Chapter 11

Reserve Powers of the Crown
Perils of Definition

Don Morris

What are the reserve powers of the Crown? I am tempted to begin this short paper with the familiar words of Justice Potter Stewart in *Jacobellis v. Ohio* about an entirely different subject when His Honour said:

> I shall not today attempt further to define the kinds of material to be embraced within that short-hand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . .[1]

This address is about the difficulty of defining the reserve powers, some examples of how they have been deployed, and one instance where they have been misunderstood. Any examination of the reserve powers of the Crown must axiomatically also consider the constitutional rights and the conventions that are comingled with them. We are all familiar with Walter Bagehot's commentary on the Sovereign's powers and duties, in *The English Constitution*.[2] *Halsbury's Laws of England* continues to recognise these rights today and has slightly modernised the language:

> The Queen still has the right to be consulted, the right to encourage, and the right to warn. However she also has the right to offer, on her own initiative, suggestions and advice to her ministers even when she is obliged in the last resort to accept the formal advice tendered to her.[3]

Professor Rodney Brazier believes there are five conventional rights:

> To be informed, to be consulted, to advise, to encourage, and to warn.[4]

Brazier makes the point that a right to be consulted necessarily involves the notion that the Sovereign may wish to express a view about the subject matter.

Several scholars have also had a good crack at trying to define the reserve powers. For the purposes of this address, I will begin with the summary provided on the website of the Office of the Governor-General. It states:

> . . . there are some powers which the Governor-General may, in certain circumstances, exercise without – or contrary to – ministerial advice. These are known as the *reserve powers*. While the reserve powers are not codified as such, they are generally agreed to at least include:
>
> 1. The power to appoint a Prime Minister if an election has resulted in a "hung parliament";[5]
> 2. The power to dismiss a Prime Minister where he or she has lost the confidence of the Parliament;
> 3. The power to dismiss a Prime Minister or Minister when he or she is acting unlawfully; and
> 4. The power to refuse to dissolve the House of Representatives despite a request from the Prime Minister.[6]

With great respect to the Governor-General's Office, I would submit that three of the four powers as they have listed them are wrong. The first power listed is "the power to appoint a Prime Minister if an election has resulted in a 'hung parliament'."

The Governor-General's reserve power to appoint a Prime Minister is not limited to this circumstance. Whilst conventionally the Governor-General will appoint the person who leads the largest parliamentary party, it is in fact a reserve power, even though a relatively circumscribed one.

Take just two recent examples, the appointment of Kevin Rudd as Prime Minister for the second time in 2013 and the appointment of Malcolm Turnbull on 15 September 2015.

On 26 June 2013 the Prime Minister, Julia Gillard, was replaced as leader of the parliamentary Labor Party by Kevin Rudd. That evening the Prime Minister wrote to the Governor-General to advise that Kevin Rudd had been elected leader of the federal Parliamentary Labor Party and recommended that the Governor-General send for Mr Rudd and ask him to accept appointment as Prime Minister.

Ms Gillard went on to say that she wished to resign as Prime Minister, with her resignation to take effect from the appointment of Mr Rudd to the office.

As Professor Anne Twomey has written, this letter adopted almost identical language to a similar letter Kevin Rudd had sent to the Governor-General when he was replaced as leader of his party in 2010 and one Bob Hawke had sent in 1991.[7]

The circumstances were, however, completely different in 2013 because the Government did not command a majority in the House of Representatives. The advisers to the Prime Minister should have taken note of that, and tailored any draft letter accordingly.

Julia Gillard was correct in not "advising" the Governor-General to appoint Kevin Rudd as Prime Minister. As a resigning Prime Minister she loses capacity to offer formal advice to the Governor-General because she could not be responsible to the House for any such advice.

She was wrong, however, to state that her resignation would take effect from the appointment of Mr Rudd to the office. She could have said that her resignation would take effect from the appointment of her successor.

In the circumstances that pertained, the Governor-General knew several things. She knew that the ALP did not hold a majority of seats in the House of Representatives. She also knew that several of the crossbench MPs who had signed written agreements to support the Gillard Government had made it explicit that their support was personal to Julia Gillard and would not necessarily be given to another person.

While it would have been objectively unlikely that enough of the crossbenchers would have supported the Leader of the Opposition, Tony Abbott, to form a government, there was at least that possibility, and it would have been perfectly proper for the Governor-General to see Mr Abbott and test whether he thought he could form a government.

At the time, the Governor-General sought advice from the Acting Solicitor-General on how she should respond to Julia Gillard's letter. The Acting Solicitor-General provided advice in person and then confirmed it in a short letter.

He said it was his opinion that the Governor-General should commission Mr Rudd as Prime Minister. In response to a question, he went on to say that it is open to the Governor-General to seek an assurance that he will announce his appointment at the first opportunity to

the House of Representatives, but that the Governor-General cannot insist on that assurance or make his appointment conditional.[8]

I would submit that the Acting Solicitor-General was right in the second part of his letter, but wrong in the first part.

It is not proper for the Government's legal advisers to give a formal opinion as to whom the Crown should commission, especially in the case of a hung parliament. What the Acting Solicitor-General should have said is that it was *open* to the Governor-General to commission Mr Rudd.

The problem with this advice, which was published, is that it could be seen to be a shield of protection for the Governor-General's actions. Her Excellency in fact had several valid courses open to her, including the one recommended by the outgoing Prime Minister.

It was reasonable for the Acting Solicitor-General to suggest that the Governor-General should ask the new Prime Minister to announce himself to the House at an early opportunity, because that is where the legitimacy of any government is found.

On 14 September 2015, Tony Abbott was replaced as leader of the parliamentary Liberal Party by a vote of Liberal parliamentarians. He remained Prime Minister until the middle of the next day. It later turned out that the new leader, Malcolm Turnbull, was fashioning a new coalition agreement with the National Party.

It is relevant to know that, in the 44th Parliament, the Liberal Party and Country Liberal Party had a total of 73 members. One of the Liberals was Speaker, however, and only had a casting vote in the event of a tied vote.

The ALP had 55 members. The National Party had 15, and there were five who either sat as Independents or as sole representatives of their particular party. That totals 75.

Mr Abbott, in his letter of 15 September, said he resigned from the office of Prime Minister from the time of the appointment of Mr Turnbull. This wording is almost identical to that written by Julia Gillard as Prime Minister to the Governor-General advising her to call Mr Rudd, and therefore is deficient for the same reasons in pre-empting the Governor-General's decision.

But, in a circumstance where the Liberal Party did not have a majority on the floor of the House, should the Governor-General have made enquiries of the leader of the National Party, Warren Truss, as to whether his party would support the new Prime Minister, given that a new coalition agreement was in the process of being negotiated and the Governor-General could not have that independent knowledge?

As it turns out, when Mr Turnbull went to Yarralumla on the afternoon of 15 September, he took with him a letter from Mr Truss addressed to the Governor-General. That letter said:

> Your Excellency
> This letter is to confirm that Mr Turnbull has the support of The Nationals in the formation of a Coalition Government under his leadership in the 44th Parliament.[9]

It was proper for Mr Truss to write that letter, and for Mr Turnbull to provide it to the Governor-General, before the swearing in, because it provided the Governor-General with written assurance that Mr Turnbull had the confidence of a majority of members of the House of Representatives.

But it was not competent for Mr Abbott to advise the Governor-General that his resignation takes effect on Mr Turnbull becoming Prime Minister.

The ability of a Prime Minister to advise the Queen or the Queen's representative ceases on the resignation of that person from office, because they cease to be responsible to the Parliament for that advice.

There may in fact be extreme occasions where the vice-regal representative must act to appoint a prime minister or premier without any recommendation or binding advice. An example is the appointment of John McEwen as Prime Minister on 19 December 1967 after the disappearance of Harold Holt.[10]

The second reserve power the Governor-General's Office suggests is, and I quote, "the power to dismiss a Prime Minister when he or she has lost the confidence of the Parliament."

No Prime Minister need have the confidence of the Parliament and, in fact, in Australia's history, at least half of the time they probably have not. Confidence of the House of Representatives is all that is required.

The third reserve power suggested is "the power to dismiss a Prime Minister when he or she is acting unlawfully." Prima facie, that seems unremarkable, but I will come back to that with a Tasmanian example where a vice-regal representative was formally advised to act unconstitutionally.

The fourth reserve power listed is "the power to refuse to dissolve the House of Representatives in spite of a request from the Prime Minister."

I would submit that this is also wrong, but would be right if the wording was changed to read, "the power to refuse to dissolve the House of Representatives *immediately*".

There have been numerous examples in Australia of the Crown's representatives declining a request to dissolve a Lower House if there appeared to be a viable alternative government available. It is quite reasonable for a Governor-General or Governor to send for leaders of other political parties or relevant parliamentarians to test whether they might have sufficient support in the House to form a ministry.

The test is linked to whether the person commissioned can face the House at an early opportunity to prove that any assurance they have given is, in fact, true. Otherwise the legitimacy of the invitation and its acceptance could be called into question and damage the standing of the Crown.

I would contend that there are at least two other reserve powers available to the Crown: the right not to accept advice about prorogation; and the right to confer Royal Assent contrary to ministerial advice.

So, what can we say about the reserve powers here? Are they definable in a comprehensive way? There is a variety of eminent views.

Professor Peter Boyce, our foremost political science scholar on the Crown, said that none of the three old Commonwealth monarchies, Canada, Australia or New Zealand, has made any serious attempt to codify the reserve powers, though there have been periodic suggestions that they should do so.[11]

Sir Harry Gibbs, in a paper written for Australians for a Constitutional Monarchy, said:

> According to the conventions, there are some powers which the Governor-General may exercise according to his own discretion, and without the advice, or even contrary to the

> advice, of the Ministry. These powers, which are rather misleadingly called 'reserve powers', are designed to ensure that the powers of the Parliament and the Executive are operated in accordance with the principles of responsible government and representative democracy, or in other words to ensure that the Ministry is responsible to Parliament and that the ultimate supremacy of the electorate will prevail. The reserve powers provide an essential check against abuse of power by the Executive or by Parliament. In Australia . . . they fill a real need in relation to the Executive.[12]

H. V. Evatt, whose book, *The King and His Dominion Governors*,[13] remains the seminal text, thought that they should be set out in positive law. He wrote that the best way to help a Governor to understand the scope of the reserve powers is to "ascertain, define, declare and enforce rules which can be applied to govern the exercise of the reserve powers of the Crown's representative."

In considering the establishment of an Australian republic, Sir Gerard Brennan, a former Justice and Chief Justice of the High Court, has made the suggestion that a small "Constitutional Council" be set up, in his words, to *supervise* the exercise of a President's reserve powers.[14]

Prime Minister Paul Keating, in his 1995 republic proposal, said:

> [T]he reserve powers currently possessed by the Governor-General would remain with the President, and the Constitution would provide that the constitutional conventions governing the exercise of those powers would continue, but the conventions would not be spelt out.[15]

> In its report, the 1998 Constitutional Convention proposed that the *undefined* reserve powers and relevant conventions should continue to exist in an Australian republic.

> Accordingly, the 1999 Bill would have authorised the Australian President to exercise a reserve power "in accordance with the constitutional conventions relating to the exercise of that power," accepting at the same time that the conventions should be allowed to evolve.

Well, that seems to me to be as clear as mud.

Let us look at some of these more elusive jelly fish to see if we can indeed catch hold of them.

Prorogation

Let us start with something very topical – prorogation. The Constitution sets out very clearly that the Governor-General may prorogue a session of Parliament and summon it to meet in new session.

But in doing so, is the Governor-General obliged to act on the advice of the Prime Minister?

The answer to that question, I submit, is "Both yes and no, depending on the circumstances."

On 21 March 2016, the Prime Minister wrote to the Governor-General advising him to exercise his power under section 5 of the Constitution to prorogue the Parliament and to summon it in a new session.

Accompanying the Prime Minister's request was a letter from the Attorney-General assuring the Governor-General that it would be within his constitutional powers and consistent with his duty to accept the Prime Minister's advice.

The Attorney cited 28 times since 1901 when the Parliament of the Commonwealth of Australia had previously been prorogued: and 17 other times when it has been prorogued prior to dissolution. Importantly, the Attorney wrote:

> In line with the principles and conventions of responsible government, these powers are, of course, exercised on ministerial advice.[16]

What the Attorney-General was saying was entirely consistent with the general constitutional approach approved of by Bagehot, Evatt and many other scholars: that the responsibility for accepting advice tendered rests with the ministers giving that advice.

And Sir Peter Cosgrove's response accepting the Prime Minister's advice was unremarkable.

But could there be circumstances where the Governor-General might have the discretion not to accept advice to prorogue?

Certainly there could be. For example, if the governing political party has changed its leader and the person holding the commission as Prime Minister has, for a short period, not been the leader of any party. When they lost the leadership of their respective parliamentary parties, both Kevin Rudd and Tony Abbott continued to be Prime Minister until the following day.

Could they have advised the Governor-General to prorogue or, indeed, to dissolve the House?

Certainly they could have. And could the Governor-General have declined to accept that advice? Yes – most people would say it would be the correct response to delay a decision until the Governor-General could confirm that was also the advice of the incoming Prime Minister.

A good example of where a vice-regal representative counselled his premier on prorogation occurred in Tasmania in 1981. This example has been previously outlined to The Samuel Griffith Society by a distinguished former Governor of Tasmania, William Cox.[17] Essentially the facts were that a new Premier of Tasmania, Harry Holgate, had seen his immediate predecessor and another member cross the floor of the House of Assembly, depriving him of his majority, and the House had then risen for the Christmas break.

The Premier called on the Governor on 14 December 1981 to advise him to prorogue the Parliament until May 1982, in order that he could establish his government. He told the Governor that the situation in the House of Assembly was "volatile and unstable" and gave some other specific public policy reasons why a prorogation was necessary.

The Governor, Sir Stanley Burbury, a former Chief Justice of the Supreme Court of Tasmania, counselled the Premier not to give him such advice, and instead suggested that he would welcome advice for a shorter, three-month prorogation period, until March.

The Governor wrote, in a file note, that he told the Premier that while he felt he had made out a case for prorogation, his strong view was that it would not be in the public interest to prorogue Parliament for a period exceeding six months.

The Premier therefore provided a written request for prorogation until 26 March 1982. Sir Stanley wrote:

> Although ordinarily the Governor acts on the advice of his Ministers in relation to prorogation or dissolution of the Parliament, it is a fundamental constitutional convention under the Westminster system that he is not in all circumstances bound to accede to that advice. Two examples occur to me:
>
> Advice to grant prorogation when a motion of No Confidence is before the House;
> Advice not to dissolve Parliament after a Government has been defeated in the House.[18]

I believe Burbury acted entirely properly. He did not put himself in the position of rejecting advice from the Premier; he counselled him to provide amended advice, which counsel was readily accepted. He also did not do this in any formal correspondence, thus sparing any potential political embarrassment to the Premier.

During the prorogation period, significant public pressure was put on the Governor. Petitions were signed and political opponents railed against the Premier running away from facing the music, sure in the knowledge that he would face a want of confidence motion as soon as the House met.

In response to the petitions and statements by political leaders, Government House issued a short statement which stated, simply: "support for a government is not measured by counting outside the House".

Burbury deployed all three of Walter Bagehot's suggested rights of the Monarch, to "advise, encourage and warn". The Governor also underlined to the Premier that government office depended on majority support in the people's house.

Was Burbury wrong? Should he have simply accepted Holgate's advice, and let the Premier take the heat? Would he have done so if the Premier had pressed his original advice? Was this essentially an exercise of a reserve power, at least in terms of the length of the prorogation period?

It is, prima facie, true that the Prime Minister or Premier takes responsibility for the advice tendered to the vice-regal representative. But I would contend that it is also true that the power of prorogation is a reserve power and especially so where the government of the day does not enjoy a majority on the floor of the Lower House.

That was the approach that Burbury took in 1981. And it was the approach that the Governor-General of Canada, Michaelle Jean, took late in 2008 when she was asked by the Prime Minister, Stephen Harper, who headed a minority government, to prorogue the Parliament.

In that case, the Governor-General sought independent constitutional advice and decided after discussion with the Prime Minister to grant the request for prorogation. She did so on two conditions, that it was only for a period of one month and that, when the new session convened, the Government would immediately present a budget, the approval or rejection of which would constitute a vote of confidence.

In taking this approach, Michaelle Jean was adopting the same general approach as Sir Stanley Burbury adopted. She was allowing some time for the Government to regroup, but making clear that the Government must face the House at an early date.

The result in the Tasmanian instance was that the Holgate Government was defeated in a no confidence motion on the first day of the new session of Parliament. In Ottawa, the Harper Government survived after a new political alliance was negotiated during the prorogation period.

Imposing conditions on a commission

In 1914, the Governor of Tasmania, Sir William Ellison-Macartney, refused a request from the Premier, Albert Solomon, to dissolve the House of Assembly after a vote of censure had been carried. The Governor told the Leader of the Opposition, John Earle, he would commission him as Premier provided three conditions were met. The first was that he would immediately recommend a dissolution of the House. The second was that the new Parliament should meet within two months, and the third was that in the case that the Attorney-General was not a qualified lawyer in practice, the Governor should be free to obtain legal advice from outside the Ministry.[19]

Earle said later he protested against these conditions but nevertheless accepted the commission and proceeded to form a Ministry. He then promptly sent the Governor a memorandum stating that to exact the pledge of a dissolution was contrary to the principle and well-established practice regulating parliamentary government and that the circumstances were not such as to justify a Governor forcing a dissolution on his ministers.

For good measure, Earle had the House of Assembly pass a motion condemning the Governor's actions and asking that the text of the motion be conveyed to the King.

The Governor sought advice from the Secretary of State for the Colonies, Lewis Harcourt. Harcourt said that the Governor should not have exacted this pledge and re-stated the constitutional doctrine that all the Governor's actions must be clothed with ministerial responsibility. Harcourt said that the action of Earle in now refusing to advise a dissolution transferred the responsibility for that action from the Governor to himself.

Silent in these communications was the fact that the Governor had earlier declined Solomon's request, as Premier, for a dissolution. It has never been explained why.

There are two other pertinent examples where the Crown has used powers of persuasion to encourage an outcome to a political dilemma, deploying Bagehot's principles.

In 1991, the Premier of British Columbia, Bill Vander Zalm, was replaced by a vote of his party's caucus after a financial scandal involving his family company. The Lieutenant-Governor of the Province, David Lam, accepted a message from the chairman of the party caucus confirming its wish that the Premier resign and naming an acceptable successor.[20]

But the Premier refused to resign. The Lieutenant-Governor, faced with the problem of having a chief adviser who was no longer leader of any party but who still held the commission as Premier, received him and privately encouraged him to resign. Vander Zalm did bow to the inevitable and a smooth succession took place. The constitutional scholar, Edward McWhinney, described it as a "low-key and graceful interposition of the reserve powers".

A not dissimilar situation rose, in a more robust way, in Queensland in 1987.[21] The Premier, Sir Joh Bjelke-Petersen, was swiftly losing the support of his own party colleagues. He decided to reconstitute his ministry in order to shore up support and determined that five ministers should be sacked for disloyalty. The Premier decided to offer his own resignation, which would have carried with it the resignation of his ministry, as a way of avoiding having to ask the ministers to quit. He wrote to the Governor:

> I therefore propose tendering to Your Excellency, on a date to be mutually agreed upon, the resignation of myself, and thereby placing at Your Excellency's disposal the offices of all the members of my Ministry. At the same time I seek a further commission from Your

Excellency to form a new administration.

Relevantly, the Queensland Parliament had adjourned a few days before this letter, to a date to be fixed.

The Governor advised the Premier that a re-structuring of the ministry should not be done by way of Sir Joh's resignation and that the proper course was for the Premier to discuss the matter with his ministers and request the resignation of the ministers he did not want.

The Governor, meeting with the Premier, asked officers to join them. He asked them whether there was a precedent for a Premier resigning in these circumstances and asking to be re-commissioned.

The only example proffered was the resignation of Winston Churchill in 1945 at the end of the National Government, but that was a very unusual circumstance where the Labour Party was leaving the government in preparation for a general election to be held later that year.

Another example that could have been cited to Sir Walter was when Ramsay MacDonald resigned as Prime Minister of a Labour Government in 1931 and was re-appointed as Prime Minister of a National Government. But, again, that was an exceptional situation because the Great Depression had presented a national emergency.

Campbell made clear to Bjelke-Petersen that, should the Premier resign, he as Governor would have to be satisfied, before re-commissioning the Premier, that he could form a new administration and that he and his new ministry would have the confidence of the Legislative Assembly.

Sir Walter Campbell warned the Premier that he might not be prepared to re-commission him, and that he might consult other members of Parliament, including members of the Premier's own party, as to whether Sir Joh retained the confidence of the House.

Again, we see Bagehot's three rights – advise, encourage and warn.

Campbell's position was also strengthened because the Bjelke-Petersen Government had had amendments passed in 1977 to the State's Constitution to say that the Governor, in appointing and dismissing ministers, "shall not be subject to direction by any person whatsoever nor be limited as to his sources of advice."[22] Indeed, the Governor received two of the disaffected ministers whom the Premier wanted to sack, but he refused to reveal to them any advice he had given the Premier.

In the meantime, the parliamentary National Party met and elected a new leader, Mike Ahern. The Premier still refused to resign. Ahern provided the Governor with legal advice, including from the Solicitor-General, that suggested that the Governor might withdraw the Premier's commission.

The Governor disagreed and said, in my view entirely correctly, that the floor of the House was the ultimate judge of these things, not what happens within the meeting of a parliamentary party. He said that before commissioning anyone as premier, he would have to be satisfied that the person could form a ministry and command the support of the Legislative Assembly.

The Governor kept the Palace informed as events unfolded and a subsequent letter from the Queen's Private Secretary, Sir William Heseltine, reiterated what he had told the Governor by telephone:

> [T]hat you would have been safe in withdrawing the Premier's Commission only when and if he had suffered a defeat in the Parliament itself.[23]

There was significant pressure, including from the media, for the Governor to act to end Bjelke-Petersen's premiership.

As the resumption of Parliament loomed, the Premier eventually saw the writing on the wall. He called on the Governor and resigned, the resignation carrying with it the resignation of his ministry. He also resigned from the Executive Council. It later emerged that he also wrote to the Speaker resigning his seat.

The Governor called Ahern and commissioned him as Premier on the proviso that he sought a vote of confidence when the Parliament resumed the next day, and that he advise him within eight days of the composition of his new ministry.

Thus Campbell imposed conditions on the commission, contrary to advice given to Ellison-Macartney in 1914, and to Dame Quentin Bryce in 2013, but the incoming Premier was happy to accede to them.

The Parliament met and passed a vote of confidence in the new Government.

Campbell later maintained that the crisis was essentially a political one, not a constitutional one, and so he had not deployed the full range of reserve powers, preferring the Premier who had lost support to see sense.

As we have seen, Lieutenant-Governor David Lam in British Columbia took a very similar path in 1991.

Refusal of dissolution when another government available

I believe, had Bjelke-Petersen advised Sir Walter Campbell to dissolve the Legislative Assembly during the turmoil surrounding the end of his premiership, the Governor would have refused to accept that advice.

In the 1989 Tasmanian election the Liberal Government had won the largest number of seats at a general election, but faced a post-election alliance between the Labor Opposition and five Green Independents which would constitute a majority on the floor. The Governor, Sir Phillip Bennett, nevertheless re-commissioned the Premier and on his advice swore in a new Ministry before the Parliament met. He ignored calls from the Opposition and five Greens Independents that another government was apparently available.

Privately, the Governor made it clear to the Premier that, whilst it was open to him to request an election, the Governor would be likely to decline to accept that advice; given the proximity of the election and that an alternative government seemed available.

In the event the House met, a constructive motion of no confidence was passed, and the Premier resigned.

I believe that had the Premier given advice recommending a fresh election, Bennett would have dismissed him in the knowledge that an alternative and viable government was available, and an election had just been held. That new government could then have been tested on the floor of the House.

Royal Assent

There is another area where I would contend a reserve power may be found to exist, and that is in a vice-regal representative giving the Royal Assent.

The Royal Assent procedure involves two elements. The Governor-General or Governor acts, in giving the Royal Assent, constitutionally as part of the Parliament, not of the Executive. But in the act of Assent, the Attorney-General must furnish a certificate advising the vice-regal representative that there is no reason why a particular Bill should not receive Assent.

There are at least two examples where there has been executive intervention in the giving of Royal Assent and, in both, it is my contention that the Governor could rightly have rejected ministerial advice.

In 1924, in Tasmania, there was a tussle between the House of Assembly and the Legislative Council about amendments to an Appropriation Bill. The Legislative Council of Tasmania cannot be dissolved, members coming up for election on a rotational basis each year. It also has the right to reject any Bill, including a money bill. It has therefore been called the most powerful upper house in a Westminster system.[24]

At the time, the Administrator of the State pending the arrival of a new Governor was the Chief Justice, Sir Herbert Nicholls.

The Legislative Council refused to pass the Appropriation Bill unless certain amendments were made. The House refused the amendments and the Government contended that the Council had no capacity to make them.

The Speaker then presented the Appropriation Bill to the Administrator following a resolution of the House directing it be presented "in the form it passed the House of Assembly".

Nicholls had sought advice from the Secretary of State for the Colonies in London. The Secretary of State cabled back merely advising the Administrator to seek the opinion of the Law Officers as to whether he could give assent to the Bill in that form and that, if they confirmed in writing that such action was valid, "responsibility will rest exclusively with your Ministers and no question can arise as to the constitutionality of your action".

The Administrator therefore gave the Royal Assent, and the Bill went onto the statute books with the usual preamble that it had been enacted "…with the advice and consent of the Legislative Council."

I would contend that this was clearly unconstitutional and possibly an illegal act, advised or not. It framed the Administrator as a "mechanical idiot" or a constitutional automaton; a model discussed by Sir Guy Green as supported by some scholars but which he cogently argues is precisely what a vice-regal representative is not.[25] And it also framed him as solely acting as the head of the executive government rather than also as part of the Parliament.

A similar stress on conventions occurred in 1985 in Victoria. When the Racing and Gambling Acts (Amendment) Bill was presented to the Governor by the Clerk of the Parliaments in the usual way, the Clerk of the Executive Council read out an advice from the Premier that the Governor should not give the Assent.[26]

The Clerk of the Parliaments reported this to the Presiding Officers who duly announced it to their respective chambers. Questions were asked and an urgency motion was moved, condemning the Government.

The Premier wrote to the Presiding Officers explaining that he had elected to advise the Governor to defer assent to the bill because it was expressed to come into force the day after Royal Assent and administrative preparation had not yet been completed. While the reason for the delay may have been quite understandable in terms of public administration, an intervention of the Executive like this should, in my view, be condemned, because it unnecessarily put the Governor in a conflicted situation. Which hat was he wearing?

The only saving grace was that the Attorney-General's certificate was not withheld, and direct advice from the Premier was tendered instead.

I asked a subsequent Attorney-General of Victoria about this case and he said it was his strong view that the certificate should never be withheld, even if a government vehemently opposed the provisions in a particular Bill, provided the Bill itself was technically in order.

It would have been preferable for the Government to have advised the Governor to return the Bill to the Houses under section 14 of the Victorian Constitution requesting a Governor's amendment. That could have been easily explained.

It is my view that the Governor of Victoria was placed in a most invidious position in this instance, perhaps due to administrative incompetence rather than constitutional malice, but I also believe he would have been within his rights to have repudiated the Premier's advice.

Misunderstanding of reserve powers

Sometimes, because they are hard to define, vice-regal representatives can fall into traps in the interpretation of reserve powers and conventions. An over-reach occurred after the inconclusive election in Tasmania in 2010. That poll returned 10 Labor Members, 10 Liberals and 5 Tasmanian Greens to the House of Assembly.

The Governor saw the Premier and then, at the Premier's suggestion, the Leader of the Opposition, to see who could form a government. Ultimately, he determined that the Premier should face the House and see if his government had the confidence of the House.

The Governor published the reasons for his decision[27] and rightly, in my view, said:

> In the exercise of the duty to commission a person who can form a stable government the Governor will take formal advice from the current holder of that commission but is not bound to act on that advice.

He also said the following, about what he had told the Premier:

> I also told him that as he was still the holder of my commission to form a government and the Premier of the State he had a constitutional obligation to form a government so that the Parliament could be called together and the strength of that government tested on the floor of the House of Assembly.

I do not believe this was correct. There is no constitutional obligation on a Prime Minister or Premier to retain his or her commission. They can resign at any time.[28]

This specific issue was examined in detail in the United Kingdom after the 2010 general election. A *Cabinet Manual* was published, which included a commentary on elections and government formation.[29] The *Cabinet Manual* stated that it has been suggested that an incumbent

Prime Minister's responsibility involves a duty to remain in office until it is clear who should be appointed in their place.

Professor Vernon Bogdanor said in evidence to a House of Commons select committee examining the *Cabinet Manual*:

> The incumbent Prime Minister has a right to remain after an election in a situation where no single party enjoys a majority but not, in my view, a duty. The decision as to when to resign is in my view a political one with no constitutional implications.[30]

The House of Lords also had a select committee examining the *Manual* and it concluded:

> It is a matter of debate as to whether a Prime Minister has a duty to stay in office until it is clear who might command the confidence of the House of Commons. The Manual should distinguish between the right to remain in office and the duty to do so.[31]

It cannot be right that a Prime Minister or Premier is obliged to stay in office; that is certainly not a convention, though it is understandable that a Governor-General or Governor wants any break to be as short as possible. The previous Cabinet Secretary in Britain, Sir Gus (now Lord) O'Donnell, probably had it right when he said:

> It is the responsibility of the Prime Minister to ensure that the Monarch remains above politics and that when the Prime Minister resigns it is very apparent who the Queen should be calling to produce the next, hopefully stable, government.[32]

Conclusion

The Republic Advisory Committee in 1993, chaired by Malcolm Turnbull, wrestled with the dilemma of the reserve powers. It rightly said that conventions in relation to the reserve powers develop slowly and haphazardly and, if a power has not been used for some time, there is bound to be argument as to whether it has ceased to exist or has simply not been needed.

The Committee report went on to say that any attempt to codify the reserve powers would be criticised as "freezing" the conventions in time and reducing their flexibility. It says that one of the arguable virtues of the system of conventions is that it allows appropriate responses to unforeseen circumstances and is capable of changing to take account of developing expectations as to the roles of the government and the head of state.

Having made these eminently sensible comments, the Committee then went on to say that the question of codifying them will have to be resolved in any move towards an Australian republic.[33]

As I have endeavoured to point out with just a few examples today, it would not only be almost impossible to distil all the reserve powers accurately, but also when and in what circumstances they should be deployed.

It would seem to me that the words of the eminent Canadian constitutional scholar, Eugene Forsey, are as accurate today as when he wrote them. Forsey said of the reserve powers:

> To embody them in an ordinary law is to ossify them. To embody them in a written Constitution is to petrify them.[34]

I hope this short tour around some constitutional conundrums is a reminder of the perils of trying to define the reserve powers.

Precisely because political situations are so organic, constitutionally challenging situations cannot all be predicted. What we want, and what we have had in Australia in our vice-regal representatives, are ultimate arbitrators in whom the community has confidence, who are above the ruck of politics, and who can be trusted to operate efficiently and fairly – and rarely – as is needed.

Endnotes

1. *Jacobellis v. Ohio*, 378 U.S. 194.

2. Walter Bagehot; *The English Constitution*, Chapman & Hall, 1867.

3. *Halsbury's Laws of England*, LexisNexus Butterworths, published and updated online.

4. Ronald Brazier; *Constitutional Practice*; 3rd ed., Oxford, 1999.

5. "Hung" parliament is a misapplied term, deriving from the notion of a "hung" jury, a jury that is unable to come to a verdict. A "hung" parliament may be well able to function, unlike such a jury. Minority parliament might be a more apposite term.

6. Governor-General's Role; Office of the Governor-General website – http://gg.gov.au/. Accessed: 30 July 2016.

7. Anne Twomey, "Advice to the Governor-General on the appointment of Kevin Rudd as Prime Minister", (2013) 24 *PLR* 289.

8. Advice from the Acting Solicitor-General to the Governor-General, the Honourable Quentin Bryce, AC, CVO, on Commissioning a new Prime Minister. Office of the Governor-General website; http://gg.gov.au/; Published online: 27 June 2013.

9. Letter dated 15 September 2015 from the Honourable Warren Truss, MP, Deputy Prime Minister and Leader of The National Party. Provided by the Office of the Official Secretary to the Governor-General to the Senate Finance and Public Administration Legislation Committee on 2 November 2015.

10. *Commonwealth of Australia Gazette*, No. 107A 19 December 1967. The Governor-General (Lord Casey) determined the appointment of Harold Holt as Prime Minister and "directed and appointed" John McEwen to hold the office of Prime Minister. This has been cited as an example of the doctrine of necessity. The doctrine has also been cited in relation to certain actions the Governor-General of Grenada, Sir Paul Scoon, took in 1985 after the collapse of government in that country.

11. Peter Boyce, *The Queen's Other Realms, The Crown and its Legacy in Australia, Canada and New Zealand*, The Federation Press, 2008.

12. Rt Hon. Sir Harry Gibbs, "Reserve Powers of the Governor-General and the Provisions for Dismissal," 20 August 1995. Published on the Australians for Constitutional Monarchy website, http://norepublic.com.au. Accessed: 30 July 2016.

13. H.V. Evatt, *The King and his Dominion Governors: a study of the Reserve Powers of the Crown in Great Britain and the Dominions*, 2nd ed., Frank Cass & Co, 1967.

14. The Hon. Sir Gerard Brennan, *A Pathway to a Republic*, George Winterton Memorial Lecture 2011, The University of Sydney, 17 February 2011.

15. Statement by the Prime Minister, the Honourable P. J. Keating, MP, Australian Republic, 7 June 1995.

16. Documents relating to the Prorogation of the Parliament, letter from the Attorney-General, Senator the Honourable George Brandis, QC, to the Governor-General, 21 March 2016. Office of the Governor-General, http://gg.gov.au/, published online. Accessed 30 July 2016.

17. The Honourable William Cox, "The Exercise of the Reserve Powers of the Governor of Tasmania," *Upholding the Australian Constitution*, volume 23, 2011.

18. The Honourable Sir Stanley Burbury, Undated Memorandum made December 1981, His Excellency the Governor's Establishment, Hobart.

19. W. A. Townsley and John Reynolds in F. C. Green (ed.), *A Century of Responsible Government in Tasmania 1856-1956*, L.G. Shea, Government Printer, Tasmania, 1956.

20. Peter Boyce, *op.cit.*.

21. Geoff Barlow and Jim E. Corkery, "Sir Walter Campbell: Queensland Governor and his role in Premier Joh Bjelke-Petersen's resignation 1987," Owen Dixon Society eJournal, Bond University. Published online: 1 March 2007.

22. *Constitution Act Amendment Act* 1977 (Qld). This was repealed in 2001 and the current equivalent clause is slightly different. Constitution of Queensland 2001, section 24, reads: "Ministers hold office at the pleasure of the Governor who in the exercise of the Governor's power to appoint and dismiss the Ministers is not subject to direction by any person and is not limited as to the Governor's sources of advice."

23. Geoff Barlow and Jim E. Corkery, *op.cit.*.

24. W. A. Townsley and John Reynolds, *op.cit.*.

25. The Honourable Sir Guy Green, *Governors, Democracy and the Rule of Law*, Menzies Oration on Higher Education, University of Melbourne, 29 October 1999.

26. For a full summary of this event and the procedures in Victoria for Royal Assent, see: Kate Murray, "Royal Assent in Victoria," For the ANZACATT Parliamentary, Law Practice and Procedure Program, Legislative Assembly, Victoria, 12 February 2007.

27. Office of the Governor of Tasmania, "The reasons of the Governor of Tasmania, the Honourable Peter Underwood AC, for the commissioning of the Honourable David Bartlett to form a government following the 2010 House of Assembly election." Published online by Government House, Hobart, 2010. Accessed: 30 July 2016.

28. See also: Michael Stokes, "Why I disagreed with the Governor's reasons for recommissioning the Bartlett Government," *Tasmanian Times* website. Published online 22 April 2014. Accessed: 30 July 2016.

29. Cabinet Office (UK), *The Cabinet Manual*, 1st ed., October 2011. Published online. Accessed: 30 July 2016.

30. House of Commons Political and Constitutional Reform Committee, Sixth Report of Session 2010-11, volume 1, Constitutional Implications of the Cabinet Manual. At 22.

31. House of Lords Constitution Committee, Twelfth Report, 7 March 2011 – Chapter 3: The content of the Manual.

32. *ibid.*, at para 71.

33. For a comprehensive analysis and discussion on the reserve powers in Australia, see *An Australian Republic: the options*, Report of the Republic Advisory Committee; AGPS, 1993. Especially Appendix 6, The Reserve Powers of the Governor-General.

34. Peter Boyce, *op.cit.*, quoted at 61.

Additional reading

David Butler & D.A. Low (eds.), *Sovereigns and Surrogates: Constitutional Heads of State in the Commonwealth*, Cambridge Commonwealth Series, Macmillan, 1991.

Roger King, *The King-Byng Affair 1926: a Question of Responsible Government*; Copp Clark, Toronto, 1967.

D.A. Low (ed.), *Constitutional Heads and Political Crises – Commonwealth Episodes, 1945-85*, Cambridge Commonwealth Series; Macmillan, 1988.

Don Markwell, *Constitutional Conventions and the Headship of State: Australian experience*, Connor Court Publishing, 2016.

Anne Twomey, *The Chameleon Crown: The Queen and her Australian Governors*, The Federation Press, 2008.

Anne Twomey, *The Australia Acts 1986 – Australia's Statutes of Independence*, The Federation Press, 2010.

Anne Twomey, "The Unrecognised Reserve Powers," High Court Public Lecture, 14 November 2012.