CHANGING THE LEADER – THE CONSTITUTIONAL CONVENTIONS CONCERNING THE RESIGNATION OF PRIME MINISTERS AND PREMIERS

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I INTRODUCTION

In recent times in Australia there have been a number of changes in the leader of the governing party at both Commonwealth and State level, leading to a change in the holder of the office of Prime Minister or Premier. These changes have occurred not as a consequence of retirement or the loss of an election, but because of the loss of support for the leader by the leader's parliamentary party. They include the South Australian change of Premier from Mike Rann to Jay Weatherill, the New South Wales changes of Premier from Morris Iemma to Nathan Rees to Kristina Keneally and the change in Prime Minister from Kevin Rudd to Julia Gillard. Earlier examples include the change from Bob Hawke to Paul Keating and from John Gorton to Billy McMahon. This article explores the connection between the loss of party support for a leader and the role of the Governor or Governor-General in the appointment and removal of the Premier or Prime Minister.[1]

When a party loses confidence in its leader, there is usually a leadership challenge and a vote of the parliamentary party, which results in the appointment of a new leader. The former leader then customarily resigns his or her commission as Prime Minister and a new Prime Minister is commissioned. The Governor-General, in assessing who is most likely to hold the confidence of the lower House, will ordinarily choose the person who leads the party or coalition which holds a majority of seats in the lower House. Part II of this article considers the consequences of resignation. In doing so, it addresses two questions. First, does the resignation of a Prime Minister, in such circumstances, entail the resignation of the entire Cabinet? Secondly, is the Governor-General, in commissioning a new Prime Minister, obliged to act upon the advice of the departing Prime Minister as to who should be his or her successor?

Part III of this article considers the position of a Prime Minister who chooses not to resign, despite having lost the leadership of his or her party. This might occur when a

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1 For ease of reference, this article will refer in general to Prime Ministers and Governors-General, but the same principles apply also to Premiers and Governors.

party splits or a new coalition forms, potentially leaving the Prime Minister with a new majority in the House. Alternatively, it may simply be a case of a Prime Minister wanting to fight on, despite the loss of support of a majority of his or her party. In these circumstances, an issue arises as to the role of the Governor-General. On what basis is the Governor-General justified in determining that the Prime Minister has lost the confidence of a majority of the lower House? Can or should a Governor-General dismiss a Prime Minister on the receipt of a letter of a majority of Members of the House advising of a loss of confidence in the Prime Minister, or must there be a vote of no confidence on the floor of the House? If a Prime Minister who has lost the confidence of his or her Cabinet or party seeks to reassert control by advising the Governor-General to dismiss Ministers, prorogue Parliament or dissolve Parliament, should the Governor-General act upon that advice, or can it be ignored as no longer representing the advice of the government? These are all difficult questions that have rarely arisen in practice and even more rarely been the subject of judicial consideration. As a consequence, this article draws not only on Australian experience, but on experience in other countries, such as Canada, Nigeria and Malaysia, where similar Westminster-style structures and conventions have applied.

II THE CONSEQUENCES OF THE RESIGNATION OF THE HEAD OF GOVERNMENT

A The effect of a Prime Minister's resignation on the Ministry

1 Theory

When a government is formed after an election, it is an individual who is commissioned by the Governor-General to form a government. The convention which governs the appointment of a Prime Minister obliges the Governor-General to commission the person who holds (or is most likely to hold) the confidence of the lower House. The Governor-General's decision about whom to commission is usually based upon the assumption that the leader of a parliamentary party has the support of all the members of that party in the lower House. If they form a majority, then it is a fair assumption that the leader of that party can form a government that holds the confidence of the lower House.

The person commissioned as Prime Minister to form a government does so by advising the Governor-General on the appointment of Ministers and the allocation of portfolios to particular Ministers. The Prime Minister may also advise the Governor-General on the removal of Ministers, if they do not resign at the Prime Minister's request.[2] The removal of Ministers is not a reserve power — it is a power exercised by

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2 It is customary for Ministers to resign when requested to do so by the Prime Minister. In rare cases, however, a Minister's commission has been terminated on the advice of the Prime Minister or Premier. See, eg, Geoffrey Sawer, *Australian Federal Politics and Law 1901-1929* (Melbourne University Press, 1956) 161; R P Roulston, 'Dismissal of Ministers of the Crown — A Tasmanian Precedent' (1959) 1 *Tasmanian University Law Review* 280; John Kerr, *Matters for Judgment* (Macmillan, 1978) 241-4; R D Lumb, *The Constitutions of the Australian States* (University of Queensland Press, 5th ed, 1991) 78; Richard McGarvie, *Democracy* (Melbourne University Press, 1999) 55; and *Stewart v Ronalds* (2009) 76 NSWLR 99. In Canada, the formal resignation of a Minister is not required. It is sufficient that the Prime Minister recommends a Minister's replacement, as a Minister holds office 'during pleasure': Canada, Privy Council Office, *Manual of Official Procedure of the Government of Canada*

the Governor-General on the advice of the Prime Minister.[3] This is because the Prime Minister, while he or she holds his or her commission, is the person responsible for forming the government and advising upon its constitution.

If a Prime Minister resigns following the defeat of his or her government at an election or a defeat in the lower House that indicates a loss of confidence, then the Prime Minister's resignation has the effect of terminating the commissions of all other Ministers (subject to Ministers carrying on in a caretaker capacity until a new government is sworn into office). If the Prime Minister dies or resigns for personal reasons or because he or she has lost the confidence of the governing party, there are mixed views as to the consequences for the rest of the Ministry.

Some have taken the view that a ministry is automatically terminated by the resignation or death of the Prime Minister[4] (subject again to continuation in office until a new leader is chosen and a new ministry formed, as the country can never be without a government). This is because the ministry is appointed on the advice of the Prime Minister and its existence is dependent upon the operation of the Prime Minister's commission to form a government. A new Prime Minister, operating pursuant to a new commission, must form his or her own government. As the Canadian Privy Council Office put it in the *Manual of Official Procedures of the Government of Canada*:[5]

> The Prime Minister's resignation from office brings about the resignation of all ministers and of the Government. Whether the Prime Minister's resignation follows a defeat in the House or at the polls or is for personal or other reasons the life of the ministry is terminated with the formal acceptance of his resignation. Individual ministers however continue in office until the new Government is formed. …
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> The Government is identified with the Prime Minister and cannot exist without him. He alone is responsible for recommending who will be appointed ministers. He can recommend their replacement or dismissal and he can bring about the resignation of the whole Government by his own resignation.

(Ottawa, 1968) 338, <http://jameswjbowden.files.wordpress.com/2011/09/ manual-of-official-procedure-of-the-goc.pdf>. In the UK dismissal is usually regarded as an implied resignation: I Jennings, *Cabinet Government* (Cambridge University Press, 3rd ed, 1961) 83.

3 George Winterton, 'The Constitutional Position of Australian State Governors' in H P Lee and G Winterton (eds), *Australian Constitutional Perspectives* (Law Book, 1992) 274, 303. See also United Kingdom Cabinet Office, *The Cabinet Manual* (United Kingdom Government, 1st ed, October 2011) para 3.4.

4 See in relation to Canada: Canada, Privy Council Office, *Guide to Canadian Ministries since Confederation*: <http://www.pco-bcp.gc.ca/mgm/index.asp?lang=eng#fN_2_>; Adam Dodek, 'Rediscovering Constitutional Law: Succession Upon the Death of the Prime Minister' (2000) 49 *University of New Brunswick Law Journal* 33, 36; A Heard, *Canadian Constitutional Conventions — The Marriage of Law and Politics* (Oxford University Press, 1991) 49; J R Mallory, *The Structure of Canadian Government* (Gage Educational, revised ed, 1984) 93; and John Saywell, *The Office of Lieutenant-Governor* (University of Toronto Press, Toronto, 1957) 94. See in relation to the UK: Alpheus Todd, *Parliamentary Government in England* (Sampson Low, Marston, Revised ed, 1892) Vol II, 21; and A B Keith, *The British Cabinet System 1830-1938* (Stevens & Sons, 1939) 63.

5 Privy Council Office, above n 2, 77 and 463.

Others have argued that where the resignation is 'personal',[6] such as a retirement, the government as a whole does not vacate office.[7] This view tends to be based more on the notion of party governance — that it is a particular political party that forms the government and that the Prime Minister is simply one member of this government whose departure does not affect its continuing existence. Hence the Prime Minister is commissioned to form the government, but that government may continue to exist without the Prime Minister, until terminated by defeat.

Some of the confusion about the issue is related to the need for ministers to continue in office until a new ministry is appointed. If a Prime Minister's resignation or death were immediately to terminate all ministerial offices, then the country or State would potentially be left without a government, which would be extremely problematic.[8] In the United Kingdom, for example, after the Brown Government failed to win a majority in the 2010 general election, the Prime Minister, Gordon Brown, wanted to resign as Prime Minister even though the Conservatives and the Liberal-Democrats had not yet completed negotiations on a coalition. He apparently advised the Queen's Private Secretary that he wished to tender his resignation, but was told that the Queen would not accept it. Her Private Secretary apparently advised: 'The Prime Minister has a constitutional obligation, a duty, to remain in his post until the Queen is able to ask somebody … to form an administration'. He was told that he would have to wait longer until the political situation became clearer.[9] This problem arose because it was assumed, and presumably intended, that Brown's resignation would take immediate effect, including the resignation of the entire ministry.

In Australia, this problem is avoided by the custom and practice that the resignation of a Prime Minister or Premier and that of their ministry, only takes effect once a new head of government is commissioned to form a government. For example, the letter of resignation of Kevin Rudd as Prime Minister stated that the resignation was to take effect upon the appointment of Ms Gillard to the office of Prime Minister.[10]

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6 For a discussion of the circumstances in which a resignation is 'personal', see Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law* (Penguin Books, 7th ed, 1994) 175.

7 See in relation to Canada: Peter Hogg, *Constitutional Law of Canada* (Thomson Carswell, 2004) [9.6(b)] (but see [9.3(a)]). See in relation to the UK: Jennings, above n 2, 84-5; United Kingdom, *Parliamentary Debates*, House of Commons, 10 July 1935, vol 304, col 360 (Mr Stanley Baldwin, Prime Minister); and Rodney Brazier, *Constitutional Practice* (Oxford University Press, 3rd ed, 1999) 52-3, 310.

8 See the discussion in Canada of cases where this had occurred prior to 1920. The practice was then changed so that the Prime Minister's resignation would not be given 'formal effect until his successor is ready to take over': Privy Council Office, above n 2, 453-5. See also Mallory, above n 4, 83.

9 Anthony Seldon and Guy Lodge, *Brown at No 10* (Biteback Publishing, 2010) 460. Cf *The Cabinet Manual* of the United Kingdom which records at [2.10] that it remains a matter for the Prime Minister 'to judge the appropriate time at which to resign' but that recent examples 'suggest that previous Prime Ministers have not offered their resignations until there was a situation in which clear advice could be given to the Sovereign on who should be asked to form a government'. *The Manual* notes that it 'remains to be seen whether or not these examples will be regarded in future as having established a constitutional convention.': United Kingdom Cabinet Office, above n 3.

10 Letter from Kevin Rudd to the Governor-General, 24 June 2010.

This avoids the transitional problems and ensures that a government is always in existence.

The question of whether the resignation of a head of government includes that of the whole ministry has been litigated in Malaysia. In 1994, the Chief Minister of the State of Sabah, Datuk Pairin, tendered his resignation after a number of members of his party defected to an opposition party and a majority of the members of the Legislative Assembly petitioned the Governor to demand Datuk Pairin's resignation as Chief Minister. A new Chief Minister and Cabinet were subsequently appointed. The Plaintiff, who was a Minister in Datuk Pairin's Government, argued that Datuk Pairin's resignation was personal to him and did not affect the Plaintiff's appointment as a Minister, which had never expressly been revoked. While the case largely turned on specific provisions of the *Constitution* of Sabah, the High Court (Sabah and Sarawak) also held that it was a 'well-established convention' that 'upon the death or resignation of the Chief Minister, the Cabinet stands dissolved'.[11] Abdul Kadir Sulaiman J held that Datuk Pairin's resignation must be deemed to include that of the whole Cabinet. He contended that only the Chief Minister who advised on the appointment of a Minister could advise upon his or her revocation of appointment. Hence, if the resignation of the Cabinet was not given effect by the resignation of the Chief Minister, the newly appointed Chief Minister would be unable to advise the Governor that other Members of the Cabinet be removed from office.[12] The Court considered that for Ministers to continue in office after the resignation of the Chief Minister would amount to a 'fetter on his discretion to advise the head of state as to the choice of the members to be with him in his Cabinet'.[13]

Such an argument might have some resonance in Australia. If the resignation of a Prime Minister, even for 'personal' reasons, did not entail the resignation of his or her Ministry, then the newly appointed Prime Minister would be obliged to seek the resignation of Ministers whom he or she had not appointed, and if they refused to resign, to advise the Governor-General to dismiss them from office, which could give rise to significant controversy and bitterness[14] and might be regarded as an unreasonable fetter on a newly appointed Prime Minister.

2 *Commonwealth practice*

The Australian Constitutional Convention in 1985 set out the following practice regarding the effect on the ministry of the termination of a Prime Minister's commission:

> The resignation of a Prime Minister following a general election in which the government is defeated or following a defeat in the House of Representatives terminates the commissions of all other Ministers, but the death of a Prime Minister or his resignation in

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11 *Datuk (Datu) Amir Kahar bin Tun Datu Haji Mustapha v Tun Mohd Said bin Keruak Yang di-Pertua Negeri Sabah* [1995] 1 MLJ 169, 190.

12 Ibid 189.

13 Ibid 190.

14 See the controversy surrounding the dismissal of Tony Stewart as a Minister in New South Wales, including litigation and claims concerning the need for procedural fairness: *Stewart v Ronalds* (2009) 76 NSWLR 99. Note that Allsop J held at [45] (Hodgson JA and Handley AJA agreeing) that advice to the Lieutenant-Governor on dismissal was a political matter and could not be scrutinised by the courts. The same conclusion has been reached by the Rajasthan High Court: *Dalapt Raj Bhandari v President of India* AIR 1993 Raj 194, [9], [13].

other circumstances does not automatically terminate the commissions of the other Ministers.[15]

It is not, however, an accurate description of the practices, as they have developed, nor is it particularly helpful, as reference to a ministry not being 'automatically' terminated tells us nothing about who decides upon whether or not it is terminated, by what criteria such a decision is to be made and whether it is consistent with constitutional principle.

The practice in Australia concerning the resignation of heads of government has varied over time and between the Commonwealth and the States. It has been the practice at the Commonwealth level since 1940[16] for the Prime Minister to resign after an election, even though his or her government won the election, in order to clear the ministry and to allow a new one to be sworn in after the Prime Minister is re-commissioned.[17] Prime Ministers have also resigned and been re-commissioned when the party supporting the Prime Minister split or was reconstituted or a new coalition was formed, but the Prime Minister still retained the confidence of the House of Representatives.[18] In these cases the Prime Minister's resignation included that of the whole ministry.

The death of an Australian Prime Minister has also been regarded as terminating the offices of ministers, requiring the appointment of a new ministry, even if it was in much the same form as the previous ministry. The deaths in office of Lyons,[19] Curtin[20]

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15 *Proceedings of the Australian Constitutional Convention,* Brisbane, 1985, Vol 1, 416, Practice H ('*Proceedings*').

16 Prior to 1940 Prime Ministers generally resigned when defeated, either at an election (Deakin, Fisher, Cook and Bruce), in the House of Representatives (Deakin, Watson, Reid, Fisher and Scullin), or at a referendum (Hughes — who resigned but was reappointed in the absence of another viable government). Barton and Fisher resigned upon retirement to take up other posts. Ministries would continue through elections, as long as the government won and the Prime Minister stayed in office. Note that on 17 August 1904, Deakin was chastised by the Governor-General for failing to send a formal resignation letter when he lost office in April that year and was made to sign a back-dated one. In 1909 Andrew Fisher was required by the Governor-General to rewrite his letter of resignation as it was not in the 'proper form': Files of the Australian Constitutional Convention, ACC9 Item 6, Finemore Collection, University of Melbourne Law School ('*ACC Files*').

17 Menzies appeared to start this practice with his resignation and re-commissioning in October 1940, after the September election. Curtin continued the practice and apart from an aberration in 1961 when only specific Ministers resigned after the election — not Menzies — the practice of incumbent Prime Ministers resigning after winning an election and being reappointed with a new ministry has continued through to Howard and Gillard. See, eg, Commonwealth, *Gazette: Special*, No S 426, 26 October 2004 (re resignation and re-appointment of John Howard as Prime Minister after the 2004 election); and Commonwealth, *Gazette: Special*, No S 160 and Commonwealth, *Gazette: Special*, No S 161, 16 September 2010 (re resignation and re-appointment of Julia Gillard as Prime Minister after the 2010 election).

18 See, eg, the resignation and re-commissioning of Billy Hughes on 14 November 1916 and 17 February 1917, Joseph Lyons on 9 November 1934 and 7 November 1938 and Robert Menzies on 14 March 1940.

19 Prime Minister Lyons died on 7 April 1939. On 8 April 1939 the Government Gazette stated that Sir Earle Page had accepted the position of Prime Minister and set out a full new ministry: Commonwealth, *Gazette*, No 21, 8 April 1939.

and Holt,[21] show that even though an interim Prime Minister (Page, Forde and McEwen respectively) was appointed pending the choice of a new leader for the governing party, a full new ministry was appointed either upon the day that the interim Prime Minister was appointed or the following day.[22]

There have been four occasions when a Prime Minister resigned after losing the support of his Cabinet or party colleagues: Menzies in 1941, Gorton in 1971, Hawke in 1991 and Rudd (throwing out the numerical symmetry) in 2010.[23] In the case of Menzies, a full new ministry was appointed on the date of Menzies' resignation and Fadden's appointment as Prime Minister.[24] It appears that his resignation was regarded as including the resignation of the full ministry.

In the case of the change from Gorton to McMahon, McMahon advised the Governor-General that the existing ministry should continue for the present.[25] It was therefore a choice made by the incoming Prime Minister to preserve the ministry for the time being. A new ministry was appointed 12 days later.[26]

When Keating defeated Hawke on 19 December 1991, however, the Government Gazette simply recorded Hawke's resignation and Keating's appointment.[27] Hawke's resignation letter stated:

> I wish to resign the office of Prime Minister with effect from the appointment of Mr Keating to the office. As Mr Keating may wish current Ministers to continue in office, my resignation is intended to leave ministerial appointments other than my own unaffected until such time as Mr Keating, as Prime Minister, may advise Your Excellency otherwise.[28]

The difference here was that it was the outgoing Prime Minister who advised the continuance of the ministry, not the incoming Prime Minister, as in the case of

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20 Prime Minister Curtin died on 5 July 1945. On 6 July 1945 the Government Gazette stated that Francis Forde had accepted the position of Prime Minister and set out a full new ministry: Commonwealth *Gazette*, No 133, 6 July 1945.

21 On 17 December 1967, Prime Minister Holt went missing. On 19 December 1967 it was notified in the Government Gazette that the Governor-General had 'determined' (ie terminated) the appointment of Harold Holt as Prime Minister and appointed John McEwen to hold the office of Prime Minister: Commonwealth, *Gazette*, No 107A, 19 December 1967. The following day the Governor-General appointed a full ministry: Commonwealth, *Gazette*, No 109, 20 December 1967.

22 Note also at the State level that upon the death of the Queensland Premier, Edward Hanlon, in March 1946, the Governor, Sir John Laverack, took the view that the government had ceased to exist and asked Vince Gair to form a new one: Brian Costar, 'Vincent Clair Gair — Labor's Loser' in D Murphy et al (eds), *The Premiers of Queensland* (University of Queensland Press, revised ed, 2003) 268, 272.

23 Hughes might also be placed in this category, but he lost the support of his coalition partner, rather than his party, causing his resignation in February 1923. The interim Prime Ministers of Page, Forde and McEwen have not been included in this category as their appointments were always intended to be temporary.

24 Commonwealth, *Gazette*, No 175, 1 September 1941, referring to appointments made on 29 August 1941.

25 Letter from Mr W McMahon to the Governor-General, 10 March 1971.

26 Commonwealth, *Gazette*, No 32, 22 March 1971.

27 Commonwealth, *Gazette: Special*, No S 367, 24 December 1991, recording the change of leadership on 19 December 1991.

28 Letter from Mr R J L Hawke to the Governor-General, 19 December 1991.

McMahon. Hawke's advice was accepted by the Governor-General and the full ministry was not vacated as a consequence of Hawke's resignation. Later on 27 December, Keating formed his first Ministry, not by resigning and seeking reappointment, but instead by undertaking a Cabinet reshuffle involving the revocation of appointments and the making of new appointments. Two new Ministers were sworn in as Executive Councillors, eleven ministerial appointments were revoked and twelve new ministerial appointments were made.[29]

Rudd's resignation letter of 24 June 2010 was in exactly the same terms as Hawke's, with the only substantive changes being those of the relevant names.[30] It included the same statement about the intention to leave other ministerial appointments unaffected 'until such time as Ms Gillard, as Prime Minister, may advise'. The Government Gazette, which curiously broke with precedent by not recording Rudd's resignation, merely recorded the appointment of Gillard as Prime Minister.[31] Another Gazette notice recorded a minor reshuffle four days later affecting three Ministers.[32] No full ministry was appointed on that occasion either.

It therefore appears that as a matter of practice at the Commonwealth level, the resignation of the Prime Minister will include the resignation of all his or her ministerial colleagues unless the resignation is for 'personal' reasons *and* the outgoing Prime Minister expressly advises the Governor-General that the resignation of the full ministry is not intended or the incoming Prime Minister advises that Ministers are to continue under their current commissions. It is contended, however, that the better approach would be for the outgoing Prime Minister's resignation to include the resignation of the full ministry, subject to those Ministers continuing in office until replaced by a new ministry. This is more consistent with the constitutional principle that it is the Prime Minister who holds the commission to form a government and is responsible for the advice upon the appointment and revocation of ministerial appointments. Once that commission is terminated, the appointment of all ministers forming part of that government ought to be terminated, subject to a transitional caretaker period in which they continue to hold office until a new ministry is appointed. This ensures that the country is never without a government, but that the incoming Prime Minister is free to establish his or her own Government.

3 State practice

Practice in the Australian States varies considerably. At one extreme, the New South Wales practice has been for the resignation of the Premier to include the resignation of all ministers, regardless of whether it is a resignation and re-appointment following an

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29 Commonwealth, *Gazette: Special*, No S 369, 31 December 1991.

30 Letter from Mr K Rudd to the Governor-General, 24 June 2010. The only other change in the wording is that 'continue in office' in the Hawke letter is changed to 'remain in office' in the Rudd letter. Clearly the letter was drafted by a public servant copying from the earlier precedent, rather than one personally dictated by the Prime Minister.

31 Commonwealth, *Gazette: Special*, No S 104, 30 June 2010, regarding the appointment made on 24 June 2010.

32 Commonwealth, *Gazette: Special*, No S 105, 30 June 2010, regarding appointments made on 28 June 2010.

election win,[33] resignation following an election loss,[34] or a 'personal' resignation, be it voluntary retirement[35] or resignation due to loss of political support.[36]

Although the Government Gazettes recording the transfers of premiership from Morris Iemma to Nathan Rees[37] and then to Kristina Keneally[38] only recorded the resignation of the Premier and appointment of the new Premier, each resignation letter stated that the Premier's resignation included the resignation of all his ministerial colleagues.[39] In each case a new ministry was appointed some days later.[40] It is not clear whether former Ministers continued in office on a caretaker basis until the new ministry was appointed or whether the new Premier held all ministerial offices during the intervening days before the new ministry was appointed.[41]

At the other extreme is South Australia. There, the Premier's resignation does not involve that of all his or her Ministers where the resignation is personal or the Premier dies in office.[42] Instead, each Minister resigns separately (or if necessary, his or her commission is revoked by the Governor where there is a refusal to resign).[43]

In South Australia, there is no practice of incumbent Premiers who win an election then resigning and seeking reappointment. Instead, the one government may continue across numerous Parliaments, until it is defeated or the Premier resigns. For example, one of the Playford Ministries lasted over 20 years from 1944-1965. One of the Dunstan Ministries lasted over 8 years from 1970 to 1979, the Bannon Ministry lasted over 9

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33 See, eg, New South Wales, *Gazette*, No 62, 2 April 2003 regarding Bob Carr's resignation after the 2003 election 'which action involves the resignation of his colleagues' from their respective offices and as Members of the Executive Council, and his reappointment as Premier with a full ministry.

34 See, eg, New South Wales, *Gazette*, No 32, 28 March 2011, regarding Kristina Keneally's resignation after the 2011 election 'which action includes the resignations of her colleagues from their respective offices and as Members of the Executive Council'.

35 See, eg, New South Wales, *Gazette*, No 105, 4 July 1986 (regarding Neville Wran's resignation); and New South Wales, *Gazette*, No 97, 3 August 2005 (regarding Bob Carr's resignation), both of which also expressly included the resignation of the full ministry.

36 See, eg, New South Wales, *Gazette*, No 74, 24 June 1992, regarding Nick Greiner's resignation, which included the resignation of the full ministry.

37 New South Wales, *Gazette*, No 113, 5 September 2008.

38 New South Wales, *Gazette*, No 192, 4 December 2009.

39 Letter from Morris Iemma to the Governor, 5 September 2008 and Letter from Nathan Rees to the Governor, 4 December 2009.

40 New South Wales, *Gazette*, No 115, 8 September 2008 (regarding full Rees ministry); and New South Wales, *Gazette*, No 197, 8 December 2009 (regarding full Keneally ministry).

41 Note that Eric Roozendaal was appointed as Treasurer one day before the rest of the Keneally ministry, as the Treasurer was needed to attend an inter-governmental meeting: New South Wales, *Gazette*, No 196, 7 December 2009. Note also that Barry O'Farrell and Andrew Stoner held all ministries between them from 28 March 2011 until the appointment of a full ministry on 3 April 2011 — New South Wales, *Gazette*, No 34, 3 April 2011.

42 Bradley Selway, *The Constitution of South Australia* (Federation Press, 1997) 44.

43 See, eg, the 'withdrawal' of the commission of Dale Baker as Minister for Mines and Energy and Minister for Primary Industries: South Australia, *Gazette*, No 149, 22 December 1995, 1831.

years, from 1982 to 1992,[44] and the Rann Ministry lasted over 9 years, from 2002 to 2011.

If a South Australian Premier resigns in circumstances where the government continues in office, only those Ministers who are subject to a portfolio change resign. Any Minister who retains the same portfolio under the new Premier continues in office under his or her old commission, rather than resigning and receiving a new commission. Hence when Premier John Olsen resigned in October 2001 and was replaced by Premier Rob Kerin, the only changes made were to the offices of Premier and Deputy Premier.[45] More recently, when Premier Mike Rann resigned in 2011 and was replaced by Premier Jay Weatherill, only those Ministers whose portfolios changed resigned.[46] Those who retained their portfolios continued in office under their old commissions.[47]

The other States tend to sit between these two extremes and often show inconsistency within State practice. Queensland,[48] Victoria[49] and Western Australia[50] tend to follow the New South Wales approach of a new ministry being appointed after an incumbent Premier wins an election, although only those Ministers who are changing or losing portfolios usually resign. Ministers continuing in the same portfolio are simply reappointed without ever having resigned. The Tasmanian position is set out in s 8B of the *Constitution Act 1934* (Tas), which provides that a Minister's term of office expires eight days after the return of the writs, unless he or she is reappointed by the Governor. In practice, the Premier resigns after the election and states that his or her resignation carries with it that of the entire ministry. If the incumbent Premier has won the election, the letter also then states that he or she is able to form a new Government and advises the Governor to offer him or her a new commission as Premier.[51]

When it comes to the resignation of a Premier, voluntarily or involuntarily, the practice is inconsistent not only between States, but within States. For example, in

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44 See generally Parliament of South Australia, *Statistical Record of the Legislature 1836-2007* (2007).

45 South Australia *Gazette*, No 137, 22 October 2001, 4677-8. See also the resignation of Don Dunstan and his replacement by James Corcoran (South Australia, *Gazette*, No 7, 15 February 1979) and the resignation of Dean Brown after being challenged in the party room by John Olsen (South Australia, *Gazette*, No 140, 28 November 1996).

46 South Australia, *Gazette,* No 74, 21 October 2011, 4286-8.

47 See, eg, Russell Wortley, who retained the portfolio of Industrial Relations and therefore did not resign and was not reappointed.

48 See, eg, Queensland, *Gazette*, No 39, 22 February 2001; Queensland, *Gazette*, No 14, 13 September 2006; and Queensland, *Gazette*, No 71, 26 March 2009.

49 See, eg, Victoria, *Gazette,* No S 315, 1 December 2006; Victoria, *Gazette*, No S 231, 5 December 2002; and Victoria, *Gazette*, No S 33, 3 April 1996. Note, however, that after the 1985 and 1988 elections, while the Cain ministry resigned and was reappointed, it appears that the Premier himself did not resign as Premier and seek reappointment: Victoria, *Gazette*, No S 84, 13 October 1988; and Victoria, *Gazette*, No 18, 15 March 1985, 691.

50 Western Australia, *Gazette*, No 15, 10 March 1977; Western Australia, *Gazette*, No 18, 5 March 1980; Western Australia, *Gazette*, No 23, 26 February 1986; Western Australia, *Gazette*, No 21, 2 March 1989; Western Australia, *Gazette*, No 42, 10 March 2005.

51 See, eg, Letter from Paul Lennon to the Tasmanian Governor, 5 April 2006. Note that this 'advice' is not formal constitutional advice, as the appointment of a Premier is a reserve power, as discussed below.

Victoria when Sir Henry Bolte and Sir Rupert Hamer resigned, both the Premier and the whole ministry resigned.[52] However, when John Cain resigned, his ministers did not. The Governor, on the advice of the new Premier, then accepted the resignation of some Ministers, appointed some Ministers and 'confirmed' other Ministers to continue in their existing portfolios.[53] When Steve Bracks resigned in 2007, the Governor accepted his resignation and that of another Minister and then appointed John Brumby as Premier.[54] Some days later, the Governor then accepted the resignation of Brumby and the ministry and then reappointed Brumby as Premier with a new ministry.[55]

Western Australia also provides a mixed bag of approaches. When Sir Charles Court resigned, so did those ministers who were changing portfolios, but not those who kept the same portfolio. A full new ministry was appointed.[56] When Brian Burke resigned, the full ministry resigned with him and a new one was appointed.[57] When Peter Dowding resigned, three other ministers resigned and were reappointed, but there was no full new ministry approved.[58] When Geoff Gallop resigned, Alan Carpenter resigned too and then was appointed as Premier while continuing to hold his former portfolios. A full ministry was then listed as 'approved' by the Governor.[59]

Inconsistent approaches are largely the result of a lack of continuity in the personnel dealing with the resignation of Premiers and the time-pressure of dealing with a surprise resignation or loss of leadership. Rarely is thought given to the constitutional principles at issue and how they ought to affect the relevant procedures. As a matter of principle, when the person who has been commissioned by the Governor to form a government dies or resigns, his or her commission ceases, as do the appointments of ministers made pursuant to that commission, subject to the fulfilment of caretaker obligations until a new government is formed under a new Premier (even if the ministry and the allocation of portfolios remain largely the same). The practice should reflect this principle.

B Advice by an outgoing head of Government on his or her successor

Before a Prime Minister resigns, does he or she have the right to advise the Governor-General about whom to appoint as his or her successor? Does such advice have the status of advice from a constitutionally responsible minister, or does it have no greater status than informal advice proffered by an informed person? For example, what if Kevin Rudd, just prior to resigning as Prime Minister, had advised the Governor-General to appoint Maxine McKew as Prime Minister, rather than Julia Gillard? What if he had done so before the caucus had held a meeting to decide the leadership of the party? To what extent is the Governor-General bound to act upon such advice or could she seek a delay until caucus had made its decision and then place reliance upon the decision of the caucus?

Lowell, Forsey and Mallory have all taken the view that an outgoing Prime Minister is not entitled to advise on his or her replacement, and if such advice is given, it is not

52 Victoria, *Gazette*, No 76, 24 August 1972; Victoria, *Gazette*, No 50, 5 June 1981.
53 Victoria, *Gazette*, No 32, 15 August 1990, 2512-3.
54 Victoria, *Gazette*, No S 181, 30 July 2007.
55 Victoria, *Gazette*, No S 184, 3 August 2007.
56 Western Australia, *Gazette*, No 5, 25 January 1982.
57 Western Australia, *Gazette*, No 20, 26 February 1988.
58 Western Australia, *Gazette*, No 14, 13 February 1990.
59 Western Australia, *Gazette*, No 21, 25 January 2006.

binding.[60] Forsey argued that it would be 'preposterous' for a defeated Liberal Prime Minister to advise the Governor-General to send for a Conservative other than the leader of the victorious Conservative Party. He also regarded such advice as unnecessary, as parliamentary parties now have mechanisms for choosing their own leaders and therefore the Governor-General's choice in most cases should be 'automatic'.[61]

Marshall and Moodie set out three reasons why a Prime Minister could not advise the monarch on his or her successor. First, the Prime Minister would not be fully responsible to Parliament for the advice, as the potential sanction of loss of office would hold no fear for a Prime Minister who was leaving office anyway. Secondly, in the case of a defeated Prime Minister, he or she does not have the parliamentary authority to give binding advice. Thirdly, such an important power might be exercised in 'a highly partisan or even capricious way'.[62] Butler considered that it would be seen as 'outrageous' if the 'umpire had to act on the advice of one of the protagonists'.[63] Rasmussen went a step further, arguing that as someone 'can be invited to form a Government only when there currently is no Prime Minister', it is therefore 'impossible for the monarch to follow the convention to act on the advice of a responsible minister'.[64] He seemed to require concurrency between the act of the giving of advice and the act that it is advised that the monarch perform.[65]

When the issue was considered by the High Court of Calcutta in 1967, Mitra J rejected the notion that the Governor is bound by ministerial advice in the appointment of the Chief Minister. He thought that it could not be said 'that the Governor is bound to act, in appointing a Chief Minister, on the advice of the outgoing Chief Minister who has lost his majority in the Legislative Assembly as a result of the General Election'.[66]

Others have defended the notion of the outgoing Prime Minister advising the Governor upon his or her successor as a means of preserving the perceived independence of the Crown from politics. Brazier, for example, contended that 'it is preferable for the Queen to be advised whom to send for in order to preserve the comfortable notion that at the change of an Administration, an event which must be inextricably linked with party politics, the Queen still acts only on ministerial

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60 A Lawrence Lowell, *The Government of England* (Macmillan, 1926) Vol 1, 34; Eugene Forsey 'The Present Position of the Reserve Powers of the Crown' in *Evatt and Forsey on the Reserve Powers* (Legal Books, Sydney, 1990) lxvii; Mallory, above n 2, 80.

61 Eugene Forsey, 'The Courts and The Conventions of The Constitution' (1984) 33 *University of New Brunswick Law Journal* 11, 20. See also Ian Killey, *Constitutional Conventions in Australia* (Australian Scholarly Publishing, 2009) 133, 137.

62 Geoffrey Marshall and Graeme Moodie, *Some Problems of the Constitution* (Hutchinson, 4th ed 1967) 50-1.

63 David Butler, *Governing Without A Majority* (Macmillan Press, 2nd ed, 1983) 80.

64 Jorgen Rasmussen, 'Constitutional Aspects of Government Formation in a Hung Parliament' (1987) *Parliamentary Affairs* 139, 142.

65 Note also Brazier's concern that if the Prime Minister gets the order of his or her statements wrong and resigns before advising the Queen on his or her successor, then such advice is not formal ministerial advice: Brazier, above n 7, 14. See also Butler, above n 63, 91.

66 *Mahabir Prasad Sharma v Prafulla Chandra Ghose,* AIR 1969 Cal 198, [43].

advice'.[67] Selway has argued that the outgoing Premier is 'entitled to advise the Governor' as to his or her successor, but that the 'Governor is not bound by that advice'.[68]

In practice, outgoing Prime Ministers and Premiers do tend to advise upon their successor, but the status of this advice is usually regarded as not constitutionally binding. The Canadian Privy Council summarised the theory and practice as follows:

> Advice to the Crown by the Prime Minister before resignation has, in Canada, been looked upon as a normal state of affairs, but constitutional opinion clearly indicates that the Crown, in exercising its prerogative in selecting a Prime Minister, is theoretically under no obligation to take the advice of the Prime Minister. In practice, of course, the Crown may have little alternative.[69]

This is because it is usually quite clear who holds the confidence of the lower House. The Republic Advisory Committee was a little more equivocal, noting that the 'outgoing Prime Minister can usually be expected to advise the Governor-General of the party's choice and recommend the appointment of that person, although there is a question whether that recommendation amounts to binding "advice"'.[70] It also raised the concern that such advice from an outgoing Prime Minister might not be truly 'responsible' advice.[71]

The problem is that there is a clash of conventions involved. On the one hand, the Governor-General is obliged by convention to commission as Prime Minister the person who is most likely to command the support of the House of Representatives. That person is almost always the person who leads the party or coalition which holds the most seats in the lower House. This convention has the potential to clash with another convention of responsible government — that the Governor-General acts on the advice of his or her responsible Ministers, primarily the Prime Minister. However, this latter convention does not apply with respect to the exercise of reserve powers, and the appointment of a Prime Minister has been generally regarded as the exercise of a reserve power.[72] Moreover, this convention cannot apply when there is no Prime Minister to advise because the Prime Minister is dead[73] or missing.[74]

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67 Rodney Brazier, 'Choosing a Prime Minister' [1982] *Public Law* 395, 398. See also United Kingdom Cabinet Office, above n 3, [2.9], which states that the Prime Minister, at the time of his or her resignation, 'may also be asked by the Sovereign for a recommendation on who can best command the confidence of the House of Commons in his or her place'.

68 Selway, above n 42, 43.

69 Privy Council Office, above n 2, 145.

70 Republic Advisory Committee, *An Australian Republic – The Options,* Vol 2, Appendix 6, (1993) 250 ('*RAC*').

71 Ibid 254.

72 Marshall and Moodie, above n 62, 49; George Winterton, *Monarchy to Republic: Australian Republican Government* (Oxford University Press, 1994 reprint) 32.

73 When Prime Minister Lyons was dying the Governor-General apparently asked his doctors whether Lyons could advise on a successor but they replied that he was not sufficiently lucid: Commonwealth, *Parliamentary Debates,* House of Representatives, 20 April 1939, 15.

74 The Governor-General, after consultation with the Deputy Prime Minister, John McEwen, 'determined' the commission of Harold Holt as Prime Minister on 19 December 1967, two days after he went missing: Commonwealth, *Gazette*, No 107A, 19 December 1967.

Hence, although it has generally been the practice for Prime Ministers[75] and Premiers[76] to advise the Governor-General or Governor as to whom to appoint as their successor,[77] this advice is merely informal guidance, not formal advice that has the constitutional status of advice from a responsible minister.

The Australian Constitutional Convention sought to establish a convention that the Prime Minister's advice as to a successor becomes binding on the Governor-General where the Government has been defeated in a confidence motion in the lower House and decides to resign rather than seek a dissolution.[78] This would limit the reserve powers of the Governor-General and require the appointment as Prime Minister of whoever was chosen by the outgoing Prime Minister. While this might have the advantage of removing any controversy attaching to an exercise of discretion by the Governor-General, it would not appear to be consistent with the principle that the person who is commissioned by the Governor-General is the one who is most likely to command the support of the lower House.[79] A majority of the Constitutional Commission's Executive Government Committee proposed a modification of this convention which would make the Prime Minister's advice binding only if given 'in good faith'.[80] However, the wisdom of requiring the Governor-General to assess the Prime Minister's 'good faith' is not apparent either. The Republic Advisory Committee concluded that 'although in Australia the outgoing Prime Minister's advice will be given and is unlikely not to be followed, there is not yet a fully accepted convention

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75 The first record of a Prime Minister advising on his or her successor appears to be on 2 February 1923 when Prime Minister Hughes advised the Governor-General to call upon Mr Bruce to form a government. While such advice may have been given orally on other occasions, there is documentary evidence, usually in resignation letters, that Prime Ministers Hughes, Bruce, Menzies, Forde, Chifley, McEwen, Gorton, McMahon, Fraser, Hawke, Keating, Howard and Rudd advising the Governor-General as to their successors. For early resignation letters see: *ACC Files*, above n 16. In terms of the order of advice given, the Prime Minister's resignation is usually contained in the first paragraph, but stated to take effect only upon the appointment of the new Prime Minister. Thus advice in the next paragraph as to whom to appoint as Prime Minister is still given by the outgoing Prime Minister before his or her resignation takes effect.

76 In NSW, Premier Carr, in his resignation letter, recommended that the Governor request Morris Iemma to form a Government: Letter from R Carr to the Governor, 3 August 2005. However, neither Morris Iemma nor Nathan Rees advised the Governor in their respective resignation letters as to whom to appoint as their successor: Letter from M Iemma to the Governor, 5 September 2008; and Letter from N Rees to the Governor, 4 December 2009. In South Australia, it is the practice for outgoing Premiers to advise the Governor on their successor.

77 Killey makes the point that just because advice has routinely been given does not mean that it is relied upon or that the decision-maker considered himself or herself bound to seek and accept it: Killey, above n 61, 138.

78 *Proceedings*, above n 15, 416, Practice E. See also: Vol II, Structure of Government Sub-Committee Report, August 1984, [2.21]-[2.26].

79 For criticism of these proposed practices, see Killey, above n 61, 137-8. For a critical analysis of the authority of the Australian Constitutional Convention to seek to codify such practices, see: Charles Sampford, '"Recognize and Declare": An Australian Experiment in Codifying Constitutional Conventions' (1987) 7(3) *Oxford Journal of Legal Studies* 369.

80 Constitutional Commission, Advisory Committee on Executive Government, *Executive Government* (June 1987) 41.

that that advice must be followed'.[81] Nor should there be, if this would override the fundamental convention of responsible government that the Prime Minister be the person who holds the confidence of the House.

C Conclusion regarding effect of resignation and advice on successor

The death or resignation of a Prime Minister will normally result in the vacation of all ministerial offices, subject to a transitional period of continuation in office of Ministers in a caretaker capacity until a new government is sworn in. In practice this has been subject to the caveat that where the resignation is 'personal' to the Prime Minister, the ministry may continue in office if the outgoing Prime Minister so advises and the incoming Prime Minister does not advise otherwise. The better view, however, is that once a Prime Minister surrenders his or her commission to form a government, through resignation, death or dismissal, the ministry is also vacated, subject to transitional arrangements.

As for advice by an outgoing Prime Minister regarding his or her successor, such advice is not the conventionally binding advice of a responsible minister and cannot override the convention that the person commissioned to be the Prime Minister shall be the person who holds the confidence of the House. The advice of the outgoing Prime Minister can only be regarded as informal advice which the Governor-General will take into account when assessing who is the person most likely to hold the confidence of the lower House.

III REFUSAL OF THE HEAD OF GOVERNMENT TO RESIGN

A The reserve power to dismiss a head of government who refuses to resign

What if a Prime Minister, who has lost the support of a majority of his or her parliamentary party, refuses to resign? What then is the role of the Governor-General? Does the Governor-General have grounds to dismiss a Prime Minister, or is a vote on the floor of the Parliament required?

For example, what if Kevin Rudd had not resigned his commission as Prime Minister after losing the leadership of the Parliamentary Labor Party? Could Julia Gillard have demanded that the Governor-General dismiss Rudd as Prime Minister and appoint Gillard? First, until the Prime Minister resigns, dies or is dismissed, the Prime Minister remains the Prime Minister regardless of the views of his or her parliamentary party. Neither the new party leader nor the Cabinet nor any other Minister or Member of Parliament would have the constitutional standing to formally advise the Governor-General on the removal of the Prime Minister and the appointment of someone else as Prime Minister.[82] In the end, the dismissal of a Prime Minister is a reserve power of the Governor-General which is not exercised on formal advice from anyone.[83]

Would the Governor-General have good grounds to dismiss a Prime Minister who has lost the support of his or her parliamentary party, or would convention require the

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81 *RAC*, above n 70, 256.

82 Geoffrey Sawer, 'Queensland Joker Raises Knotty Points of Law', *The Canberra Times* (Canberra), 26 November 1987, 2.

83 Harold Edward Renfree, *The Executive Power of the Commonwealth of Australia* (Legal Books, 1984) 169; Winterton, above n 72, 44; Killey, above n 61, 137.

Governor-General to wait to see whether the Prime Minister was defeated on the floor of the lower House? If a Prime Minister is defeated in a confidence motion in the House of Representatives, convention requires that he or she resign or advise the dissolution of the House and an election. If neither course is taken by the Prime Minister and a reasonable period is given to permit the Prime Minister to gain a vote of confidence, the Governor-General would be entitled to dismiss the Prime Minister.[84] If, however, Parliament were not sitting, then would loss of the leadership of the parliamentary party be a sufficient ground for the Governor-General to dismiss a Prime Minister from office or recall Parliament without advice?

The loss of the leadership of a parliamentary party does not necessarily indicate loss of confidence of the lower House. Some of those who did not support Prime Minister Rudd in the caucus might have felt unable to vote no confidence in a Labor Prime Minister in the Parliament. The vote in the House would be confined to members of the House of Representatives, whereas the caucus also includes Senators, so there would be a different electoral college which could result in a different outcome, particularly where the caucus vote was close. Finally, it is possible that Members of the Opposition or independents might have voted to support Rudd as Prime Minister over the choice of the caucus (if for no other reason than to cause political instability). As Markesinis has noted, the Crown relies on fact not possibilities, in the exercise of its powers and would need 'clear and convincing evidence that the Prime Minister does not command a majority in the House'[85] before a reserve power would be exercised. A caucus vote would therefore not be sufficient to establish that a Prime Minister had lost the confidence of the House.

1 Letter from majority evidencing loss of confidence

What if a majority of Members of the House of Representatives had written to the Governor-General swearing that they no longer had confidence in the Prime Minister and petitioning for his dismissal and the appointment of another Member as Prime Minister? Would this be a sufficient basis for the Governor-General to act?

The issue has arisen in a number of other countries with Westminster-style parliamentary systems. One example is the case of *Adegbenro v Akintola*[86] concerning the Western Region of Nigeria. Section 33 of the *Constitution* of Western Nigeria stated that Ministers held office during the Governor's pleasure, provided that the Governor shall not remove the Premier from office 'unless it appears to him that the Premier no longer commands the support of a majority of the members of the House of Assembly'. On 21 May 1962, a letter was sent to the Governor by 66 members of the 124 member House of Assembly, stating that they no longer had confidence in the Premier and seeking his removal from office. The Governor then removed the Premier, Chief Akintola, from office, even though there had not been a vote of no confidence in the Premier in the House of Assembly. The Premier claimed he had been wrongfully removed. He had, in fact, sought to face the Parliament to obtain a vote of confidence, but the Speaker had refused to recall it. Akintola refused to go, forcing his way back

84 Winterton, above n 72, 45–6; Killey, above n 61, 142.

85 B S Markesinis, *The Theory and Practice of Dissolution of Parliament* (Cambridge University Press, 1972) 95.

86 [1963] AC 614.

into his office, petitioning the Queen to remove the Governor,[87] and challenging the validity of his removal in the courts. The Federal Supreme Court of Nigeria held that the Premier had not been validly removed because there had not been a vote of no confidence or defeat of the Government in the House of Assembly on a measure of importance that would show that the Premier no longer had the support of a majority of the House of Assembly.[88]

On appeal, the Privy Council took a different view. Their Lordships noted the difference between a written and unwritten constitution and the fact that the written *Constitution* of Western Nigeria did not set any limits, such as the requirement for a vote of no confidence, on the Governor's discretion to remove the Premier from office. The *Constitution* expressly permitted the Governor to act if 'it appears to him' that the Premier no longer commands the majority support of the House. Their Lordships observed that weight must be given to the fact that the Governor's power to remove was not limited to cases of votes of no confidence.[89]

Their Lordships recognised the dangers inherent in a Governor acting without a vote of the House. They pointed out that expressions of opinion, attitude or intention upon such matters 'may well prove to be delusive' and that a Governor who relied upon them risked placing himself in 'conflict with the will of the elected House of Representatives'. In the end, however, their Lordships distinguished between good policy and the law. They concluded:

> But, while there may be formidable arguments in favour of the Governor confining his conclusion on such a point to the recorded voting in the House, if the impartiality of the constitutional sovereign is not to be in danger of compromise, the arguments are considerations of policy and propriety which it is for him to weigh on each particular occasion: they are not legal restrictions which a court of law, interpreting the relevant provisions of the Constitution, can import into the written document and make it his legal duty to observe. To sum up, there are many good arguments to discourage a Governor from exercising his power of removal except upon indisputable evidence of actual voting in the House, but it is nonetheless impossible to say that situations cannot arise in which these arguments are outweighed by considerations which afford to the Governor the evidence he is to look for, even without the testimony of recorded votes.[90]

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87 The Queen declined to act upon his petition on the ground that as he was no longer Premier he could not advise her to remove the Governor. See further: Larry Jay Diamond, *Class, Ethnicity and Democracy in Nigeria – The Failure of the First Republic* (Syracuse University Press, 1988) 101; and James O'Connell, 'Politics, Law and Constitutionalism: The 1962 Western Region Crisis in Nigeria' in Donald Anthony Low (ed), *Constitutional Heads and Political Crises* (Macmillan Press, 1988) 77.

88 *Akintola v Adermi* [1962] 1 All NLR 442.

89 *Adegbenro v Akintola* [1963] AC 614, 629.

90 Ibid 630-1. Note that Chief Akintola received two substantial votes of confidence in the House shortly before the Privy Council decided the case, suggesting that the Governor may have been incorrect in his assessment of confidence in the House. Moreover, the Parliament of Western Nigeria reversed the effect of the Privy Council's decision by amending the *Constitution*, with retrospective effect, so that the Governor could only remove the Premier if there had been a vote of no confidence in the Premier in the House of Assembly. See further: Chijioke Ogwurike, 'The Governor's Power to Remove a Premier from Office in Western Nigeria' (1963) 7 *Journal of African Law* 95; and Benjamin Nwabueze, *A Constitutional History of Nigeria* (C Hurst, 1982) 102–3.

The courts in Malaysia have taken varying views upon this issue. In 1966, the Governor of Sarawak requested that the Chief Minister, Stephen Kalong Ningkan, resign after the Governor received a 'top secret' letter from an apparent majority of Members alleging a loss of confidence in Ningkan. Ningkan refused, seeking to face the legislature to determine confidence by way of a formal vote. He was instead dismissed by the Governor. He challenged his dismissal. The Court overturned his dismissal, holding that only a vote of no confidence on the floor of the legislature was sufficient to support his dismissal. Acting Chief Justice Harley noted that 'men who put their names to a "Top Secret" letter may well hesitate to vote publicly in support of their private views'.[91] Since then, however, Malaysian courts have taken a more relaxed view about issues of 'no confidence' being determined upon evidence outside of a formal vote of no confidence, as long as the extraneous source of the evidence is 'properly established'.[92]

The issue also arose in British Columbia in 1991. The Premier, Bill Vander Zalm became mired in a conflict of interest controversy. His parliamentary party wished to depose him as leader but was concerned that he would seek to dissolve Parliament and bring them down with him. They prepared affidavits that showed a majority of Vander Zalm's party, (which amounted to a majority of the House) no longer had confidence in Vander Zalm as Premier, and the leader of the caucus communicated this information directly to the Lieutenant-Governor, David Lam. After a formal report into Vander Zalm's conflict of interest was made public by the Conflict Commissioner, the Lieutenant-Governor persuaded him to resign. The Lieutenant-Governor later noted that he would have been prepared to dismiss Vander Zalm had he not resigned. It is not clear, however, whether the grounds for dismissal would have been Vander Zalm's alleged misbehaviour or his failure to resign in the face of a loss of confidence in his leadership, even though no vote of no confidence had been passed in the legislature.[93]

Either ground would have been controversial if the same events were to have occurred in Australia. In the absence of some kind of judicial finding of illegality, there would have been criticism that the Lieutenant-Governor breached the separation of powers and usurped the role of the judiciary by making his or her own judgment of guilt.[94] In the absence of a vote of no confidence in the Parliament, there would be

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91 *Stephen Kalong Ningkan v Tun Abang Haji Openg and Tawi Sli* [1966] 2 MLJ 187, 193. See also: H P Lee, *Constitutional Conflicts in Contemporary Malaysia* (Oxofrd University Press, 1995), 11-13.

92 See, *Datuk (Datu) Amir Kahar bin Tun Datu Haji Mustapha v Tun Mohd Said bin Keruak, Yang di-Pertua Negeri Sabah* [1995] 1 MLJ 169, 187; and the recent judgment of the Malaysian Federal Court in the 2009-10 Perak constitutional crisis: *Dato' Seri Ir Haji Mohammad Nizar Bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir* (Federal Court, 9 February 2010), at [48].

93 See also Ronald Cheffins, 'The Royal Prerogative and the Office of Lieutenant Governor', (2000) 23 *Canadian Parliamentary Review* 14, 17; Peter Boyce, *The Queen's Other Realms: the Crown and its Legacy in Australia, Canada and New Zealand* (Federation Press, 2008) 106; and V Palmer, 'Yes, a caucus can dump an unpopular Premier', *Vancouver Sun* (Vancouver) 24 November 2010.

94 See the criticism of Sir Philip Game on this ground, despite the relevant illegality being relatively clear cut and not denied: H V Evatt, *The King and His Dominion Governors* (Frank Cass & Co, 2nd ed 1967) 173–4; and Winterton, above n 72, 46. Vander Zalm was charged with a criminal breach of trust but later acquitted.

criticism that the Lieutenant-Governor had pre-empted the Parliament in deciding confidence.[95]

2 *Australian leaders rejected by their own parties in party splits*

Precedents on this subject in Australia have primarily arisen as a result of party-splits and the formation of new parties or coalitions. One such example occurred in New South Wales in 1916. The Labor Party split over the issue of conscription.[96] The Premier, William Holman, supported conscription but most of his party did not. Holman, along with most of his Cabinet, was expelled from the Labor Party.[97] The rump of the parliamentary Labor Party elected Ernest Durack as their new leader. On 7 November 1916, Durack moved a vote of no confidence against Holman. The Opposition Leader, Charles Wade, proposed an amendment that it was not desirable at that time to determine confidence because of the war and that a 'National Party' should be formed to assist in the prosecution of the war effort.[98] He declared that he was proud to say that his party was not tempted by the 'very inviting bait' of securing government that 'a body of disgruntled gentlemen' saw fit to dangle before their eyes.[99] Wade's amendment was passed. Hence confidence had been raised but deferred, rather than determined, by the House.

The Governor, Sir Gerald Strickland, formed the view that in the absence of a positive vote of confidence, Holman could not remain as Premier. Holman had been commissioned on the basis that he was the Leader of the Labor Party and he no longer held that position.[100] Sir Gerald sent Holman a minute on 10 November seeking his resignation. Holman sought to consult his colleagues overnight. The next morning the headlines in *The Sydney Morning Herald* declared 'Sensational Political Development - Governor dismisses Premier'.[101] It outlined a 'semi-official statement of the Governor's action' which stated that 'because Mr Wade took control of the business of the House from the Premier, the Governor has informed Mr Holman that his Excellency will cease transacting business with Ministers, and is entitled to seek the advice of the strongest group in Parliament'.[102] Holman later said that he had been told by the Press that the publication of the minute was authorised by the Governor.[103]

Holman saw the Governor and expressed his objections to the Governor's conduct. In particular, he argued that the Governor's only source of advice about proceedings in Parliament was the Premier and that the Governor therefore had no right to draw the

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95 See Taylor's view that 'dismissal should not occur until the opinion of the lower House has actually been expressed and an opportunity to resign has been given to the Premier': Greg Taylor, *The Constitution of Victoria* (Federation Press, 2006) 140–1.

96 See also Michael Hogan, 'The 1917 Election' in Michael Hogan and David Clune (eds), *The People's Choice — Electoral Politics in 20th Century New South Wales* (Federation Press, 2001) 164–8.

97 See also David Clune and Gareth Griffith, *Decision and Deliberation — The Parliament of New South Wales 1856-2003* (Federation Press, 2006) 222.

98 New South Wales, *Parliamentary Debates,* Legislative Assembly, 8 November 1916, 2493–4.

99 Ibid 2483-4.

100 Evatt, above n 94, 147.

101 'Sensational Political Development — Governor Dismisses Premier', *Sydney Morning Herald* (Sydney) 11 November 1916, 13.

102 Ibid.

103 Letter from Mr Holman (Premier NSW) to the NSW Agent-General 14 November 1916: UK Public Records Office ('PRO'): CO 881/15/6.

conclusions that he had concerning what had occurred in the Parliament. After further discussion, Holman and Wade advised the Governor that they would form a Ministry as part of a National Government for the course of the war. The Governor agreed that the constitutional incident was at an end.[104] However, the Governor then asked Holman to resign his commission in order to be reappointed and to form a new Government. The Governor insisted that he would not summon the Executive Council or sign important documents (such as assent to the Bill to prolong the life of the Parliament) until the new Ministry was appointed.[105] The Attorney-General provided an opinion that there was no obligation on the Premier to resign and that former Ministers who were no longer part of the Government could resign and be replaced individually upon the advice of the Premier.[106] Holman then advised the Governor that this was the course he proposed to take, and the change in Ministers took place without Holman having to resign, despite the Governor's objections.[107]

The British Secretary of State responded to the Governor's justification of his actions by saying that he was 'surprised' by the Governor's interference in the absence of the successful passage of a no confidence motion and when the Premier had not advised that he was unable to govern. He was not aware of any authority for the Governor's view that Holman had to resign. He considered it obvious that this kind of intervention by a Governor must render the working of the constitutional machine extremely difficult.[108] Sir Gerald was shortly afterwards 'recalled' from his office as Governor and told that he could not return to Australia.[109]

At the Commonwealth level, when the equivalent split occurred, there was less constitutional controversy. On 14 November 1916, the Labor Party removed Prime Minister Hughes from its leadership, appointing Frank Tudor instead to lead the parliamentary party. Hughes was followed by 13 Members of the House of Representatives and 11 Senators, who together with Hughes formed the 'National Labor Party'. Although a minority government, it was initially supported by the Liberal Party. Hughes took the more direct path by resigning as Prime Minister. He was then reappointed by the Governor-General with a reconstructed ministry. On 17 February 1917, Prime Minister Hughes again resigned, this time to join with the Liberal Party in forming the 'Nationalist Party'. He was again reappointed and established a new ministry.[110]

Another example of a party split occurred in Queensland. On 24 April 1957, the Queensland Premier, Vince Gair, was expelled from the Australian Labor Party as a result of a union dispute and political power struggle. He continued for a short period as Premier, leading a party of 25 supporters who left the ALP with him. He called his party the 'Queensland Labor Party'. It was the single biggest party in the Parliament,

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104 Despatch from NSW Governor to Colonial Secretary, 14 November 1916: PRO: CO 881/15/11.

105 Memorandum from NSW Governor to the NSW Premier, 15 November 1916: ibid.

106 Memorandum from NSW Attorney-General, Mr Hall, to Mr Holman, 15 November 1916: PRO: CO 418/4247/148.

107 New South Wales, *Parliamentary Debates,* Legislative Assembly, 15 November 1916, 2734.

108 Despatch from Colonial Secretary to NSW Governor, 12 January 1917: PRO: CO 881/15/6.

109 Despatch from Colonial Secretary to NSW Governor, 23 January 1917: ibid.

110 See further: Sawer, above n 2, 133–4. See also the resignation and re-appointment of Prime Minister Lyons on 9 November 1934 in order to form a coalition ministry with the Country Party.

but did not have a majority. Gair's attempt to form a coalition with the Country Party failed and he was defeated in the Parliament on a supply bill on 12 June 1957. Parliament was dissolved and the Country Party and Liberal Party won the election.[111]

B Advice from a leader lacking party support that ministers be dismissed or Parliament dissolved

The Governor-General is ordinarily required to act on the advice of his or her responsible Ministers given through the Executive Council or through Ministers. With respect to executive matters, this advice is provided by the Prime Minister. The principle of Cabinet solidarity means that in ordinary circumstances the Prime Minister's advice is taken to be the advice of his or her Cabinet, although the Prime Minister may personally decide upon such matters as advice on the appointment of Ministers and advice on an election date, without taking these matters to Cabinet.[112] The Prime Minister's status as a responsible minister and capacity to advise the Governor-General depend, however, on his or her retention of the support of the lower House of the Parliament.[113]

In some cases where a leader has lost support within his or her own party, he or she has attempted to reassert power and control over the party by advising that Ministers who oppose the will of the leader be dismissed or that Parliament be dissolved and an election held, against the will of the Cabinet. A question then arises as to whether the Governor-General should accept advice from a leader who no longer holds the confidence of his or her parliamentary party and how this is to be assessed.[114] For example, if Kevin Rudd, on the morning of 24 June 2010, had gone to see the Governor-General before the caucus meeting to decide the leadership challenge against him, and advised her to dissolve Parliament, should she have accepted his advice?

Brazier has previously contemplated such a scenario, contending that if it occurred in the United Kingdom, the Queen would be justified in refusing to dissolve the Parliament 'if a Prime Minister, placed in a minority within his own Cabinet and threatened with repudiation by his parliamentary party, suddenly asked for a dissolution in order to forestall the prospect of his imminent supersession.'[115] Jennings has also contemplated such a situation, noting that if a Prime Minister resigns in order to reconstruct his or her government, the Queen is not compelled to ask the retiring Prime Minister to form a new Government. He observed that the 'Queen must not intervene in party politics' and must not, therefore, 'support a Prime Minister against

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111 Brian Costar, 'Vincent Clair Gair — Labor's Loser' in Denis Murphy et al (eds), *The Premiers of Queensland* (University of Queensland Press, revised ed, 2003) 268.

112 Jennings, above n 2, 207, 419. See also: Lloyd Barnett, *The Constitutional Law of Jamaica* (Oxford University Press, 1977) 91, 94.

113 Gerard Carney, *The Constitutional Systems of the Australian States and Territories,* (Cambridge University Press, 2006) 301; Taylor, above n 95, 142.

114 See, eg, Carney's view that the Premier's capacity to advise upon the dismissal of Ministers is dependent upon the Premier holding the confidence of the lower House and his or her ministry and political party: Carney, above n 113, 283 and 301.

115 De Smith and Brazier, above n 6, 129, referring to the South African position in 1939. Brazier also noted at 130: '*A fortiori,* a Prime Minister who has actually been repudiated by his own parliamentary party in favour of one of his colleagues can claim no constitutional right at all to demand a dissolution.' Note that the Queen no longer has a role in the dissolution of Parliament — *Fixed-term Parliaments Act 2011* (UK).

his colleagues'. He concluded that it would accordingly 'be unconstitutional for the Queen to agree with the Prime Minister for the dissolution of the Government in order to allow the Prime Minister to override his colleagues.'[116]

Others, however, have applied the 'no political interference' principle the other way, arguing that the Queen should not interfere politically by refusing the advice of her Prime Minister unless Parliament establishes the absence of confidence. Winterton has contended that:

> The convention against vice-regal interference in the internal affairs of the government is so strong that it is submitted that a Governor or Governor-General would be entitled to refuse to follow a Chief Minister's advice on the ground that it no longer represented the *government's* advice only if the Chief Minister's minority position in Cabinet or, perhaps, the governing party or coalition had been demonstrated on the floor of Parliament and, even then, probably only if it was clear that a majority of the members of the lower House did not support the Chief Minister.[117]

Winterton has argued elsewhere that such a scenario is 'so fanciful as not to warrant serious consideration'.[118] However, he went on to give it consideration, observing:

> If the House of Representatives were in session, a Governor-General faced with such a request [ie, a request to dissolve parliament against the wishes of the rest of the government], would be well advised to defer consideration of it until the House had had the opportunity to consider whether or not the prime minister still enjoyed its confidence. If the House were not in session, the Governor-General might suggest that the House of Representatives be recalled, warning the prime minister that the ultimate consequence of a refusal could be dismissal.[119]

Winterton also suggested that the Governor-General might address the nation and call upon public opinion 'to bring the prime minister to his senses'. This, however, would be a far more dangerous course, as it would involve the Governor-General in a public conflict with his or her Prime Minister and potentially give rise to claims of partisanship.

Lumb, in contrast to Winterton, has argued that a Governor is entitled to decline to act on a Premier's advice (in this case to dismiss Ministers) where the Premier has lost the support of the majority of members of his or her Party or Cabinet. He considered that the Governor could refuse to act until the question of confidence is determined 'by a party vote and ultimately on the floor of the parliament'. He also thought that if the Premier persisted with such advice, the Governor could request the Premier to 'return his commission' on the ground that Parliament should decide confidence before the advice is acted upon.[120] Killey, however, has regarded this view as 'fairly extreme' and a misrepresentation of the Queensland Bjelke-Petersen precedent discussed below.[121]

In most cases political pressures will be effective to resolve political crises without the need for a Governor-General to become directly involved. The Governor-General's power of delay (while formally seeking further information) is therefore a very

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116 Jennings, above n 2, 86.
117 Winterton, above n 3, 302.
118 Winterton, above n 72, 41.
119 Ibid 41–2.
120 Lumb, above n 2, 78.
121 Killey, above n 61, 183.

effective weapon as it gives time for political pressures to operate.[122] This may, indeed, be the true lesson of the Bjelke-Petersen case.

1 Lang and dissolution

The two primary Australian examples of the tactic of seeking dissolution or the dismissal of Ministers arose in 1926-7 and 1987, through the eccentric (if not fanciful) protagonists, Jack Lang and Joh Bjelke-Petersen.

Jack Lang's first term of office as Premier of New South Wales was turbulent and marked by a series of crises. Opinion within the Labor Party about Lang's leadership was sharply divided, with many seeing him as a saviour while many others, particularly from the rural areas, saw him as destructive, dangerous and incompetent. In September 1926, Lang was challenged for the party leadership by Peter Loughlin. The vote was tied, but Lang eventually won by obtaining Edward McTiernan's vote by telegraph from a ship on the high seas.[123]

In November 1926 the ALP State Conference decided that the leadership of the party should be determined by the State Conference, rather than the caucus. This commenced a period known as the 'Lang dictatorship'. As caucus no longer had any power over the leadership, the only way it could bring Lang down was through a vote of no confidence in the Legislative Assembly.

Loughlin resigned from the Ministry and with two supporters attempted to bring down the Government. Although his attempt failed, it signalled significant dissent within Labor's ranks at Lang's leadership. As Hogan has noted:

> By early 1927, Lang's position in his own Caucus was untenable. A majority of its members demanded that Caucus be given back the right to choose its Leader — which would have seen Lang supported by only a handful of MPs.[124]

Seeing a crisis brewing, the Governor, Sir Dudley de Chair, sought the advice of the Chief Justice of the Supreme Court, Sir Philip Street, as to the circumstances in which he should agree to any proposal by Lang to dismiss his Ministers. The Chief Justice advised that it really depended on the circumstances, but that the Governor should not regard the Premier as being his sole adviser on the matter. He thought the Governor should summon a meeting of the full Executive Council to ascertain the opinions and wishes of the majority.[125]

When Lang approached de Chair, he instead sought the Governor's agreement to a dissolution, but on the basis that it be kept secret so that he could make use of it when needed. De Chair said that he would only dissolve the Parliament openly and insisted on a meeting of the full Executive Council to decide the matter. Sir Philip Street advised the Governor not to dissolve the Parliament if it was against the wish of the majority of the Executive Council.[126] At the meeting, all but one of the Ministers objected to a dissolution. The Governor decided that he would not immediately

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122 Note, however, that in some political circumstances delay is not advisable, eg, if it were likely to result in revolution or violence.

123 John Thomas Lang, *The Turbulent Years* (Alpha Books, 1970) 67.

124 Michael Hogan, 'John Thomas Lang' in David Clune and Ken Turner (eds), *The Premiers of New South Wales 1856-2005* (Federation Press, 2006) Vol 2, 179, 190.

125 Letter from Sir Philip Street to Sir Dudley de Chair, 26 April 1927: Imperial War Museum Archives ('IWM') DEC/5.

126 Letter from Sir Philip Street to Sir Dudley de Chair, 25 May 1927: IWM DEC/5.

dissolve the Parliament, in the face of the objection of the majority of the Cabinet. However, he then told Lang to resign and that he would reappoint him with a new Cabinet to act as a caretaker government until a new election could be held.[127] The election was held in October 1927, after a new electoral roll was prepared. Lang and his party lost government. Lang, however, remained leader of his party, despite its lack of support for him. Although the matter was decided in the end by the people, through an election, this example shows the importance of a Premier's power to advise a Governor on the dismissal of ministers and the dissolution of Parliament, if the Governor is prepared to support a Premier who has lost the support of his Cabinet and party.

2 Bjelke-Petersen and the dismissal of ministers

In Queensland, a similar tactic proved less successful for Sir Joh Bjelke-Petersen. In November 1987, in the midst of the Fitzgerald Royal Commission inquiry into corruption in Queensland, the Premier, Sir Joh Bjelke-Petersen, fell out with senior figures in the National Party and lost the support of key Ministers. He proposed to regain control over his parliamentary party by dismissing five Ministers whom he regarded as disloyal.[128] He initially advised the Governor on 23 November 1987 that he wished to resign on behalf of his whole ministry and then be reappointed as Premier, leaving him free to restructure his ministry, reducing its size, excluding some former Ministers and reallocating portfolios. He had not advised his colleagues, despite holding a Cabinet meeting that morning. The Governor, Sir Walter Campbell, was concerned that the Premier might no longer hold the confidence of his Cabinet and his parliamentary party.

The Governor confirmed in writing the following advice that he had given orally to Sir Joh:

> I advised you that, should you resign as Premier, it may be that I may not re-commission you as Premier unless I was of the view that you were able to form a new Ministry and that you would be able to obtain the confidence and support of the Parliament.[129]

The Governor suggested to Bjelke-Petersen that it would be wise to discuss the restructure with his Ministers and seek the resignation of those whom he wished removed. Sir Joh returned to the Governor the following day, advising that he had placed letters of resignation in front of the five Ministers he proposed to dismiss, but all had refused to sign. He had not discussed the matter with his Cabinet. The Governor stated that he would not be rushed into action and sought a letter from Sir Joh setting out all the details including an account of his discussion with Ministers

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127 Dudley De Chair, *Memoirs,* Vol VI, IWM, 98–9. See also Telegram from Sir Dudley de Chair to the Secretary of State, 27 May 1927, advising him of what had occurred: IWM DEC/5.

128 The following account is largely derived from Geoff Barlow and Jim F Corkery, 'Sir Walter Campbell: Queensland Governor and his role in Premier Joh Bjelke-Petersen's resignation, 1987' *Owen Dixon Society eJournal,* Bond University, March 2007: <http://epublications.bond.edu.au/odsej/5/>. See also: John Wanna and Tracey Arklay, *The Ayes Have It — The History of the Queensland Parliament 1957-1989* (ANU e-Press, July 2010) Ch 15; and Brian Galligan, 'Australia', in David Butler and Donald Anthony Low (eds), *Sovereigns and Surrogates — Constitutional Heads of State in the Commonwealth* (St Martin's Press, 1991) 61, 85.

129 Letter from Sir Walter Campbell, Qld Governor to Sir Joh Bjelke-Petersen, 25 November 1987 in Galligan, above n 128, 86.

about the proposed restructure. He also pointed out that Sir Joh should give reasons to those he was asking to resign.

Later that day, after a Cabinet meeting, Sir Joh returned to Government House. He told the Governor that he had put the restructure proposal to the Cabinet. He now only sought the resignation of three Ministers, but all had refused. One, the Health Minister, Mike Ahern, announced that he was calling a party meeting to test confidence in the Premier. Sir Joh rejected this as an illegal meeting. Sir Joh formally advised the Governor to dismiss the three Ministers. The Governor finally accepted that advice and dismissed them from office. As Winterton has pointed out, the power to dismiss Ministers (other than the Premier or Prime Minister) is not a reserve power, so the Governor was ultimately obliged to act in accordance with the Premier's advice on this matter, after exercising his rights to warn and defer the matter pending the receipt of adequate advice.[130]

On 26 November, the parliamentary party voted to replace Bjelke-Petersen as its leader with Mike Ahern. Ahern advised Government House that he had been elected as leader. Sir Joh advised the Governor that Parliament be recalled on 3 December (which was later moved to 2 December). Ahern then visited the Governor, delivering a letter that pledged the support of 47 National Party parliamentarians, being a majority of the House. He included an opinion by the Solicitor-General and another by legal counsel appointed by the National Party, to the effect that the Governor should appoint the new leader as Premier if it were clear that he commanded a majority in the House.[131] The Governor declined to dismiss Sir Joh on the basis of this letter. Barlow and Corkery have recorded that the Governor:

> told Ahern that Parliament was the ultimate judge — what took place at a party meeting was not the deciding factor. Before commissioning anyone as Premier, the Governor would have to be satisfied that the person could form a Ministry and command the support of Parliament.[132]

The Governor was supported in this approach by Buckingham Palace, with the Queen's Private Secretary, Sir William Heseltine, later confirming in writing his telephone opinion:

> that you would have been safe in withdrawing the Premier's Commission only when and if he had suffered a defeat in the Parliament itself.[133]

There was some criticism of the Governor at the time for leaving the State in confusion and without an effective government until Parliament sat or the Premier resigned.[134] Most, however, regarded the Governor as behaving in a proper and considered manner.[135]

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130 Winterton, above n 3, 303. See also Sawer, above n 82.

131 Galligan, above n 128, 88–91.

132 Barlow and Corkery, above n 128, 22. See also Galligan, above n 128, 89.

133 Barlow and Corkery, above n 128, 22.

134 Marian Hudson, 'Governor leaves Queensland in chaos: State leaderless as Joh refuses to go', *Daily Sun* (Brisbane), 27 November 1987, 1 and Michael Quirk, 'Joh must be sacked for State's good', *Editorial, Daily Sun* (Brisbane), 1 December 1987 in Barlow and Corkery, above n 128, 23 and 25.

135 Barlow and Corkery, above n 128, 28; Galligan, above n 128, 89; Winterton, above n 3, 303; Carney, above n 113, 286; and Taylor, above n 95, 142.

In the face of his loss of the party leadership, Sir Joh initially refused to resign. He thought that if the matter was to be determined by Parliament, the members of his party would support him rather than go to an election.[136] He also tried to gain support from the Opposition, but to no avail. Sir Joh finally submitted his resignation on 1 December, before Parliament sat. Ahern was sworn in as Premier, but was asked to seek a motion of confidence in his Government in the Parliament the following day. Although Sir Joh's letter of resignation had included the resignation of 'the other members of the Bjelke-Petersen Ministry', out of an abundance of caution the Governor formally dismissed the previous ministry, allowing Ahern to form his own ministry once he had worked out the portfolio allocation.[137]

This example shows that a skilled Governor can on the one hand refuse to be manipulated by a leader who has lost the confidence of his or her party and exercise the right to be consulted and warn to great effect, while on the other hand not taking precipitate action in dismissing the leader, which would have changed the nature of the crisis into one concerning vice-regal powers. The Governor, instead, let the crisis resolve itself politically, either through the mounting pressure on the Premier to resign or the work of the Parliament. Although this took time and resulted in a period of disruption of government, it avoided the kind of constitutional trauma that would have been involved in the dismissal of the Premier.

C The use of prorogation or refusal to recall Parliament to avoid loss of office

The other tactic that might be used by a Prime Minister facing a likely loss of confidence in the lower House is the prorogation of Parliament to avoid such a vote or the refusal to advise the recall of Parliament if it has already been prorogued.

1 Prorogation

It remains contentious whether a Governor-General or Governor has the reserve power to refuse advice to prorogue the Parliament, particularly when the prorogation is intended to avoid a vote of no confidence. Certainly, in the early days of Australia's constitutional history when Governors were still representatives of the British Government and held broad discretionary powers, a Governor could refuse advice to prorogue the Parliament. For example, in 1899 the Governor of NSW, Earl Beauchamp, refused advice by George Reid to prorogue Parliament, leading to the defeat of the Government.[138] Beauchamp took the view that Reid's request for a prorogation 'was a clever idea, but obviously a trick to use the prerogative of the Crown as a party move'.[139] William Holman, as Acting Premier of NSW, was also initially refused a prorogation in 1911, although later granted it after his government resigned and another government could not be formed.[140] In 1971, however, the Western Australian

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136 Galligan, above n 128, 89.

137 Ahern and his Deputy, Bill Gunn, were initially sworn in as sharing all ministries between them until a new ministry was decided upon.

138 G N Hawker, *The Parliament of New South Wales 1856-1965* (NSW Government Printer, 1971) 63; Graham Freudenberg, 'William Lygon, Earl Beauchamp' in David Clune and Ken Turner, *The Governors of New South Wales 1788-2010* (Federation Press, 2009) 381, 385–6.

139 Freudenberg, above n 138, 386 (quoting from Beauchamp's diary).

140 See also Clune and Griffith, above n 97, 214–6; H V Evatt, *William Holman – Australian Labor Leader* (Angus & Robertson, 1979) 211–2; William Holman, 'My Political Life', reprinted in: Michael Hogan (ed), *The First New South Wales Labor Government 1910-1916*

Governor granted a prorogation in circumstances where a Government lost its majority through the death of the Speaker and sought to prorogue Parliament until the by-election was held. The Governor was sufficiently uncertain about the propriety of granting a prorogation to seek advice from the British Government.[141] Taylor has argued that 'the Crown might very properly refuse to prorogue the Legislative Assembly despite advice to do so during a debate on a no-confidence motion and in the period after notice of such a motion has been given'.[142]

In Canada the issue arose in 2008 when the Harper Government advised the Governor-General to prorogue Parliament in the face of a political agreement by opposition parties that would have led to the defeat on confidence of the Harper Government in the Canadian House of Commons. This decision was subject to much criticism and debate, with the general view being taken that the Governor-General had a discretion to refuse advice to prorogue in such circumstances,[143] with some regarding it as her duty to do so,[144] while others considered that in the circumstances delay and prorogation was the best option.[145] Hogg took the view that there is no discretion to refuse advice to prorogue when that advice is given at a time that the Government clearly has the confidence of the lower House,[146] but where there is a loss of confidence or an imminent loss of confidence in the Government, then the Governor-General has a personal discretion (or 'reserve power') to refuse advice to prorogue, if the Governor-General regards this as the best alternative in the circumstances.[147] A similar argument would apply with respect to advice to prorogue by a Prime Minister who had lost the support of his or her own party and potentially the lower House.

(UNSW Press, 2005) 37; and Anne Twomey, 'How to succeed in a hung parliament', 2000 54(11) *Quadrant* 36, 39.

141 Anne Twomey, *The Chameleon Crown — The Queen and Her Australian Governors* (Federation Press, 2006) 78.

142 Taylor, above n 95, 131.

143 Andrew Heard, 'The Governor-General's Decision to Prorogue Parliament: A Chronology and Assessment' (2009) 18 *Constitutional Forum* 1, 5; Eric Adams, 'The Constitutionality of Prorogation' (2009) 18 *Constitutional Forum* 17; Peter Hogg, 'Prorogation and the Power of the Governor General' (2009) 27 *National Journal of Constitutional Law* 193, 196–9; C E S Franks, 'To Prorogue or Not to Prorogue: Did the Governor General Make the Right Decision?' in Peter Russell and Lorne Sossin (eds), *Parliamentary Democracy in Crisis* (University of Toronto Press, 2009) 33, 44. *Cf* McWhinney's view that 'the grant of Prorogation is non-discretionary, on request': Edward McWhinney, 'The Role of the Governor General: Some Lessons from Australia and the Commonwealth' (Winter 2010) *Canadian Parliamentary Review* 11, 12 and Privy Council Office, above n 2, 150.

144 See, eg: Heard, above n 143, 8–9.

145 See, eg: Adams, above n 143, 19; Hogg, above n 143, 199–201; Franks, above n 143, 46.

146 This was the case in Canada in 2009 when the Parliament was prorogued with the effect of shutting down a parliamentary committee inquiring into a scandal concerning Afghan prisoners. Hogg argued that the Governor-General had no discretion to refuse to prorogue in such circumstances: Hogg, above n 143, 201. See also the prorogation of the NSW Parliament in December 2010 and the South Australian Parliament in December 2005.

147 Hogg, above n 143, 197–8 and 201. See also the prorogation of the Sri Lankan Parliament in July 2001 to avoid a vote of no confidence.

2 *Prorogation in Tasmania in 1981*

The Governor of Tasmania, Sir Stanley Burbury, faced the dilemma of whether or not to prorogue the Parliament in December 1981. It happened during the controversy in Tasmania about whether to dam the Gordon-below-Franklin River. The Labor Premier, Doug Lowe, had favoured damming the Gordon-above-Olga, which would have saved the Franklin River, but the Liberal Party, the unions and a majority of Tasmanians in a referendum,[148] favoured the damming of the Gordon-below-Franklin. Lowe was overthrown by his own party on 11 November 1981 and replaced by Harry Holgate. Lowe and another colleague, Mary Willey, then resigned from the Labor Party and joined the cross-benches. This left the Government with 17 Members, the Liberal Party with 15, and the cross-benches with one Australian Democrat and two independents.[149] The Government was aware of the fact that it could face a vote of no confidence at any time and asked the Governor on 14 December 1981 to prorogue the Parliament until 26 March 1982. The reasons given to the Governor for the prorogation of Parliament were: (a) that the Parliament was unstable and not conducive to proper consideration of the legislative programme; (b) that it would give the Government the time to analyse the results of the referendum on hydro-electricity in south-west Tasmania; and (c) that time was needed to clarify the funding situation with respect to the works programme, including energy development.[150] Sir Stanley accepted these grounds and prorogued the Parliament.

Sir Stanley later noted that although, in his view, the Governor has discretionary powers with respect to prorogation, 'the dominant factor in exercising that discretion must be the advice tendered to the Governor by his chief adviser, the Premier'. He considered that only in 'exceptional circumstances' would the Governor be justified in refusing that advice, although he accepted that one such case 'would be a request to prorogue Parliament when a motion of No Confidence is before the House'.[151] At that stage a motion of no confidence had not yet been initiated.

On 29 January the Tasmanian Government announced a change in policy to support the Gordon-below-Franklin dam proposal. This resulted in the Australian Democrat, Mr Sanders, declaring that he would support a vote of no confidence against the Government as soon as Parliament resumed. On 22 February, the Opposition leader, Mr Gray, sent to the Governor a petition signed by a majority of Members of the House of Assembly asking him to recall Parliament early on the

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148 The results of the referendum on 12 December 1981 were: Gordon-below-Franklin — 54.72%; Gordon-above-Olga — 9.78%; Informal (most of which were marked 'No Dams') — 35.5%. Note, however, that there were arguments about what amounted to a formal vote and a recount that lowered the vote approving the damming of the Gordon-below-Franklin to 47.2%: 'Political Chronicles — Tasmania', (1982) 28(1) *Australian Journal of Politics and History* 83, 106, 110.

149 For a more detailed analysis of the political situation, see: Scott Bennett, 'The Fall of a Labor Government: 1979-1982' (1983) 45 *Labour History* 80, 88.

150 Letter from Mr Holgate to Sir Stanley Burbury, 14 December 1981.

151 Letter from Sir Stanley Burbury to Mr James Guest MLC, 12 March 1984 in *Proceedings*, above n 15, Vol II, Structure of Government Sub-Committee Report, August 1984, Appendix H, 72–3.

ground that the Government no longer commanded the confidence of the House.[152] Sir Stanley replied:

> The question whether or not the present Government continues to have the support of a majority of members of the House of Assembly is not to be determined by any counting of heads outside the House and can only be resolved by constitutional procedures on the floor of the House. My Premier and Ministers therefore continue to be my constitutional advisers.
>
> In forming an opinion either in relation to the exercise of my powers to prorogue Parliament under Section 12(2) or subsequently to call it together earlier under Section 13(1A) constitutional convention requires that the advice tendered to me by my Premier and Ministers is the dominant consideration.[153]

Sir Stanley noted that the Premier had advised him that there were good reasons why Parliament should not be recalled earlier. He was not prepared to use 'generalised statements' in a letter as the basis for taking the 'extreme step of rejecting the advice' of his Government.[154] When Parliament resumed on 26 March, a no confidence motion was passed and Holgate sought, and was granted, an election to be held in May. The Liberal Party won the election.

3 Refusal to recall Parliament

Most commentators take the view that a Governor or Governor-General does not have a reserve power to recall Parliament without responsible advice or other statutory authority. Winterton, however, has suggested that while the power to recall Parliament is not at present a reserve power, there is a 'strong case' for it being added to the list of reserve powers, 'for otherwise incumbent Premiers could prolong their tenure in the face of a threatened no-confidence motion by refusing to advise the Governor to summon Parliament.'[155] Taylor has also argued that:

> In circumstances in which there is some extraordinary emergency in the state, or there are real grounds for believing that the government no longer enjoys the confidence of the Legislative Assembly but refuses to meet it, it should indeed be recognised that there is a residual discretion in the Governor to call Parliament together even if ministerial advice to that effect is not forthcoming and there is no need for it to meet soon in order to ensure supply.[156]

Taylor based this view on the principle that vice-regal action should be as minimal as possible in removing a constitutionally objectionable state of affairs and that the recall of the Parliament by the Governor is less intrusive than the dismissal of a Premier. Killey, however, has expressed greater scepticism about such a reserve power, noting that there are no precedents for it, apart from one doubtful one in British Columbia in 1882-3, where it was alleged that the Lieutenant-Governor had 'forced' the

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152 Letter from Robin Gray *et al* to Sir Stanley Burbury, 22 February 1982 in *Proceedings,* above n 15, Vol II, Structure of Government Sub-Committee Report, August 1984, Appendix H, 80.

153 Letter from Sir Stanley Burbury to Mr Robin Gray, 24 February 1982 in *Proceedings,* above n 15, Vol II, Structure of Government Sub-Committee Report, August 1984, Appendix H, 81.

154 Ibid.

155 Winterton, above n 3, 274, 297.

156 Taylor, above n 95, 131 and 141. See also: Lumb, above n 2, 78, where Lumb appears to contemplate such a use of the reserve powers.

Premier to recall Parliament early,[157] although this might have merely been a case of effective persuasion.

For the most part, the issue arises instead in relation to whether a Prime Minister may be dismissed from office for refusing to recall the Parliament, particularly when matters of confidence are at issue. Winterton has suggested that in circumstances where a Prime Minister had lost the support of his or her ministry and sought the dissolution of Parliament against the wishes of the ministry, if 'the House were not in session, the Governor-General might suggest that the House of Representatives be recalled, warning the prime minister that the ultimate consequence of a refusal could be dismissal'.[158] Forsey and Selway have also accepted that dismissal might be justified in circumstances where confidence is at issue and the Premier or Prime Minister refuses to recall the Parliament to deal with it.[159] In such cases, dismissal would be the last resort.

As noted above, the Governor of Tasmania, Sir Stanley Burbury, when faced with this issue, took the view that the advice of the Premier and Ministers was the dominant consideration, although he did appear to consider that there might be circumstances in which Parliament might be recalled early, without or despite advice. The Queensland Governor, when faced with the absence of confidence in Sir Joh Bjelke-Petersen, recommended that Parliament be recalled quickly, and it was.

The issue arose in a more acute form in India in 1967. After an election produced a hung Parliament in West Bengal, a coalition was formed and Mr Muckherjee was appointed as Chief Minister. On 6 November 1967, Dr Ghose resigned as a minister of the Government and claimed, along with other members of the Legislative Assembly, that the coalition Government no longer held the confidence of the Legislative Assembly. That same day, the Governor requested the Council of Ministers to recall the Legislative Assembly into session by no later than the third week of November to resolve doubts about confidence. The Governor's request was ignored. The Governor made further requests on 14 November and 16 November that the Legislative Assembly be recalled in November, but the Council of Ministers decided that it should not be recalled until 18 December. The Governor, apparently 'having regard to the acute famine conditions and lawlessness on a wide scale then prevailing in the State' took the view that confidence needed to be settled quickly. On 21 November 1967, the Governor dismissed the Chief Minister and the Council of Ministers and appointed Dr Ghose as Chief Minister. The appointment of Dr Ghose was challenged in *Mahabir Prasad Sharma v Prafulla Chandra Ghose.*[160] Mitra J of the Calcutta High Court held that it was within the discretion of the Governor to dismiss the Chief Minister, as the Chief Minister held office at the Governor's pleasure. The power to appoint and dismiss the Chief Minister was conferred exclusively upon the Governor and was not subject to ministerial advice or control by the Legislative Assembly.[161] Further, the Governor's decision, in the circumstances, was not tainted with bad faith, as it was reasonable for the Governor to take the view that confidence should be established without delay.[162]

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157 Killey, above n 61, 181.
158 Winterton, above n 72, 41–2.
159 Forsey, above n 61, 23; and Selway, above n 42, 43.
160 AIR 1969 Cal 198.
161 Ibid [41].
162 Ibid [47].

D Conclusion regarding the exercise of discretion by a Governor-General

Holders of vice-regal office in Australia have rightly been very wary of exercising reserve powers to resolve political crises in Australia. The uncertain scope of the reserve powers, however, has been to their advantage. A Governor-General, faced with a Prime Minister who has lost the support of his or her Cabinet or party may warn the Prime Minister that certain advice might not be accepted, such as advice to dissolve or prorogue the Parliament, and might advise the Prime Minister to take certain steps, such as consulting his or her Cabinet or recalling Parliament and seeking a vote of confidence. The Governor-General's power to seek further formal advice, which is in effect a right to delay acting on advice, might also be used to effect by letting the political pressures mount in such a way as to force a political resolution of a political problem. A Governor-General is perfectly justified in waiting to see the judgement of the lower House of the Parliament as to whether a leader holds the confidence of the House, rather than relying on a letter, petition or other evidence of loss of confidence.[163] Indeed, this would be the advisable course in most circumstances, if the Parliament is recalled within a reasonable period, rather than reliance on caucus votes or letters signed by a majority of Members. It places responsibility back in Parliament, which is in turn responsible to the people.

If Kevin Rudd had advised the Governor-General to dissolve Parliament on the morning of 24 June 2010, before the caucus vote on his leadership, she would have been entitled to defer consideration of his advice and to have sought further advice from him as to whether he had the support of the government. The ensuing delay would most likely have resulted in the crisis being resolved politically. If Rudd had refused to resign after losing the support of his caucus, the Governor-General would have been entitled to wait until the House of Representatives had been able to decide upon confidence. She would also have been entitled to refuse advice to prorogue the Parliament in such circumstances so that the matter of confidence could be quickly resolved.

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163 As far back as 1871, the Queensland Governor, the Marquis of Normanby stated: 'I shall always be found ready to pay the greatest deference to the opinion of parliament, but that opinion must be expressed by the majority of the Assembly in their legislative capacity, and not by a majority without the walls of the House of Assembly'. Quoted in: Peter M McDermott, 'Queensland Revisited', [1988] (Spring) *Public Law* 31–2.

IV CONCLUSION

While these scenarios might all appear 'fanciful', it is still useful to explore them for two reasons. First, they help test and expose the basic constitutional principles and conventions that underlie the *Constitution*. Secondly, strange situations do occasionally arise in politics, as the various events of 2009-10 have shown, and it is preferable that such issues be explored objectively, away from the heat of politics and accusations of political bias. If the various parties to a future constitutional crisis understand those principles and how they are likely to apply, then it is less likely that they will push events to their extremes, avoiding the deepening of any crisis. If the constitutional conventions have been closely examined and are well accepted in their application, then it is less likely that they will ever need to be applied as the participants in constitutional conflicts are more likely to bow to the inevitable result and step back from the brink.

Eugene Forsey, many years ago, noted that while precedents and authorities are helpful, they are not enough. He observed that 'we do have to use our heads' and not apply precedents or principles 'woodenly to any and every situation', lest the result be 'nonsense'.[164] Just because something has been done one way in the past, is not necessarily reason for doing it again in the same way in the future. The question should be whether the precedent or 'convention' is consistent with the fundamental constitutional principles of representative and responsible government, and how best to accommodate clashes between existing principles. In constitutional law, precedents, such as those discussed above, are useful because of what they reveal about the scope and application of fundamental constitutional principles. They help deepen our knowledge and understanding, but should never be applied rigidly or woodenly.

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164 Eugene Forsey, 'Professor Angus on the British Columbia Election: A Comment' (1953) XIX *Canadian Journal of Economics and Political Science* 226, 230.