natural gas and pipelines in Western Australia, petro-chemicals in South Australia, rail electrification in Victoria, NSW, Queensland and Tasmania, and coal ports in NSW," they said.

"But if the search for overseas — and especially Middle Eastern — loan funds was not necessarily aberrant in its conception it certainly proved to be so in execution," Mr. Evans and Mr. Crommelin said.

"The money was not forthcoming, and the bizarre methods by which it was sought — which it is not the purpose of this paper to retail or evaluate — unquestionably did much to undermine the Government's general credibility."

"The attempted loan raising came to be the 'reprehensible circumstance' on which, above all others, the Opposition relied in explaining its eventual decision to turn out the Government by blocking supply," they concluded.

Refusal of Supply improper: Eggleston

By TIM COLEBATCH

The Senate's action in rejecting Supply last October was not only improper but unconstitutional, the chancellor of Monash University, Sir Richard Eggleston, told the seminar.

Sir Richard, formerly Chief Judge of the Industrial Court, put forward a barrage of reasons for interpreting section 53 of the Constitution as denying the Senate the right to reject Supply.

He was given the greatest ovation of the tense final session of the seminar, in which speakers discussed the propriety of the refusal of Supply and the actions of the Governor-General during the Constitutional crisis.

Other speakers in the session included the Opposition Leader, Mr. Whitlam, the Attorney-General, Mr. Ellicot, and Professor Colin Howard, of Melbourne University.

Sir Richard said the elaborate procedures set out in the Constitution to deal with deadlocks were clearly not envisaged as dealing with a rejection of Supply by the Senate.

Nor were the opportunities given the Senate to ask the House to amend the Supply Bill — and the provision that it could not amend Supply itself — consistent with it having power to reject Supply.

Absurd result

The section dealing with Supply Bills had originally given the Senate the power to reject Supply, but this was deleted in the final Constitutional Convention.

"The construction which allows the Senate power to reject money bills, and to send messages requesting amendments or omissions, while denying power to amend, leads to an absurd result," Sir Richard said.

"As the events of last year have demonstrated, that interpretation makes the Senate superior to the House, not co-ordinate."

Sir Richard said whatever result should have flowed from last year's crisis, it was not

"the dismissal of the Prime Minister and the installation of the Leader of the Opposition in his place."

Mr. Ellicot said the main reason for the crisis was that "Prime Minister Whitlam did not act as a statesman."

"If you make harsh judgments (on Sir John Kerr) and acclaim the demagogue, I believe you are not only unjustly condemning a man who to this time had an unblemished record of public service," Mr. Ellicot said.

"You are also undermining the office he holds, and playing into the hands of elements bent on undermining our basic fabric."

Drowned out

Mr. Ellicot was laughed down by the audience at one point as he was answering a question from Constitutional historian Professor J. A. La Nauze.

Professor La Nauze asked whether the Senate's action in refusing to pass Supply until an election had been called was not a breach of the Constitutional rule that no conditions could be placed on the Supply Bill.

Mr. Ellicot was drowned out by laughs and jeers when he replied that the Senate's demand was not a condition but a statement of when it intended to pass the Bill.

Mr. Whitlam told the seminar that Sir John had never asked him to resign and call a full election before dismissing him.

He said Sir John's claim in his November 11 statement that Mr. Whitlam had told him he would not call an election was "an ex parte statement . . . an inaccurate statement."

Canberra power will rise, Byers predicts

The Commonwealth Solicitor-General, Mr Maurice Byers, this weekend suggested that the changing concept of nationhood would lead to increased Constitutional power for the Federal Government.

Mr. Byers told the Federal Anniversary seminar that ever since Federation the mere fact of nationhood had encouraged the High Court to expand Federal powers.

"Nationhood affects the quality of given powers. It is a source of power.

"It is that character which will, in legal terms, determine the Constitutional future as it has shaped the past," Mr. Byers said.

High Court judgments in recent cases made it clear that the extent of Commonwealth power "inherent in the fact of nationhood and of international personality" was yet to be fully explored.

"The general trend of the Constitution is clear. It created the nation from the people of all the States. Fundamental to it is a disparity between the polity it established and those it continued, albeit in a new character," Mr. Byers said.

"Already the Territories legally may be represented in both the Senate and the Representatives. The admission of a new State has been bruited. The extent of Commonwealth power to legislate externally is now seen to be vastly larger than was hitherto thought."

'Disregard'

Victoria's Solicitor-General, Mr. D. Dawson, QC, attacked the former Whitlam Government over its expansion of the legislative powers of the Federal Government.

Mr. Dawson told the seminar the Whitlam Government appeared to believe in "acting in disregard of any distribution of powers and functions" between Canberra and the States.

"It was apparent that the principle upon which some activities were undertaken was that, once they were operating, they would provide their own atmosphere in which challenge would be more difficult," he said.

This was "either because of the climate of public opinion or because even High Court judges are not entirely impervious to the practical effects of their decisions."

Mr. Dawson said the Constitutional battles between the Commonwealth and States had revealed a significant cleavage of views between the various High Court judges.

Australia was the only country where the "umpires" of Constitutional disputes, the High Court, were selected by one side without any consultation with the other, he said.

But both Mr. Byers and Mr. Dawson rejected a suggestion from the floor that politicians should be barred from appointment to the High Court.

REMEMBRANCE DAY WILL NOT BE FORGOTTEN

One of the least attractive responses to the events surrounding Remembrance Day 1975 is that they are passe, that the electorate has spoken, and there is little to be reaped from raking over old coals and thrashing a dead issue.

It is a view that, apparently, the Prime Minister and the Attorney-General have now decided to eschew, since last weekend both used the forum of Melbourne University Law School's celebrations of 75 years of Australian federation to attempt to justify their side in the dispute which culminated in the sacking of the Labor Government.

The weekend seminar represented possibly the greatest concentration of legal talent in Australia, and hardly need be said that there was considerable diversity of views on questions of constitutional construction.

However, the salient lesson for the observer is that the constitution does not provide complete solutions to the sort of problems that the events of last October and November threw up. There is near unanimity that it is an inadequate document.

The three contentious constitutional issues that are the nub of the current debate are the Senate's powers on blockage of money bills, the Governor-General's power to sack a government, and the use of the deadlock provision in the Constitution to dissolve both Houses.

On the first the opinions range between those advanced by Sir Richard Eggleston on one hand and Senator Reg Withers' colleagues on the other.

Sir Richard has pointed out that ear-

lier drafts of the Constitution in 1891 and 1897 specifically conferred upon the Senate a power to reject Appropriation Bills, whereas the final draft did not.

From this he deduces that Section 53 of the Constitution (dealing with the Senate's powers) was not intended to confer a power of rejection on the Senate.

Certainly there is no contemplation anywhere by the founding fathers that a bill could be put into "deep freeze" by the Senate and kept in that state as a device to turn the Leader of the Opposition into the Prime Minister.

The Hearn Professor of Law at Melbourne University, Professor Howard (who is a consultant under contract to Attorney-General Ellicott) says that the convention debates show that no peculiar significance can be attached to the change in the wording of Section 53.

He advances the view that the only deadlock procedure provided by the Constitution (Section 57) is in practice inappropriate to deal with an impasse on Supply Bills. By the time that the requirements of Section 57 are met (three months must elapse between the first and second failures to pass by the Senate) the Government would long since have run out of funds.

The Constitution simply gives no help in reconciling the purported powers of the Senate on money bills with the deadlock provisions.

On the matter of the Governor-General's powers to sack a government there is also a variety of views.

However, it is the question of the

Governor-General's powers to dispatch the Parliament that was at the centre of some of the most interesting debate over the weekend and is causing some of the greatest problems with constitutional interpretation.

Sir John Kerr did not use reserve powers to dissolve both Houses of Parliament. He commissioned a new adviser who gave him that advice.

He then dissolved the Parliament pursuant to Section 57.

In effect the new Prime Minister was getting a double dissolution on the basis of his political opponents' deadlocked legislation.

The new Prime Minister was attempting to resolve the deadlock on bills which his party had been very determinedly deadlocking throughout the life of the preceding Parliament.

A great deal of legal eminence recognises that such a situation is a constitutional absurdity, not to say illegal.

Some members of the High Court, including the Chief Justice himself, in the Territorial Senators case, said that it is illegal to use Section 57 bills to dissolve the Parliament, when the reason for the dissolution is remote and unrelated to the stockpiled bill or bills rejection twice by the Senate.

Even so this was the very course that was embarked upon on November 11.

afford to have a bill fall within the con-

From now on no Government can afford to have a Bill fall within the confines of Section 57, since that section of the Constitution, which was designed to

solve legislative disputes between the two Houses, is now the section on which Governments can be summarily removed from office.

This was not the founding fathers' intentions with respect to Section 57.

The Constitution does not provide any ready answers to a problem that could come about if the Government was denied Supply and there were no deadlocked bills meeting Section 57 requirements on the stockpile.

There would be no double dissolution in these circumstances and the Lower House alone would have to face an election brought about on the instigation of the Senate. The Senate in this way would effectively be immune from accountability for its actions.

Of course, one of the dangers that arises out of situations fraught with constitutional difficulty is that legal fictions spring into use in an attempt by one side or other to invest itself with a degree of legitimacy.

One of the most startling of these fictions was the contention of the present Prime Minister, who, when Leader of the Opposition maintained that a government has the right to govern if it has the numbers in the Lower House, except in "extraordinary and reprehensible circumstances."

In the face of the Constitution's inadequacy to provide ready solutions to extraordinary events it is incumbent upon politicians to be aware of the mechanisms that are available to resolve disputes before the disputes are created in the first place.

THE AUSTRALIAN

FINANCIAL REVIEW

TUESDAY, AUGUST 10, 1976

Tuesday, August 10, 1976

Defusing the Kerr crisis

Mr. Fraser's argument was that Sir John Kerr was obliged to intervene because the Whitlam Government refused to accept the Senate's deferral of Supply as a vote of no confidence requiring it to resign and face an election. In other words, the Governor-General was forced to act as an umpire and thus attracted all the opprobrium — quite unjustifiably, in Mr. Fraser's view — that an umpire is apt to provoke when he makes a decision which severely disadvantages one side. The Prime Minister's proposal would by-pass the necessity for (or temptation to) the Governor-General to act as umpire if such a situation arose again. As he put it: "The only alternative would be an appropriate constitutional device which would secure an automatic election if Parliament denied Supply".

His suggestion has been taken as a strong hint that the Government intends to introduce it in the form of a referendum proposal to amend the Constitution accordingly. Some observers have been interpreted it as a first step towards installing Prince Charles as the next Governor-General. Clearly, the Prince could not be appointed to the post if there were any risk of his having to resolve a constitutional crisis similar to last year's and thus being exposed to the acrid controversy that has dogged Sir John Kerr. We hope that this was not the only motive behind Mr. Fraser's proposal. But whether or not it was intended to smoothe the way for Prince Charles, the Fraser solution suffers from several defects.

There is the pragmatic political objection that a constitutional amendment of this kind is unlikely to be adopted by the Australian people unless both major parties are in favor of it. The Labor Party will certainly not support a constitutional change designed to do no more than make life easier for any Governor-General in future, especially as it would appear to justify everything that happened last year. But there is a more serious objection. The role of the Governor-General, and the particular way

in which Sir John Kerr exercised his discretionary authority, indeed the role of Mr. Fraser himself, were not the only and perhaps not even the most important aspects of the crisis. The fundamental question to be resolved is whether the Senate ought to have the right to reject or defer Supply.

Most authorities agree — although an eminent jurist, Sir Richard Eggleston does not — that the Senate has the power to withhold Supply with the intention of forcing a Government to the polls. But there is a sharp division among legal and political authorities as to whether the Senate should have this power or, if it should, whether it should exercise it in the way the Senate did last year. Mr. Fraser has no doubts: he believes that in Australia, unlike in Britain or any other country that has adopted the Westminster model, parliamentary approval of Government expenditure requires the consent of both Houses of Parliament, not simply the Lower House.

Such a thesis might be more acceptable if the Senate were as democratically elected as the House of Representatives. But it is not. Each State has an equal number of senators, regardless of its population. And senators are normally elected for staggered terms, so that, except immediately after a double dissolution, the Senate is not such an up-to-date reflection of popular opinion as the House of Representatives. Thus the Fraser thesis means that unless a Government has a majority in both Houses — something more difficult for Labor than for the conservative parties to achieve — it is constantly at the mercy of a hostile Senate. True, Opposition senators would probably not risk sending a reasonably popular Government prematurely to the polls but, as Mr. Fraser knows, no Government can be popular all the time.

No, Mr. Fraser's proposal is not the last word. He deserves credit for acknowledging that the 1975 crisis must not recur. He is right in recognising that a Governor-General should

PARTISANSHIP and self-justification were not entirely absent from the Melbourne University law school's week end seminar on "The Labor Government and the Constitution". As two of the principal protagonists in the constitutional crisis of last year took part, this is hardly surprising. Neither Mr. Fraser nor Mr. Whitlam could be expected to take a detached view of the events leading up to November 11. But the seminar served a valuable purpose in bringing together some of Australia's foremost legal and political authorities to review the crisis in an atmosphere where reasoned argument could predominate over impassioned polemics, and where the focus could be on wider issues than the actions of the Governor-General, Sir John Kerr.

The rich diversity of opinion expressed by the eminent and learned participants pointed up not only the complexities of Australia's constitutional structure but also the difficulties of reaching a consensus on how best to make it more workable and acceptable. The Prime Minister's contribution vividly illustrated this problem. Although much of his paper was devoted to defending the conduct of the Senate and the Governor-General last year, he did acknowledge, by implication rather than explicitly, that the crisis resulted in a bitter political rift throughout the community that should not be allowed to recur. For this, Mr. Fraser deserves credit. His proposal has attractions, but one big disadvantage: it would simply lift the burden of breaking a constitutional deadlock from the vulnerable shoulders of the Governor-General without in any way inhibiting the powers of the Senate to create such a crisis.

not be placed in such an excruciating position as Sir John Kerr was last November, although the outcome might not have been so excruciating for him if he had explained himself better. But the Senate must not be allowed an unqualified right to withhold Supply to enable it to force a Government to the polls. A more principled and prudent approach would be for the two major parties to negotiate a constitutional arrangement that not only protects the Governor-General from possible controversy but, more importantly, safeguards a Government with the confidence of the House of Representatives against the constant threat of obstruction and early termination by a hostile Senate.

The second major forum this month on constitutional aspects of the Whitlam Government's dismissal opened at the University of NSW last night.

Two of the main speakers were Mr Edward St John, QC, who held that the

Governor-General, Sir John Kerr, was justified in dismissing Mr Whitlam, and Sir Richard Eggleston, a former Judge of the Commonwealth Industrial Court, who took an opposing view.

Sir John Kerr saved Aust from 'grave disaster'



Mr Edward St. John

Sir John Kerr's actions — and the good sense of Labor leaders other than Mr Whitlam — were all that saved Australia from "the grave possibility of disaster" last November, Mr Edward St John, QC, said.

Mr St John, a former Liberal MP, said the Governor-General's action represented the "last chance to pull Australia back from the brink before the process set in train by the Whitlam Government became irreversible."

The dismissal of the Prime Minister and the dissolution of Parliament were in accordance with the law and convention of the Australian Constitution.

There were only three matters of vital importance in considering the constitutional justification for the dismissal of the Whitlam Government. These were the Senate's refusal of Supply, the attitude taken by Mr Whitlam when faced with the refusal, and the action of the Governor-General.

There was no convention in Australia that the Senate should never reject money bills.

"On the contrary, the Senate's right to reject was clearly intended by the founding fathers of the Constitution and has ever since been accepted as such by text writers and by most politicians, including Mr Whitlam himself," Mr St John said.

"The Senate possessed the same powers to refuse Supply as to decline its consent to any other legislation.

"The men who drafted the Constitution were not hillbillies. It is quite futile to read into these simple provisions a drastic limitation on the powers of the Senate which they never chose to express, for the good reason that they never intended it."

Mr St John said he continued to acknowledge Mr Whitlam's great talents in certain aspects, but by the way he reacted to the Senate's refusal of Supply and his dismissal "he demeaned this country, himself and the office he had previously held, and disgraced his leadership of a great party."

There was no question of the Governor-General's right and duty to act as he did "somewhere along the line," Mr St John said. "The only real question might be just when he should have acted."

Sir John had acted at an appropriate time when Supply was about to run out and a complete deadlock was apparent.

Mr Whitlam had failed in his attempt to retain power but had succeeded in "introducing a permanent distortion" in the future operation of the Constitution.

The constitutional questions involved had been made to appear far more difficult than they were. Full explanation could be found in "the black letter law of the Constitution itself, and elementary textbooks of English and Australian constitutional law."

Contrary to the impressions created in the past nine months, those sources were "in accord with the action of the Senate, unfavourable to Mr Whitlam and his Government, and in agreement with the action of the Governor-General."

Mr St John, told the seminar that he, like many others, had voted for change in 1972 when Mr Whitlam came to power.

But he believed that academics had not appreciated the degree of concern for Australia's future sincerely felt by responsible people throughout Australia when Mr Whitlam was dismissed.

There was 'no need' for Whitlam dismissal



Sir Richard Eggleston

There had been no need for the Governor-General to dismiss Mr Whitlam to solve last year's constitutional crisis, Sir Richard Eggleston said.

There would have been no difficulty in arranging passage of the Budget if Sir John Kerr had told Mr Whitlam that he proposed to dissolve Parliament.

Supply had been arranged in comparable circumstances in 1974.

"Of course, Mr Whitlam might well have chosen to be dismissed rather than go to the country as Prime Minister — if he had it would probably have been an error of judgment — but he was at least entitled to the choice," Sir Richard said.

"Some have said that if Mr Whitlam had been given the choice, he would have reacted by asking for the Governor-General's recall.

"This may well be so, but to say that in a crisis of this kind the Queen would be bound to recall a Governor-General who proposed to dissolve Parliament or to dismiss the Prime Minister is to say that the Governor-General has no such independent power as we are assuming.

"My own guess is that if Mr Whitlam had asked for the recall of Sir John Kerr's commission, the answer from the palace would have been: 'We are considering your request and will let you have the answer in the course of the next few days.'

"At the least, once Supply has been passed and a vote of no confidence in Mr Fraser had been carried, Mr Whitlam was entitled to be recommissioned as Prime Minister for the purpose of the election."

As the major theme of his address, Sir Richard argued that, on a true reading of the Constitution, the Senate did not have the power to refuse Supply.

An earlier draft of the Constitution had specifically included the words "affirm or reject" in relation to the Senate's power on a money bill, he said.

The fact that these words had been omitted in the final draft implied that the Constitution did not give the Senate this power.

Sir Richard said the most extraordinary part of the events of November 11 was the great emphasis both Sir John and the Chief Justice, Sir Garfield Barwick, gave to the desirability of Mr Fraser's guaranteeing Supply.

"At this point, the significance of Mr Fraser's stated reason for deferring rather than rejecting the bills becomes clear," he said.

"The only Supply which Mr Fraser was in a position to guarantee, if indeed he was in a position to give any guarantee, was the Supply which he had refused to the Whitlam Government.

"If he had rejected the bills, he could not have given any guarantee at all since, in substantial terms as opposed to verbal gymnastics, neither party was able to command Supply in both Houses.

"There is surely something paradoxical in a situation in which a party leader can, by putting his opponent's Supply Bill in cold storage, secure that opponent's dismissal and immediately thereafter, by promising to pass the Supply Bill, qualify for appointment as Prime Minister."



"The Australian"

August 14, 1974

All the Queen's men

Governors flexing their muscles

by
**ROBERT
DARROCH**

THE conversation around the polished cedar table in the private dining room of Government House in Melbourne could have a profound effect on Australia's future. For, around that table, having lunch before they attended the memorial service to Lord Casey in June, were the Governor-General and all the State Governors bar one, Sir Stanley Burbury, of Tasmania. What they talked about was their future as the Queen's representatives in Australia.

Perhaps more than anyone else — although Gough Whitlam might disagree — they were deeply affected by Sir John Kerr's decision last November to sack the Federal Labor Government. They suddenly realised that the rules under which they carry out their often ritual, but fundamentally vital, roles have changed, perhaps for the better, perhaps for the worse.

They chatted informally, taking up threads of conversations that had occurred between individual governors since last November. A number of ideas have been thrown around and there has even been a suggestion of something akin to a governors' trade union appointment. One or two of the Governors thought that in future Governorships should go only to distinguished jurists.

Their concern is understandable. Recent events in Canberra and South Australia and incidents throughout Australia involving mobs and the Governor-General have turned what used to be a pleasant sinecure for ex-army men and retired colonial officers into what could become the nation's number one hot-seat. As well, they are in the invidious position of not being able to hit back at the people who attack and denigrate them.

Consider their situation. Their lifestyle, thanks to their appointments and the vice-regal history of their offices, is unique in Australia. They live like dukes, have the theoretical power of kings, and yet they are largely puppets. And now many people want them abolished altogether.

Dress-suit world

Before looking at the political implications of their jobs, walk with me into their respective parlors and see how they live, what they do, and what sort of people they are.

At the moment — and for the first time in our history — each one of our six State Governors is an Australian. Two are former chief justices of their State (Sir Stanley Burbury in Tasmania and Sir Henry Winneke in Victoria), one is a diplomat (Sir Roden Cutler, of NSW), two are former air force officers (Sir Wallace Kyle in Western Australia and Sir Colin Hannah in Queensland), and one is a scientist (Sir Mark Oliphant in South Australia).

Sir Mark, who is 75, is nearing the

end of his five-year term and he will be succeeded on December 1 by Pastor Sir Doug Nicholls, Australia's first Aboriginal Governor — and also the first clergyman to get the job. Sir Roden is the most senior Governor, and at 60 also the youngest; he has been Governor of NSW for 10 years and could well be reappointed when his current term ends next year. The other four are fairly recent appointments: Sir Stanley, 67, was appointed in 1973; Sir Colin, 62, began his term in 1972; Sir Henry, 67, was appointed in 1974 and Sir Wallace, 66, began his term last year.

Each of them lives in Government House in the capital city of their State. They have servants — butler, footmen, chauffeurs, cooks, maids, secretaries and various other helpers — the wages are paid either by the State or out of the substantial allowance each Governor receives on top of his official salary (which is usually around \$20,000 tax-free).

They live amid silverware, crystal, rich furnishings, paintings (often borrowed from the State art gallery), extensive lawns and gardens (maintained by State gardeners), well-stocked cellars, Rolls-Royces, and a great deal of formal bowing and curtsying. They move in the dress-suit world, a hangover from the Victorian era when everyone went to dinner dressed to the nines.

While most Governors' establishments are fairly similar — with the Governor's private secretary running his social life, an official secretary looking after his constitutional commitments, and a butler overseeing the household — each Government House, however, has its own distinctive style and idiosyncracies.

By far the biggest and most imposing vice-regal residence is that of Sir Henry Winneke in Melbourne. Modelled on Osborne, Queen Victoria's palace on the Isle of Wight, it is a palatial, white-stuccoed mansion in sweeping grounds containing one of the biggest private ballrooms in Australia (even Queen Victoria was jealous when she learned of its dimensions), probably the longest servery in the land, plus magnificent green-carpeted and cedar-lined reception rooms that can hold almost 1000 people. The formal dining table must be Australia's largest, able to sit 56 diners and almost as big as a cricket pitch.

With 1.7 million square feet of living space, topped by a tower 145 feet high, there is no shortage of room, yet the whole place is run by a fairly small staff, including a lady who comes in each day and "does" the public rooms. Each day's staff duties are put up by the butler in the servants' hall and they range from cleaning the silver to lighting the fire in Sir Henry's study.

(The man who looks after the firewood, a delightful Irishman of long service, once surprised a visiting Archbishop of Canterbury by falling down on his knees and asking for a blessing. Upon receiving it, so the story goes, he went out and backed the card at a Saturday race meeting. Later a prelate from his own church gave him a similar blessing but, alas, without inspiring a similar lucky streak.)

Though the style of living in Government House, Melbourne, is luxurious by ordinary people's standards, a close watch is kept on the daily housekeeping. Captain Curwen, the Governor's private secretary, shops round for the cheapest meat and best-value vegetables and is always on the lookout for bargains at the wine merchants. Recently he stocked the Government House cellar with several score dozen Liebfraumilch he got as a job lot.

Sir Henry himself likes informality, and usually sits in the front seat of his Rolls with the chauffeur. He is keen on sport and has men's and ladies' tennis teams at Government House who play outside clubs. He is captain of the Governor's golf team, who also play other clubs around Melbourne, though his own handicap has blown out from 12 to 19 while he has been Governor. He broke a long-standing tradition of vice-regal support for Richmond football club by continuing to support Hawthorn, of which he is joint number 1 ticket-holder (with Premier Hamer).

About the only inhabitant of Government House, Melbourne, who isn't settling in is Sir Henry's red setter, Rufus. He has escaped at least once, and had to be retrieved from the Melbourne City dog pound.

Sir Henry told me that — despite what other people might think are the advantages of a Governor's life — he found his job a very lonely one. Often he and his wife are out on different engagements and he misses his children and grandchildren. He has few weekends off and regrets the lack of privacy.

Bruised hands

Every morning he gets up at 7 and has breakfast with one of his staff, then sets out to fulfil the busy schedule of functions his private secretary organises several months ahead. The schedule is drawn up from applications received at Government House for the Governor to address meetings, open buildings, take on patronages (he is patron of over 100 organisations in Victoria) and visit towns and suburbs. He is seldom in bed before midnight.

When he first took on the job he was a little nervous, but now is more relaxed and finds the work absorbing. "We have done most things without any disasters, and I feel more easy now."

The Constitutional side of his job he finds most interesting, but he also enjoys the social side. "You get the occasional earbasher, of course, but most people are very good." About the only part he has not become fully used to is the speechmaking, the chore that Governors dislike the most. None employs a speechwriter, so they have to do their own research and preparation. Sir Henry said: "If it's a legal meeting, or a sporting one, I can usually find something of interest to say. But sometimes it gets a bit tough to think up something interesting to say."

He meets so many people that his right hand often becomes so bruised that he has to switch to the left. Though he likes a firm handshake, after 60 to 100 clasps his shaking hand is black and blue.

Like the other Governors, he spends a great deal of time travelling. "I have seen a lot more of the country than I ever dreamt I would," he said, puffing his omnipresent pipe. He has a special vice-regal train carriage, and travels in this whenever possible, pulling up at a siding at night and sleeping in it.

Several other of the Governors have access to a special train carriage, but most prefer to use car or plane. Sir Colin Hannah — as an ex-RAAF chief — naturally prefers to use the Government VIP aircraft on his long swings through Queensland.

Sir Colin, a bluff, informal man, was almost certain to be promoted from Chief of the Air Staff to Australia's top military post, Chief of the Defence Staff, when Mr Bjelke-Petersen rang him up one day and asked if he would be available "for a very important job" in Queensland.

Sir Colin still isn't quite sure how he was chosen or what the process of appointment was, but he said "yes" and a little later Buckingham Palace announced that Air Marshal Sir Colin Hannah, KBE, CB, had been

appointed His Excellency the Governor of Queensland (since then Sir Colin has received two more knighthoods, the KCMG and KStJ). He has found the job pretty much as he expected it, but he, too, misses his privacy and the fact that he is working almost all day every day. Although he and his wife have built a holiday house on the Nerang River, south of Brisbane, since moving to Queensland, it is very seldom that they can escape there.

Much of his time is spent entertaining at his Brisbane residence, the large Victorian mansion once called Fernberg (named by its German owner and meaning "distant mountain"). At Fernberg, which is about 4.8 km out of Brisbane and set on a hill in 16 ha of grounds, Sir Colin holds an average of at least one function a day — usually a small dinner party or informal gathering, but often something larger, like a formal dinner (the smallish vice-regal table seats only about 25), a reception, investiture or (more rarely) a dinner dance.

The Governor invites perhaps 500 people a year to dine with him. What sort of people get asked? How do you get an invitation? What is it like to dine at Government House?

The criteria for invitations are varied, but most guests are chosen from lists kept in a file by the Governor's private secretary. These are made up from the names of people whose work in various fields it is felt should be recognised by the Governor. These would include the presidents and chairmen of various State organisations, like the RSL, St John's Ambulance Brigade, Red Cross, CWA, and so on.

Dinner at Government House is

usually formal, rather like dinners held at large English houses in Victorian and Edwardian times. The invitations go out weeks ahead, asking the guests to be at Government House "at 7.15 for 7.30." Dress is stipulated as black tie and the women wear evening dresses. The guests are met at the front door and conducted to the large sitting room where Sir Colin and Lady Hannah

CONTINUED ON WEEKEND 3

'A sort of super-ombudsman'

FROM WEEKEND 1

greet them and exchange a few words. Bowing and curtsying are not actively discouraged, but no one would take it amiss if you just shook hands. It is the custom to address the Governor as Your Excellency or Sir Colin.

After a pre-dinner drink in the sitting room during which the staff and other guests are introduced, the butler announces dinner is served and the party goes into the dining room in a formal procession, led by the Governor and the wife of the senior guest, then Lady Hannah and the senior male guest, and so on. The serving is normally done by the butler with a few outside helpers, usually university students. There are no speeches and only the loyal toast. The talk is very informal and the food usually fairly simple, prepared by the Government House cook. (For larger functions, outside catering is used.)

After the dessert course Lady Hannah will rise, indicating that the ladies will withdraw while the men continue at the table for about half an hour, smoking and having port or cordials. Then they too rise and rejoin the ladies for about another half hour or so. The evening ends around 10 or 10.30 when the Governor and his wife farewell the guests.

Sir Colin, like all the other governors, believes he is doing an important and valuable job — and a necessary one. Although he can conceive of a time when the position of Governor might be abolished, he cannot see it happening in his time. Apart from the constitutional necessities of the job (presiding over Executive Council meetings, giving the royal assent to bills, signing proclamations, dispensing honors, etc) he also thinks the Governor provides a visible link with the Crown and England which, he thinks, most people want to retain.

"When I'm out in the country, say at a remote station in the far west, people come from miles around to greet me, sometimes flying in by plane," he said. "They tell me they want to pay their respects and to convey their loyalty to the Queen." This feeling of loyalty cuts across all class, political and geographical lines. Sir Colin said he had received sentiments of support from many Labor people and he is able to speak on the best of terms with Labor politicians, many of whom are guests at his house.

Through pressure of duties and conventions that restrict him to a non-political role there is little he can do to make positive initiatives in Queensland, but occasionally he might be asked to get an informal group of people together to discuss some problem that has arisen, perhaps a financial crisis in a charity or community organisation. As well he receives, both at Government House and on tour, appeals from individuals who have been thwarted by the normal channels and want him to intercede on their behalf. He never promises he can do anything, but more often than not he can direct attention to their problem.

Many of the governors would like to see this positive aspect of their job expanded — several believe that they have a definite role to play in their community stimulating discussion and acting as a sort of court of final appeal.

In South Australia Sir Mark Oliphant intersperses his formal commitments with lunches and dinners to which he invites stimulating guests and encourages discussion on matters of topical — and even controversial — interest.

Normally governors avoid controversy like the plague, and for a governor to



The opulence of a governor's residence . . . Government House, Tasmania.

say something provocative is, as Dr Johnson said of women preachers, like a dog standing on its hind legs: it is not done well, but what surprises is that it is done at all. But times are changing, especially in South Australia, and there Sir Mark's most successful and popular term as Governor has been considerably enlivened by his extramural comments.

(It should be added that the most controversial utterance by a governor occurred last year when Sir Colin Hannah at a function in Queensland was reported as saying that many people in his State were disillusioned with the Federal Labor Government. This caused a furore and Mr Whitlam asked the Queen to withdraw Sir Colin's commission to act as administrator of the Commonwealth in the absence of the Governor-General and the governors senior to him.)

But of late governors have begun to get more daring. Recently Sir Mark Oliphant spoke out about a visiting American evangelist, Dr John Haggai, who wanted an invitation to come to Government House. Sir Mark gave him short shrift, dismissing him as someone preying on people's gullibility. This caused some perturbation in Adelaide, noted for its churchy society, and Sir Mark thought it might be prudent to refrain from public comment in future. However he was deluged with letters pleading with him to keep speaking out: the people of Adelaide liked his forthright views.

Sir Mark has also spoken out against nuclear non-proliferation ("an impossible dream"), against opponents of birth control ("a monstrous belief"), and has held forth on women (he believes they are superior to men in every respect, save strength). He also believes that people such as scientists may have influenced history more than politicians and soldiers.

As well, Sir Mark can act as a sort of super-ombudsman to South Australians who have gone through the normal channels without gaining satisfaction. Again he has access to people and can command attention which other people cannot. He receives an average of at least two letters a week from people asking him to intercede on their behalf.

After all, the Governor is still the

Queen's representative in his State, and it has been a right of subjects since feudal times to be able to appeal to the Crown for personal justice. And to discharge this task a governor must be able to stand apart from his Government and say it has erred.

He also believes that governors should play a more active role in their community — not in the political sphere so much (from which convention bans them), but in matters of public interest, as, for example, the question of the exploitation of the Adelaide Hills.

In the grounds of Government House he has a small workshop in which he potters around, making things with his hands as he did with Rutherford in the Cavendish laboratory in Cambridge in the 1920s and 1930s. He has made a set of solid silver candlesticks for the Government House dinner table and a set of bookcases for the royal suite.

Before we went in to lunch I was taken on a guided tour of the house by Sir Mark's private secretary, Mr Henderson. Of all Australia's vice-regal homes, Adelaide's is the most homely — and most modern, having been almost completely renovated in the past few years. There are the usual expanses of polished cedar, plush carpet and echoing formal rooms, but here the scale is almost (but not quite) that of a largish suburban house.

What impressed most, however, were the spanking new kitchens, laundries and other functioning parts of the house. The inevitable butler runs most of the domestic arrangements (under Mr Henderson and Lady Oliphant) and presides over the serving of meals. But the rest of the staff is modest by the usual standards: a few lads who live in, a cook, a couple of helpers, and a few secretaries and aides. Apart from the small ballroom, medium-sized dining room (seating about 26) and several reception rooms, the rest of the house comprises a small private dining room, a pleasant sitting room, and a host of upstairs bedrooms and bathrooms (each done up in a different style). The royal apartments, where the Queen and Prince Philip stay when in Adelaide, consist of two suites, each of a large bedroom, en suite bathroom and sitting room.

Sir John has friends

ROBERT DARROCH continues his investigation of the attitudes of State governors.



All the Queen's men

TWO years before Gough Whitlam was sacked, the Governor of Tasmania, Sir Stanley Burbury, stood up in Hobart Town Hall and said, in effect, that if he were faced with the sort of constitutional problem which developed last November he would do exactly what Sir John Kerr did.

Mr Whitlam should have been in Hobart that day; then, perhaps, he might not have embarked on a course of action which assumed that a viceroy would put the letter of the Constitution in second place to the convention that he should act only on the advice of his ministers.

What Sir Stanley forecast — and most people in Australia have yet to grasp this point — is probably the way most of the State governors would act today if faced with similar pressures.

This means, in the words of Professor Henry Mayer of Sydney University, that Australian politics is a whole new ball game, post-November 11. The polite facade has been torn away from the role of the governors and Governor-General and they have been revealed as something far more powerful than the toothless puppets most Australians had thought them.

Not that the governors themselves would put it frankly. They say to a man (and I have recently taken the trouble to ask them — something that neither Mr Whitlam nor anyone else had previously bothered to do) that they would only assert their power over Parliament and Cabinet in exceptional circumstances.

On paper the powers of the governors are enormous. They can summon and disband parliaments, commission or sack premiers and cabinets, they can pardon criminals, remit fines and sign death warrants; the Public Service from the highest departmental head to the lowliest typist answers to them; all important executive acts of government are seen and signed by them; they can give or withhold the royal assent to parliamentary bills; in fact they personally embody most of the power and authority that exists in each State of the Commonwealth. They are the heads of State of their areas: kings in their own domain. In theory, of course.

In fact, as every schoolboy knows — or thought he knew up until last November — the actual power wielded by the Australian governors is slight. By convention he is bound to use his power only on the advice of his ministers.

This has meant that most Australians have come to think of a governor as an opener of fetes, a ribbon cutter filling the sort of functions that most people associate with the Queen — of decorative

figurehead. This picture, however, is quite untrue, and dangerously misleading. As the events of November 11 last show, the Governor-General and the governors are not impotent, and their powers are not all illusory. They have teeth, and when the occasion demands, they can bite.

More than that. Recent trends and events in Australia have wrought changes in the role and functions of the vice-regal representatives, changes that could have profound and far-reaching importance to all Australians. As the importance of the Queen as titular head of State of Australia and its States diminishes, the importance of the governors increases. It is not exaggeration to say that the increasing Australianisation of the executive functions of the Commonwealth (which Mr Whitlam typified and encouraged) was the very reason Sir John Kerr was forced to act as he did last year.

His authority derives from three main sources: what are known as the letters patent (an executive act of the Queen in

stitution and the laws of the Commonwealth, or even the customary usages of the Australian Government, it would be the Governor-General who could present the crisis to Parliament and, if necessary, to the nation for determination." So the viceroy has reserve power — to take a matter out of the hands of his advisers and put it before the people.

Additionally they can appoint or sack ministers and premiers, and — in extreme circumstances — delay or veto parliamentary bills.

So it is not a question of governors having power — they have ample power — but what use they make of their power. Here there is a great difference of opinion among the governors. While, for example, all the governors said that placed in the position Sir John Kerr was last November they probably would not have acted differently, two of the governors thought the question of what to do was not all that clear cut.

One governor pointed out that the decision when to invoke the reserve powers



SIR JOHN KERR . . . "He knew he could not trust Whitlam".

had resigned immediately after the November 11 decision (or after the election result was announced).

Another governor thought that Sir John's actions had in part been dictated by previous events, especially the loan affair. "He knew he could not trust Whitlam, so he had to keep his hand close to his chest." Yet another governor could not understand how Sir John came to sign the Executive Council minute

Tomorrow: Why Don Dunstan appointed Sir Douglas Nicholls

England setting up the office of governor, a document outlining the Governor's duties and called "the instructions to the Governor; and a number of facts of the State Parliament, particularly the Constitution Act, which lays down how the State is governed.

It is important to note that although the Governor is enjoined to follow the advice (i.e. the orders) of his ministers and although he normally would do so, he does have an option, as Sir John Kerr showed when he declined to follow Mr Whitlam's advice. It is this action known (sinisterly, in some circles) as "the exercising of the reserve powers."

What these reserve powers are was outlined in 1972 by the then Governor-General, Sir Paul Hasluck, and although he was speaking of the Commonwealth, the position is similar in each State.

Sir Paul said: "In abnormal times or in case of any attempt to disregard the Con-

might differ according to the background of the man in question. A governor from a legal background might be tempted to observe the letter of the law more than the spirit (or, by implication, the convention) of the law.

This governor said that although the legal obligation to act was great, there was the consideration that democratic tradition indicated that the Lower House provided the Government and that it should be allowed to govern, he seemed to take the view that, say, had Sir John Kerr been from a political background, like Lord Casey or Sir William McKell, he might have acted a little differently, perhaps waiting longer, or more actively seeking a compromise before acting.

Another governor thought that Sir John, through no fault of his own, had made a decision that had split the community, and that this being a fact it might be better for the community if he

authorising the loan raising effort. "In no way could this be seen as a temporary loan, as the Labor Government claimed, it would not have passed the sort of scrutiny that I gave executive council matters."

But what thing all the governors were unanimous on was that Sir John was perfectly correct in seeking advice, and from the Chief Justice. All were adamant that in any situation of constitutional difficulty or doubt they would not hesitate to get advice other than their ministerial advice. Sir Henry Winneke said he would probably consult the law officers first — the Attorney-General and Solicitor-General, but then he would probably see his own State's Chief Justice. Also (as a former Chief Justice of Victoria) he would exercise his own judgment.

Western Australia's Sir Wallace Kyle agreed: "I would seek the best advice I could possibly find, and take as much time as I possibly could before I pass any

judgment." Sir Roden Cutler said he would canvass advice informally, though official channels first, then through the people he chose as the most expert. He said one of the key functions of the Governor was knowing when he should seek advice. But all were firm that the ultimate decision on a course of action on a constitutional deadlock rested with them. Though both Winneke and Kyle termed themselves umpires, calling the players together and asking them to calm down and act properly, they recognised that the buck stopped with them.

All the governors see their role as guardians of the Constitution and laws of the State — and also of the system. Tasmania's Sir Stanley Burbury described himself as a constitutional watchdog, making sure there was no hanky-panky with the law. All the governors are sworn to uphold the Constitution and the laws, and this is the role all see as the most important part of their jobs. Sir Stanley Burbury believes that having this final check puts us ahead of America, whose head of State is a politician. "Watergate could never happen here," said Sir Stanley.

One must not get the impression, however, that all that is between us and anarchy are the seven vice-regal officers inhabiting their respective Government Houses around Australia. Their scope is in reality entirely dependent of the mood of the government advising them. As Sir Paul Hasluck said: "In normal times, when customary practices and procedures are being followed and the Constitution and laws — are being scrupulously observed, the role of the (viceroy) would seem to be a matter of unbroken routine."

And this is even more true of the State governors than the Governor-General.

But if a reforming government did happen to get elected in a State, and especially if it tried to do some real reforming, then it is almost automatically thrown up against the Governor. This happens rarely in Australia's history, though it did occur most dramatically in NSW in 1932 when the illegal actions of the Lang Government forced the Governor to "do a Kerr" and sack the Premier and call an election (and although like last year, the electorate overwhelming endorsed the Governor's action, this precedent caused such a furor that most Australian politicians assumed — wrongly — that no viceroy would ever dare to do the same thing again).

But the roles of the Governors, after 75 or more years of decline, seem to have turned the corner and there are distinct signs that more rather than less Kerr-like incidents will happen. The Governors are restless and worried and they have some reason to be.

The outspoken one

AS WELL as being Governor of NSW, Sir Roden Cutler acts as Administrator of the Commonwealth when the Governor-General is absent from the country. Sir Roden has performed this function many times and is almost as familiar with Yarralumla as he is with his castellated residence overlooking the Opera House on Sydney Harbor.

When the Governor is absent from his own State he is replaced by the Lieutenant Governor who is normally the Chief Justice of that State. This practice, combined with the modern habit of appointing Australians to governorships, means that the Chief Justice, having had experience as Acting Governor, is an ideal man to step into the shoes of a retiring governor.

Like the other governors — and perhaps more so, being Governor of the senior and most populous State — Sir Roden has a busy social life, flying around NSW and giving his full ration of functions in Government House, Sydney. But his main interest, and on which he spends a great deal of his time — again more than the other governors — is what he calls his "official business."

He presides over his Executive Council once a week and performs many other formal duties. Among other things he is Official Visitor to several NSW universities (which meant that he was almost dragged into the current controversy at the University of Sydney over a new economics chair). He pardons criminals, receives deputations and letters requesting his help and he has many other duties.

In fact he firmly believes he has too much to do in the way of petty details. Every clerk or typist appointed to the Public Service has to be approved by him (a formality of course) and every parking fine that has to be annulled must go through him.

Statutes dating back to the early days of the colony when the Governor was all-powerful still require his signature for all manner of executive acts, such as the release of Crown land, granting of holidays and so on. Sir Roden believes that many of these functions should be taken from him so he can devote more time to the more important aspects of his job.

But the key function is his job as President of the Executive Council, a shadowy body which few people know about and yet whose functions determine a great deal of what goes on in every State and indeed in the Commonwealth. Remember it was the Federal Executive Council which approved the starting of Labor's chase after Arab loans. Usually the Executive Council consists of the Governor and the Cabinet of the day, although not everyone has to be present at every meeting, and it is common for only three people to be



SIR RODEN CUTLER with the Usher of the Black Rod, Mr K. C. McRae, after opening NSW Parliament.

present, the Governor and two of his ministers.

Note the use of the word "his." Under the Constitutions that determine how each State is run, the Premier and his ministers are merely the Governor's advisers and all executive acts including the passing of parliamentary bills are not law until the Governor signs them.

All executive councillors including the Governor take an oath of secrecy never to reveal what goes on at Executive Council meetings. This is designed to ensure that what does go on is totally frank and that no effort is made to mislead the Governor. Even so the Governor keeps a very close watch over the business that goes through the council each week (virtually ALL government business — down to the appointment of a minor secretary).

Tradition-bound

Sir Roden has probably the biggest workload of all the governors because NSW is not only the busiest but the most tradition-bound. He approves about 300 items a week at the meetings, brought up to him at Government House by the ministers with boxes of supporting documents. Most documents he gets several days before the meeting and he burns the midnight oil going through them with, if not a fine toothcomb, then a very experienced eye for such things as errors or insufficiently documented submissions.

It is quite common for him and the other governors (although here the more experienced and the more legalistic are more active) to query quite a number of items. It is

also open to ministers to query other ministers' items of business, and in this way contact and channels of information between the various ministers are kept open.

Sir Roden also believes he should be free to speak out on "crucial issues." This does not mean political issues, of course. But Sir Roden feels that he is perfectly entitled to state his views, and what he thinks are the views of the people of his State, on such broad matters as defence. Recently Sir Roden flew off to a flooded area of NSW to inspect the damage and to extend his sympathy. He did this off his own bat — not on the advice of his ministers. And this indicates some of the independence he sees in his role.

Sir Roden is one of the most popular holders of his office (when he was appointed he was the only Australian Governor at the time). He trained as a diplomat, won a VC in World War II and lost a leg, which makes some of his official duties — for example, dancing — very onerous. But he does not flinch from these physically demanding obligations. He attends every Anzac Day dawn service, which entails standing for long periods.

When he travels around the State he goes by normal scheduled airlines and stays at motels as if he were just another citizen. If he finds himself in a country town he will go into the local pub and have a drink. However, he does realise that his job means having to maintain a certain distance and he, like the Queen, must choose his "walk-about" adventures with some care so as the dignity of his office is not prejudiced.

The governors' duty to speak out

THE INHABITANT of what is regarded as Australia's most beautiful Government House — Hobart — is Sir Stanley Burbury. Tasmania's Government House looks like a Scottish hunting lodge, perched on a hill in Hobart's Botanical Gardens overlooking the Derwent and the still-incomplete bridge.

Sir Stanley Burbury, whom people may recall was chairman of the Voyager Royal Commission, believes governors should say much more than they do, especially about important issues of the day. He is a staunch defender of the office of Governor and believes they have an active role to play in their States.

In his Anzac Day speech this year, Sir Stanley warned that apathy and complacency were a threat to Australia's democratic institutions. He added that Australians needed an iron will to preserve their heritage of freedom.

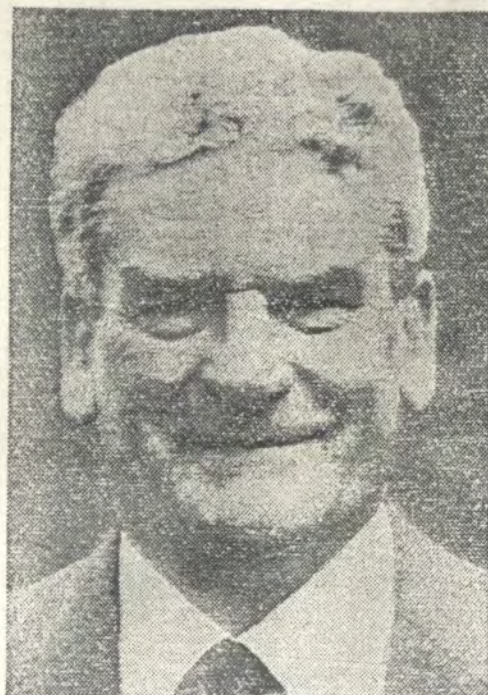
"Let us heed the warnings given by such men as Solzhenitsyn and Kissinger that Christian Western democracy is in danger through apathy and complacency in the face of the progress of communism," he said. "Let us remember that the enemies of freedom are around us and that the citadel of freedom can be as surely destroyed from within as from without."

Sir Stanley takes great care with his speeches and obviously delights in being slightly daring. He also thoroughly enjoys the job as Governor — "far more enjoyable than I thought it would be."

Country tours

Despite a bad leg — caused by polio — he is very active, playing bowls regularly at Royal Hobart Bowling Club (where he is regarded as "one of the boys") and entertaining at Government House, seeing about 6000 people a year. He has the usual quota of formal dinners and receptions, but because of the comparative smallness of his bailiwick he makes many more country tours, travelling in his car around Tasmania seeing and speaking to people. He believes the warmth of his reception indicates that he is reasonably successful in his job.

Sir Stanley, though he has



WA's Kyle



Tasmania's Burbury

family connections here I would have felt it more. You see, I'm nearly 67. I've had a marvellous life and at my age I want to enjoy life in a reasonably relaxed way."

In the name of relaxation, Sir Wallace will soon go to Rottnest Island and ride a bike. "Why not?" he said. "It's the only way to get around on Rottnest." Sir Wallace and Lady Kyle (born Mary, but called Molly all her life) have booked themselves into an army house on the island and will take with them one of their daughters and her children out from England.

Sir Wallace takes his job very seriously. Although he doesn't enjoy public speaking he spends long hours working on his speeches, which he always records into a tape-recorder before polishing. His official secretary, Wing-Commander Peter Larard, helps him with this work as well as the executive business along with the Governor's aide-de-camp, Squadron-Leader Richard Lilley.

Security

The rest of the staff of Perth's convict-built Government House, nestling near the Supreme Court at the end of St George's Terrace, includes a butler, a first footman and two assistants, a head housemaid and one assistant, a chef, a first cook and a kitchenmaid. There is also a devoted head gardener (helped by gardeners from the Public Gardens Department), a lady-in-waiting for Lady Kyle, a stenographer-secretary, a receptionist-clerk and a duty policeman — which is hardly overdoing security.

At some official functions he would like to say more of what he thinks, but doesn't.

"It's true that a Governor is somewhat deprived of a forum," he admits, "but rightly so. I would often like to express my view, but only with the authority of my age and experience, not with the authority of being Governor. Sadly, you can't do that except in private because it may be misrepresented."

In three years time Sir Wallace could be offered a second term as Governor of WA. If so, he is unlikely to accept. "I will be 70 years old then," he says. "I think that will be time to call it a day. Like lots of things, though, I will judge that problem on its merits if and when the question arises."



All the Queen's men

ROBERT DARROCH continues his State-by-State survey of governors and their attitudes

been Governor of Tasmania for three years, is still very much a man of the law, his life-long career (though he and his wife have dabbled in amateur dramatics and were formerly stalwarts of the Hobart Repertory Theatre Society). He was a chief justice of his State, after being a QC and Solicitor-General.

Governors' wives have their own roles, often independent of their husbands'. They are expected to open fetes, chair society luncheons, head charity committees and generally act the part of the female governor. Lady Cutler of NSW, who has been in Government House Sydney for ten years, is particularly busy, being the head of the Girl Guides and many other organisations.

Often when people send invitations to the Governor and he turns up without his wife they look surprised and it then has to be explained:

"But you didn't invite Lady So-and-so."

Being related to the Governor or even being merely a friend is fraught with difficulties. Even members of their families have to be careful to observe protocol in the presence of third parties, and it becomes very difficult if the Governor is invited out by an old friend to determine where friendship ends and where protocol starts. This adds to the loneliness of the job.

My colleague, Bob Duffield, reports from Perth:

The Governor of Western Australia, Sir Wallace Kyle, was born in Egan Street, Kalgoorlie, and attended Guilford Grammar School. He joined the RAF as a cadet in 1928 and began a 40-year career which ended with his retirement as C-in-C of Strike Command in 1968. Seven years later Sir Charles Court, Premier of WA, called at his

house in Hampshire and asked him to succeed Sir Hughie Edwards as State Governor.

It was a difficult decision for the almost totally anglicised Wallace Kyle — most of his children and grandchildren live in England and he would miss them. However, he agreed to take the post, feeling that he should regard it as an honor and privilege "and if I declined I would regret for the rest of my life having failed to meet a need and a challenge."

Sir Wallace concedes that being Governor can be lonely sometimes: "You have to remain a little remote; I think people expect it." This makes it hard to cultivate close friends: "The Queen has private friends in London — but she can't really relax in public with them and, by extension, I can't, either."

"This remote image has not been a strain but if I hadn't

"The Australian" Tuesday 17 August 1976

Why Dunstan chose Sir Doug

By ROBERT DARROCH

THE attacks of the mob on Sir John Kerr have worried Australia's governors greatly, but what worries them even more are the recent actions in South Australia by the Labor Premier, Mr Dunstan.

The bottle-throwing and name-calling of the anti-Kerr demonstrators are probably a passing phase, damaging to the office of viceroy in Australia, but bearable. In fact such incidents could help the governors by rallying support around them and bringing them out of the constitutional shadows into the public limelight.

But the appointments by Mr Dunstan to Government House in Adelaide, along with other less well-known actions of his, threaten to undermine both the office of governor and the future of vice-regal rule in Australia and this poses problems for the rest of Australia, too.

The reason why Mr Dunstan chose Sir Douglas Nicholls could have been noble. Sir Doug is a distinguished Australian. He is a leader of his race and there is no reason why an Aboriginal should not be appointed governor. Sir Doug is also a very religious man, a man of high principles and fine integrity: characteristics that are needed in the discharge of the office of governor.

But Sir Doug is also very inexperienced. Worse, he is inexperienced in those skills which quite patently a governor needs — the law, politics and public life.

FIGUREHEAD

The suspicion many people hold is that the reason why Mr Dunstan chose Sir Doug to succeed Sir Mark Oliphant was not those first fine characteristics — honesty and so forth — but because Sir Doug singly lacked those second set of characteristics. Mr Dunstan deliberately decided to follow Sir Mark with a man who would prove no problem.

The Premier was determined to have in Government House, Adelaide, only a figurehead — not because Sir Doug would be Mr Dunstan's man through weakness — but because he could not have the necessary knowledge to contradict Mr Dunstan.

This is a cynical view, but it is widely held. All the other governors feel deeply sorry for Sir Doug. They believe he is being imposed on by Mr Dunstan.

The reason why Mr Dunstan might want a pliable man in Government House is easy to see. As mentioned in yesterday's article, if a reforming government genuinely tries to make reforms, then it is — because of the nature of the office of a viceroy in Australia — automatically thrown up against the governor. He is sworn to uphold the laws and the Constitution, and any real attempt to reform must put pressure on both the law and the Constitution.

DIGNITY

Even before Sir John Kerr sacked Mr Whitlam, the possibility that something like this could happen might well have occurred to Mr Dunstan. For when he made Sir Mark Oliphant governor he was entitled to expect, perhaps, that a scientist and fairly radical person, by repute would be in no position or mood to interfere with Mr Dunstan's reforms.

But Sir Mark did not prove to be a puppet. Almost from his first day in office he indicated to Mr Dunstan that the dignity and decorum of the office would continue to be upheld. This must have piqued Mr Dunstan considerably. It is no secret in Adelaide that relations between Mr Dunstan and Sir Mark over the past four years or so have deteriorated rapidly.

The disputes have been minor, some over domestic arrangements in Government House. But whenever Mr Dunstan has tried to put pressure on Sir Mark he has been met with a polite rebuff.

CONTINUED PAGE 11

Darroch: Dunstan and Sir Doug

CONTINUED FROM PAGE 1

It seems that Mr Dunstan mistook his man.

Sir Mark, though no great shakes at constitutional law, has had wide experience in administering universities and has a judgment and appreciation of major issues that more than make up for any expertise he might lack.

Mr Dunstan could not have been expected to make the same mistake twice, a determination which must have been reinforced triple-strength by Mr Whitlam's experiences with Sir John Kerr.

In any case, the choices open to Mr Dunstan after November 11 last were pretty slim. A legal man was out of the question; the Labor Party would not have worn it. Anyone with any possible conservative bent was equally out. Even Labor politicians were a dicey proposition — vide Sir John Egerton's troubles. In fact no Labor politicians would have taken on the role: it would smack of justifying the vice-regal role.

The dilemma facing Mr Dunstan was aggravated by a motion put up for debate at this year's South Australian State ALP conference. This called on the State Labor Government to make sure the man to succeed Sir Mark was true-to-the-last Labor, and not a titled man at that. A housewife, or somebody equally innocuous, was suggested.

This put Mr Dunstan in a difficult spot, for he had already decided that Sir Mark's successor would in fact be a titled man — Sir Doug Nicholls. But coincidentally the motion was forestalled because of a leak tipping off the press that Sir Doug was the pea. Fortunately Sir Doug, being the honest man he is, confirmed the leak, thus getting Mr Dunstan out of a potentially nasty hole.

But this was not the end of Mr Dunstan's finangling at Government House.

The lesson Mr Dunstan drew from the events of November 11 was that it was not enough to think you have Government House covered and compliant. You must try to make sure. And with the apparent object of achieving this Mr Dunstan decided to change things around a little at Government House.

Normally when a governor is appointed he retains the staff of the previous governor — at least for the time being. This is handy because it ensures continuity and gives the new man benefit of the experience of the old staff. For a man like Sir Doug Nicholls this sort of experience and advice would be especially needed.



SIR DOUG NICHOLLS . . . honest—and no fool

So when Sir Doug's appointment became public, the present head of the Government House staff, Mr Dick Henderson, indicated to Sir Doug that if he wished him to stay on, he would. Sir Doug in turn indicated that he would like Mr Henderson to remain.

A week later, however, Mr Dunstan announced that Mr Henderson would be replaced as the Governor's private secretary. Indeed, he went further. He combined two positions — that of the private secretary and the official secretary (the latter post being the formal liaison between Government House and the Government).

To this new post he appointed a former official of the South Australian Premier's Department, a career public servant, Mr John White, at present South Australian Agent-General in London.

Independent

Mr Dunstan, who had apparently come to regard Mr Henderson as a "Governor's man," was determined that not only would Sir Doug not have access to a source of advice seen to be independent, but the man who would be his main contact with the outside world would be Mr Dunstan's nominee.

However, my inquiries show that Mr White, who served

four premiers from Sir Tom Playford to Steele Hall, is a man of ability and independent mind, not at all easily pushed around.

This change-around, which certainly gives the appearance of being forced on Sir Doug after he had made other arrangements, is a drastic departure from the normal practice. The Governor always appoints his own private secretary, as he does the rest of his staff.

If Sir Roden Cutler or Sir Henry Winneke were told by their premiers who to appoint as their private secretaries they would be most affronted.

Indeed, the premier has no right whatsoever to dictate to the governor whom or whom not he should appoint to his staff. Otherwise it would mean that the governor could be the servant of the premier — instead of the other way round.

But the other way around is possibly what Mr Dunstan had in mind.

Many people in South Australia are worried about the position of Sir Doug. They feel he is being taken advantage of by Mr Dunstan.

The other governors are also worried about their own positions. It is a reasonable guess that Mr Dunstan's selection of Sir Doug reflects a strong line of thinking in the Labor Party throughout Australia. The governors fear that if this

line continues, then their jobs and their roles could become untenable, just as Sir John Kerr is finding his job almost impossible.

No one likes to be hated or to be mistrusted; for men like Sir Stanley Burbury, Sir Henry Winneke, Sir Roden Cutler and the other governors to be regarded as incubuses, fools or aunt sallies — to be attacked and denigrated and their office made light of — would be intolerable.

The Labor Party and Mr Dunstan could find that any effort to make the office of governor into a hollow shell could come unstuck. (There is almost no way the office can be abolished without referendums and amending legislation, and in the Australian context this is not feasible).

Trying to abolish the office by making it ineffectual could also go wrong. As Henry II found out with Thomas a'Becket — and Mr Whitlam found out with Sir John Kerr — it is the office rather than the man that often determines how an individual reacts.

Early election

Sir Doug Nicholls is no fool. More importantly, he is a very honest man, and one who will not be imposed upon, as his clash with a TV reporter showed. It might well be that the office again will determine what sort of reaction Mr Dunstan gets from Government House.

Sir Doug takes over from Sir Mark Oliphant on December 1, and it might not be very long before he is called upon to take important decisions in South Australia. Mr Dunstan has a majority of only one in the Lower House. If he were to see the chance to improve his majority, he could well seek an early election.

This is one decision that the viceroy is not committed to agree with the premier on. As Sir Paul Hasluck has said — and many other authorities have agreed — the viceroy must be sure before he agrees to an election that it is being requested for genuine and proper reasons. If he thinks that the Parliament is still workable, and that Mr Dunstan is seeking to go to the polls early merely because he is high on the opinion polls, a governor could say: "No."

What Sir Doug might do in this circumstance is a matter of speculation. Certainly an inexperienced governor would be hard put to go against his premier's advice.

Which is why, of course, Sir Doug Nicholls was appointed to Government House — instead of a Chief Justice like Sir John Kerr.

18 August 1976



YARRALUMLA . . . seat of more power than most people imagine

No mistake now, they have power

ALTHOUGH the Queen is nominally Australia's head of State, we actually have seven heads of State — the Governor-General and the six State governors.

For most of the years of responsible government in Australia, the viceroys' reign has been discreet almost to a point of invisibility. In fact, they have had a much greater influence than most people imagine. The solitary Federal example of Sir John Kerr obscures numerous other occasions in the States.

Since 1900 there have been at least two major assertions of vice-regal power in NSW (by governors Strickland and Game), several in Victoria, at least one in South Australia, and a number in Tasmania. And this does not exhaust the list.

Ambit

Each time the governors in question have acted gingerly, fearfully looking over their shoulders — not at the electorate or their advisers — but at England and the British Colonial Office. For, while the British authorities kept a close eye on what their viceroys did in Australia, the governors had to tread warily. Several were severely rapped over the knuckles for acting wrongly, and at least one was recalled.

So while the link with London was strong, the ambit for the local viceroys to act independently was slight. They had occasions aplenty that threw them up against the actions of their governments, but they interfered sparingly. Now, however, with the link to London virtually non-existent, the chances of vice-regal action are much increased and some people fear that Sir John Kerr's action could be the tip of the iceberg.

At least two current governors recognise this fact, and one of them quite openly admits its ramifications.

In Tasmania Sir Stanley Burbury has taken the Australianisation of the office of Governor to its logical conclusion and recognises that he is his State's head of State. He takes the final decision on what his reserve powers are and when he might exercise them — without consultation with the Queen and the British Government (though, like Sir John Kerr, he would probably inform them what he was doing).

Sir Stanley sees it as quite improper for a nation such as Australia to be beholden to Britain in such matters. Most people would agree. However not many have taken the next step and asked: who decides what this new, non-British role will be? If they did, the main answer they would come up with is: the governors themselves.

A literal reading of the Australian Constitution gives

the Governor-General huge powers. He can even sack the joint chiefs of staff and order troop movements around Australia. But the Constitution in no way defines or limits his powers: it merely relates them to the powers granted in 1901 to the Federal Parliament.

If it is decided that the power of the viceroy to exercise his reserve authority is to be changed, then little can be achieved by altering the Constitution, which is basically a split-up of power between the Federal Government and the various States.

Likewise, the State constitutions only lay down how the various State legislatures and the governors interact. To understand the full scope of vice-regal power in Australia you have to refer to the letters-patent, which are the main basis of the role of viceroy.

The letters-patent establish that the powers of the governors are those of the Queen in England. These powers, which date back to feudal times, are virtually absolute. They even allow the head of State to intercept private communications between subjects.

It is the nature of these fearsome residual powers that frighten ordinary people and make the governors themselves nervous. Several feel that if their exact roles were more rigorously defined, much of the current criticism would disappear.

The Prime Minister, Mr Fraser, floated an idea similar to this at the Constitutional Conference in Melbourne the weekend before last. He suggested that the decision on what to do if the Senate were to block supply should in future be taken out of the Governor-General's hands and an election should automatically ensue.

This would make it possible, for example, for someone like Prince Charles to succeed Sir John. Prince Charles could not take the job while the possibility of another Senate deadlock remains, for he could not be put into the position Sir John Kerr was.

The same sort of objection also makes it difficult to other people to accept vice-regal office in Australia in the present climate. Many men of stature would feel diffident about taking on a job that could be fraught with trouble and controversy. After all, the

pay is not all that good, considering the hours, and it is only the dignity of the job that provides its main attraction.

As well as having their roles redefined, several of the governors would like to be freed of some of their tasks, and would like other aspects expanded. They believe that much of the weekly business of the Executive Council could be done by ministers, also a lot of the socialising could be curtailed.

All of them would like to be relieved of the interminable speech-making — or at least provided with a speech-writing and research staff to do the job properly.

One role that particularly appeals to several of the governors is that of a sort of super-ombudsman. These governors feel that the most useful part of their present jobs is acting as an alternate or extra channel of information for the Government. They feel that as their position puts them in the position of personifying the Crown and the Government then they are in a unique position to make the Government more human and humane.

Experience

Both Sir Stanley Burbury and Victoria's Sir Henry Winneke believe in an active, positive role for the Governor, overseeing all the actions of their politicians and playing the role of extra check and balance, watchdog and schoolmaster.

They believe that to discharge this active interpretation of the office, the incumbent must be a very experienced man, someone with a good knowledge of the workings of the law and politics. Both ex-chief-justices, they see it as a disadvantage to lack a legal background. (Contrast this attitude to that of Mr Dunstan in South Australia.)

Queensland's Sir Colin Hannah, an ex-RAAF officer, thinks people from a much wider spectrum can fulfil the role, though he agrees that administrative experience is essential.

In NSW, Sir Roden Cutler, a diplomat, believes most people who have come to the top in their sphere could make a good governor. With the late Lord Casey he agrees

that what is most needed is a man of the world, one well-versed in the hurly-burly of public life.

Sir Mark Oliphant tends to agree. He has found being a scientist no disadvantage. He believes the ability to think clearly is just as important as legal or other official experience.

There have been suggestions that governors should be protected from the threat of summary dismissal by their premiers.

One suggestion canvassed is that, like judges, governors should be unable to be removed except by impeachment or the expiry of their terms. But at least one governor — Sir Roden Cutler — strongly disagrees. He believes that governors should be instantly dismissible. "If a governor loses the confidence of his ministers, or vice versa, then he himself should resign," Sir Roden told me.

But fears that we are in for more Kerr-like incidents may be unfounded. The governors don't want this sort of notoriety and they are anxious to avoid confrontations. While the existing system has its problems, the alternatives are even less attractive.



All the Queen's men

ROBERT DARROCH concludes his examination of The Governors with an assessment of the future of the viceroys office

THURSDAY 19 AUGUST 1976

Sir Doug not a political choice —Dunstan

THE Premier of South Australia, Mr Dunstan, has denied suggestions that the appointment of Sir Douglas Nicholls to succeed Sir Mark Oliphant as State Governor was politically inspired.

Mr Dunstan said angrily *The Australian's* article on Tuesday — part of the series All The Queen's Men by Robert Darroch — demonstrated disloyalty to the Queen.

To meet Darroch's statement that the other State governors had a measure of sympathy for Sir Douglas, Mr Dunstan has been in touch with the Labor administrations in NSW and Tasmania, and issued this statement:

"I have been assured by the Premier of NSW, Mr Wran, that the Governor, Sir Roden Cutler, has not made any comment to any person concerning the appointment.

"I am assured that the Governor of Tasmania, Sir Stanley Burbury, made no comment on this matter to Mr Robert Darroch of *The Australian* newspaper." (Sir Stanley is abroad.)

Today *The Australian* publishes on page 11 a long letter of protest from Mr Dunstan and a letter from Sir Mark Oliphant which describes his "cordial relations with Mr Dunstan."



All the Queen's men

'It's an attack on Her Majesty herself...'

Don Dunstan
writes to *The Australian*

THE ARTICLE which you have published, written by Robert Darroch, attacking the appointment of Sir Douglas Nicholls as Governor of South Australia, and Mr John White as the governor's secretary, not only contains gross errors of fact, but is defamatory and disloyal to the Queen.

Your reporter says, "But Sir Doug is also very inexperienced. Worse, he is inexperienced in those skills which quite patently a governor needs — the law, politics and public life." On the contrary, Sir Douglas Nicholls is more knowledgeable in each one of these areas than almost any of his predecessors.

In the course of his very considerable public activities, Sir Douglas Nicholls has had to cope with questions of the law and its administration and of politics. The law as it affects his people has been something he has had to concern himself with very closely, and nobody can say that his pursuit of reforms in Australia has left him without knowledge of the politics of this country and how they work.

He is much more closely experienced in these areas than were some previous governors of South Australia, who were retired British or Australian service chiefs whose knowledge of the law was slight and whose involvement with, or knowledge of, politics was necessarily similar. As an adviser to numbers of governors, I can testify that Sir Douglas's knowledge of constitutional position exceeds the knowledge which some of them had when they took office.

Your reporter says, "All the other governors feel deeply sorry for Sir Doug. They believe he is being imposed on by Mr Dunstan." I cannot believe that any governor in Australia would authorise your reporter publicly to state such an opinion on their behalf. For any governor to say this would be grossly improper and a reflection, as is the article itself, upon the decision of the Queen.

The appointment of governor is not the prerogative of the State Government. The State Government may merely advise the Queen. The appointment is ultimately the Queen's. It takes some time between when advice is tendered and a decision is made by Buckingham Palace, because the palace makes necessary and independent inquiries before Her Majesty can be satisfied that the advice of her ministers in this important matter is correct.

Your correspondent must have known this from his investigation of a governor's position in Australia. The whole tenor of his article is that the governors must exercise an independent mind to see that executive advice given to them is proper.

The Queen, of course, is in no different position, and the attack which your paper has made upon the appointment of Sir Douglas Nicholls is not only an attack upon the advice tendered by ministers to Her Majesty, but on Her Majesty herself.

Your reporter goes on, "If a reforming government genuinely tries to make reforms, then it is — because of the nature of the office of a viceroy in Australia — automatically thrown up against the governor." That statement is completely wrong.

The reforming work of the South Australian Government has never been the subject of conflict between the Government and the governor. The reforming Government of

South Australia is known to have introduced far more reforms than any other in this country within the last decade. There has never been a case of conflict with the governor — any governor — on any of these reforms.

The Government of South Australia has acted properly and within the Constitution. To suggest that a governor should have a "mood to interfere with Mr Dunstan's reforms" is a gross reflection upon the governor and his office.

Your report continues, "But Sir Mark did not prove to be a puppet. Almost from his first day in office he indicated to Mr Dunstan that the dignity and decorum of the office would continue to be upheld. This must have piqued Mr Dunstan considerably. It is no secret in Adelaide that relations between Mr Dunstan and Sir Mark over the past four years or so have deteriorated rapidly."

That statement is defamatory, untrue and completely without foundation. I have never questioned that the governor's office should be maintained with dignity and decorum. The only changes which were made in procedures at Government House which reduced some previously used formalities were on Sir Mark Oliphant's suggestion. There was no reason for me to feel any pique, and I have felt none.



MR DUNSTAN

To say that it is no secret in Adelaide that relations between Mr Dunstan and Sir Mark have deteriorated is a nonsense, because it is a secret from Sir Mark and myself. Neither of us is aware of any deterioration in our relations, which remain as they ever were — cordial and indeed affectionate.

Your correspondent goes on, "The disputes have been minor, some over domestic arrangements in Government House. But whenever Mr Dunstan has tried to put pressure on Sir Mark he has met with a polite rebuff." I have not had disputes with Sir Mark, even about domestic arrangements. I have never tried to put pressure on Sir Mark, and in consequence I have never met with a rebuff, polite or otherwise.

Your reporter continues about what he says is my "finangling" (sic) at Government House, and suggests that I have improperly got rid of Sir Mark Oliphant's secretary, Mr Henderson, and appointed Mr John White to the position for evil motive. The statements leading him to this conclusion are uniformly wrong.

At the time of discussion with Sir Douglas Nicholls of his accepting that we should put his name forward to the Queen, I discussed with him the question of the appointment of an extremely experienced official secretary. We agreed that the appointment of Mr White would be most beneficial.

Subsequently, a press man questioned Sir Douglas about present Government House staff. At that time Sir Douglas had not been fully briefed

on the position of all staff at Government House, because he was being questioned after a press leak which led to an announcement of his appointment before in fact it had been approved in Buckingham Palace.

Sir Douglas said he did not want to interfere with the present staff at Government House, but wanted to retain the general staffing position. At the time he did not realise that in talking of the private secretary he was also talking of the position which I had discussed with him.

Your reporter says, "He (ie, the Premier) combined two positions — that of the private secretary and the official secretary." That is quite untrue. There has been no change in the position of secretary to the governor, who acts both as his official and private secretary. The post which Mr White will take up is precisely the same post as Mr Henderson has always held. Mr White will retire from the Public Service on his return to South Australia and take up the post with the same functions and independence as it has always had.

Your reporter further says "The governor always appoints his own private secretary, as he does the rest of his staff." That is not true. It has always been the requirement in South Australia that the secretary to the governor is appointed by the Governor-in-Council, i.e., by the governor on the advice of his ministers.

The reason for this is that in South Australia the secretary has a number of official duties, including attendance on special occasions at Executive Council itself. Mr Henderson's appointment was made in Executive Council as previously. There has been no departure from that practice on this occasion.

It is suggested that I came to regard Mr Henderson as a "governor's man" and that I did not want Sir Douglas to have access to a source of advice seen to be independent. Those statements are completely untrue. I have no occasion to think of Mr Henderson as a "governor's man" or in any other partisan light.

Mr Henderson is well aware of the reasons for the Government's advice in relation to this appointment. I have discussed this with him and with Sir Mark Oliphant, but it would not be proper for me to make further public comment upon it, other than to say it in no way arises from matters such as you suggest in your article.

The suggestion that Mr John White will not be a person who will give Sir Douglas Nicholls the kind of independent advice and service which a governor's secretary should properly give, is grossly defamatory of Mr White, an outstanding public servant who has served governments in South Australia, of whatever political complexion, with loyalty and ability. He was personal secretary to Sir Thomas Playford, Mr Frank Walsh, myself, Senator Steele Hall, myself again, and then has occupied the post of Agent-General in London (also a post requiring independence and loyalty to public duty) with distinction.

One can only speculate as to the reasons why you have seen fit to publish this scurrilous, untruthful and disgraceful attack upon a great man and a great appointment. I can only conclude that this wretched piece of journalism is part of the editorial policy of your paper in an endeavor to attack Labor governments in Australia and their disagreement with the course followed by Sir John Kerr last November.

— DON DUNSTAN.

Robert Darroch replies:

THE OBJECT of the Governors' series, including the article to which Mr Dunstan refers was to point out that: vice-regal office is important; it is currently under attack; and the degree to which it survives or succumbs to attack is vital to all Australians.

In this context Mr Dunstan's actions appeared to me to reduce the scope of vice-regal authority in South Australia.

The reason why I wrote the particular article on Sir Doug Nicholls was not to attack anyone, nor to be disloyal. It was to show that Mr Dunstan's actions gave the appearance of making the office of Governor in South Australia weak rather than strong. Nothing in Mr Dunstan's letter causes me to alter my opinion that this apparently was and is his aim. If he is not trying to do this, then he is giving the wrong impression.

As to errors of fact he claims I made, I will not argue with him except to say that I believe my information on all major points is correct. It came

from sources which I regard as authoritative.

I did not impugn Sir Doug's abilities, nor Mr White's. Indeed, I wrote that their careers provided ample reason to believe they would discharge their new duties with integrity. Neither was there any intention to pass judgment on the rightness or wrongness of Mr

Dunstan's actions.

No governor authorised me to state his feelings about the appointment — as Mr Dunstan rightly says, this would have been improper. But I gained the distinct belief from the governors that they had misgivings about the appointment and that they felt great sympathy for Sir Doug.

Relations cordial, says Sir Mark

I WOULD like to correct the impression given in the front page article, "Why Dunstan chose Sir Doug" (August 17), that relations between the Premier and me have deteriorated rapidly over the past four years. In fact, throughout my term of office, I have enjoyed the most cordial relations with Mr Dunstan and members of his Government. I have been treated with kindness by all members of Parliament, Government and Opposition, and by the public. Indeed, as my knowledge of them and of their many problems has increased, understanding has improved continually.

— MARK OLIPHANT, Governor



BUCKINGHAM PALACE

5th August, 1976

Dear Sir

I now have your two letters of 27th and 29th July to answer. Both have of course been read with close attention by The Queen.

I think I should begin this letter by saying that whatever Mr. Menadue may think about the desirability of your leaving Yarralumla before The Queen's visit, I could detect no sign of a wish that you should do so in Mr. Fraser's mind. Nor is there any disposition on The Queen's part to wish you to resign.

It will not be the end of the world if there are demonstrations and placards in The Queen's presence when she is in Australia. Precautions must obviously be taken to ensure that there is no violence and that The Queen's security is not endangered but peaceful demonstrations are, I think, perfectly in order and will not, I am sure, spoil the visit.

A sizeable number of Irish yelled and waved placards in Boston at the time of The Queen's visit and I think, on the whole, this added to everybody's enjoyment of a memorable and happy occasion.

Sir Garfield's point about the continuity of monarchical representation during a crisis is of course valid and I entirely agree that if a Governor-General is to act properly he must be able to feel that his position is secure.

I think it is only right that when he is faced with the need to use his reserve powers a Governor-General should have the same security of tenure as the Sovereign in this country would have if the use of reserve powers was necessary here. Security of tenure does not of course preserve the incumbent from criticism but it does at least make it possible for him or her to act without having to stand back-to-the-wall to prevent a knife being slipped in between the ribs.

As I understand it, the question is how can such security of tenure be assured for the Governor-General of Australia and it is clear from your second letter that this problem is not going to be solved in a hurry. It is probably better that we should have substantive discussions on it when we meet in Australia next year rather than by correspondence. By then we shall know whether or not there is to be a referendum and other ideas, such as the contractual arrangement mentioned at the foot of page 2 of your letter of 29th July, will have become more developed.

I think at this stage I should confine myself to asking one question and making one observation in respect of

the proposition that the Crown should seek to move towards the assertion of a "reserve power" in so far as the continuity of the monarchical representation is concerned.

My question is, what does your trained legal mind tell you in this matter when you study the Constitution? Is there anything in it on which the assertion of a reserved power could be based?

My observation is this. The action you took last November undoubtedly saved The Queen from great embarrassment. Had Her Majesty been faced with a demand for your dismissal she would have been immediately and personally involved in the crisis and whatever she had done would have been open to criticism.

As you know, I do not believe she would have been able to resist the Prime Minister for very long had he been determined to get rid of you, and I do not consider she would have had any real choice other than to accept "advice", extremely distasteful as it would have been to her, to do so.

But what would the Crown do in such circumstances if it had a real discretion? How could it, at 12,000 miles distance, and inevitably not in touch with the day to day events, have the knowledge and feel for the actual situation to make what would be a very difficult political and Constitutional decision, with incalculable consequences? This seems to me, from the common sense point of view, to present a real difficulty.

I have read the press cuttings with great interest especially those stimulated by the Times leader "The Monarchy in Australia".

To me these emphasise that, quite apart from considerations of a settled married life, to which I referred in my last letter, it would be very difficult for Prince Charles to become Governor-General until the Constitutional questions are solved.

Everybody here has a great admiration for the steady and courageous way in which you and Lady Kerr are carrying on: you both have many well-wishers in this house beginning, as you know, with The Queen.

Yours we
Mantlin

His Excellency the Governor-General of Australia.

Government House,
Canberra. 2600.

5 August 1976

I attach some editorials and an article from the Bulletin. As you will be able to see from these and other recent clippings I have sent we are getting a little nearer to more restrained and scholarly discussion. There are as I have previously mentioned, to be two seminars largely dominated by Labor lawyers but even at these the pressure of argument will narrow the issues.

It is always difficult for me to know how far to go in trying to help you through the highly complicated maze of our Constitution. Even the specialists disagree, partly for ideological reasons. There is one point however on which, even at the risk of repetition and of producing obscurity rather than light, I should like to say something.

Section 57, the provision for solving deadlocks between the two Houses permits the storing up of Bills which can be used later to found a double dissolution. There is some difference of opinion in the obiter dicta of the High Court justices as to whether such Bills can be used to found a double dissolution even if allowed to grow "stale" by the passing of time or by the factual disappearance of real dispute between the Houses about them. There is also some difference of opinion about whether they can be used to produce a double dissolution for some reason remote or different from the actual legislative differences inherent in the Bills themselves and the disputes between the Houses about them.

It is thought by some commentators that I, in some way, produced a double dissolution in alleged reliance upon the existence of the twenty-one stored up Bills when my real purpose was remote and different from any of the legislative disputes involved in the actual twenty-one deadlocks. It is said that my real motive was to resolve a different dispute namely the Supply dispute and my production of a double dissolution to get that issue to the people, relying on the stored up Bills, made the double dissolution illegal.

.../2

First I should say that this totally misunderstands what happened. The Supply issue resulted in the dismissal and the dismissal enabled me to find a Prime Minister who could and did guarantee me Supply. He also immediately obtained it. My new Prime Minister did not however have the confidence of the Lower House, admitted in advance of being commissioned that he could not get it and admitted also that he would have to ask for a dissolution as soon as he was commissioned. No one doubts, except for the charade of the vote of confidence which in any event only confirmed what was the predictable and known position, that he would have been entitled to a dissolution of the Lower House.

In that situation, before commissioning Mr Fraser I referred to the twenty-one deadlocks which he, of course, conceded did still exist - as they did! I said I thought he should consider advising a double dissolution to enable those twenty-one deadlocks to be resolved. He said he would advise me to act under Section 57 to resolve those deadlocks and before being commissioned undertook to do so. He immediately carried out that undertaking. In my discussion with him on this point I said he could lose the election and if he did Mr Whitlam was entitled to his prospect of a joint sitting. Mr Fraser agreed with this. I said this would have the incidental result which in the special circumstances would be the fairest result all round, namely that the Senate which blocked Supply would be going to the people as well as the House. It was fortuitous that this situation existed.

In summary I acted on the new Prime Minister's advice in ordering a double dissolution and the specific reason was to solve the twenty-one deadlocks.

Incidentally, I have never claimed any reserve or other power to dissolve the Senate except under Section 57 and my reference to Section 57 not interfering with the reserve powers was not a reference to some "reserve power" in addition to Section 57 to dissolve the Senate or both Houses. What I was referring to was the "reserve power" to dismiss and to produce a forced dissolution. The accident that in the circumstances it could be a double dissolution was precisely because in the existing circumstances Section 57, under its terms, permitted such a course to resolve twenty-one additional deadlocks apart from the Supply deadlock.

The second point I should like to make is that what Barwick, C.J. said in his judgment would never be regarded by him as a basis for saying that the double dissolution was illegal. I told him on¹⁰ November that if his advice on the dismissal power supported my own approach then my view was that I was entitled to obtain, if I could, a double dissolution

.../3

PERSONAL AND CONFIDENTIAL

3.

on the basis outlined above. I have no doubt at all that even on his judgment from which I shall not quote, referred to in the Bulletin article, the double dissolution granted in the circumstances as explained by me was entirely valid and, of course, no one challenged it. As part of my reference to this point I may say that it seems to me to be very doubtful indeed whether Barwick should have addressed the National Press Club and answered questions "off the cuff" and inaccurately thus leaving some alleged room for the suggestion that we were, or are, at issue on some aspects of what I did. So far as I know he entirely agreed that I could and should obtain such dissolution as the constitutional situation at the time warranted. This will all come out in due course.

I am enclosing a coloured photograph of the Coat of Arms designed for me by Garter and of a letter I have received from him on the point about the Crown in the shield which I should like to have if I can. I thought you should see the whole design.

Please let Her Majesty know that my wife and I are in good spirits and express our usual sentiments of duty and loyalty.

Yours sincerely
John Kerr

Lieutenant Colonel the Right Honourable
Sir Martin Charteris, G.C.V.O., K.C.B., O.B.E.,
Private Secretary to The Queen,
Buckingham Palace,
LONDON ENGLAND

PERSONAL AND CONFIDENTIAL

Bulletin COVER STORY

The dissolution of parliament was the Governor-General's action legal?



Sir John Kerr: was the dissolution decision his alone?

NOVEMBER 11 IN RETROSPECT WAS KERR RIGHT?

TEMPERS aren't getting any cooler. Once or twice a week the police are out sheltering Sir John Kerr from hostile crowds. Rumors abound that Prince Charles will take over his job, and Prime Minister Fraser has to deny he's pressuring the Governor General to resign. The public pursues the controversy over Kerr and November 11 with as much energy as vehemence as ever.

The country has been at it for eight months now; time at least for the shape of the controversy to clarify. It's more clear-cut these days, and as the experts find agreement on some of the fundamental questions raised by November 11, the debate is shifting into new and potentially important territory.

By now most of the constitutional lawyers agree that the Senate had the power under the constitution to refuse the government Supply, and acknowledge that Kerr had the prerogative power to sack Gough Whitlam.

With those out of the way, legally but not politically, the fate of the last parliament is coming in for controversial scrutiny. The experts are asking:

- Did Kerr have the power to sack parliament?
- Has the normal routine for getting legislation through a hostile Senate been fouled up in the process?

• What was Chief Justice Sir Garfield Barwick doing at the centre of things on November 11?

It is a new and radical shift in the debate. While Whitlam stood at the centre of the political stage, attention focused on his dismissal, and the dissolution of parliament seemed just a side show to that. Now it's being argued that the questions raised by the double dissolution go beyond the politics and personalities of the crisis, and are the issues to decide the future impact of November 11.

Let's make clear what the argument is. No one is saying that the new parliament is illegal, or that the courts can reverse the landslide election of December 13. Only speculative purists are saying it could involve either Fraser or his government in litigation at this stage. The argument, simply, revolves around the suggestion that what happened to parliament on November 11 may have been illegal and has consequences for the future conduct of politics in this country.

Barwick has made judicial pronouncements to back these doubts over the dissolution, and in the light of these his already contentious role in the affair becomes more controversial. Barwick has, since the crisis, thrown out hints that on the question of the dissolution Kerr did not have his

backing. The Governor-General may have acted here without — possibly contrary to — the advice of the Chief Justice.

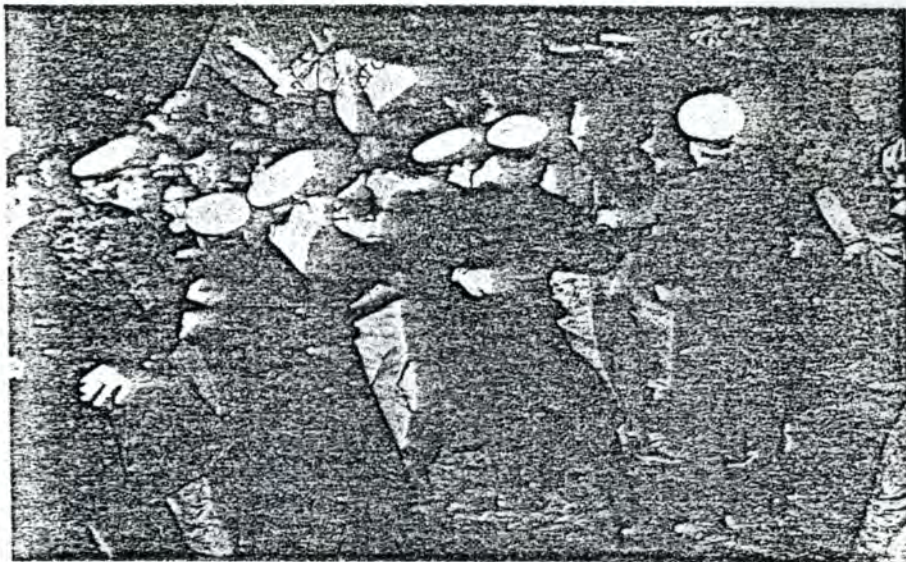
The sacking of parliament came late in the day. Whitlam was gone. Supply was through the Senate, and now Kerr wanted the politicians to go to the people. He chose the device of a double dissolution to do it. He could, perhaps, have sent only the House of Representatives to an election, but he decided to dispatch both Houses, and if there had to be an election (if there could be an election) it was undoubtedly the fairest choice.

At 4.50pm Kerr's official secretary, David Smith, appeared on the steps of parliament before an angry crowd. It was an emotional, noisy scene. The sacked Prime Minister stood behind him on the steps as he read the Governor-General's declaration dissolving both Houses, but jeering and cat calls drowned the announcement. It was no time to catch the legal jargon. Smith read: "Whereas by section 57 of the constitution..."

The declaration said nothing about Supply. It mentioned 21 bills twice rejected by the Senate as the reason for granting the dissolution. The bills were not the caretaker Prime Minister's, nor were they germane to the Supply dispute that had boiled over so spectacularly



Sir Garfield Barwick: what was he doing on November 11?



Eight months have done little to cool tempers over the events of that day

Behind the public posturing of intellectually impoverished demonstrators, who desecrate churches and the like, there is considerable serious thought being devoted to what implications the events of last November 11 may hold for the future of Australian politics. There is no doubt that many of the ground rules have been altered. Staff writer DAVID MARR has sought opinions from the widest range of expert legal opinion available on the subject. This is how he sees it.

earlier that morning — and ended with the passage of Supply legislation at 2pm, some three hours before.

Joe Starke, QC, editor of the *Australian Law Journal*, said afterwards: "It is curious that this inherent paradox ... has received little or no publicity."

Many at the time thought it unfair, nothing more, that Whitlam's bills should be used against him to dissolve parliament, but legal argument soon developed on the issue. Leslie Katz, a law lecturer at the University of Sydney, began working on the point and his evangelising is responsible for much of the growing concern over the 29th parliament's demise. His argument runs like this: Section 57 is the only method we have for dissolving both Houses of Parliament simultaneously before their terms end. The section requires that a bill be knocked back by the Senate twice before the Governor-General can dissolve both Houses. These are simple mechanical provisions.

But the argument goes on: The object of the dissolution power in section 57 is to resolve the deadlock over the twice-rejected bills, and a Governor-General must have that end in view when he uses the power. But that was certainly not the object of the use of section 57 that day — it was used for a different purpose, and so not authorised by the constitution.

Backing for this argument can be held to have come from Barwick and another judge of the High Court during the monumental Territorial Senators case. In a dispute between the Houses of Parliament, (said the judges) section 57, bills can only be used for a double dissolution when the dispute and the bills are connected, when they are tied up in the one package. On November 11 the dispute was over Supply, and the 21 bills dealt with things such as broadcasting licence fees, health insurance, income tax agreements and electoral redistribution.

If Kerr was right (and we come later to the arguments that back him) a fundamental understanding of Australian politics had been stood on its head, and the future impact on parliament is incalculable.

Whitlam (like his predecessors) had tried to pressure legislation through a hostile Senate by threatening to take senators to an election if they brought section 57 into play by rejecting one of his bills twice. What's more he would have had the advantage of timing the election himself — and he did this in May, 1974, with some success.

But as things stand after November 11, a section 57 bill can tip a government out of office, and an administration faced with a hostile Senate is taking its life in its hands having a section 57 bill

around, especially if it thinks the Senate is determined enough to follow last year's precedent and reject Supply. A section 57 bill is dynamite in the cellar; the threat to the Senate becomes, on Kerr's interpretation, a threat to the government.

Tony Blackshield, associate professor of law at the University of NSW, and one of the first and most trenchant media pundits since the crisis began, says: "Sir John Kerr has not created an effective means of solving future budget crises that develop between the House of Representatives and a hostile Senate. By choosing to resolve this deadlock in this way Kerr may have ensured that this is the last deadlock solved."

What will a government be able to do? It can put a bill to the Senate once and have it knocked back without any danger. But it can't afford to put it up a second time, and risk a second rejection. The government will have to cave in or shelve the legislation after only one examination by the Senate. The balance between the Houses has changed radically.

The involvement of Barwick in the argument is puzzling. What can explain his descending from his safe, judicial inaccessibility to share with Kerr the controversy and perhaps the odium of November 11 — particularly when his

views on the gubernatorial strategy are far from clear?

Joe Starke says: "There is a general lack of enthusiasm in the profession even from people of a Liberal persuasion about the role of Sir Garfield Barwick. They are not very enthusiastic about his coming into it."

Some argue that he was the best qualified and most accessible authority for Kerr to approach, and there are constitutional points for and against this view. But a further argument focuses on Barwick, the ex-politician, and Professor Daniel O'Connell, of Oxford, in the course of a long and scholarly defence of Kerr commented that Barwick's participation in events that day could, "engender public disquiet and give excuse to those who stigmatise the events as an establishment plot."

Barwick has not disguised his desire to make his side of the story known. He opened the new National Press Club in Canberra (he'd been the first speaker at the old Press Club) and agreed to face general questions after his speech. It was an unprecedented action for a Chief Justice, and his associate Peter McQueen warned him that questions might be tough and well-drilled. His reply was, in effect, "Let them come." He answered most questions put to him and later in

the street spoke to a group of journalists who had been prominent in the Press cross-examination. He was off the record, but frank. Privately he is said to be equally open and emphatic about his part in November 11.

After lunch at the Press Club he said: "The question of a double dissolution did not arise in the advice which I gave." While some of the answers that day seem muddled in the reading (slips of the tongue? troubles with the transcript?) this answer is clear — and Barwick seems to be saying he was happy to back Kerr's strategy for dismissing Whitlam, but bought out of the business of dissolving parliament.

The question put to Barwick was this: "May the Governor-General use the deadlock legislation (section 57) to dissolve the parliament when the real reason for the dissolution as you said in your judgment was remote and unrelated to the situation in which the stockpiled bills were deadlocked?"

He replied: "First of all I was in the minority expressing that opinion so I must have been wrong. And secondly the question of a double dissolution did not arise in the advice which I gave."

It seems inconceivable that Kerr did not discuss his plans to dissolve parliament with the Chief Justice during

their talks on November 9 and 10, and equally hard to believe that he did not ask for Barwick's support for that part of his strategy. The letter of advice Barwick wrote to Kerr on November 10 is emphatic when discussing Kerr's powers to dismiss Whitlam, but leaves it to others to decide how to disband parliament.

A rift appears between the two men.

Leslie Katz poo-poo's Barwick's disclaimer that his original opinion "must have been in the wrong." Said Katz: "In his answer at the Press Club he didn't even attempt to refute his reasoning in the Territorial Senators case, and he was not — no matter what he says — in a minority on that point. He was in a minority on an entirely different point. He and Stephen J. were the only judges to say anything on whether a dissolution in last year's circumstances would be illegal, and both agreed it would be."

Barwick's role remains a mystery. Perhaps to be asked his advice flattered his sense of what was due to him, and he gave it. It could have been as simple and as human as that.

He is not bound to be silent forever. Once he leaves his post, the last restrictions of judicial etiquette fall away. He will be free to publish, and

though he laughs at the idea when friends accuse him of preparing his memoirs, he is said to be doing so. Perhaps they will set out his legal views in detail, and perhaps they will explain why he intervened at all. Was it more than concern for the general situation that drove him to act? One theory has it that he was obsessed with the dangers of alternate Supply to the financial supremacy of parliament and this propelled him into action, but until he says publicly more than he has already said, we can only speculate on one of the most unusual aspects of the crisis.

To return to the section 57 argument.

Kerr's rationale for his approach to the business of dissolving parliament rests on two separate arguments — one shaky, the other firm but controversial. He claims to have his own prerogative power to dissolve, and said in his statement of November 11 that section 57, "did not cut down the reserve powers of the Governor-General."

It's a lonely position to defend. Judgments of the High Court, including all three of Barwick's judgments in the cases that dealt with the joint sitting of 1974, go the other way. In this question, they say, Kerr is an ordinary mortal: he has to rely on section 57.

But even some of Kerr's most bitter

critics support his right to use the 21 bills to procure a proper double dissolution. It was, they say, just luck they were hanging about and there was nothing to stop him using them.

Tony Blackshield, at odds with Katz, says: "In commonsense terms there is something unfair in the use of section 57 that day, a feeling that as Whitlam's bills were blocked only Whitlam could use the deadlocking procedure. But there is no legal argument here. Kerr could use them and he was fortunate they were there."

The controversy over this continues as constitutional experts gather in Melbourne this week and at a further conference the following week in Sydney, where participants in the eight-month-old debate will be sorting themselves out.

At least the experts have had time to think. Says Blackshield: "Initially all the lawyers who spoke were having to proceed on bits and pieces of British procedure half remembered from their first year law."

"They were giving intuitive judgments, and Bob Ellicott told us that his famous advice was instinctive, written without opening a book. Lawyers, you see, had never needed to exercise their minds on such basic concepts of law."



THE CONSTITUTION

Section 57

If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time . . .

We have put together a chart showing where the constitutional experts stand on the major issues of November 11. It simplifies their positions — and for that the lawyers will hate it — but by sacrificing subtle nuances of argument for a moment it's possible to see the broad lines of debate. Taking it blow by blow:

Supply: There's general agreement that the Senate had the power to refuse it. Some are holding out against this conclusion. Professor Colin Howard who

originally thought it against convention, has hardened his stance and now sees it as illegal.

Sir Garfield Barwick's advising Sir John Kerr: A general thumbs down.

Government without Supply: A tricky question. Many of the commentators supporting Kerr allude to the perils of arrangements Whitlam was supposed to be making to carry on without Supply. No details are given of these. The question then is, assuming the arrangements were mechanically legal,

could Whitlam avoid parliament and carry on? A mixed response. Kerr refers to continued parliamentary control of Supply as, "a fundamental feature of our system of responsible government."

Gough Whitlam's dismissal: At least the power to dismiss him is acknowledged by everyone on the chart. Debate here is now on the business of failing to warn. For Kerr, it's said he would have been sacked had he tried: against him. Joe Starke says: "I think debate centres now on the propriety of

CONSTITUTIONAL EXPERTS' SCOREBOARD



	Senate refusing to grant supply	Chief Justice advising Kerr	Governing without Supply when alternative money is raised legally	Dismissal of Prime Minister by Governor-General	Kerr limiting Fraser to caretaker role	Kerr's refusal to see Speaker before dissolution	Double dissolution of Parliament by section 57	
Sir John Kerr	OK	OK	Contrary to responsible government	Power exists	OK	OK	OK	
Sir Garfield Barwick	OK	OK	Government impossible	Power exists	OK	?	Illegal	
Maurice Byers, Solicitor-General	Against convention	?	?	Power exists	?	?	Illegal	
Gough Whitlam	No power	Improper	OK	Power exists	?	Improper	?	
Bob Ellicott, Attorney-General	OK	?	Constitutional anarchy	Power exists	?	?	?	
Geoffrey Sawer, Prof Law, ANU	Against convention	Unwise	OK	Power exists	Undecided	Undecided	OK	
Daniel O'Connell, Chichele Prof Law, Oxford	OK	Questionable	OK	Power exists	?	Speaker's message a charade	OK	
Colin Howard, Hearn Prof Law, Melbourne Uni	Illegal	?	Serious blow to government	Power exists	Startling innovation	Against convention	Doubtful	
Gareth Evans, Senior Lecturer Law, Melbourne Uni	Against convention	Improper	Undecided	Power exists	Bad thing	Outrageous	Doubtful	
Paddy Lane, Prof Law, Sydney Uni	OK	OK	Illegal	Power exists	OK	OK	OK	
Tony Blackshield, Assoc Prof Law, Uni NSW								
(1) Before Nov	Against convention	Illegal	OK	Power exists	Wrong	Discourteous	OK	
(2) After Nov	OK	Illegal	OK	Power exists	OK	Discourteous	OK	
Dr Paul Gerber, formerly Qld Uni	OK	OK if issue not in courts	Impossible	Power exists	Principle OK, but Whitlam not Fraser	Undecided	Legal, but a device	
Leslie Katz, Lecturer Law, Sydney Uni	OK	Improper	Undecided	Power exists	Wrong	OK	Illegal	

the Governor-General's actions in not telling Whitlam that he might have to terminate his office, that he did not intimate to Whitlam in any way that this was in his mind."

Creating a caretaker: An issue not much discussed. Considered a radical innovation but there's support for it even from conservative lawyers.

Refusal to see Speaker: So far no serious legal issue has been canvassed over this. It worries Professor Paddy Lane, a strong supporter of Kerr's actions, who says, however: "Within the circumstances and as part of the package put to Fraser by Kerr, the vote of confidence was almost a charade." Gareth Evans, convenor of this week's Melbourne conference says: "It sums up in a nutshell Kerr's contempt for the office of Speaker and the House of Representatives."

Section 57: Opinions divide: Some of the big guns, once confident the dissolution was okay, are hearing further argument about it.

Few of the academics have looked at the question of what December 13's landslide election did to confirm, in constitutional and legal terms, the events of November 11. Most are arguing what the constitution was, but Blackshield has a before-and-after view — hence his two entries on the chart.

"What Kerr did on November 11 was to offer a new version of the rules," says Blackshield. "I think that is now the established version because of the elections. I don't believe that the majority who voted for the government endorsed Kerr's rules, but at the very least the constitutional issues were before them and they were at least prepared to acquiesce in what Kerr did. So that, though it stops short of endorsement, it is at least acceptance, so that they are now the rules." The refusal of Supply, the dismissal of Whitlam and the creation of caretaker Prime Ministers — all wrong on Blackshield's view of the constitution pre-November 11 — are now, he argues, confirmed by the people as okay conventions.

The Melbourne conference will be taking up the question of whether the "Kerr version" of the rules will work. Gareth Evans, the convenor, is especially anxious to get on with this in the face of what he calls the "entrenched" attitude of experts to technical questions of the constitution. Three courses of action appear possible to Evans in the future.

The first is to set down the powers of the Governor-General somewhere in black and white, but more than an ordinary act of parliament would be needed for this. Evans says: "The statute would always be read against the constitution, and the constitution talks in

terms of absolute discretions. It would always be open to the courts to challenge it."

Faced with this, lawyers (and politicians) often throw up their hands and opt for a second alternative: the appointment of a cypher Governor-General, a paragon of party virtue who would live away from the blandishments of Yarralumla (Woden Valley has been suggested). He would be dropped every time, and immediately, the government changed. This is one way, they argue, to put political certainty back into the constitution.

Evans argues for a third and tougher line: the system must be defined by referendum. One approach would be to put a clause in the constitution saying the Governor-General could only exercise his powers on the advice of the Prime Minister. It's simple, but would take away the Governor-General's critical power to pick and choose a Prime Minister when he has a turbulent, divided House of Representatives. He must be left with some individual power.

Evans says: "One must be careful of using the word inconceivable these days, but it is inconceivable that a crisis like this will arise in the future other than in the context of another Senate challenge to Supply. The Senate is the key to the whole thing, and for the future we must focus full bore on the Senate." He argues that the Senate's power over money bills must be chopped, and adds: "A constitutional amendment like this is at least simple enough for the electorate to grasp and deal with. And it will work. Some of the new Commonwealth countries have quite elaborate provisions in their constitutions codifying the gubernatorial power, but they are just unworkable."

But that's to pre-empt the conference. Colin Howard, Blackshield, Ellicott, Sir Richard Eggleston and other November 11 pundits will be presenting and commenting on papers — so will Whitlam.

This may come as a shock, but his opening address on August 6 will be the first time Whitlam has put together a full legal defence of his position. He has argued the political consequences, but has yet to give his opinion as a lawyer.

His standing to be heard on the matter? November 11 was the only constitutional round he lost in three years of constitutionally controversial government. Says Gareth Evans: "There were minor defeats in the courts, but these were trivial compared to the defeats of Scullin and Curtin, and Chifley's defeat in the banking case. Whitlam hasn't lost a round in the courts on questions of constitutional power."

Whitlam, QC, has still some talking to do.

Thursday, August 5, 1976

EDITORIAL OPINION

A chance to look ahead

MANY of those most closely involved or professionally interested in the constitutional crisis of 1975 will gather to discuss it at Melbourne University this weekend. With inspired initiative, the university's law school has invited the Prime Minister, the Opposition Leader, the Attorney-General, the Solicitor-General and several eminent academics and constitutional lawyers to take part in the debate. Unfortunately, but understandably, the central figure in the crisis, Sir John Kerr, will not be there; we shall have to wait for a full explanation of what happened and why from his point of view until he retires. But perhaps this does not matter much. Although Mr. Whitlam and the Labor Party have concentrated with great anger on the Governor-General's personal role in the events leading up to November 11, the issues are much deeper and wider.

There is little doubt that the letter of the Constitution gave Sir John Kerr the lawful authority to dismiss the Whitlam Government, dissolve both Houses of Parliament and invite Mr. Fraser to head a caretaker administration pending the elections. The still controversial question is whether he acted with due propriety, and an agreed answer is unlikely to emerge from this seminar. What will have to be acknowledged, however, is that the Governor-General was placed in an extraordinarily difficult position by the peculiarities of the Australian Constitution and

the intransigence of the opposing parties. He felt impelled to break a potentially damaging deadlock caused by breaches of constitutional convention on both sides: the Senate's deferral of Supply in an effort to force the Government to resign and the Government's declared intention to carry on without parliamentary approval for its expenditure.

Thus the haunting problem is not confined to the discretionary powers of the Governor-General and how Sir John Kerr chose to exercise them. And it is not simply one of academic interest, because the circumstances, although they had not arisen before last year, could conceivably arise again. The awkward marriage of the Westminster model and a Federal structure has left the unresolved questions of whether the Senate should have the power to reject or withhold money bills and whether failure to obtain Supply due to such obstruction should be treated — as it had never been previously — as justifying the dismissal of the Government. It is to be hoped that the participants in the seminar will suppress the temptation to indulge in recrimination or self-justification, and direct their attention to whether and if so how the powers of the Governor-General and the Senate ought to be modified so that such a crisis cannot be repeated.

The gathering this weekend will have been well worthwhile if it helps to persuade Australians — including those inclined to hurl abuse and missiles at Sir John Kerr — that the future form of the Australian Constitution is much more important than the fate of the present Governor-General. It will be even more valuable if it induces the two major political parties to think constructively about constitutional reforms.

The Sydney Morning Herald

THURSDAY, AUGUST 5, 1976

Sir John is not the real target

THE DEMONSTRATIONS against the Governor-General are reaching the point where it may fairly be asked why the community should put up with them. The latest and most childish was the demonstration of bad manners yesterday by a handful of members of the Sydney University Law Graduates' Association who walked out when their invited guest, the Queen's representative in Australia, rose to speak. By so doing they brought discredit on themselves and their profession. They should not be allowed to get away with it. The profession and the association to which they belong should take disciplinary action.

But there is a danger that in emphasising the puerility of individual "protests" of this kind the reality of what we are witnessing in the campaign against the Governor-General is obscured. It should not be. The campaign is a sinister one, mounted, co-ordinated and paid for by sinister people for sinister reasons. It is a basic part of these manipulators' techniques to present it as a "spontaneous" manifestation of popular anger. It is, of course, nothing of the kind. The demonstrations are carefully organised and publicised; leaflets and dodgers are distributed in advance; transport is laid on; the professional agitators are mobilised. Among the sprinkling of honest dupes and the locally recruited larrikin student element always

ready for a "demo," the faces of the same hard core of agitators appear in every city.

Who is behind the campaign and what is its purpose? These are questions which it is time for the community to ask. Nor are the answers far to seek. The organisers and inciters (and paymasters) are a small minority of irrational Labor politicians — the Labor Party as a whole has disavowed the campaign and is understandably embarrassed by it — and communist activists who have seen in it an opportunity. The purpose of the campaign is to create a climate of violence, intimidation and harassment and to use it to upset the verdict of the electorate last December. The real target is not Sir John Kerr. He is just the convenient cockshy. The real targets are orderly government and the democratic process.

Not for the first time, the freedoms of democracy — the right to demonstrate, the right to "protest" — are being used to subvert democracy. The campaign, it is true, is neither a sophisticated one — indeed, it is extremely crude — nor, as yet, a dangerous one. But it needs to be marked. It represents a new (to Australia, although familiar enough elsewhere) and potentially very dangerous element in our political practice. It amounts, in essence, to an appeal from the electorate to the mob.

The real issue

TO commemorate the 75th anniversary of the Australian Federation, Melbourne University's Law Faculty has arranged a weekend of debate on the most significant constitutional crisis which that federation has passed through.

Only Australia's Governor-General and Chief Justice will not be there — for obvious reasons. But from what Mr Fraser, Mr Whitlam, Mr Ellicott, Mr Byers, and many other eminent academics and constitutional lawyers will put forward, the Australian people are entitled to expect guidance to a solution of the basic problem that underlay the 1975 crisis and still threatens the future.

At bottom, that problem is not the action of Sir John Kerr in dismissing the Whitlam government, however singular that may have been in the modern history of the Commonwealth. The Governor-General's decision to ignore the advice of a Prime Minister will doubtless draw much constructive attention at the seminar, but it should not obscure the problem and the issue that caused both the May, 1974 and December, 1975 elections — the disputed powers of the Senate.

Plainly, a method should be found to remove the possibility of an Australian upper house either rejecting a money Bill, or threatening to reject it. No upper house in this country should any longer retain the power to destroy or to usurp the lower house prerogative of the ability to determine the course of money Bills.

That is the real issue. What Sir John Kerr did was the result of a dilemma caused by the Senate's creation of a constitutional crisis. He should not resign now. That would not only appear to be an admission of guilt, precipitating a whole new debate over the events of last year. It would also obscure the importance of the task we now face: making the Australian Constitution workable again through reform that makes powers legally distinct, and not solely a matter of "conventions" that are now blown away.

Those who would argue, in tactical terms, in favor of the Senate's role last year should ponder their priorities if the party roles were reversed. One day Labor will have a majority again in the Senate — and a Labor-appointed Governor-General.

In this determination to re-establish vital national constitutional stability and reasonable concord, there can be no short cuts. The solution recently raised — appoint Prince Charles as Governor-General to paper over the Australian rift — should not find much favor with those whose job it is either to analyse the Constitution or to make it workable. Prince Charles, if available, could be welcome later when we have cleaned up the present perilous confusion; appointed now, he could find himself in the middle of a repeated crisis. That would be disastrous for both the monarchy and the constitution.

A necessary alteration of the Constitution can be effected only through the parliamentary and referendum procedures. Under the realities we recognise from past referenda, achievement will be possible only if there is virtual unanimity inside Federal Parliament that the kind of crisis which has continued to divide Australia since November, 1975 cannot be allowed to happen again.

From
Sir Anthony Wagner,
K.C.V.O., D.Litt.,
Garter Principal King of Arms.

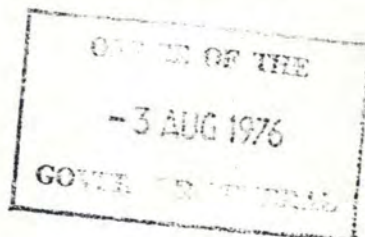


College of Arms,
Queen Victoria St, London EC4
Tel, City 4300.

ARW/KEO

23rd July 1976

David Smith, Esq.
Secretary to the Governor General
c/o Australia House
Strand
London W.C.2.



Dear Mr. Smith,

Thank you for your letter of the 29th of June returning the sketch design of arms for the Governor General, with instructions supplementary to those which he himself gave me on the telephone on the 24th of June.

I accordingly now return the design, amended and coloured as requested, and should be obliged if His Excellency would be good enough to sign it at the foot and if it might then be returned to me with an accompanying note confirming that His Excellency, as Governor General, confirms his approval of the inclusion of the Royal Crown in the arms as a reference to his office as the Queen's representative. This is entirely in order but requires this confirmation.

I shall then be in a position to put the Letters Patent granting the arms in hand but their completion may well take some time, as there are a number of processes involved.

In the meantime I should be glad to know of any special designs or renderings of the arms or parts thereof, in colour or black and white, which His Excellency would wish to have made for official or private purposes. Anything wanted can be estimated for but, as guidance, I enclose a list of some of the most usual types of design with the respective cost.

I am,

Yours sincerely,

Anthony Wagner

Garter King of Arms



BUCKINGHAM PALACE

PERSONAL AND CONFIDENTIAL

3rd August, 1976.

Dear John

I have more than one letter of yours to answer but I write now in reply to your letter of 22nd July which I found waiting for me on my return from Montreal with The Queen a week ago yesterday. The Queen has of course seen your letter and read it with much interest.

The Queen's visits to the United States of America and to Canada were tremendously successful. There was never much doubt that the visit to the United States would be a bonanza but in the event it exceeded everybody's expectations. The visit to Canada was, of course, more open to question but in the event everything turned out extremely well and none of the dire predictions of trouble was fulfilled, indeed, I did not see an angry face in Montreal or anywhere else in the Province of Quebec.

I was glad to be able to get a message through to you about the way the Prime Minister's audience in Montreal had been arranged, as the suggestion that it was done at The Queen's specific request was quite untrue. When Mr. Fraser was with The Queen I had an opportunity to take this matter up with Mr. Menadue and expressed displeasure that a false idea of what happened had gained currency. Mr. Menadue admitted that this was the fault of the Prime Minister's Press Department and I said that this was not the way to behave towards The Queen.

I saw Mr. Fraser on two occasions, the first when he attended a Reception given in H.M. Yacht BRITANNIA for Commonwealth athletes which I think both he and Mrs. Fraser enjoyed, and on the second occasion the next day, 24th July, when, as you know, he was received by The Queen. I gained the impression that the Prime Minister and Her Majesty made a good contact and whatever may have been the genesis of this meeting, I am very glad it took place.

I am glad to hear from your letter that the demonstrations against you have continued to subside and that you had two very pleasant visits to Queensland. I hope this favourable trend continues and the Gallup Poll of which you speak seems satisfactory.

I had, in fact, seen the transcript of Mr. Whitlam's "Face the Press" interview and whilst I wish he could have been more forthcoming in condemning violent demonstrations a good deal of what he said was satisfactory.

The Queen was very interested to learn that Mr. Fraser is contemplating a referendum to amend the Constitution. Something about which the Prime Minister did not, in fact, tell The Queen. I find the implications of the proposed provision about a half Senate election difficult to understand but perhaps that does not matter too much. The implications of the second part of the referendum are however much easier to grasp and I will revert to this when I reply to your letter of 27th July which I have not as yet had an opportunity to lay before The Queen.

At the end of your letter you refer to the subject which you have discussed with me and Squadron Leader Checketts and which Mr. Eggleton discussed with Bill Heseltine when he was in London. I did, indeed, discover in Canada that this matter was on the Prime Minister's mind and that he viewed the appointment of Prince Charles as Governor-General at some date as a desirable end. Timing, of course, is the essence and in this regard I was distressed to read "The Times" leading article which, I think, was unhelpful.

I tackled Denis Hamilton about this and tried to discover why the article had been written at this particular time. Sir Denis told me that it was entirely the work of "The Times" and had not been inspired by any outside person or agency. It is a pity that "The Times" did not consult us before they wrote the article as it has in it inaccuracies and, in my view, a misunderstanding of the position.

I think the point we must all bear in mind is that I do not believe The Queen would look with favour on Prince Charles becoming Governor-General of Australia until such time as he has a settled married life. No one will know better than you how important it is for a Governor-General to have a lady by his side for the performance of his duties. The prospect, therefore, of The Prince of Wales becoming Governor-General of Australia must remain in the unforeseeable future.

The Queen sends her very best wishes to you and your wife.

*John Mac
Mackin*

His Excellency the Governor-General
of Australia.

Government House,
Canberra. 2600.

29 July 1976

My dear Martin,

The matters which I discussed in my last two letters have, up to a point, come into the open in Australia as subjects of discussion.

I am attaching some clippings giving editorial comment on the London Times editorial about The Prince of Wales, the coming visit of Her Majesty, the increasingly recognised difficulty of any change in my own position for some time to come, the demonstrations and their counter-productive effects in helping to keep me where I am, the possibility of or the alleged necessity for constitutional reform and, on the other hand my duty to Queen and country to go now with dignity for unity's sake.

These I think speak for themselves and there is no point in my commenting on them. I should, however, like to touch upon some matters in the editorials which might justify an observation or two.

First, it is assumed that at no stage did I contemplate or suggest resignation, either immediately after 11 November, or immediately after 13 December. People assume that because I did not in fact resign there was no discussion about it. Some day, of course, the whole story can be told.

Secondly, there is a passing reference, once again, to the very famous Executive Council Meeting of 13 December with a suggestion in some way or another I may have failed to help with the problems of that meeting. You know the truth about the way that meeting was organised and when in due course the story is told, the record will be set straight.

The main reason for writing this letter is, however, that I had an interesting conversation with Mr Yeend, the Acting Head of the Prime Minister's Department, the Prime Minister and Mr Menadue being, of course, in North America.

.../2

Summarising what was said, it became clear to me that a great deal of thought is being given at the departmental level to various proposals for constitutional reform and what has been referred to as "the continuity of Monarchical representation" in times of crisis. The conversation has led me to modify, to some extent, some opinions I expressed in the two earlier letters.

Mr Yeend is very strongly of the view and says this apparently with some departmental support, that there should be no referendum of any kind and indeed no attempts to change anything until after Her Majesty's visit. He says there is a strong view that any national debate before the visit will only exacerbate the problems we have here because demonstrations will be stepped up and produce a situation in which they are switched from being mainly a matter of personal protest against me to being part of a bitter referendum campaign.

He says that looking at it from the Government's point of view, there is no chance of the Labor Party agreeing to the kind of referendum which has been mentioned as they were deeply committed last year to the idea that the Senate either does not have, or should not have, the powers which were involved in the supply crisis. He says that his strong view is that the Labor Party would have to fight on the ground that the true point that should be put to the people is that the Senate's powers over supply should be abolished. In a sense this is Barwick's view about likely Labor reaction.

Yeend says that departmental opinion is that a referendum of the kind being contemplated by the Prime Minister just before his departure for North America could not be won and would make things much worse if it were held.

In the other part of the conversation which I had with Yeend, he said that other work was also being done on the assumption that there would be no constitutional change, at least for some time.

On the matter of endeavouring to ensure Vice-Regal continuity in office during, say in a supply crisis, the lawyers are apparently looking at this matter upon the basis that there will be no constitutional change giving a fixed term to the Governor-General. They and policy officers in the Prime Minister's Department are considering whether it may be possible by a kind of contractual arrangement for the Government to undertake and promise that although the appointment is one which under the Constitution is at pleasure, the person appointed would in fact be promised a term for, say five years, subject to the kind of conditions applicable to judges - that is to say, removal for proven misconduct by a resolution of both Houses of Parliament.

I have not looked into this legal possibility myself but what is suggested is based on the idea that it might make it difficult for a Prime Minister to seek to have a Governor-General recalled in the midst of a crisis such as last year's if such a formal contract or promise existed. Of course, if a Prime Minister, either the one who made the original "contract", or a successor who wished to break it, wanted to recommend to Her Majesty the recall of a Governor-General the question would then arise whether Her Majesty, who would have been told of and presumably agreed to the original bargain, could use the proposed breach of that bargain as a reason for rejecting, during a time of high crisis, Prime Ministerial advice for recall.

I have hastened to let you have this additional gloss upon my previous two letters because although I referred to the possibility that there may be no referendum and no change at all, I was inclining to the view myself that the referendum would possibly be a way of clearing the air. Having listened to what Mr Yeend has to say, I am now by no means sure that this is so. Two Ministers today after an Executive Council Meeting were in favour of an early referendum as previously outlined. So things are very fluid.

The one thing that is certain, is that the Senate's powers, as you will see from the attached editorials, are now being made the subject of national discussion. It appears to be taken for granted that it is difficult to alter both them and the Governor-General's powers.

During Mr Whitlam's day there was some work done on the point that the instructions to the Governor-General should be withdrawn for the reason that powers given by the Constitution belong to the Governor-General and he could not legally be instructed by Her Majesty as to how they should be used. This was part of the general notion of repatriating constitutional power completely to Australia.

That Prime Minister, of course, had no intention whatsoever of allowing the Governor-General to exercise the powers under the Constitution which were to be repatriated but to make certain that the Governor-General, being under no instructions from The Queen of Australia, would in fact be bound totally by instructions and advice by the Prime Minister, whatever the circumstances.

On another point, there are going to be a couple of seminars probably dominated by labor lawyers in the next month or so. A lot of nonsense will be talked but also some scholarly work produced.

.../4

PERSONAL AND CONFIDENTIAL

4.

It seems to me that things will, as Yeend says, move slowly. He was inclined to think that nothing whatsoever would be done while I am still the occupant of the office. Any possible constitutional or any other changes should be brought forward, he believes, when I am, in due course, gone from this place.

I may say that although Menadue is, as far as I can judge, still in the grip of his strong oppositional views on the subject of the dismissal, etc., Mr Yeend, his Deputy, is in a different position. I have known him for a long time and trust him to look at things fairly and in the orthodox Public Service way. He is I believe friendly to me. We worked closely together some years ago.

When we have all had time to digest the material coming forward and to assess the matter of demonstrations I may accept an invitation of Her Majesty extended to me at Sandringham to write direct to her about the situation as I then assess it and to assure her directly of my anxiety to do whatever seems to her to be best. In the meantime please assure Her Majesty of the continued loyalty and humble duty of my wife and myself.

Yours sincerely,
JOHN R. KERR

Lieutenant Colonel the Right Honourable
Sir Martin Charteris, G.C.V.O., K.C.B., O.B.E.,
Private Secretary to The Queen,
Buckingham Palace,
LONDON ENGLAND

PERSONAL AND CONFIDENTIAL

THE Sun says

LET'S BUY AUSTRALIAN

THE mere mention of Prince Charles as Governor-General of Australia sounds like a blast from our colonial past.

That appointment would seem to many like sending a Timbertop schoolboy on a man's errand.

In fact, Prince Charles, able young man though he is, would be the wrong man for the job.

It is said he would take politics out of the job and, presumably, restore that tranquillity which once made it so splendidly ornamental.

That argument fails on two grounds.

The political potential is inherent in the job, not the titleholder, and it will be for Australians to settle the debate over its exact powers.

The nature of the job, too, is changing subtly.

Still regal in form, it has become more intensely Australian in substance.

A tradition has already grown of distinguished Australians who will prod, needle and lead the nation on social issues.

An Australian republic is a long way off.

Even Mr Whitlam, the impatient reformer and presidential stylist, conceded that.

Until that day, Australia has its own worthwhile tradition to keep up.

That means our top job must go to top Australians.

The Age
Thursday, 29 July 1976

The prince is at least a way out

HISTORY will make the final judgment on whether Sir John Kerr was right or wrong in dismissing the Whitlam Government last November 11.

The question that should concern us now — and must surely haunt him, too — is whether he can continue to hold his office of Governor-General.

While emotionally involved Australians remain bitterly divided over his position, a dispassionate and authoritative outside opinion is worth considering.

The Times of London, in a half-page leader last Friday, concluded that Sir John Kerr must go and suggested Prince Charles as an appropriate successor.

The significance of this advice should not be lost upon us, nor should the spirit in which it was offered be misinterpreted.

Although the Times no longer lives up to its reputation as "the Thunderer" that made statesmen tremble and changed the course of events, it is not a newspaper to indulge in idle speculation.

We may assume that its thoughts on "The Monarchy in Australia" are not far removed from those in the minds of the Queen and her advisers.

The Queen — and the Australian Government — must be worried by the threat of vehement demonstrations against Sir John Kerr during the Royal visit scheduled for next March.

Such demonstrations would be unpleasant but they would be manageable. And most Australians would deplore them because, whatever they may think of Sir John Kerr, they would not wish to be discourteous to the Queen.

But the Royal visit is not the only consideration. The Queen cannot be unconcerned that her representative in Australia has become and will remain the very opposite of what constitutional convention deems him to be.

Rightly or wrongly — I would say he is neither entirely blameless nor entirely blameworthy — Sir John Kerr is a continuing source of controversy, a stimulus to partisan passions and a symbol of national disunity.

He is an affront and a distraction to the Opposition and an embarrassment to the Government. He is a constant reminder of what many Australians still regard as the illegitimacy of the Fraser regime.

The danger is that public respect for the office of Governor-General and even for the monarchy will be irreparably diminished by the political controversy in which he remains embroiled.

The anti-Kerr demonstrators are relatively few in number and their motives are mixed. They



are the unruly waves on the surface of a much deeper tide of resentment and consternation.

A recent opinion poll in Melbourne and Sydney returned only a bare majority of 53 per cent. in favor of Sir John Kerr staying put. Thirty-nine per cent. felt he should go, and 8 per cent. did not know or care.

A political leader might regard such figures as a vote of confidence. A Government can survive on less support. But a Governor-General is not a politician; he is supposed to be above the political struggle and acceptable to all important sections of the community.

Sir John Kerr is not, and that is why he must go. Not just because a few hooligans throw things at him and desecrate church walls: they would soon find another target for their compulsive exhibitionism.

Not because some Labor leaders continue to denigrate him; I suspect they would rather have him sweat it out and remain a discredited reminder of November 11. Not because some members of the Government would rather be rid of him, so that he will not serve as such a reminder.

SIR JOHN has to be persuaded that a consensus of confidence in his office is more important than his personal pride, and that, after a suitable period of keeping out of public sight, he should quietly retire with as much dignity as he can summon.

The next question is whether Prince Charles would be an appropriate successor. I should say yes, but with the same proviso as the one cautiously advanced by the Times — that he must be acceptable to a substantial majority of Australians.

The problem is that it may already be too late. Australian nationalism has become so rife and disillusionment with the Governor-Generalship so pronounced that the Prince may not be a universally popular and uncontroversial appointment.

Objectively, he would be an admirable choice. Anyone else nominated by the Fraser Government could be suspect to its opponents, and there is no risk that Prince Charles — of all people — would carry out his constitutional duties with other than impeccable impartiality.

He would come not as a colonial governor or superannuated Englishman but as the future King of Australia (among his other realms) who has been trained since boyhood for the job and has already formed strong personal links with this country.

There are some who feel that the whole concept of the Royal connection is quaintly old-fashioned in a predominantly republican world. So it is, but the monarchy is neither an imposition nor an infringement of our national independence.

In practice the Governor-General is already Australia's autonomous Head of State who performs his constitutional duties and — as Sir John Kerr demonstrated — exercises his discretion without instructions or interference from Buckingham Palace.

The monarchy will remain a part of our Constitution only so long as most Australians want it to remain so, and Prince Charles should be invited to become Governor-General only if most Australians want him to come.

Do they? I don't know. But I am convinced that there is a far more important issue than the fate of Sir John Kerr and the future of Prince Charles as Governor-General.

That is the peculiar defect in the Australian Constitution which enables the Senate to force a Government prematurely to the polls and empowers a Governor-General to resolve a deadlock in a way that exposes him to grave suspicions of deviousness and partisanship.

There is a great danger that the present Government will either allow the Kerr controversy to continue or else replace him with Prince Charles in the hope that one or other will distract attention from the need for constitutional reform to ensure that the events of November 11 can never recur.

I am not suggesting that one Government or political party is necessarily more ethical than another, but the Liberal and Country parties are more likely to be in a position again to manipulate the flawed Constitution to their own advantage.

But if, like the Bourbons, they learn nothing and forget nothing, they may find, like the Bourbons, that eventually a majority of people will conclude that the only way to gain a good Constitution is to establish a republic and start afresh.

AFTER SIR JOHN KERR

The role of the Governor-General in Australian society is naturally focused at the present time on the future of Sir John Kerr and the possibility that the Queen will be the subject of demonstrations when she tours this country next year.

Without in any way diminishing the natural speculation which washes around specific personalities it is none the less worthwhile to look beyond the colourful figures at present dominating the stage.

Sir John Kerr demonstrated last November that the Governor-General does have the power to dismiss an Australian Government, to install another government and to hold an election in circumstances and conditions which do favour one party against another.

History may or may not vindicate his action. In the short term it can be said that the Governor-General has intervened in the political process in a most decisive manner.

This overt, public action was in fact the most dramatic possible initiative for a Governor-General to take. It may well be that he saw the situation forced upon him by the action of the Senate, a Chamber with considerable constitutional power.

But before Sir John Kerr took that fateful step it was already evident, though far from documented to any length, that the Governor-General's role in Australian politics had already departed from the general concept of the position as envisaged both in the textbooks and by the practising politicians of both sides of Parliament.

In part this came from the natural development of a sense of Australian nationalism whereby it became the accepted orthodoxy that Australia should have an Australian Governor-General. Our last three Governors-General, Casey, Hasluck and Kerr, have been active, thrusting, ambitious men with a high regard for their own ability.

They have not retired into the position of Governor-General with an idea of being cyphers and fete openers. Each was individually incapable of taking a passive, supine role.

Successive governments have found that each has been uncomfortably active within the constitutional limits of the office.

Sir Paul Hasluck and Sir John Kerr, in particular, have publicly and half publicly (this refers to Sir John's outline of his role delivered in India but not given to the government of the day) sought to set out their belief that they have a responsibility to involve themselves in the political process.

Sir Paul's Quayle Memorial Lecture, delivered in Adelaide in 1972, advanced propositions which should have been controversial when he made them but which were in fact largely ignored because of the mistaken belief that Governors-General were little more than rubber stamps no matter what their pretensions might be.

In practice we have learned, though without much satisfactory documentation, that Sir Paul was apt to give the new Labor Government a tough time as he stuck pedantically to his perception of his role.

THE AUSTRALIAN

FINANCIAL REVIEW

WEDNESDAY, JULY 28, 1976

Sir John Kerr was at first inclined to be rather more casual about his responsibilities. When the time comes for history to judge it should examine carefully the Executive Council minute approving the raising of \$4,000 million abroad.

There can be little doubt that that episode and the subsequent criticism directed at Sir John had a considerable impact on his behaviour in reaching the controversial decision of November 11, 1975.

To a surprising extent it is possible for the Governor-General to behave as a de facto President, to stall, if not to veto, Cabinet decisions, legislation and executive appointments.

The tendency to behave in this fashion will be encouraged by the practice of appointing prominent Australian political figures to the position.

Sir John's action in dismissing a government and at the same time engineering a double dissolution has created a precedent which has changed the character of the office.

It is important to consider whether this precedent should be enshrined or demolished by a calculated political act.

To do so while Sir John occupies the office would be impossible because whatever action was taken would be seen to be directed at the individual, not the office.

★ ★ ★

Consequently, when Sir John goes, as he eventually will, the idea of appointing a political neuter, such as Prince Charles, holds some attractions in terms

of allowing a serious political debate about the role of the Governor-General.

Doubtless the Royal Family, which is an instrument of British foreign policy and as such anxious to maintain a close relationship with a well-endowed economy such as Australia's, would have no objection to this.

Such a materialistic judgment of the monarchical connection may offend those who hold to more metaphysical ties between Australia and the United Kingdom but it does at least put the case for the Windsor connection in a totally unsentimental light.

Prince Charles would certainly be non-partisan and, as far as local issues were concerned, he would be apolitical. This would give our legislators a chance to reassess their ideas of what they expect from a Governor-General.

To imagine that the present system ensures the existence of a conservative umpire at the top of the political tree is to totally misunderstand the way in which the role of the Executive Council has been quietly enlarged in recent years and to underestimate the room for manoeuvre within constitutional limits available to a Governor-General.

It is impossible to imagine an Australian Government reverting to the idea of appointing successive titled Englishmen to being Australian Governors-General.

However, the present situation at least offers the opportunity of making a popular appointment that would enable some hard-headed political assessment to be done and, if need be, the holding of a referendum without embroiling controversial personalities.

Wednesday, July 28, 1976

Sir John Kerr: the man and the issue

THE great Kerr controversy rages on. Eight months have passed since the dismissal of the Whitlam Government, and the Queen's representative still cannot appear in public without running the risk of being pelted with missiles or abuse, or both. The affair is embittering the political life of the country. And the irony of it is that the tactics being adopted by the Governor-General's more militant enemies are perpetuating it. While violent demonstrations against Sir John continue, he cannot consider resigning, nor can the Government consider replacing him. A Vice-Regal departure in the present circumstances would inevitably be seen as a surrender to an intimidatory campaign mounted by a minority of extremists.

Sir John has shown great courage in carrying on with his public duties in the face of the extremists. Yet, in retrospect, it is a tragedy that he did not resign after the December elections. To do so now would be to appear to surrender to mob pressure. To have done so then would have been an act of statesmanship — not an acknowledgement of error, but proof that he regarded the office as more important than his own continuing tenure. True, it was not Sir John's fault that he was put in a position in which any decision he took would inevitably

have been interpreted as a political one by one section of the community. Yet by continuing in office, and — above all — failing even to explain adequately why he acted as he did, he has made himself not a symbol of national unity, but a cause of national division.

As though all this were not enough, the Times of London has now chosen to confuse the issue by throwing a right royal red herring into the ring. In a touching display of paternalism, the Times has suggested that Australia's little difficulty could be resolved by replacing Sir John, when the time comes, with Prince Charles. While generously conceding that the decision must be one for Australians to make, it argues that the heir to the Queen of Australia might be acceptable as a man pre-eminently above the party battle.

The real question

In some ways the idea is not without its attractions. This newspaper remains firmly convinced that Australia is perfectly capable of producing its own Vice-Regal representatives, but Prince Charles would fall into a quite different category to the retired soldiers and under-employed aristocrats whom Australia used to import for such posts. As our future King, and

one who gained part of his education in this country, he is in a sense an honorary Australian.

The real question, however, is not whether Prince Charles would be a good choice as Governor-General — even assuming he was willing to take on the job and Sir John Kerr was willing to relinquish it — but whether such an appointment would provide a way out of the constitutional mess in which Australia has been wallowing ever since Mr. Fraser ordered his senators to defy convention by refusing Supply to the Whitlam Government. And the short answer to that question is: No.

There are, in fact, two separate problems to be resolved. The less important is the continuing and divisive presence of Sir John as the tenant of Yarralumla. Sooner or later — and it is unlikely to be sooner unless his more irresponsible enemies moderate their tactics — this problem will be removed by the departure of Sir John. Almost any replacement — whether it be Prince Charles, or some eminent Australian or Uncle Tom Cobbley — would be more acceptable to about 40 per cent. of Australians than the present incumbent.

Unfortunately, however, Sir John's retirement would in no way resolve the second, more fundamental and more intractable problem which last year's crisis has imposed

upon us. This is the constitutional dilemma created by the decision of the then Opposition to use its Senate numbers to block Supply. That precedent having been set, it can theoretically recur at any time when a Government is unable to command a majority in the Upper House. True, no Opposition is likely to follow Mr. Fraser's lead unless the Government of the day is exceedingly unpopular. Yet it is in the nature of politics that most Governments do at some time make themselves unpopular, and sometimes for good reasons. It is therefore very likely indeed that, unless the constitutional system is altered, some future Governor-General will find himself in precisely the same impossible situation as Sir John did. However impartial and politically disinterested he may be, he could be forced to play the role of political umpire.

The real difficulty

And surely Prince Charles is the last man who should be put in a position which carries that risk. Indeed, the Times itself does point out in its editorial that the Prince could not be asked to serve if there was any possibility of his being forced to face such a decision.

Since this possibility does exist, the modest suggestion put forward by the Times is rather less helpful than it might have seemed at first sight. The difficulty is not to find a suitable candidate to replace Sir John, but to ensure that whoever it is does not find himself treading the same bottle-strewn path.

Regrettably, neither the Government nor the Opposition has yet shown much public enthusiasm for facing up to the problem. It is more than time they did. The most obvious and, in our view, the best solution would be to amend the Constitution to remove the Senate's power to reject or block money bills. This would require a referendum and the only hope of getting the necessary public majority for change would be for both Government and Opposition to campaign for it. If either of them has a better idea, they should produce it without delay. This country cannot afford a re-run of last year's traumatic events and their continuing and ugly aftermath. Nor can it afford to live through recurring periods during which any Government without a Senate majority will be unable to take effective action for fear of such a re-run. The trouble with the Kerr controversy is that it is built around the man — not the issue.

Sun-Pictorial MELBOURNE*Your Royal Highness, Sir:*

DON'T be a tail-end Charlie!

THINK twice, Prince Charles, before you let them put the bite on you to become our next Governor-General.

Of course, the silent majority of Australians would welcome your appointment.



A respectful plea from DOUGLAS WILKIE

Maybe the Queen and Mr Fraser discussed what period of time must elapse before Sir John Kerr can decently step down without his resignation being misconstrued as an admission of error last November or as surrender to hooliganism.

Maybe they WERE holding the string of that kite flown by the London Times last week when it suggested that you, as Prince of Wales, would be the cat's whiskers — if you'll forgive the phrase — for Yarralumla.

An amiable bloke, able to combine the dignity of office with perhaps another quip about the stench at Elwood beach!

Just the personality to win Australian hearts, restore the vice-regal image, and put value back into the concept of a constitutional monarchy that stands above party politics and sidetracks the dangers of a presidential system.

But there's another side to this Governor-General chore.

Of course, Britain wants Australia to remain a

turbish the links provided by the monarchy.

Some may suggest that Britain uses the monarchy to embroider what's left of the fabric of empire. She still has her economic interests in Australia.

Others may see the monarchy as a symbol of kinship and shared traditions and ideals.

And, as usual, there's room for both cynics and sentimentalists to be correct.

But Britain is anxious, above all, to avoid damaging involvement — and seeming "interference" — in Australian affairs.

Britain hates the thought of those bits and pieces of the Australian Constitution in Westminster's lumber room.

They were parked there by the former Australian colonies as a condition of accepting federalism.

These "states' rights", which only the British Parliament can repeal, and which it won't repeal except by Australian request, more

will lead to all sorts of contention before a way can be cleared for the sensible constitutional and Upper House reforms needed in Australia.

By the same token, the

Queen nominally appoints her own viceroys in Australia, as elsewhere. Nominally she can instruct them in their handling of a political crisis.

In fact, she makes appointments only on the advice she receives from the Australian Prime Minister of the day. She then scrupulously washes her hands, in effect, of the decisions taken in her name by these appointees.

Today Labor's shadow Treasurer, Mr Chris Hurford, is regurgitating complaints that Sir John Kerr did not inform Mr Whitlam of what he might feel forced to do in a situation of financial anarchy.

tralian politics by rejecting an Australian Prime Minister's advice? Or would she have summoned her own constitutional lawyers to endorse Kerr's stand?

She was spared making the choice.

But similar crises may well arise at Canberra in the near future.

And how much more perilous the outcome if the Governor-General of the day happened to be a member of the Royal Family, identifiable in the public eye as one of Britain's ruling elite tinkering with Australian democracy.

Visit us again, Prince Charles. Have a second sniff at Elwood. But for your own good -- and Britain's and Australia's -- keep out of the greater stench at Canberra.

You don't want to be another Charles to put your head on the chopping block -- even before you are crowned King.

But suppose a forewarned Whitlam had got in first, sacked Kerr, and then "advised" the Queen to replace him with a more pliant Governor-General, as nominated by Whitlam.

Would the Queen have chosen to "interfere" in Aus-

Government House,
Canberra. 2600.

27 July 1976

My dear Martin,

I have not yet heard anything about what happened in Montreal and this is written on that basis.

I had lunch and a long talk on Friday last, 23 July, with Sir Garfield Barwick. It may be useful for me to amplify what he said to me in his letter of 2 July.

Before doing so, I should mention something which the Prime Minister said to me during our last talk. He mentioned that Sir Arthur Tange had indicated that he felt concerned about what the Prime Minister called "the continuity of the Monarchy" in such a time of crisis as occurred last year. Questions asked by me clarified this to some extent. It was not the continued existence, popularity or stability of the Monarchy itself which was being raised, but the continuity of monarchical representation during such a crisis.

This point is a very similar one to the first point raised in Sir Garfield's letter. For this reason I told Sir Garfield that the Prime Minister had mentioned to me a similar matter to the first made in his letter, saying that Sir Arthur Tange had taken it up with him. Sir Garfield said he thought it was the other way round - that the Prime Minister had opened the question up with Sir Arthur. He then said that as a result of this, Sir Arthur had come to see him, Sir Garfield, to get his reaction to the problem.

I should say that when Mr Fraser was Minister for Defence in the Gorton Ministry, Sir Arthur was, as he still is, Permanent Head of the Defence Department. I assume he impressed Mr Fraser. Certainly he is a strong, tough, able administrator. He had been Permanent Head of the Foreign Office for ten or twelve years, including the period when Sir Garfield was Foreign Minister. Just before Sir Garfield became Chief Justice, he had arranged for Sir Arthur to go to India as High Commissioner. The actual appointment came later, just after Sir Paul Hasluck took over as Foreign Minister. Sir Garfield has a high opinion of Sir Arthur.

.../2

I mention all of this because if presumably explains why the various conversations occurred.

In my talk with Sir Garfield he referred to the acceptance by the Crown (see your letter to Mr Scholes) of the view that the Constitution gives various powers in terms and directly to the Governor-General rather than to the Crown for exercise, under instructions, by the Governor-General. The crisis indicates, according to Sir Garfield, that the system can work properly, on the rare occasions of crisis when it may be needed to do so, only if the Governor-General feels secure in his office.

Sir Garfield's real point is that one power which The Queen of Australia certainly has is the power to appoint and recall a Governor-General - a power normally exercised, of course, on advice from her Australian Prime Minister. He feels that The Queen should as Queen of Australia feel able to have at least as much discretion on that matter as she has under the reserve powers on forced dissolution or dismissal in the United Kingdom. He believes the power of recall, especially, should be developed on the basis that in times of great crisis it does not have to be exercised upon advice.

In a nutshell his approach is that The Queen should not feel bound to recall a Governor-General upon the advice of a Prime Minister who has already put himself into a critical situation which could involve his dismissal and a forced dissolution. It ought to be open to the Crown to say that, whereas it would normally accept advice to recall, it is not bound to do so if that action would become a factor in the resolution of a developing crisis such as last year's.

The Crown ought to have the discretionary power to prevent a Prime Minister from saving himself from dismissal and a forced dissolution by getting rid of the Governor-General in favour of a puppet. There ought to be continuity of monarchical representation and it should, so he argues, be within the Crown's powers to ensure this in such circumstances. If this were not so, a Prime Minister could, by governing without Supply, destroy the Senate's power over Supply as a real power; destroy the reserve powers of the Governor-General; destroy the Crown's powers; and establish a Prime Ministerial Presidency for as long as the Lower House supported him.

As you know, last year I did not seek to put an argument along these lines to Her Majesty. On the contrary, I accepted the position that although it might not happen instantly, a recall would be inevitable if asked for and that it probably could not be delayed for long in the face of a determined Prime Minister insisting upon it.

.../3

Furthermore, it seemed to me that once the Prime Minister was told that he would be dismissed if he did not recommend a dissolution he would certainly have insisted on my immediate recall. This would have had two consequences - (a) involvement of The Queen in the crisis, and (b) total confusion of the issues with the Governor-General threatening to dismiss the Prime Minister and the Prime Minister demanding the dismissal of the Governor-General - it would have been very difficult for me to jump in ahead of The Queen's decision in such circumstances.

I could have given the Prime Minister a warning and put to Her Majesty an argument along Barwick's lines but I believed I had a clear view from the Palace that such an argument, if put, would in the end and perhaps sooner than later, have to be rejected. It is this assumption which Barwick questions, hoping to see a development in time which would leave a real discretion to the Crown in a critical situation.

I have not really indicated any attitude to Sir Garfield about his point. But I feel, on the whole, that the circumstances were so unusual and were so unlikely to reoccur that it was probably better for me to take the whole brunt of the problem, preserving the position of The Queen above the fray, confident that the Monarchy would be just as popular afterwards as before. Certainly what Barwick says would have been much more pleasant for me if it could have been achieved and it would be for a future Governor-General similarly placed. But is it politically possible for the Crown to take such a position and should it attempt to do so to meet such an unlikely crisis? Should it seek, on the experience of last year to move towards the assertion of a "reserve power" in this field?

Barwick's real difficulty is that he wishes to avoid any constitutional amendment of Section 53. If he would accept the proposition of automatic double dissolution after, say 30 days denial of Supply and if such an amendment were passed, we would be clearly rid of last year's kind of problem forever. He is inclined to think the Australian Labor Party would oppose such an amendment because it would endorse the Senate's power over Supply. But that power clearly exists now. What is the Australian Labor Party likely to prefer, the status quo as to the Vice-Regal power to force dissolution in a Supply crisis and to dismiss, or to accept the existing Senatorial powers whilst removing the Vice-Regal power on this point?

Barwick also doubts whether such a referendum would pass even if it were supported by the Australian Labor Party.

In summary, my own view would be that it is worth trying the referendum even though it would cut away one part of the Vice-Regal powers. If it fails to pass and the electorate prefers the status quo then a future Governor-General might face the same problem some day that I faced but it surely must be very unlikely that a Prime Minister will ever again try to govern without Supply and if need be, to avoid dismissal and a forced dissolution by trying to recall a Governor-General. If this were to happen and the Crown were not to be willing to take the Barwick line, then the Governor-General of the day would have a very difficult problem and a very difficult time.

There is another point worth mentioning. If things stay as they are there could be a tendency to appoint party hacks or nobodies as Governors-General. If the proposed referendum were passed there would perhaps be more chance of good appointments.

This as usual is too long an exposition of a problem which we have to face in this country. It could be, of course, that nothing will happen at all - no referendum and nothing else.

If I am wrong in my assessment of what the Crown would like, so far as future exercise of the power to recall is concerned, I could participate in further informal talks and put the view that appeals to the Crown as to what ought to happen. I cannot, of course, get publicly involved but I am entitled to be told what the Government thinks and to "advise and warn" in a private way if so minded. It could be possible gradually, if necessary, to develop a "reserve power" in this area. The best judgement on this would come, of course, from Her Majesty.

There have been two demonstrations in Sydney and one statement, short and exceptional, by me. The enclosed clippings deal with these and with the Times editorial and the Montreal audience. I also enclose the texts of A.B.C. news items last night on radio and television.

Please assure Her Majesty of the continued willingness of my wife and myself to carry on and to do so in humble duty and loyalty to her.

Yours sincerely,
JOHN R. KERR

Lieutenant Colonel the Right Honourable
Sir Martin Charteris, G.C.V.O., K.C.B., O.B.E.

Anti-Kerr demonstrations will be no deterrent

The Queen is determined to visit Aust

From PETER BOWERS. Political Correspondent

CANBERRA, Sunday. — The Queen is determined to make her three-week visit to Australia next March despite the threat of demonstrations against the Governor-General.

Government officials in Canberra believe the Queen affirmed her resolve to make the visit when she saw the Prime Minister, Mr Fraser, in Montreal yesterday.

Mr Fraser is believed to have been told before he left Australia that his Government should not be concerned about the Queen being confronted by protesters against Sir John Kerr's dismissal of the Labor Government on November 11 last year.

The official Buckingham Palace view is that the Queen

is no stranger to political protests and will not be embarrassed by demonstrations.

After seeing the Queen last evening Mr Fraser strongly rejected a suggestion that Sir John would resign before the Queen's visit.

"You should know Sir John's character better than that," he told an ABC reporter.

Tour of all States

The Queen and the Duke of Edinburgh will arrive in Canberra on March 7 for a visit that will include all States and the Northern Territory.

Planning for the visit is now expected to go ahead on the basis that anti-Kerr protests will be officially tolerated as long as they are non-violent and do not interfere with people turning out to welcome the Queen.

A statement emanating from the Prime Minister's office that the Queen had requested yesterday's meeting with Mr Fraser has apparently created some friction between the Government and Sir John.

The Governor-General's private secretary, Mr David Smith, is believed to have complained to the Prime Minister's office about the statement.

Mr Smith refused to comment last night on the issue.

The Governor-General's view is believed to be that the Queen had not requested the interview but had merely expressed disappointment that she would be leaving Montreal

before Mr Fraser was due to arrive.

Mr Fraser subsequently rearranged his overseas trip so that he would arrive in Montreal in time to see the Queen.

MELBOURNE, Sunday. —

Student organisers are planning demonstrations against the Governor-General during the Queen's visit if Sir John Kerr does not resign.

A spokesman for the Victorian ALP Students' Association, Mrs Jan Moore, said tonight that the demonstrations would be peaceful, aimed "to the Queen against Sir John Kerr."

The demonstrations would involve carrying placards and chanting but would not be "as extreme" as recent demonstrations against the Governor-General in Melbourne, Mrs Moore said.

"Our aim is for peaceful demonstrations, but we can't guarantee it."

Page 9: Fraser's audience with the Queen extended.

New focus on Prince

From PETER BOWERS
CANBERRA, Sunday. — Speculation that Prince Charles will be appointed the next Governor-General of Australia has been renewed by support for the proposal by the influential British newspaper, The Times.

The speculation has surfaced spasmodically in Canberra since the dismissal of the Whitlam Government last November.

The proposal has been discussed by the Prime Minister's

team of advisers who appear to be divided on the question.

No one is prepared to dismiss the idea as completely unfounded.

"Very premature but very interesting," was how one of Mr Fraser's closest advisers tonight described The Times editorial.

Other officials suggested The Times could have been floating the idea so that Buckingham Palace could assess the reaction of the Australian people.

Page 4: The Times editorial.



Police drag away a woman during the demonstration against Sir John Kerr in Macquarie Street.

Five protesters were arrested during an angry demonstration against the Governor-General, Sir John Kerr, in Sydney, yesterday.

Scuffles broke out between police and demonstrators, women protesters burst into tears, and one man received a deep cut over his left eye.

It was the second Sydney protest against Sir John in two days.

On Saturday night police were able to keep about 200 demonstrators away when the Governor-General attended a dinner at the Royal Motor Yacht Club, Newport.

5 held in protest against Sir John

Yesterday he attended a thanksgiving service at St Stephen's Presbyterian Church, Macquarie Street, to mark the 75th anniversary of the union of the Presbyterian Churches of Australia and Tasmania.

About 100 police linked arms and formed a human wall on both sides of the church entrance when Sir John arrived.

Sir John was whisked inside the church and his driver, after removing the Australian flag from the car bonnet, drove away quickly. One man was arrested.

During the service, sporadic shouts from the street could be heard inside the church.

Scuffles broke out and a second man was arrested when the vice-regal car returned to

the church at 4.20. The car was driven away without Sir John.

One demonstrator, Mr. John Wales, 36, of Palmer Lane, Darlinghurst was grabbed by a policeman and taken 30 metres along the footpath to a patrol van.

After a brief talk with police he was released. He had a gash over his left eye, and claimed he had been punched.

At 4.40, Sir John's car arrived again. The Governor-General entered it quickly and was driven away.

A man and two women were arrested. Both women struggled violently.



'Loathing, disgust'; Sir John hits out at church vandals

CANBERRA, Monday.—The Governor-General has criticised the vandalism done to St Stephen's Presbyterian Church, Macquarie Street, during his visit to Sydney yesterday.

Sir John Kerr's secretary, Mr David Smith, in a two-sentence statement today, said the Governor-General normally did not comment on events and incidents involving himself.

"However, on this occasion, His Excellency has asked me to express



Sir John Kerr — asked his secretary to express his "loathing and disgust."

his loathing and disgust at what was done to the church," Mr Smith said.

It is the first time Sir John has publicly condemned an act associated with the demonstrations against his dismissal of the then Prime Minister, Mr Whitlam, in November.

The Acting Prime Minister, Mr Anthony, said today the vandalism at St Stephen's was deplorable and would be condemned by the great majority of people.

"What this hooligan element does not seem to understand is that it was not Sir John Kerr who turned a five-seat Labor majority in Federal Parliament into a 55-seat Liberal-National Country Party majority last December, but the Australian people themselves," Mr Anthony said.

The Labor Party itself stood condemned for its continued failure to make the slightest effort to disown the actions of a violent and very small minority, he said.

This minority was attacking the constitutional and democratic system

which enabled the community to express its own judgment last year.

This afternoon the Opposition's shadow treasurer, Mr C. Hurford, accused Sir John of speaking out on political issues now.

He called on the Governor-General to "tell the country why he deceived his elected ministers" before dismissing Mr Whitlam.

"Let Governor-General Kerr speak out on this issue instead of issuing statements inflaming the divisions he has produced," Mr Hurford said.

A group pressing for Sir John's removal from office has written to the Queen warning her of demonstrations during her tour next year.

In the letter, the Secretary of the Society for Asserting the Constitution over Kerr, Harriett Swift, said that if Sir John was still Governor-General then, "there will be demonstrations against him in your presence," regardless of whether he was present or not.

Support for Sir John, in the form of letters and petitions received at Government House, has been overwhelmingly in his favour.

Since November Sir John has received more than 10,600 signatures of support, compared with about 1,600 critical of him.

The letters and petitions reveal that support for Sir John has grown rapidly after every demonstration.

Tuesday, July 27, 1976

DODGING THE ISSUE

THE last word on the actions of the Governor-General, Sir John Kerr, last November and on the present structure of the vice-regal office is a long way off. But we are suffering at the moment from a mass of irrelevancies on the subject which are shifting an uninformed, political shouting match further and further away from the real issues.

The latest ingredients which have been added to the pointless demonstrations against Sir John are speculation about the Prime Minister's conversation with the Queen in Canada and the suggestion from several quarters, including such disparate organs of the press as *Nation Review* in Melbourne and *The Times* in London, that Prince Charles could be a successor to Sir John if only to get the political heat out of the vice-regal kitchen.

It is high time Australians realised that the future of the governor-generalship is their own problem. It will not be solved either by inviting a Prince Charming to establish a court in Yarralumla or by continuing to hurl insults at a convenient scapegoat in the form of Sir John Kerr. The real problem lies in the Constitution that places the lower house of Parliament on an equal footing with the upper house on money matters. As long as that system pertains and the Governor-General has his present powers the possibility remains that a popularly elected government deprived of funds for day-to-day expenses could be dismissed by use of the vice-regal powers.

There is little point in going over what should have happened last November because it is almost impossible to say where one breach of convention or political dirty trick did not affect another: the appointment of non-Labor senators to fill vacancies left by Labor senators; the refusal of the Senate to vote one way or another on Supply; the threat by the Government of the day to raise funds without the authority of Parliament. Suffice it to say that whatever the complexion of the Parliament as a result of the election in December, nothing has changed to avoid a similar set of circumstances in future.

Chestnuts for Prince Charles

It has been suggested, and there is some merit in it, that the powers of the Governor-General should be more closely defined than they are at present in the Constitution. But the danger here is that it is almost impossible to allow for all eventualities without giving the blanket power vested in the office at present. To avoid such half-measures as changing the Governor-General's role, the powers of the two houses of Parliament should be changed. As has been said in *The Canberra Times* several times before, the first step towards this would be to give to the Government of the day the unfettered right to pass money Bills that guarantee the day-to-day expenses of public administration by denying the Senate its present power of veto on such Bills. This does not impinge on the right of the Senate to withhold approval of money Bills for other specific purposes. And the Senate would still retain its right to block legislation that could give rise to a legitimate call for a double dissolution. This change in the Constitution, which would naturally be decided by the people at a referendum, would remove an area of political conflict from the potentially dangerous hands of appointed governors-general and contain it in Parliament where it belongs.

To avoid the difficulty of changing the Constitution a government with a majority in both houses could pass legislation that would make "ordinary annual services" a charge on consolidated revenue, as was the case with Medibank and pension payments during last year's crisis. But it would be a precarious solution, subject to repeal by a government with different ideas about the primacy of the lower house.

The competence of Prince Charles for the job is not in dispute. No previous governor-general would claim to have had the wisdom of Solomon the office's present duties require, and advice — wanted or not — is always available. But the common sense of such an appointment is in question simply because if a member of the Royal family was forced to intervene as Sir John Kerr was (or if a Royal incumbent failed to intervene with similarly disruptive consequences), the monarchy in Australia would suffer irreparable harm. At present people draw a distinction between the monarchy and the monarch's representative which would virtually disappear should Prince Charles be appointed.

It appears that many politicians are, in their separate ways, content to let the opprobrium fall on Government House rather than face up to the unpleasant truth that they do not want to give up the means to throw a government out of office by using numbers in the Senate to block Supply. In those circumstances Australians should be prepared to look forward to a succession of party faithfuls residing at Yarralumla rather than to expect a future King of Australia to burn his fingers pulling political chestnuts out of the fire.

The Sydney Morning Herald

6

TUESDAY, JULY 27, 1976

Sir John Kerr

IT IS AS ABSURD to suggest that the Queen would contemplate cancelling her visit to Australia because of demonstrations by handfuls of young larrikins stiffened by professional agitators and egged on by a minority of discredited Labor politicians as it is to suggest that Sir John Kerr would contemplate resigning for the same reason. This kind of silly and nasty exhibitionism does not deserve to be taken seriously except when it gets out of hand, and then it should be firmly stepped on by the police. If it were taken seriously it would be seen to be singularly counter-productive. The Queen and the Queen's representative could not allow themselves to be put in the position, or to appear to be put in the position, of knuckling under to violence.

Many Australians will be amused and some will be irritated by the solemn worrying of The Times of London, which seems to have based its interpretation of the Australian scene on Mr Whitlam's undignified and immoderate commentaries in London. Had The Times taken the trouble to get its facts straight it would hardly have published the leading article it did. The Australian Government does not face a "dilemma" over "Sir John's position." It is to

misread the situation wildly to say, as The Times does, that "the Australian people as well as their leaders in all parties and departments of opinion" have as their purpose "restoring impartiality to Government House." Most Australians would be quite pleased to accept at some future date The Times' kind offer of Prince Charles, but not for the reasons The Times advances.

The myth, sedulously fostered by such embittered tongues as that of Senator James McClelland, that the Whitlam Government is out of office because the Governor-General carried out some sort of a coup should be treated as the rubbish it is. The Whitlam Government is out of office because a decisive majority of the Australian electors voted it out in a democratic election, and they did this because, as more level-headed Labor leaders acknowledge, it was a bad Government, badly led. The Governor-General's role in the proceedings was to intervene to uphold the Constitution and allow the electorate to pass its judgment. Sir John Kerr should take not the slightest notice of the young bullyboys who dance to a very un-Australian tune. Sir John's actions have been endorsed by the majority of the Australian people. He has the support of the majority of the Australian people.

Perc. buries the hatchet despite ALP

The Mayor of Townsville, Alderman Perc Tucker, smiles as he greets the Governor-General at the Townsville Centenary Show yesterday — a smile which is sure to mean frowns in the Labor Party camp. Ald. Tucker refused to buckle under to A.L.P. pressure to snub Sir John during his Townsville visit. Also in the photo are Mr. Warren Craddock, the president of the Townsville Show Society, and Mrs. Craddock.

(Alex Trotter photo)

"The Townsville Daily Bulletin"
Thursday, July 8, 1916.



All eyes were on Townsville's Labor Mayor, Alderman Perc Tucker, as the Governor-General, Sir John, smiled at the Townsville Showgrounds yesterday.

If he was having second thoughts about greeting Sir John, it didn't show.

Despite Labor pressure to snub the Viceroy, Ald. Tucker has repeatedly said that his first duty

is to the people of Townsville as the elected Mayor of the city.

He vowed to uphold his civic duty and greet the Governor-General, thus becoming the first A.L.P. public figure to do so since last November when Sir John dismissed the Whitlam Labor Government.

The Governor-General broke the ice when he gripped Ald. Tucker's hand and said: "I have inquired about the condition of your wife in Brisbane. I hope everything's going to be all right."

Ald. Tucker replied: "Thank you, Your Excellency, welcome to the Townsville Show."

(Ald. Tucker's wife is recovering in a Brisbane hospital from a serious operation).

Defied A.L.P.

By greeting the Governor-General and his wife, Lady Kerr, Ald. Tucker, a former Leader of the State A.L.P., had defied the unwritten code of the A.L.P. party machine.

He sat alongside Sir John during the opening ceremony but did not speak to him.

At the end of the ceremony, Sir John turned in his seat and engaged the Mayor in a sombre conversation about Mrs. Tucker's illness.

The conversation later turned to a lighter note and the two men began smiling on the dais.

They later left in separate cars to attend a Townsville City Council luncheon at Lowth's Hotel.

APPLAUSE

Loud applause greeted the arrival of the Vice-Regal car onto the Show arena. Many people stood and clapped enthusiastically.

There were no boos or catcalls which have marked the Governor-General's official duties in the south.

The large crowd bristled with uniformed

and plainclothes policemen and women. A ring of uniformed police, 25 metres apart, encircled the inner arena.

Police later reported no arrests or incidents.

In his official opening speech Sir John praised Ald. Tucker for attending the function and for stating his intention to attend the civic luncheon.

"My wife and I are very grateful that you have found it possible to be here today with regard to the personal situation in which you find yourself."

"His presence here is a compliment to one of Townsville's oldest and best-known institutions," said the Mayor.

"And, on your behalf, I wish to say that we are very grateful for this recognition and the Governor-General's obvious personal interest in this progress of our city and region," he said.

A few moments later, Ald. Tucker again expressed the "gratitude and appreciation" of the council and the people of Townsville to the Governor-General and his wife for visiting the city

to protect Their Excellencies.

Five policemen, including Sir John's personal bodyguard, were fed ordinary hotel fare outside the room, as the 20 Townsville dignitaries feasted inside.

Ald. Tucker sat between Sir John and Lady Kerr, and chatted politely about Sir John's journey around the north, about his stay on Heron Island last week, and about the weather. Mrs. W. Cradock, wife of the president of the show society, sat on the other side of Sir John.

Causing some concern was the non-appearance of the stand-in for the Deputy - Mayor (Ald. Reynolds had a university exam yesterday), Ald. Ben Bloom. However Ald. and Mrs. Bloom arrived just in time to join the other distinguished guests as they finished their pre-luncheon drinks and were taking their seats.

The guests, including the Vice-Chancellor of James Cook University, Professor K. Back, chairman of the Townsville Harbour Board, Mr. A. Field, chairman of the Townsville Development Bureau, Mr. K. O'Shea, and vice-president of the T.P.A. & I. A., Mr. F. Plunkett, and their wives. The State Minister for Mines, Mr. Ron

Camm was a late addition to the guest list.

Sir John and Lady Kerr enjoyed the tropical menu prepared for them, which included seafood cocktails, avocados, white wine, barramundi, and strawberries and cream.

BURIAL AT SEA

Meanwhile, out in Cleveland Bay, the effigy of Sir John that led Tuesday's march through the streets, was, with curses, dumped into the

sea by disaffected unionists, eating meat pies and drinking beer.

The unionists had planned to bury the effigy on the beach outside the motel where the vice-regal party was staying, but Police told them they would be "littering" the beach and stopped them.

After a short argument, in which the Police said that the permission to bury the effigy granted on Tuesday had been withdrawn,

the burial party returned to Trades Hall. A T.L.C. spokesman said that the T.L.C. decided "the presence of even a dummy Governor-General could no longer be tolerated", and the dummy was put to sea in a small boat.

Sir John and Lady Kerr were greeted by sporadic applause from about 60 people gathered outside Lowth's when he re-emerged after lunch. He flew back to Sydney shortly thereafter.

All eyes were on him as the Rolls cruised onto the arena

"Everyone here understands the situation and we applaud you in the circumstances," he said.

Sir John's comments were greeted by spontaneous clapping in obvious support of the Mayor's action.

and officially opening the show.

"It is pleasing to know that, as guests of this city, they have enjoyed themselves."

"Thank you, Sir John, for officially opening our 1976 Show," he said.

"MY HONOUR"

Moving a vote of thanks to Sir John and Lady Kerr, Ald. Tucker said: "As the Mayor and representative of the Townsville City Council and the people of Townsville, it is my honour and special duty today to welcome His Excellency, the Governor-General, Sir John Kerr, and Her Excellency, Lady Kerr, to our city."

"Sir John has conferred an honour on the Show Association and this city."

CASUAL TALK

It was casual conversation only between the Governor-General and the Mayor as they sat side by side at the top table in the Matthew Flinders Room at Lowth's Hotel after the opening of the Show.

The Mayor, his baggage still at the airport, had made a rushed trip back from Brisbane to attend the luncheon, put on for the Governor-General by the City Council.

One of the first men to greet Ald. Tucker when he stepped off the plane was a council officer with a telegram from an ALP organisation deploring Ald. Tucker's meeting with Sir John.

Ald. Tucker has been under considerable pressure from members of his party and ALP supporters to snub the Governor-General.

Sir John and Ald. Tucker shook hands at the show, and again when His Excellency alighted from the black Rolls-Royce onto the red carpet across the footpath outside of Lowth's Hotel.

CLAPPED

A small crowd of on-lookers clapped when the Vice-Regal car, preceded by three police motorcyclists, came down the Stanley Street hill. Police security was tight, as it has been throughout Sir John's northern tour.

Both uniformed and plainclothes officers swarmed the air-conditioned corridors of the luxury hotel, although actually inside the Matthew Flinders Room, only one policeman, the officer-in-charge of the northern police region, Superintendent S. P. C. Phillips, accompanied by Mrs. Phillips, was there

TEXT OF ABC RADIO NEWS ITEM

26 JULY 1976

It's not the first time that Sir John's broken the silence that normally surrounds Governors-General and given the demonstrations, planned, and still to come, it probably won't be the last.

But for those who believe Sir John's latest statement is a sign that he's buckling under the pressure, forget it. Sir John has no intention of resigning, before or after The Queen's visit in March next year.

If anything, demonstrations like yesterday's paint daubing of St Stephen's Presbyterian Church in Sydney appear to have firmed his resolve to finish his five year term. And judging by the volume of mail that these demonstrations cause to be delivered to Government House in Canberra, Sir John has good reason to believe that a great many Australians want him to stay.

In the seven odd months since November 11 - the day Sir John sacked Mr Whitlam as Prime Minister, more than 10,000 petitions, telegrams and letters of support have poured into Sir John's official residence. By contrast during the same period, according to Government House, he received about 1,500 letters of protest.

After last month's violent Melbourne demonstrations, the mail was running 16 to 1 in Sir John's favour. The Governor-General reads them all - good and bad - and all are answered.

Sir John takes the overwhelming number of letters in his favour as some proof that the so-called silent majority wants him to stay. Obviously Sir John Kerr can't ignore the demonstrations against him but his supporters believe that protests like yesterday's in Sydney have the reverse effect on the majority of Australians.

Sir John is letting it be known privately that he's staying on and has no intention of resigning.

Suggestions that Sir John's relationship with Mr Fraser has cooled are also dismissed as not true.

So it would seem at this stage anyway that speculation about Prince Charles being appointed Australia's next Governor-General would be a little premature to say the least.

Sir John Kerr isn't letting it all pass unnoticed. With a lawyer's passion for record he's recording it all on paper for some future date.

Ken Begg, Canberra.

TEXT OF ABC TELEVISION NEWS ITEM

26 JULY 1976

Demonstrations or no demonstrations... The Queen will visit Australia next year and Sir John Kerr will still be residing here at Government House, Yarralumla.

That's the firm view of Government here in Canberra.

Like Sir John, The Queen is no stranger to political demonstrations and, unless they get too violent, she, like Sir John, will carry out her planned public duties.

If anything, demonstrations like yesterday's paint daubing of St Stephen's Church in Sydney, have firmed Sir John's resolve to stay on and, it would seem that he has good reason to believe that a great many Australians want him to continue.

The volume of mail arriving here at Government House has been overwhelming in favour of Sir John. In the seven months since November 11 - the day Sir John sacked Mr Whitlam as Prime Minister, Government House has received more than 10,000 petitions, telegrams and letters of support. This compares with only 1,500 letters of protest during the same period. And, after last month's violent demonstrations in Melbourne, letters of support poured into Yarralumla at the rate of 16 to 1. So many in fact that staff here at Government House have had difficulty answering all of them. The Governor-General reads them all good and bad and regards the letters of support as proof that most Australians dislike the demonstrations against him and want him to complete his term.

There's also the other side to the demonstrations. In North Queensland and Western Australia the demonstrators have been heckled and chased away. In Townsville a planned demonstration fizzled because of lack of support.

So it's business as usual here at Yarralumla.

Sir John Kerr has no intention of resigning and contrary to some reports relations between the Prime Minister and the Governor-General are good. But for the full story of what happened last November we're going to have to wait a while yet. One of the principal figures Sir John Kerr has put it all down on paper and no doubt one day will publish it.

Ken Begg, Canberra.

PERSONAL
IN CONFIDENCE



BUCKINGHAM PALACE

17th July, 1976

Dear Governor-General,

Your letter of 13th July for Martin has arrived here, and I shall send it on by bag. All our accounts, both in the newspapers and direct are that the State Visit to the United States was a most unqualified success. The incidents which I imagine you are referring to as having been reported in the Australian press probably relate to the two or three occasions on which enthusiasm seemed to get a little out of hand.

I met the Premier of Queensland at a cocktail party here in London earlier this week, and he referred to the question of Sir Colin Hannah's term. I told him that he would have to take it up with the Foreign and Commonwealth Secretary. However anomalous and irritating this may be, that is the constitutional requirement. He accepted this very readily, and thought he might make some headway with the new Foreign and Commonwealth Secretary, Anthony Crosland. In fact, I have heard subsequently that he was unable to meet the Foreign Secretary, who has been away for much of this week, and he had his talk with Lord Goronwy-Roberts. Goronwy has since told me that Bjelke-Petersen happily accepts that it would be better not to persist with his suggestion that the Governor's term should be extended.

There is nothing I can say from here about the suggested design of your Coat of Arms. I have no doubt that Martin will try this out on The Queen, and let you have Her Majesty's reaction as soon as North American preoccupations permit.

From our point of view, Mr. Whitlam's visit to The Queen went without misadventure, and his comments on it at his subsequent press conference were punctiliously correct. I am told that he recorded a press conference for television, which is being shown tomorrow, at which his attitude to The Queen and the Monarchy is equally correct, but I have also been warned that some of the things he has to say about the Governor-General are "pretty rough"! I shall be watching with bated breath.

I am glad that the visit to Northern Queensland went so well, and hope that your next visits to Victoria which, as you say, will be a good test of the atmosphere are at worst somewhat happier than the last. The enclosures to your letter were, as always, of great interest. I will be interested to hear more about your meeting with the Chief Justice.

Martin and I were both impressed by Francis West's article. I travelled with him by sea from Australia to London in 1965.

Like you, we are in the midst of economic talks. The Chancellor's preoccupation here is how to persuade the Labour Left and the Trade Unions that a substantial cut in public expenditure is a harsh economic necessity.

Yours sincerely
Ric Haskins

His Excellency
the Governor-General of Australia.



H. M. YACHT BRITANNIA

at Halifax,
Nova Scotia,
13th July, 1976.

My dear David

Bill has, I believe, answered your letter of 1st July with which you forwarded Professor Francis West's article from the Australian Quarterly. This is just to say that I have read it with much interest on passage between Boston and Halifax.

It seems to me to be extremely helpful. If the Founding Fathers had wished to deny to the Senate the right to refuse supply I am quite sure they would have said so without prevarication in the Constitution. But as West says, the lawyers for the Labour case is not really about Constitutional Law, but about politics.

Forgive a short and ill thought out letter - and all best wishes.

Yours ever
Malcolm

David Smith, Esq.

Government House,
Canberra. 2600.

22 July 1976

My dear Private Secretary (Martin)

You will perhaps be home again by the time you receive this letter.

We were very sorry out here that so many countries withdrew from the Games, but it seemed to be a very successful occasion for the Royal Family even if the Olympic spirit suffered a little for various political reasons. I hope very much that Her Majesty and her family enjoyed both America and Canada.

Politically and economically things remain quiet here. The Budget Cabinet talks have proceeded and I understand will produce a deficit of about \$2,500 million. This is the best that can be achieved. The inflation rate is down slightly to 12.3%. The Medibank general strike was, as most people think, not a success from the union point of view. Only about 45% of the people stopped work. These were in the militant led blue collar unions. An opinion poll shows well over 70% of voters to be opposed to such political strikes and there is no talk of any repeated strike effort of a general kind on this issue. Everyone now awaits the Budget session and its politics.

I should like to thank you for the message which you sent to me about the way in which the Prime Minister's audience with The Queen was treated by the press here. He had told me in advance that such an audience might be arranged and he was, at the time when he called on me, awaiting an answer to inform him whether he would be able to call upon Her Majesty. The press here treated whatever announcement was made on the basis that The Queen had "summoned" the Prime Minister. I am sure that whatever was said did not justify the way in which the press dealt with the matter.

I have not asked the Prime Minister what was the precise form of press statement made, I can only assume that some attempt was made to indicate that Her Majesty had invited the Prime Minister to an audience. In any event, I was grateful to be told what was the exact position from the point of view of the Palace.

.../2

PERSONAL AND CONFIDENTIAL

2.

The Prime Minister did not tell me that any initiative had come from Her Majesty or the Palace. I think what happened was that he got the impression from Tony Eggleton on his return that, if he were able to go to Canada, an audience with The Queen would be possible and perhaps welcome. Acting on this basis, he said that he had then actively canvassed the possibility. I am sure he is looking forward to his opportunity to have some talks with The Queen. He remains, so far as I am concerned, still very strongly of the view that I should remain here and I assume he will say so.

The demonstrations have tended to subside. I had two very pleasant visits to Queensland and two visits recently to Grafton on the north coast of New South Wales and to Bendigo in Victoria. There was some activity in Bendigo but it was minor and the Acting Commissioner of Police in Victoria, who was there and who handled Melbourne, said it was 'a personal triumph for yourself and Lady Kerr'.

There is a big programme of future events, many of them in Melbourne, and the best advice that I can get is that I should accept them, go to them and see what happens. Melbourne is the hard core militant place.

The Prime Minister and the Minister for Administrative Services have given to Mr Lawler in final form, full authority to handle the matter of considering and advising on my activities in such a way as to take account of all the implications of the programme. I feel confident that this will work out well. I like Mr Lawler and I have no doubt about his personal loyalty. I also have no doubt about the attitude of the Government at the present time and feel that it will continue to be one of full support. The Prime Minister will doubtless tell The Queen, quite frankly, what he feels about the situation as it now stands.

You will remember that his Permanent Head, Mr Menadue, who will be with him, is no friend of mine and believes I should go but is said to have no influence on this point. He serves the Prime Minister well but he was so deeply involved in the Whitlam strategy to govern without Supply that he will, I suppose, never recover from his involvement in the failure to face the then Prime Minister up to possible consequences of his line of action.

I have been told that there is a Gallup poll about to be published which shows 53% of the people against my resignation, 39% in favour of resignation and 8% undecided. This is regarded as good by my advisers.

.../3

PERSONAL AND CONFIDENTIAL

Mr Whitlam, after his visit to The Queen, appears to have rather changed his line of approach. He does not seem now to be saying that I am likely to be gone by the time of The Queen's visit, nor is he now saying that anything that I did has adversely affected the position of Her Majesty in Australia. (Everywhere I go there is evidence of Her Majesty's popularity. I believe that, whatever may be my position, her position has been brought more before the public with enthusiastic results.) I think it is possible that Mr Whitlam may cease to stress heavily the point that I was not entitled to do what I did and will concentrate more on my alleged misconduct, impropriety and so on in the way that I did it. However, we must await his return and his approach.

I am told that he is doing himself damage by keeping this subject alive and by saying that he certainly does not propose to discourage people from shouting at and abusing the "Governor-General and his Lady". The constant addition of the words "and his Lady" in his statement is, to say the least, unchivalrous and does him no credit. It gets him no support - on the contrary.

I am attaching, in case you do not have it, a copy of the transcript of his interview on the British programme "Face the Press". The relevant part of that interview was televised here on the Australian Broadcasting Commission programme "This Day Tonight". The vigorous pressure upon Mr Whitlam came, I think, from Mr Worsthorne. It is an interesting document showing the way Mr Whitlam is at present taking a course which is very different from what he predicted would be the position in his letter to you of 26 December 1976.

The talk which I had with the Prime Minister recently was a very interesting one. He is contemplating holding a referendum to amend the Constitution in two aspects. One, to have a provision that any half Senate election which is due shall take place at the same time as any House of Representatives election also due or impending. I have no doubt that his intention is, if possible, by constitutional amendment to enable him to delay the half Senate election due by the end of June 1978 until the end of the year. It would be extremely difficult for him to have an election for half the Senate in the first half of 1978 without at the same time bringing out the House of Representatives. To do otherwise would mean that the Senate election would be taking place six or eight months ahead of a House election and he would see political disadvantages in having to face a half Senate election so close to a House election.

.../4

To do this would be to give the people a chance to express dissatisfaction as in a by-election without taking responsibility of deciding who is to govern. It would invite a rather more adverse result than might occur if the Government was standing or falling on an election. The difficulty, however, is that if he were to hold an election for the House and half the Senate in the first half of 1978, the economy may not then have responded as they hoped and it may be more unpopular and at risk.

If he can hold back his election for the House until say early December 1978, and by constitutional amendment hold the half Senate election at the same time, he would have an opportunity to introduce an additional budget in the Spring of 1978. This would be a great advantage. He would then have the 1976 Budget, the 1977 Budget and a 1978 Budget to enable him to improve economic conditions and gain or regain popularity.

I understand that there may be some difficulty within his own party about this proposed referendum and the matter is being dealt with on a highly secret basis at the present time. Very few people know that it is being contemplated.

The second part of the referendum is intended to deal with the constitutional problem of last year. The proposal is that the Governor-General's discretionary powers of dismissal should remain exactly as they are except in one respect.

It is to be proposed, so I am informed, that if the Senate denies Supply and persists in its denial for 30 days, there will be an automatic double dissolution of both Houses by constitutional requirement. This proposed amendment is one which I think would be very desirable. Certainly I think the people should have an opportunity of deciding whether they wish the present situation to be maintained, that is to say, for one man, the Governor-General, to have the burden and responsibility of deciding what should happen in a situation such as developed last year.

There is an additional point, that had it not been possible last year to have a double dissolution, which was an adventitious situation and not by any means likely to be the case on every denial of supply, what would have had to happen would have been that the House would have had to go to the people alone and the Senate whose action had forced the position would have been immune, except that last year a half Senate election was due. This also would not necessarily always be the case.

PERSONAL AND CONFIDENTIAL

5.

What would be involved in this proposed referendum would be a decision by the people as to whether they want the status quo as far as the Governor-General's powers in this situation to remain or whether he should be relieved of the problem by an automatic provision in the Constitution.

I think that it is possible that the proposed legislation to set up the two referenda will be brought down in say September and that the referenda will take place in November.

The secrecy which is at present attached to this whole subject is due to the need to clear it politically with great care. However, should the legislation go on it will provide an opportunity for informed debate on the nature of the Governor-General's powers as exercised last year and on the proposed reform.

If the reform is submitted to the people by referendum, a case "for" and a case "against" are prepared and circulated to all electors. By the time the referendum is over there would have been quite a debate on the issues.

If the answer is "no, then that will be a vote for the status quo and for the continuation of the Governor-General's present powers in relation to dismissal and dissolution on a supply issue. If the vote is "yes" then the automatic double dissolution will have been accepted.

It is thought that the Labor Party will find it difficult not to go along with the proposed reform because to advise a vote of "no" would be to advise a continuance of the Governor-General's present powers. It will be interesting to see what happens.

The Prime Minister, who may not mention this matter, is of the view that such a referendum would go a long way towards defusing the controversy associated with my personal position. The people will have been given the right to decide. Having made the decision it will be difficult to continue the level of campaign which has so far been maintained.

Such a constitutional decision on the Governor-General's powers would also be a great help to any future Governor-General. It is the power of the Senate to force an election over the opposition of the Government in the way last year's events demonstrated, however unlikely this may be, which would leave any

.../6

PERSONAL AND CONFIDENTIAL

Governor-General in an awkward position if, (a) the Senate is in different hands from the House, and (b) the Government is so unpopular that the Senate is tempted to deny Supply. The amendment if carried would force the Senate to take direct responsibility for its decision to the people without any intervention on the part of the Governor-General.

Mr Eggleton brought back some information about a subject which I have discussed with you and with Squadron Leader Checketts and which, as you know, I have also discussed with one other person.

Sometime before Mr Eggleton went to London, bearing in mind my own problems, I felt it to be desirable to open up as a possibility with the Prime Minister, the development discussed in a tentative way by me on previous occasions in the United Kingdom, Papua New Guinea and earlier in Australia. He was very interested indeed and very supportive of the notion, provided, of course, that it appealed to the appropriate authorities in London. This discussion was between the two of us. It was not a subject to be mentioned elsewhere for the time being.

Mr Eggleton brought back an impression that this development can be envisaged as a real possibility, to be timed in relation to a number of factors which have already been the subject of some exploratory talks with me. I have made my own position quite clear to those concerned in the United Kingdom on all matters of timing and generally. I have felt that I should mention this matter in this indirect way.

I have no idea whether the Prime Minister, who has mentioned it to me, will seek any way of having talks on his own account whilst he is in Canada. I am sure that you will appreciate that there are many aspects of this subject which I would later like to open up if it is appropriate to do so but if it is felt that it would be better that we should let the matter rest, I shall, of course, accept without question that approach.

My main purpose in this letter is to let you know, if you do not otherwise discover it in Canada, that the matter is on the mind of the Prime Minister. It is something which he contemplates with great pleasure and it is a matter on which he and all concerned would have my full co-operation. If it becomes a real proposition it is likely to need a fair amount of forward planning based on a number of contingencies. Anything I can do to assist in that connection I shall do.

.../7

PERSONAL AND CONFIDENTIAL

7.

I hope I have not transgressed in touching upon this, but I have felt it to be my duty to do so, just as it will be my duty to do no more about it if this is preferred at your end.

Can I let you have an extract from a letter which I have received from Garter who is organising a Coat of Arms for me. I had indicated an interest to have a griffin as one of the supporters. He mentioned to me that the griffin is symbolically a guardian of treasure. I said that having regard to the events of last year, this rather appealed to my sense of irony. The attached extract from his letter may amuse you.

I have just spoken to the Prime Minister by telephone before his departure. He tells me that he believes the Budget will improve confidence, contain elements of social reform, will be no horror budget and if the economy improves revenue will rise beyond Budget estimates.

I remain very grateful to Her Majesty for her support. I realise that we have to react to events as they unfold and I ask you (as I have asked the Prime Minister) to inform Her Majesty of my wife's continued loyalty and humble duty and of my own.

Yours sincerely,

JOHN R. KERR

Lieutenant Colonel the Right Honourable
Sir Martin Charteris, G.C.V.O., K.C.B., O.B.E.,
Private Secretary to The Queen,
Buckingham Palace,
LONDON ENGLAND

PERSONAL AND CONFIDENTIAL

"THIS DAY TONIGHT" - 20 JULY 1976.

While the Opposition Leader, Gough Whitlam, is away on his latest overseas trip there has been a lot of talk back home about who's really leading the Opposition, there's even some doubt about whether the ALP or the ACTU is currently the effective Opposition in this country, mainly due to the Medibank fight.

Well you might be interested to know that Mr. Whitlam is alive and well and still fighting albeit not on his home territory. A few days ago he met three of Britain's top journalists in a debate on British television. Tonight on TDT we present part of that programme called "Face the Press".

What precisely is it that you object to about the Governor-General's conduct?

Mr. Whitlam: Well he has shown himself a dishonourable and a deceitful man. He gave no indication to me or my Ministers that he was contemplating the possibility that he would take away our commission, he in fact led us on to think that he was supporting the course of conduct that we took but the more serious thing is, quite apart from what his conduct might have been is that what he did should never be accepted as a precedent, the Queen couldn't do it and wouldn't do it even if she could in Britain and when it was possible for the Queen, her predecessors to do this they hadn't done it for 200 years. Now it couldn't happen in Britain and we don't think it should happen in Australia. George III was the last monarch who did what the Governor-General did in Australia last November.

But you see Mr. Whitlam as a result of the Governor-General's action the people of Australia were enabled to pass judgment on your Government's failures and in fact to kick you out with a landslide victory to your opponents. Now if the Governor-General hadn't done this - you had already brought Australia to the brink of financial ruin, you had already tried to introduce a socialist revolution in Australia - if it hadn't been for the Governor-General the fact that the people of Australia thoroughly disapproved both of the revolution and of the financial ruin, they wouldn't have had an opportunity to express it, you'd still be in the seat of Government and still carrying on policies which the people of Australia didn't want to see carried on. Didn't he in fact do the people of Australia rather a good service?

Mr. Whitlam: Well let me set you right on two things immediately. There was no revolution in Australia, my Government won two elections by following the rules, adopting all the proper practices, we were entitled to hold office for the three years for which Governments are elected in Australia. Twice, after a year and a half, our opponents denied us the term for which we had been elected. There was no revolution, we applied the rules, we followed the precedent, our opponents did not. The State Governments, the Senate, the Governor-General, the Chief Justice in fact broke the rules. You also say a landslide - now we got in the preferential system which applies in Australia, we got 44% of the vote, that is not an inconsiderable basis to return at the elections which are due in 1978. There was no revolution there was no landslide in terms of votes - get that straight.

I wasn't talking as a matter of fact about the Constitutional revolution, I was talking about the kind of changes that you wished to introduce, the kind of egalitarian redistribution of income changes, I wasn't meaning the word 'revolutionary' necessarily insultingly because I understand you feel that Australia needs a revolution, all I am saying which you haven't answered is that by the Governor-General's action the people of Australia got an opportunity to pass judgment on these changes that you were trying to introduce, they didn't seem to like them. Has it in any way changed your own views about trying to reintroduce them if you come back into power?

Mr. Whitlam: Not in the least, I am certain that we were on the right track. I am certain also that the people of Australia are coming increasingly to believe that because on the 1st of May there was another General election in New South Wales where 38% of the Australian population reside and at that election there was a 4% increase in the votes cast for the Labor Party, last December it had been 46%, this on the 1st May was 50% and a Labor Government replaced the Liberal/Country Party Government in New South Wales that is a Tory Government, so things are changing. Now what we were doing was not a revolution it was to bring Australia up to the conditions which are taken for granted in every Western country including Federal countries such as the United States and West Germany and Canada, that's what we were doing, this wouldn't be regarded as revolution in any Western country. I'm astonished -

What would you like to see changed to enable what the (everyone else) regards the revolution and you don't and which you were constitutionally unable to carry out -

Mr. Whitlam: No, constitutionally we were in fact carrying out most of what we were doing as the Constitution has been hitherto understood and applied we were entitled to do it all.

Yes... well ...

Mr. Whitlam: Well let me get this, there is nothing uncon...

Yes

Mr. Whitlam: There is a High Court in Australia which decides whether anything a Federal Government or a State Government does is unconstitutional and the High Court had not ruled any significant thing that we did unconstitutional.

But surely, surely -

Mr. Whitlam: In fact the contrary.

I accept that but surely, I mean you would be a very tame man indeed if you were prepared to accept the difficulties of the Australian Constitution the Senate's control of money in this case, it is the last case -

Mr. Whitlam: Sure

Surely you have some Constitutional revolution you would like to see yourself even though you may not like the word.

Mr. Whitlam: Well as regards the money powers of the Upper House, I would like to see in Australia the situation that you've had in Britain since 1911.

Well what about the Governor-General?

Mr. Whitlam: I would like to see the position in Australia which has been accepted as regards the Crown in Britain for the last 200 years, that's not revolution even, I think, to the Sunday Telegraph.

I don't actually share Peregrine analysis of your electoral defeat. I think it seems to me that you were very unlucky to be forced to the country at a difficult moment which couldn't happen in this country.

Mr. Whitlam: Nor in any other Western country.

Nor in any other, but nevertheless it does seem to be a bit suspicious that you were forced, that you were dismissed and then there was an election - do you think the Governor-General was acting in collusion with your political opponents or was

Mr. Whitlam: Oh yes, yes, quite clearly.

Have you got any evidence of that?

Mr. Whitlam: Well it is consistent with all the timetable and the statement and the actions which are known. Very clearly the Governor-General was conniving with the Chief Justice. See ...

Sir, how are you going to change that.

Mr. Whitlam: For instance the Queen doesn't take the advice of the Lord Chancellor here or the Lord Chief Justice, she takes the advice of the Prime Minister and the law officers of the Crown the Attorney-General and the Solicitor-General, and in this case the Governor-General disregarded the advice of the Prime Minister and the Attorney-General and the Solicitor-General and sought in defiance of my advice to him when he sought it, sought the advice of the Chief Justice, who of course is still more a political personality in Australia now than he was at the time he was appointed.

What I can't understand is that when you were dismissed by the Governor-General why didn't you go straight down to Parliament and get a vote of confidence.

Mr. Whitlam: We did, we did within an hour.

Was that a formal vote of confidence?

Mr. Whitlam: Oh no it wasn't only that see the Parliament rose at 1 o'clock and I went out to the Governor-General to give him the advice which I had told him three hours before by telephone that I would be giving him that I would be advising him to ask the States to issue writs for the election of half the Senate and then when I went out there he said 'Well before you come to that I've got to tell you that I'm withdrawing your Commission'. The Parliament sat at 2 o'clock, the Senate immediately passed the money bills and then at about twenty minutes past two the Leader of the Opposition, Mr. Fraser, announced that he had been appointed Prime Minister. Immediately I moved the suspension of

Standing Orders which requires a majority of the House. It was passed. I moved that the House didn't have confidence in Mr. Fraser as Prime Minister, did have confidence in me as Prime Minister and directed the Speaker to tell the Governor-General immediately of these opinions expressed by the House and that was carried and then

interruption

Mr. Whitlam: Wait a bit, the Speaker tried to get in touch with the Governor-General, the Governor-General made an appointment an hour and a half later after some difficulty and in the meantime issued a proclamation dissolving the Parliament countersigned by Mr. Fraser so whatever you may think of the Governor-General's right to dismiss us because we hadn't yet got supply although we had three weeks to get it, still there can be no question of the impropriety of his actions, disregarding -

But the fact of the matter is -

Mr. Whitlam: Will you let me, I've not interrupted you once and your questions have been longer than my answers. There can be no question -

Arguable probably. Let him get on.

Mr. Whitlam: Yes I know, well you mightn't be susceptible to argument, but there can be no question of the impropriety of the Governor-General in defying the expressed will of the House of Representatives particularly when my Party, my Government, by then had the supply and then the Governor-General then deliberately stalled seeing the Speaker who was bidden to give the House's views to the Governor-General. Now this was connivance quite clearly and I'm surprised that anybody would overlook it.

interruption

Mr. Whitlam: Whatever might have been the position before on that day -

You took your case to the Australian people in an election, you pointed out to them over and over again what you're now pointing out to us about the improprieties of your political opponents and the improprieties of the Governor-General in getting rid of you, the Australian electors considered these facts and decided that for their part over 60% of them at any rate thought the Governor-General was right and offered political opponents the right to do so, doesn't that slightly affect the confidence that you now come before us and say you were absolutely in the right.

Mr. Whitlam: I do not accept that the people of Australia at that election said that the Governor-General was right. I do not believe that they did say that. They did say that at that time they thought our opponents would be a better Government than we had been, now that's clear -

interruption

Mr. Whitlam: ... Yes but there again I do believe that any government in the West would be in similar jeopardy if its opponents were able to get the ear of the Head of State to have an election half way through its term.

How can you change that Mr. Whitlam. This is to me When Labor gets back to power again what are you actually going to do about the Head of State?

Mr. Whitlam: Well quite obviously you will have to have as a Head of State an honourable man who will act openly in accordance with the proper practices. The man that I recommended to the Queen as Governor-General and I must apologise for that, got delusions of grandeur. He wanted to enhance the significance of the office and of course he did that by going back to George III. Now sure the Crown was more significant in 1776 at the time the American Revolution broke out than it is in 1976 and the Governor-General was more significant when the Australian nation was formed in 1901 than he is today, but that is I don't believe the people will intake as a precedent, as an acceptable precedent the fact that the Government they elect, that is the party which they give a majority in the House of Representatives can be frustrated by the Senate and I don't believe that the Australian people will accept that the person who is appointed Governor-General by the Queen of Australia on the recommendation of the Prime Minister of Australia can then do what he likes.

Is it none of this and you've expressed the, your rebuttal of the idea of disenchantment with the Queen and even with Great Britain, none of this persuade you to leave the Commonwealth or ..

Mr. Whitlam: None at all - I would be the most consistent advocate of the virtues of the Commonwealth in the Australian Parliament and I would have been the most consistent advocate of it for some years and I do so because at least half the members of the Commonwealth are in the southern Pacific or in and around the Indian Ocean. The Commonwealth is the most natural context in which Australia can discuss political or economic or social issues. The Commonwealth is very important to Australia, I've said that for many years and nobody in Britain should be in any doubt about it whatever.

When your successor, Mr. Fraser, recently pointed out that the Soviet Union increased its defence expenditure well beyond anything that was necessary for the defence of the Soviet Union, it seems to me that he made a statement of bald fact, you I think declared this to be one of the most irresponsible statements that you'd ever heard an Australian Prime Minister make. Could you explain why it was so irresponsible to point out what is so obviously true?

Mr. Whitlam: Well all the advice which my Government received, which the previous Government received and which Mr. Fraser's Government has been receiving has been that the Soviet Union's activities on the high seas are no threat to Australia. Now Mr. Fraser since the time to which you refer has made a visit to China and he went quite overboard in supporting China in her dispute with the Soviet Union and went so far as to suggest that there should be an understanding between China and Japan and the United States and Australia in resisting the Soviet Union. Now what Mr. Fraser who's prone to the overkill must realise is that where there is a dispute between nations then it is impossible to get adulation from both sides that is you must be discreet to see that ill-feeling that there is between nations such as between the Arab countries and Israel or between China and the Soviet Union is not exacerbated.

Mr. Whitlam as he appeared when he faced the press in London, that was produced by Tine Tees (?) Television in Britain and he was talking with Peregrine Westhorn the associate editor of the Sunday Telegraph, Harold Evans, Editor of the London Sunday Times, and Paul Johnson, journalist and historian.

E X T R A C T

from letter to the Governor-General of Australia from
the Garter King of Arms, London; dated 13 July 1976:

"I am glad to say I have confirmed my recollection that the griffin is symbolically a guardian of treasure. Arnold Whittick, Symbols, Signs and their Meaning, 1960, page 194, writes "Its function appears to have been that of a guardian of treasure and it was thus regarded as a symbol of watchfulness. Pliny referred to the conflicts of griffins with one eyed Arimaspi for the gold which the former guarded and which they were supposed to dig out of the mines". I am sure you will treasure the thought of the one eyed Arimaspi."



BUCKINGHAM PALACE



7th July, 1976

Dear David, *DS 15/6/76*

Thank you for your letter of 1st July, which I shall send on out to Martin. He may have a few spare moments travelling between the States and Canada in which to digest this latest, and I think excellent, contribution to the great constitutional debate. He should at least have time to enjoy the cartoons.

Best regards,
Yours very truly
Que

David Smith, Esq.

Government House,
Canberra. 2600.

13 July 1976

Dear Markin,

We have been following in the press the story of the visit to the United States. Some accounts give a picture of an awkward incident or two which, if correctly reported, must have been somewhat distressing. Perhaps things were not as bad as some papers reported. We hope that Her Majesty is enjoying the visit and will have a pleasant if exacting (to use your word) time until she returns home.

There are two relatively small points I should like to mention. The first has to do with Sir Colin Hannah, the Governor of Queensland. When I was staying at Government House a few weeks ago, Sir Colin told me that the Premier intended to raise with me the matter of an extension of Sir Colin's term. I am broadly acquainted with what happened some little time ago but have not seen the letter which set out the views of the Secretary of State for Foreign and Commonwealth Affairs. The Premier did speak to me at a dinner at Government House and said he was most anxious to have an extension arranged and wanted to re-open the matter. He had asked the Prime Minister for some help and the latter had suggested that he put his request in writing.

The Premier wanted to write to me and seek my help, presumably on an informal basis. I pointed out to him that, as I understood his previous general policy, he valued his direct relations with the U.K. Minister and had not wanted to go through Australian Commonwealth channels to London. It seemed a little inconsistent to seek the help of either the Prime Minister or myself. He asked if he could write to me about the matter but I said that as he had discussed things with the Prime Minister perhaps it would be better if he wrote to him. This he did and sent me a copy. I told him that I should doubtless have an opportunity to mention to the Palace, on an informal basis, his continuing interest in obtaining an extension for Sir Colin. I mention it now by way of information so that you can consider things in the Palace. I do not know whether the question was one in which Her Majesty was directly concerned but feel that she should know of the possibility of it being raised again.

I understand that the Prime Minister is unwilling to do anything to help but the Premier may work through the Foreign and Commonwealth Office.

The second matter has to do with a coat of arms for myself which I discussed with Sir Anthony Wagner, Garter King of Arms, when I was in London in January. He has suggested that a symbolic reference to both the Office of Governor-General and to my connection with the Order of Australia could be made by a single symbol if we could include the mimosa ensigned with the Royal Crown. He has pointed out that any inclusion of the Royal Crown in the arms of a subject is a special privilege requiring, in the United Kingdom, the Sovereign's Royal License and, in Australia, under an arrangement made some years ago, the approval of the Governor-General. I feel that I should draw Her Majesty's attention to the suggestion. I should like, as a person, to adopt what Garter suggests, but feel that there is something incongruous about granting myself the right to have the mimosa ensigned by the Royal Crown.

If you need to know something about the total design now being settled, Garter could let you have the full details. He has a number of reasons why he thinks what he suggests would be appropriate. I enclose an extract from Garter's letter to me of 11th May 1976. Perhaps you could advise me whether there is any objection to my adoption of his proposal.

We had a nationwide 24 hour strike yesterday. It was supported, indeed directed, by the ACTU as a protest about the Government's Medibank proposals. There is a "stand-off" position on Medibank at the moment between the Government and the unions. There is a great deal of press criticism of the unions on the ground that the strike is a political one against Government policy, not an industrial one. This is countered by the argument that Medibank levies affect the pay packet. The long term industrial policy, especially of the left wing unions, will be very important on a number of political and industrial issues, not the least of which is the acceptance of the latest decision of the Commonwealth Conciliation and Arbitration Commission which allowed full wage indexation only up to a certain wage level (less than the average minimum wage) and flattened increases out at the plateau thus selected.

May I say a word about the Whitlam visit. You will remember Mr Whitlam's letter to you dated 26 December 1975. A glance at it will reveal a very different attitude to the way in which he was looking at the future of the Monarchy at that time. I gather that in London on this occasion he agreed that there would be no trouble from The Queen's point of view during her visit. I am very grateful to Her Majesty for speaking to Mr Whitlam about violence. We shall see what happens on his return.

My wife and I had a most pleasant visit to Northern Queensland. No difficulties arose. We have some further visits to Victoria coming up which will test the atmosphere amongst the militants there. Many people are tending to say that we are over the worst but I am by no means sure. It is very helpful to know that you are still of the view that "stand fast" should be the policy.

I enclose a cutting from the Bulletin by Alan Reid and one from yesterday's National Times by Professor Aitken. David Smith has already sent you a printed version of Professor Francis West's article in the Australian Quarterly for June.

Her Majesty may be interested to glance at a "Personal and Confidential" letter I had from Sir Garfield Barwick. I am to have lunch with him on 23rd July to discuss it. Perhaps I should let comment await the outcome of my talk with Sir Garfield.

You will note that I have said nothing on the economy or the coming budget. Budget talks in Cabinet are just beginning. I shall get some guidance tomorrow night from the Prime Minister on both economic and foreign policy.

My wife and I are both deeply appreciative of Her Majesty's interest in our problems, which weigh far less heavily upon us at the moment but may build up again. We ask her to accept our expression of loyalty, humble duty and, if I may say so, gratitude.

Yours sincerely,

JOHN R. KERR

Lieutenant Colonel
the Right Honourable Sir Martin Charteris,
G.C.V.O., K.C.B., O.B.E.,
Private Secretary to The Queen,
Buckingham Palace,
LONDON ENGLAND.

Extract from letter dated 11th May 1976 to the
Governor-General from the Garter Principal King of Arms -

"... Any inclusion of the Royal Crown in the arms of a subject is a special privilege requiring, in this country, the Sovereign's Royal Licence and in Australia, under an arrangement made some years ago, the approval of the Governor-General, as the Queen's representative. If we could take it that the Governor-General would give his approval in the present instance, we should have an emblem which only the Governor-General could hope to have granted to him. A special advantage, moreover, would be that it would be an emblem which would not be appropriate to Governors-General of any others of the Queen's realms and so would not create what might for us be a difficult precedent - partly because there is no symbol of the office of Governor-General as such, the Royal Crest which is used for the Governor-General's flag being actually part of the Queen's personal Royal Arms and so signifying that for the time being the Governor-General stands actually in the Queen's place, as is of course right, but, as you will understand, awkward to attach to a Governor-General other than during his period of office, whereas what I have proposed gets us round that, I think ..."



Sir John Kerr: the figures suggest his opponents are a small organised minority

ROYAL VISIT

Fraser wants Kerr to stand firm

By ALAN REID

NEITHER THE QUEEN nor Prime Minister Malcolm Fraser want Governor-General Sir John Kerr to resign before the Queen arrives in Australia next March.

Fraser has made his view known to colleagues, and probably to the Governor-General, in the bluntest of fashions. I cannot claim any direct knowledge of the Queen's attitude — my assertion that her attitude is the same as Fraser's is based on deduction. Plans for a royal visit are made well in advance. Undoubtedly information about the Queen's attitude has already been sought, obliquely if not directly. If the Queen had expressed any reservations about Sir John Kerr holding the position of Governor-General when she reached Australia, Fraser would know about it, and would not be expressing his view so forthrightly.

Since November 11, 1975, some 12,000 Australians have communicated with Kerr through petitions, telegrams, or letters. Of these 10,596 have supported the action he took and 1576 have expressed disapproval.

But much more fascinating to my mind is the reaction to the demonstrations themselves. In May, when the issue was, "Did the Governor-General do the right thing or did he do the wrong thing?" 90 communications were

received at Government House endorsing Kerr's action and nine condemning it. Then came the demonstration in Melbourne in June, a demonstration which would have frightened the hell out of me if I had been sitting in the Governor-General's car. The communications increased in number. Over 800 were received by the end of June — 788 expressed support for Kerr and 48 were condemnatory.

Another quite fascinating point is that although, when the demonstrations are organised, Kerr has to have a heavy guard of police, he is still able to walk the streets when there has been no prior organising.

For example, I am told that on a recent Sunday morning he and his wife left their Melbourne hotel and went for a walk along Collins Street, accompanied by a nervous security guard. Admittedly, Collins Street, Melbourne, on a Sunday morning is not Pitt Street, Sydney, on a late shopping night, but neither is it a deserted village.

The Governor-General was stopped several times and engaged in conversation. The for-and-against ratio was roughly the same as for the communications received at Government House. The attitude of the majority was, "Good on you, mate — don't let the demonstrators intimidate you." Those who disagreed with the actions he had taken put their adverse viewpoints in a civilised, rational manner, and the security guard found that he had no occasion for his nervousness.

The "spontaneity" of the Melbourne demonstrations can be measured to some extent by the fact that to get demonstrators along the organisers had to lay on free buses to and from the demonstration.

History will decide if Kerr was right or wrong

By DON AITKIN*

Mr Whitlam MP Junior suggested the other day that the Governor-General would resign before long; the Rev Alan Walker argued that he should. Some are claiming that he should vacate his office in order to preserve national unity. Others are urging that the demonstrations against him cease, for the same reason. One correspondent to a morning paper even invoked national unity as a reason for people not to attend dinners at which Sir John Kerr would be present:

National unity is very much in at the moment, which suggests that there is not very much of it about. But what is it

that the Governor-General could, or should do?

He could certainly resign and, though I have not seen the terms on which he was appointed to his office, I have no doubt that his resignation could be effected in such a way that he retained his rights to a pension which is not at all beggarly.

And the Governor-General must have given some thought to resigning. It cannot be pleasant to discover that there is after all an important use for the police escorts which customarily accompany him. Public occasions must have lost for him some of the charm that they formerly had.

But I should be very surprised, none the less, if Sir John Kerr were to leave office under any circumstances other than the end of his term or sudden and severe ill-health. Nothing he has done so far suggests that his nerve is poor or that his self-confidence is frail.

Moreover, to resign now or in a few months' time would be to raise all kinds of doubts about his own belief in the rightness of his actions last November. There was a time at which resignation would have been appropriate, and that was at 8 pm on polling day, December 13.

He might have resigned then on the grounds that having taken the unprecedented step (for a Governor-General, at least) of replacing a Prime

Minister by the Leader of the Opposition without the people having given the nod, he should neither expect reward nor fear retribution from the consequences. Indeed, he should act so that the people understood that he had acted without thought for himself at all.

All this, of course, would be true only if the Governor-General realised that the partisan *consequences* of his decision to dismiss the Whitlam Government (and I assume that there was no partisan *intent*) had to be recognised in some way. It is clear that the Governor-General did not hold to this view.

Perhaps he would have changed his mind had it been obvious that Gough Whitlam was going to win that election, especially given that the former Prime Minister had campaigned very largely on the question of the dismissal. It would have been almost inconceivable for a re-elected Mr Whitlam to have wished to continue with the Governor-General who had sacked him, and Sir John would no doubt have preferred to resign than be sacked in his turn. (Again, the details are hidden, but could Sir John have been dismissed without compensation?)

In any event, he did not resign then and, like Mr Whitlam, will now have to "tough it out" until the tumult and the shouting die, which will in all probability occur by the end of the year. Of course, he will never be a "popular" Governor-General in the sense that Sir William Slim was, but it is doubtful whether Governors-General care much about their popular esteem anyway. And no doubt he can withstand the snubs at the official level that will be handed out to him in Labor-governed States.

Meanwhile, an academic battle still rages (if that is the right verb) about the propriety and constitutionality of his actions. So far the action has been confined to the newspapers and journals, though no doubt someone will take the opportunity to write a book (as H. V. Evatt did after Game's dismissal of Lang in 1932: his *The King and His Dominion Governors* is still a classic).

The end of publication on this subject is by no means in sight but there is enough evidence now to discern three general issues, or lines of disagreement. These are not always admitted by the writers but seem clear enough to at least this reader.

The first is that what

was done was in whole or in part illegal or unconstitutional. Leslie Katz, for example, has argued that the Governor-General did not have the power to dissolve both Houses of Parliament because the grounds that were used (the 21 bills that the Senate had twice rejected) were not germane to his explicit reason for dissolution (the blockage of supply). He cites Sir Garfield Barwick as an authority here, a nice irony which would be nicer still if Barwick had not in fact been in a minority on the question.

The second is that what was done was against the grain of constitutional development, in that it represented a re-assertion of autocratic or arbitrary power after centuries of the erosion of that power and its replacement by democracy. Here the rights of the Governor-General are not disputed, only his propriety in making use of them. This is a rich and complex area for disputation, and one which will remain topical for years, since we must wait to see whether in fact Sir John Kerr's actions were just a flash in the pan or whether they are followed by the development of the Governor-General's role into that of a more important political actor.

The third is that Labor was robbed. This is not a straightforwardly partisan view, because it can be argued in general terms: governments are elected for three-year terms, and should be given the opportunity to use all that time if only because governments often need to do unpopular things and need time for the benefits of these unpopular decisions to be made manifest.

Supporters of this view argue that the Hayden Budget's virtues would have been apparent in May, 1977 if only the politicians had been left to sort out the mess they had created. The Governor-General's actions forced Labor to an election at the worst possible time. And so on.

Some of these issues are raised in an excellent critique of the "Labor-was-robbed" school by Francis West, in the current *Australian Quarterly*. No doubt the Governor-General will read it with approval and surprise, for most of what has been written has been against him.

In fact, in the long run Sir John's reputation depends less on the demonstrations he is having to face than on the outcome of the debate between the lawyers, historians and political scientists, those who write the history books. On present indications he is going to have a bad press.

*Don Aitkin is Professor of Politics at Macquarie University, Sydney.



"MUNDROOLA",
133 GEORGE STREET,
CAREEL BAY, N.S.W. 2107

2nd July, 1976.

PERSONAL AND CONFIDENTIAL

Dear John

First of all, may I say to you, John, how much you are admired for your steadfastness at the present time. All may not realise, but I do, how difficult the situation is proving for you. But I know you realise that steadfast you must be.

I notice that fears are expressed as to what may occur during the Queen's visit. My own best judgment is that nothing will occur. If any demonstration is attempted nothing, I think, can come of it if the police attend *with* sufficient preparation and sufficient numbers. A great proportion of those who presently demonstrate can be seen in one place or another doing so. *There is a deal of professionalism.*

I have been giving a good deal of thought to the situation which obtained last year. I can see no need for, or indeed room for, amendment of the Constitution. A Senate is only likely to exercise its right to defer or reject supply if it is confident that the government has lost the support of the electorate. Evatt in 1951 made the error of failing to pass legislation and in the ensuing election lost the majority in the Senate: Menzies had the support of the electorate. The unwisdom of the rejection in Sneddon's time was seen in the electoral result. It had, amongst other results, the passage of the bill allowing territories to send Senators to the Senate.

But there are two aspects of what occurred last year which continue to trouble me in my quiet contemplation of events. The first is that it is an unbearable situation that a Governor-General should feel under obligation to act without warning or discussion because he feels himself under threat of dismissal by a Prime Minister, that is to say that he believes that the Crown would on the request of a Prime Minister instantly withdraw the Governor-General's commission. One of the reiterated criticisms of the events last year is that no warnings were given or discussions had, and the occasion is contrasted with what passed between Game and Lang prior to Lang's dismissal. In that case, of course, the Governor was secure. He rightly felt that there was no risk of his recall at Lang's request although he was very conscious of the lukewarmness of the Colonial Office for the course he proposed to take.

Of course, the remedy could not be the grant of a fixed term to a Governor-General. Apart from the political

atmosphere of the times I do not think it would, in any case, be a good thing. But it seems to me that the Crown, being the Crown of Australia, cannot continue the traditional attitude of the British Crown since the loss of the American plantations in not wanting to be involved at all in colonial affairs and to shake off any involvement in them. It may very well be that in relation to Australian affairs the Crown will need to act with at least as much participation as it does in British affairs: perhaps, in some circumstances, with greater participation. I mention this to you for your consideration because the anomaly of the Crown standing completely apart from Australian affairs has already excited some discussion.

The other matter is that I am troubled that no responsible group in the community have come out to put their finger on the essence of last year's occurrence, namely, the inability of a Ministry to secure supply to carry on the ordinary services of government. No one has emphasised that no Prime Minister who could not obtain supply should put a Governor-General in the situation in which you were put. I have been turning over in my mind possible ways upon which this fundamental of responsible government can gain currency. I cannot, of course, enter the lists in any sense. I could not have said at the Press Club recently that no self-respecting Prime Minister would put a Governor-General in the situation in which you were put, and I do not see anyone in the community who at an appropriate time and in an appropriate way could make the point. However, it has occurred to me that it is in the hands of the Governor-General to make the matter explicit, that is to say, the obligation to provide supply. It seems to me that when commissioning a government it would not be inappropriate, but rather on the other hand most appropriate, that the Governor-General should expressly inform the Ministry that the commission being given to it did involve and depend upon supply being provided for the ordinary services of government. That does not mean, of course, that the Ministry must command a majority in the Senate. Frequently it will not. But it does mean that the Ministry must, on the one hand, woo the Senate and, on the other hand, watch its electoral base in case the lack of electoral support encourages the Senate to reject or defer supply.

I have thought for quite some time before penning this very personal and highly confidential note. Perhaps when we have a little time together we might talk about its contents.

*Kindest regards
Yours sincerely
G*

(GARFIELD BARWICK)

His Excellency The Honourable Sir John Kerr,
A.K., G.C.M.G., K.St.J.,
Government House,
CANBERRA.



BUCKINGHAM PALACE

2nd July, 1976

Dear David, *DS 12/7*

Your letter of 29th June arrived just in time for Martin to see it and show it to The Queen before they left for America. Her Majesty hopes that the Governor-General and Lady Kerr are enjoying the full benefit from their short rest, and that on their return perhaps events will have settled down somewhat. The enclosures to your letter were of the greatest possible interest. Mr. Whitlam has come and gone. His audience with The Queen has caused no embarrassment, and may, I think, have done some good. He was most punctilious in his refusal to say anything about it when asked here at his press conference what had passed between them.

Yours ever
DS

David Smith, Esq.



BUCKINGHAM PALACE

30th June, 1976

My dear John

Thank you very much for your two letters of 17th June and 22nd June. These arrived very conveniently in time for The Queen to read and absorb them before she received Mr. Gough Whitlam yesterday. I was also able to brief Her Majesty as a result of David Smith's telephone call about your discussion with Archbishop Woods in Melbourne.

Before commenting on your letters, I think you will wish to know how the audience went, and what preceded it.

Gay and I dined with the Buntings on Monday night to meet Gough and Margaret Whitlam. The only other guests were the parents of the Whitlams' daughter-in-law. I understood from Jack Bunting that Mr. Whitlam had asked that I should be invited to the dinner and I was of course very pleased to accept.

Mr. Whitlam was in excellent form and the conversation at dinner ranged agreeably from Sir Harold Wilson's resignation honours list to the characters of politicians in this country and in yours!

I had about half-an-hour's private talk with Mr. Whitlam after dinner and he remained sweet and reasonable, spoke warmly of The Queen and at least conceded that it could be argued that you had acted in accordance with the Constitution! I said that whatever we were asked we would say nothing of what passed between The Queen and him next day, at which he threw up his hands and said the very idea of anyone saying anything about that was totally unacceptable.

The actual audience with The Queen seems to have gone very well, and Her Majesty told me that she had spoken firmly about the use of violence. We must hope that some of this is reflected in any answers Mr. Whitlam may give at his press conference today.

To revert to your two letters, The Queen was very interested to read your Aide-Memoire to the Prime Minister and the remit for the Task Group. It will be very interesting to see what this Task Group produces.

Your second letter gives some encouragement and I was glad to learn from David Smith that you are receiving a full and supporting mail. You must nonetheless be living under considerable tension and everybody here who knows what is going on has a lot of sympathy for you. These are difficult times for you but I remain convinced that it is indeed right for you to "stand fast". All who know you admire your courage and determination.

Dick Casey was a great man but I expect his death was in some ways a merciful release, as I know how ill he has been for some time. The Queen is grateful to you for having represented her at the Memorial Service.

It is a great pity that Sir John Egerton has been forced out of his Trade Union and ALP offices; he will be a loss to the forces of moderation.

We are off to America on Saturday for what is certainly going to be an exacting visit: I hope and believe, however, that it will be successful.

The Queen sends her warm good wishes to you both.

*Yours wa
Martin*

His Excellency the Governor-General of Australia.

Government House,
Canberra. 2600

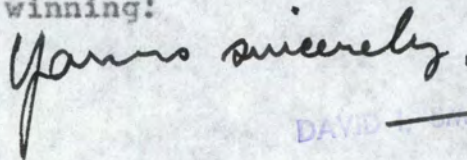
1 July 1976

Dear Martin,

Professor Francis West's article on the 1975 constitutional crisis has at last been published in the Australian Quarterly, which is the journal of the Australian Institute of Political Science, and I enclose a copy to replace the unreadable one which I sent to you earlier.

I am also enclosing the two cartoons relating to Mr Whitlam's call which I tried to describe to you last night. The A.B.C. this morning carried a brief extract from Mr Whitlam's press conference, in which he spoke of The Queen being received with warmth and enthusiasm next year. His reference to the demonstrations against the Governor-General, however, was still somewhat equivocal. At the same time, Bob Hawke, as President of the A.L.P., has again called on the party to forget about the Governor-General and concentrate its opposition against the Prime Minister. This morning's Australian cartoon by Pickering, which I also enclose, seems to deal rather effectively with Bob Hawke's problems in this direction.

Our office is still being flooded with letters of support for the Governor-General in continuing to carry out his public engagements in the face of the demonstrators. I certainly have the feeling that we are winning!

Yours sincerely,

DAVID MARTIN

Lieutenant-Colonel the Right
Honourable Sir Martin Charteris,
G.C.V.O., K.C.B., O.B.E.,
Private Secretary to Her Majesty
The Queen,
Buckingham Palace,
LONDON ENGLAND

The Australian Quarterly

June 1976
Volume 48, No. 2

editors		Hugh Pritchard Antoinette Wyllie
articles	5	Policy Making in the Liberal Party: the Opposition Experience by Ian Marsh
	18	The Politics of Housing by David Donnison
	32	A Review of the Jackson Committee Report on Policies for Development of Manufacturing Industries in Australia by David Gadiel
	42	A Comment on Mr David Gadiel's Review of the Report of the Committee appointed to advise on Policies for Manufacturing Industry by Gordon Jackson
	48	<u>Constitutional Crisis 1975: an historian's view by Francis West</u>
	61	Divorce in Australia — another look by Lincoln Day
	74	A guaranteed income scheme: Implications for women by Meredith Edwards
	81	The Effect of the Government's economic policies on Industry, 1973-75 by R. A. Price
reviews	95	Political Review by David Adams
	106	New Guinea Review by Bill Standish
	120	A Review of the Victorian Elections by John Warhurst
cover		John Spooner, by courtesy of the National Times
printer		Southwood Press Pty Limited, 80 Chapel Street, Marrickville

Constitutional Crisis 1975 — An Historian's View

by Francis West

Tens of thousands of words have now been written by lawyers about the events of October/November 1975: letters to the editor, paid advertisements, articles in newspapers and journals. One might be forgiven for thinking that the relevant sections of the Constitution and the commentaries upon them by such authorities as Quick and Garran and Odgers had been so exhaustively examined that there is little more to say. Yet, that is not so. The majority of the lawyers who have written about these events have taken the view that the Senate, in deferring Supply, and the Governor General, in revoking the Prime Minister's commission, acted in some way improperly or even unconstitutionally or illegally. They have provided, whether they intended it or not, an apparently authoritative backing for the cry which has echoed from Australian Labor Party politicians ever since their dismissal from office and subsequent electoral defeat: 'we was robbed'. More closely examined, the lawyers for Labor case is not really about constitutional law in a strict sense, but about politics and history. Before one accepts their view as authoritative, through the sheer weight of words, the nature of the legal argument is worth a much closer examination than supporting historians and political scientists have so far given it.

The Lawyers' Argument

The first shot in the lawyers' war of words was fired over the Senate's

CONSTITUTIONAL CRISIS

power to reject Supply even before that House had acted. On 11 October 1975 there was published in *The Age* and other major newspapers, a letter signed by four professors of law: Castles, Howard, Sawer and Zines. The four had not as a group drafted the letter that bore their names; that was done in the office of the Labor Attorney-General, Mr Enderby. But when the text was brought round the universities for signature, those four lawyers signed when others did not. One who refused, Professor Lane, has told us why (*The Age*, 15 Oct. 1975): the letter misrepresented the view attributed to Sir Isaac Isaacs in condemning the rejection of Supply by the upper house in Victoria in 1947. That is not the only reason for a constitutional lawyer to have doubts about the argument set out in that original letter. Apart from the curious origins it had, the legal arguments used were even more questionable. Later expanded and elaborated, the lawyers' for Labor case was contained in embryo in that letter.

The gist of the academic lawyers' argument was this: although the Senate, under Section 53 of the Constitution, seemed on the plain words of the Section to have the power to reject Supply, nevertheless *by convention* it could not do so. To support their contention these lawyers adduced, not judicial interpretations of the Section nor even *obiter dicta* in the High Court nor federal precedents, but analogies from the powers of upper houses in 'the Westminster system', especially analogies with the British upper house, the House of Lords. This is still the analogy one of the signatories uses. Professor Howard, in the previous issue of the *Australian Quarterly* (March 1976, p. 8) still bases his case against the Senate on 'the theory and practice of parliamentary government . . . in all countries which have followed the British . . . model'. The case is further bolstered by prophecy: if such a convention about upper houses is not observed, then there will follow unstable government, civil disorder or worse. Democracy is in Danger. Sir Isaac Isaacs made this kind of prophecy of Victorian government in 1947. Need one say that since that date Victorian State government has been noticeably stable?

Stripped of prophetic anger and the wrath-to-come, the lawyers' case, adumbrated in that letter and later elaborated, comes down to the bare assertion that, whatever the Constitution seems quite plainly to say, there is a convention that the Senate cannot refuse Supply. What the Constitution says, in the Section 53 which has been so argued over, is worth repeating: the Senate shall not originate proposed laws 'appropriating revenue or moneys or imposing taxation'; it may not amend such laws; except for that 'the Senate shall have equal power with the House of Representatives in respect of all proposed laws'. Now, there are only two ways of arguing that the Constitution does not mean what it says. You can say, as the lawyers for Labor do, that the power so explicitly given is negated by convention. Or you can say, as one non-academic lawyer has, that rejection is itself an amendment and therefore uncon-

stitutional. This second argument, put by Sir Richard Eggleston (*The Age*, 27 Oct. 1975) did not convince Professor Sawyer. Nor, as a matter of fact, has it even convinced both Houses of the federal parliament which have never treated rejection of a bill in the other place as an amendment. One may guess that it would never convince the High Court because it is strained legal interpretation. And like the academic lawyers for Labor argument, it is not at root a legal argument at all; it is, as Sir Richard later developed it (*The Age* 5 & 11 Nov. 1975), really based upon the belief that those who drafted the Federal Constitution did not intend that the Senate should reject Supply. With that, we come back to an historical question such as is involved in the academic lawyers' argument from convention.

In their original letter and in their later elaborations of its points, the lawyers slipped from using the word 'convention' to using the word 'rule'. But conventions are not rules. They derive from British constitutional practice where, with no written constitution, they have guided political behaviour, *not* legal or judicial behaviour, where there is no precise statute definition. For example, in the 'Glorious Revolution' of 1688/89, the British parliament by statute declared that the royal power to suspend the law was illegal. Thereafter, there can be no convention about the royal suspending power. By statute, the royal power to dispense the law in individual cases was declared to be illegal 'as it hath been used of late'. In the absence of definition, you can very well have conventions about what the royal dispensing power is. The point is quite clear: conventions, in British parliamentary practice, exist where statute has not been precise; they do not exist where statute is quite clear, for that would be to defy the authority of parliament and the laws it has passed.

The Australian Constitution is a statute. It defines, precisely, what the Senate's power is. You cannot have a convention which says that the statute means the reverse of what it says, for you cannot have, with a written Constitution, a convention which is itself unconstitutional i.e. reverses the plain words of the statute, unless you can cite a series of judicial decisions which so interpret it. And this is signally what all of the lawyers have failed to produce in the whole of the discussion about what the Constitution means. In the absence of High Court decisions, the only argument left to the lawyers would be an historical demonstration that the Founding Fathers intended something other than what they actually said. Sir Richard Eggleston claimed that this was so. He believed that the omission from the final draft of the Constitution in 1898 of a precise spelling out of the Senate's powers over Supply shows the intention. This seems to add bad history to strained law. As Professor Sawyer could have told him, by far the greatest amount of the Founding Fathers' time was devoted to the Senate's powers. They indeed did not accept that the Senate should have completely co-ordinate powers with the House of

Representatives, but equally they rejected the idea that the Senate should have a very restricted power of review. They actually said that with the sole exception of originating or amending money bills, the Senate should have equal powers with the House. In politics, as in law, men intend the consequences of their actions.

Moreover, the Founding Fathers made their intentions clear within the Constitution. If the lawyers for Labor had not concentrated their attention on Section 53, they might have noticed Section 49. This says that the powers privileges and immunities of the Senate are those of the House of Commons; they are quite explicitly therefore *not* those of the House of Lords. Nevertheless the lawyers' case against the Senate's use of its powers rests in large part on the analogy with the British upper house which by convention at the time the Australian Constitution was drafted could not reject a money bill. A better legal argument from that fact is this. The Australian Constitution spells out, in so many words, certain British political customs and conventions which thereby became written rules. Particularly it spells out custom or convention where it is being changed from British practice. This was deliberately done in the case of the Senate's being different from the House of Lords. It should be unnecessary to labour the point because it is quite obvious that an hereditary upper house with no electoral mandate within British parliamentary practice is very different from the Senate which is directly elected by popular vote and which has defined powers within a written Constitution.

The bad analogy with the House of Lords has been a major part of the lawyers for Labor case against the Senate's use of its constitutional powers. Less stressed has been the argument that, from 1901 to 1975, the Senate had never rejected nor failed to pass a money bill and this establishes a convention that it cannot do so. As a matter of logic, it is hard to see how you can establish a convention from something which has never happened; this amounts to saying that nothing should ever happen for the first time, a conservative argument that sounds oddly in radical mouths. The most you could make of this kind of argument is that in analogous circumstances — of economic crisis, of ministerial dismissals and forced resignations, of grave scandals — the Senate had not acted. The only such analogous circumstance in federal political history is the situation of the Scullin government between 1929 and 1931 where a non-Labor Senate did not act. The circumstances are not precisely analogous with those of 1975, but even if they were, you cannot establish the growth of a convention from one example. Even the Senate's failure to pass Supply in 1975 does not establish a convention, although it makes nonsense of any argument that there has been a 'growth' or an 'evolution' of a convention that it cannot.

To use a proper British analogy to show the nature and growth of a

convention: the appointment of a Prime Minister from the lower house. Until the mid-nineteenth century, the British Prime Minister was more often than not a peer, not a commoner. The appointments of Pitt, Perceval and Peel before the middle of the century established no convention that the Prime Minister should come from the Commons. Nor did the appointment of Gladstone and Disraeli in succession in the second half of the century. At its close the Prime Minister might still be a member of the House of Lords. Within the twentieth century, the British Prime Minister has been a member of the House of Commons, and in 1963, when Mr MacMillan retired while still in office and his successor as Leader of the majority party was a peer, the earl of Home renounced his peerage for his own lifetime and took a seat in the lower house. That recognized a convention; but in both 1922, when on Bonar Law's resignation Lord Curzon might have become Conservative Party leader, and in 1940, when on Neville Chamberlain's resignation Lord Halifax was seriously canvassed as leader and Prime Minister, the convention was open to question. It is convenient, but neither essential nor obligatory, to have a Prime Minister in the house in which money bills originate. It is, in short, a political and not a constitutional or legal judgment.

And, in truth, the lawyers for Labor case is a political, not a constitutional nor a legal one. Although their use of words is often imprecise — for example they talk of Supply, where the Constitution speaks of revenue, moneys and taxation; or a deferral of Supply, where the Constitution speaks of failure to pass — what the lawyers are really saying is not that the Senate *cannot* do what it did but that it *should* not do what it did. And this, in 1975, was the Labor politicians' argument.

The Politicians' Argument

One of the difficulties, although the lawyers for Labor do not often allude to it, is that their case against the Senate's use of its constitutional powers was undercut by Australian Labor Party politicians. Professor Howard, for example, in the previous issue of the *Australian Quarterly* (March 1976, p. 7) states that the pass was sold in 1974, when a threat by a non-Labor Senate to reject Supply led Prime Minister Whitlam to ask the Governor General for a double dissolution. He omits to mention that in 1970, when the Liberal-Country Party coalition government had a majority in the House of Representatives but did not have a majority in the Senate, the Australian Labor Party asserted Senate's powers within the Constitution. Since 1919, the abolition of the Senate, by putting the question to a referendum to amend the Constitution, has been part of the Australian Labor Party's manifesto, but in 1970, when Liberal-Country Party membership of the Senate was a minority, both Mr Whitlam, then Leader of the Opposition in the House of Representatives, and Senator

(now High Court Justice) Lionel Murphy, Leader of the Opposition in the Senate, asserted the powers of the Senate. Thus Senator Murphy on 18 June 1970: 'The Senate is entitled and expected to exercise resolutely but with discretion its power to refuse its concurrence to any financial measure, including a tax Bill'. There are no limitations on the Senate in the use of its constitutional powers, except the limitations imposed by discretion and reason'. Thus Mr Whitlam, on 25 October 1970: 'our opposition to this budget is not mere formality. We intend to press our opposition by all available means on all related measures in both Houses. If the motion is defeated, we will vote against the Bills here and in the Senate. Our purpose is to destroy the Government . . .'; and on 1 October 1970 he had already said: 'We all know that in British parliaments the tradition is that if a money Bill is defeated . . . the Government goes to the people to seek their endorsement of its policies'.

What Mr Whitlam said after 16 October 1975 when the Senate indeed failed to pass Supply was that he would 'crush' or 'smash' this 'vicious' and 'tainted' house. What High Court Justice Murphy would have said, had any case involving the Senate's powers, come before the High Court, is a matter of conjecture. Men appointed to high judicial office often tend to assume the traditions of the judiciary, rather than the politics they have left, although this is denied to Sir Garfield Barwick, the Chief Justice of the High Court, by the lawyers for Labor. Mr Whitlam's intention to destroy the Senate could only be achieved if he put the abolition or restriction of the Senate's powers to a referendum, as Labor Party policy requires, and won. Other than that, he could only negate the Senate's powers if he controlled a majority in the Senate which would therefore vote as the House of Representatives with a Labor majority voted. Mr Whitlam, as Prime Minister, was never able to secure this. In 1974, on the mere threat that the Senate might reject or fail to pass Supply, he asked the Governor-General for a double dissolution and was granted it. In that election, the powers of the Senate were an issue; *the* issue, so far as the occasion of the double dissolution was concerned. What happened was that, on this prominent issue, Mr Whitlam did not gain a majority in the Senate and his majority in the House of Representatives was reduced. After that election, the Senate might well have concluded that, as Senator Murphy had argued, it not only had the power to reject money bills but that it had a popular mandate to do so.

The coincidence of the politicians' argument and the lawyers' argument is most clearly to be seen in respect of the Senate's position. Where the Labor politicians in 1975 spoke of the lower house as the 'people's' or popular house, with the implication that the upper house was neither, the lawyers for Labor argued that by never before using its 'theoretical' powers, the Senate in practice had always accepted the paramountcy of the House of Representatives. What both assert is that, whatever the

Constitution says about Parliament consisting of the Queen, the Senate and the House of Representatives and about the equal status of both Houses with one sole exception, in theory and in practice only the lower House should matter. That is an interpretation of the Constitution. But it is a political not a judicial one. Since it plainly asserts the Constitution to mean other than what it says and in effect denies that the intentions of those who drafted the Constitution are now relevant, the practical result of such a 'constructive' view of the Constitution is to create a dilemma for the Governor-General who takes an oath of office to execute and maintain the Constitution.

The Governor-General's Case

On 11 November 1975 the Governor-General published two documents: his letter to Prime Minister Whitlam and a statement of explanation of his decision to revoke the Prime Minister's commission. The former stated, as a matter of fact, that Mr Whitlam had told the Governor-General that he would never resign nor advise an election of the House of Representatives nor a double dissolution, and that the only way in which such an election could be obtained would be by the dismissal of himself and his ministers. In the second document, Sir John Kerr grounded his action upon the deadlock between the two Houses of Parliament and the consequent inability of the government to obtain Supply. A Prime Minister who could not obtain Supply must either advise an election which would enable Supply to be obtained or to resign. Mr Whitlam would do neither of these things. The Governor-General must therefore do his duty under the Constitution he had sworn to maintain and exercise his powers to revoke the Prime Minister's commission and to appoint a Prime Minister who could guarantee Supply and who would advise a double dissolution. The Leader of the Opposition, Mr Fraser, would do both of these things. No other decision, the Governor-General wrote, would enable the Australian people to decide for themselves what should be done.

Constitutionally there is no serious doubt that the Governor-General was right in law. The Senate had the power to reject or to fail to pass Supply. Appropriations must be duly authorised by both Houses of Parliament. The Governor-General has power to dismiss ministers; he possesses what Sir John Kerr called 'reserve' powers and the lawyers for Labor more dramatically call 'emergency' powers, although even the latter do not challenge the existence under the Constitution of such authority. Indeed, they could not, for Prime Minister Whitlam had relied upon them himself when he asked the Governor-General to dismiss one of his own senior ministers who refused to resign and the threat of their use to compel another senior colleague to resign one ministry and accept another which he did not wish to have. The question is not the existence of such

powers but whether the Governor-General can exercise them of himself and not upon the device of the Prime Minister.

Mr Whitlam's answer to this question was clear: he spoke of 'my' Viceroy and said that the Governor-General would do as the Prime Minister told him, that the Governor-General could act only on his advice. In the Constitution this is by no means so clear. Certain Sections require the Governor-General to act with the advice of the Federal Executive Council (e.g. Sections 62, 67); other Sections give him power to act without any reference to any other person or authority, including his powers under Section 57 which deal with the dissolution of both houses. Even the lawyers for Labor agree that, whatever may be the argument over these powers in matters of executive government, the Governor-General must himself have the power to judge his sworn duty to maintain and execute the Constitution. If a Governor-General accepted Mr Whitlam's interpretation of the Constitution, he might have to act, if he must take the Prime Minister's advice alone, in violation of his oath, that is to say unconstitutionally. Sir John Kerr has not said that he was so advised, and one of the lawyers, Professor Sawyer, (*Current Affairs Bulletin* 1 March 1976, p. 21) there was 'no suggestion that he had acted or intended to act or authorise action in breach of the law'. Yet, even without explicit statements from the protagonists, it is clear from the public record that there were very good reasons for the Governor-General to believe that he had been given and would be given advice to behave in violation of his oath to maintain the Constitution.

After the Senate failed to pass Supply on 16 October 1975, Mr Whitlam said he would 'tough it out'. In the course of the next twenty-five days he talked of 'crushing' or 'smashing' the Senate and of 'destroying' Mr Fraser as, he said, he had destroyed his predecessors as Leaders of the Opposition. He did not advise, immediately upon the Senate's deferral of Supply, a half Senate election and he refused to advise any other kind. The available evidence is that 27 November was the last date on which the salaries of the public service could have been paid from lawfully appropriated moneys i.e. voted by both Houses of Parliament. Mr Whitlam claimed to have other moneys by which the government could continue to govern without Supply. He was never precise as to what other money he could legally have secured. Certainly the Commonwealth and private banks were approached, but the latter had legal opinion that they were at risk if they granted unsecured loans. The government also explored the possibility of using the Loan Fund. But the Loan Fund is part of the Commonwealth Public Account from which, under the Audit Act, no money may be withdrawn unless the Auditor General certifies that that the amount is lawfully available i.e. voted or to be voted by both Houses and the Treasurer can then be issued with a warrant for such payment by the Governor-General. Mr Whitlam's case may well have been that, since

the budget was deferred not rejected, he could withdraw money from the Loan Fund for appropriations which were to be made when the Senate either gave way or was replaced by one which would pass Supply. But the position would have been that the Governor-General was advised to issue warrants for payments which had not been certified as lawfully available and were very unlikely to be.

There might at one point have been another available source of money for the Labor government. If the attempt to raise four billion dollars in December 1974 had been successful, any crisis over Supply could have been temporarily averted. That loan was authorised by a minute of the Federal Executive Council which met on 13 December; the minute was signed by the Governor-General the following day. The 'temporary purposes' for which the loan was authorised have never been spelled out, but one of the lawyers for Labor, Professor Howard, believed (*The Age*, 11 July 1975) 'the size of the sums involved reveals the probable truth of the whole business, for they are of budgetary proportions . . . an attempt to open up an extra-parliamentary source of supply . . . to ride out the threat of another forced election.' Even if, since the purposes were never defined, the money was really intended to 'buy back the farm', it might still have been available in August 1975 to avert the Senate's action. But the relevance of the Loans affair is not simply to the Supply crisis but to the Governor-General's position.

On 14 December 1974 he had been advised to sign the Loans minute, passed by the Federal Executive Council which met in his absence on the previous day. (It met in the Prime Minister's Lodge while a meeting of the Federal Executive of the Australian Labor Party was also taking place in the building.) The minute, by using the words 'for temporary purposes' evaded the Financial Agreement between the Commonwealth and the States. Attorney General Lionel Murphy apparently gave it as his opinion that a loan for a period of twenty years was arguably for temporary purposes, although no departmental or other legal opinion to that effect was produced, and twenty years is a longer period than most bond issues. If, in fact, twenty years is 'temporary', then nearly all Commonwealth loans are temporary and the Financial Agreement does not apply to them so that the Commonwealth need not seek the approval of the Australian Loan Council and therefore the States.

Apart from any legal question the minute raises — and the very considerable constitutional doubt is obvious — there is another unusual feature. When the Governor-General is present and presiding at a meeting of the Federal Executive Council, two of the attending ministers sign a minute. When the Governor-General is not himself present, three ministers sign. On the occasion of the Loans minute, exceptionally four did so. The unusual features must certainly have struck a lawyer such as the Governor-General and he might justifiably have concluded that he,

because he was advised to sign by the Prime Minister and his ministerial colleagues, was being implicated in a constitutional matter whose legality was open to grave doubt. That particular matter might have results testable in a court of law. In October/November 1975, with the issue of the Senate's power to refuse to pass a bill and of the Governor-General's powers to appoint and to dismiss a Prime Minister, there was, as Chief Justice Barwick wrote, after the Governor-General had taken his own decision, a 'situation unlikely ever to come before the court'. The matters were not, by their inherent nature, justiceable. And the Governor-General, by his office, had to satisfy himself that there was no other course of action he could take to resolve a deadlock which would, at the end of November, bring government to a halt.

Sir John Kerr was specific, in his letter and statement of 11 November, that the Prime Minister would not advise a way to resolve the deadlock and that he could not obtain Supply to carry on the government. After, with Mr Whitlam's permission, having consulted Mr Fraser, he was convinced that the Opposition would not give way. Therefore his constitutional position was clear, as the Chief Justice agreed, and his duty was to let the matter be decided by the people.

Did the Governor-General have any alternatives? If Mr Whitlam had advised a half Senate election on 16 October, when time remained before Supply ran out, he would certainly have been given one. That was Mr Whitlam's decision. When he asked for one on 11 November, there could have been no Senate result and therefore no Supply before government had come to a halt. The Governor-General might have presented Mr Whitlam with a choice: advise a double dissolution or be dismissed. The Governor-General must have made an informed judgment upon Mr Whitlam's character to know how likely he was to accept such an ultimatum; he may very well have assumed that Mr Whitlam stood firmly by what he had been saying since the Senate failed to pass Supply. And concluded that on form, so to speak, the choice was a foregone conclusion. If he had offered the Prime Minister such a choice and Mr Whitlam had asked for time to think it over and had then gone to the Queen to remove the Governor-General — which, again on form, he might very well have concluded would happen — two things would have followed. Supply would still have been denied to the government and the constitutional crisis would have deepened. Future Governors-General would have become ciphers of the Prime Minister for the effect would have been to deny the existence, certainly to prohibit the use, of any discretionary or reserve powers in the office of head of state.

None of the alternatives alleged to have been open to the Governor-General, as distinct from those open to the Prime Minister and the Leader of the Opposition, would in fact have solved the deadlock over Supply which was the cause of the crisis, and some of those which might have

been advised by the Prime Minister seemed to do violence to the Governor-General's oath of office, of which, lacking judicial decisions, he must be the sole judge.

Sir John Kerr's actions, even by an academic political scientist, David Butler (*Current Affairs Bulletin*, 1 March 1976, p. 9) were called 'arbitrary'. By still less detached observers they have been called 'a coup' or a 'king-hit'. These emotional words echo the more understandable anger of Labor politicians who still pursue a vendetta against Sir John Kerr in public and in private. The constitutional arguments against his action rest, in my opinion, upon strained law and bad history prompted by political anger. Placed in Sir John Kerr's position and with the knowledge at his disposal, the situation must have seemed thus: a Prime Minister had no majority in Parliament and so could not obtain Supply but he said, in effect, Parliament won't give me the money, so I'll govern without it. In those circumstances, the Governor-General had a constitutional duty to do what he did.

The future implications of his action, so forebodingly drawn by the lawyers for Labor, presume a series of such deadlocks, resolved by vice-regal intervention, which threaten democracy. Even if deadlocks were in future to be more frequent than they have been in the past seventy-six years, it is hard to see how vice-regal intervention is undemocratic if the result is an election. And after such an election, by definition held in circumstances of crisis, there is as likely to be, probably more likely to be, a 'clear result, as there was in December 1975. I find the alternative proposition — that the Senate cannot refuse Supply, cannot therefore compel an election, and that the Governor-General has no discretionary power to resolve a deadlock — rather more disturbing. For, without a Senate with that power, a federal constitution might indeed prove unworkable. The dominance of the House of Representatives would in effect create a uni-cameral parliament under the control of one party without the checks and balances necessary to federations. One such party at the centre, with a Prime Minister whose creature the Governor-General was, seems to me to open up the possibility of a Prime Ministerial dominance holding more dangers for democratic government than a Governor-General with limited reserve powers to meet an exceptional situation created not by him but by the political misjudgments of a Prime Minister.

The Aluminium Can

The aluminium beverage can keeps contents fresh, chills quickly and is being recycled back into new cans.

These are good reasons to ask for drinks in aluminium cans.

Comalco's buy-back centres reclaimed 2,200,000 kilograms of used aluminium cans in 1975. Scrap aluminium cans are worth approximately \$224 a tonne or 22¢ per kilogram. Since 1972, when the Comalco can reclamation scheme began, 150 million cans have been reclaimed for which \$75,000 was paid out to individuals,

charities and service groups.

The aluminium industry is getting usable scrap at a fair price. And the metal that is recycled requires only 5% of the energy needed to make the original virgin aluminium.

Comalco has 41 buy-back centres located in Sydney, Melbourne, Brisbane, Adelaide, Launceston, and certain country areas. For more information write to:
Comalco Limited,
95 Collins Street,
Melbourne.
3000



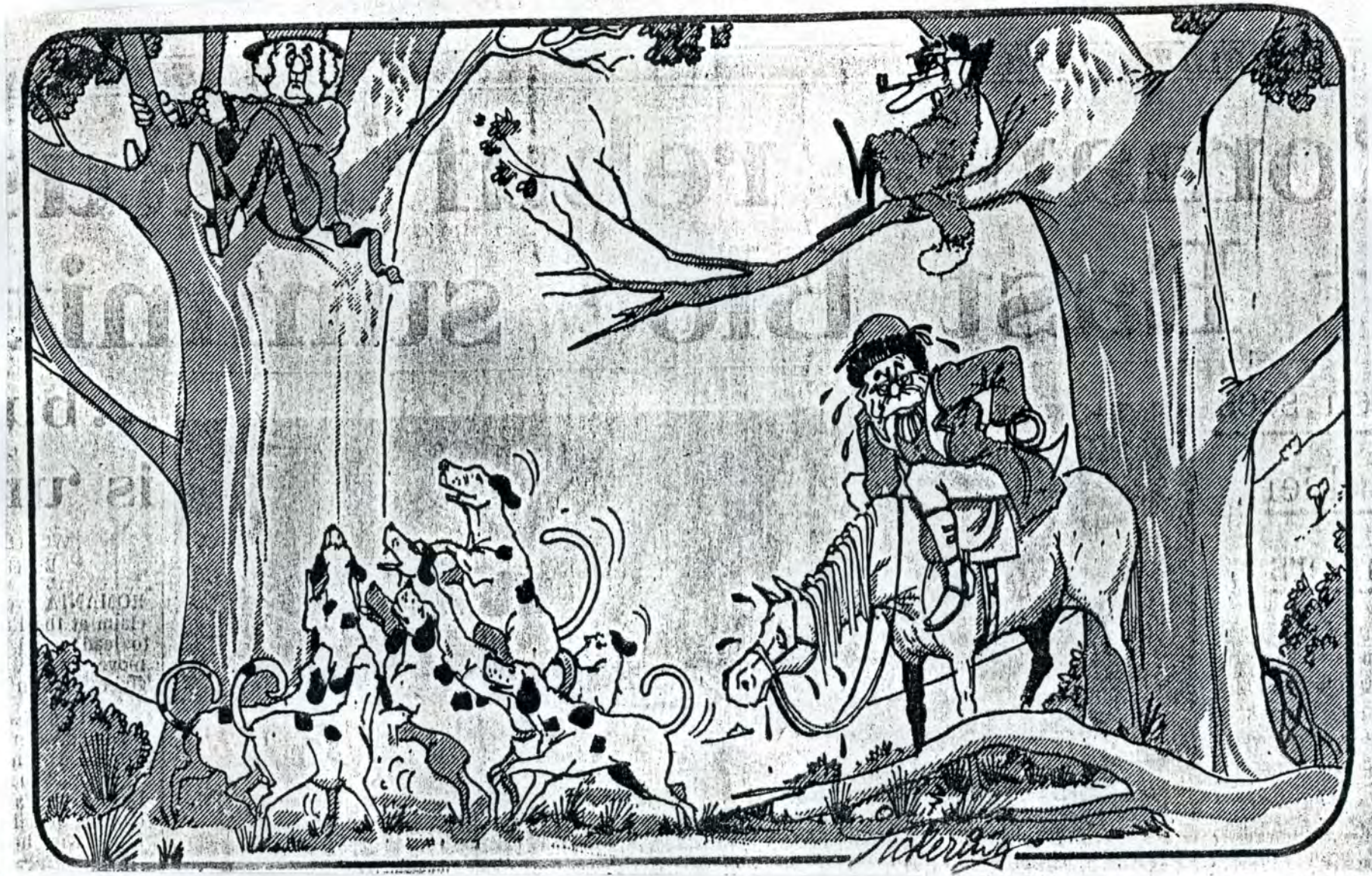


"She didn't mention it, but that Kerr's cur bit never did go down well with the corgis."

The Australian
Wednesday 30 June 1976



The Australian
Thursday 1 July 1976



Government House,
Canberra. 2600.

29 June 1976

Dear Martin,

We have at last been able to persuade the Governor-General to take a short break. As a result, Their Excellencies will be spending this week on Heron Island, about fifty miles off the North Queensland coast.

Before going north His Excellency asked me to send you some of the current press cuttings and give you a resume of events in Melbourne last week.

After the drama of the Law Institute in Melbourne on Wednesday night, Their Excellencies returned to Melbourne for engagements on Saturday and Sunday in connection with the Order of Saint John. All three functions were inevitably attended by the police in some strength but fortunately they were not needed: the demonstrators just did not appear. This is no doubt due in part to their own assessment of the value of violent protests, as indicated in the story in the Melbourne Age. Once again there has been an upsurge of support for the Governor-General, and violent opposition to any suggestion that he or the Government should give any attention to street mobs.

On Sunday night the Reverend Alan Walker, Superintendent of the Central Methodist Mission, Sydney, called on the Governor-General to resign for the sake of national unity. Monday's editorial in the Melbourne Age and the front page story in the Sydney Morning Herald seem to have adequately dealt with Alan Walker's suggestion.

Sir Alan Watt has now taken up the attack on the demonstrators. The Governor-General will not have seen that article yet, but I know he will be strengthened by it.

.../2

There has been a great deal of press and radio comment on the fact that Mr Whitlam is to see The Queen today. No doubt the first account of that meeting will have also hit the press by the time this letter reaches you. Should this happen before the Governor-General returns to Canberra I shall let you know what is being said; otherwise His Excellency will no doubt deal with it in his next letter.

*With kind regards,
Yours sincerely,*

DAVID ~~+~~ SMITH

Lieutenant Colonel the
Right Honourable Sir Martin Charteris,
G.C.V.O., K.C.B., O.B.E.,
Private Secretary to Her Majesty The Queen,
Buckingham Palace,
LONDON ENGLAND.

The edge

Friday, June 25, 1976.

Students rethink on Kerr protests

Victorian demonstrations against the Governor General, Sir John Kerr, may have passed their peak with this week's violent protest.

Organisers of Wednesday night's rally are considering abandoning their campaign.

The Victorian ALP Students' Association — the major organising force — may not take part in future demonstrations.

Leaders of the association will meet over the next few days to decide "if it is all worth it".

They are also preparing a detailed list of complaints against the police handling of the demonstration. Their report will be presented to senior police and the Press.

The association spokesman, Mr. Lindsay Tanner, said last night several meetings were planned to re-assess the situation.

"I personally am in favor of continuing but, with our members going to jail and being arrested, we have to work out if it is worth it," he said.

Mr. Tanner said students were upset by what they believed were unprovoked horse and baton charges by police.

The president of the Law Institute, Mr. Brian McCarthy, yesterday praised police handling of the demonstration. He said they had "exercised masterly self-control".

The Premier, Mr. Hamer, yesterday condemned the demonstration. He said there was "a peaceful way of protesting and innocent people should not be embroiled.

"This type of demonstration is un-Australian and repugnant to all decent living citizens.

"The Government is determined to take all necessary action to stamp it out," he said.

The president of the Australian Liberal Students' Federation, Mr. Paul Coughlin, also condemned the demonstration.

He said the demonstration was "disgusting and shameful".

In ADELAIDE the national president of the RSL, Sir William Hall, said the demonstrations were disgraceful and should be stopped by the authorities.



Sir John Kerr leaves the cathedral.

THE AGE

FRIDAY 25 June 1976



Lady Casey at the memorial service.

Casey...the final tribute

It's 2.00 p.m. Inside St. Paul's Cathedral the atmosphere is reverent and reflective as 2000 people wait for the memorial service for Lord Casey.

A few minutes later muffled shouts and cheers cut into the silence heralding the arrival of a tall white-haired man, who carries a black top hat in his hand.

The congregation rises row after row as he walks down the aisle — it is Sir John Kerr.

The official mourners arrive. Lady Casey leads with her son, Mr. Donn Casey, daughter and son-in-law Mr. and Mrs. Murray MacGowan and their children.

With them is Mr. and Mrs. Dermot Casey, Mr. and Mrs. P. V. C. Ryan, and their son, Dominic, who wears mourning dress and shoulder-length hair.

Then the sounds of soft singing and the Anglican Archbishop of Melbourne, Dr. Woods, leads

By JO GORMAN

the clergy and choir into the cathedral.

In the procession are churchmen from 18 denominations, including the crimson-robed Catholic Archbishop of Melbourne, Dr. Little, and Bishop Aristarchos, of the Greek Orthodox Church.

The memorial service for Richard Gardiner Casey, Baron Casey of Berwick, Victoria, and of the City of Westminster begins.

It is a magnificent tribute from all levels of society — State Governors, Cabinet Ministers, military chiefs of staff, judges, friends — to a man who was Australia's third Australian-born Governor-General, a member of the British War Cabinet and the Governor of Bengal.

Archbishop Woods, giving the eulogy, said Lord Casey was a deeply spiritual man — a man of wisdom and charity — and one who did not abuse power.

He said Lord Casey was "a thoroughly good man" endowed with a keen intellect and an inward state of mind which was "on the lookout constantly" to serve the underprivileged.

As Australia's Foreign Minister (1951-60) Lord Casey had pioneered new relationships and alliances which had drawn Australia closer to Japan, Malaysia and Indonesia, and ensured Australian security in the 1960s and 1970s.

"But though he carried immense responsibility and sometimes enormous power, he appears never to have abused that power," Archbishop Woods said.

"In 1945, while Governor of Bengal, he found himself compelled to dismiss the Government and to prorogue the Parliament, whose incompetence and self-seeking and underhand methods were rapidly bringing the country to ruin."

Archbishop Woods said Lord Casey had ruled 35 million people,

directed the Government, and taken upon himself the entire functions of a cabinet.

He said there were some criticisms of Lord Casey's decisions but never any suggestions that they showed "self-seeking, self-grandiosement or self-enrichment".

"One cannot help noticing the comparison between Casey and the absolute rulers of our own day," he said.

About 20 demonstrators shouted abuse at Sir John Kerr, when he arrived for the service.

As he and Lady Kerr stepped from the Vice-Regal car the protestors — mainly men in their twenties — shouted "Sack Kerr" and "Resign, you mug".

Police prevented demonstrators getting close to the cathedral. The hecklers stood in a group on the balcony above Princes Bridge Station.

Nearly 300 police were involved in yesterday's security operation.

"Sydney Morning Herald"

"25 June 1976"

Anti-Kerr violence condemned

Labor leaders opposed to the Governor-General, Sir John Kerr, yesterday unanimously condemned violence at Wednesday night's Melbourne demonstration.

The Acting Prime Minister, Mr Anthony, also deplored and condemned the actions of demonstrators who engaged in "outrageous harassment and violence in a protest directed at the Governor-General and other citizens in Melbourne."

"It was a responsibility of Australians to reject the techniques employed on this and other occasions," he said.

"It is about time people understood that Sir John Kerr's action last November was proper and inescapable."

Sir John's private secretary, Mr David Smith, said yesterday that Wednesday night's demonstration had not upset the Governor-General, who would continue to carry out his normal program.

Mr Michael Danby, of the Victorian ALP Students Association, one of the organisers of

the demonstration, said he was upset at the violence but blamed it on over-reaction by the police.

But he predicted that the association would have a difficult meeting next Tuesday when it is to decide on future demonstrations.

"We are a body supporting the ALP while fighting to remove the Governor-General," he said. "We do not want to embarrass the party."

Sydney students are planning a demonstration against the Governor-General when he visits the Royal Motor Yacht Club at Broken Bay on July 24.

The convener of the 24th July Committee to Abolish Governors-General, Miss Sarah Sheehan, yesterday condemned the use of police horses to force a way through a peaceful demonstration.

"We are pleased Sydney will have an opportunity to demonstrate," she said. "We have a lot of support and will demonstrate forcibly, but I do not think any violence will come from us."

The Premier, Mr Wran, accused fringe ele-

ments among the demonstrators of stirring up violence.

"There is nothing wrong with demonstrations as long as they are orderly and peaceful affairs," he said.

"Violence is doing more harm than good to the protest against Sir John Kerr's action."

The president of the NSW branch of the ALP, Mr John Ducker, said that violence could cause a backlash against the Labor movement.

"Demonstrations should continue, but they should be peaceful and orderly, drawing on as wide a base as possible."

The president of the ACTU and ALP, Mr Hawke, said he supported Wednesday's demonstration but protested against the violence.

"I respect people's rights to protest and I understand completely the strength of feeling against Sir John Kerr, but — I report — I wish people could express their feelings peaceably."

The Labor MLA for Campbelltown, Mr H. C. Mallam, suggested that unionists should use the day of any national strike to collect petitions re-

questing the dismissal of Sir John Kerr.

This would give dissidents a less violent means of expressing their attitudes towards Sir John.

The Leader of the Opposition in the Senate, Senator Wriedt, said he opposed any violent action. The Acting Leader of the Federal Opposition, Mr Uren, could not be contacted last night.

Mr Danby, speaking of Wednesday night's incidents in Melbourne, said it was "horrible" to have organised a demonstration in which people were subjected to violence.

"All our plans were laid to waste by the police reaction, which was quite incredible," Mr Danby said.

He and other organisers with loud hailers and "our own sort of crowd control" had been prevented by police cordons from reaching the scene of the demonstration.

"There were extremists present whom we had not organised. There were some violent incidents on our side which I also deplore."

Mr Danby alleged that

police had baton-charged a group of demonstrators in a back lane, that one girl had been trampled by a police horse and that several people, who had not resisted arrest, received lacerations.

The association was preparing a long list of formal complaints about police action in the incident.

Assistant Commissioner S. I. Miller, who organised the police operation, would not comment on student claims that there were 600 foot police, 30 mounted troopers, three police barges on the Yarra and plain-clothes police present at the incident.

He said there was no evidence that anyone had been trampled or bitten by horses.

Since Sir John Kerr dismissed the Labor Government on November 11 last year there have been demonstrations against him at the opening of Federal Parliament, at the Royal Military College, and in Perth, Canberra, Adelaide, Melbourne and Brisbane.

"The edge"
Saturday, June 26, 1976

Demonstrators' folly: making it impossible for Kerr to go

SOONER or later, something is going to have to be done about Sir John Kerr.

And perhaps I should say, at the outset, that I am not advocating any repetitions of the notably nasty performance by demonstrators in Melbourne on Wednesday night.

It has been my dubious privilege to watch a good many violent demonstrations in all sorts of places for a variety of causes, and I have never got to like them, even when I have sympathised with the cause.

Wednesday's riot was pretty modest on the international scale, but the pattern was familiar enough. I am prepared to accept that the majority of the students and others who took part went along to Sir John's dinner date intent on doing no more than peacefully demonstrating their disapproval of the Governor-General.

But a minority of them clearly had other ideas. People with peaceful intentions do not go to demonstrations equipped with smoke bombs and other missiles. Nor—unless they are even more childish than I believe—do they carry marbles in their pockets.

Some demonstrators did reportedly carry marbles, and did throw them under the hooves of police horses.

Others positioned themselves in vantage points from which they could bravely spit upon Sir John's fellow guests.

In short, it is quite clear that some of the protesters intended to provoke violence, and it really won't do for them to blame the police because violence occurred. Indeed, most of the accounts I have heard, including some by people who are by no means admirers of Sir John Kerr, suggest the police behaved with remarkable restraint in a difficult situation.

Now I know it is traditional to denounce all forms of direct action—ranging from violent protests to strikes—as counter-productive. I also know that such denunciations are sometimes mere wishful thinking. Direct action is sometimes very effective indeed, and it is also sometimes justified.

Some of the forms of protest adopted against Sir John—such as boycotts and peaceful protests—may well fall into this category. Ugly episodes like that on Wednesday night do not.



PETER
COLE-ADAMS

Indeed, while they continue they make it virtually impossible, not to say improper, for Sir John to consider resigning or for Mr. Fraser to suggest that he should. Neither of them would wish to be seen to surrender to mob politics.

Nor would the majority of the Australian people wish them to. About the worst possible reason for a public figure to resign or be removed would be because a tiny majority had taken to throwing things at him.

Those who want Sir John out of office should realise that a cessation of violence (as opposed to legitimate protest) is a necessary pre-condition for his departure.

Some months ago, I suggested in this column that it would be in Sir John's and the nation's best interests if he were to resign with dignity.

I still think that is true—or at least it would be if idiots would stop chucking vegetables at him.

The issue is not so much

Those who want him out should realise that a cessation of violence (as opposed to legitimate protest) is a necessary precondition.

whether he was right or wrong to act as he did last November—that is, and will remain, a matter of opinion upon which the constitutional lawyers are as divided as the general public.

The crucial point is that his continued occupancy of his office is damaging that office, embarrassing the monarchy, and souring Australia's political life.

Admittedly, this is not entirely Sir John's fault. The crisis precipitated by the then Opposition's refusal to allow Supply to pass through the Senate last year placed him in an unenviable position in which he was obliged to make a decision, knowing that whatever decision he made would be bitterly resented by a very large number of Australians.

In short, the holder of an office which is supposed to be above politics was obliged to take what was inevitably interpreted as a political decision. For as long as he remains at his post, Sir John will perpetuate the divisions in this society, instead of symbolising its unity.

However deplorable it may be, it is a fact that the Queen's senior representative in Australia cannot today appear in public without running the risk of being pelted, booed, or boycotted.

So what is to be done? Or rather, what is Mr. Fraser likely to do?

I think we can take it as read that while the anti-Kerr campaign continues to throw up episodes of violence, he will be reluctant to do anything at all.

If, however, Sir John's more extreme opponents can be persuaded to behave like civilised adults, Mr. Fraser's attitude, and Sir John's, may change. Apart from anything else, neither would relish the prospect of embarrassing incidents during next year's Royal tour.

Their problem would be to arrange Sir John's departure in such a way that it would not appear to be either a humiliating surrender to his enemies or a de facto admission that he had acted wrongly last November.

And about the most effective way of doing that—a method much practised by Australian Governments of all persuasions—is to find him another job, some-

thing prestigious, agreeable, and preferably abroad.

It so happens that just such a position could well become available. Australia's present High Commissioner in London, Sir John Bunting, suffered a major heart attack last February. Although he has made some steps along the road to recovery, he might well be happy to retire in the not too distant future.

As jobs go, the London post is not quite up to the Governor-Generalship, but some very senior Australian politicians have been ready to accept it in the past.

It has the advantage of offering a quiet life, the trappings of high office, and very few people have ever bothered demonstrating against the incumbent. It also provides plentiful opportunities for wearing formal dress.

Conceivably, its attractions might be enhanced by the offer of an even more senior knighthood or some other honor to add to Sir John's collection.

I am not saying Sir John will, or should, be offered the London job if it becomes vacant—senior diplomatic posts are best filled by senior diplomats who are trained for them. I am simply saying that odder things have happened.

Sir John should consider resigning — cleric

The Sydney Morning Herald

"Monday June 28 1976"

The Rev Alan Walker called on the Governor-General, Sir John Kerr, yesterday to consider resigning "for the sake of national unity."

But other churchmen have disagreed, saying last night that although Mr Walker had a right to give his own opinion, Sir John should not back down.

Mr Walker, who is the superintendent of the Central Methodist Mission in Sydney, said in an address at the Lyceum Theatre that the office of the Governor-General, intended as a symbol of unity, was dividing Australia.

Mr Walker warned that "Australia is under threat, not from external foes but from internal division and a weakening of the moral foundations of the nation's life."

Action was required on several levels to strengthen national unity, he said.

"For the sake of national unity the Governor-General, Sir John Kerr, should resign. While deploring the language of hatred and the violent demonstrations directed at the Governor-General, his leadership is now unacceptable to many Australians."

The president of the NSW Methodist Conference, the Rev Jack Brand, said last night that Mr Walker's address was not an official statement on behalf of the Methodist Church.

"I am sure the members of our Church will be divided on Sir John Kerr's actions," he said. "Some will be very much in favour of his decision."

Mr Brand said he recognised the integrity of Sir John over the years, both in his legal career and in public life, and was sure his decision to dismiss the Government last year was "made very carefully and for the best interests of the Australian nation."

The Dean of Sydney, the Very Rev Lance Shilton, said that for Sir John to resign at this stage might almost be an admission that what he did was wrong.

"I would hate to think the kind of rabble-rousing going on in the streets is effective in causing a Governor-General to resign," he said.

But Mr Walker had spoken responsibly in the past and what he said yesterday must be taken seriously.

The secretary of the NSW Council of Churches, the Rev Campbell Egan, said he felt that for Sir John to resign "would in fact be a sell-out to violent mob rule."

The Church was divided on the issue, as was the rest of the community.



MR WALKER



DEAN SHILTON

an Auxiliary Roman Catholic Bishop of Sydney, said it would be premature to make a statement on the issue.

A spokesman for the Governor-General would not comment on Mr Walker's call.

MELBOURNE, Sunday. — The Governor-General was not troubled by demonstrators in Melbourne at the weekend.

The only reminder of the demonstrations which have dogged him since the events of November 11 was a strong contingent of detectives and uniformed police who attended his public movements.

"The Age"
Monday, June 28, 1976

Calm after the Kerr storms

THE Governor-General, Sir John Kerr, appeared publicly in Melbourne three times last week. On Wednesday night he was the

centre of an ugly incident at Hawthorn involving 1000 demonstrators. They hurled smoke bombs at the police, pounded the Governor-General's car, and kicked and damaged the cars of 30 guests at a Law Institute dinner. Four hundred police — 12 of them mounted — had to be deployed to control the mob, and to provide Sir John with safe passage. On Friday afternoon Sir John attended the memorial service for Lord Casey at St. Paul's Cathedral. This time only 20 demonstrators were on hand. They shouted abuse, but there was no violence and there were no arrests. On Saturday Sir John watched an ambulance and nursing display at South Melbourne. The scores of detectives and uniformed police who accompanied Sir John were again not needed. For there was not a single demonstrator in sight.

Cynics may attribute the lack of demonstrators on Saturday to the competition provided by the football. A more likely explanation is the decision taken by the student organisers to rethink their protest tactics, following the Wednesday night near-riot in which 10 people were arrested and charged with street offences. What they found was that the protests were proving counter-productive. Instead of focusing attention on the events of November 11 last, they were increasing public sympathy for Sir John. The students also found

themselves involved in head-on clashes with the police — clashes which have led to a number of students being arrested, fined and, in some cases, jailed.

If this is in fact the explanation, we can only applaud the students' change of heart. There is no need, and no excuse, for the kind of hooliganism which occurred at the Law Institute dinner, and at a similar function at the Royal Commonwealth Society a fortnight before. Such tactics are intolerable. They are also the height of political folly. For while Sir John is abused, harassed and molested, the demonstrators place him in an impossible position.

Sir John knows that he has become a divisive influence in Australian political life. He knows that his high office, which is a symbol of the national unity that lies beyond politics, has become a position of conflict and controversy. But no Government, no Governor-General, could entertain the idea that a man should be hounded from office by mob violence. If the apparent moderation now being practised by the students continues, it may help to resolve a difficult situation which is an embarrassment to the monarchy and a souring influence on Australian politics.

A violent abuse of democracy

By SIR ALAN WATT



Sir Alan Watt is a former director of the Australian Institute of Foreign Affairs and was a leading Australian diplomat. He wrote this article, he says, because "I am disturbed by the trend of minority groups to arrogate to themselves the functions of Parliament and to ignore the rights of citizens who do not agree with them."

Protesters pelt Kerr



TWO violent demonstrations have now taken place in Melbourne on the occasion of visits by Sir John Kerr in the performance of his duties as Governor-General. It seems to me time for Australians who do not accept the myth which has been created since the Federal election of December 13, 1975 — that he was guilty of some kind of conspiracy to displace the Whitlam Government — to stand up and be counted.

First, who has created the myth? The most important contribution was made by Mr. Gough Whitlam.

No one who saw on television his appearance before the crowd on the steps of Parliament House on the late afternoon of November 11, 1975, can forget his embittered cry: "Well may they say, God save the Queen, for nothing will save the Governor-General." There followed his reference to Mr. Malcolm Fraser as "Kerr's cur", and his advice to the crowd to "Maintain your rage".

Since the election, Mr. Whitlam in his public utterances gives every appearance of pursuing a vendetta designed to force the resignation or dismissal of the Governor-General.

Second, some Labor Party leaders must bear a considerable indirect responsibility for encouraging peaceful demonstrations against Sir John Kerr which have resulted in violence. Surely it should be obvious to anyone of experience that such peaceful demonstrations can easily turn to

violence if a mere handful of people who have determined that violence shall be used join in.

Third, the journalists who have produced instant histories of the events of November-December 1975 have contributed greatly to the conviction of the "concerned" minority that the dismissal of Mr. Whitlam by the Governor-General was either illegal, or unconstitutional, or the result of a conspiracy, or, at the very lowest, unjustified and unfair.

Large numbers of copies have been sold and they have undoubtedly contributed to the growth of the myth that the Labor Party fell from office not through its own faults but through the trickery of its opponents.

"We wuz robbed!" runs the cry. "We were never given a fair go." Apparently few stop to ask whether even a Governor-General is entitled to a "fair go".

I have read these books. Two are much better than the others, but even these give one-sided accounts of alleged conversations between the Governor-General and various Ministers, and between Sir John and his friends.

All the information comes from the side of the Labor Party, although the source is rarely given and cannot be checked by the reader. Until we hear in detail Sir John's side of the story, the uncommitted citizen would be wise to keep an open mind.

The danger of accepting gossip or secondhand evidence is underlined by two important statements in books.

In *Kerr's King Hit* (p.226), by Clem Lloyd and Andrew Clark, it is alleged that the Governor-General sought a favorable legal

opinion from the Chief Justice of New South Wales. "... he was badly disappointed. Street rejected the proposal to use the reserve powers out of hand."

We now know that Mr. Justice Street has specifically denied any such approach or expression of opinion by him.

Again, in *Laurie Oakes' Crash Through or Crash* (p.216), it is alleged that Sir John Kerr told Professor James McAuley in February, 1976, that it was Lady Kerr who persuaded him not to tell Mr. Whitlam in advance that the latter would be dismissed if he did not agree to a general elec-

tion, and not to resign himself after the election.

Professor McAuley has now revealed (*Quadrant*, June, 1976, p. 10) that during his conversation with the Governor-General "... nothing was said that could be construed as a basis for Oakes' attempt to explain Kerr's decisions by petticoat government. This is a fabrication for which there is no excuse."

As someone who, before retirement, served various Governments as a Commonwealth public servant for 25 years, and lived in Canberra during the whole period of the Whitlam Government, my

own judgment of the events of 1974 and 1975, for what it is worth, is as follows.

I disagreed with the denial of Supply by the Senate in both 1974 and 1975, because I regarded it not as illegal but as breach of an important convention which had stood since Federation.

Equally, I disagreed with Mr. Whitlam's breach of the convention, which he himself had supported when in Opposition, that if a Government was denied Supply it should seek a general election.

In the media, and the books, all

the emphasis is placed upon breach of the first convention, and breach of the second is either played down or conveniently forgotten.

Secondly, it was my belief that the Governor-General acted as he did at the last moment beyond which, had he not acted, we would have faced chaos because Government funds would have run out before an election could have been completed.

I am well aware that reams of printed matter reflect the claim that Supply had not run out before Mr. Whitlam was dismissed.

This claim is scarcely a half-truth. At best it could be said that not all Supply had run out. Probably most public servants could have been paid for another two or three weeks.

In Canberra, however, it was notorious that services were being restricted. And it was public knowledge throughout Australia that the Government was seeking extra-parliamentary means of securing funds to carry out its normal functions, such as an agreement by the banks to accept "certificates of indebtedness" for money owed to individuals, who would then be granted bank loans which would be repaid by the Government if and when parliamentary approval were obtained.

Paul Kelly, author of the best of the Whitlam-era books (*The Unmaking of Gough*) comments at page 278 as follows: "Yet the alternative arrangements could never be regarded as an adequate substitute for Supply and could not cover the wide ambit of programmes which Supply funded".

And on page 274 he writes: "One of the fundamental requirements of any Governor-General before granting a Prime Minister an election was to ensure that there was adequate Supply for the period up to the return of election writs or declaration of the poll. This was axiomatic. It was a convention binding on all governors-general and viceroys who did their job properly. Yet Whitlam embarked on a strategy where, if there was no quick resolution of the crisis, Kerr would have to accept a situation where the Government ran out of money".

In short, in my opinion Sir

John Kerr took the correct action in dismissing Mr. Whitlam and installing a Fraser Government with a restricted mandate pending the results of a general election.

This does not imply approval of everything he did or failed to do before taking his final decision. On such matters I keep an open mind until his own full side of the story is available.

In any event, even if he was mistaken in the action he took I would argue that he is entitled to the assumption that he was prompted neither by malice nor ill-will but by his own conception of his duty in accordance with his oath of office.

Attempts by a militant minority to hound him from office and to spurn all those who support him or even attend functions when he is present can only be regarded as a subversion of democratic processes by those who claim to act in the name of democracy. Today they object to a Governor-General; tomorrow they can just as easily object to a Prime Minister, a State Premier or a judge.

For Mr. Whitlam and others to describe as a coup d'etat a course of action designed to give the electorate the opportunity to express its opinion and to decide the issue in an abuse to terminology.

The description could more appropriately, if not quite accurately, be applied to a situation in which a Governor-General might decide to resign because he has been brought to feel that a persistently protesting minority whose actions encourage violence prevent him from carrying out his functions.

The edge
Tuesday, June 29, 1976

Government House,
Canberra. 2600.

17 June 1976

My dear Martin,

Mr Fraser is in Japan and is going to China. His mind for the next two weeks will be dominantly on foreign policy. He made a strong speech a week or so ago which was rather unsympathetic to the U.S.S.R., showed a tendency to return to a foreign policy more congenial to the U.S. and less based upon third world countries. He appears to favour China rather than Russia. His trip will be important educationally and one hopes in economic relations with Japan.

His relations with Mr Hawke and moderate opinion in the A.C.T.U. are showing signs of co-operative approaches by both, but Mr Hawke's moderate attitude, which is based upon confining wage increases for the moment to indexation in return for tax indexation and reduced indirect taxes, is under attack. The left-wing of the union movement is in the process of repudiating Mr Hawke and asserting a right to strike for wages outside indexation. A question will be whether, with unemployment at its present level, there will be vigorous strike action or not.

After the Melbourne demonstration the Prime Minister became actively concerned. I spent a couple of hours with him over dinner and prepared an aide-memoire for him at his request. He immediately went off and told Mr Lawler, Permanent Head of the Department of Administrative Services, to take over in full and in detail the active organisation of a counter-strategy. Attached is a copy of my aide-memoire and a task group document by Mr Lawler. I had a session last night with Lawler and Yeend, Acting Secretary of the Prime Minister's Department.

Lawler has been full-time on this during the last couple of days and has had departmental top level talks. He is most anxious for the Prime Minister to make a major speech on his return fully supporting me and my retention of office.

.../2

PERSONAL AND CONFIDENTIAL

2.

If this is done it will restrain a tendency among senior public servants to look for the easy way out - as they may come to see it - my resignation. This could gradually infect their Ministers. However, for the moment, "stand fast" is the slogan and the Prime Minister is adamant.

Please give my expression of loyalty and humble duty to Her Majesty from both of us and from hundreds at her Birthday Reception at Government House.

Yours sincerely,
JOHN R. KERR

Lieutenant Colonel the Right Honourable
Sir Martin Charteris, G.C.V.O., K.C.B., O.B.E.,
Private Secretary to The Queen,
Buckingham Palace,
LONDON ENGLAND

PERSONAL AND CONFIDENTIAL

AIDE-MEMOIRE

1. We discussed the nature of the current campaign. You expressed concern about Commonwealth-State police cooperation and said reports were being obtained. We agreed the campaign is against the system and is a militant left-wing organised and orchestrated campaign. Police forward planning and strategy is essential.
2. You said the time is coming for an important speech by yourself defending the system, Monarchy, Governor-Generalship and Governor-General and attacking the militant left organisers. I made the point that I could not do the political defence, I could only carry on and would do so. You urged me to do this. I said the political defence of the system could come only from the Government as the responsible political leaders.
3. We agreed that what was needed was a strategy of attack, not passivity, weakness or retreat on any matters affecting the Governor-General and his office.
4. I said that The Queen would be entitled to political advice through her Australian Prime Minister as to likely developments between now and her visit. Only her political advisers can assess and advise about how things will unfold and how she, her visit, her monarchy and her representative will be affected. I can keep her informed about the passing scene and I can pass on to her her Prime Minister's advice and assessments of the future to which she is entitled.
5. It was agreed that effective administrative machinery at the top level of an ongoing and continuous kind - active, forward looking and keen was essential. You accepted this and discussed possibilities.
6. The need for special legislation was touched upon but there are pros and cons about this. It should be considered but Government policy would need to balance things out.

.../2

2.

7. The need for a White Paper was discussed.
8. The level of Knighthood in the Order of Australia and how it came into existence was raised by you. I said there was no decision of the Council and referred to the correspondence between us. You thought you might need to make, at an appropriate time, some clarificatory statement.
9. I referred again to the need for mid-term leave for myself and my wife, suggesting December-February whilst Parliament is in recess. You mentioned the same problems as previously discussed. I understood these. You said you would consider the matter with your senior colleagues. I appreciate the things which have to be balanced politically but consistently with a positive and active approach suggested that the normal way of acting might be the best thing. However, tired though we will be by the end of the year after a long, tense and strenuous haul, we would see things out till after The Queen's visit if that is your positive advice. Incidentally while we are absent, say between December and February, we cannot be attacked in violent or other demonstrations. Might not this, by then, be a better prelude to the visit?

SECRET

Task Group - Action to provide for the
unimpeded and effective discharge of
the responsibilities and duties of
the Office of Governor-General

Against the background of the recent demonstration against the Governor-General in Melbourne - and other demonstrations which have occurred, or are likely, and other initiatives which challenge the Office - and the planned visit of the Queen next year, the Prime Minister has given a remit. This is to review present arrangements in support of the Office and to consider and report on arrangements which should now be made in view of the demonstrations and challenges.

In consultation as necessary with relevant Commonwealth Departments and Authorities I am to have for the Prime Minister, on his return from overseas, a paper which provides specifications for revised procedures and rules and for courses of action to meet the position.

- The paper is to be comprehensive, covering -
 - the nature of the challenge and manner in which it impedes;
 - intelligence collection and assessment - generally in relation to challenge and specifically for particular movements or occasions;

SECRET

SECRET

- . procedures, including defined liaison points at proper levels, for the handling of matter between Government House, Commonwealth Departments and agencies and State Governments and their relevant Departments and Authorities;
- . fully integrated pre-planning in respect of all movements and occasions involving the Office;
- . recommendations for any necessary augmentation of Commonwealth Police capability - and possibly State and Territory Police capability;
- . recommendations in relation to other relevant capability e.g. Governor-General's transport, staffing at Government House, etc.;
- . development of fully adequate single Commonwealth liaison point - for co-ordination, audit and forward thinking and planning, particularly on forward programmes of Office;
- . maintenance of progressive audit of preparations and outcome for each movement and occasion;
- . co-ordination with the States at political and official level;
- . any further legislation - either Commonwealth or State;
- . handling of media and public relations;

SECRET

SECRET

- . Parliamentary action by way of statements, answers to questions etc. including a Government line for handling the matter in Parliament and publicly;
- . a system of regular reporting to the Prime Minister - and such senior colleagues as he might nominate.

There may be other aspects to be comprehended as the matter is brought more closely and more fully under review.

The Task Group has been assembled with the concurrence and support of the Permanent Heads of the Departments concerned. It will be under the immediate direction of Mr P.A. Nott. I am proposing to keep closely in touch with the progress of its deliberations and drafting.

P.J.L.

16 June 1976

SECRET

Government House,
Canberra. 2600.

22 June 1976

My dear Martin,

Lord Casey's death was, I am sad to say, not unexpected. I am honoured by the opportunity to represent Her Majesty at his Memorial Service. I knew him but not well. He was, as I said in a statement I issued, a great Australian who served his country and the Monarchy with distinction.

Things are fairly quiet here still, with Mr Fraser now in China after his Japanese visit and Mr Whitlam off on his visit to many countries during the next six weeks. There is therefore not much to report politically or economically.

Sir John Egerton made a statement about Mr Whitlam a copy of which, from a press clipping from the Queensland "Courier Mail", is attached. He has given up most of his trade union and ALP offices, probably because he intended to do so in any event, but perhaps partly because of an enormous Labor Party outcry against him for accepting his knighthood. He will soon give up the other Queensland offices he holds.

The effect is that a very strong leader of moderate persuasion in the Labor and Union movement will be gone. A left-winger has won his place as Senior Vice-President of the Federal ALP. The opinion has been expressed that Mr Fraser on balance has lost from the recommendation of the knighthood by the strengthening of the left in the ALP and ACTU. These political judgements are difficult to make.

My other letter arriving in the same despatch bag as this will have given you details of the reaction by the Prime Minister and on the administrative side to the Melbourne incident.

The result during our recent visit to Brisbane and the Gold Coast was significant. We had four engagements. At the first, an attempt was made by radical students to repeat Melbourne but the police numbers and tactics completely defeated this. Of the other three occasions there was only one, when a few, perhaps 15-20, demonstrators were distantly around. Otherwise peace prevailed outside and vocal enthusiasm inside the various functions.

.../2

PERSONAL AND CONFIDENTIAL

2.

The last was the Fiji-Australia Rugby Union Test to which His Excellency Ratu Sir George Cakobau had privately come at the last minute. I was glad to be in the area and able privately to meet and talk with him after the Test. He told my wife that he noticed a couple of police at his hotel as he arrived and said they must have thought something might happen. "But", he added, "the 32 members of the Fijian team were just standing there quietly. They need not have worried." Sir George, in addition to being their Paramount Chief, is a strong Rugby Union addict and former player and has never missed a Fijian tour of Australia since he brought the first team over in 1952.

We go back to Melbourne on Wednesday for a big legal dinner - five hundred people, solicitors and their wives - plus, we are assured, a student demonstration of the usual radical kind, but Victorian police - after Brisbane - are on their mettle and we are unconcerned.

The only other matter about which I feel able to say something, having regard to your letter of June 16, is Mr Whitlam's audience.

No one here knows what he intends to do or will be able to do in politics here. He has several times said he will lead the party at the 1979 election and there is a theory that he will come back from abroad, as he has done before, revived. I attach a clipping of an article by Alan Barnes, a journalist who, somewhat doubtfully, gives him a chance of staying on and leading in 1978. Not many others take this view at the moment. His performance has, I am told, been lack-lustre and ineffective up to the rising of Parliament but he does have a big "comeback" capacity - or has had.

He is undoubtedly the author of the campaign against me and expects me to break. (See incidentally the attached cartoon from the Sydney Morning Herald.) I have been under tension, of course, but not close to breaking. The breaking is expected to occur before Her Majesty's visit. The outward Labor philosophy of the anti-Kerr demonstrations is given in yesterday's Australian in an article by Senator James McClelland which I attach. Mr Whitlam would outwardly subscribe to this approach whilst in fact, with Senator McClelland and others, inspiring or hoping for actual violence as a means of forcing resignation.

As to all this we must await developments on the "violence" front. Some believe it will escalate, others that it will peter out. One argument constantly put is that I am the first Governor-General about whom the country is seriously split and I should go for this reason.

.../3

PERSONAL AND CONFIDENTIAL

PERSONAL AND CONFIDENTIAL

3.

I was very encouraged to get your letter of June 16 about the audience. It will, as I know you appreciate, be necessary to bear in mind the risk of "leaking" of alleged versions of what happened at the audience. Mr Whitlam will want to be able to imply that, as he has said, "The Queen would never have done it"; that The Queen is embarrassed by what happened and by its impact on the Monarchy and on her visit. He may also want to reiterate what has become a Labor Party slogan, that a party once elected is entitled to have its government serve out its full term. This simplistic and false proposition is one which he would, I think, like to be able to imply, has The Queen's support.

He has been obsessed about his dismissal and determined to destroy the man who was the final constitutional instrument of it. In the result he has so far made life rather unpleasant and will want to come back with renewed energy for his mission of revenge and destruction. I note your optimism and hope you are right.

It is, of course, possible that Mr Whitlam may stay and may win in 1978. This is not thought to be likely by many but it has to be taken into account. He may well say to Her Majesty that he would have me recalled if he is there and wins in 1978, or that whether he is there or not the same would happen if Labor wins without him in 1978. Of course, I would have assessed the position long before such an eventuality and would not be here. In any case we shall have to look carefully at the whole problem after The Queen's visit.

I cannot say much more. It is hard for me to be objective about Mr Whitlam when I believe him to be an unbalanced man of enormous drive and cleverness who is bent upon my personal defeat and removal.

Her Majesty's actual impression of him may be quite different. I sincerely hope that his audience may help him to return to normal political methods of struggle. I shall certainly be grateful for anything that can be done.

It may be of some use for me to attach a few extra clippings which give the atmosphere out here and may be of help to you in providing background for Her Majesty for the audience. I enclose -

1. An article by B.A. Santamaria from the Australian. I have mentioned him in an earlier letter.

.../4

PERSONAL AND CONFIDENTIAL

PERSONAL AND CONFIDENTIAL

4.

2. Letters published in the Australian of 17 June including one by Michael Parker who was at the Melbourne Loyal Societies function.
3. An extract from the Brisbane Telegraph showing some Queensland defection from the ordinary Labor boycott. The Deputy Leader of the Opposition attended the Governor's dinner in Brisbane and the Leader would have done so if he had been in the country. Incidentally, a group of nine union secretaries from Western Australia sent a telegram, a copy of which is enclosed, and later said it had been well received, after they published it, by their rank and file.
4. A letter from a well known academic, Dr Knopfmacher published in the Age.

My impression is that there is solid support, for the idea of leaving me alone, in both Western Australia and Queensland.

Please assure Her Majesty of our grateful thanks for her expressions of concern, through you, about our staff and ourselves and of our continued loyalty and humble duty.

Yours sincerely,

JOHN R. KERR

Lieutenant Colonel the Right Honourable
Sir Martin Charteris, G.C.V.O., K.C.B., O.B.E.,
Private Secretary to The Queen,
Buckingham Palace,
LONDON ENGLAND

PERSONAL AND CONFIDENTIAL



SIR JOHN EGERTON

"Gough is not loyal"

By JOHN BRAGG

SIR JOHN EGERTON — still Trades and Labor Council president, he says, despite claims he had resigned — yesterday criticised former Prime Minister Gough Whitlam.

He said Mr. Whitlam's greatest failing was lack of loyalty and consideration for others.

He said he was disappointed that Mr. Whitlam had used his "undoubtedly sharp tongue" in entering the furore which had arisen since Sir John accepted an imperial knighthood in the Queen's Birthday Honours.

"I never expected loyalty and consideration from him, and, needless to say, I never got any," Sir John said.

"He has never given loyalty, and this is one of

the reasons why he isn't Prime Minister of Australia.

"I'm disappointed, not only because I'm reputed to have saved his neck at times in the past. I'm not saying I saved him, but I stuck my neck out to support him.

"On at least three occasions he could quite properly have been dismissed as leader of the party.

"I went out to bat for him, not because he was Gough, but because he was the leader."

Continued, Page 3.

"I thought he was the only ALP capable of being leader, and we couldn't afford a split in the party."

He said Mr. Whitlam was "just seeing out time" as party leader and would not remain in the position much longer because he realised the impossible situation he was in.

Mr. Whitlam was hanging on, because he liked a platform for his views and the movement had not thrown up a suitable replacement.

"It's ironic that he should criticise me for accepting a title, yet he has one of his own which he refuses to give up—that of Right Honourable," he said.

In his first long interview since the row over his knighthood broke out, Sir John discussed his attitude towards the Labor Party and the monarchy.

He revealed that he would apply for a pension when he stepped down from his various jobs because he had not accepted money for his trade union work.

As we talked at his Albion Heights home, he was continually interrupted by people ringing him with messages of support, and he showed me a box full of telegrams and letters from other well-wishers.

He said that the furore which followed the announcement of his knighthood had been a traumatic experience, but there had been remarkably little adverse criticism from workers.

He received a few "filthy and abusive" calls, but he said all sprang from the same source and he knew who was responsible.

Sir John said that in accepting a knighthood he had not broken any rule of the Labor Party or of the trade union movement.

Precedents

"There's a host of precedents in the ALP for people to accept honours," he said. "This is more deeply rooted than that."

He said he expected some reaction from Trotskyite elements, and also from some people who were still fiercely republican.

But he said he failed to see why the trade union movement should not participate when offered awards.

"All honours, imperial or otherwise, emanate from the same source," he said.

Wouldn't it be assumed that the Trades and Labor Council president was a republican?

"It's a waste to spend any time on something if it's not practical, and I have tended to pursue goals that are practical."

"The monarchy has a much better record generally than the presidential nominees in the United States, which is republican."

Sir John said that for 35 years he had been a community worker and fought for workers' interests. Workers knew that in accepting a knighthood he would not change.

"There's no need for anything to change, and the fact that I've been recognised for the work I've done will be an asset to the Labor Party, which needs leaders."

"I love the Labor Party. I believe in what it stands for, and the ordinary ALP people who have contacted me recognise that."

Sir John was sad when he spoke about the Labor Party. He said it had a rough time ahead of it and he wished people would spend as much time on winning elections as they did on losing them; but he said it would survive.

No argument

Although he has vacated his position as senior vice-president of the Federal party, he said he still remained president of the ALP Queensland branch as well as of the Trades and Labor Council.

"My contract of work with the Labor Council is for as long as I'm carry-

ing out my work," he said.

"I can't be sacked and I haven't retired; but I'm prepared to negotiate an earlier retirement than I originally planned."

"I've got no argument with the Labor Council executive and accept they are bowing to pressures from a vocal minority; but they can't claim I haven't carried out my job in a proper manner."

He said he had been working seven days a week without payment for his trade union work.

Sir John, who is 58, said he had been intending to retire for a long time.

"The doctors tell me I am clinically all right, but every good union official—certainly those who take their jobs seriously—seldom lives past 60."

"I'm now starting to get this thing that you can't live past 60."

He said he had always been prepared to live on the pension like other workers.

"I've got no money," he said. "I own my unit and have no debts; but my only account is with the SGIO Building Society and it's not in a very healthy state."

Egerton

secret

THE Trades and
dent (Sir John Egerton
believed in postal and

"People are as entitled to the right of privacy in the election of union officers as in the election of a Prime Minister," he said.

But he said he had not known unionists to be afraid to put up their hands and vote at meetings in general dispute.

Sir John was commenting on a pamphlet being circulated among Elec-



ALLAN BARNES, in Canberra, reports on a transformation the Leader of the Opposition, Mr. Whitlam, has undergone in the past few weeks. Gough is back in business and his eyes are on 1978.

Labor's once and future leader

CANBERRA — The moods of Edward Gough Whitlam have long been the subject of intense study, both inside the Australian Labor Party and among outside voyeurs of politics.

Because of his clear domination of the party, the Labor Leader's tempers, tantrums and triumphs, his flashes of brilliance and arrogance and his alternate periods of sulking and elation often have served as a barometer to the ALP's internal morale and electoral fortunes.

For much of the past six months — since his shattering defeat at the polls on December 13 — Mr. Whitlam has been in one of his lowest psychological troughs. Simultaneously, the Federal Parliamentary Labor Party has been dispirited and ineffectual.

Critics have lamented that the Opposition appeared leaderless and rudderless. There has been speculation that Mr. Whitlam might quit.

But suddenly, new and telling signs have appeared.

Last Tuesday, Mr. Whitlam called together advisers working on Labor's foreign affairs policy for the ALP Federal conference in Perth next June.

On Wednesday, he instructed his staff to have some new

tional headquarters in Canberra, John Curtin House, and delivered a rallying speech to the party faithful.

He also engaged in some energetic (although ultimately unsuccessful) lobbying for the bid by his NSW State ALP President, John Ducker, to gain election as the party's national senior vice-president.

On Thursday evening, before he left for his home in Sydney to pack for an overseas tour beginning today, he told members of the ALP national executive: "We'll slaughter Fraser in the Budget."

Opposition and noted the enthusiasm in his voice, came to one united conclusion: "Gough's back in business".

There is no doubt that Mr. Whitlam has undergone a metamorphosis in the past few weeks. He has now firmly decided to lead the Labor Party at the 1978 Federal election. There no longer appear to be any obstacles to the realisation of that intention.

A number of factors have contributed to Mr. Whitlam's new-found determination. Upmost is his belief that public support for the Fraser

prospective. He was obsessed with the past, with trying to vindicate his Prime Ministership, with putting the record of his Government in the most favorable light for future historians.

Clearly, he believed he had little chance of ever being Prime Minister again — the only incentive to a politician of Mr. Whitlam's character and calibre.

The announcement that the Labor leader was planning a six weeks' overseas tour in the winter recess of Parliament shocked and angered many caucus members. They recalled the public furore over Mr. Whitlam's European excursion at the end of 1974 and argued that he now should stay home to lead the fight against the Fraser Government.

Mr. Whitlam was so unruffled by this new fuss that people began to wonder whether the trip would be his swan-song. They pointed out



MR. HAYDEN: Not

and triumphs, his flashes of brilliance and arrogance and his alternate periods of sulking and elation often have served as a barometer to the ALP's internal morale and electoral fortunes.

For much of the past six months — since his shattering defeat at the polls on December 13 — Mr. Whitlam has been in one of his lowest psychological troughs. Simultaneously, the Federal Parliamentary Labor Party has been dispirited and ineffectual.

Critics have lamented that the Opposition appeared leaderless and rudderless. There has been speculation that Mr. Whitlam might quit.

But suddenly, new and telling signs have appeared.

Last Tuesday, Mr. Whitlam called together advisers working on Labor's foreign affairs policy for the ALP Federal conference in Perth next June.

On Wednesday, he instructed his staff to have some new letterheads printed for him.

That same day, he officially opened the Labor's new na-

tional headquarters in Canberra, John Curtin House, and delivered a rallying speech to the party faithful.

He also engaged in some energetic (although ultimately unsuccessful) lobbying for the bid by his NSW State ALP President, John Ducker, to gain election as the party's national senior vice-president.

On Thursday evening, before he left for his home in Sydney to pack for an overseas tour beginning today, he told members of the ALP national executive: "We'll slaughter Fraser in the Budget session."

Insiders who observed these forward-looking actions by the Leader of the Federal

Opposition and noted the enthusiasm in his voice, came to one united conclusion: "Gough's back in business".

There is no doubt that Mr. Whitlam has undergone a metamorphosis in the past few weeks. He has now firmly decided to lead the Labor Party at the 1978 Federal election. There no longer appear to be any obstacles to the realisation of that intention.

A number of factors have contributed to Mr. Whitlam's new-found determination. Uppermost is his belief that public support for the Fraser Government has slumped dramatically.

"Gough's suddenly decided that he has a real chance of getting back into the Lodge in '78", one of his closest confidants said yesterday.



Mr. UREN: He saw Hayden as Whitlam's logical successor.

This certainly represents a change of heart by Mr. Whitlam. Until Parliament rose a fortnight ago, there was widespread speculation among Labor caucus members that "The Leader" could be preparing to retire from the post he has held since 1967.

Ever since the Iraqi election funds affair blew up in February, Mr. Whitlam had appeared dispirited and uninterested. He lost some of his strongest supporters over that mess — men like Mick Young and John Ducker — and held his post only because of the overkill tactics of the Prime Minister, Mr. Fraser, and newspaper proprietor Rupert Murdoch.

From that time, Mr. Whitlam began to re-evaluate his

and calibre.

The announcement that the Labor leader was planning a six weeks' overseas tour in the winter recess of Parliament shocked and angered many caucus members. They recalled the public furore over Mr. Whitlam's European excursion at the end of 1974 and argued that he now should stay home to lead the fight against the Fraser Government.

Mr. Whitlam was so unruffled by this new fuss that people began to wonder whether the trip would be his swan-song. They pointed out



MR. HAYDEN: Not interested in leadership.

that he would turn 60 on July 11 and wondered whether he would follow the recent lead of the British Labor Leader, Sir Harold Wilson, and retire at that age.

Party historians also turned up records which said that when Mr. Whitlam gained preselection for his Sydney seat of Werriwa back in 1952 he pledged he would retire at the age of 60. He has recently been introducing his son, Nicholas, around the Werriwa ALP branches. Clearly, he wants the seat to remain in the family.

Against this background, leading figures in the Labor Party began to apply themselves to the possibility of having to choose a successor to Mr. Whitlam. The most obvious choice was the former Treasurer, Mr. Bill Hayden.

On the day after the general election last December, Mr. Whitlam offered to stand aside for Mr. Hayden. But Hayden declined.

Mr. Hayden refused then even to stand for the parliamentary executive or "Shadow Cabinet". He had become alarmed at the near-loss of his Queensland seat of Oxley and had decided to concentrate on consolidating his local support and on studying law.

Gradually, Mr. Hayden became more realistic. In March, he agreed to stand for a vacancy on the executive, caused by the resignation of

This week at the National Gallery

SPECIAL EXHIBITIONS:

"Modern Australian Photographs" (including purchases for the Kodak Collection), from the permanent collection of the National Gallery of Victoria, are on view to the public, until June 27th, in the third floor, Photography Gallery.

Recent acquisitions by the Department of Prints and Drawings, are exhibited in the Robert Raynor Gallery, until July 25th.

The Fred and Mary Marer Collection of American West Coast Ceramics, is displayed in the Gallery Society Corridor, until June 30th.

MINI TALK:

Tomorrow, Sunday, at 11.30 a.m., in the Asian Gallery, Dr. Emma Devapriam will talk about Hinduism.

CBA PROM. CONCERT:

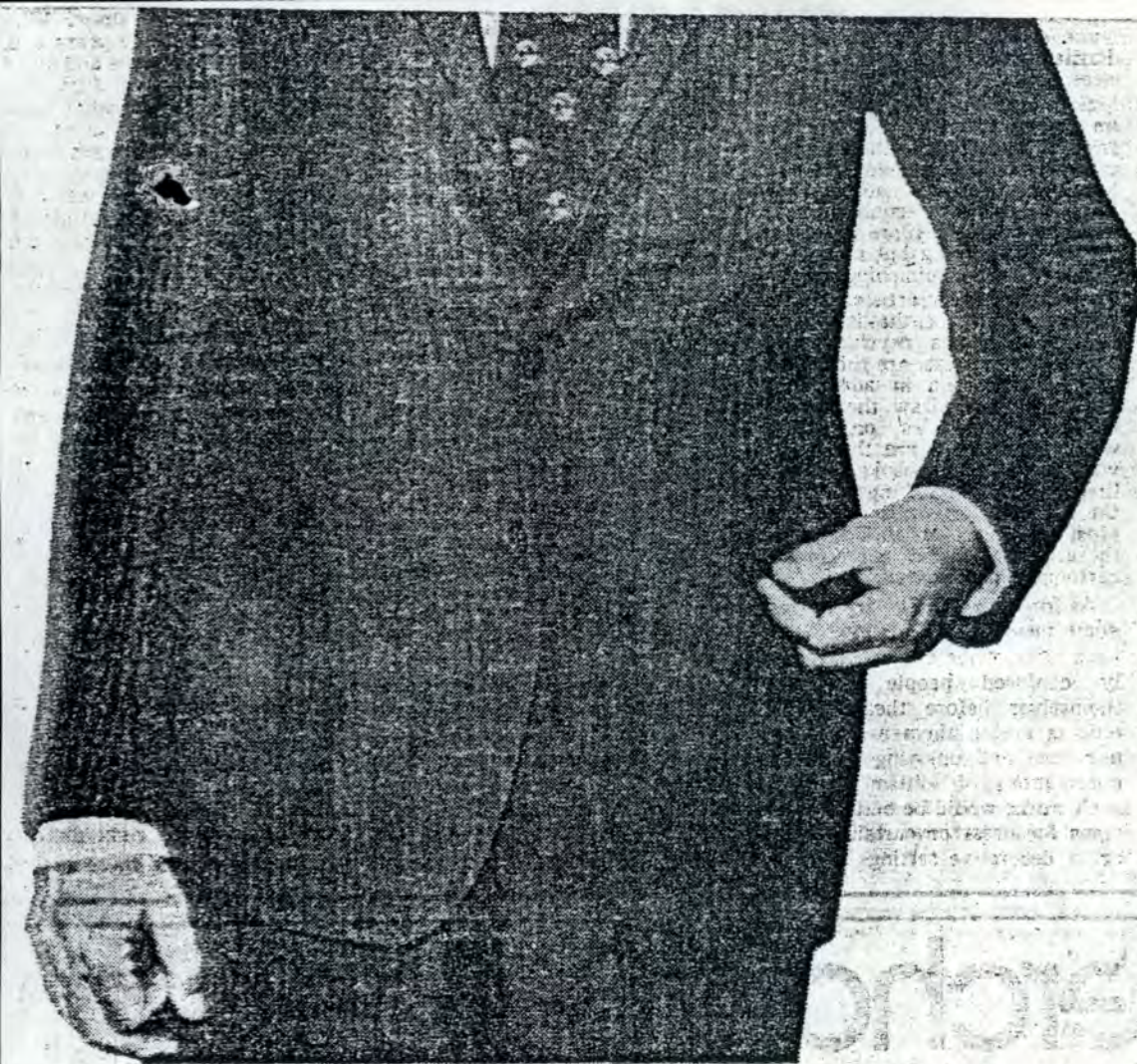
Tomorrow, Sunday, at 2.30 p.m., in the Great Hall, the CBA Prom. Concert, will be a recital by the Philharmonia of Melbourne, directed by Paul McDermott.

GUIDED TOURS:

Free guided tours, led by the Voluntary Guides, are available during Gallery hours.

National Gallery of Victoria.
180 St. Kilda Road.
Just over Princes Bridge
Gallery Hours
Tues., Thur.,
Fri., Sat., Sun.
10 a.m.-5 p.m.
Wed. 10 a.m.-9 p.m.
Closed Monday
except on
Public Holidays





Mr. Whitlam for the leadership at the mid-term caucus elections in the middle of next year

Unless some sitting Labor member (Dr. Cairns' name also has been mentioned) has a change of heart, that plan must go by the board.

Mr. Hawke now must make a quick decision on his political future. The Victorian State Conference of the ALP decided last weekend to close nominations for all House of Representatives' seats on September 30.

Given the sentimentality which often infects the Labor Party and the queues that form for safe seats, it is far from a foregone conclusion that Mr. Hawke would win endorsement from a sitting member such as Mr. Crean or Mr. Bryant.

one of Mr. Whitlam's strongest critics, the former Minister for Education, Mr. Kim Beazley.

In spite of a solid vote against Mr. Hayden by those he had antagonised by his earlier petulance or who saw him as a future competitor, he won the post, became spokesman on defence and resumed activity in parliamentary debates and party planning.

Last month, at the height of the speculation about Mr. Whitlam's future, the question of leadership was raised during an informal luncheon discussion at the Australian National University bistro between Mr. Hayden and three other leading Labor MPs, Senator James McClelland, Senator John Button and Mr. Ralph Willis.

Some of these later told colleagues that Mr. Hayden had indicated he would not be interested in the leadership post.

Mr. Hayden is reported to have given a similar indication to the Deputy Leader

of the Labor Party, Mr. Tom Uren, who had made it clear that he saw Hayden as Mr. Whitlam's logical successor.

Uren's Left-wing forces were determined that the leadership should not fall to the Right-wing's strongest contender, the former Minister for Manufacturing Industry, Mr. Lionel Bowen, of NSW.

With Mr. Hayden a non-starter, caucus members were sounded out about their attitudes towards Mr. Beazley, but there was little enthusiasm for him.

Younger MPs whose names emerged for discussion at that time included the former ALP Federal Secretary, Mr. Mick Young, the former Minister for Northern Australia, Mr. Paul Keating, and the former ACTU advocate, Mr. Ralph Willis. However, it generally was agreed that all were too inexperienced to be realistic contenders for the leadership at this stage.

Then, of course there is Bob Hawke.

The President of the ACTU and the ALP has made no secret of the fact that he would like to go into Federal Parliament and, once there, become Leader of the Labor Party.

Quite exhaustive efforts have been made on Mr. Hawke's behalf this year to find him a safe seat. Attempts have been made to induce at least two Melbourne MHRs, Mr. Horrie Garrick (Batman) and Dr. Harry Jenkins (Sculin) to retire. Both have declined.

The planning behind these approaches was to allow Mr. Hawke to enter Parliament soon so that he could establish himself in time to challenge



MR. HAWKE: He must make a quick decision on his political future.

But even if he did, he then would not go to Canberra until after the 1978 elections.

If, by some miracle, Labor wins that election, Mr. Whitlam naturally will stay on for another term as Prime Minister.

If, more probably, Labor loses but greatly improves its position, Mr. Whitlam will stand down.

Continued, Page 13.

LINCOLN INSTITUTE
A College of Advanced Education in the Health Sciences

The Helen Vale Foundation

GUIDELINES FOR LIVING COURSES

The return of Gough

Continued from Page 11.

However, the caucus is most unlikely to turn immediately to an untried Parliamentarian like Mr. Hawke.

They are far more likely to put pressure on Mr. Hayden to change his mind or to turn to Mr. Bowen, or decide that one of the present "young brigade" has developed sufficiently.

Mr. Hawke's first real chance would be at the mid-term caucus election in June, 1980, if Mr. Whitlam's successor had proven unsatisfactory.

But that is looking a long way ahead. The news of the moment is that, as of now, Mr. Whitlam is going to stay on.

He has read the recent public opinion poll which showed

a slump in the Government's support from 53 per cent. last December to 47 per cent. in May and he has reminded supporters of how he improved Labor's vote from 42 per cent. in 1966 to 49 per cent. in 1969.

"We could have won in three years then and we can win in three years now," he told one senior colleague last week. And he sounded as if he believed it.

Gough Whitlam has emerged from his latest sulk.

Last weekend a rejuvenated Mr. Whitlam went out and spoke over the heads of his caucus critics to the

grassroots of the Labor Party at their State conferences in Melbourne, Adelaide and Sydney.

He told them how the Fraser Government was dismantling Labor's reforms and how the public was becoming quickly disillusioned.

Reflecting his new-found do-or-die determination, Mr. Whitlam told the conferences: "I know there is a disposition in some quarters to set our sights on the election after next. It would be a stupid mistake to do so.

"The longer the conservative parties are in power, the harder it is to dislodge them — the more

chance they have to entrench themselves, to cover up their mistakes, to pose as the natural ruling party, to inculcate the fear of change which is the strongest emotion in their favor.

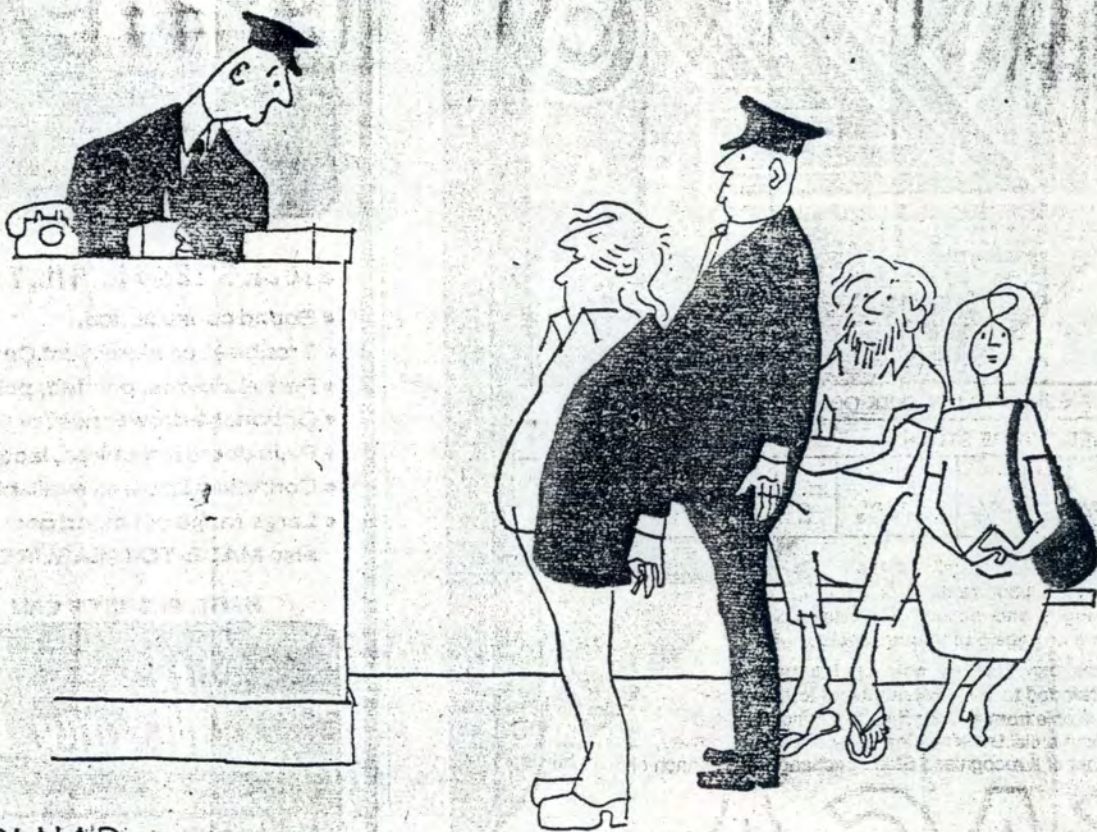
"Our best chance of breaking the back of Fraserism will be in three years' time, not in six, not in nine."

Mr. Whitlam's optimism may be unrealistic. He may lack the drive or initiative to revitalise Labor's depleted and demoralised ranks. He may be too wedded to the policies of the past instead of the demands of the future.

But whether those doubts are well founded or not, the fact remains that Gough Whitlam is now off and running for 1978.

SYDNEY MORNING HERALD

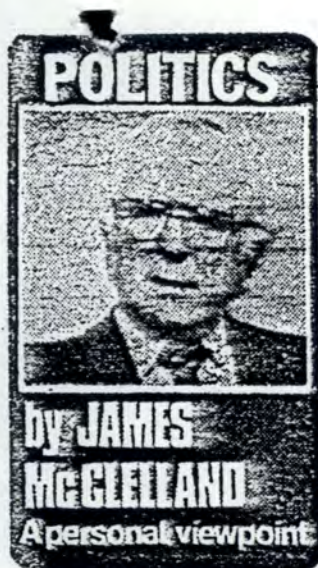
11 JUNE 1976



MOLNAR
11. 6. 76

"... as I was proceeding peacefully, maintaining Mr Whitlam's rage ..."

SMYH
11.6.76



The right to demonstrate is precious

I HAVE recently been the subject of public and private criticism for the stand I have taken in support of demonstrations against Sir John Kerr. I should like to make my position perfectly clear.

I deplore violence of any kind. The hurling of a brick through the window of Sir John's car in Melbourne on the night of June 9, was a cowardly act of which, I have been assured, the vast majority of the demonstrators were thoroughly ashamed.

But is it seriously suggested that because there is a possibility of violence inherent in any crowd of people gathering together (for example, to bar-rack for opposing teams at a football match) all such gatherings should be banned?

Another charge which is levelled against Mr Whitlam and myself is that, by continuing to criticise Sir John Kerr, we are fomenting demonstrations and therefore increasing the possibility of violence against him and his entourage.

Might it not be argued with equal force that the unprecedented virulence of the attacks on Mr Whitlam during the last election campaign by his more strident critics amounted to an incitement to the lunatic fringe to attack him physically?

Personally, I was surprised that in the atmosphere of anti-Whitlam hysteria which was whipped up, no violence occurred. (I have my own theory about the letter bombs.) Is forceful advocacy permissible only for those who

Politics may be conducted either civilly or brutally. Fortunately in Australia the contest between contending parties has been conducted for the most part with civility. But this has been based on the acceptance of certain rules, one of which was that a party which wins a majority of seats in the House of Representatives is entitled to see out its term.

I said during the election campaign and I repeat now that the flouting of this rule ushered in a new era in politics, an era in which increasing numbers of people will lose faith in the electoral process. This must increase the danger of people resorting to violence. How can those who tore up the rule book be exonerated if this is the consequence of their actions?

In retrospect it seems remarkable that the Governor-General's dismissal of a legally elected government was accepted with such apathy. But it is a mistake to believe that all of those who took the opportunity to change the Government on December 13 approved of the Governor-General's action. Many who voted for Australia's continuing participation in the Vietnam war in the 1966 election came to see that they had been mistaken. In the fullness of time I believe that an overwhelming majority of citizens will realise the damage done to our institutions by Sir John Kerr's coup of November 11.

The full implications of his decision have so far been recognised by comparatively few. Suppose that in some future time of crisis a governor-general, following the precedent set by Sir John that the governor-general has the powers of an absolute monarch, were to dismiss a Liberal government. (Even Sir John might get so carried away as to try it again.) Would the more rabid right-wing elements in the community, including a Prime Minister like the present one, accept such a dismissal as tamely as Labor did?

There is in my view far graver danger of violence from the right than from the left in Australia.

Sir John Kerr must accept a heavy burden of responsibility for increasing the instability of political life, for weakening the parliamentary institution and, ultimately, for making violence more likely.

This is not to say that he or his entourage deserve to be the recipients of violence. I speak often at universities, from which most of the demonstrators come, and I constantly urge that demonstrations be peaceful. I also believe that Sir John should be given more adequate police protection than he received in Melbourne. If he will not resign, as he should, we will just have to accept the fact that he is the most expensive governor-general we are ever likely to have.

But the right to demonstrate peacefully is one of the most precious rights we have. The demonstrators against the Vietnam war were just as roundly condemned as the anti-Kerr demonstrators, and by the same people. But they were proved right, weren't they?

At least Gough escaped with his head



THE controversy over the Governor-General has returned to the centre of affairs as a result of two events.

The more lurid is the demonstrations, which prominent leaders of the A.L.P. continue to incite or condone, and which "accidentally" escalate into violence.

The more ultimately serious is the controversy which has developed as a result of Sir Garfield Barwick's address to the National Press Club.

What the Financial Review called "a slightly shortened transcript of the questions" presented 19 questions asked of the Chief Justice.

Every single one of the 19 questions was obviously hostile to the Governor-General and to the Chief Justice. There was not one single question which assumed that there could be a case for either of them although, whether one agrees with their case or not, people who are neither morons nor crooks have found it convincing.

There may be dissidents in the Soviet Union: evidently there are none in the Parliamentary Press Gallery!

Violated

What is before the courts today is the submission that the Whitlam Government not merely violated the Constitution but — as the Chief Justice pointed out — the far more serious charge that it attempted to overthrow the basic canons of responsible government, which the Constitution simply assumes. The Governor-General, acting according to due process, defended both, by the only legal method which remained

The submission which is now subject to legal determination is that the Whitlam Government first violated the Commonwealth Constitution on December 13, 1974. The Executive Council minute of that date, signed by Messrs Whitlam, Cairns, Murphy and Connor authorised the Cabinet to seek the \$4 billion loan. Unless this could be classified as a loan for temporary purposes it would be prima facie a violation of Section 105A (5) of the Commonwealth Constitution.

The incredible advice that a loan to be raised for 20 years could be classified as a loan for "temporary purposes" and was therefore legal under the Constitution was presumably given by the then Attorney-General, who is now a justice of the High Court.

It was not only the method of raising these vast loan funds outside the Loan Council which raised the question of unconstitutionality.

There is strong evidence that the purpose for which the money was intended was in fact to set aside the machinery of responsible government altogether.

Attention

This is the only conclusion one can draw from the statement of one of the Whitlam Government's firm supporters, Professor Colin Howard. At the time of the Executive Council minute, he was legal counsel to the Attorney-General, Senator Murphy, and presumably privy to the Government's intentions.

His letter, published in the Melbourne Age (11/7/75), when he was still an official of the Whitlam Government, has never received the attention it deserved.

He wrote:

"In my view the loans scheme was simply an attempt to open up an extra-parliamentary source of supply which would be available, not, to be sure, to by-pass Parliament forever, but to keep a Government afloat for a long enough time to ride out the threat of another forced election."

I find it impossible to believe that Professor Howard, speaking from his privileged position as legal counsel for Senator Murphy, a position he continued to hold after publishing that letter, could simply have recklessly concocted that story.

It was clearly not an isolated incident. When in October-November the Senate later "deferred" supply, Mr Whitlam once again sought to raise money away from Parliament, by going to the private banks.

It was that persistent pattern of defiance of the parliamentary system of responsible government which not merely justified, but demanded, Mr Whitlam's dismissal. Neither the violent demonstrations nor the legal obfuscations can change that essential issue.

Tolerance and the Left

SIR — In the daily thrust and counter-thrust of politics, significant patterns often pass unnoticed.

In the events of the last few weeks, for example, the Labor Party has exhibited an intolerant, authoritarian manner, suggesting that it is more interested in conformity than reform.

I refer to such apparently unconnected issues as the continuing campaign against Sir John Kerr, the attacks on Sir John Egerton, and the Medibank debate.

Clearly there is room for difference of opinion over Sir John Kerr's action in dismissing Mr Whitlam. If there are those who disapprove of Sir John's action; equally there are those who believe that Mr Whitlam grossly exceeded the prerogatives of a Prime Minister.

But is there justification for the continual bullying of the man who faced up to this awkward situation, and presumably did what he thought was best?

The NSW president of the A.L.P. has said that Sir John must be shamed into resigning. Even more shockingly, Senator James McClelland in a recent television interview claimed that Sir John was responsible for the violence against him in Melbourne.

The Senator will probably be offended to hear that his remarks reminded me of pre-war statements about Jews being responsible for the violence against them. But that interview was one of the most disturbing snippets of public comment I have seen for some time.

We now have the spectacle of someone who was, and presumably is, widely respected within the Labor movement subjected to hounding and abuse because of his personal decision to accept a knighthood. ("Sir Toby Belch," says Mr Whitlam of someone who has saved his skin on more than one occasion).

Finally, on Medibank, the A.L.P. and the militant unions have gone berserk, not because the underprivileged are being denied full access to medical care, but because the comparatively better off are able to exercise a choice outside Medibank, with the penalty of paying much more for it.

If the Labor Government had spent less time worrying about forcing people to conform and worried more about helping the underprivileged, it presumably would have introduced the family-allowance reforms introduced by the

Fraser Government. These are widely acknowledged to be much more significant in the attack on poverty than any reform initiated by the Whitlam Government.

Until Labor spokesmen begin to accept dissent from their views as a legitimate exercise of the independent human will, and not as treachery, or conspiracy, to be eliminated by bullying or resort to the streets, they will rightly be regarded with fear and suspicion by the Australian people.

J. J. CARLTON
General Secretary,
NSW Division,
Liberal Party, Sydney

A word

COULD anyone define the word democracy for me please, as I am totally confused.

Is this the word that allows left-wing radical students the right to assault and insult our Governor-General without being prosecuted? Is this the word used by the communist unions in their plans to shape the policies of this country, which they are doing?

I am afraid that if the policies of law and order which apply to 90 per cent of Australians are not made applicable to the 10 per cent student and union radicals, there is not much future in this country.

P. C. DONOVAN
Double Bay, NSW

'They didn't hesitate to attack guests'

THERE is one angle of the disreputable incident which occurred outside the Royal Commonwealth Society the other night which has not been brought to the attention of your readers. In view of the increasing violence of our society I feel that all should be aware of the situation.

On the night concerned I and my husband had left our taxi and had to approach the building on foot. We were pushed, shoved, abused, spat on and sprayed with a yellow dye.

As a result of this dye, my evening dress and fur stole have been ruined. I must

point out that evening wear for ladies of my age and figures takes some skill in devising and is now far from cheap. I have inquired from my lawyer if I can claim damages from the organisers of the riot, but have been told I cannot.

These people had enough money to charter several buses, which they kept waiting for them at overtime rates for some hours. They brought their children, whom they held on their shoulders to see the fun.

They didn't hesitate to at-

tack several guests, long before the Governor-General appeared. The fact that we were wearing evening dress appeared to infuriate them.

If the people who organised these outings had to pay for the damage they caused, they might not have the money to spend on transport to get them all over the country.

I shall continue to attend legal gatherings where and when I wish. I do not dispute the right of peaceful assembly, but the mindless violence of the other night should be a warning to us all.

ANNE CLEMENS
Toorak, Vic

The meat in a political sandwich

SIR — No sensible person approves of violence against any individual, regardless of whether it is the Governor-General or anybody else.

I suggest these points for debate.

Nothing that happened last

November 11 was contrary to the laws of the land, as they exist today. Everything that happened on that day was contrary to the principles of parliamentary democracy, as they are understood in all countries that use our system

of government.

The Constitution was not concerned with democracy; it was an agreement between six State governments and a British Government on the best way to set up a Federal Government here.

The powers that the Governor-General used were probably inserted by Queen Victoria and her ministers to keep some control over the actions of a new government being set up in one of her overseas dominions. It is, therefore, correct to look to the Constitution for what is lawful, but not for what is democratic.

In a true parliamentary democracy premature elections are only held on the advice of the majority in government, never on the demands of the minority in Opposition and certainly not on instructions from an unelected authority outside Parliament.

Although a majority of the people wanted an election at that time, a sizeable minority (about 43 per cent) did not want one. It may have been unwise to upset normal parliamentary procedure in order to do something that was bound to antagonise so many.

The Governor-General was the unfortunate meat in a political sandwich — between two warring factions, neither of which would compromise. He did what seemed best to him.

If there were to be any violent protests, they should have been directed at those senators who would not pass Budget legislation needed for the normal administration of the country, and who passed it unanimously once they had obtained their undemocratic objective.

S. A. ARMSTRONG
Darlington SA

Letters

TO THE EDITOR

Address letters to G.P.O. Box 4162, Sydney, NSW 2001. Letters must have full name and residential address, although not necessarily for publication.

'It's Sir John's bed'

I KNOW I am wasting my time in writing this letter. Nevertheless, I feel I must write it. I recently started to buy *The Australian* again.

While one cannot read with any pleasure your item on Sir John Kerr's visit to Melbourne, one realises that a great many Australians still feel outraged by the action of the Governor-General and Mr Fraser and the Australian press last October/November in arranging to dismiss an elected Labor government.

This action was a prostitution of our democratic rights, and it was done cynically on November 11 — the day we pay homage to those men and women who gave their lives defending democracy in two wars.

Most people can now see the alleged "constitutional crisis" for what it was: a wangle to get rid of an elected Labor government and replace it with a conservative government, true to pattern, which intends to cut, cut, and cut again, all forms of social services, including Medibank.

Our Constitution does not

specifically give the Senate the right to stop Supply, thereby forcing an election. It is a matter of interpretation, and was interpreted as such by those opposed to Labor.

According to our Constitution, in just over a year we could have kicked out Mr Whitlam or re-elected him. It should have been allowed to go its constitutional term, and we should have had our constitutional right to do either.

The collusion of Mr Fraser the Governor-General, and most of the press has brought the British monarchy into disrepute, and brought in unconstitutionally a conservative government.

The Governor-General's action has created deep divisions within Australia, caused many people to despair of the democratic process and, through the prostitution of democracy, has made the Governor-General extremely unpopular among many Australians.

It is his bed — he made it himself, and must now lie on it.

ROY NICHOLLS
Goodwood, SA

SIR JOHN KERR:
THE NEW STORM

The man

MY WIFE and I were at the Commonwealth Society's reception last week, and we saw the disgusting scene made by the demonstrators and their organisers. It was ugly, crude, and went too far.

The great majority of people in Australia are solidly behind the Governor-General. He knows his job, and he carries it out with precision.

If certain political extremists don't like it — mob rule and demonstrations will not change it. Our great Constitution ensures that it stays the way it is, and can only be altered by due process in Parliament and referendum.

Some of the news media will endeavor now to say that because the Queen is visiting us next year, the Governor-General should resign to prevent embarrassment. Her Majesty cannot be embarrassed by anyone who upholds the Constitution.

But more, perhaps, to the point is the fact that any demonstration of the kind we saw last night would only bring lasting and irreparable harm to their cause, and those who organise it.

I was grateful to be present last night, because I felt I was witnessing a facet of Australian history. All our Governors-General in the past have been appointed because they were great men.

Today we have our first Australian Governor-General to become a great man in the position itself. He is the only one to be put to the test of safeguarding the Constitution.

His courage, his devotion to duty and his bearing adorn the task with superb distinction. Well done, Sir John, and carry on. We're with you.

MICHAEL PARKER
Toorak, Vic.

Flashback

I ARRIVED home a few days ago after living in England for some time. It was as though, in jetting across the world, I had somehow travelled back in time at least a decade.

The television and radio told me that some rabble students were demonstrating against Sir John Kerr. Newspaper editorials told me that the students' actions smacked of nazism. RSL spokesmen pompously condemned the demonstrators while upholding and praising the primary act of violence of the Governor-General — the ripping to ribbons of the Australian Constitution.

Were not the same pontifications delivered by precisely the same sections of society about students and other citizens demonstrating against the Australian involvement in the shameful Vietnam war?

KATHLEEN TAYLOR
Bondi, NSW

I ARRIVED home a few days ago after living in England for some time. It was as though, in jetting across the world, I had somehow travelled back in time at least a decade.

The television and radio told me that some rabble students were demonstrating against Sir John Kerr. Newspaper editorials told me that the students' actions smacked of nazism. RSL spokesmen pompously condemned the demonstrators while upholding and praising the primary act of violence of the Governor-General — the ripping to ribbons of the Australian Constitution.

Were not the same pontifications delivered by precisely the same sections of society about students and other citizens demonstrating against the Australian involvement in the shameful Vietnam war?

KATHLEEN TAYLOR
Bondi, NSW

Benighted

AUSTRALIA '76 — the knighted and the benighted.

JAMES BARNETT
Stanmore, NSW

'FORGET KERR, IT'S FRASER'

By IAN MILLER

Labor supporters should stop wasting their time demonstrating against the Governor-General, Sir John Kerr, acting state secretary of the A.L.P. Mr Bob Gibbs, said today.

The Labor movement should direct its wrath toward the Fraser government's cynical promises rather than chant on street corners.

"Surely we've got more concrete things to do than stand around street corners chanting and throwing stones," Mr Gibbs said.

"Why should we waste our time on a broken-down hack of a governor-general?"

"What's the Governor-General? He's not the person people will be voting for at the next elections."

Mr Gibbs supported the rights of individual parliamentarians and party members to demonstrate their objections, but they were wasting their time.

His comments follow a decision by Labor Mayor of Townsville, Ald Percy Tucker, to host a council luncheon for Sir John on July 7.

Ald Tucker bitterly criticised Labor supporters for "brainless" demonstrations against Sir John who is in Brisbane today.

He said: "We are wasting a lot of time and energy in the wrong way — the main political enemy is the Fraser government, not an over-ripe governor-general."

"We are going around booing and hissing and should be getting Fraser and his razor out of office."

"At the moment the governor general is a wonderful decoy and lure — only brainless hounds chase decoys and lures."

"I would hope the Labor movement can see this. I don't believe he should ever have been

appointed in the first place — he was anti-Labor from the beginning.

"We didn't inherit him. We appointed him. How we allowed ourselves to do it I don't know."

Ald Tucker said he would go ahead with the luncheon for Sir John as it was arranged before he was elected to office last March.

"I gave my word I would honor com-

mitments made by the previous administration here."

Mr Gibbs said lot of what Ald Tucker, a former State Labor Opposition leader, said made sense.

Brisbane police were ready for another demonstration against Sir John today.

Sir John was speaking at a business executives' luncheon at Parkroyal Motor Inn.

TEXT OF TELEGRAM RECEIVED 10 JUNE 1976

His Excellency the Governor-General
of Australia,
Government House,
CANBERRA A.C.T. 2600

" WE BELIEVE THAT THE ORGANISERS OF THESE ATTACKS
ARE EXTREME LEFT-WING POLITICAL ACTIVISTS WHOSE IDEOLOGY
IS THAT OF REGRESSIVE MARXISM.
WE PLEDGE OUR SUPPORT FOR THE OFFICE OF GOVERNOR-GENERAL
IN THIS AUSTRALIAN DEMOCRACY, AND URGE THAT YOUR EXCELLENCY
NOT BE SHAKEN BY THESE POLITICALLY MOTIVATED AND
IRRESPONSIBLE ATTACKS. "

Signed : Mr J.F. Harding, Mr I. J. Sands, Mr B.P. O'Loughlin
and Mr J.D. Smith (Federated Clerks' Union),
Mr B.G. Harrison (Municipal Officers' Association),
Mr N.J. Millar and Mr P. O'Meara (Food Preservers'
Union and Dental Technicians' Union), Mr J.P.
Fitzgerald (Furniture Trades Union), and Mr J.C.
Beedham (Association of Architects, Engineers,
Surveyors and Draughtsmen of Australia).

Study of a Kerr demonstrator

SIR, — I share Mr. Imre Salusinszky's refusal (14/6) to accept the description of "young hoodlum" used by "The Age" in relation to himself and other student demonstrators against the recent presence in Melbourne of the Governor-General. A much more suitable description would be "young investigative journalist doing some gratuitous practical work for his course". And the road of such pseudo-hoodlums, judging by massive local and American precedents, does not lead "straight down", but straight up, often into the editorial boards of metropolitan dailies.

Mr. Salusinszky's behavior, of which his letter is a far more interesting symptom than his actual demonstrating, indicates that the National Affairs Correspondent of Farrago holds the following beliefs, directly or by implicit assumption:

- (1) If a Government is voted out of office by a substantial majority, and Mr. Salusinszky or his political reference group holds this defeated Government in very high esteem, they are entitled to inflict physical harm on what they deem to be the persons who are thought to have played some administrative or political role in the changeover of the Government.
- (2) If Mr. Salusinszky or his political reference group develops a strong hatred against a particular Governor-General (in this case against one appointed by the head of their favored Government), they are entitled to attempt illegal acts of physical violence against his staff, his means of transport and to disrupt his exercise of lawful functions.
- (3) Mr. Salusinszky and his political reference group feel that the a Governor-General of Australia should not be permitted to travel in a motor vehicle made by Rolls-Royce, and feel, therefore, entitled to subject such vehicles, if they contain the person of a Governor-General, to acts of illegal physical vandalism.
- (4) Mr. Salusinszky does not believe that the present Australian Constitution is democratic, presumably because it does not embody the above three assumptions.

May I say that Mr. Salusinszky's belief that the Whitlam Government was the best in Australia's history is shared by many people and organisations (e.g. the Iraqi and Soviet Governments and the PLO, and certainly Mr. Whitlam himself though apparently not by the Chinese Government, and it is, therefore, by no means eccen-

trically unique. Nevertheless, it also seems that the implicit assumptions underlying the political activities of a present-day moderate student publicist are worth stating explicitly and they ought to be studied closely by people concerned with the tertiary educational processes in this country.

FRANK KNOPFELMACHER
(Gardenvale).



WINDSOR CASTLE

PERSONAL

16th June, 1976.

My dear John

Many thanks for your letter of 10th June with the story of the most unpleasant business to which you were subjected in Melbourne last week.

Having spoken to David on the telephone, I was able to give The Queen a verbal account of what happened. Her Majesty has now had the opportunity of reading your account and looking through the newspaper cuttings you sent with it.

The Queen was extremely sorry to hear of this unfortunate business, and much relieved that neither you nor Lady Kerr were hurt. She is also glad that David, contrary to the first reports, was unscathed. Will you please tell Flight Lieutenant Fox how sorry Her Majesty is that he was injured and send him her best wishes.

David told me on the telephone that you were hopeful that this incident, thoroughly unpleasant as it must have been, may have done good, and it is excellent to learn from your letter that the Prime Minister has come to see the position clearly and intends to do something positive about it.

I hope the counter-strategy will be as "robust" as you say Mr. Lawler is and, as it appears to me, the Governor-General is also !

All of us here, from The Queen downwards, were delighted to learn that Bob Menzies had agreed to accept the first Knighthood in the Order of Australia. Nothing, I imagine, could be more helpful in getting the revised Order off to a good start.

The Queen sends you both her best wishes.

Yours ever

Martin Lantieri

His Excellency the Governor-General
of Australia.



WINDSOR CASTLE

14th June, 1976.

My dear David

Many thanks for your letter of 8th June
and for the papers you sent with it.

I shall enjoy reading the pages from the
Australian Current Law Digest but I think I shall
wait before reading Professor Francis West's article
until you can let me have a clearer copy !

*Yours as
Martin*

David Smith, Esq.



BUCKINGHAM PALACE

9th June, 1976

My dear John

Thank you very much for your two letters of 27th May both of which have been read by The Queen with much interest.

It seems, from what you say, that Mr. Fraser's Government is more ready to contemplate real reductions in Government spending than is Mr. Callaghan's on this side of the world. In our case, I do not believe it would be practicable for the savings, which many say are necessary, to be made without the break up of the Labour Party. Some people think this will come but I doubt very much if it will come just yet.

The pound looks a bit more healthy than it did last week: another breathing space has been achieved and, with the solid good news that the Miners have accepted the second phase of the Government's pay policy, we may survive without a major political crisis.

The Queen was most interested in your thumbnail sketch of Mr. Wran, the Premier of New South Wales. His victory at the polls so soon after the Federal and Victorian landslides certainly looks surprising from here. As you say, the "expensive promises" made at the election will cause him difficulty: so it seems it always is in politics.

The Queen was pleased to learn from your second letter of the success of your Western Australia trip, and that you received such excellent support from the Governor and the Premier. It must surely be right to discourage pro-Governor-General demonstrations, welcome as they would be in many ways, which could only inflame matters. I feel sure that the energy in the anti-Governor-General demonstrations, if they are left alone and allowed to be seen as what they are, will fade away. This passive attitude which you are forced to adopt must be somewhat exasperating but I am sure it is wise.

This brings me naturally to the audience for which Mr. Whitlam has asked. First, let me say that you have no reason to be diffident in your approach to this matter and that anything you think it would be useful to say before the audience takes place will be of value to The Queen.

Her Majesty's attitude to this audience can be plainly stated. She made it clear that she would only receive Mr. Whitlam with positive advice to do so from Mr. Fraser and that such advice must reach her through you. The Queen will be aware of the sort of campaign Mr. Whitlam has mounted against you and I do not believe he will get any change out of Her Majesty at all.

We must all hope that the audience will do good:
I am a sufficient optimist to believe that it will.

The Queen sends you both her warm good wishes, as
of course do I.

Yours ever

Martin Lantieri

His Excellency the Governor-General of Australia.

Government House,
Canberra. 2600.

10 June 1976

My dear Private Secretary (Sorry!) Martin

I suppose I should deal with first things - or rather last things - first. We arrived in Melbourne last night direct from Norfolk Island, of which more later. Our intelligence was that there would be a demonstration. My wife and I were guests of honour of the ten combined loyal societies at a reception to show loyalty to Her Majesty on the occasion of Commonwealth Day. I read Her Majesty's message.

There were about 400 demonstrators and the scene was pretty nasty. They were mainly Maoist militant students from the three Melbourne universities supplemented by militant unionists from the Builders Labourers Union, the Waterside Workers Federation and the Painters and Dockers Union, or so I am told.

The front side window of the Rolls was broken with a brick and the flying glass cut the face of my Aide, Flight Lieutenant Fox, who had to have medical attention. All morning papers but one had the story wrong, saying that David Smith had been injured. My security man, Detective Inspector Brown performed most courageously outside the car. Mounted police were used but the police apparently seriously underestimated both the numbers and the likelihood of violence. There were various missiles, paint and so on.

Inside the premises it was very different. Expressions of loyalty to The Queen and disgust about the rabble were constant. It was really not a rabble but a highly organised affair. Buses picked up the demonstrators at prearranged points and carried them without payment. At 7.15 p.m. there were no demonstrators; at 7.45 p.m. as we left the hotel we were told that there were over 800. In fact the figure was apparently about 400. Enclosed are a few clippings including one with a nice photograph of David (Canberra Times).

.../2

The Prime Minister rang me at the hotel when we got back to express his concern. I think he has finally realised that there is an organised campaign by the far left and that a counter-strategy is needed. He has called for an urgent detailed report on the campaign from ASIO. I am to see him tonight at 6.00 p.m. after the despatch bag goes, so further comments on his attitude must await a later letter.

A development which has occurred is that a very right wing organisation has taken up my cause - the League of Rights. It is issuing great numbers of pamphlets and placing advertisements. The sort of things it is saying are true enough. I enclose a copy of its pamphlet. Someone in the press, coining a phrase, has said, "with friends like this who needs enemies". Eric Butler who is the leader of the organisation is said to be racist and anti-semitic but these things are not stressed in his organisation. I enclose an ASIO report on his organisation. It is very pro-Monarchy. He may be cashing-in on my position and The Queen's visit.

My opinion as to the position generally is that The Queen's visit will be unaffected. The grass-roots support for the Monarchy is very great. The militant demonstrators mouth republican sentiments but they are negligible in numbers, even if uncomfortable for me. They will be in the background during the visit. I shall be publicly with Her Majesty only on her arrival and departure. My special position should not complicate things. Nevertheless, constant review of the situation will be necessary. If it appears that some kind of attack of a limited kind may be made on the Monarchy during the visit we shall know well in advance.

Norfolk Island is totally loyal and emotional about The Queen. They remember her visit with deep feelings. They have some political problems with the Australian Government but this did not spread to me. We had a very pleasant stay between 5 and 9 June.

Mr Lawler the head of the Department of Administrative Services was with us. His department administers policy for Norfolk Island and other territories. He also looks after my security and security for Ministers. He is, to use a marvellous word of yours, very robust and most anxious to adopt a positive and constructive counter-strategy. The people in the Prime Minister's Department are in his view and mine, a bit defeatist about the Governor-Generalship. Last night's incident, if it stirs the Prime Minister into realising that what is involved

.../3

is a limited but highly organised campaign of the far left which requires, for its handling, better police work, better intelligence and real determination will be an advantage. This I believe is what the people want and it would be good politics for the Government to be seen to be active and involved.

Would you please thank Her Majesty on my behalf for all she has done about the Order of Australia. We are happy that Sir Robert Menzies has agreed to accept the first knighthood.

As to economic policy we are in the midst of Commonwealth-State bargaining about money. The Premiers' Conference is to be held today and most think the States will have to tighten their belts. More of this on some later occasion.

Recent statistics appear to indicate a perceptible improvement in the economy though not in employment. Wages policy remains the central issue. Mr Fraser is trying to set the stage for talks with the ACTU and has retreated upon another issue - Medibank. He has agreed to let Medibank compete with the private health insurance funds for the business of the higher earners who on the previous policy were to be driven out of Medibank and into the private funds because Medibank, with a 2½% levy on after-tax income, would have been too expensive.

As to Mr Whitlam's visit it seems increasingly possible that he may wish to submit that the Crown itself and the Monarchy is endangered. Whereas I can give my views on this question as the months go by, it could be best for Her Majesty's Australian Prime Minister and Government to advise her about the political realities in Australia. The responsibility must be theirs and I shall suggest this today to the Prime Minister as an on-going commitment.

I add some cuttings about last night from the afternoon press - including editorials.

Please assure Her Majesty of the continued loyalty and humble duty of her Australian Governor-General.

Yours sincerely,

Lieutenant-Colonel the Right Honourable
Sir Martin Charteris, G.C.V.O., K.C.B., O.B.E.

Thursday, 10 June 1976

Flying glass cuts Sir John's aide

By MALCOLM FARR

DEMONSTRATORS threw a brick through the window of a Rolls-Royce carrying the Governor-General and his wife to a Commonwealth Week dinner in Melbourne last night and splattered the vehicle with yellow paint.

A crowd of more than 400 — mostly students and unionists — forced the car to turn away from the front door of the Royal Commonwealth Society headquarters where Sir John and Lady Kerr were guests.

The brick smashed a front passenger window as the car headed for the rear of the building where a smaller crowd was waiting.

Sir John and Lady Kerr were unhurt but Mr David Smith, Sir John's secretary was cut and the vehicle sustained expensive damage including a door panel which was kicked by the demonstrators. There were two arrests.

At one stage during the scuffles a police horse fell in front of the car.

Senior army officers, who walked through the demonstrators, had braid ripped from their uniforms and many of the women among the 300 guests were distressed by their treatment.

There were wild scuffles before Sir John's car and more than 20 police running with it turned away from the building.

Packets of dye, which turned into a thick yellow paint when moistened by the drizzling rain, were thrown over the car, which was pounded by demonstrators.

Guests ran a gauntlet of demonstrators, with some of the men scuffling with protesters.

They were hit with eggs and paint bombs.

A returned army nurse, Mrs Barbara Williams, of East St Kilda, stopped in the middle of the mob, took off her shawl and displayed service medals on her chest.

"I had to do it. I had to show them I was proud," she said.

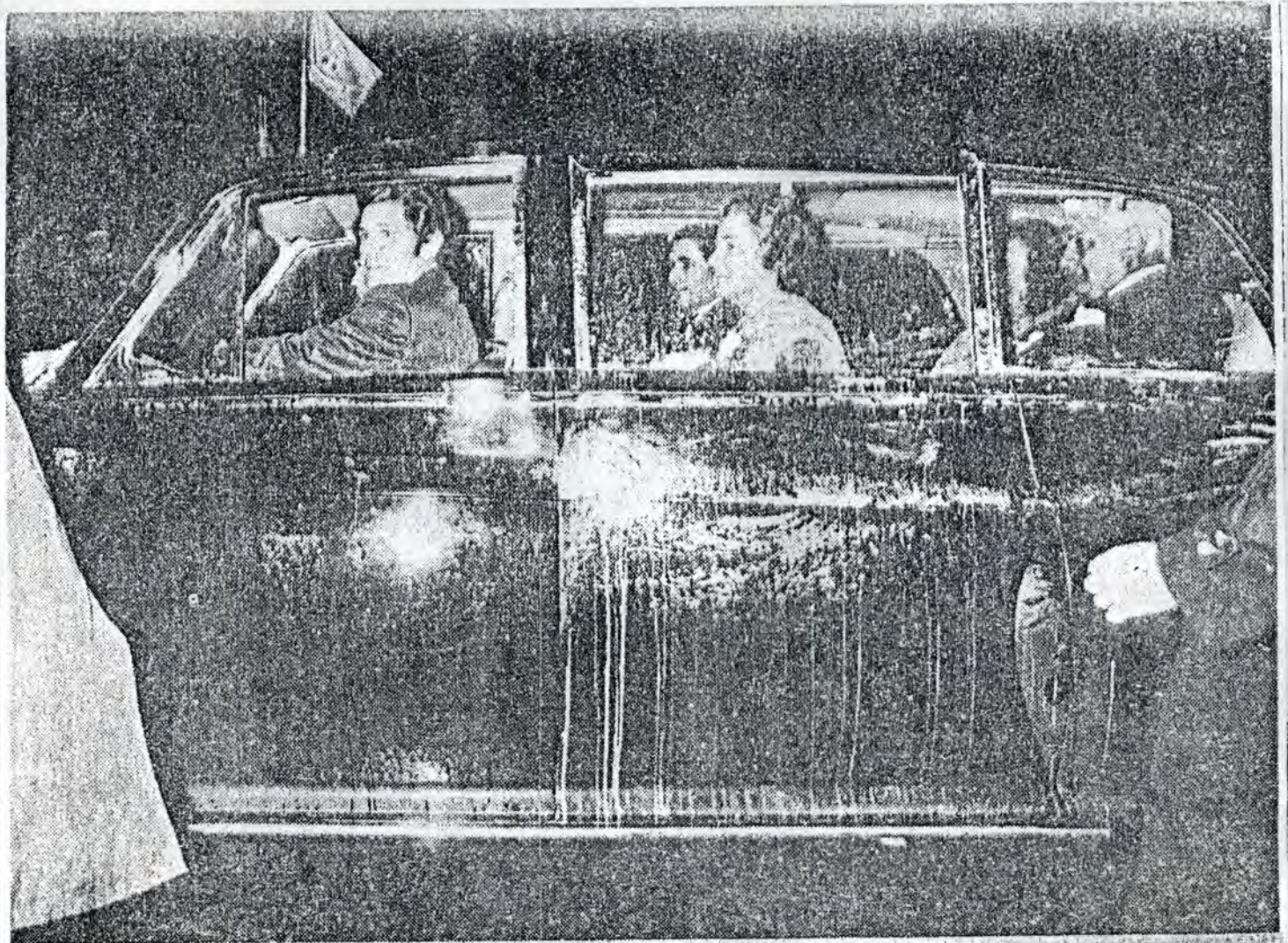
When Sir John left the dinner at about 10 pm — an hour before it was due to finish — he was heckled by 40 demonstrators who remained in the rain.

at Kerr's Rolls



Sir John and Lady Kerr leave after the dinner — an hour early

Brick, paint hit Kerr's Rolls



SIR JOHN and Lady Kerr leave after the dinner — an hour early

PROTESTERS PELT KERR

Limousine window smashed

By ROSS WARNEKE

More than 400 demonstrators pelted rocks, eggs, and ink bombs at the Roll-Royce carrying the Governor-General, Sir John Kerr, to a dinner in Melbourne last night.

Several police suffered minor injuries and one of Sir John's aides was cut on the face when the front passenger window of the limousine was smashed.

The demonstration — outside the Royal Commonwealth Society building in Queens Road — was the most hostile against Sir John since he sacked the Whitlam Government last November.

Sir John, who arrived in Melbourne late yesterday afternoon from Canberra, was escorted to the venue by police on motor cycles and in cars.

More than 100 policemen and women, and four mounted policemen, tried to hold back the crowd as Sir John's car approached at 8 p.m.

But about 50 metres from the driveway to the building the car was stopped when protesters swarmed on to the road.

'Sack Kerr'

Police had closed Queens Road to traffic at 7.30 p.m.

Several people threw themselves on to the bonnet of the limousine while others threw sulphur bombs and egg.

As the car was driven slowly through the mob, protesters abused Sir John and chanted "sack Kerr".

Police said two people were arrested in the brawl which continued for about six minutes.

Mounted police tried to force an opening for the motorcade, but demonstrators stood in front of the horses.

Several people fell into the horses' paths.

After several minutes police told the driver of the limousine to drive out of the crowd and around the block to a heavily guarded rear entrance to the building.

Demonstrators cheered as Sir John's car drove away. They claimed it was a victory for them.

They chanted: "That's right Kerr, you always use the back door".

Police said later Sir John appeared nervous and shaken as he stepped from the car to attend the dinner.

Several policemen said they were hit in the face by rocks and banners during the brawl at the front of the building.

About 40 demonstrators were waiting outside the building when Sir John left at 10 p.m.

They shouted and jeered as the car, spattered with yellow dye, ink and eggshells, drove out the front gate into Queens Road.

Before he left, aides spent about 30 minutes weeping broken glass from the floor of the car.

A spokesman for the organisers of last night's demonstration, the Victorian ALP Students' Association, said later: "Kerr has already discovered that he is no longer welcome in Adelaide, Perth or Canberra."

"Sir John Kerr has not been in Melbourne since November 11."

"We have shown him tonight that the people have not forgotten the constitutional outrage of Remembrance Day 1975."

The demonstrators were supplied by protest organisers with black cardboard top hats shortly before Sir John's arrival.

The spokesman said: "In essence we are protesting against the revival of the 'bunyip aristocracy' and the syndrome of 'black hattery' associated with the dismissal of the Labor Government."

Before Sir John's arrival last night, other guests were jostled and abused by the protesters.

They included the State Minister for Labor and Industry, Mr. Maclellan.

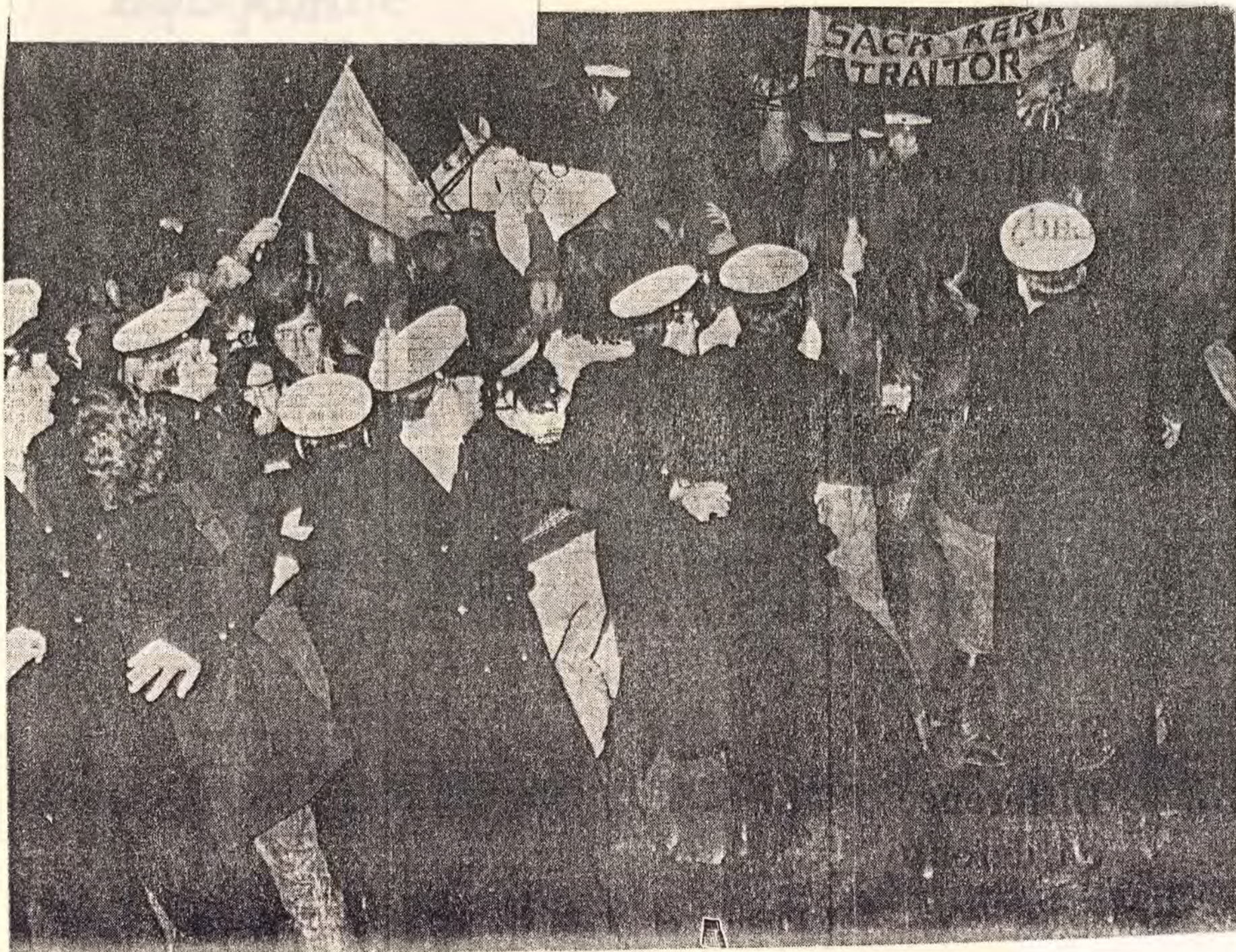
One woman, a returned army nurse, stood in front of the protesters and displayed her second world war medals.

A military limousine which arrived 15 minutes before Sir John's car drove straight through the protesters, but was hit by more than a dozen ink bombs and eggs.

After Sir John entered the dinner, demonstrators milled around in Queens Road. They chanted "Kerr out" for more than 30 minutes after he entered the building and organisers claimed the protesters were shouting to disrupt the function.



AGE
sday, 10 June 1976



VICE-REGAL CAR MOBBED



The bespattered vice-regal limousine at the height of last night's demonstration in Melbourne. — Picturegram.

Aide injured in wild demonstration

MELBOURNE, Wednesday. — Mr David Smith, official secretary to the Governor-General, Sir John Kerr, was injured during a wild demonstration against the Governor-General tonight.

Mr Smith received lacerations when demonstrators smashed a window of Sir John's Rolls-Royce as he arrived at a Royal Commonwealth Society function in South Melbourne.

He was sitting in the front passenger seat when the window shattered over him. Sir John and Lady Kerr were in the back seat.

More than 400 demonstrators blocked Sir John's car from entering the building in Queens Road. Dye bombs, ink bombs and smoke bombs exploded across and around the car and police motor-cycle escort.

Demonstrators fought wildly with policemen and Sir John's car was diverted to a back entrance.

There, 100 demonstrators shouted "Sieg heil" and booed.

Police arrested several of the demonstrators.



Mr Smith

It was Sir John's first visit to Melbourne since he dismissed the Labor Prime Minister, Mr Whitlam, last November.

Labor supporters and students began gathering outside the society's headquarters about 6pm. They were carrying banners and wore top hats.

Early guests to the private function at which Sir John was to be guest speaker were met with good natured boos, hisses and chanting.

By the time police closed Queens Road to traffic at

7.30pm the mood was tense and guests were getting a more hostile reception.

An Army staff car, with an officer and woman inside, was splattered with eggs, yellow dye and had its sides pummelled as police cleared a way through demonstrators.

Sir John's arrival with outrider policemen was greeted by a rising tide of sound. Smoke bombs sent acrid fumes billowing around the Rolls-Royce as the Governor-General's cavalcade was slowed nearly to a halt.

Television lights and flashlights lit the scene up in a smokey blue haze as police and demonstrators fought to get to the car.

The broken passenger-side window of the Vice-Regal car was removed while Sir John and Lady Kerr were inside the building.

The Governor-General's departure about 10pm was an anti-climax. The crowd was down to about 50 and about the same number of policemen held them back from the car.

Neither Sir John or Lady Kerr took any notice of the crowd and looked straight ahead as the car sped off along Queens Road.

DAILY TELEGRAPH,
Thursday June 10, 1976

Paint, eggs flung at Sir John

A crowd of chanting students and unionists threw paint bombs, eggs and other missiles at the Governor-General, Sir John Kerr's car last night.

Demonstrators and police fought as Sir John drove up to the headquarters of the Royal Commonwealth Society in Melbourne for a dinner to mark Commonwealth Week.

Motorcycle policemen and 100 uniformed and plain clothes men on foot had to clear a path through 400 demonstrators in Queens Rd, which had been blocked by the protesters.

Some demonstrators threw packets

of dye which turned into a thick yellow paint in the rain.

Sir John's car was hit by the "bombs" and pounded by demonstrators several times.

Police were forced to take his Rolls-Royce to the building's rear entrance, where a smaller group of demonstrators continued the jostling.

They were also hit with eggs and paint bombs and senior army officers who walked through the protesters had their uniforms ripped.

Aide hurt as 400 block Sir John Kerr's car

Sydney Morning Herald

16 June 1976

MELBOURNE, Wednesday. — Mr David Smith, private secretary to the Governor-General, Sir John Kerr, was injured in a wild demonstration against Sir John tonight.

Mr Smith received cuts when demonstrators smashed a window of Sir John's Rolls-Royce on arrival at a Royal Commonwealth Society function in South Melbourne.

Mr Smith was sitting in the front passenger seat when the window shattered over him. Sir John and Lady Kerr were in the back.

More than 400 demonstrators blocked Sir John's

car from entering the grounds of the building in Queen's Road.

Dye bombs, ink bombs and smoke bombs exploded across and around Sir John's car and police motorcycle escort.

Police make arrests

Police made several arrests at the demonstration which occurred during Sir John's first visit to Melbourne since he dismissed the Whitlam Labor Government last November.

Demonstrators, fighting wildly with police on foot and with four mounted policemen, stopped the car entering the front gateway of the building and it was forced past.

Cheering demonstrators continued to grapple with police as the car went around to a back entrance.

There, another 100 demonstrators shouted "Sieg heil" and booed as the official party went past.

The mounted police left the front to rush to the back gate to meet Sir John as gates leading to a back lane were opened for him.

The front passenger's side window was smashed in the melee.

Labor supporters and students began gathering outside the society's Queen's Road headquarters about 6 pm, carrying banners and wearing top hats.

The banners read "Toss Toff Kerr" and "Deflowerer of Democracy."

gowned women guests who arrived early for the private function at which Sir John was to be guest speaker were met with good-natured boos, hisses and the chanting of "If you hate the Governor-General, clap your hands."

However, by the time police closed Queen's Road to traffic at 7.30 pm the mood was tense and guests were getting a more hostile reception.

The white-cross and starred flag on a blue background used at Eureka stockade by miners was waved in their faces.

An Army staff car, with a red-coated officer and a woman inside was splattered with eggs and yellow dye. Its sides were pummelled as police cleared a way through demonstrators.

Sir John's arrival with outrider policemen on motor cycles was greeted by shouts.

Smoke bombs sent acid fumes billowing around the Rolls-Royce as it was slowed almost to a halt.

Television lights and flash-lights lit the scene up in a smokey blue haze as police and demonstrators fought.

Sir John entered the building through a side door.

IN DEFENCE OF SIR JOHN KERR

It is now clear that a cold-blooded, organised campaign is under way to hound His Excellency Sir John Kerr, and the office of Governor-General in Australia, into oblivion.

Behind the ill-mannered and mindless jeers and hisses; behind the denigration and intimidation of a man whose office prevents him defending himself; behind the far-fetched and groundless allegations of political collusion is a quite deliberate attempt to destroy the place of the Crown in Australia's parliamentary system.

In other words, a malicious campaign to pervert the Australian Constitution, under the provisions of which the events of the recent Federal election took place—without asking the people, who are the authors and arbiters of the Constitution—is now in progress.

Australians should be told what is behind this campaign, and its ultimate purpose.

It is—and will be shown to be—part of a long-term objective of the Fabian Society, to **which every member of the Whitlam Cabinet belonged**. The unsuccessful attempt to change Australia's flag was a pursuit of the same objective, as was the partially successful attempt to abolish "God Save The Queen" as Australia's National Anthem.



*His Excellency,
the Honourable Sir John Kerr,
A.C., K.C.M.G., K.St.J., Q.C.*

1. The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives. . . .

2. A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him.

CHAPTER 1. SECTIONS 1 & 2, Australian Constitution.

The Fabian Society—an elite international socialist movement—has never hidden its antipathy to the Crown and the Westminster system of Government. Both in England and Australia, the abolition of the “second chamber” or Upper House, has been a basic objective.

Eirene White, a chairman of the Fabian Society, ridiculed the Monarchy and the House of Lords in the *Fabian News* (May 1958). Harold Wilson and Professor G. D. H. Cole—both prominent Fabians—advocated the complete abolition of the Monarchy. Similarly, Australia’s Fabians—in a dominant position in the A.L.P.—have opposed the Senate and the Governor-General.

The Fabian Society aims for a centralised Government with no limitations, either from Senate or from Crown upon those in power.

Sir John Kerr’s letter dismissing Mr. Whitlam on November 11, 1975, gave the Constitutional provision for this action, and outlined the lack of any alternative which Mr. Whitlam had allowed the Governor-General. It read:

“In accordance with section 64 of the Constitution I hereby determine your appointment as my Chief Adviser and Head of the Government. It follows that I also hereby determine the appointments of all the Ministers in your Government.

You have previously told me that you would never resign or advise an election of the House of Representatives or a double dissolution and that the only way in which such an election could be obtained would be by my dismissal of you and your ministerial colleagues. (Emphasis added) As it appeared likely that you would today persist in this attitude I decided that, if you did, I would determine your commission and state my reasons for doing so . . .”

Mr. Whitlam knew, and had previously acknowledged this legitimate power of the Governor-General when, threatened by an earlier refusal of Supply, he stated in April 1974: “Such a refusal to supply the Government with the money it needed to carry on its normal services would have made Parliament unworkable. Accordingly I informed the House that if the Senate rejected any money bill I would tender the advice to the Governor-General to dissolve both Houses of Parliament.”

SECTION 57, Australian Constitution: “If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it . . . the Governor-General may dissolve the Senate and the House of Representatives simultaneously . . .”

SECTION 64: “The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish. Such officers shall hold office during the pleasure of the Governor-General . . .”

While Mr. Whitlam stated, prior to his dismissal, that the Governor-General could not act independently of the Prime Minister's advice, he must have known that this was not true. An earlier A.L.P. leader and constitutionalist—and a Fabian—Dr. H. V. Evatt, dealt with this question in his book "The King and His Dominion Governors" in these words:

"Is it permissible to agree that the occasion will never arise when, in the crisis of a political controversy, a Governor-General may think it proper to exercise his ultimate authority and even dismiss a Ministry which has the support of a majority of the Assembly, appoint the Opposition Leader as Prime Minister, and grant a dissolution of Parliament to the new Prime Minister? Surely it is wrong to assume that the Governor-General for the time being will always be a mere tool in the hands of the dominant party. (Emphasis added) It is true that a Governor-General could not safely exercise his reserve powers unless he had good reason to suppose that the electorate would vindicate his action."

WHICH IS EXACTLY WHAT THE ELECTORATE DID ON DECEMBER 13, 1975.

It is NOT necessary to support the Fraser Government—and the Heritage Society, with its parent body the Australian League of Rights, which has been highly critical of the Fraser Government, both before and after the election—to acknowledge that:

★ The Governor-General, Sir John Kerr, is being treated in the most scandalous manner for carrying out his duty without fear or favour, in accordance with the provisions of the Constitution.

★ The completely cynical attempt to paint Sir John as an accomplice of the Liberal-National Party coalition is only sustained by the most venomous allegations, unsupported by any dispassionate evidence.

★ Following this, the campaign aims to ensure that the Governor-General is blamed for any failings of the current Federal Government, to the detriment of the Crown's place in Australia's parliamentary system.

★ Ultimately, it is hoped that, through specious argument, the exploitation of hysteria and manipulation, all restraints from Crown, Constitution or Senate, to which all politicians are subject, can be destroyed. Sir John Kerr happens to be the unfortunate tool to be used in this stage of the campaign. His own actions—proper and courageous though they have been—have made him particularly vulnerable. None of the traditional Australian virtues—loyalty, fair-mindedness, or even a reasonable go for the underdog—will be extended to Sir John by those behind this campaign.

AND THIS CAMPAIGN WILL SUCCEED IF THE SILENT MAJORITY REMAINS SILENT!

The latest Morgan Gallop Poll (April 1976) confirms that Australians are more than two-to-one for remaining a Monarchy, rather than becoming a republic with an elected President.

Thousands of Australians would speak out for Sir John Kerr, given an opportunity to do so.

The Australian Heritage Society proposes the following steps:

- (1) Write to: His Excellency the Hon. Sir John Kerr, A.C., K.C.M.G., K.St.J., Q.C., Government House, Canberra, supporting and encouraging him. Send a copy of your letter to your Federal Member, Parliament House, Canberra, seeking his action to back up the Governor-General and the Crown, and to re-introduce **God Save the Queen** as Australia's official National Anthem. ☐
- (2) Send a copy of this brochure to the Editor of your local paper, and your representatives in State and Local Government, seeking their active support for the Governor-General and the Crown. ☐
- (3) Write to your Church leader, suggesting that prayers for the Crown and "those in authority" should be accompanied by active support. ☐
- (4) Circulate extra copies of this brochure—obtainable from the Heritage Society in your State—to as many as possible in your community. ☐
- (5) The Australian Heritage Society is considering the insertion of advertisements in the national press, containing the material in this brochure. This costly step will depend totally on the financial support gained from people who agree with such action. Will you donate what you can?

FILL IN, AND POST THIS BROCHURE TO THE AUSTRALIAN HERITAGE SOCIETY IN YOUR STATE. (Box 1052J, G.P.O. Melbourne, Vic. 3001; Box 16, Inglewood, W.A. 6052; P.O. Box 179, Plympton, S.A. 5038; G.P.O. Box 2957, Sydney, N.S.W. 2001; P.O. Box 552, South Brisbane, Qld. 4101).

Dear Sir,

I have ticked in the appropriate squares above the steps which I have personally taken so far. Please send me.....Sir John Kerr brochures.

I am enclosing S.....to help defray cost of brochures and for the Heritage Advertising Campaign.

NAME.....

ADDRESS.....

*O Lord our God, arise; Scatter her enemies
And make them fall!*

*Confound their politics, frustrate their knavish tricks!
On Thee our hopes we fix. God save us all!*

Verse 2, God Save the Queen.

W. & J. Barr (Printers) Pty. Ltd.

CONFIDENTIAL

THE AUSTRALIAN LEAGUE OF RIGHTS

8 June 1976

CONFIDENTIAL

CONFIDENTIAL

1. INTRODUCTION

The first League of Rights in Australia was formed in South Australia in 1946, where it developed from a "Vote NO" campaign conducted in that State against the Federal Labor Government's proposals for constitutional change. The Victorian League of Rights was brought into existence shortly afterwards and in 1951 a League was established in Western Australia. A League of Rights also operated in Brisbane for a period prior to the 1949 Federal elections.

On 5 May 1960, as the result of efforts by Eric Dudley BUTLER, the State Leagues of Rights joined to form the Australian League of Rights (ALR), with branches in all mainland States. The ALR is currently active in all these States.

CONFIDENTIAL

2. OBJECTIVES

The ALR claims to be a non-party pressure group whose aim is to achieve changes in political policy and not to achieve power.

The stated objectives of the ALR are as follow:

- (a) To promote loyalty to the Christian concept of God, to the Crown, and to the country as a member of the British Commonwealth of Nations.
- (b) To advocate genuine competitive individual enterprise and to uphold and foster individual initiative and responsibility.
- (c) To defend private ownership and advocate its extension in order that individual freedom with security shall be available to all.
- (d) To attack and oppose all forms of totalitarianism, especially those which are a threat to Australia.
- (e) To attack and oppose government-by-regulation and bureaucratic interference with economic and social activities.
- (f) To take steps designed to secure to the individual very definite rights which no government can take away, and especially by defence of the written constitution.
- (g) To defend the rule of law which makes all equal before the law, and ensure that the individual is at all times allowed due access to the process of law.
- (h) To stress the value of our system of common law, built up in Great Britain, to protect the rights of the individual; and to that end to expose corruption and partiality in all their forms.

- (i) To emphasize the value of Legislative Councils and the Senate and take such action as to ensure that they fulfil their true function.
- (j) To expose the manner in which safeguards of individual rights and liberties are being destroyed.
- (k) To expose and oppose all propaganda, and actions, irrespective of their origin which seek to destroy the British tradition and heritage.
- (l) To take such other actions based on Christian principles as may be deemed desirable to promote the policy of The League, and at all times to humbly rely on the blessing of Almighty God.

These aims form only part of the ALR's fundamental philosophy. From its publications and activities the ALR displays other characteristics which are fundamental to its policy objectives. These characteristics include the following:

- anti-semitism;
- racialism;
- social credit financial policies;
- anti-communism;
- anti-socialism;
- royalism;
- pro-British Empire;
- anti-centralism in government;
- anti-political parties; and
- anti-representative government.

In other words the ALR is not merely a conservative body, as its published aims suggest, but it is a body radically opposed to fundamental aspects of the Australian political, economic and social systems.

3. CAPACITY

(a) Organisation

The organisational structure of the ALR is complicated and extensive. It comprises a hierarchy of full-time federal and state functionaries headed by the National Director, Eric BUTLER; a large number of action groups organised to coincide with Federal electorates (Voters' Policy Associations and Lilac Groups); specialised divisions; "front" organisations and a number of organisations which are under varying degrees of influence by the ALR. (See Appendix 'A').

This structure allows for strong central leadership and control and provides considerable capacity for carrying the League's policies to the electors and their elected representatives in the Australian Parliament and to political parties.

(b) Membership

Membership figures of the ALR are a closely kept secret. It is believed that there are at least 1,000 full members, a "hard core" of about 5,000 active supporters, and as many as 20,000 other supporters.

Members tend to be concentrated in Victoria and Queensland but recent activity has produced an expansion of membership in Western Australia.

(c) Leadership

At the national level, and in Victoria and Queensland in particular, leadership of the ALR is strong and skilful. The more notable leaders are Eric BUTLER and Jeremy LEE. Until the mid-1960's the ALR was under the strong personal control of Eric BUTLER and thus many of his personal views, particularly those on racialism, social credit and Jews, permeated ALR policies and publications, probably to an exaggerated degree.

BUTLER has stated publicly that his anti-semitic views are his own and are not those of the ALR. However, BUTLER's anti-semitic writings can still be purchased at the ALR's bookshop in Melbourne from time to time.

(d) Publicity

The ALR places particular emphasis on the distribution of literature as a means of publicising its policies and for keeping ALR members and organisations aware of each other and of trends and developments affecting the League.

The ALR has its own publishing company, "New Times Limited", and its own bookshop, the Heritage Bookshop, both of which operate from the League's National Headquarters at 273 Little Collins Street, Melbourne.

As well as producing pamphlets, leaflets and booklets, each division of the ALR's structure has publicity access to regular publications.

Distribution of literature takes several forms, including sales at the Heritage Bookshop, sales at meetings attended by ALR members and distribution by both mail and hand delivery.

(e) Training

The ALR operates correspondence courses, schools and seminars as means of recruiting potential activists and training members in operational methods of the League. The courses and schools tend to concentrate on themes such as anti-communism, social credit, social dynamics and the effective operation of Voters' Policy Associations.

In October 1972 Eric BUTLER claimed that over 5,000 persons had been through the League's basic Social Dynamics School.

(f) Finance

The ALR sets itself, and usually achieves, an annual goal of \$40,000 from subscriptions and donations. This figure is multiplied by using the capital to finance other fund raising activities. Funds are also supplemented through collections at meetings and the sale of publications.

The ALR also admits that at least some of BUTLER's many and regular international trips are financed by overseas sources. No intelligence is available to substantiate what these sources are.

4. ACTIVITIES

The main strategy of the ALR is to try to achieve acceptance of its policies through activities at the grass roots level of Australian politics. Its prime organs for conducting such activities are the Voters' Policy Associations in Federal electorates and Lilac League groups.

In recent times the activities of the ALR have included the following:

- (a) the publication and distribution of material on a multitude of issues;
- (b) public speaking;
- (c) involvement in campaigns such as the "Save Our State Movement" in Queensland;
- (d) personal contact with voters, candidates, politicians and political parties;
- (e) training courses;
- (f) money raising;

- (g) playing "God Save the Queen" at rallies;
- (h) international lecture tours by BUTLER; and
- (i) involvement of outsiders through "front" organisations such as the Conservative Speakers' Clubs.

5. ASSESSMENT

The ALR adopts two significant attitudes on political matters which affect an assessment of its activities:

- (a) it claims to be concerned with policy and not with power and for this reason chooses to operate as a highly organised pressure group rather than as a political party; and
- (b) it adopts the populist view that elected Members of Parliament should act as "delegates", i.e. they are elected to do the things the electors tell them to do, rather than as "representatives", which is more widely accepted, i.e. they are elected to represent the electorate as they, or the Party to which they belong, see fit.

Given these fundamental views, the ALR seems justified in claiming that it does not "infiltrate" political parties, and to state freely that there is no contradiction in members of the ALR also belonging to different political parties. Indeed, the ALR's activities tend to support the view that it is no more than a highly organised pressure group. Its apparent, but unassessable, success can be attributed to at least the following factors:

- (a) it is well organised and led;
- (b) its published objectives are mainly respectable, plausible and appear conservative rather than radical;

CONFIDENTIAL

- 8 -

- (c) its financial and logistic resources are large;
- (d) its membership and support are considerable; and
- (e) its strategy and tactics are sound.

Where the danger lies in the ALR is that its more important policies are not adequately reflected in its stated objectives. These policies are extreme and the aims of the League are radical in that they are directed towards achieving fundamental changes in government policy and the established economic and political systems. Coupled with these objectives the ALR has demonstrated a considerable capacity to carry out its intentions.

CONFIDENTIAL

ORGANISATION AND STRUCTURE1. Functionaries and CouncilsNational Director (Eric BUTLER)

The National Director is the chief executive officer of the ALR and is responsible for the conduct of the League's affairs both nationally and internationally. He is elected annually and may appoint paid officers, lecturers, clerks, collectors and other persons who may be required for the conduct of the business and management of the League. Salaries, wages and fees are decided upon by agreement between the National Director and the employee.

State Director

State Directors are appointed by the National Director and may be a paid officer. They are responsible for the League's affairs in the respective States and may, subject to the National Director's agreement, employ staff under the same terms as the National Director.

Regional Councillor

Regional Councillors may be paid officers and are appointed by State Directors. These appointments are subject to ratification by State Councils. Regional Councillors are responsible for the conduct of the League's affairs in areas designated by State Directors but, where possible, they are usually based upon Federal electoral divisions.

National Secretariat

The National Secretariat comprises all State Directors and two other members from each State who are elected at the State annual general meetings. It is a consultative body which is obliged to meet at least once each year. The National Director

is obliged to report either in writing or orally to members of the National Secretariat at least once every three months.

State Councils

State Councils comprise executive and co-opted members of the ALR and should include all Regional Councillors together with any other members who may be appointed by the State or National Director.

The State Director is obliged to report either in writing or orally to the members of the State Council, the National Director and all other State Directors, at least once every three months.

The functions of the State Councils are mainly to act as advisory bodies for the State Directors and to consider aspects of membership and loyalty.

Regional Councils

Where practicable State Directors may ask Regional Councillors to form Regional Councils which act in an advisory capacity to the Regional Councillor and may make recommendations to State Councils.

Regional Councils are formed by the State Directors and Regional Councillors in conjunction with one another and may comprise any person they might appoint including persons who are not members of the ALR.

2. Action Groups

Voters' Policy Associations (V.P.A.s)

V.P.A.s are vital groups for the implementation of ALR policies at Federal electorate (i.e. regional) level and may be regarded as the ALR's "branches" even though formal membership of the ALR is not a pre-requisite for membership of a V.P.A.

A published count by the ALR of the number of V.P.A.s was 350 in October 1972, but at that time Mr. BUTLER made the complaint that for a variety of reasons the wastage rate of V.P.A.s was about 50%. ("On Target", 20 October 1972).

Lilac League Groups

These groups are essentially anti-communist women's groups centred largely in Queensland and Northern New South Wales. They are designed to involve women in current political issues.

3. Specialist Divisions

The Institute of Economic Democracy
The Christian Institute for Individual Freedom
The Australian Heritage Society
Young Australians for Freedom (probably defunct).

4. Front Organisations

Electors' Associations
Conservative Speakers' Clubs (Sydney, Melbourne,
Brisbane, Adelaide
and Perth)

5. Organisations Influenced by the ALR

Political Party Branches
The Rural Women's Action Committee
The "Australia for Our Children" Committee
The "Save our State" Campaign
The Preservation of Local Government Association
The Western Action Campaign
The "Save the Family Farms" Association

6. Alleged Links

The Social Credit Secretariat

The John Birch Society (U.S.A.)

Tidal Publications, Sydney

The Christian Anti-Communist Crusade (Australia
and U.S.A.)

Australian Citizens for Freedom (Sydney, Melbourne
Brisbane, Adelaide.
Canberra)

The British League of Rights (off-shoot of ALR)

Independent Democratic Movement (U.K.)

Australia-Rhodesia Association

Immigration Control Association

DAILY MIRROR

Sydney, Thursday, 10 June 1976

GUARD ON KERR DOUBLED

MIRRORVIEW

Hate causes more trouble

The violent mob involved in last night's ugly demonstration against Sir John Kerr did democracy a great disservice.

No one would deny any person the right to peacefully demonstrate against actions that person believes to be wrong.

Throwing insults and abuse is one thing — but hurling missiles is a different matter.

When demonstrators resort to these frightening tactics they deny themselves the right to protest.

The continuing disturbances around the Governor-General's public appearances represent an alarming and unwelcome development in the political life of this country.

Democratic freedom depends on the right of ALL people — diplomats, politicians and citizens — to move and speak freely in the community.

When a group jeopardises this freedom with mob violence it threatens its right to be heard.

There will be a limit to the tolerance of those who safeguard the lives of people in the public eye.

The cause of the many people who disagree with Sir John Kerr's actions last November will not be served by this display of hatred.

The right of free speech, missing in so many countries, is threatened here by the very people who claim to defend it but in fact abuse it.

From TREVOR KAVANAGH in Canberra

Police protection for the Governor-General, Sir John Kerr, is to be doubled at all future public appearances.

This follows the wild demonstration in Melbourne last night by 400 people armed with rocks, eggs and ink bombs.

Several policemen and one of Sir John's aides were injured in the melee as Sir John arrived in his official Rolls-Royce at the Royal Commonwealth Society.

But despite the rock-throwing, Sir John is determined he will not quit his job as Governor-General.

His and Lady Kerr's personal body guard will be strengthened to cope with the sudden escalation of violence in the campaign of intimidation against him.

The use of sticks and rocks in last night's demonstration marks a new level of violence which has surprised even Sir John's critics in the Labor Party.

Backing

Police fear the violence may snowball, with Sir John as a target of deliberate physical assault.

Some Labor supporters believe the attacks will rebound against the Labor Party in the form of a public opinion backlash.

Police and security officials are today having to rethink their approach to the protection of Sir John at all public func-

tions where his safety is at risk.

Sir John has said he will not allow a noisy minority to prevent him carrying out his official duties as Governor-General.

Police hurt in violent clash



Police clash with demonstrators as Sir John Kerr's car arrives last night.

He has the strong backing of Lady Kerr.

Some observers have suggested the Queen will be embarrassed if there are similar demonstrations during her official visit to Australia next year.

But the Prime Minister, Mr Fraser, has already stated that apart from the Queen's arrival and departure, she will not be seen in public at the same time as Sir John.

THE Sun says

THE RAGE RUNS RIOT

NO doubt the Governor-General has thought, if only in passing, of the peace which would follow his resignation.

Sir John Kerr's life would be quieter. A deep-felt grievance in some sections of the community would be soothed.

But to quit in the face of mob violence is no solution.

Last night's attack on him in Melbourne was not just Whitlam's rage maintained. It was not honest anger.

It was crude and brutal intimidation to break a man.

If successful, it would be an aberration of our political processes surely as great as that charged against Sir John himself.

If Sir John goes, what then? The office remains, to be filled by a Liberal appointee.

Is the next Governor-General to be the prisoner of street mobs?

Must he bow to the whim of every street rabble in steel-tipped thongs?

The solution is not to hound a man who exercised debatable powers. It is to clarify and put those powers beyond debate — one way or the other.

That is Parliament's job, and perhaps the nation's, by referendum.

It is no job for street thugs.

e in.

continue doing today. the continued

SIR JOHN STANDS FIRM

STAND FIRM

rators clashed
id Smith said
e the demon-
Sir John's
ould continue

th was speak-
the Melbourne
e Sir John and
stayed over-
er strict secur-

it was not true
dation had been
because of the
out he did not
etails of the
provided for the

Smith said Sir John's party was return-
ing to Canberra as

were "quite concerned" when Lieutenant Fox was cut in the face.

"Ross looked bad, with several cuts," said Mr Smith, who was with the party at the time.

"It looked a little close to the eyes and could have been worse than it turned out.

"The Governor-General was quite concerned about the lad.

"But, he went off and, after some treatment, returned to the function for the rest of the night and is now all right."

Mr Smith said Sir John's party was return-
ing to Canberra as

planned.

The demonstration was the most hostile against Sir John since he sacked the Whitlam Government last November.

Police said later Sir John appeared nervous and shaken as he stepped from the car to attend the dinner.

A police spokesman said today two men had been arrested during the demonstration.

They would appear at South Melbourne Court today charged with assault and other offences.

Sydney, Thursday, 10 June 1976

SIR JOHN Kerr will not give in.

"He has a job to do and he's going to continue doing it," his private secretary, David Smith, said today.

But security men are concerned about the continued hostility to the Governor-General.

After last night's ugly demonstration, they are reviewing security.

They are worried about some extreme groups on opposite sides of the political spectrum becoming involved in the Kerr controversy.

In last night's incident, 400 demonstrators

• CONTINUED PAGE 3

SIR JOHN STANDS FIRM

KERR TO STAND FIRM

• FROM PAGE 1

attacked the Rolls-Royce carrying Sir John and Lady Kerr to a Commonwealth Week dinner in South Melbourne.

A brick was thrown through the car window, and the vehicle splashed with yellow paint.

One of Sir John's aides, Flight-Lieutenant R. Fox was slightly injured by flying glass from the broken window.

Demonstrators chanted "Sieg Heil" as dye, ink and smoke bombs exploded round the car.

There were wild scenes

as demonstrators clashed with police.

Mr David Smith said that despite the demonstration Sir John's schedule would continue as planned.

Mr Smith was speaking from the Melbourne hotel where Sir John and his party stayed overnight under strict security.

He said it was not true accommodation had been changed because of the incident but he did not know details of the security provided for the party.

Mr Smith said Sir John and Lady Kerr

were "quite concerned" when Lieutenant Fox was cut in the face.

"Ross looked bad, with several cuts," said Mr Smith, who was with the party at the time.

"It looked a little close to the eyes and could have been worse than it turned out.

"The Governor-General was quite concerned about the lad.

"But, he went off and, after some treatment, returned to the function for the rest of the night and is now all right."

Mr Smith said Sir John's party was returning to Canberra as

planned.

The demonstration was the most hostile against Sir John since he sacked the Whitlam Government last November.

Police said later Sir John appeared nervous and shaken as he stepped from the car to attend the dinner.

A police spokesman said today two men had been arrested during the demonstration.

They would appear at South Melbourne Court today charged with assault and other offences.

Melbourne, Thursday, 10 June 1976

Violence strains our politics

UGLY physical results mount from organised, violent demonstrations against Sir John Kerr. Last night's protest here by more than 400 activists brought a crop of minor injuries.

More serious harm is to be feared if the pattern escalates through anti-Kerr confrontations in Adelaide, Perth, Canberra and Melbourne. And all this in the name of democracy.

The overall aim is plainly to force resignation before the Queen and Prince Philip arrive in March next year. Tour organisers will be more concerned than ever after last night that any public appearance by Her Majesty in Sir John Kerr's company will raise extraordinary security and diplomatic problems.

But the demonstrations, in addition to exceeding what the law and public opinion can tolerate, may actually be reinforcing Sir John Kerr's determination to stay in office. Many who oppose the unprecedentedly controversial decision that he took last November will see a more effective — if still negative — gesture of disapproval in "demonstrations" such as the boycott by Labor lawyers of the dinner which Sir John Kerr will address here.

Far better than this of course is continued constructive examination of the issues in last November's crisis, and determination that Australian national life must never again come to the point where it can be torn asunder in this manner. Sir John Kerr must eventually contribute to this by disclosure of his reasoning, intention, and actions at the time.

Meanwhile a poison of violence threatens our public life. It must not be allowed to spread.

Government House,
Canberra. 2600.

8 June 1976

Dear Martin,

The Governor-General is at present on an official visit to Norfolk Island. Before leaving he asked me to send the accompanying papers to you.

In some of his earlier correspondence to you His Excellency referred to scholarly papers which would eventually begin to appear and make their contribution to the debate on last year's event, once the first flood of paper-backs written by newspaper journalists and the like had subsided. The enclosed articles qualify for the description "scholarly contributions" and the Governor-General thought you might like to read them.

The type-written article is a photo-copy of a draft by Professor Francis West. West was formerly at the Australian National University and has just moved down to the new Deakin University being established in Geelong, Victoria, where he is to become the Dean of Social Sciences. Although he writes from the point of view of a constitutional historian, he does have an answer to the argument that a so-called convention can set aside expressed statutory provisions and he provides an interesting reply to some of the lawyers.

The larger document is an extract from the Australian Current Law Digest, and contains a number of interesting contributions by academic lawyers. The first two will be of particular interest.

Once again may I say that the Governor-General is mindful of the volume of paper he is contributing to your files but feels it important that you should have the opportunity to read these papers if you are so minded. As soon as West's article appears in published form I shall send you a clearer copy to replace the one which I am now sending.

With kind regards

Yours sincerely,

~~DAVID I. SMITH~~

Lieutenant Colonel the Right Honourable
Sir Martin Charteris, G.C.V.O., K.C.B., O.B.E.,
Private Secretary to Her Majesty The Queen,
Buckingham Palace,
LONDON ENGLAND.

Tons of thousands of words have now been written by lawyers about the events of October/November 1975: letters to the editor, paid advertisements, articles in newspapers and journals. One might be forgiven for thinking that the relevant sections of the Constitution and the commentaries upon them by such authorities as Quirk and Garrahan and Odgers had been so exhaustively examined that there is little more to say. Not, that is not so. The majority of the lawyers who have written about these events have taken the view that the Senate, in deferring Supply, and the Governor General, in revoking the Prime Minister's commission, acted in some way improperly or even unconstitutionally or illegally. They have provided, whether they intended it or not, an apparently authoritative backing for the cry which has echoed from Australian Labor Party politicians ever since their dismissal from office and subsequent electoral defeat: 'we was robbed'. More closely examined, the lawyers for Labor case is not really about constitutional law in a strict sense, but about politics and history. Before one accepts their view as authoritative, through the sheer weight of words, the nature of the legal argument is worth a much closer examination than supporting historians and political scientists have so far given it.

The Lawyers' Argument

The first shot in the lawyers' war of words was fired over the Senate's power to reject Supply even before that House had acted. On 11 October 1975 there was published in The Age and other major newspapers, a letter signed by four professors of law: Castles, Howard, Sawyer and Zines. The four had not as a group drafted the letter that bore their names; that was done in the office of the Labor Attorney-General, Mr Enderby. But when the text was brought round the universities for signature, these four lawyers signed when others did not. One who refused, Professor Lane, has told us why (The Age, 13 Oct. 1975): the letter misrepresented the view attributed to Sir Isaac Isaacs in condemning the rejection of Supply by the upper house in Victoria in 1947. That is not the only reason for a constitutional lawyer to have doubts about the argument set out in that original letter. Apart from the curious origins it had, the legal arguments used were even more questionable. Later expanded and elaborated, the lawyers' for Labor case was contained in embryo in that letter.

The gist of the academic lawyers' argument was this: although the Senate, under Section 53 of the Constitution, seemed on the plain words of the Section to have the power to reject Supply, nevertheless by convention it could not do so. To support their contention these lawyers adduced, not judicial interpretations of the Section nor even obiter dicta in the High Court nor federal precedents, but analogies from the powers of upper houses in 'the Westminster system', especially analogies with the British upper house, the House of Lords. This is still the analogy one of the signatories uses. Professor Howard, in the previous issue of the Australian Quarterly (March 1976, p. 3) still bases his case against the Senate on 'the theory and practice of parliamentary government .. in all countries which have followed the British.. model'. The case is further bolstered by prophecy: if such a convention about upper houses is not observed, then there will follow unstable government, civil disorder or worse. Democracy is in Danger. Sir Isaac Isaac made this kind of prophecy of Victorian government in 1947. Need one say that since that date Victorian State government has been noticeably stable?

Stripped of prophetic anger and the wrath-to-come, the lawyers' case, elaborated in that letter and later elaborated, comes down to the bare assertion that, whatever the Constitution seems quite plainly to say, there is a convention that the Senate cannot refuse Supply. What the Constitution says, in the Section 53 which has been ^{so} argued over, is worth repeating: the Senate shall not originate proposed laws 'appropriating revenue or moneys or imposing taxation'; it may not amend such laws; except for that 'the Senate shall have equal power with the House of Representatives in respect of all proposed laws'. Now, there are only two ways of arguing that the Constitution does not mean what it says. You can say, as the lawyers' for Labor do, that the power so explicitly given is negated by convention. Or you can say, as one non-academic lawyer has, that rejection is itself an amendment and therefore unconstitutional. This second argument, put by Sir Richard Eggleston in (The Age, 27 Oct. 1973) did not convince Professor Sever. Nor, as a matter of fact, has it ever convinced both Houses of the federal parliament which have never treated rejection of a bill in the other place as an amendment. One may guess that it would never convince the High Court because it is strained legal interpretation. And like the academic lawyers' for Labor argument, it is not at root a legal argument at all; it is, as Sir Richard later developed it (The Age 3 & 11 Nov. 1973), really based upon the belief that those who drafted the Federal Constitution did not intend that the Senate should reject Supply. With that, we come back to an historical question such as is involved in the

academic lawyers' argument from convention.

In their original letter and in their later elaborations of its points, the lawyers slipped from using the word 'convention' to using the word 'rule'. But conventions are not rules. They derive from British constitutional practice where, with no written constitution, they have guided political behaviour, not legal or judicial behaviour, where there is no precise statute definition. For example, in the 'Glorious Revolution' of 1688/89, the British parliament by statute declared that the royal power to suspend the law was illegal. Thereafter, there can be no convention about the royal suspending power. By statute, the royal power to dispense the law in individual cases was declared to be illegal 'as it hath been used of late'. In the absence of definition, you can very well have conventions about what the royal dispensing power is. The point is quite clear: conventions, in British parliamentary practice, exist where statute has not been precise; they do not exist where statute is quite clear, for that would be to defy the authority of parliament and the law it has passed.

The Australian Constitution is a statute. It defines, precisely, what the Senate's power is. You cannot have a convention which says that the statute means the reverse of what it says, for you cannot have, with a written Constitution, a convention which is itself unconstitutional. i.e. reverses the plain words of the statute, unless you can cite a series of judicial decisions which so interpret it. And this is signally what all of the lawyers have failed to produce in the whole of the discussion about what the Constitution means. In the absence of High Court decisions, the only argument left to the lawyers would be an historical demonstration that the Founding Fathers intended something other than what they actually said. Sir Richard Eggleston claimed that this was so. He believed that the omission from the final draft of the Constitution in 1998 of a precise spelling out of the Senate's powers even Supply shows the intention. This is news to add bad history to strained law. As Professor Saver could have told him, by far the greatest amount of the Founding Fathers' time was devoted to the Senate's powers. They indeed did not accept that the Senate should have completely co-ordinate powers with the House of Representatives, but equally they rejected the idea that the Senate should have a very restricted power of review. They actually said that with the sole exception of originating or amending money bills, the Senate should have equal powers with the House. In politics, as in law, men intend the consequences of their actions.

Moreover, the Founding Fathers made their intentions clear within the Constitution. If the lawyers for labor had not concentrated their attention on Section 53, they might have noticed Section 49. This says that the powers privileges and immunities of the Senate are those of the House of Commons; they are quite explicitly therefore not those of the House of Lords. Nevertheless the lawyers's case against the Senate's use of its powers rests in large part on the analogy with the British upper house which by convention at the time the Australian Constitution was drafted could not reject a money bill. A better legal argument from that fact is this. The Australian Constitution spells out, in so many words, certain British political customs and conventions which thereby become written rules. Particularly it spells out custom or convention where it is being changed from British practice. This was deliberately done in the case of the Senate's being different from the House of Lords. It should be unnecessary to labour the point because it is quite obvious that an hereditary upper house with no electoral mandate within British parliamentary practice is very different from the Senate which is directly elected by popular vote and which has defined powers within a written Constitution.

The bad analogy with the House of Lords has been a major part of the lawyers for labor case against the Senate's use of its constitutional powers. Less stressed has been the argument that, from 1901 to 1973, the Senate had never rejected nor failed to pass a money bill and this establishes a convention that it cannot do so. As a matter of logic, it is hard to see how you can establish a convention from something which has never happened; this amounts to saying that nothing should ever happen for the first time, a conservative argument that sounds oddly in radical mouths. The most you could make of this kind of argument is that in analogous circumstances - of economic crisis, of ministerial dismissals and resignations, of grave scandals - the Senate had not acted. The only such analogous circumstance in federal political history is the situation of the Scullin government between 1929 and 1931 where a non-labor Senate did not act. The circumstances are not precisely analogous with those of 1973, but even if they were, you cannot establish the growth of a convention from one example. Even the Senate's failure to pass the Supply Bill in 1973 does not establish a convention, although it makes nonsense of any argument that there has been a 'growth' or an 'evolution' of a convention that it cannot.

To use a proper British analogy to show the nature and growth of a convention: the appointment of a Prime Minister from the lower house. Until the mid-nineteenth century, the British Prime Minister was more often than not a peer, not a commoner. The appointments of Pitt, Perceval and Peel before the middle of the century established no convention that the Prime Minister should come from the Commons. Nor did the appointment of Gladstone and Disraeli ^{in succession} in the second half of the century. At its close the Prime Minister might still be a member of the House of Lords. Within the twentieth century, the British Prime Minister has been a member of the House of Commons, and in 1963, when Mr Macmillan retired while still in office and his successor as Leader of the majority party was a peer, the earl of Home renounced his peerage for his own lifetime and took a seat in the lower house. That recognized a convention; but in both 1922, when on Bismarck Law's resignation Lord Curzon might have become Conservative Party leader, and in 1940, when on Neville Chamberlain's resignation Lord Halifax was seriously canvassed as leader and Prime Minister, the convention was open to question. It was not regarded as a rule, but as a matter of convenience. It is convenient, but ^{neither} essential nor obligatory, to have a Prime Minister in the house in which money bills originate. It is, in short, a political and not a constitutional or legal judgment.

And, in truth, the lawyers for Labor case is a political, not a constitutional nor a legal one. Although their use of words is often imprecise - for example they talk of ~~negotiating~~ Supply, where the Constitution speaks of revenue, moneys and taxation; or a deferral of Supply, where the Constitution speaks of failure to pass - what the lawyers are really saying is not that the Senate cannot do what it did but that it should not do what it did. And this, in 1973, was the Labor politicians' argument.

The Politicians' Argument

One of the difficulties, although the lawyers for Labor do not often allude to it, is that their case against the Senate's use of its constitutional powers, was adherent by Australian Labor Party politicians. Professor Howard, for example, in the previous issue of the Australian Quarterly (March 1976, p. 7) states that the pass was cold in 1974, when a threat by a non-Labor Senate to reject Supply led Prime Minister Whitlam to ask the Governor General for a double dissolution. He omits to mention that in 1970, when the Liberal-Country Party coalition government which had a majority in the House of Representatives but which did not have a majority in the Senate, the Australian Labor Party asserted

the Senate's powers within the Constitution. Since 1919, the abolition of the Senate, by putting the question to a referendum to amend the Constitution, has been part of the Australian Labor Party's manifesto, but in 1970, when Liberal-Country Party membership of the Senate was a minority, both Mr Whitlam, then Leader of the Opposition in the House of Representatives, and Senator (now High Court Justice) Lionel Murphy, Leader of the Opposition in the Senate, asserted the powers of the Senate. Thus Senator Murphy on 18 June 1970: 'The Senate is entitled and expected to exercise resolutely but with discretion its power to refuse its concurrence to any financial measure, including a tax Bill'. There are no limitations on the Senate in the use of its constitutional powers, except the limitations imposed by discretion and reason'. Thus Mr Whitlam, on 25 October 1970: 'our opposition to this budget is not mere formality. We intend to press our opposition by all available means on all related measures in both Houses. If ~~the motion is defeated~~ the motion is defeated, we will vote against the Bills here and in the Senate. Our purpose is to destroy the Government...'; and on 1 October 1970 he had already said: 'We all know that in British parliaments the tradition is that if a money Bill is defeated... the Government goes to the people to seek their endorsement of its policies'.

What Mr Whitlam said after 16 October 1973 when the Senate indeed failed to pass Supply was that he would 'crush' or 'smash' this 'vicious' and 'tainted' house. What High Court Justice Murphy would have said, had any case involving the Senate's powers, ^{come before the High Court} is a matter of conjecture. Men appointed to high judicial office often tend to assume the traditions of the judiciary, rather than the politics they have left, although this is denied to Sir Garfield Barwick, the Chief Justice of the High Court, by the lawyers for Labor. Mr Whitlam's intention to destroy the Senate could only be achieved if he put the abolition or restriction of the Senate's powers to a referendum, as Labor Party policy requires, and ^{other} other than that, he could only negate the Senate's powers if he controlled a majority in the Senate which would therefore vote as the House of Representatives with a Labor majority voted. Mr Whitlam, as Prime Minister, was never able to secure this. In 1974, on the mere threat that the Senate might reject or fail to pass Supply, he asked the Governor-General for a double dissolution and was granted it. In that election, the powers of the Senate were an issue; the issue, so far as the occasion of the double dissolution was concerned. What happened was that, on this prominent issue, Mr Whitlam did not gain a majority in the Senate and his majority in the House of Representatives was reduced. After that election, the Senate might well have concluded that, as Senator Murphy had argued, it not only had the power to reject money bills but that it had a popular mandate to do so.

The coincidence of the politicians' argument and the lawyers' argument is most clearly to be seen in respect of the Senate's position. Where the ^{Labor} ^{in 1975} politicians spoke of the lower house as the 'people's' or popular house, with the implication that the upper house was neither, the lawyers for Labor argued that by never before using its 'theoretical' powers, the Senate in practice had always accepted the paramountcy of the ~~lower~~ House of Representatives. What both assert is that, whatever the Constitution says about Parliament consisting of the Queen, the Senate and the House of Representatives and about the equal status of both Houses with one sole exception, in theory and in practice only the lower House should matter. That is an interpretation of the Constitution. But it is a political not a judicial one. Since it plainly asserts the Constitution to mean other than what it says and in effect denies that the intentions of those who drafted the Constitution are now ~~not~~ relevant, the practical result of such a 'constructive' view of the Constitution is to create a dilemma for the Governor-General who takes an oath of office to ^{execute and} maintain the Constitution.

The Governor General's Case

On 11 November 1975 the Governor-General published two documents: his letter to Prime Minister Whitlam and a statement of explanation of his decision to revoke the Prime Minister's commission. The former stated, as a matter of fact, that Mr Whitlam had told the Governor-General that he would never resign nor advise an election of the ~~lower~~ House of Representatives nor a double dissolution, and that the only way in which such an election could be obtained would be by the dismissal of himself and his ministers. In the second document, Sir John Kerr grounded his action upon the deadlock between the two Houses of Parliament and the consequent inability of the government to obtain Supply. A Prime Minister who could not obtain Supply must either advise an election which would enable Supply to be obtained or to resign. Mr Whitlam would do neither of these things. The Governor-General must therefore do his duty under the Constitution he had sworn to maintain and exercise his powers to revoke the Prime Minister's commission and to appoint a Prime Minister who could guarantee Supply and who would advise a double dissolution. The Leader of the Opposition, Mr Fraser, would do both of these things. No other decision, the Governor-General wrote, would enable the Australian people to decide for themselves what should be done.

Constitutionally there is no serious doubt that the Governor-General was right in law. The Senate had the power to reject or to fail to pass Supply. Appropriations must be duly authorised by both Houses of Parliament. The Governor-General has power to dismiss ministers; he possesses what Sir John Kerr called 'reserve' powers and the lawyers for Labor more drastically call 'emergency' powers, although even the latter do not challenge the existence under the Constitution of such authority. Indeed, they could not, for Prime Minister Whitlam had relied upon them himself when he asked the Governor-General to dismiss one of his own senior ministers who refused to resign and the threat of their use to compel another senior colleague to resign one ministry and accept another which he did not wish to have. The question is not the existence of such powers but whether the Governor-General can exercise them of himself and not upon the advice of the Prime Minister.

Mr Whitlam's answer to this question was clear: he spoke of 'my' Viceroy and said that the Governor-General would do as the Prime Minister told him, that the Governor-General could act only on his advice. In the Constitution this is by no means so clear. Certain sections require the Governor-General to act with the advice of the Federal Executive Council (e.g. Sections 62, 67); other Sections give him power to act without any reference to any other person or authority, including his powers under Section 57 which deal with the dissolution of both houses. Even the lawyers for Labor agree that, whatever may be the argument over these powers in matters of executive government, the Governor-General must himself have the power to judge his sworn duty to maintain and execute the Constitution. If a Governor-General accepted Mr Whitlam's interpretation of the Constitution, he might have to act, if he must take the Prime Minister's advice alone, in violation of his oath, that is to say unconstitutionally. Sir John Kerr has not said that he was so advised, and one of the lawyers, Professor Sawyer, (Current Affairs Bulletin 1 March 1976, p. 21) there was 'no suggestion that he had acted or intended to act or authorise action in breach of the law'. Yet, even without explicit statements from the protagonists, it is clear from the public record that there were very good reasons for the Governor-General to believe that he had been given and would be given advice to behave in violation of his oath to maintain the Constitution.

After the Senate failed to pass Supply on 16 October 1975, Mr Whitlam said he would 'tough it out'. In the course of the next twenty-five days he talked of 'crushing' or 'smashing' the Senate and of 'destroying' Mr Fraser as, he said, he had destroyed his predecessors as Leaders of the Opposition. He did not advise, immediately upon the Senate's deferral of Supply, a half Senate election and he refused to advise any other kind. The available evidence is that 27 November was the last date on which the salaries of the public service could have been paid from lawfully appropriated moneys i.e. voted by both Houses of Parliament. Mr Whitlam claimed to have other moneys by which the government could continue to govern without Supply. He was never precise as to what other money he could legally have secured. Certainly the Commonwealth and private banks were approached, but the latter had legal opinion that they were at risk if they granted unsecured loans. The government also explored the possibility of using the Loan Fund. But the Loan Fund is part of the Commonwealth Public Account from which, under the Audit Act, no money may be withdrawn unless the Auditor General certifies that that the amount is lawfully available i.e. voted ^{or to be voted} by both Houses and the Treasurer is then be issued with a warrant for such payment by the Governor-General. Mr Whitlam's case may well have been that, since the budget was deferred not rejected, he could withdraw money from the Loan Fund for appropriations which were to be made when the Senate either gave way or was replaced by one which would pass Supply. But the position would have been that the Governor-General was advised to issue warrants for payments which had not been certified as lawfully available and which were very unlikely to be.

There might at one point have been another available source of money for the Labor government. If the attempt to raise four billion dollars in December 1974 had been successful, any next crisis over Supply could have been temporarily averted. That loan was authorised by a minute of the Federal Executive Council which met on 13 December; the minute was signed by the Governor-General the following day. The 'temporary purposes' for which the loan was authorised have never been spelled out, but one of the lawyers for Labor, Professor Howard, believed (The Age, 11 July 1975) 'the size of the sums involved reveals the probable truth of the whole business, for they are of budgetary proportions... an attempt to open up an extra-parliamentary source of supply... to ride out the threat of another forced election.'. Even if, since the purposes were never defined, the money was really intended to 'buy back the farm', it might still have been available in August 1975 to avert the Senate's action. But the relevance of the loans affair is not simply to the Supply crisis but to the Governor-General's position.

On 14 December ~~1973~~ 1974 he had been advised to sign the Loans minute, passed by the Federal Executive Council which met in his absence on the previous day. (It met in the Prime Minister's Lodge while a meeting of the Federal Executive of the Australian Labor Party was also taking place in the building.) The minute, by using the words 'for temporary purposes' evaded the Financial Agreement between the Commonwealth and the States. Attorney General Lionel Murphy apparently gave it as his opinion that a loan for a period of twenty years was arguably for temporary purposes, although no departmental or other legal opinion to that effect was produced, and twenty years is a longer period than most bond issues. If in fact twenty years is 'temporary', then nearly all Commonwealth loans are temporary and the Financial Agreement does not apply to them so that the Commonwealth need not seek the approval of the Australian Loan Council and therefore the States.

Apart from any legal question the minute raises— and the very considerable constitutional doubt is obvious— there is another unusual feature. When the Governor-General is present and presiding at a meeting of the Federal Executive Council, two of the attending ministers sign the minute. When the Governor-General is not himself present, three ministers sign. On the occasion of the Loans minute, exceptionally four did so. The unusual features must certainly have struck a lawyer such as the Governor-General and he might justifiably have concluded that he, because he was advised to sign by the Prime Minister and his ministerial colleagues, was being implicated in a constitutional matter where legality was open to grave doubt. That particular matter might have results testable in a court of law. In October/November 1973, with the issue of the Senate's power to refuse to pass a bill and of the Governor-General's powers to appoint and to dismiss a Prime Minister, there was, as Chief Justice Barwick wrote, after the Governor-General had taken his own decision, a 'situation unlikely ever to come before the court'. The matters were not, by their inherent nature, justiciable. And the Governor-General, by his office, had to satisfy himself that there was no other course of action he could take to resolve a deadlock which would, at the end of November, bring government to a halt.

Sir John Kerr was specific, in his letter and statement of 11 November, that the Prime Minister would not advise a way to resolve the deadlock and that he could not obtain Supply to carry on the government. After, with Mr Whitlam's permission, having consulted Mr Fraser, he was convinced that the Opposition would not give way. Therefore his constitutional position was clear, as the Chief Justice agreed, and his duty was to let the matter be decided by the people.

Did the Governor-General have any alternatives? If Mr Whitlam had advised a half Senate election on 16 October, when time remained before Supply ran out, he would certainly have been given one. That was Mr Whitlam's decision. When he asked for one on 11 November, there could have been no Senate ~~must~~ result and therefore no Supply before government had come to a halt. The Governor-General might have presented Mr Whitlam with a choice: advise a double dissolution or be dismissed. The Governor-General must have made an informed judgment upon Mr Whitlam's character to know how likely he was to accept such an ultimatum; he may very well have assumed that Mr Whitlam stood firmly by what he had been saying since the Senate failed to pass Supply. And concluded that on form, so to speak, the choice was a foregone conclusion. If he had offered the Prime Minister such a choice and Mr Whitlam had asked for time to think it over and had then gone to the Queen to remove the Governor-General - which, again on form, he might very well have concluded would happen - two things would have followed. Supply would still have been denied to the government and the constitutional crisis would have deepened. Future Governors-General would have become ciphers of the Prime Minister for the effect would have been to deny the existence, certainly to prohibit the use, of any discretionary or reserve powers in the office of head of state.

None of the alternatives alleged to have been open to the Governor-General, as distinct from those open to the Prime Minister and the Leader of the Opposition, would in fact have solved the deadlock over Supply which was the cause of the crisis, and none of those which might have been advised by the Prime Minister seemed to do violence to the Governor-General's oath of office, of which, lacking judicial decisions, he must be the sole judge.

Sir John Kerr's actions, even by an academic political scientist, David Butler (Current Affairs Bulletin, 1 March 1976, p. 9) were called 'arbitrary'. By still less detached observers they have been called 'a coup' or a 'king-hit'. These emotional words echo the more understandable anger of Labor politicians who still pursue a vendetta against Sir John Kerr in public and in private. The constitutional arguments against his action rest, in my opinion, upon strained law and bad history prompted by political anger. Placed in Sir John Kerr's position and with the knowledge at his disposal, the situation must have seemed thus: a Prime Minister had no majority in Parliament and so could not obtain Supply but he said, in effect, Parliament won't give me the money, so I'll govern without it. In those circumstances, the Governor-General had a constitutional duty to do what he did.

The future implications of his action, so forebodingly drawn by the lawyers for Labor, presume a series of such deadlocks, resolved by vice-regal intervention, which threaten democracy. Even if deadlocks were in future to be more frequent than they have been in the past seventy-six years, it is hard to see how vice-regal intervention is undemocratic if the result is an election. And after such an election, by definition held in circumstances of crisis, there is as likely to be, probably more likely to be, a clear result, as there was in December 1973. I find the alternative proposition - that the Senate cannot refuse Supply, cannot therefore compel an election, and that the Governor-General has no discretionary power to resolve a deadlock - rather more disturbing. For, ~~with~~ without a Senate with that power, a federal constitution might indeed prove unworkable. The dominance of the House of Representatives would in effect create a uni-cameral parliament under the control of one party without the checks and balances necessary to federations. One such party at the centre, with a Prime Minister whose creature the Governor General was, seems to me to open up the possibility ~~and~~ of a Prime Ministerial dominance holding more dangers for democratic government than a Governor-General with limited reserve powers to meet an exceptional situation created not by him but by the political misjudgments of a Prime Minister.

Francis West

AUSTRALIAN CURRENT LAW DIGEST

THE CONSTITUTIONAL CRISIS

Constitutional crises throw up problems which are central to our form of democracy and to our system of law. Usually legal and political factors are inextricably entangled, and the issues are consequently largely non-justiciable. In particular, only rarely do the courts have the opportunity to comment upon the inter-relationship of the Houses of Parliament and upon the powers of the Executive. Jurists therefore have a more influential role than elsewhere in the identification of the problems and in suggestions for their resolution.

The current crisis is of just such a nature. On the one side it is said that the Constitution has been subverted; on the other, that it has emerged triumphant. Much sound and fury, but what does it signify? Often, apparently, merely confusion. This issue of Australian Current Law has been given over to four articles examining some of the questions raised. The Advance Summary of Cases has been held over; "normal service" will be resumed in January.

Professor Castles and Michael Coper both examine the position of the Senate under the Constitution. Michael Coper examines the Senate's place in the framework of the Constitution, and in particular analyses the exposition by the High Court in its two recent decisions in the Petroleum and Minerals Authority Case [1975] ACLD 247; 7 ALR 1, and the Representation of the Territories Case [1975] ACLD 245; 7 ALR 159. Professor Castles looks at the conventions which have since Federation regulated the exercise by the Senate of their Constitutional powers. He demonstrates what are the conventions, how and why they have grown up, and considers their utility against the background of the current crisis. He suggests that a convention has grown up that the Senate occupies a subordinate place under the Constitution, but hints that the Governor-General's exercise of his discretion can be justified at least by nineteenth century precedent.

Peter Hanks considers the role of the Governor-General under the Constitution. The actions of Sir John Kerr are studied in the light of the precedents set by his predecessors in Office. He concludes that the vice-regal action is unprecedented. Finally Peter Bayne takes a wider view describing how other countries with a federal system of government have resolved the problem of deadlock between two houses of legislature which possess almost equal power. He particularly examines the situation in Canada, West Germany and Switzerland.

THE PLACE OF THE SENATE IN THE CONSTITUTIONAL FRAMEWORK

The focus in the present constitutional crisis has been not so much on the legal powers of the Senate as on the conventions which are claimed to guide and control the use of those powers; indeed, the debate has usually assumed a sharp distinction between the issues of legality and propriety. The two issues run together, however, in various ways: the existence of a legal power may be as uncertain as the existence of a convention, judicial resolution of the former may depend on judicial cognizance of the latter, and interpretation of the Constitution embraces a range of considerations which properly include the purposes sought to be achieved by its provisions, purposes which can sometimes be ascertained only by reference to practices and conventions. Furthermore, a judicial remedy may not always be available to resolve a dispute about the Senate's legal powers, for the issue may be non-justiciable or it may be effectively concluded in other ways. So unless the absence of a judicial sanction for a breach of convention is put forward, by definitional fiat, as the exclusive test of the distinction between law and convention, the distinction remains an elusive one.

The issue of whether the Senate has the power to refuse supply provides a good example. The Senate's powers in respect of legislation are set out in s 53 of the Constitution: the first four paragraphs provide that it may not originate proposed laws imposing taxation or appropriating revenue, it may not amend proposed laws imposing taxation or appropriating revenue for the ordinary annual services of the Government, it may not amend any proposed law so as to increase any proposed charge or burden on the people, but it may return to the House of Representatives any proposed law which it may not amend requesting omissions or amendments; the House may, if it thinks fit, make such omissions or amendments, with or without modifications. Section 53 concludes: "Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws."

Most commentators have been adamant that the section clearly does not prevent the Senate from rejecting outright proposed laws which it cannot amend. Such a view formed the basis, of course, of the Senate's action in November which culminated in the Governor-General's dismissal of Mr Whitlam as Prime Minister and the simultaneous dissolution of both Houses. The section does not give the Senate any such power expressly, but the implication is obvious enough that the specific restrictions in relation to money bills are the only restrictions on the Senate's power in relation

AUSTRALIAN CURRENT LAW

to them. However, the contrary argument may be put that the Senate's power to request omissions or amendments is its *only* power in relation to money bills, and that the last paragraph of the section, which can be construed only after the meaning of the first four paragraphs is determined, therefore confers equal power in relation to all proposed laws other than money bills. Various considerations support this argument, not the least of which is the inappropriateness of the procedure in s 57 for resolving a deadlock between the Houses in the case of rejection of supply, for if this were the only proposed law which could ground a double dissolution, the dissolution could not occur (assuming that s 57 leaves no room for any prerogative power to dissolve both Houses in circumstances which would not fulfil the conditions of the section) until an interval of three months had elapsed, followed by a second rejection of supply.

It is unnecessary to detail the further considerations which lend support to the view that the Senate has no legal power to reject money bills. The point is that even if the contrary is the better view, the view which denies the power is arguable, both on linguistic and practical grounds. It is at this point that the existence or non-existence of a convention becomes relevant, for if there were a convention that the Senate ought not to reject supply, the High Court could properly take notice of it in resolving any ambiguity in the legal interpretation of s 53 (cf *Copyright Owners Reproduction Society Ltd v EMI (Aust) Pty Ltd* (1958) 100 CLR 597 and, more recently, *the Queen of Queensland Case, Commonwealth v Queensland* (1975) 7 ALR) where the court rejected the argument that because the Judicial Committee of the Privy Council merely tenders advice to the Queen the giving of such advice on references from Queensland would not be inconsistent with the jurisdiction of the High Court to finally determine the same matters, on the basis that although the Queen was not legally bound to accept the advice, the Judicial Committee was by convention a judicial body and failure to implement its decisions was unthinkable). This article is not concerned with whether or not there is, or was, a convention that the Senate ought not to reject (or threaten to reject) supply—that is dealt with in another article in this issue—but is concerned to make the point that if the question of the Senate's legal power to reject supply were justiciable, the identification of a convention could be relevant. If the words of the section were clear, the convention could not displace them; but whether the words are clear is a threshold question on which lawyers have differed, and the preponderance of opinion in favour of the Senate's power to reject supply suggests not objective certainty but rather the basis of a (probably successful) prediction of how the High Court would decide.

The issue, however, is no doubt non-justiciable. Not only has the court suggested this generally in relation to s 53 (*Osborne v Commonwealth* (1911) 12 CLR 321), but unlike a money bill which improperly originated in or was improperly amended by the Senate, the end result of a rejection can obviously only be the *absence* of an Act—there would be nothing for the court to adjudicate on. This is the converse of the usual situation where the court might be asked to either intervene in the legislative process to restrain an unlawful act or to pronounce legislation invalid because of it but after the completion of the legislative process. One cannot imagine the court compelling the Senate to pass supply or even declaring that it has no power to reject it, even though in *Cormack v Cope* (1974) 3 ALR 419 the majority of the court reserved the question of intervention in cases where a challenge was not possible after the completion of the legislative process. The situation would be unique, but intervention unlikely.

The issue has been effectively concluded, however, by the Governor-General, for his action in dismissing the Prime Minister and dissolving both Houses involved a prior decision that the Senate was acting within its powers, a decision confirmed, in an exercise of doubtful jurisdiction, by Sir Garfield Barwick. In the absence of a judicial remedy, the Governor-General's decision is conclusive, whether right or wrong by other criteria. It may even be that a wrongly granted double dissolution (and the new Parliament) would have de facto validity because of its irreversibility—some members of the High Court suggested this in the recent *Petroleum and Minerals Authority Case*—although in those circumstances a joint sitting could not pass any valid law. In the case of the 1975 double dissolution, 21 proposed laws appear to fulfil the conditions of s 57 and thereby provide grounds for a valid double dissolution, even though, ironically, the double dissolution was granted (notwithstanding the recital of those proposed laws) as a consequence of the blocking of supply.

If some questions relating to the powers of the Senate are non-justiciable, so that answers to them depend on the consensus of lawyers or on events in the political arena, the High Court may nevertheless pass on them in the course of decisions on related issues. In two recent decisions, the court has had occasion to consider the place of the Senate in the constitutional framework in order to resolve issues relating to the deadlock provision (*the Petroleum and Minerals Authority Case, Victoria v Commonwealth* (1975) 7 ALR 1) and to the question of the permissible extent of representation of the territories (*the Territories Case, Western Australia v Commonwealth* (1975) 7 ALR 159). In *the Petroleum and Minerals Authority Case*, Gibbs

DIGEST

and Stephen JJ both asserted the Senate's power to reject any proposed law, including a money bill; together with Barwick CJ and Mason J, they relied on the Senate's equal powers with the House of Representatives under s 53 to reject an interpretation of s 57 which would have involved a substantial diminution of those powers in relation to the resolution of deadlocks. So although the precise point of the Senate's power to reject supply was not at issue, we can probably regard the point not only as effectively concluded but also as settled judicially.

Apart from the issue of whether the questions arising under s 57 were justiciable, the *Petroleum and Minerals Authority Case* required a decision on two points: first, whether the requisite three month interval before the second passage of a proposed law by the House of Representatives was measured from the time of its first passage by the House or from its rejection or failure to pass by the Senate, and secondly, the meaning of "failure to pass". It was argued in relation to both points that the construction of the section should be governed by the intention of the section that the will of the lower House should ultimately prevail; such a principle had in fact been suggested by Stephen J in *Cormack v Cope*. The consequence of this, it was argued, was that the three month interval ran from the first passage of a proposed law by the House of Representatives, since the purpose of the interval was merely to demonstrate the persistence of the will of the House, and that the Senate was in a state of having "failed to pass" the proposed law from the first moment of its introduction into the Senate; in other words, that "fails to pass" means "does not pass".

Both arguments were rejected by a majority of the court, with Jacobs J dissenting and McTiernan J finding the issues non-justiciable. The second passage of a proposed law by the House of Representatives was sufficient demonstration of the persistence of its will; the purpose of the interval was to provide time for reconciliation of the differences between the Houses and it therefore made sense for it to commence only after the deadlock had occurred. And to require the Senate to pass a proposed law at the first available opportunity would not be consistent with its equal position vis-a-vis the House of Representatives; the Senate has a duty to properly consider all proposed laws and must be allowed a reasonable time to do so. "Failure to pass" therefore imparts some notion of delay, if not fault; some notion of inaction which falls short of rejection.

In coming to these conclusions, the majority stressed the important constitutional position of the Senate, notwithstanding its less "popular" character, brought about by unequal State-wide electorates and the system of rotation, than that of the House of Representatives. Barwick CJ and Stephen J particularly emphasized the position of the Senate as the States' House. It was intended, they said, that the Senate should consider proposed laws from a different viewpoint from that of the House of Representatives; the Senate was not a mere house of review. Section 57 was intended to resolve deadlocks, but without destroying the Senate's role as a guardian of States' rights. That the development of party politics and the executive dominance of Parliament might have negated this role could not affect the interpretation of the Constitution.

The result of the case was that the Petroleum and Minerals Authority Act 1973, although passed at the joint sitting which followed the 1974 double dissolution, was invalid: the Senate had not "failed to pass" it on a date which would have satisfied the correct interpretation of the three month interval requirement. Jacobs J argued strongly in dissent that the interpretation of the majority involved considerable uncertainty—it required determination of the precise moment of time of a failure to pass for the purpose of identifying the time of commencement of the three month interval, a determination which might result in the extraordinary consequence that the Parliament was wrongly dissolved. Drawing a sharp distinction between private law and public law, his Honour held that any concept of fault, or the implication that the Senate be allowed "reasonable" time, was out of place in the Constitution. The better interpretation was that the period of three months commenced from the time when it was first open to the Senate to consider a proposed law passed by the House of Representatives, and that the state of failure to pass existed and continued so long as the Senate had not passed it. Murphy J did not sit in the *Petroleum and Minerals Authority Case* but nevertheless expressed his opinion on the issues raised therein in the later Territories Case, where he agreed with Jacobs J's interpretation.

Both interpretations claimed support from the wording of the Constitution. Both interpretations also claimed support on broader grounds: the majority sought an interpretation which would minimize the infringement of the essentially bi-cameral nature of the Parliament, and Jacobs J worked towards a position of judicial restraint, invoking considerations equally relevant to the justiciability issue (which he left open). A discussion of justiciability is beyond the scope of this article, but it is worth noting that Jacobs J's judgment indicates how bound up the issue is with the choice between the possible interpretations of the section. The majority saw the court as the Guardian of the Constitution: the provisions of s 57 were not concerned merely with internal Parliamentary procedure but constituted conditions of law-making: the principle that courts may not examine the law-making process had no application where

AUSTRALIAN CURRENT LAW

the legislature was created and governed by an instrument which prescribed that certain laws may only be passed in a particular way (cf *Bribery Commissioner v Ranasinghe* [1965] AC 172). The minority (McTiernan J, with whom Murphy J later agreed in the *Territories Case*) thought the issues raised "political" questions and were inappropriate for judicial determination; they were rather matters for Parliament itself, and the Governor-General, to decide. As noted above, Jacobs J opted for an interpretation which involved less of an intrusion into the political sphere than that of the majority; in the *Territories Case* he resolved his earlier doubt in favour of non-justiciability, on the rather different ground that the expression of the people's choice cured any earlier formal defect in the procedure, but now deferred to the view of the majority. The minority view had really been precluded by the decision in *Cormack v Cope*, for the justiciability of the issues after the completion of the legislative process was there given as the very reason for non-intervention at an earlier stage. Although the point was fully argued only in the later cases, it would have been difficult, in the face of *Cormack v Cope*, to conclude that the issues were not justiciable.

Notwithstanding the majority's concern in the *Petroleum and Minerals Authority Case* with minimizing any exception to the bi-cameral character of the legislature, the decision in *Cormack v Cope* had already authorized a substantial inroad into that character by permitting a double dissolution and joint sitting in respect of more than one proposed law, and Stephen J now had to qualify his statement there that s 57 was designed to ensure that the will of the lower House should prevail by noting that it was more accurate to say that if anything prevailed it was the will of the electorate, as reflected in the newly constituted Parliament. The single bill interpretation of s 57 was quite untenable, on linguistic and practical grounds, but Barwick CJ's expressed concern in *Cormack v Cope* about the possibility of a "storehouse" or "stockpile" of bills being passed at a joint sitting was translated into an equally untenable interpretation in the *Territories Case* where he held that despite the absence of any express time limit within which a double dissolution must follow the Senate's second rejection or failure to pass a proposed law, there is a temporal limitation which requires the second rejection or failure to pass and the dissolution to be so related in time as to form part of the "current disagreement" between the Houses. The other members of the court rejected this interpretation, for a variety of reasons: a period of time after the Senate's second rejection or failure to pass provides further opportunity for reconciliation, the granting of a dissolution may properly await the outcome of bills subsequent to the first one which qualifies as a proposed law within the meaning of the section, a dissolution was intended to be used not at the first opportunity but as a last resort, "undue delay" would be impossible of determination by the court (a view which contrasts with the court's sanguine attitude to the possibility of determining when there is a "failure to pass"), and the electorate endorses not the proposed law but the Government. In the result, however, Barwick CJ agreed that the three Acts under challenge in the *Territories Case* (the Electoral Act (No 2) 1973, the Representation Act 1973 and the Senate (Representation of Territories) Act 1973) were all duly passed in accordance with s 57.

The Senate (Representation of Territories) Act was also challenged on the substantive basis that it was beyond the legislative power of the Commonwealth. This issue required further, and direct, consideration of the Senate's position as a States' House, for s 122 of the Constitution, which provides that Parliament may allow the representation of any territory in either House to the extent and on the terms which it thinks fit, appeared to be in flat contradiction of s 7, which provides that the Senate shall be composed of senators for each State, and of the other provisions of Pt II of Ch I which also speak only of senators from the States. By a majority of four to three, the court found s 122 to be dominant, so that the Act, which provided for the representation in the Senate of the Australian Capital Territory and the Northern Territory by two senators for each territory and gave the senators full voting powers, was valid.

Linguistic considerations were clearly inconclusive, though both the majority and minority purported to rely on them. The majority (McTiernan, Mason, Jacobs and Murphy JJ) held that the words of s 122 must be given their full meaning and must be read as an exception to s 7; to interpret "representation" as anything less than full membership would be to give it a different meaning from that which it has in other sections of the Constitution, especially in s 121 which provides for the representation of new States. The minority (Barwick CJ, Gibbs and Stephen JJ) on the other hand, held that s 7 was capable of only one meaning, that the Senate shall be composed of, not include, senators for each State, whereas the word "representation" in s 122 was capable of several meanings and should therefore be given that meaning which was consistent with s 7; that meaning must exclude voting powers.

More importantly, both constellations of judges reinforced their conclusions by reference to the purposes of the Constitution. The minority found that the purpose of the Constitution was to create the Senate as the States' House, that the territories

DIGEST

were not part of the federal structure of the Constitution and therefore could not be given representation which would impair that structure, and that a limited concept of representation was familiar to the framers of the Constitution. The majority found a contrary purpose, namely, that the founding fathers envisaged in s 122 the possibility of territories developing to a point where Parliament might decide that full representation was desirable; the power to allow representation should not be given a restricted interpretation merely through fear that Parliament might abuse it by providing for such a large number of senators for the territories that the concept of the Senate as a States' House would be destroyed. In other words, the court must assume that Parliament will act responsibly. The counter of the minority was to agree that although a legislative power should not be given a restricted construction for fear that it may be abused, the possibility of abuse supported the conclusion that the wide interpretation of s 122 could not have been intended by the founders. Touché!

The case provides a fascinating example of the judicial process. Gibbs J took the opportunity to remind us that "(s)ome might think it unfortunate if the Constitution did not allow a Territory which had reached a sufficiently advanced stage of its development to be represented by voting members in both Houses of the Parliament, since the Parliament either directly makes the laws by which the Territory is governed or by statute grants to a subordinate legislature authority to make such laws. Others might think that it would be even more unfortunate if the federal balance of the Constitution could be destroyed by converting the Senate from a House representing the States to a House in which the States might have only a minority of representatives, particularly if this could be done against the will of the Senate, by adopting the procedure laid down in s 57. However, the function of this Court is to consider not what the Constitution might best provide but what, upon its proper construction, it does provide". If this oft-repeated article of faith, in the orthodox tradition of Sir Owen Dixon's plea for a "strict and complete legalism" (see 85 CLR xiv), ever has any validity, it is a patent myth in this context. Either conclusion was logically possible and neither was logically compelled; adherence to the myth does nothing to develop and refine judicial techniques for handling the extra-legal factors which must inevitably influence decisions when strictly legal considerations are inconclusive.

Of course, there is no clear dividing line between so-called "legal" and "extra-legal" considerations, especially in constitutional interpretation. Jacobs J leaned heavily on notions of democracy to support his view of non-justiciability; Murphy J similarly spoke of the "democratic theme" of the Constitution in order to justify the conclusion which allowed the territories full representation. In the absence of clear words, it can hardly be denied that these are legitimate considerations; if legal purists criticize Murphy J's judgment on the ground that it is analytically shoddy or stylistically inelegant, that is not to the point. A popular tack in the current debate about the Senate's powers is to have recourse to the intention of the founders, but this is usually no more than distracting: if a precise intention can be ascertained it may be inappropriate to modern conditions, and in any event, it is wrong to imagine that the founders did not intend that the Constitution be interpreted to accord with those conditions.

Whatever the High Court's method of resolving constitutional questions, its decisions have played a major law-creative part in defining the position of the Senate in the constitutional framework. To say that the Senate is the States' House is obviously incomplete; the court's perception of the Senate's role as such has influenced the procedure by which a bill can become an Act without being passed by the Senate, yet the concept was insufficient to deny full representation to the territories. The statement that the Senate is the States' House needs further qualification because of the development of rigid voting along party lines, a factor recognized by the court but held to be irrelevant to questions of constitutional interpretation. So the place of the Senate under the Constitution may be gathered by a reading of the Constitution, together with the High Court's exposition of it, and an awareness of the practices and conventions of political behaviour without which purely legal analysis would be misleading.

In summary, it may be said that the Senate is the second legislative chamber of the Australian Parliament, elected on full adult franchise, though with unequal State-wide electorates to ensure equality of State representation, and possessing equal power in respect of legislation with the lower House except in relation to money bills and except, in a sense, for the procedure provided to resolve deadlocks. It performs not only the role of a house of review but also other roles, for example through its investigative committees. Whether the Senate's place under the Constitution is a proper one is a matter for debate, and a question which, if a Labor government is elected on December 13, the people of Australia may well be asked to decide early in 1976.

MICHAEL COPER
Senior Lecturer, Faculty of Law
University of New South Wales

December 1975

AUSTRALIAN CURRENT LAW

CONSTITUTIONAL CONVENTIONS AND THE SENATE

The British model of responsible government is one foundation for the working of the Australian system of government. It was recognized formally in the *Engineers Case* as a major point of demarcation between the Commonwealth Constitution and its US counterpart. Except for the limited recognition of responsible government in Ch II of the Commonwealth Constitution the day to day working of the system is left to the operation of traditional conventional processes, except where these may be at variance with the express terms of the Constitution. As Wynes has pointed out, the conditions under which aspects of the working of responsible government are carried out, particularly at the level of the exercise of Crown powers by the Governor-General under the Constitution, are "not generally matters of judicial cognizance". In his third edition of his *Legislative, Executive and Judicial Powers*, Wynes says that such matters as the exercise of the Governor-General's powers in relation to the dissolution of Parliament and the formation of governments are, for this reason, outside the scope of his work (p 507).

The system of responsible government as it evolved in its developed form in Britain after the Reform Bill of 1832 was an accretion of practice labelled by Dicey as part of the regimen of Constitutional Law in the form of Conventions of the Constitution. In part the strength of Conventions has also contributed to their weakness. The essential flexibility and imprecision of many Conventions has provided a unique capacity for maintaining the course and strength of democratic government by evolution without violent revolution. Conventions, however, are not necessarily compatible one with the other in all evolving situations, partly because of their tendency to flexibility and imprecision. As they are also not "law" in the strict sense, their capacity to control a situation may be expunged or limited in the face of the written law. In Britain itself, the Parliament Acts of 1911 and 1949, limiting the authority of the House of Lords, exemplify the recognition, variation and final interment of conventional practices which were once said to regulate the relationships of the two British Houses of Parliament.

In a State with a written Constitution, the working of conventions is at once both more difficult and problematical no matter how essential they may seem to be for the effective working of the system of government. They must be related to and interwoven into the context of the formalized directives on government. At times, usage may in practice vary the strict letter of a written Constitution. In the normal course, for example, it is accepted in Australia that despite the formal recognition of the powers of the Sovereign or a Governor set out in time honoured form, these are exercised on the advice of Ministers responsible to Parliament in the same fashion as in Britain. Even so, the course of constitutional history demonstrates the difficulty of equating the inter-relationships of essentially unwritten principles in the face of statute law. The first great constitutional cases in Australia in 1824-1825 showed this only too clearly. On the one hand, appealing to the fundamental law of Magna Carta, as he viewed it, Chief Justice Forbes of New South Wales gave a broad interpretation to the New South Wales Act of 1823, permitting jury trial at Quarter Sessions in the colony. In Van Diemen's Land, Chief Justice Pedder reached the opposite conclusion with a strict construction of the same Act.

Even without a written Constitution, as British experience demonstrated, the working of "constitutional principles", as they began to be described by 1871, may face special hazards in situations where legislatures are bicameral. The core principle of responsible government that ministries shall be responsible to Parliament provides an essential dilemma as to whether a Ministry must be responsible to only one or both chambers of the Legislature. Although practice seemingly dictated in Britain in the second half of the nineteenth century that the House of Commons was the forum which made or broke Ministries, the defeat of Lloyd George's "Peoples Budget" in the House of Lords pointed in the opposite direction. Finally, it was the Parliament Act 1911, which set the matter at rest in favour of the Commons.

The same dilemma, transferred to the context of a governmental system with formal constitutional provisions regulating the powers and functions of the organs of a legislature, may become even more complex in terms of resolution. Nineteenth century experience in Australian colonies and elsewhere, evidenced trials of strength on ministerial responsibility between the upper and lower houses of legislatures. The variants from the British bicameral system, with nominated and elective upper houses replacing an hereditary upper house, showed potential differences of substance in the way "constitutional principles" might operate outside Britain. They showed also the difficulty of necessarily applying the same principles as between the different variations of bicameralism outside Britain. In legal theory there was no difference between the veto powers of the upper houses whether elected or not. The system of nominee houses, however, generally had an inbuilt mechanism for ensuring the

DIGEST

ultimate supremacy of a lower house, as in the case of the House of Commons in conflict with the Lords. In the last resort the "stacking" of a nominated upper house with new members, paralleled the recognized threat of ennobling new peers to provide a majority favourable to the Commons in the Lords. With elective upper houses, however, with their powers and functions delineated by formal constitutional fiat, the position could not be the same. The great constitutional struggles between the two houses in Victoria in the nineteenth century exemplified the need for new mechanisms to be devised to help resolve such conflicts. At times these mechanisms were created in the form of deadlock provisions like those in the Victorian and South Australian Constitutions. In other places, as evidenced by the Tasmanian constitutional crises of the mid 1920's, the situation remained without formal guidance on the way inter-house conflicts were to be resolved.

The essential dilemma facing the working of ministerial responsibility with a bicameral legislature with both houses elected, albeit in different ways, was therefore a fact of political life to many of those who worked on the drafting of the Commonwealth Constitution. Its application to the proposed federal system was also viewed as creating even more complex problems than usual. There were eminent constitutionalists, as Quick and Carran relate [p 706], who were concerned at the application of a cabinet system of executive government in the proposed federation. Suggestions were made to adopt the form of the executive "in harmony with the Federal principle". This included the view that the approval of the Senate might first be required as a pre-condition to the appointment of federal Ministers. When once so approved it was suggested that Ministers should stay in office as long as they retained the confidence of the House of Representatives. Another proposal was that federal ministries should be elected for fixed terms at joint sittings of both houses of Parliament. But as Quick and Carran point out these "views have not been accepted". As they go on: "... for better or for worse, the system of Responsible Government as known to the British Constitution has been practically embedded in the Federal Constitution ..." [p 707].

The only final solution accepted to deal with deadlocks between the two houses on money or other matters was the inclusion of the double dissolution clause in s 57 with the solution of joint sittings after disagreements as prescribed by the section. This was an adaption of the style of approach taken in Victoria and elsewhere to deal with cases of inter-house dispute. Today, when governmental funds loom much more largely in the life of society, compared to the second half of the nineteenth century, the delay of three months or more before those deadlock provisions might operate in money matters might seem inordinate. Before the turn of the century, however, before the birth of the modern welfare State, and the more limited role accepted then for government activity, this means of resolving even conflicts on supply, does not seem to have been regarded with great concern.

Aside from s 57, however, and the limiting role on the Senate in dealing with financial measures in s 53, the formal provisions of the Constitution left unanswered the role of the Senate in the working of responsible government. Harrison-Moore acknowledged this situation in 1910 when he affirmed: "[I]t is a factor not to be neglected that, while the Senate has a recognized power over money bills beyond that of any other second chamber in the British Dominions, it can hardly exercise the extreme power of rejecting the Bill for the 'ordinary annual services of the Government' upon any other ground than that the Ministry owes responsibility to the Upper not less than to the Lower House". At the same time, he recognized that this was a position "which in the future, the Senate as the House of the States as well as the Second Chamber, may take up". But as he went on to assert: "... it is a position from which even in the history of Parliamentary Government in the Colonies, the strongest supporters of the Upper House have generally shrunk". [Constitution of the Commonwealth of Australia, 2nd ed, p 145].

By the time this was published in the second edition of Harrison-Moore's monumental work on the Constitution, it seemed, at least for the time being, that the first decade of federation had already set a firm basis for a constitutional practice that de-emphasized the role of the Senate in the making and breaking of federal ministries. Deakin, in his secret guise as an Australian correspondent for the London Morning Post in this period, chronicles the way in which the early years of federal Parliamentary practice had moved to a position which seemed to recognize the primacy of the House of Representatives in determining the membership of federal ministries. As he reported in mid 1901, there were those in the Senate who first asserted the basic equality of the upper house, with Sir John Downer of South Australia for example, contending that a Ministry might be held responsible to the Senate as well as the House of Representatives. [Federated Australia, pp 58]. Later Deakin recorded that "a battle for supremacy or, at all events, for a definition of their constitutional boundary seems inevitable [Ibid, p 62]". Five years later, however, after the ebb and flow of conflict between the two houses, Deakin

AUSTRALIAN CURRENT LAW

reported on the clear outcome of the initial trial of strength between the two houses of the Commonwealth Parliament. He wrote: "The man in the street cannot divest himself of the conviction that wherever there are two Chambers they are to be ranked in order of importance as first and second. Unconsciously he realizes that when Ministers hold office upon the authority of one house that house is the true source of power, and its fellow merely a chamber of review. At the beginning Senators were exasperated by this misconception of the Constitution, but every year find themselves sinking deeper into the well worn ruts of constitutional practice. We are governed expressly by the precedents of the Mother Country, so far as they apply, and indirectly by their adaptations in our State Legislatures. In spite of Sir Richard Baker and his zealous henchmen, who have preserved and will continue to preserve their theoretical overlordship, one has only to look at the manner in which Parliamentary business is transacted to see how in fact the Senate is subsiding into the second place instead of occupying the position which our written law in terms undoubtedly confers upon it".

From 1906, when Deakin wrote this, down to 1974, when moves were made against supply in the Senate, leading ultimately to a double dissolution of the Commonwealth Parliament, without rejection of supply, it was, as Odgers in his Senate practice records an "academic argument as to whether the Senate can, by refusing Supply force a dissolution of the House of Representatives". No rejection of supply had ever occurred in the history of the national Parliament although there had been numerous occasions since 1901 when the Senate had made requests for changes in proposed laws under s 53. These, over the years, had given rise to considerable constitutional debate on the extent to which even this power might be pressed, echoing the sentiments of Senator R E O'Connor in 1903 that this would be "the most fruitful battleground for contests between the two houses—the ground upon which we shall exercise our greatest power, and upon which the House of Representatives shall struggle to retain as much power as they can".

Although to Odgers the argument was academic, at least from the time that Deakin claimed that the Senate was sinking "into the well worn ruts of constitutional practice", the processes for the establishment of a convention on British lines seem to have been evolving from this time onwards. The precise manner in which such accepted practices develop is not of course to be gained necessarily from any formal rule making. Traditionally, it is the accretion of practice, recognized by those concerned with government which determines the scope and content of those usages. In the case of the powers of the Senate with respect to supply and impliedly thereby, the determination of the membership of a Ministry, the fact that successive national governments with the confidence of the House of Representatives, have repeatedly survived in the face of Senate majorities hostile to them, with no Senate rejecting Supply, speaks strongly in itself of the development of accepted practice. Although its non-elected membership marks it off from its Australian counterpart, the process at least by which it has been accepted that the Canadian Senate does not use its constitutional authority to amend or reject supply bills despite its authority to do this, provides a relevant if not entirely apposite example of the same style of development.

In addition, it is an accepted mode for recognizing conventions that within the interstices of government at the highest level, opinions on non-justiciable matters such as those on the Commonwealth Parliament in the Constitution, provide guidance, although not necessarily controlling force, in the exercise of discretions concerned or related to these matters. Unfortunately, as commentators on such usages have remarked, the documentation is sometimes sparse, partly at least because of the problems of confidentiality which arise in this context. Sometimes it may be letters, cabinet papers and even memoirs, published or made available many years after an event which provide important evidence of the evolution and acceptance of constitutional practice.

In the case of the powers of the Senate vis à vis the House of Representatives, however, there is at least one opinion at the level of a Memorandum by Chief Justice Griffith which provides strong evidence of the rapid acceptance, even within a decade or so after 1906, of a subordinate position for the Senate in relation to the formation of executive governments. The bulk of this Memorandum is concerned with the exercise of the discretionary authority of the Governor-General in determining whether a double dissolution of the Commonwealth Parliament should be granted under s 57 of the Constitution. But the Memorandum begins with an important, clear statement on the relative positions of the House of Representatives and the Senate. As Griffith asserted: "Under the Australian Constitution the Senate and House of Representatives have equal authority, except as to one matter of procedure. But a working rule has for the present been adopted, based upon what is called the theory of Constitutional Government, which lays down that the continued life of an Administration is practically dependent solely upon it enjoying the

DIGEST

confidence of a majority of the House of Representatives, and that it is sufficient if it enjoys that confidence without regard to the views of the Senate." Griffith rightly indicated, at the same time, that as with any "working rule" it might later be varied. But as he wrote: "It may be that in the future some modification of this working rule will be found necessary, but for the present we must take it as we find it."

Many years later, the views of former Governor-General Sir Isaac Isaacs, himself of course also a former Chief Justice of the High Court, in a letter to the Age newspaper at the time of a conflict on supply between the houses of the Victorian legislature in 1947, evidences the maintenance and seeming further acceptance of this practice in the Australian context, by one of the nation's most distinguished constitutionalists. As the conflict in question was at a time before full adult franchise had been introduced for the Victorian Legislative Council, the State situation at the time may not be considered entirely apposite to the situation in the federal sphere and certainly Isaacs was not referring to the Senate's powers in his remarks. But countervailing this is the fact that the Senate is less representative of the population in numerical terms, compared to the House of Representatives, making this view as relevant although not as strong in the national as well as the State context.

The genesis and main thrust of Isaacs' argument is to be seen in the progressive development of British style conventions in the Australian constitutional situation, going back to the nineteenth century working of colonial legislatures. In his letter Isaacs affirmed: "The Council has overstepped established usage, and has in effect violated the Constitution of the State. If the Council's demand were conceded as the price of the Appropriation Bill, that would be surrendering the well-established right of the Assembly to control money bills, and it would be a severe blow to democracy in this State." An issue in this controversy was the application of ss 53 and 57 of the Victorian Constitution, provisions which helped to shape the similar, although more extensive counterparts in the Commonwealth Constitution. Under s 56, the power of rejecting supply was more explicit than in s 53 of the national instrument. In commenting on the Victorian provision Isaacs remarked: "It is true the Council has the power of 'rejection', but that is not intended to be an arbitrary tyrannical power, nor to be used for purposes foreign to our Constitution. The Crown has 'recommended' the payment of honest, lawful debts; the Council says these shall not be paid unless something is done which the Australian Constitution has by imperial legislation entrusted to other hands. That is a misuse of the power of rejection not within the contemplation of our State Constitution as it was penned. If an Appropriation Bill is sent to the Council in breach of the Constitution or with another Bill 'tacked' on to it so as to deprive the Council of the right to amend that other Bill, or for some valid reason touching the merits of the Bill itself, without contravening the undoubted right of the people of Victoria as represented in the Assembly to control payment of their honest debts, then the rejection would not transgress the real intention of the power granted to the Council." [Age Newspaper 7 October 1947]

While both Griffith and Isaacs recognize that the "working rule" is not immutable, it seems clear, particularly in the case of Isaacs, that this should not be set aside except on substantial grounds. Certainly in Isaacs' case, only something approaching illegality, perhaps when this cannot be tested in the courts, could provide a touchstone for the exercise of a veto power on money bills by the Victorian upper house at the time he wrote. Garran in his *Prosper the Commonwealth*, after a lifetime of working with the Constitution he helped to forge, does not seem to have dealt explicitly with this point. But it is instructive to read his comments on the Senate, given his support for its continuance as an essential component in the Australian governmental system. At least in 1958, when his last main work on the Constitution appeared, he does not seem to have viewed the upper house as being a body with authority to exercise an ultimate power of veto on the House of Representatives and Ministries responsible to it, except in situations of "emergency". As he wrote: "Though we may be unable to point to an instance of its voting as a 'States House', it is there as an insurance against an emergency, like the safety valve of a steam boiler or the fuse in an electric circuit." [*Prosper the Commonwealth*, p 197]

The foundations for such working rules or conventions are not of course to be found in law. On the one hand, the product of practice has been part of the accepted regimen of constitutional law, at least since Dicey penned his *Law of the Constitution* with its exposition of the conventions of the Constitution. As part of this regimen jurists and others have had a peculiarly responsible role in exposing and commenting on these, given that in the normal course they are non-justiciable. On the other hand, the practice which gives these conventions life and continued meaning is to be found not in law but in the working of government, including the political process.

AUSTRALIAN CURRENT LAW

In governmental terms it is not hard to divine the reasons why the style of working rule described by Griffith and others has evolved, even with the differences between the nature and status of upper houses in legislatures modelled on the Westminster system. It is a truism that no bicameral legislature in the Westminster mould can be exactly the same as the "Mother of Parliaments", so that the powers, functions and inter-relationships between the Crown and Parliament and the houses of Parliament can be treated in precisely the same way. By the same token, rarely, if ever, can the working of bicameral legislatures of this type, even within the same country, as in Australia, be treated in exactly the same way. The elective versus the nominated or hereditary principles of providing the membership of upper houses provides one simple reason for this. The differing mode of electing the Legislative Council in South Australia, by universal suffrage, with the whole State as a single electorate, provides a potentially important contrast, marking off the South Australian bicameral system from that of New South Wales whose Legislative Councillors are elected by Parliament. When all this is said, however, there are, nevertheless, important traditions or strains of political practice which have seemed to transcend these differences. Originally, the assertion of lower house authority in money matters goes back to the long enduring conflict between the House of Commons and the Lords, with the Commons asserting the right of the more popularly chosen house to have the final say on government expenditures. New meaning was given to this assertion after the replacement of the old mixed British Constitution with the passing of the Reform Bill of 1832, presaging the development of the modern system of responsible government.

In the second half of the nineteenth century, even with the differences between colonial bicameral legislatures, after the attainment of responsible government, with some upper houses nominated and other elected, Todd in his classic *Parliamentary Government in the Colonies* asserted: "The relative rights of both houses in matters of aid and supply must be determined, in every British colony, by the ascertained rules of British constitutional practice. The local acts must be construed in conformity with that practice wherever the Imperial polity is the accepted guide." [p 709] By the second half of the nineteenth century, with responsible government and even with elected upper houses, albeit not with universal franchises, notions of maintaining "harmony" in the working of government, and, implicitly, stability in the working of the governmental system, were also being advanced for determining the relative positions of upper and lower houses. In his well known Memorandum on the Victorian constitutional crisis of 1878, M E Hicks-Beach refers to the need for the two houses to maintain "a general understanding as would be most in harmony with the spirit of constitutional government". [Quoted Todd, p 747] Todd himself asserted that there should exist between the two houses of a Westminster type legislature "general acceptance by both houses of counsels of moderation, and in the avoidance by each of the assertion of extreme rights". [*Ibid*] He asserts, too, "Frequent, unnecessary or abrupt dissolutions of Parliament, inevitably tend to blunt the edge of a great instrument, given to the Crown for its protection ...". [p 760]

In the Australian federal context, at least up to the change in the method of election of Senators at the 1949 poll, there were reasons probably as strong as any, why such forbearance was needed if reasonable stability was to be maintained in the working of government. Under the previous electoral system the gross over representation of particular parties, which might still remain after a poll for the House of Representatives, could and did result in serious imbalances between party representation in the upper and lower houses. Since 1949, with the introduction of election by proportional representation, this position has been largely overcome. Now, however, with the introduction of two members from each of the Australian Capital Territory and the Northern Territory, it might well be argued that there has been a reversion, at least in part, to a situation where the upper house is less representative of the popular will, compared to the House of Representatives.

In the nett result of the November dénouement of this year's constitutional crisis, however, arguments like this can seemingly carry no greater weight than as forms of moral suasion in the conduct of Parliamentary affairs at the national level. In the last analysis, in the view of the Governor-General, the strict letter of the Constitution must have primacy. In his statement of 11 November, after his dismissal of Prime Minister Whitlam, the Governor-General did not deny that constitutional usage or convention on the powers of the Senate was necessarily irrelevant to the working of government. But as he wrote: "The Constitution must prevail over any convention because, in determining how far the conventions of responsible government have been grafted on to the Federal compact, the Constitution itself must in the end control the situation."

On the face of it this is an unexceptionable result. The Commonwealth Constitution, in much the same fashion as the British Parliament Acts, for example, lays

DIGEST

down the final rubric on the guiding force, or otherwise, of convention. Clearly this is an option open to the Crown and acceptable as such. But it is not necessarily the only option, if past experience is a guide in dealing with constitutional directives where these are non-justiciable, as in the case of s 52 of the Constitution. In the Victorian constitutional disputes of the nineteenth century, for example, s 57 of the Victorian Constitution Act unequivocally gave the Legislative Council authority to reject money bills. In 1877, however, the Victorian Governor, Sir George Bowen, as Todd relates, "resolved to adhere steadfastly to the rule of non-intervention between the combatants". [p 722] Todd himself, in summing up the Victorian crises suggested that upon "such occasions the governor should refrain, except in the capacity of mediator, from all personal interference, until at least he is called upon to do or to sanction an act which he might consider to be illegal, in which case he should promptly and authoritatively interpose". [p 722]

In the view of the Governor-General, however, it would seem that even without any call to sanction an illegal act, his judgment of the situation placed serious time constraints on the period a deadlock on supply could be permitted to continue. As he wrote in his statement of 11 November: "As a result of these discussions [with the Prime Minister and Leader of the Opposition] and having regard to the public statements of the Prime Minister and Leader of the Opposition I have come regretfully to the conclusion that there is no likelihood of a compromise between the House of Representatives and the Senate nor for that matter between the Government and the Opposition." As he goes on: "The deadlock which arose was one which, in the interests of the nation had to be resolved as promptly as possible and by means which are appropriate to our democratic system."

With this time factor in mind, the Governor-General considered it was inappropriate to rely upon what he describes as "perhaps the usual means of resolving a disagreement between the two houses", the double dissolution clause in the Constitution, s 57. Faced therefore, with s 52 overriding convention, the inappropriateness, on the other hand, of using s 57 to resolve the deadlock on Supply because of unacceptable time constraints, with the three month time lag before the machinery of this section could be used to deal with supply, the Governor-General seems to have found himself in a situation where his range of options was increased, again with the Constitution itself helping to provide a touchstone to determine his course of action.

Historically, as suggested previously, the constitutional usage on the relationship of upper houses to lower houses of Parliament has not, in itself, provided firm direction on the mechanisms to be adopted in situations of continuing deadlock between two houses. In Victoria after the 1877-1878 deadlock the hope was expressed at the time that some formalized mechanism might be adopted to overcome the style of hiatus created in a situation. In Tasmania, after the continuing conflict between the two houses on supply in the mid 1920's, leading to appropriation measures being given the royal assent without the approval of the Legislative Council, the State Constitution was amended in an effort to prevent such occurrences in the future. The British Parliament Act of 1911 itself evidences the establishment of formalized machinery to achieve a similar end.

Given the Governor-General's view that time forbade the use of s 57, to resolve the deadlock on supply, the only formalized means of breaking such deadlocks in the Commonwealth Constitution, recourse was necessary to the more amorphous, and sometimes potentially conflicting criteria which can be considered to have relevance in such situations. In such circumstances, only judgments based on evaluating these, both in relation to the Constitution and the context of the particular circumstances, with the evidence available only to the Governor-General, could determine the mode to be used in the exercise of reserve powers to break a deadlock which was regarded as requiring prompt action to resolve.

As time honoured as the assertion of Commons authority in money matters, and not complementary to this assertion in cases of inter-house deadlock, is the provision in the Bill of Rights 1689 that "...levying money for or to the use of the Crowne by pretence of prerogative without Grant of Parlyament for longer time or in other manner then the same is or shall be granted is illegal". Under the Commonwealth Constitution this finds a strong, latter day equivalent in s 81 of the Constitution, the appropriations power. It is this requirement of Parliamentary authority for appropriations that seems to have loomed importantly in the Governor-General's thinking in taking the action he did. As Sir John Kerr recorded in his statement: "Parliamentary control of Appropriation and accordingly of expenditure is a fundamental feature of our system of responsible government."

In the absence of a strong constitutional directive such as this, the ensuing reasoning of the Governor-General, flowing from this, might have been open to greater objection. The presence of s 81, however, is a marking off point seemingly of major import, from other cases of deadlock where written Constitutions have

AUSTRALIAN CURRENT LAW

not contained such express, affirmative directions on appropriations. Such a clause, when viewed in historical perspective, provides a considerable counterweight, although not necessarily a controlling one, in the exercise of reserve powers when these are brought into play in the case of deadlock. As Harrison-Moore shows, the purpose of a clause such as this is to foreclose options for a lower house in attempting to circumvent the will of an upper house. As he wrote: "Appropriation by law" excludes the once popular doctrine that money might become available for the service of government upon the mere votes of supply by the Lower House" [Constitution, etc, 2nd ed, pp 522-3].

At a point where supply might soon run out, the presence of s 81 in the Constitution provided a strong reason for distinguishing those earlier crises, such as the Victorian impasse of 1878, where, at least for a time, steps were taken successfully to circumvent the financial veto of an upper house. Certainly, nineteenth century practice as discussed by Todd, is suggestive of the type of solution along the lines finally determined upon by the Governor-General. Todd suggests that when disputes between two houses "transcend the lawful bounds of Parliamentary warfare, and seem to be irreconcilable", a Governor "is justified in the attempt to invoke the aid of the people to restore harmony by dissolving the popular chamber". He goes on: "[I]f an existing administration be not prepared to accept the Governor's decision in regard to a proposed dissolution, and to assume responsibility for the same, they are bound to resign office and give place to other ministers, who are willing to facilitate and to become responsible to parliament and to the country for — the intended exercise of the royal prerogative." [p. 803] In such a way, at least in Todd's nineteenth century understanding of the practice, it was appropriate for the prerogative to be exercised to make the electorate the ultimate arbiter of the dispute.

How far the exercise of such reserve powers might be circumscribed by twentieth century practice, evidenced particularly by the discussions following the dismissal of Premier Lang is the subject of examination elsewhere. Suffice to say, however, that nineteenth century practice at least, as outlined by Todd, certainly provides a foundation for the style of action taken by the Governor-General to deal with a seemingly irreconcilable Parliamentary deadlock, albeit with variations in the particular circumstances.

The high priority placed by the Constitution on the Parliamentary granting of supply helps to give strength also to the importance attached by the Governor-General to the traditional role that the provision of supply has played in influencing the exercise of reserve powers to resolve a Parliamentary deadlock. It has been an accepted practice that a requested election by a Prime Minister, as for a double dissolution, for example, should not be granted unless supply is guaranteed to support the working of government until Parliament next meets. The immediate cause of the dismissal of Prime Minister Whitlam was seemingly his request for an election for half the Senate, without any guarantee of supply in the interim and no guarantee that supply would be available even after such a poll. As the Governor-General stated in this regard: "There has been discussion of the possibility that a half-Senate election might be held under circumstances in which the Government has not obtained Supply." As he goes on, "If such advice were given to me I should feel constrained to reject it because a half-Senate election held while Supply continued to be denied does not guarantee a prompt or sufficient clear prospect of the deadlock being resolved in accordance with proper principles".

There is another factor, not canvassed in the Governor-General's statement, which might also have been called in aid to at least support recognition that the discretionary authority of the Governor-General could be wider than might have first been apparent in dealing with the 1975 impasse. In other cases of inter-house deadlock a recent expression of the will of the electorate has sometimes at least been weighed in the balance in determining the exercise of Crown authority. In Victoria in 1878 one reason why no dissolution of the Assembly occurred was that it had recently been elected. The Ministerialists as they were described had overwhelming support on the floor of the Assembly and no further election at the time seemed likely to alter the position. In Britain, in the final showdown between the House of Commons and the House of Lords, leading up to the enactment of the Parliament Act 1911, there were two elections for the Commons between the rejection by the Lords of Lloyd George's "Peoples Budget" and the final understanding that the Lords would become subordinate legally to the Commons in financial matters. Similarly at the time of the great debate on the Reform Bill of 1832 the defeat of Grey's administration in the Lords led to the Prime Minister's appeal to the electorate. Only with a recent expression of support from those who chose the Commons at the time was the way opened for the possible exercise of crown power by King William IV to resolve the deadlock by ennobling a sufficient number of new peers to support the Parliamentary reform required by the Whigs.

DIGEST

In the heavily charged political atmosphere of a constitutional crisis like that of 1975 it is impossible so near to the events to come up with anything like final and conclusive assessments, if only because the evidence to do this remains, as always, locked in the interstices of government at the highest levels. It seems clear from the circumstances surrounding the events of October-November, however, that the precise solution adopted by the Governor-General is one which has, at best, only limited utility in dealing with inter-house deadlocks at the national level. In the circumstances, the Governor-General was enabled to bring about a solution as close as possible to the "usual means" required by the Constitution for breaking these. This was possible because of the bank of bills available from previous disagreements between the Senate and the House of Representatives which brought s 57 into operation. This result accords with the spirit of the Constitution although because of time constraints s 57 could not be used to resolve the deadlock on the supply bills themselves. At the same time, the immediate solution of a double dissolution arising from the special circumstances of this bank of bills is not one which could always be expected to deal with situations of inter-house conflict. Because of this, the decision in the particular instance could not be followed to bring about a double dissolution failing such a bank of bills, for to do otherwise would be to collide with the express provisions of s 57 as to when a dissolution of the Senate may occur. An alternative, and presumably a further option which was also available in November, would be to dissolve the House of Representatives and perhaps permit a half-Senate poll, depending on the circumstances at the particular time. The possibility of half-Senate elections, however, raises matters of judgment which are not easy to resolve. Such matters as the time delays before new Senators can take their place, the possibility of accidental majorities because of Territorial elections and replacing dead or retired Senators would be factors to be weighed in the balance in determining the exercise of reserve powers in such circumstances.

For the time being, the events of October-November, clearly leave largely unanswered a series of questions which only history and perhaps the ballot box will help to answer in the context of determining the future role of the House of Representatives and the Senate in the working of national government. The precise solutions which might be expected when there is not a fortuitous bank of bills enabling a double dissolution is one example of this. In such a situation, s 57 seems to be ruled out from application. Recourse is needed therefore to other, less constitutionally directed means for dealing with the issue. The ultimate success of the Senate in bringing the Commonwealth Parliament to a dissolution also places in contention the way in which traditional British style constitutional practice may be relevant in the context of relations between the two Houses of Parliament. Conventions can and must play a role in our system of government. The Commonwealth Constitution clearly requires this in assuming the working of a system of responsible government. But essentially indigenous solutions, evolved through our own practice, should perhaps be more clearly recognized. The recent exercise of reserve powers by Sir John Kerr has pointed, for example, to the primacy which may be accorded in an essentially legalistic fashion to "written rules" even when these are non-justiciable. As an elected house, described by the Governor-General in his statement of 11 November as "a popularly elected chamber", with what is now seen as a potentially strong authority over supply, it could be, too, that the Senate, if it wished, could seek to re-invigorate the style of attitude to its powers which have been virtually dormant since the first decade of the century. It remains to be seen therefore, whether the Senate might develop now more along the lines of the US Senate, albeit with limits on its authority with respect to amending money bills and with a deadlock provision with no American counterpart. Such a development would, of necessity, bring new dimensions to the working of national government in Australia.

The recent crisis has pointed also to a weakness in the Commonwealth Constitution. Section 57, based on the experience of deadlocks between elected houses in the nineteenth century, was intended to resolve cases of impasse. But as recent events have shown, s 57 may be inappropriate today in the case of supply. As a result, the Crown in exercising its reserve powers, no matter how non-political this has been, will find its action, at least in the short term, judged by some by its political consequences. It would surely be in the best interests of government generally to minimize such possibilities although they cannot be removed entirely under the Westminster system. One way in which this could be achieved without upsetting the present authority of the House of Representatives and Senate under the Constitution would be to amend s 57 to deal specifically with deadlocks on supply, limiting the time perhaps to a month before the double dissolution clause could be brought into operation in such circumstances. Such a solution would not of course counter the lessons of our own and British history which have pointed to the need for forbearance in the use of what Todd described as "extreme rights". Nor

December 1975

AUSTRALIAN CURRENT LAW

would it obviate the need to pay heed to Todd's warning that unnecessary or abrupt dissolutions of Parliament "blunt the edge of a great instrument". Such a solution would, however, be compatible with the Commonwealth Constitution and provide at least more guidance than at present on the exercise of Crown powers in such circumstances. It would help also to remove the uncertainties which marked the October-November impasse within the Parliament. It would make more obvious the way in which it is the political process, in the last analysis, which must bear the responsibility and be held accountable for the risks and the possible benefits for the running of government when irreconcilable differences occur between two constitutionally almost equally powerful houses in a bicameral legislature.

ALEX C. CASTLES

Professor of Law
University of Adelaide

VICE-REGAL INITIATIVE AND DISCRETION

Speaking at the first of the Australian constitutional conventions (the National Australasian Convention of 1891) a Western Australian delegate observed that "responsible government... as applied to a federation, is distinctly not proved a success in Canada, and... as applied in the United Kingdom, has distinctly proved a failure". He went on to deliver that prophecy which, for decades, was dismissed as alarmist pessimism, but which is now an apt description of reality:

"[I]f that is the responsible government which it is proposed to graft upon our new federation, there will be one of two alternatives—either responsible government will kill federation, or federation in the form in which we shall, I hope, be prepared to accept it, will kill responsible government".¹

Ultimately the delegates to the constitutional conventions of the 1890's ignored that dire warning: ultimately they proceeded on the assumption (recognized or alluded to in such sections of the Constitution as s 44 and s 61) that our national government should be a responsible government. But, legally and superficially, at least, the executive arm of the Commonwealth of Australia is personified by the Governor-General in whom are vested a substantial number of significant powers and functions.

The office of Governor-General is created by s 2 of the Commonwealth Constitution² and by clause 1 of Letters Patent³ dated 29 October 1900.

The functions and responsibility of the Governor-General are described in broad terms in s 2 and s 61 of the Constitution: as s 2 rather narrowly declares, he is to be the Queen's representative in the Commonwealth, to exercise such powers and functions of the Queen as the Queen may assign to him; or, as s 61 more generously states,

"The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution and of the laws of the Commonwealth".

The wording of these two sections, s 2 and s 61, is curiously contradictory: for s 61 reads like a wholesale investiture in the Governor-General for all powers and functions associated with the executive government of the Commonwealth, while s 2 appears to assert that the Governor-General may exercise only those functions specifically assigned to him by the Queen. This contradiction is compounded by the fact that the principal assignment of functions under s 2 (that contained in the Letters Patent of 29 October 1900) purports to assign to the Governor-General functions, most of which are expressly vested in him by various sections of the Constitution.⁴

The question whether s 61 of the Constitution vests in the Governor-General all the executive powers which would otherwise be exercisable by the Queen, or whether the Governor-General has only those powers which are specifically assigned to him by the Constitution, Commonwealth legislation and prerogative instrument, is not settled. The weight of judicial authority favours the view that s 61, together with the specific conferrals of power in other sections of the Constitution, authorize the Governor-General to exercise any of the powers and functions of the Crown in respect of the Commonwealth of Australia.⁵

Whatever the resolution of that question, the political functions of the Governor-General (that is, his functions in relation to elections, sittings of Parliament, and composition of the Ministry) depend upon specific sections of the Constitution.

Section 5 authorizes the Governor-General to appoint times for holding sessions of Parliament, and to prorogue Parliament and dissolve the House of Representatives—

DIGEST

Section 28 confirms that the House of Representatives may be dissolved by the Governor-General before the expiry of its three year maximum duration.

No powers are vested in the Governor-General in relation to the regular ("half-Senate") elections for the Senate. Unless there is a double dissolution, those regular elections fall due every three years; and within the limits established by the Constitution, s 13, the Commonwealth Electoral Act 1918-1973, ss 62, 63, 64, 65, and the several State Senate Election Acts, the power to issue writs for these elections is vested by s 12 of the Constitution in the State Governors.

However, s 57 gives the Governor-General a key role in the double dissolution of the House of Representatives and the Senate. Given the condition precedent of a prolonged deadlock between the two houses over a bill originating in the House of Representatives, "the Governor-General may dissolve the Senate and the House of Representatives simultaneously". The writs for the consequential Representatives election are issued by the Governor-General in Council (s 32), those for the Senate election by the several State Governors (s 12); in each case the writs "shall be issued within ten days from ... the dissolution".

Section 64 of the Constitution gives to the Governor-General the power to appoint and dismiss Ministers of State for the Commonwealth. These Ministers of State are declared by s 64 to be, *ex officio*, members of the Federal Executive Council, a body whose functions are described in s 62 of the Constitution—"to advise the Governor-General in the government of the Commonwealth". Section 62 goes on to authorize the Governor-General to appoint and dismiss members of the Executive Council and to summon Councillors to its meetings.

According to the Constitution, then, the Governor-General occupies a pivotal position in the framework of Government: he decides when elections to the House of Representatives are to be held, when Parliament is to sit, when there is to be a double dissolution, who are to be the Ministers of State and who is to attend meetings of the Executive Council. And each of these functions appears to be at the discretion of the Governor-General: for example, he "may ... dissolve the House of Representatives" (s 5 and s 28); he "may dissolve the Senate and the House of Representatives simultaneously" (s 57); he "may appoint ... the Queen's Ministers of State for the Commonwealth" (s 64). But none of the people involved in drafting the Constitution believed that they were establishing a system of autocracy, however benevolent. As Quick and Garran expressed it in their commentary on s 5 (the power to summon, prorogue and dissolve Parliament):

"All those powers which involve the performance of executive acts ... will, in accordance with constitutional practice, as developed by the system known as responsible government, be performed by the Governor-General by and with the advice of the Federal Executive Council ... parliamentary government has well established the principle that the Crown can perform no executive act, except on the advice of some Minister responsible to Parliament. Hence the power nominally placed in the hands of the Governor-General is really granted to the people through their representatives in Parliament. Whilst therefore, in this Constitution some executive powers are ... vested in the Governor-General, and others in the Governor-General in Council, they are all substantially in *pari materia*, on the same footing and, in the ultimate resort, can only be exercised according to the will of the people."⁶

Quick and Garran were writing at the close of the nineteenth century, after more than two hundred years of the evolution of responsible government within the British context, after 55 years of experience of the system in the Australian colonies and after the draftsmen, the Convention delegates and the electors of the federating colonies had resolved that the executive government of the new Commonwealth of Australia should be "responsible government on the British model".⁷

To what extent were the expectations of the founding fathers and of the people of Australia borne out by events? What has been the Australian experience of responsible government? The short answer is that Governors-General have, with few (and those quite peculiar) exceptions, acted on the advice of their Ministers when performing their constitutional functions.

On only three occasions has a Governor-General refused to dissolve the House of Representatives when advised to do so by his Prime Minister. On each of those occasions, the Prime Minister had been defeated on a vote of confidence in the House of Representatives. In August 1904 the Labor Government led by Watson was defeated 36 votes to 34 on a Conciliation and Arbitration Bill. Watson sought a dissolution from Lord Northcote and, when this was refused, he resigned. Northcote then called on the Leader of the Opposition, Reid, to form a ministry. That ministry survived until July 1905, when it was defeated during the Address-in-reply debate, by 42 votes to 25. Northcote, still the Governor-General, refused Reid's request for a

December 1975

DIGEST

the House of Representatives: he declared that he had sought "information from representatives of all sections of the House with a view to determining where the majority lay", and that he believed that a Government "could only be formed from that section of the House" consisting of the National Party.¹² To my knowledge, that is the only occasion on which a Governor-General has articulated his belief that he should look to the House of Representatives for his Prime Minister. However, in the 75 years until 11 November 1975, every Governor-General has acted in conformity with that principle.

The occasions when a Governor-General has acted on the advice of his Ministers are, of course, innumerable. That this practice of acting on ministerial advice is more than merely habit is borne out by the responses of two Governors-General whose responsiveness to ministerial advice was challenged. In 1914, when Prime Minister Cook advised Munro-Ferguson to grant a double dissolution, the Senate (controlled by the Labor Party) formally addressed the Governor-General seeking the reasons advanced by Cook for the double dissolution. Munro-Ferguson replied:

"I am advised by [my Advisers] that the request... is one the compliance with which would not only be contrary to the usual practice, but would involve a breach of the confidential relations which should always exist in this as in all other matters between the representative of the Crown and his Constitutional Ministers. I am advised further that to accede to the request... would imply a recognition of a right in the Senate to make the Ministers of State for the Commonwealth directly responsible to that Chamber... and that such a recognition would not be in accordance with the accepted principles of responsible government."¹³

Again, in 1931, the Senate objected to the Government's promulgation through the Governor-General of regulations under the Transport Workers Act 1928, regulations in identical terms to those which the Senate had just disallowed. The Senate formally addressed the Governor-General, Isaacs, requesting him "to refuse to approve" the regulations. Isaacs replied, refusing to act as requested, and asserting that "normally by constitutional practice, confirmed and perhaps strengthened by the pronouncement of the Imperial Conference of 1926, I am bound to act upon the advice of my Ministers". He went on to declare that where a political conflict developed between the House of Representatives and the Senate, his

"plain duty... is simply to adhere to the normal principle of responsible government by following the advice of the Ministers who are constitutionally assigned to me for the time being as my advisers, and who must take the responsibility of that advice. If, as you request me to do, I should reject their advice, supported as it is by the considered opinion of the House of Representatives, and should act upon the equally considered contrary opinion of the Senate, my conduct would, I fear, even on ordinary constitutional grounds, amount to an open personal preference of one House against the other—in other words, an act of partisanship."¹⁴

The "pronouncement of the Imperial Conference of 1926" referred to by Isaacs was the formal Declaration (known as the Balfour Declaration), issued by the 1926 Conference of Dominion Prime Ministers, that it was "an essential consequence of the equality of status existing amongst the members of the British Commonwealth of Nations that the Governor-General of a Dominion is the representative of the Crown holding in all essentials the same position in relation to the administration of public affairs in a Dominion as held by His Majesty the King in Great Britain...".¹⁵

The position of the Queen in relation to her prerogative and executive functions within the United Kingdom is described in these terms by Professor S A de Smith:

"The principal convention of the British constitution is that the Queen shall exercise her formal legal powers only upon and in accordance with the advice of her Ministers, save in a few exceptional circumstances. In independent Commonwealth countries the powers of the Governor-General... are similarly restricted except in so far as they may have been enlarged or attenuated by the text of the constitution."¹⁶

De Smith goes on to outline the exceptional circumstances: these are confined to the situation where a government has lost control of the House of Commons, or is attempting to prolong the life of Parliament to avoid an election, or is attempting duress or fraud to influence an election. In the latter situations the Crown might dismiss a ministry ("an ultimate weapon which is liable to destroy its user") or force a dissolution (the Crown "would then become a 'football of contending factions'").¹⁷

Taking all this evidence into account, one is driven to the conclusion that, while substantial executive powers and functions are vested in the Governor-General under

AUSTRALIAN CURRENT LAW

dissolution and, when Reid resigned, commissioned Deakin to form a government, which lasted until November 1908, when Deakin resigned and Fisher formed a Labor government. Fisher's government was defeated on a motion of no confidence in May 1909, by 39 votes to 30. Fisher asked Lord Dudley, the then Governor-General, to dissolve the House of Representatives and resigned when the dissolution was refused. Dudley commissioned Deakin to form a government which endured until the general election of April 1910.^{7a}

On two other occasions a Governor-General has asserted some discretion to consider (and, perhaps, act against) the advice of his Prime Minister. In 1914, the Cook Ministry, which had a slender majority in the House of Representatives and very small minority in the Senate, introduced a Bill in the Representatives to abolish employment preference for trade unionists in the Commonwealth public service. The Labor majority in the Senate quite predictably rejected the Bill; after an interval of three months, the Representatives again passed the Bill and the Senate again rejected it. Cook then advised the Governor-General, Munro Ferguson, to grant a double dissolution under s 57 of the Constitution. Munro-Ferguson, new to Australia, asked Cook if he might consult the Chief Justice, Sir Samuel Griffith, and Cook "most willingly" agreed. Griffith wrote that the double dissolution power was so extraordinary that it should be exercised only where the Governor-General was "personally satisfied, after independent consideration of the case" that the deadlock was over a bill of public importance or that the relations between the two houses had reached a state of practical deadlock. Griffith concluded that, while the Governor-General "cannot act except upon the advice of his Ministers, he is not bound to follow their advice but is in the position of an independent arbiter".⁸

Munro-Ferguson granted the double dissolution sought by Cook, whose government was soundly defeated at the subsequent election.

In 1951, when Menzies advised Governor-General McKell to grant a double dissolution, and supported his request with opinions of the Attorney-General and the Solicitor-General, McKell replied: "I have given most careful consideration to the documents referred to and have decided to adopt the advice tendered in your [Menzies'] memorandum."⁹ McKell did not consult with the then Chief Justice, Sir John Latham.

It is a reasonable inference that McKell regarded himself as having a discretion to accept or reject his Ministers' advice, much as that discretion had been outlined by Griffith in 1914.

So far as the records show, the occasions when a Governor-General has exercised or claimed an independent discretion are confined to these narrow situations: where the current ministry has lost its control of the House of Representatives (as in 1904, 1905 and 1909); and where the current Ministry is seeking a double dissolution under s 57 (as in 1914 and 1951). But it is worth emphasizing that, while the last two¹⁰ events suggest an independent discretion in the Governor-General, neither Munro-Ferguson nor McKell chose to act against the advice of their Ministers. Indeed, until the events of 11 November 1975, it would have been regarded as practically impossible for a Governor-General to refuse those double dissolutions. The requests were prompted, not by a Ministry's defeat in the House of Representatives, but by that Ministry's inability to control the Senate. Neither in 1914 nor in 1951 was there any possibility of an alternative Ministry being formed, capable of controlling the House of Representatives. If the requests had been refused, the Cook Ministry and the Menzies Ministry would, presumably, have resigned: and on whom could the Governor-General have then called to form a Ministry? As Crisp wrote in 1965, "In all the circumstances, the Governor-General could in 1951 do nothing else... [T]here was no alternative Government capable of carrying on".¹¹ On the other hand, the Governor-General was able, in 1904, 1905 and 1909, to replace the defeated Ministry with one capable of controlling the House of Representatives.

The notion that a Governor-General should, when appointing a Ministry, confine his choice to those persons who can control the House of Representatives was asserted unequivocally by Munro-Ferguson in 1918. In December 1917 the National Government, led by Hughes, held a plebiscite on the issue of conscription for overseas service. The electorate voted against conscription (as it had in October 1916). Hughes thereupon resigned as Prime Minister although his leadership of the National Party, which held a large majority in the House of Representatives, was not challenged. The Governor-General, Munro-Ferguson, called on Hughes to form another Government and explained his request in a memorandum to Hughes, in which he referred to his "paramount duty... to make provision for carrying on the business of the country in accordance with the principles of parliamentary government". He asserted that in appointing Ministers, "his choice must be determined solely by the parliamentary situation. Any other course would be a departure from constitutional practice and an infringement of the rights of Parliament". And Munro-Ferguson went on to make it clear that by the "parliamentary situation", he meant

AUSTRALIAN CURRENT LAW

the Commonwealth Constitution, those powers and functions are, in reality, controlled by the Governor-General's Ministers of State who, in turn, owe their position to their ability to control the House of Representatives. This reality was explicitly recognized by Jacobs J as recently as 29 October 1975 when he said, in the course of his judgment in the Representation of the Territories Case, of the Governor-General's double dissolution power.

"It is an executive discretion or power which the Governor-General exercises. He does not act as *persona designata* or in curial or quasi-judicial role. He acts either on the advice of the Executive Council or as an officer under the instructions of the Queen in all cases subject to the Constitution. No doubt it was envisaged in 1900 that the Queen would at times give instructions on the advice of her United Kingdom ministers, but it may now be taken that not only the Governor-General as the medium through which the Queen exercises her executive and prerogative powers, but also the Queen herself, acts on the advice of her Australian ministers in all matters appertaining to the government of the Commonwealth. Neither the Queen nor the Governor-General acts personally."¹⁸

Within the text of the Commonwealth Constitution, it is as if the terms of s 62 ("There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth") were mandatory upon the Governor-General. Certainly Governors-General have consistently acted (until 11 November 1975) as if that were so—that is, they have consistently acted on the advice of their ministers, controlling the House of Representatives.

On the other hand, however, the Governors of the Australian States have asserted rather more independence of their ministerial advisers, even during the past 50 years. To some extent this may be a relic of the time when colonial Governors saw themselves as agents of Her Majesty's Government in Whitehall, and when they conceived that their ultimate duty was to ensure that Her Majesty's imperial interests were not threatened by the actions of a colonial government.¹⁹ Certainly the Royal Instructions issued to State Governors contemplate the possibility that the Governors will not always act on ministerial advice. Clause 6 reads:

In the execution of the powers and authorities vested in him, the Governor shall be guided by the advice of the Executive Council, but if in any case he shall see sufficient cause to dissent from the opinion of the said Council he may act in the exercise of his said powers and authorities in opposition to the opinion of the Council, reporting the matter to Us without delay, with the reasons for his so acting.²⁰

There is no equivalent clause in the Royal Instructions to the Governor-General of the Commonwealth. It might be argued, therefore, that, so far as the formal instruments are concerned, the Governors of the Australian States are placed in a very different position from the Governor-General. Indeed, the different systems, which have evolved for the appointment of State Governors and the Governor-General reinforce that argument. For each State, Governors are appointed by the Queen acting on the advice of the Secretary of State for Foreign and Commonwealth relations (that is, a Minister in the United Kingdom Government). On the other hand, Governors-General are appointed by the Queen on the advice of her Australian Ministers. (That practice was firmly established in 1930 when Scullin's Labor Government prevailed on George V to appoint Sir Isaac Isaacs as Governor-General, and an Imperial Conference confirmed that only the King and the Dominion ministers were interested in the appointment of that Dominion's Governor-General. On the other hand Western Australia went without a Governor from 1933 to 1947, because the United Kingdom Government would not advise, as the Western Australian Government proposed, the appointment of an Australian.)

It is certainly true that, as a matter of historical observation, State Governors have shown more independence of their ministers than any Governor-General (until 11 November 1975). Apart from the occasions²¹ when a Governor has refused, or claimed that he could refuse, a dissolution of Parliament to a Ministry defeated in the lower house on a motion of confidence, there are two well-known and, for our present purposes, interesting occasions.

In 1932 the Governor of New South Wales, Sir Philip Game dismissed the Premier of that State, Jack Lang, who still had the confidence of the New South Wales Legislative Assembly. The immediate cause for the dismissal was Lang's refusal to withdraw an instruction to members of the Public Service, to the effect that they should

- "(1) ... refrain from meeting governmental expenditure by the drawing of cheques;
- (2) ... hold all moneys collected, forwarding them to the Treasury; and
- (3) ... insist upon payment to Government in cash or by bearer cheques".

DIGEST

The Governor believed that the terms of this instruction "directed Public Servants to commit a direct breach of the law as set out in Proclamation No 42"²², a proclamation issued by the Commonwealth Government, and the validity of which was never tested. Lang not only refused to withdraw this instruction to the Public Service, but declined to provide Game with a legal opinion on the instruction's legality.

Certainly there has been considerable controversy over Game's actions: if they are to be justified it must be in accordance with a principle that a Governor may assess the validity of Ministers' activities and act against those Ministers if the Governor believes those activities to be illegal or if those Ministers refuse to furnish legal opinion which establishes the legality of those activities.

In 1952, the Victorian Governor, Sir Dallas Brooks, rejected the advice of two successive ministries within as many days.

In October 1952, a Country Party Government, led by Mr J McDonald, held the confidence of the Legislative Assembly as the result of the support of the Liberal Country Party led by Mr L G Norman. The Australian Labor Party, led by Mr Cain, and the Electoral Reform League (a group of defectors from the Liberal Country Party), led by Mr Hollway, together held a majority in the Legislative Council. When the McDonald Government's Supply Bill came to the Council after passage by the Assembly it was rejected because of "the inequitable electoral system".

The Premier then sought a dissolution of the Assembly from the Governor, Sir Dallas Brooks. Brooks consulted with the other three party leaders. Norman advised a dissolution, declaring his support for the McDonald Government. Cain advised that the Australian Labor Party members would vote Supply only if a Government led by Hollway was commissioned in order to implement electoral reform. Hollway advised that, if he were commissioned, he would guarantee Supply.

The Governor refused a dissolution to McDonald and commissioned Hollway, conditionally upon his obtaining Supply from the Council. The Supply Bill was then passed but when the Hollway Government met the Assembly it was defeated on a vote of no-confidence. Hollway then sought a dissolution from the Governor. This was refused, Hollway resigned, and McDonald was commissioned to form another Government and was immediately granted a dissolution.²³

This incident confirms that, within the State context at least, the Crown might refuse to act on ministerial advice in two situations, where the business of government would be imperilled by a lack of supply; and where the ministers do not have the support of the Lower House of Parliament. The exact considerations which moved the Governor are not known²⁴ but we may assume that his refusal of McDonald's first request for a dissolution was prompted by the Legislative Council's rejection of Supply.

How relevant to the position of the Governor-General are such incidents? As a matter of constitutional theory it could be argued that cl 6 of the Royal Instructions recognizes that a State Governor has a discretion to act against the advice of his Ministers—but there is no such recognition of any discretion in the Governor-General. And the Balfour Declaration of 1926 was in terms limited to the Governors-General of the Dominions: it made no reference to the Governors of the States. If any analogy is to be drawn, it might be argued, it is between the Governor-General and the monarch—the Queen within the United Kingdom; and the State Governors stand in a special, indeed peculiar, position.

But such an argument assumes that the Royal Instructions can be regarded as significant; that cl 6, in particular, is more than an anachronistic expression of the notion that a State Governor could be influenced or controlled by the Imperial Government rather than his local Ministers. I cannot see how Clause 6 can be significant: a State Governor's decision to decline Ministerial advice can only be taken in a situation where he believes an alternative viable Ministry is available or where, as in Victoria in 1952, such a decision is essential to preserve the constitutional government of the State. This decision will be influenced by the Governor's reading of the political situation, not by the terms of the Royal Instructions.

Even before 11 November 1975, it was feasible that the Governor-General, or the Queen, might exercise a similar independent discretion. Although no monarch has refused a request for dissolution from United Kingdom Ministers since Queen Victoria came to the throne, it has been confidently argued that "the Queen may properly refuse a Prime Minister's request for a dissolution if she has substantial grounds for believing (i) that an alternative Government, enjoying the confidence of a majority of the House of Commons can be formed without a general election, and (ii) that a general election held at that time would be contrary to the national interest".²⁵ The fact that no dissolution has been refused by the monarch can be explained by the substantial stability of British party politics over the last century.

December 1975

AUSTRALIAN CURRENT LAW

Again, although no Governor-General had acted against ministerial advice between 1909 and 1975, there was no evidence that Governors-General regarded themselves as absolutely bound to act on Ministerial advice, at least where the Ministry had lost control of the House of Representatives.²⁶ The explanation for the sharp differences between the Commonwealth experience and that of, say, Victoria²⁷ probably lies in the relative political stability at the Commonwealth level. There had been considerably more opportunity (and necessity) for Victorian Governors to exercise their discretion in the extreme instability that characterized Victorian politics until the late 1950's.

But now, it seems, political instability has returned to the Commonwealth sphere: certainly, refusal of the Senate to vote on Supply in October/November 1975 has opened up the real prospect of long-term political instability, and faced the Governor-General with some difficult choices.

On 11 November, 1975 the Prime Minister, Gough Whitlam, called on the Governor-General, Sir John Kerr, with the apparent intention of advising the Governor-General to call upon the State Governors to issue writs for a half-Senate election (the issue of such writs being within the State Governor's prerogative under s 12 of the Commonwealth Constitution).

However, the Governor-General advised the Prime Minister that his commission was terminated, because the Prime Minister could not obtain supply and would not resign or advise an election. The Governor-General asserted that there was a "reserve power in the Governor-General to dismiss a Ministry which has been refused supply by the Parliament and to commission a Ministry, as a caretaker ministry which will secure supply and recommend a dissolution". And the Chief Justice of the High Court, Sir Garfield Barwick, (in an extraordinary opinion, furnished to the Governor-General) referred to the Governor-General's "authority" to dismiss the Prime Minister and his "authority and duty" to commission the Leader of the Opposition.

It seems to me that, within the context of the Australian experience, this vice-regal action was unprecedented. The dismissal of Lang by Governor Game in 1932 is not relevant, for Game was convinced (perhaps justifiably) that Lang was acting illegally: no charge of illegality was made against Prime Minister Whitlam.

Again the refusal, by Brooks, of McDonald's request for a dissolution is not in point, for then (in 1952) the Upper House had committed itself and had refused Supply. On the other hand, the Senate did no more than defer consideration of the Appropriation Bills in October/November 1975. It was by no means established that the Senate would persist in its deferral until the end of November, when supply would have been exhausted. Certainly on 11 November 1975 the Prime Minister had sufficient funds, properly appropriated, to allow the business of government to carry on for more than two weeks, and he had some prospect (which he was denied the opportunity of testing) of persuading the Senate to grant supply beyond that date.

If the action of Sir John Kerr is to be justified, it must be because of some deeply rooted reserve power in the Governor-General to act against ministerial advice where the Governor-General believes that the interests of the community demand this. It could be argued that the constitutional basis for this lies in the mandate contained in s 61 of the Constitution, that the Governor-General should maintain the Constitution. Or it might be argued that, despite our 75 years of experience, the Governor-General is essentially a free agent and always has a discretion to act against ministerial advice.

But such an ill-defined reserve power depending on the Governor-General's assessment of the political, economic and social realities (an assessment which may well be faulty), is hardly satisfactory in that it introduces an unpredictable element into the political process. As Harold Laski wrote in 1936,

"The strength of the Crown rests upon the conviction that its neutrality is, in all cases, beyond suspicion. It is difficult to maintain that conviction when not only is the extent of its powers unknown, but when, also in the passion of party strife, demands for their use are made which go far beyond those limits which would enable the conviction of neutrality to be preserved ... The present elasticity of the Crown's powers leaves dangerous room for the differences between men over ends to cloud their judgment about the legitimacy of the means the Crown might be persuaded to invoke upon critical occasion".

PETER HANKS,
Senior Lecturer,
Monash University

DIGEST

Footnotes

- 1 *Convention Debates, Sydney* (1891) 280. The delegate was Hackett, and, as a representative of Western Australia, he would have been particularly interested in preserving the position of the smaller States, who could hardly expect to exert much influence over a ministry responsible to a popularly elected House in the national parliament. And, of course, the colony of Western Australia introduced its own system of responsible government in 1890.
- 2 Constitution of the Commonwealth of Australia, as enacted by the Commonwealth of Australia Constitution Act 1900 (UK) s 9.
- 3 Letters Patent, dated 29 October 1900, passed under the Great Seal of the United Kingdom, Constituting the Office of Governor-General and Commander-in-Chief of the Commonwealth of Australia.
- 4 Compare, for example, cl I of the Letters Patent (establishing the office of Governor-General and Commander-in-Chief) and ss 2 and 68 of the Constitution; Clauses III and IV (authorizing the Governor-General to appoint and remove office holders) and ss 62, 64, 67, 72 (i), (ii) and 103 (i), (ii); Clause 5 (authorizing the Governor-General to summon, prorogue or dissolve Parliament) and ss 5, 26 and 57.
- 5 *A-G (Coni) v CSR Co Ltd* (1913) 17 CLR 644; *Joseph v Colonial Treasurer of NSW* (1918) 25 CLR 32, 46; *R v Burgess: Ex parte Henry* (1936) 55 CLR 608, 683-4; *Official Liquidator of E O Farley Ltd v Federal Commissioner of Taxation* (1940) 63 CLR 278, 303, 322; *Australian Communist Party v Commonwealth* (1950) 83 CLR 1, 230.
- 6 Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901), 406.
- 7 La Nauze, *The Making of the Australian Constitution* (1972), 152: the adoption of responsible government was decided only after considerable debate: in particular, there was considerable doubt whether responsible government could be compatible with federalism: could the executive government, responsible to the House of Representatives, co-exist with the powerful Senate! *Id.*, 41-2.
- 7a Hughes, *A Handbook of Australian Government and Politics* (1968), 6, 8.
- 8 See Crisp, *Australian National Government* (1965), 369-70.
- 9 *Commonwealth Parliamentary Papers*, 1957-8, vol 5, 937.
- 10 The memoranda relating to the double dissolution of April, 1974 have not been made public.
- 11 Crisp, *op cit*, 371-2.
- 12 83 *Comm Parl Deb*, 2896. The episode is discussed in Sawyer, *Australian Federal Politics and Law 1901-1929* (1956), 129-34; Evatt, *The King and His Dominion Governors* (2nd ed 1967), ch XVIII; Ence, *Cabinet Government in Australia* (1962), 177-80.
- 13 74 *Comm Parl Deb*, 2419-20.
- 14 130 *Comm Parl Deb*, 2595-6.
- 15 Report of Inter-Imperial Relations Committee, Imperial Conference 1926, reproduced in Keith, *Speeches and Documents on the British Dominions* (1932), 164.
- 16 de Smith *Constitutional and Administrative Law* (2nd ed, 1973).
- 17 *Id.*, 103-9.
- 18 *Western Australia v Commonwealth (Petroleum and Minerals Authority Case)* (1975) 7 ALR 159 at 213.
- 19 Bailey, "Self-Government in Australia 1800-1900", in *Cambridge History of the British Empire*, vol 7, 399-400, 405-6.
- 20 Instructions passed under the Royal Sign Manual and Signet to the Governor of the State of Victoria and its Dependencies in the Commonwealth of Australia.
- 21 As in Tasmania in 1923 and 1956, and in Victoria in 1924, 1943 and 1952.
- 22 Evatt, *op cit*, 163.
- 23 On this episode, see the *Age*, 21 October to 1 November, 1952.
- 24 The Governor declined to have the relevant correspondence published.
- 25 de Smith, *Constitutional and Administrative Law* (1971), 105.
- 26 See discussion of 1929 dissolution in Ence, *op cit*, 88-90; and of 1931 dissolution in Crisp, *op cit*, 368-9.
- 27 Where dissolutions were refused in 1924, 1943 and 1952.
- 28 Foreword to Evatt, *The King and His Dominion Governors* (2nd ed, 1967).

UPPER HOUSES OUTSIDE AUSTRALIA

This essay has been prompted by the constitutional and political ramifications of the refusal by the Australian Senate in October and November 1975 to pass Appropriation Bills passed by the House of Representatives. It is not, therefore, as comprehensive as its title suggests. About half of the legislatures of the world have upper houses. These upper houses have been created to satisfy a great variety of purposes and motives and as a result they occupy vastly differing roles in their respective constitutional systems. It would not be possible to canvass thoroughly these variations and to make a comprehensive comparative study in short compass, and in any event such a study would be incomplete unless account were taken of how each second chamber actually functioned in the total political context.

The essay has a more limited objective. It will deal in the first place with some very general themes which have a direct bearing on the role of the Australian Senate. Secondly, a somewhat more detailed study will be made of the upper houses in Canada, the Federal Republic of Germany (West Germany) and Switzerland. The

December 1975

AUSTRALIAN CURRENT LAW

Canadian Senate deserves particular study because its legal powers are almost identical to those of the Australian Senate and because it operates in a very similar constitutional and political context to that of Australia. The two European upper houses have been chosen for study because the economic and social cultures of these countries is similar to that in Australia. These countries also have federal systems.

Legislative and executive branch relationships

An important factor influencing the strength of upper houses is the nature of the relationship between the legislature and the executive in the constitutional system. For the purposes of this study, the contrast to be drawn is between, on the one hand, systems where the executive is responsible to the legislature, and, on the other, systems where the executive is relatively independent of the legislature.

In a system of responsible government, the tenure in office of the executive authority is dependent upon its maintaining the support of a majority of the lower house of the legislature. This of course is the system operating in the United Kingdom and in many Commonwealth countries. In such a system, the upper house is usually weaker than the lower house, and, in particular, the upper house may not be able to veto absolutely legislation relating to the raising or expenditure of finance. This correlation between a system of responsible government and a weak upper house is succinctly expressed by Wheare in these words:

There is a strong belief in these countries that if there is cabinet government, the cabinet can be responsible to one house only, and that house must be the popularly elected house... It is natural to conclude, therefore, that a cabinet system encourages, if indeed it does not require, the supremacy or at least the superiority of one chamber over the other. A cabinet it would seem must be responsible to one chamber: it cannot be responsible to two.¹

The United Kingdom provides the most well-known example of a system where the growth of responsible government led to a weakening of the power of an upper house. The history of the conflicts between the House of Commons and the House of Lords is well-known and will not be repeated in any detail here.² As a result of the *Parliament Acts* of 1911 and 1949, the House of Lords cannot delay the passage of ordinary legislation for more than twelve months and cannot delay a money bill for more than one month. There is however one significant exception—the consent of the Lords is required to pass a Bill to extend the life of the Parliament. Prior to the Act of 1911, the power of the Lords was limited only by conventions which had evolved over several centuries, and it is difficult to be precise about what was the content of these conventions at a particular point of time. The Act of 1911 was enacted following a crisis caused by the rejection by the Lords of a Supply Bill, but this does not by itself establish that prior to 1911 it was generally accepted that the Lords did have the power to reject. Many of the views expressed at the time were of course influenced by the political context, but it is nevertheless the case that many condemned the action of the Lords as improper.³

In a system where the executive is independent of the lower house, there is less reason to place the upper house in a subordinate position and in such a system the relative strengths of the two houses will be determined by other considerations. Where the composition of the second chamber is democratic, it is likely to be relatively strong. Another important factor is whether the upper house is supposed to represent the component political units of a federation. This factor is of course of particular relevance in the Australian context.

Federal systems

With a few exceptions, federal States have upper houses and it is safe to see some connection between federalism and bicameralism. It is also often assumed that the upper house of a federal legislature will be relatively strong in order to protect the interests of the component political units of the federation. However, there is no necessary connection between strong upper houses and federalism. The important link seems to be rather whether the upper house represents units of the social and political system on a basis where each unit is represented equally irrespective of population.⁴ These units may be the political units of a federation, but they may in other systems represent other interests, for example, ethnic groups. What may be said therefore is that upper houses in federal systems are likely to be relatively strong where the political units of the federation are equally represented in the upper house.

The Senate of the Congress of the United States of America is an upper house which represents the States of the federation on an equal basis and which operates in a constitutional system where the executive is relatively independent of the legislature. As a result of the combination of these two factors, it is one of the strongest upper houses in the world.

The Senate is composed of an equal number of Senators from the States, (at present two), elected for six year terms by the electors of their States. The Representatives are elected from single-member electorates roughly equal in size. The federal executive

National Archives of Australia
Archives Item Control



32322823