AUSTRALIAN CONSTITUTIONAL CONVULSIONS OF 1975 — THE RESERVE POWERS OF THE GOVERNOR-GENERAL AND IMPLICATIONS FOR THE FUTURE

1. *Introduction*

The Commonwealth of Australia Constitution Act 1900 (which took effect on 1st January 1901), an Act of the Parliament of the United Kingdom, is the charter of nationhood for Australia. The Constitution Act brought together into federation a number of States which prior to the date on which the Act became effective were separate entities and were colonies of the United Kingdom. Under the Constitution legislative power is vested in a Parliament consisting of the Queen, the House of Representatives and the Senate. Various powers are conferred by the Constitution on the Governor-General as the Queen's representative in relation to the functioning of Parliament and the exercise of the executive power. The doctrine of responsible government is implicit in the Constitution though nowhere specifically referred to. The Constitution vests executive authority in the Governor-General as the Queen's representative. The Constitution does not make any reference to the "Prime Minister" or "Cabinet". Yet clearly such institutions were paramount in the minds of the founding fathers, the representatives of the then colonies on the Australian continent, who drafted the Commonwealth of Australia Constitution Bill which was subsequently enacted with one modification by the United Kingdom Parliament. At federation it was assumed that Australia would follow the British system of responsible cabinet government which was already in force in the then colonies of New South Wales, Victoria, Queensland, West Australia, South Australia and Tasmania.

It scarcely requires mention that in the Westminster style parliamentary democratic system (which undoubtedly the founding fathers intended to introduce into Australia) executive power is vested in a nominal head — the Queen in the United Kingdom and in the Governor-General as the Queen's representative in the self-governing dominions. Executive power is however in fact exercised by the Cabinet with the Prime Minister at the apex, which is responsible to the lower house of the legislature (Parliament). Cabinet ministers are members of parliament. Responsible government requires that the Governor-General should act on the advice of the Cabinet consisting of ministers who enjoy the support of a majority of the Lower House. The more significant conventions of the Constitution have evolved so as to ensure that the Governor-General exercises his powers on the advice of the ministers responsible to Parliament. But one of the issues of 1975 was a denial of this convention.[1]

[1] See discussion at heading 14 in Part II (to be published in July 1980 issue).

On November 11, 1975 the Whitlam Government was dismissed from office by the Governor-General in an exercise of the discretionary power granted to him under section 64 of the Constitution. Mr. Malcolm Fraser was appointed Prime Minister on condition that he recommended to the Governor-General a dissolution of Parliament under section 57 of the Constitution. Mr. Whitlam commanded the support of a majority in the House of Representatives, while the coalition which Mr. Fraser headed possessed majority support in the Senate.[2] Section 64 provides for the appointment of Ministers of State for the Commonwealth, who shall hold office during the pleasure of the Governor-General and shall be members of the Federal Executive Council. The Governor-General's action was prompted by a deadlock between the Senate (the upper house) and the House of Representatives (the lower house) over the passing of the Appropriation Bill.

Section 53 of the Constitution provides that the Senate shall possess equal powers to the House of Representatives in all respects with the exception that it cannot originate or amend a money bill. On a literal interpretation however it appears that it could reject such a bill. There exists controversy (discussed below) as to whether the Senate possesses power to reject the Appropriation Bill under section 53 of the Constitution. In the case of a deadlock between the Houses which arises from the House of Representatives twice passing a Bill and a rejection of it twice by the Senate, section 57 confers on the Governor-General a power to dissolve both houses, thus precipitating a general election. It should be noted however that the Appropriation Bill was not the basis of the dissolution of Parliament in 1975 as this Bill did not satisfy the procedural requirement of section 57.[2a] The existence of twenty-one bills which had been previously blocked by the Senate enabled resort to section 57.

The crisis of 1975 was not an isolated, spontaneous act in the cut and thrust of politics but rather the culmination of an intricate set of circumstances. The following, arranged in an approximate chronological order, may be said to be the main events:

— The loans adventure.

— Rejection by the Senate of legislation passed by the House of Representatives.

— The first resort to section 64 — the germ of an idea?

— Did a convention exist regarding the manner of appointment by State Parliaments to fill casual vacancies?

— Refusal of supply by the Senate — the legal position.

— The deferral of supply by the Senate.

— Does a convention exist that the Senate should not refuse supply?

[2] Copies of the letter of dismissal given by the Governor-General to the Prime Minister, the Statement of Reasons issued by the Governor-General to justify the dismissal of the Prime Minister and the other actions he had committed and the letter written by the Chief Justice to the Governor-General commenting on the Governor-General's actions are attached as an appendix to this article in Pt. II.

[2a] See below, sub-heading 6.

— The legality of the actions of the Government after supply ran out.

— Prime Minister Whitlam's proposal of a half Senate election as a solution to the supply crisis.

— The letter containing advice by the Chief Justice to the Governor-General.

— General elections of 1975 — a vindication of the actions of the Governor-General and the Senate?

— The role of the Governor-General.

— Dismissal of a Prime Minister.

— Implications of actions taking place subsequent to the dismissal of the Prime Minister.

— Was the fear in the Governor-General's mind that he could be removed from office a justification for the chosen course of action?

— Correspondence between Speaker Scholes and the Queen.

— Implications for the future and evaluation.

It is proposed to discuss these issues one by one.

2. *The Loans Adventure*

The Executive Council on 13 December, 1974 recommended, for the approval of the Governor-General, that "the Minister for Minerals and Energy be authorised to borrow for temporary purposes" the sum of $4,000 million (U.S.). The Governor-General signed the authority the next day. There has been much speculation about the purpose of the loan. The established view seems to be that the money was to be spent 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, New South Wales, Queensland and Tasmania, and coal ports in New South Wales.[3] It has also been suggested that the purpose of the loan was to have in reserve money to meet the problems that might have arise from a possible rejection of the Appropriation Bill by the Senate.

The Opposition claimed that in authorising the borrowing without seeking the prior approval of the Loan Council, the Executive Council had acted in breach of fundamental provisions of the 1927 financial agreement. The financial agreement of 1927 between the Commonwealth and the States meant the discontinuation of the practice by the States and Commonwealth Governments of borrowing independently, trying often to outbid each other in the manner and amount of interest offered to outside investors. It enabled the Commonwealth, *inter alia,* with its large international resources, to borrow on behalf of the States, thus allowing for uniform interest rates and a widening of the Australian money market.

[3] See speech by Hon. R.F.X. Connor M.P. in *House of Representatives Debates* 1975 vol. 95, col. 3611-12; L. Oakes, *Crash Through or Crash: The Unmaking of a Prime Minister* (1976) p. 65; P. Kelly, *The Unmaking of Gough* (1976) p. 158.

The validation required for this Commonwealth initiative and the evolution of the Australian Loans Council was given by an amendment to the Constitution by referendum (section 105A) in 1928. The overall management of this agreement and any further financial agreements between the States and the Commonwealth, under the care of the Loans Council was granted by two Acts in 1928-29.[4] The argument given by the Opposition in 1974, was that by virtue of section 105A(5) of the Constitution the financial agreement has status equivalent to a section of the Constitution, and that because no Loan Council approval had been given the Government were in breach of the agreement, and, *ipso facto,* of the Constitution. The 1927 agreement allowed the Commonwealth to raise funds on its own for "defence", for "temporary purposes", or "conversion, renewal or redemption loans". Clause 6(7) empowered the Commonwealth to borrow for "temporary purposes", the interest rates and other charges to be set by the Loans Council. "Temporary purposes" are not defined in the agreement but there is a specific Clause 4(4) which states that money borrowed by either Commonwealth or States must be borrowed in accordance with the agreement.

If the Government could show that the loan was for "temporary purposes" then no breach of the agreement could be charged. Mr. Whitlam gave the justification for the loan during a debate in the House of Representatives:[5] "the Australian Government needs immediate access to substantial sums of non-equity capital from abroad for temporary purposes, amongst other things to deal with exigencies arising out of the current world situation and the international energy crisis, to strengthen Australia's external financial position, to provide immediate protection for Australia in regard to supplies of minerals and energy and to deal with current and immediately foreseeable unemployment in Australia."[6] The main argument hinges around the meaning of "temporary purposes". Loans payable within twelve months have been considered "loans for temporary purposes". The idea of "passing or transient need" has also been examined in this context but at no time has an explicit definition been given. When looking at "passing or transient needs" it is necessary to look to the surrounding facts. For example, what was the state of the economy at the time the loans affair began? Could such a loan be absorbed in such a small time to validate the idea of "passing or transient needs"? It could be argued, if a very restricted view of section 105A of the Constitution is taken, that a Commonwealth loan, raised for its own purposes (as stated by Mr. Whitlam) will not come under section 105A because the wording of the financial agreement states that it will be the "public debts of the States" which will come under its mandate and not those of the Commonwealth *per se.* This is because the financial agreement to the extent that it relies on section 105A for its validity cannot provide for what section 105A does not. Section 105A deals with the "public debt of the States" and that is as far as the

[4] Financial Agreement Act 1928; Financial Agreement Validation Act 1929; Consolidated Version, Schedule to Financial Agreement Act 1944.
[5] This object was expressed in an explanatory memo to the Executive Council Minutes of 13 December, 1974.
[6] Quoted in the *House of Representatives Debates* 1975, vol. 95, col. 3595 (Mr. Whitlam).

agreement goes between the Commonwealth and the States. There have also been High Court *dicta*[7] refuting this idea and perhaps when all is taken into account it could be said that the Commonwealth did breach the agreement. The Constitution gave the agreement its validity but it would be going too far to suggest that the agreement was given full constitutional status by the addition of section 105A. However, a look at the amount involved renders it difficult to regard this as a temporary loan unless the purpose was to use it to govern for a short time if the Senate obstructed the passage of a future Appropriation Bill.

Quite apart from the legal arguments the "bizarre methods" by which the loan was sought did much to undermine the Government's general electoral credibility. The Opposition one year later cited this as a "reprehensible and extraordinary" act which justified the rejection of supply. The Governor-General signed the order authorising the raising of the loan. He was not present at the Executive Council meeting on 13 December 1974 when the matter was discussed and the decision taken. It is alleged that he was not informed about the meeting.[8] When the Governor-General writes his memoirs and expresses his point of view it may well be that he will cite the way his signature was obtained for the approval as an indication of the type of unlawful acts which Mr. Whitlam may have committed if supply ran out as a justification for his dismissal of Prime Minister Whitlam. But it is difficult to connect this incident with an action taken one year later. If this incident was sufficiently reprehensible, the Governor-General should forthwith have acted. But it appears there was nothing he could do. It is not uncommon for governments to commit unlawful acts — and the accepted remedy in such a situation is not vice-regal intervention, but actions instituted in the courts which curb the acts of the government. The Governor-General also has the undoubted power to refer back issues to the Cabinet for reconsideration.

When the Labor Government was being blamed for the fact that this authorisation was illegal it was argued in some circles that the Governor-General had signed the order. This by itself cannot confer authority on the action, if the action itself was illegal. The Governor-General cannot be blamed for signing the order even if it was illegal. If he is to be regarded as a "nominal" executive (as it is argued below he should be) he cannot, unlike the Ministers of State, be expected to be conversant with the aspects and implications of policy decision. This attempt to shift some of the blame may have affected the Governor-General's future actions. He may have thought that if he must bear responsibility for his acts he should also intervene more positively. An action has been instituted by an individual against Messrs. Whitlam and Cairns, Justice Murphy and Mr. Connor alleging that this and other alleged acts constituted a violation of the criminal law.

7 See specifically Richand Williams JJ. in *Bank of N.S.W.* v. *Commonwealth* (1948) 76 C.L.R. 1, 281.
8 A. Reid, *The Whitlam Venture* (1976) pp. 20-26; C. Lloyd and A. Clark, *Ken's King Hit* (1976) p. 150; Kelly, *op.cit.,* n. 2, (1976) p. 185.

3. *Rejection by the Senate of Legislation Passed by the House of Representatives*

The Senate throughout the period in office of the Whitlam Government (1972-75) refused to pass proposed laws which had been initiated by the Government and passed in the House of Representatives. This led to a double dissolution in 1974 when the Governor-General acted on the advice of Prime Minister Whitlam and dissolved both Houses under section 57 of the Constitution. When the Labor Government was returned to office by resort to the special procedure in section 57 a number of laws were passed by a Joint Sitting of both Houses convened by the Governor-General. Litigation followed which ended with the validation of all except one of the proposed laws.[9]

The adoption of the same pattern after the re-election of the second Whitlam Government, led to the double dissolution of November 1975 when the Governor-General appointed Mr. Fraser as Prime Minister subject to the condition that he would recommend a double dissolution under section 57. Twenty-one Bills had been passed by the House of Representatives and not passed by the Senate and the Governor-General was of the opinion that a double dissolution under section 57 could be effected in these circumstances. It has however been questioned whether in the circumstances section 57 was legitimately resorted to.[10] The Senate of course acted within the legal provisions of the Constitution in rejecting legislation initiated by the Government. The action of the Senate has been questioned on other grounds, namely that it was acting against the wishes of the majority of the people of the country who had voted in favour of the Labor Government. This is however to overlook two factors. Firstly, if one follows the views of the draftsmen of the Constitution as stated in the Convention Debates, it appears that the Senate was set up not only as a House which would guard the interests of the smaller States, but also as a conservative House which would act as a check on hasty and ill-conceived legislation. Secondly, any claim by the Whitlam Government that it had a mandate for *all* the legislative and executive policies it initiated, is difficult to maintain. It could be argued that the Senate in rejecting at least some of the proposed laws was acting in accordance with the conservative instincts of the majority of the people of Australia. On the other hand, the Senate at times, went beyond acting as a check on hasty and ill-conceived legislation, and seemed merely concerned with obstructing and frustrating the objectives of the Government. It is, of course, difficult to determine at what point the Senate's "watch-dog" role degenerates into obstructionism.

4. *The First Resort to Section 64 — The Germ of an Idea?*

The Governor-General, Sir John Kerr acting on the advice of the Prime Minister, Mr. Whitlam, dismissed Mr. Clyde Cameron from his ministerial position on 6 June 1975. The Australian Gazette of 6 June, 1975 reads "His Excellency the Governor-General directs it to be notified for general information that he has... determined the

[9] *Cormack* v. *Cope* (1974) A.L.J.R. 318; *Victoria* v. *Commonwealth* (1975) 50 A.L.J.R. 7; *Western Australia* v. *Commonwealth* (1975) 50 A.L.J.R. 68.
[10] See sub-heading 15 in Pt. II.

appointment of the Honourable Clyde Cameron, M.P., as Minister for Labour and Immigration." By comparison the Australian Gazette of 11 November, 1975, reads "His Excellency the Governor-General directs it to be notified for general information that he has determined the appointment of the Honourable Edward Gough Whitlam, Q.C., M.P., as Prime Minister." There is an irony in the similar wording of the two dismissal Gazette notifications and it becomes even more ironical when the facts of Mr. Cameron's dismissal are examined as it appears from the account of the incident by Reid.[11]

Mr. Whitlam in June 1975 decided to effect a cabinet reshuffle. In doing so he wanted to transfer Mr. Cameron from his post as Minister for Labour and Immigration to Minister of Science and Consumer Affairs. Mr. Cameron however resisted this and when asked by Mr. Whitlam to resign refused to do so. When Mr. Cameron refused to resign there were two courses of action open to Mr. Whitlam. He could have returned his Commission to form a Government to the Governor-General, asked for a fresh Commission and when the fresh Commission was issued announced his new Ministry with Mr. Cameron allocated to the Science and Consumer portfolio. Alternatively he could have requested the Governor-General to dismiss Mr. Cameron as Minister for Labour and Immigration and announced his Cabinet with Mr. Cameron in the Science and Consumer Affairs portfolio. For a reason which is not clear, Mr. Whitlam did not want to return his Commission and therefore decided to follow the second course. However the dismissal (as distinct from a resignation on request) of a Minister raised an issue which had not previously arisen in Australian constitutional and political history. According to Reid's account[12] Sir John Kerr at the outset expressed doubts as to whether he could follow the course of action which Mr. Whitlam suggested to him. Mr. Whitlam's idea was that the Governor-General acting under section 64 of the Constitution would determine the appointment of Mr. Cameron as Minister. Mr. Whitlam advised the Governor-General in writing that he had no doubts that the Governor-General had the constitutional right to determine a Minister's appointment, a right conferred by section 64 of the Constitution under which "Ministers hold office during the Governor-General's pleasure". The only reservation that Mr. Whitlam's advice contained was that the Governor-General should act in accordance with constitutional principles upon the advice of the Prime Minister. The Attorney-General, Mr. Kep Enderby orally advised the Governor-General that he could legitimately act on Mr. Whitlam's advice.

It may be that the germ of the idea for the dismissal of Mr. Whitlam five months later was conveyed to the Governor-General by Mr. Whitlam himself. The issue which arose from this incident was that if the Governor-General could dismiss a Minister under section 64, could he not also dismiss the Prime Minister? This raised a further question as to whose advice the Governor-General should act on if a Prime Minister was to be dismissed, as obviously the Prime Minister would not tender advice regarding his own dismissal.

11 Reid, *op.cit.*, n. 8, pp. 309-15.
12 *Ibid.*, p. 313.

5. *Did a Convention Exist Regarding the Manner of Appointment by State Parliaments to Fill Casual Vacancies?*

Section 15 of the Constitution enacted that where a casual vacancy occurred in the Senate, the Houses of Parliament of the State which elected the member whose seat had become vacant, sitting and voting together should choose a person to hold the place for the unexpired period or until an election was held. On 63 occasions between 1901 and 1974 casual vacancies had occurred in the Senate. On 60 occasions the State Houses of Parliament chose to fill the vacancy with a Senator from the same political party as that of the Senator whose seat had been vacated.[13] Hanks points out[14] that it is misleading to treat those 74 years as a single period.

> The introduction in 1949 of proportional representation (through the single transferable vote method) dramatically changed the nature of political representation in the Senate. Whereas before 1949 large, even grotesque, party majorities had been common, after 1949 the voting system ensured a closely divided chamber.[15]

Between 1949 and 1975, 25 casual vacancies had occurred. Each of these vacancies had been filled by the choice of a Senator from the same political party as the vacating Senator.[16] Nonetheless when two vacancies occurred in the Senate in 1975, their places were filled by the New South Wales Parliament in February 1975 appointing an Independent who did not belong to either the Labor or the Liberal party and the Queensland Parliament in October 1975 appointing a member of the Labor party who was however a committed opponent of the Whitlam Government. Section 15 of the Constitution confers the power on the Houses of Parliament of the State to fill the vacancy. The question arises whether there could be said to be a convention outside the Constitution regulating appointment. It should be noted that such a convention seems necessary for the operation of government and had been consistently followed and thereby satisfies the essential tests for establishment of a convention laid down by British constitutional authorities.[17]

It is ironical that the Governor-General in his statement of 11 November referred to the Senate as an *elected* chamber, when two of its members had not been elected — and in their appointment the wishes of the electorate as expressed on the most recent occasion were not taken into consideration. It is especially significant when it is noted that these two members changed the balance of power in the Senate.

13 J.R. Odgers, *Australian Senate Practice* (1967) pp. 58 and 52.

14 P.J. Hanks, "Parliamentarians and the Electorate" in Evans (Ed.) *Labor and the Constitution* (1976) pp. 166-214.

15 See also Odgers, *op.cit.,* n. 13, p. 6.

16 *Senate Debates, 2* May 1976, p. 1475.

17 See W.I. Jennings, *Cabinet Government* (1959) pp. 5-13; W.I. Jennings, *Law and the Constitution* (1958) pp. 134-36. For a discussion of the place of conventions in Australia, see Evans, *op. cit.,* n. 14, pp. 184-87; L.J.M. Cooray, *Conventions, the Australian Constitution and the Future,* chapter 3, especially 3.7.

6. Refusal of Supply by the Senate — the Legal Position

The Senate for the first time in the history of the Commonwealth, failed to pass in 1975 the annual Appropriation Bill which appropriated money for the ordinary annual services of the Government. Ironically enough, the closest the Senate had come prior to 1975 to rejecting supply was in 1970 when Mr. Whitlam was Leader of the Opposition, and he threatened that the Labor controlled Senate would withhold supply, but the Senate did not do so. The DLP who held the balance in the Senate refused to co-operate. In 1974 there had been talk of Senate refusal of supply which was pre-empted by the Whitlam inspired double dissolution. The relevant section of the Constitution (section 53) has been subjected to various interpretations. The interpretation which the then Liberal Opposition put upon it was to emphasise the last paragraph of section 53 which enacts "Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws". The exceptions stated in the preceding paras of the section are: certain bills can not originate in the Senate and that the Senate can not amend certain types of laws. Section 53 specifically enacts that the Senate may not amend proposed laws appropriating revenue or monies for the ordinary annual services of the government. It was however argued that this did not prevent the Senate from rejecting such a law.

Three arguments have been put forward to demonstrate that the Senate does not have a power to reject the Appropriation Bill. First, Sir Richard Eggleston[18] argued on a comparison of the draft prepared by the Conventions which drafted the Australian Constitution Bill, that it was not intended to confer on the Senate the power to reject the Appropriation Bill because a power to "affirm or reject" contained in an earlier draft had been omitted in a later draft. Second, Sir Richard further argued as follows:[19]

> …, the section expressly states that the Senate may send a message requesting the omission or amendment of any item or provisions in a money Bill. Not much significance would attach to this provision if there had been any doubt about the right of one House to send messages to the other, but the present practice of the Houses in Britain as to sending messages was established in 1855 and the inclusion of an express provision strongly suggests that it was intended to exclude other action by the Senate in respect of Bills which it could not amend.

Thus emphasising paragraph 4 of section 53 and construing the word 'amend' in a broad sense to include rejection (in other words if the Senate cannot amend it cannot reject), Sir Richard argues that the Senate does not have the power to reject proposed laws appropriating revenue or monies for the ordinary annual services of government. He also stresses that the second paragraph of section 53 does not deal with all appropriation bills but merely those bills appropriating revenue or monies for the ordinary annual services of government.

The third view is put forward by Howard and Saunders.[20] Their argument commences with section 57 — the section dealing with the

18 Sir Richard Eggleston in Evans, *op.cit.,* n. 14, pp. 297-301.
19 *Ibid*., p. 299.
20 C. Howard and C. Saunders, "The Blocking of the Budget and Dismissal of the Government" in Evans, *op. cit.,* n. 14, pp. 251-257.

resolution of deadlocks. They argue that in a situation where a supply deadlock arises, the correct procedure if one construes the section literally, is to adhere to the procedure in section 57 which was intended to deal with deadlocks. Section 57 comes into operation only when a bill has been passed twice by the House of Representatives and rejected twice by the Senate. On 11 November the Appropriation Bill had been passed once by the House of Representatives and had not been rejected by the Senate (the Senate having merely deferred a vote on the question). The reason why this view of the matter was not taken by the Governor-General was that before the cumbersome processes of section 57 had been worked through, the money for government services would have run out. From this they argue that section 57 of the Constitution which was intended to deal with deadlocks between the Houses cannot possibly apply to a refusal of supply by the Senate. Therefore they conclude that section 57 which was intended to deal with deadlocks between the Senate and the House of Representatives, could not have been intended to apply to the deadlock which arose from the Senate refusing to pass the Appropriation Bill. The argument is based on a rejection of a literal construction of section 53 and adoption of a broader approach. They point out that the approach which the Governor-General adopted was to give a narrow literal interpretation to section 53 *accepting* the view of the Opposition in the Senate, but to reject a similar narrow literal interpretation of section 57. A narrow literal interpretation of section 57 would have involved using section 57 and adhering to the procedures in section 57 to resolve the supply deadlock. Howard and Saunders say "In truth, the technique whereby section 53 is read literally, but section 57 is not, is intellectually dishonest".[21]

There have been expressions of opinion by the High Court to the effect that the Senate has the power to reject supply.[22] The importance to be attached to this dicta could be over-emphasised. What was said by the judges clearly falls within *"obiter dicta"*. There had been no arguments before the Court on the various constructions of section 53 which could be put forward and therefore the High Court was expressing an opinion without the benefit of argument. But the views are expressed in definite terms and perhaps the High Court felt that the construction of section 53 presented no real problem or ambiguities. And if one construes section 53 analytically, it does not appear there is much room for doubt. The last clause of section 53 "Except as provided in the section, the Senate shall have equal powers with the House of Representatives" is crucial. The Senate is intended to have equal powers with the House of Representatives, subject to the earlier clauses of section 53 and the burden is on those who wish to establish that the Senate cannot reject an Appropriation Bill to point to a preceding clause which establishes this. On this basis there seems to be little doubt that section 53 construed on its words (and it is a fairly detailed section) confers on the Senate the power to reject an Appropriation Bill.

A distinction may be drawn between those sections which are very terse and leave scope for assumptions (like section 5 which says the

21 *Ibid*., p. 281.
22 *Victoria* v. *Commonwealth op.cit.,* n. 9 (Barwick C.J.).

Governor-General may dissolve the House of Representatives), and a section like this which is more specific is relevant here. Where the words are specific they lend themselves to a literal interpretation. Sir Richard Eggleston's argument discussed above on the construction of section 53 relies on a technical rule which the High Court has laid down, namely that the drafts of the Constitution may be referred to in order to clear doubts on the interpretation of sections of the Constitution. But he is able to ignore the Convention Debates, because the High Court has held that the latter are not so admissible. On the basis of reference to drafts he succeeds in raising an ambiguity in the construction of section 53, an ambiguity which is not present if one looks at section 53 itself. Having raised a definite ambiguity, he is able to get away with this only by relying on another technical High Court rule (a rather unfortunate rule) that in interpreting the Constitution it is not permitted to look at the Convention Debates. If the Convention Debates are scrutinised there seems to be little doubt that the framers of the Constitution intended the Senate to have this power. It was an issue which the founding fathers debated over and over again, and, at the end, since they could not resolve the question of the Senate's power over an Appropriation Bill, they therefore let section 53 go in a particular form with the hope that the problems which existed would be resolved later on.[23]

The argument is maintainable because Sir Richard is able to refer to the Convention drafts of the Constitution and not the Convention Debates, relying on two technical rules which permit one and forbid the other. The approach to the interpretation of section 53 by Mr. R.J. Ellicott[24] is also technical. Quotations from Convention Debates are taken out of context. Further, in meeting Howard's argument referred to above, he states that in 1975 the Appropriation Bill was introduced later than usual, that if it had been introduced in September or August, section 57 could have applied. However, one point has been overlooked. In the circumstances of 1975, section 57 could not apply to the Appropriation Bill because the Senate was not disposed to reject the Bill and a double rejection is a prerequisite for operation of section 57. By deferring supply the Liberal/Country Party made impossible the use of section 57 to resolve the supply problem. The Bill had to be passed twice by the House of Representatives and rejected twice by the Senate for section 57 to apply. The argument therefore in no way counters Howard's basic argument which is that if section 57 cannot apply to a supply deadlock, then section 53 should not be interpreted in a way to permit rejection of supply.

7. *The Deferral of Supply by the Senate*

The Senate did not reject the Appropriation Bill. When the motion was moved for the second reading of the Bill an amendment was moved that the Bill be not proceeded with until the Government agreed to hold an election because it no longer had the support of

[23] See quotation below this article sub-heading 8 from Howard and Saunders, *op. cit.,* n. 20.
[24] Which is contained in Evans, *op. cit.,* n. 14, pp. 288-297.

the people for reasons stated in the amendment.[25] The Government spokesman rose to a point of order as to whether the amendment was contrary to section 53 of the Constitution. The Acting Deputy President ruled that the amendment was only an amendment to a procedural motion and therefore not contrary. The amendment was voted on, and was carried. Some Opposition Senators who would not have voted for the rejection of supply, voted for deferment. The Opposition by this tactic avoided technically rejecting the supply bill — but in fact, what they did amounted to a rejection.

The Senate chose to sit on the fence — it neither passed nor rejected the Appropriation Bill — and when one takes into consideration the importance of supply for government, this refusal to take a definite stand either way could be regarded as an act of gross irresponsibility. There is a substantial distinction between *deferring* the Appropriation Bill and rejecting it, which has not been given sufficient prominence and consideration.

The reason for stating that the Senate's action of deferring supply was irresponsible is that by doing so, the use of section 57 which was designed and intended to solve deadlocks which arose between the two Houses (for reasons stated above) was rendered inapplicable to solve the deadlock. Even if there was no opportunity for section 57 to operate because there was no time for the passing of the Bill twice by the House of Representatives and a double rejection by the Senate, if the Senate had rejected the Appropriation Bill, the constitutional crisis would not have assumed the proportions it eventually did. The strongest argument against the Governor-General's actions on 11 November was that the Senate had not rejected the Appropriation Bill and could have passed it before 30 November when supply ran out. If the Senate had rejected the Appropriation Bill when it was first presented, there would have been time for a general election and a solution to the supply issue before 30 November. In such a situation it was very unlikely that Mr. Whitlam would have refused to go to the polls and the Governor-General and the nation would have been spared the trauma of the dismissal of a Government. Even if Mr. Whitlam had refused to resign, any action the Governor-General took after the Senate had specifically rejected the Appropriation Bill would have caused less controversy.

As a comparison to the Commonwealth supply crisis of 1975 information about supply crises at the State level is informative.[26] In the nineteenth century on two occasions the Victorian Legislative Council rejected the annual Appropriation Bill. On both occasions the Government refused to be thwarted and held firm supported by the people and British Governors who were informed by the respective Colonial Secretaries to follow the advice of their Ministers. The outcome of each supply crisis was the non-payment of the civil service

25 Which contained a series of allegations including incompetence, evasion, deceit, failure to maintain proper control over Ministers, mismanagement of economy and so on.

26 See H.V. Evatt, *The King and His Dominion Governors* (1967), pp. 178-84; J.I. Fajgenbaum and P.J. Hanks, *Australian Constitutional Law* (1972) pp. 84-85.

and private enterprise was severely impaired. Public works, of course, came to a complete standstill.

In 1864-65 the Premier, Sir James McCulloch, announced new measures in customs duties which, when the full ramifications were realised showed a supposed protectionism, which was anathema to the merchants and squatters who controlled the Legislative Council. To get his legislation through he tacked it onto an Appropriation Bill. Although there was no power given to amend the Bill in order to remove the offending part, the Council could and did refuse to pass it. The members of the Council apparently felt that the Assembly would be dissolved and an election held. However, this was not the case. Despite the eventual widespread unemployment, financial chaos in the business world as well as personal mental and physical breakdowns the Government remained in office, money finally being found after the Governor allowed access to Treasury funds, Civil servants were either working without pay or had been dismissed. No Government contracts were let which dealt a sharp blow to the business world as a whole. This continued for six months until the Legislative Council gave in and passed the Bill. A snap election held in 1866 showed the amount of public support given to McCulloch when his party was returned with an increased majority — 58 out of a possible 78 seats. The Governor at that time, Sir Charles Darling, felt compelled to act on the advice of his Ministers and thus gave McCulloch the much needed support to see the crisis through. However, he paid for his part in the affair, the Colonial Secretary eventually dismissing him from office.

In 1878 another supply crisis arose which had much the same beginning as that of 1864-65. Even some of the actors were the same but were on different sides. The Council was still dominated by the wealthy middle classes but the overall emphasis had changed. However, the Government of the day wished very clearly to put through innovative legislation to break up the oligarchic oppression of the Council. Imposition of land taxes became the *bete noir* of this particular crisis and the wealthy Council squatters owning thousands of acres between them were not easily persuaded that such taxes were necessary to Victoria's future. Premier Berry (who had opposed McCulloch on similar issues in 1864-65) presented an Appropriation Bill to which he had tacked a measure (Payment of Members Bill) to allow MPs to be paid a weekly salary to enable small businessmen and tradesmen who entered Parliament to be able to afford to devote their whole time to their duties. The Council refused to pass the Bill. The vindictive nature of the refusal had a backlash however. The Government with the Governor's reluctant assistance and the proceeds of an Interim Supply Bill held out until the Council finally gave in. To save face the Payment of Members Bill was presented separately and passed thus leaving the way clear to legally pass the Appropriation Bill. The seven month interval had caused even more harm than the previous rejection of supply in that civil servants were dismissed outright rather than being allowed to work without pay. However it was seen that the resultant clean up of the civil service was fruitful in that persons who were considered redundant were not reappointed when the crisis was over. It was found, for example, that in one department nine men could adequately do the job that previously had been done

by eighty-nine and after initial confusion was sorted out, they seemed able to cope.

In 1947 the Victorian Legislative Council rejected supply with the object of forcing an election for the Legislative Assembly. The principle of British constitutional law that a Government which could not gain supply must resign, was the basic motive in this extreme move. Sir Isaac Isaacs, deploring the Upper House's use of such a measure, gave this statement to the newspapers of the day:

> The Council has overstepped established usage, and has in effect violated the Constitution of the State. If the Council's demands were conceded as a price of an 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.27

Supply was again refused in 1952. At the time there was a Country Party Government with Liberal support under the leadership of Mr. J. McDonald. The Appropriation Bill was put but rejected, the object again being a purely political move to put a Government which had the confidence of the Lower House out of office between the appointed election times. The main conflict was between some dissident members of the Liberal Party who formed the Electoral Reform League and the Government. The former wished to enact new electoral laws with a view to reducing the number of elected Country Party members, there being an imbalance between the two parties.

The Labor Party supported a Government to be led by Mr. Hollway who headed the Electoral Reform League and the move for a reversal of the imbalance. At this stage the Labor Party and the Electoral Reform League had a majority of seats in the Council, but were in the minority in the Assembly. The Bill was passed by the Legislative Assembly but rejected by the Council which stated its reasons quite openly, that it should be refused because "of the inequitable electoral system". The Premier asked for a dissolution of the Assembly and the procedure which followed could well have been used in November 1975 by the Governor-General. The Governor of Victoria, at that time Sir Dallas Brooks, did not decide at once. He assembled the party leaders with a view to reconciling the conflict without putting it to the people. Mr. Norman, leader of the Liberal Party, advised a dissolution, being in agreement with Mr. McDonald. Mr. J. Cain, leader of the Labor Party, firmly held that Labor Party members would vote for supply in the Upper House only if Mr. Hollway was commissioned to form a Government. Mr. Hollway stated that he would guarantee supply if commissioned and the electoral reform law around which the whole crisis revolved would probably be brought into being. However, the Governor refused the dissolution to Mr. McDonald on the lack of supply and commissioned Mr. Hollway, of course dependent on Mr. Hollway being able to obtain supply. The Bill was put to the Upper House and was enacted but Mr. Hollway's Government met with a vote of no confidence from the Assembly. Mr. Hollway sought a dissolution from the Governor which was refused but, on the Governor's request, Mr. Hollway resigned and Mr. McDonald was asked to form a government and was given an immediate dis-

27 *Age,* 7 October, 1947.

solution. Mr. Hollway's statement to *The Age*[28] *shows* the concern which he felt at the Governor's actions.

> The Governor has refused me a dissolution of the Legislative Assembly and has asked for my resignation. It would be most improper for me to say that, as far as my legal advisers have informed me, constitutional history has been made which will undoubtedly have very serious constitutional repercussions. As far as can be gathered no precedent exists for the present decision. I have asked His Excellency to permit to be made public the submissions by me supporting the request for a dissolution. I have been informed by His Excellency that this is a privileged document which cannot be published.

8. *Does a Convention Exist that the Senate should not Refuse Supply?*

If the view is accepted that section 53 confers on the Senate a power to reject the Appropriation Bill, the further question arises whether a convention exists outside the Constitution, according to which the Senate should not reject the Appropriation Bill which provides for the recurring annual services of government. The Convention Debates were not referred to above in the analysis of section 53, because it has been held that the Constitution may not be construed by reference to the Convention Debates.[29] But in discussing whether there is a convention outside the Constitution (or as some would prefer to call it a rule of political practice) that the Senate should not reject the Appropriation Bill, reference to Convention Debates may legitimately be made. Quotations from what the delegates said could be collected to support either of the rival positions.[30]

The founding fathers were conscious of the problems that could arise in a system of responsible government from the grant of wide powers to the Senate. On the other hand there were the States righters who wanted a strong Senate. This pressure came primarily from the delegates of the smaller states. There were those who stressed that a system of responsible government in which the Prime Minister and Cabinet were responsible to Parliament could not work efficiently if the Government was responsible to both Houses of Parliament. In the British system it is the House of Commons that wields power and the Government is responsible to this House which alone can destroy a Government and send it to the polls. The system of responsible government could break down if the Government was responsible to both Houses, in situations where different political parties control the two Houses. In the United States where there are two Houses of coequal authority, the President is popularly elected and the Cabinet is composed of persons who are not members of either House and who cannot be removed from office by either House. The founding fathers were conscious of the problems which could arise from the enshrinement of the federal idea and principles of responsible government in the governmental structure. But because of the insistence of the States righters for a powerful Senate, they could not resolve the problem. Whenever the question was raised as to what would happen if the Senate rejected supply, the reply was that in practice this would not be contemplated and it was idle to speculate on improbable events.

28 1 November, 1952.
29 *Municipal Council of Sydney* v. *The Commonwealth* (1904) 1 C.L.R. 208.
30 See for a selective collection D. Hall and J. Iremonger, *Makers and Breakers* (1976) pp. 119-182.

It is very evident that in the early years of the functioning of the Commonwealth, the politicians, many of whom having been involved either directly or indirectly in the process of the work of the Conventions at which the Constitution was drafted, recognised the need to synthesise the system of responsible government with the special position given to the Senate under the Constitution, Thus it came to be recognised in the early years of the Commonwealth that the Government was responsible to the House of Representatives — and this tradition, related to the essential needs of the smooth functioning of responsible government, endured until the 1970's when (in 1970) Mr. Whitlam threatened and (in 1975) Mr. Fraser carried out the threat to block supply. Howard and Saunders sum up the process thus:[31]

> … (A) new system of government from a combination of responsible government and federalism... (was devised). The details of this complex structure were neither resolved in the Conventions nor embodied in the Constitution. Instead, both sets of principles were incorporated in the Constitution (somewhat vaguely in the case of responsible government) in the hope that the logical inconsistency between them would work itself out in practice. In the words of Griffith: 'I propose to leave to the future the avoiding of these difficulties, and that we should not make difficulties in advance.'

Could it be said that there was a convention outside the Constitution relating to the Senate and supply? One of the tests enunciated for the establishment of a convention is a continued observance of a practice which is necessary for the working of government. It could be said that the existence of the alleged convention is necessary for the working in Australia of the system of responsible government. It is also relevant that in the first 74 years of the Commonwealth the Senate has had an Opposition majority for 18 years. During this period 139 Appropriation Bills had been passed and prior to 1975 such a Bill had never been rejected (even in 1975 it was not rejected).

It is relevant that the insistance in the Convention Debates that the Senate retain the power to reject the Appropriation Bill arose from the delegates who wanted a strong Senate (where each State had equal representation) in the hope that it would protect the interests of the States. It is thus clear that if the delegates ever envisaged the rejection of an Appropriation Bill it was on the grounds of it being in some way adverse to the interests of the States. In 1975 the Appropriation Bill was rejected on grounds of party politics which did not directly bear on the interests of the States. The above factors though not relevant to an interpretation of the legal effect of the powers of the Senate, are relevant in assessing whether a convention exists and the political propriety of the actions of the Senate. It should also be noted in this context that conventions are essential for the functioning of democratic and representative government and are so recognised in many countries, notably Britain and even in the United States.[32]

Mr. Fraser, the then Leader of the Opposition, stated that supply will only be rejected in "extraordinary and reprehensible circumstances" which he argued were present in 1975. This is relevant in that the

[31] Howard and Saunders, *op. cit.,* n. 20, p. 258.
[32] See further L.J.M. Cooray, *op. cit.,* n. 17.

Opposition did not deny the existence of what they called a "political practice" (refusing to use the term convention). But the question arises as to what test (if any) can be adopted to determine what constitutes "extraordinary and reprehensible circumstances". It is worthy of note that at the time the Hayden budget was presented the Opposition did not seem inclined to oppose it. Subsequently the Opposition leaders changed their minds. It is alleged that the decision of the High Court handed down on 10 October 1975 holding that the Representation Act was not contrary to the Constitution was responsible for the "about face". The effect of the High Court decision was that four new Senators would have to be elected to represent the A.C.T. and the Northern Territory and there was the possibility that Labor could gain control of the Senate. This would enable speedy implementation of its legislative programme and enactment of legislation implementing the proposals of the Distribution Commissioners to allow a substantial redistribution of electorates for all States except Western Australia, to the political cost of one of the Opposition parties, the National Country Party.[33] Thus it may be that it was an "unstated" purpose that lay behind the Opposition's mad rush for power. Kelly[34] states that some Opposition Senators who would not otherwise have supported the blocking of supply consented to do so for this reason. The Governor-General purported to put the supply dispute to the people. The people however apparently voted on the economic issues and performance of the Labor government. Thus even though apparently the people had not voted on the supply issue in the general election, paradoxically the election result is construed as a vindication of the stand of the Senate. The result is that it has been made much easier for a Senate in the future to reject supply. Seventy-five years of history and practice have been wiped out. It is worthy of note in this context, that the opinion polls prior to the Governor-General's intervention showed that the people were not in favour of the Senate's role in relation to rejection of supply, apparently because they felt that the Senate's stand was unjustified and contrary to convention. The Governor-General's intervention citing in his statement the concurrence of the Chief Justice changed that, and the stamp of authority was placed on the actions of the Senate.

There is much confusion over the role of the Senate in relation to the rejection of supply which is epitomised in the Governor-General's statement of 11 November. The Governor-General stated that the Senate had the undoubted right to reject the Appropriation Bill. But he glosses over the fact that the Senate had not rejected the Bill and had only deferred consideration of it. He accepted the assurance of the Leader of the Opposition (a member of the House of Representatives) that the Senate would not pass the Appropriation Bill. But was Mr. Fraser *who was a member of the House of Representatives* entitled to speak about what action the Senate would take? Why did the Governor-General not ask the Senate whether or not it intended to pass the Appropriation Bill? There is a further matter which requires emphasis. Apparently the rejection of supply was not a Senate decision.

[33] See further Kelly, *op.cit.,* n. 3, pp. 242-271, especially pp. 258-259; Hanks, *op. cit.,* n. 26.

[34] Kelly, *op. cit.,* n. 3.

The newspapers of the time (editorials, articles and letters to the editor) discussed the possibility of rejection of supply as a decision taken by Mr. Fraser, and when the decision was taken it was proclaimed as Mr. Fraser's decision. If this is so it is difficult to perceive the much proclaimed role of the Senate as an independent body taking an independent stand. If the refusal of supply was a decision masterminded by Mr. Fraser, the Senate was a passive instrument in the game of party politics. In order to justify the actions of the Senate one has to regard it as an independent body as well as one acting at the dictates of a party body in the House of Representatives — and this double conflicting implication is contained in the Governor-General's statement, which accepts the view of Mr. Fraser as to what the Senate will do. The Senate may well have acted as an independent body if the Governor-General had not intervened, and had it been compelled to vote on supply, in which case some Liberals of "independent" mind may have voted with the Government, as they had threatened to do.

9. *The Legality of the Actions of the Government after Supply Ran Out*

Sections 81-83 of the Constitution deal with the appropriation of money by Parliament to the Government. In view of the Senate's attitude the Government explored alternative methods of supply. But there seems little doubt that after supply ran out towards the end of November, the Government could not avoid committing acts of illegality.[35] The Governor-General was apparently appalled by the consequences which could occur. The episodes in the history of Victorian politics where Governments without supply had dismissed public servants no doubt haunted him.[36] In his statement of November 11, 1975 the Governor-General said:

> Here the confidence of both Houses on supply is necessary to ensure its provision ... the duty of the Prime Minister is the same in the most important respect — if he cannot get supply he must resign or advise an election ... the announced proposals about financing public servants, supplies, contractors and others do not amount to a satisfactory alternative to supply.

The Government's stated alternative courses of action after supply ran out gave rise to criticism (and were probably also in the Governor-General's mind) that "this was no way to run a country". Clark and Lloyd[37] reply to this argument thus: "This missed the point. The vouchers scheme was a political device, not an economic or administrative tool. It was designed to allow the government to carry on until the opposition yielded."

At first sight it appears that the Governor-General was in a situation where he had no other course of action. This is the argument which O'Connell[38] develops. The argument is that when supply ran out at end of November the Government would be driven to illegal and extraordinary methods to maintain public services; that though

35 Fajgenbaum and Hanks, *op.cit.,* n. 26, pp. 139-156; Lloyd and Clark, *op.cit.,* n.8, pp. 193-204.
36 See above sub-heading 7.
37 Lloyd and Clark, *op. cit.,* n. 8, pp. 234, 193-204.
38 D.P. O'Connell, in (1976) *Parliamentarian* pp. 5, 6, 13.

supply would run out at the end of November, November 11 was last possible date on which the Governor-General could act because if Parliament was dissolved on November 11 a general election could be held in mid-December, but if Parliament was dissolved after November 11 due to the intervention of the holidays and other connected factors, an election could not be held till mid-February. This argument is highly debatable. There is no reason why an election could not have been held at any time. It is not correct to assume that an election could not have been held before mid-February. In a national emergency, surely conventional notions of what should or should not be done can be disregarded. Even if the sanctity of the Australian Christmas holidays is accepted, an election could have been held in the first week of January, or even the week before Christmas. Another answer to O'Connell's argument and the main criticism of the Governor-General's actions[39] is that by his intervention before the Senate had actually rejected the Appropriation Bill and about twenty days before supply ran out, the Governor-General prevented the working out of a compromise or a capitulation by either Mr. Fraser or Mr. Whitlam. Given the seriousness of the position before supply ran out the politicians surely would have had to come up with a compromise. Was the Governor-General's intervention on November 11 really necessary? If a compromise had not been worked out, the Governor-General could have followed the same course of action when supply ran out at end of November or earlier if the Senate rejected supply, and the price to be paid was that the general election would have had to be delayed till mid-February (accepting O'Connell's highly debatable argument). The implications and propriety of the actions of the Senate are discussed further below in 18.2.

10. *Prime Minister Whitlam's Proposal of a Half Senate Election as a Solution to the Supply Crisis*

An election for half the members of the Senate fell due under sections 12-13 of the Constitution one year before July 1, 1976. At the same time the first elections for Senators to represent the A.C.T. and the Northern Territory in accordance with legislation which had recently been enacted would be held. The Senators representing the territories would take their seats in the Senate immediately after the elections, and the other Senators would take their seats on July 1, 1976.

The Governor-General said in his statement that he was not disposed to accept, if it were given to him, the advice of the then Prime Minister Whitlam to hold a half Senate election as a method of resolving the supply crisis. There were two objections to Mr. Whitlam's proposal. Firstly, the State Governors whose responsibility it is under the Constitution to issue writs for the election may have been advised by some of the Premiers to refuse to do so. Secondly, the half Senate election could not offer a solution to the supply crisis before the end of November. The Senators elected for the States would not take their seats in the Senate until July 1, 1976 and therefore there was reason for the State Premiers to argue that an election in

[39] Which is developed below, sub-heading 18 in Pt. II.

November was premature. This proposal of Mr. Whitlam could perhaps be seen as a political ploy — but its effect was that it provided the Governor-General with one more reason on which to base his chosen course of action. From the Labor point of view, it would have been better if this proposal had not been put forward.

11. *The Letter Containing Advice by the Chief Justice to the Governor-General*

When looking at the events surrounding the sending of the letter of advice from the Chief Justice to the Governor-General there are three aspects which need to be examined (i) should advice have been tendered? (ii) the contents of the letter and (iii) the use made of the letter by the Governor-General.

11.1 *The propriety of tendering advice*

The request by the Governor-General and the decision of Chief Justice Sir Garfield Barwick to write a letter (attached as an appendix to this article) advising the Governor-General has been criticised by many. Both Sir Garfield's letter to the Governor-General and the Governor-General's statement make reference to the "Chief Justice". Even if such reference had not been made when Sir Garfield's letter was published for public consumption, it would necessarily be assumed that the views expressed were those of the Chief Justice in his capacity as Chief Justice of the High Court, even though Sir Garfield was expressing his individual opinion. Members of the public could not be expected to differentiate between Sir Garfield Barwick expressing an individual opinion and Sir Garfield Barwick advising as Chief Justice of the High Court. In other words his advice, which in reality was a personal opinion, in the public mind would more naturally be associated with the Chief Justice of the High Court and thus confer a stamp of authority and legitimise the Governor-General's chosen course of action.

Sir Garfield was a former Liberal politician and Cabinet Minister, factors which made it inadvisable for him to express an opinion, however subjectively honest and sincere it was. The consultation by the Governor-General of, and the advice given by, the Chief Justice contravened the principle of the separation of powers and the independence of the judiciary from the executive on which the Constitution rests. It is also relevant in this context that the High Court has decided that it will not give advisory opinions on legal questions.[40] It will not decide probable or hypothetical issues that may in the future arise, but will decide disputes between parties which are based on actual facts and events. On the other hand, if the Governor-General needed advice on a legal matter, who was he to consult but the Chief Justice? There was a precedent for him to do so. In 1914 the Governor-General *with the consent of the Prime Minister* sought advice from Sir Samuel Griffith over the granting of a double dissolution under section 57. But in 1975 the Governor-General acted against the advice of the Prime Minister. It is perhaps *inherently* not improper for the Governor-General to have consulted the Chief Justice. The view is

40 *In re the Judiciary and Navigation Acts* (1921) 29 C.L.R. 257.

put forward below (sub-heading 14) that the Governor-General should not take upon himself the role of guardian of the law and the Constitution so as to usurp the role of the courts. If however he does intervene in legal matters, then it follows that he would need the Chief Justice's advice. The conclusion then is that if the giving of advice by the Chief Justice was improper, it arose not from the inherent impropriety of the advice, but that the Governor-General was contemplating a course of action which it was not legitimate for him to embark upon — and this tainted the advice which would otherwise have been proper.

11.2. *The Content of the Chief Justice's Letter*

Quite apart from whether the Chief Justice should have tendered advice, there is the further question whether the statements made by him are correct. Sir Garfield in his statement expresses the view that a Prime Minister who cannot ensure supply to the Crown must resign on the analogy of the operation of responsible government in England. Sir Garfield overlooked the fact that in Britain a Prime Minister who commanded a majority in the lower House would never be without supply and that it was unthinkable that in Britain a Prime Minister who enjoyed the unquestioned confidence of the lower house would be dismissed. Thus a situation arose in which two British conventions (a Prime Minister without supply must resign and a Prime Minister who enjoys the confidence of the lower house is entitled to govern) when applied in the Australian federal context conflicted. They therefore were not entirely appropriate as precedents and there was a need to think more deeply on the matter.[41]

Sir Garfield in his letter discussed exclusively the Prime Minister's duty to resign but did not discuss the Governor-General's duty in that situation. The issue is discussed further below (sub-heading 14) and it is pointed out that the mere existence of a duty to resign on the part of the Prime Minister does not necessarily lead to the consequence that a Governor-General has a power to dismiss him.

If an issue covered by his advice came before the High Court, the Chief Justice would be in an awkward situation because he would have prejudged it and this would have been a reason for Sir Garfield refusing to tender advice. However Sir Garfield stated[42] that he was giving advice on a subject which could never come before the High Court. Howard conclusively demonstrates[43] that this is not so. If Mr. Whitlam had refused to accept his dismissal on the grounds that the Governor-General had no power to do so, and continued to act as Prime Minister and gave orders to public servants, the advice the Chief Justice had given would have necessarily come before the courts. Howard gives other ways in which the issues regarding which the Chief Justice advised could have been the subject of litigation.

41 See further sub-heading 18 in Pt. II.

42 In an interview at the National Press Club reported in Financial Review of June 11, 1976 and in Hale and Iremonger, *op. cit.*, n. 30, pp. 211-16.

43 *National Times,* 14-19 June, 1976.

11.3. *The use made of the letter*

The most disconcerting aspect of the Chief Justice's advice was the use made of it by the Governor-General. The popular interpretation was that the Chief Justice had stated that all the actions of the Governor-General were legally proper. Sir Garfield had placed his stamp of approval on the Governor-General's actions.

Having allowed the above interpretation put upon his statement to stand and observed its use in a general election, subsequently in June 1976 in an interview at the National Press Club[44] Sir Garfield qualified in two ways the popular interpretation of his advice. He denied that he had said anything in his letter about the propriety of the Governor-General's action in dissolving Parliament under section 57, and that he was dealing in his letter only with the Governor-General's power to dismiss a Prime Minister. He had merely said that it would be legitimate for the Governor-General to dismiss the Prime Minister *provided he was not in a position to gain supply.* He had said that whether supply was available or not was a political matter on which he could not and did not express an opinion. In effect he had not said that the Governor-General was justified in dismissing Prime Minister Whitlam in the particular circumstances existing on November 10 (the date of his letter), but that he would be justified if it was clear that the Prime Minister was not able to provide supply, which was a matter for the Governor-General to find out. The question arises whether since the Appropriation Bill had been deferred and not rejected and since there were about 20 days before supply ran out, it could be said on November 11 that the Prime Minister was unable to provide supply. Thus it appears that the Chief Justice's letter did not go very far in validating the Governor-General's actions, even though the Governor-General gave the impression that it did. It is of course not possible to speculate on how many people accepted the Governor-General's actions on the basis that the Chief Justice had given an opinion to the effect that it was legal.

12. *General Elections of 1975 — a Vindication of the Actions of the Governor-General and the Senate*

The Governor-General claimed that he was putting the supply dispute to the people. But it should have been clear to him that the people would not vote on the supply dispute, but on the economy and whether they wanted the Labor Government in power for another three years. But even though the people did not vote on the supply issue as such, paradoxically in some circles the election is regarded as having established that the Senate and the Governor-General had the undoubted right (by law and convention) to act in the way they did. The Liberal/Country Party throughout the election campaign asked the people to focus on economic issues and not the constitutional ones, but after the election claimed that the people had spoken and justified the actions of the Senate and the Governor-General.

The whole parliamentary system works on the basis that the decision when a general election should be held is one vested in the

44 *Op.cit.*, n. 42, pp. 211-216.

Prime Minister who commands the confidence of the House of Representatives subject to the rule that the maximum period is three years. Mr. Fraser was able to choose in 1977 an opportune time at which a general election should be held. The effect of the Governor-General's action was that he sent the Whitlam Government to the polls at the worst point in a global economic crisis when its popularity rating was at its lowest. It is perhaps idle to reflect that in December 1975 President Ford was trailing Jimmy Carter by 20 per cent in the popularity polls and this was narrowed to 2 per cent one year later. A parliamentary leader in any country where the system of free elections exists who was compelled to face the electorate in 1975, at the height of a global economic crisis, would probably have been swept from power. Thus Sir John Kerr chose to send a government which had obtained two popular mandates in the preceding three years to the polls at the worst conceivable time. The extent of international factors operating on the Australian economy has been made clearer in the period of the Fraser Government's tenure in which that Government has not succeeded in righting the economy. The Labor Government was dismissed just at the time when commentators seemed to agree the Hayden budget showed that it was making an attempt to come to grips with the economic issues. The Labor government may have failed — it may have succeeded. The Governor-General's precipitate action has had the result that the people can never know. The controversies that ensued underline the salutory principle that it is not the role of an unelected Governor-General responsible to no one to determine the date of an election. If the people voted primarily on the economic issues and the performance of the Labor Government, the proposition that the votes of the people confirmed the actions of the Senate and the legally, conventionally and politically questionable acts of the Governor-General cannot be maintained.

L.J.M. COORAY*

(To be continued)

* Associate Professor, School of Law, Macquarie University, New South Wales, Australia.