1975 And All That
Partisan Perspectives on the Dismissal and Their Implications for Further Debate on the Constitution

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The dismissal of the Whitlam Government gave rise to a plethora of Labor-sympathizing publications condemning it as a misuse of vice-regal power. Paul Kelly pressed this case from the outset and twenty years later augmented his *oeuvre* by reworking Labor's old refrain.[1] He restated his principal propositions in the 1995 Hugo Wolfsohn Memorial Lecture and thereby vexed its eponym's ghost.[2] A Supreme Court Justice and a QC in praising this book at a conference in Sydney in 1996 persuaded me that it demanded a critique also aimed at other partisan accounts.

Three subsequent events reinforced this belief: Gough Whitlam's repetition of his debatable views on the subject;[3] some misconceived criticism of Sir Garfield Barwick when he died; and my impressions of the Constitutional Convention. The 'model' backed by that republican-dominated assembly with less than a majority lacks that advantage Kelly claimed for a republic — a securely tenured head of state who could act more assuredly in a crisis than Sir John Kerr. Unless otherwise indicated, my page references to Kelly will be to his lecture.

THE VARIETIES AND ADAPTABILITY OF RESPONSIBLE GOVERNMENT

Kelly claims that 1975 'brought to a head the contradiction in our Constitution between responsible government and federalism'.[4] Some of the Founding Fathers discerned such a contradiction, but it was ill-defined even then. Powerful second chambers are known in British-derived unitary polities while Canada's Senate is a weak body in a country more true to coordinate federalism than Australia.

Kelly conceives responsible government as embodying the unchallengeable supremacy over an Upper House of a Lower House dominated by the Ministry. He cites Quick and Garran: 'for better or for worse, the system of responsible government as known to the British Constitution has been practically

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1 P Kelly, *November 1975: The Inside Story of Australia's Greatest Political Crisis*, (Allen & Unwin) 1995.

2 For an edited version see Paul Kelly, 'The Dismissal, Twenty Years On' (1996) January-February *Quadrant*.

3 G Whitlam, *Abiding Interests* (1997) especially in Chapter 1, and more peripherally in Chapters 2 and 11.

4 41.

embedded in our federal constitution'. But they emphasized the necessity of Ministers 'having the confidence of that branch of the legislature which immediately represents the people' rather than dominating it.

When John Quick and Robert Garran published their *Annotated Constitution of the Australian Commonwealth* in 1901 the absolute veto of the House of Lords in respect of all legislation still survived in that unitary polity including the power to reject Money Bills, or to defer consideration of them. It was disputed when this latter power had last been used; some authorities thought it had fallen so far into desuetude that its revival would violate the British Constitution's conventions. The House of Lords settled the issue on 30 November 1909 when it refused to pass the Finance Bill containing the Asquith Government's Budget. The Prime Minister *within three days* advised King Edward VII to dissolve Parliament although he eloquently denounced the Lords' conduct in moving a resolution (which the Commons carried) consistent with those above-mentioned authorities. This same power had been entrenched before Federation in Australia's colonial Upper Houses in what were then six *unitary* polities. The *Constitution Acts* of South Australia, Tasmania, Victoria and Western Australia contain provisions similar to sections 53-55 of the Commonwealth Constitution outlining the Senate's powers.

Dr A C V Melbourne emphasized that 'responsible government' altered its meaning in the last century from colonial self-government *tout court*:

> In many ways, the constitutional struggle, both in British North America and in Australia, sprang from a misunderstanding. In 1850, the term 'responsible government' had ... acquired a common meaning, but it had lost its old significance ... Colonial leaders ... had soon discovered that self-government, even in local matters, could never be obtained while the Governor had command of a revenue which was free from legislative supervision, and while he consulted none but permanent officials who were appointed by the Secretary of State. In the circumstances, when they pressed for what they called responsible government, they were led to attack the independent revenues, and to demand that the Governor should accept as his advisers men who would give expression to popular opinion [as] ... the elected representatives of the people ... [Ultimately], it was claimed that the Governor should accept as his advisers members of the Legislature who enjoyed the confidence of that body.
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> ... [The] term 'responsible government' ... came ... to mean government by the advice of ministers chosen from and responsible to the Legislature ... [It was] applied to the form of government which had existed for many years in the United Kingdom, *although without specific recognition and without distinctive name*.[5] In this way, the term acquired a general currency in the United Kingdom and in all the colonies,

[5] Dr Melbourne footnoted this passage as follows: 'Cf. Debates in Lords and Commons (1806) on Lord Ellenborough's Seat in the Cabinet (*PD* 1st Series. vol. VI); and on Canadian affairs (1829 and 1836) (*PD* 2nd Series, vol XXI, *PD* 3rd Series, vol XXXIII)'.

> but it bore a meaning which held no suggestion of its earlier significance . . . (parentheses and emphasis added).[6]

And Mr Justice Holroyd in 1888 warned against invoking this term too glibly:

> We must not be misled by abstract terms. No such thing as responsible government has been bestowed upon the colonies by name and it could not be so bestowed. There is no cut-and-dried institution called responsible government, identical in all countries where it exists . . .[7]

The term was no more definitive then — any more than it is now — of a unicameral legislature or of a bicameral legislature with an Upper House so emasculated as to amount *de facto* to the same thing!

At the National Australasian Convention held in Sydney in 1891 Thomas Playford, the Premier of South Australia, spoke as follows:

> I think that if we protect the interests of the States by giving them equal representation in the Senate, no matter what their population is, and if we give the Senate the right to reject any Money Bill they may receive from the Lower House, surely with the majorities which they will have there, the rights of the smaller States throughout Australia will be sufficiently protected.[8]

Playford argued that extending the Senate's power to *amending* Money Bills would 'make the difficulty of responsible government greater and greater' but the '1891 compromise' he promoted seemed reconcilable with responsible government as then understood.

Sir Samuel Griffith[9] moved from advocating the combination of responsible government with coordinate Houses to supporting the '1891 compromise'. In 1896, as Chief Justice of Queensland, he presented a paper to his Government, remarking in a Prefatory Note 'that for the most part, these Notes are in accordance with the views which found favour with the Convention of 1891, and are embodied in the Draft Commonwealth Bill adopted by that Convention'.[10] Dealing with 'The Executive Government' he made this statement:

> There must be Federal Ministers of State to carry on the Federal Government. History affords no instance of the application of the system called 'Responsible Government' to a Federal State. The system was not indeed invented, or rather had not been evolved from the free development of the British Constitution, when the Constitution of the United States was framed . . .

6 A C V Melbourne, 'The Establishment of Responsible Government', Chapter X, 276-7 in Australia, being Volume VII, Part I of *The Cambridge History of the British Empire* (Professor Sir Ernest Scott ed) first published 1933, reissued in 1988 with a new Introduction by Professor G C Bolton.

7 *Toy* v *Musgrove*, 14 VLR 349, 428.

8 *Convention Debates*, Sydney, 1891, 426.

9 Premier of Queensland in 1891. Appointed Chief Justice of Australia in 1903.

10 Sir Samuel Griffith, *Notes on Australian Federation: Its Nature and Probable Effects*, Brisbane 1896.

> *There are perhaps few political or historical subjects with respect to which so much misconception has arisen in Australia as that of Responsible Government* ... The system ... is based on the notion that the head of the State can himself do no wrong, that he does not do any act of state of his own motion, but follows the advice of his Ministers, on whom the responsibility for acts done in order to give effect to their volition naturally falls. They are therefore called 'Responsible' Ministers. If they do wrong they can be punished or dismissed from office without effecting any change in the Headship of the State ... The system is in practice so intimately connected with Parliamentary Government and Party Government that the terms are often used as convertible (emphasis added).
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> The present form of development of Responsible Government is that, when the branch of the Legislature which more immediately represents the people disapproves of the actions of Ministers or ceases to have confidence in them, *the Head of State dismisses them*, or accepts their resignation, and appoints new ones. The effect is that the actual government of the State is conducted by officers who enjoy the confidence of the people. In practice they are themselves members of the Legislature ... (emphasis added).
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> *The 'sanction' of this unwritten law is found in the power of the Parliament to withhold the necessary Supplies for carrying on the business of the Government until the Ministers appointed by the Head of the State command their confidence* ... (emphasis added).
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> The British Constitution ... is absolutely free from any dogmatic provisions on the subject of the appointment or tenure of office of Ministers of State. It has grown up with time, and is still growing and developing ... *Modifications in the working of the system of Responsible Government are already apparent in Australia, where, also, the Constitutions of the Colonies contain no express provision dealing with it* ... (emphasis added)
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> [The] life of a Government depends on its possessing the confidence of the popular branch of the Legislature. In a Federal Legislature, however, the position and power of the Senate would be very different from that of any of the existing Australian Second Chambers. *If it is accepted as a fundamental rule of the Federation that the laws shall not be altered without the consent of a majority of people, and also of a majority of the States, both speaking by their representatives, why should not the same principle be applied to the no less important branch of State authority — the Executive Government? Would the States,* **as States** (his emphasis), *be content to be bound by the executive acts of Ministers merely because they possessed the confidence of the popular House? And if they insisted in withholding that confidence, and refused to provide the necessary Supplies until a change was made, it is hard to see what alternative there would be to a change of Ministers.* Lately, in the French Republic, the Senate, by this means, compelled a change of Ministers ... (parenthesis and emphasis added).[11]

Australia's federal Constitution as proclaimed embodied the very flexibility which Griffith commended.

[11] It is quoted with some deletions.

THE CONVENTION OF 1897-98

After the Australian colonial parliaments effectively shelved the 1891 draft Constitution, a revived federation movement came into its own when a reconstituted Convention assembled in Adelaide in 1897 and took up the earlier draft. The '1891 compromise' came under attack, however, from most of the representatives of the smaller colonies — their voting strength made more significant in the absence of a delegation from Queensland. Defenders of this compromise ultimately carried the day by only two votes; while denying the Senate the power to initiate or amend Money Bills they conceded the power to reject them, as in 1891, without a fight. Had the power of rejection been aggressively queried, the consequences of its use might have been more fully discussed. What little was said, however, proved illuminating!

Debating the Resolutions, Richard O'Connor,[12] conceded to 'the Senate, as representing the States, an absolute veto in regard to Bills imposing taxation and appropriating revenue';[13] and proposed, if the two Houses were deadlocked over such a Bill, an immediate joint sitting and, if that failed to end the impasse, a change of Ministry and/or a dissolution of the House of Representatives.[14]

Later Bernhard Wise, representing New South Wales like O'Connor, referred to his proposal:

> It was asked by Sir George Turner — Suppose you had a minority in the Lower House which was turned into a majority by the reinforcement it received from those of a similar way of thinking in the Assembly of the States? And Mr O'Connor replied that in that case the will of the States Assembly would prevail. 'And what then?' asked Sir Graham Berry,[15] but the question was not answered. How could the Ministry carry on if it found itself in a minority in the Lower House? I fail to see any answer to it.
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> Sir GEORGE TURNER: It would not be a majority in that House; it would be a minority. No minority in the House of Representatives, coupled with a majority in the States Assembly, should override a majority in the House of Representatives which gave its confidence to the Ministry.
>
> Mr WISE: Exactly so. *If the Appropriation Bill is not passed what is the Ministry to do?*
>
> HON. MEMBERS: *Resign.*
>
> Mr WISE: *What is the next Ministry to do?*
>
> Sir GEORGE TURNER: *They must go to the people.*
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> Mr O'CONNOR: *My answer was that they must go to the country* (emphasis added).[16]

[12] Justice of the High Court of Australia 1903-12.
[13] *Convention Debates*, Adelaide, 1897, 53.
[14] Id 56, with Sir George Turner, Premier of Victoria, prepared to concur if he could not persuade the Convention to sanction a referendum.
[15] Speaker of the Victorian Legislative Assembly and a former Premier.
[16] Id 110.

Although the Convention did not adopt O'Connor's proposal for an immediate joint session, his belief remained unaffected in the ultimate necessity, if the Senate failed to pass an Appropriation Bill, of a change of Ministry and/or a dissolution of the House of Representatives. Indeed those who supported the '1891 compromise' (and those who wanted it varied) agreed on this necessity.

G H (later Sir George) Reid, the Premier of New South Wales, mentioned that the House of Lords had seemingly allowed its power of rejection of Money Bills to atrophy and then claimed:

> I admit that there should be a reserve power in this Constitution which should enable the Senate, based on an equality of States, to veto an unjust Bill ... and therefore I say that States should have — *not as an antiquated maxim of the British Constitution, never to be used, but as a real living right put in the Federal compact in black and white* — the right of exercising their power to reject any Bill which to their minds is permeated by any serious wrong or injustice ... (emphasis added).[17]

As to the consequences of such rejection, Reid seemed undecided at first as to any specific deadlock-breaking mechanism, ruminating:

> I do not disguise from myself the fact that, say in the case of the rejection of an Appropriation Bill ... it would be in the power of the Executive to prorogue Parliament and re-assemble for another session in two days, so that the measure might be dealt with in a week ... *There is another suggestion which has been made, and that is the dissolution of the Lower House* (emphasis added). This is ... an old-fashioned clumsy form in which the referendum exists under the British Constitution, a most unsatisfactory thing and the result must be that things would be left very much as they are.[18]

Reid was equally unenthusiastic at that stage about a simultaneous dissolution of both Houses if the Senate rejected an Appropriation Bill and almost as unenthusiastic about a referendum.[19] He then drew on his own experience as Premier in 1895 and advocated as a first step the very device which he had questioned earlier:

> Members may recollect that the Government of which I was a member found itself engaged in a cardinal conflict with our local Senate over a certain Bill which we considered vital. Well, I did not fulminate in the House. I simply dissolved it, and went to the country to get the requisite power to pass that measure. When I got the power ... I immediately adopted a moderate and conciliatory attitude ... *With some security of some kind against the danger of a fatal strain I would be perfectly content to concede the right on proper occasions to the Senate to reject Money Bills* (emphasis added).[20]

Alfred Deakin, a future Prime Minister of Australia like Reid, speaking later that day was much more emphatic:

[17] Id 277.
[18] Id 279-80.
[19] Id 280-1.
[20] Id 281. See also W G McMinn, *George Reid* (1989) 111-7.

If the Senate decided to take the important step of rejecting the financial policy of the Executive, what would happen? It would thus challenge the policy of the Government, and the Government would consult the electors ... [If] the Government is returned at the election, it will be clear that the policy of the Government is approved, I take it that the Council of the States will have fulfilled its office. It will have satisfied itself that the majority of the people who find the money have decided that it will be raised in the way suggested by the Government (emphasis added).

Mr LYNE: Would you give a second power of veto after a dissolution?

Mr DEAKIN: *I am afraid the power of veto must remain absolute; otherwise, in times of excitement, it might lead to coercion and disruption. I would leave to the Upper Chamber the absolute power of veto, and trust to the good sense of the community, and to the final fairness of public opinion, to bring it into harmony with the popular Chamber* (emphasis added).[21]

Both Reid and Deakin reinforced their respective views when debating the financial clauses. Reid concluded:

I say under a system of responsible government there must be only one financial House. Any other system is fraught with disaster, but, at the same time, *I am willing that the Senate should have — not as an antiquated power never to be used, but as a real living power — the right of rejection. We know that in the old country it has ceased to be a right by disuse; but I quite agree that in this compact the Senate should have not an abstract right, but an absolute right, and be perfectly entitled to use it, to throw out a Bill when it is stamped with such a serious wrong or injustice as to cause the Senate to feel itself justified in so throwing it out* (emphasis added).[22]

Sir George Turner, the Premier of Victoria, speaking next, also opposed giving the Senate the power of initiation and amendment of Money Bills adding: 'I believe with the Premier of New South Wales that the proper course would be to leave to the Senate the living power of rejection'.[23]

Deakin referred to those challenging the '1891 compromise':

They have asked if we can give any reason ... why it is advisable that the power of amendment in this particular class of measures should be denied to ... the Senate ...?

An HON. MEMBER: *When you also grant the power to reject?*

Mr DEAKIN: *When you also grant the power of rejection. I, for one, grant freely the power of rejection, and admit the right and title of the Senate to exercise that power of rejection on certain specific occasions under certain specific circumstances. Under this Constitution that right is given without qualification; and the certain special circumstances and certain special occasions are left to the Senate themselves to determine. This power of veto may be exercised absolutely. I am not now disputing their right to exercise that power, but I am challenging the right of amendment of Tax Bills ... The Senate can lay aside any Bill, and, although it cannot be brought to book,*[24] *because it is not liable to dissolution at the time, if it take a step contrary to the public will, yet the other Chamber, if it be sent to the*

[21] *Convention Debates*, Adelaide 1897, 295.
[22] Id 485.
[23] Id 486.
[24] At this stage, the draft Bill did not contain a provision for a double dissolution.

> *country, returns with a specific instruction as to this or any similar issue. With such a clear direction before it the Senate would, in all probability, bow, with judgment and discrimination, to the verdict of the people on the question in dispute* (emphasis added).[25]

Later Deakin declared: 'The power that is being entrusted to the Senate is an enormous power, and the majority have no other security than the good judgment and conscience of the minority'.[26]

Isaac Isaacs[27] stated the matter bluntly in closing his speech:

> The House of Representatives is to be subject to dissolution. Why is that so? *Suppose the two Houses come into conflict, and the main thing they are likely to come into conflict about is finance, what is the only remedy? Dissolution — an appeal to the whole people* (emphasis added).[28]

It was Barton, who as Sir Edmund was federated Australia's first Prime Minister,[29] who dwelt on the power of rejection in reference to another right being conceded to the Senate: to return to the House of Representatives any proposed law which it could not amend requesting, by message, the omission or amendment of any items or provisions therein. Barton was at pains to explain that this right did not amount to the power to amend.[30] When addressing the Convention's second session in Sydney on 14 September 1897 Barton, after seeking forgiveness for quoting himself 'for the sake of shortness', was prepared to repeat word for word the whole of his statement on this subject in Adelaide:

> If the Second Chamber makes suggestions . . . and if the suggestions are not adopted, that House must face the responsibility of deciding whether it will veto the Bill or not. If the procedure is to be by way of amendment, and the amendments are disagreed with by the House of Representatives, and are still insisted on by the Second Chamber, then it is upon the House of Representatives that the responsibility must rest of destroying its own measure . . . *In the first case the responsibility rests where it should, with those who wish to negative the policy of finance upon which the entire government of the country hangs; because without money you cannot govern. If the policy of the Ministry according to their desires in the main is not carried out there must be another Ministry, and those who lead to the formation of that Ministry should take the responsibility. If the procedure is by way of suggestion, which is insisted upon, the Senate must take the responsibility of the veto.* If it is by way of amendment, and that amendment is disagreed with, it is the Lower House that must take the responsibility of the destruction of its own work (emphasis added).[31]

25 Id 507-9.
26 Id 510.
27 High Court 1906-30, Chief Justice 1930, Governor-General 1931-1936.
28 *Convention Debates*, Adelaide, 545-6.
29 Barton, a former Speaker of the New South Wales Legislative Assembly, was at this time a member of the nominated New South Wales Legislative Council. He was a High Court justice from 1903 until his death in 1920.
30 *Convention Debates*, Adelaide, 557.
31 *Convention Debates*, Sydney, 1897, 533-4 (space permits only this extract).

Contrary to the explicit understanding of the Founding Fathers on the consequences of the Senate's rejection of an Appropriation Bill, Kelly's conception of responsible government is based on the practice at Westminster since the Parliament Act of 1911 as it affected Money Bills. This Act mandated the supremacy of the House of Commons in budgetary policy by denying to the House of Lords any power over any Money Bill declared as such by the Speaker of the House of Commons; it also went further in limiting the powers of its Upper House than any Australian Constitution, Federal or State, by substituting a suspensory veto for an absolute veto over almost all other measures. Given that responsible government, as generally understood, had flourished in Britain's self-governing colonial and dominion parliaments well before the passing of this Act, it makes no sense to treat Westminster post 1911 as its prototype. The Victorian Legislative Council has had the constitutional power to refuse Supply since its inception and has used it since Federation not just once, as the Tasmanian Upper House had done in 1948, but twice — in 1947 and 1952. In all three instances a Lower House election was called soon afterwards. In Tasmania the dissolution was obtained within five days; in Victoria in 1952 the dissolution, *sought by one Ministry on the day Supply was denied*, was granted to that same Ministry on being recommissioned after another Ministry had obtained Supply.

Kelly has claimed correctly that 'the price for federation was a Senate designed with virtually equal powers with the House of Representatives, including the power to reject appropriation'. But the strictly *federal* element lay as much in the Australian Senate's composition as in its powers. The much weaker Canadian Senate is a nominated body with the Provinces represented according to population. The Australian Senate — which the Convention of 1897-8 made a popularly elected Chamber — copied the American Senate in being based on equal representation from each State, although it was not until 1913 that the American Senate was changed to a popularly elected Chamber from one based on election by the State legislatures. The powers of the American Senate, however, were not adapted to Australian purposes as urged by some of the Founding Fathers whom Quick and Garran were to describe as the 'federalist' minority. Article I, Section 7 of the Constitution of the United States begins: 'All Bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills'. The Australian Senate, with its powers in Section 53 of the Constitution based on the '1891 compromise' which had itself been based on a 'compact' to which both Houses of the South Australian Parliament had agreed in 1857, seems less powerful than the House of Representatives which by being *alone* empowered to initiate and amend Money Bills is in a formal sense a more significant player than its American counterpart.

Australia's system is then a specimen of responsible government — something the American system has never been. (The same can be said of the parliamentary systems in the Australian States including those with Upper Houses as powerful as the Senate.) Kelly's confusion on these matters is attested by this rhetorical question: 'How could governments be made and unmade in the Lower House if the Upper House could vote against Supply?'[32]

[32] 41.

Setting aside the experience of the States (formerly colonies), the history of the Commonwealth has demonstrated that the Senate's possession of this power of refusal of Supply has not prevented the House of Representatives from unmaking governments at its own pace, as in 1904 (twice), 1905, 1908, 1909, 1929, 1931 and 1941, any more than that the House of Commons in Westminster before 1911 had been likewise inhibited.

WHAT DROVE FRASER AND THE COALITION PARTIES IN 1975?

While not strictly relevant to a consideration of constitutional or even political principle, judgments of Malcolm Fraser's motives as Opposition leader in 1975 have tended to distort the total picture. For instance, one commentator claimed that '[rank] opportunism saw Fraser tear down all the conventions in 1975'.[33]

In late 1975 the Whitlam Government was effectively denied equal numbers with the Opposition parties in the Senate which it had had since the 1974 double dissolution election. This change was not due to Cleaver Bunton's appointment to fill Lionel Murphy's Senate vacancy — Bunton voted with the Government on most legislation including the Appropriation Bills — but to a disagreement between the Bjelke-Petersen Government and the Queensland ALP. The latter could have avoided this by accepting the Premier's revival of a precedent set by Sir Frank Nicklin in 1962 and allowing Parliament to fill a casual Senate vacancy from a list of three ALP nominees. By insisting on the sole nomination of Dr Malcolm Colston, despite Bjelke-Petersen's notorious antipathy for him, the Queensland ALP allowed the Premier to give Fraser that unsought bonus of an anti-Whitlam replacement.[34]

With Labor's numbers reduced the coalition Senators could defer the Appropriation Bills; blocking those Bills on a tied vote had not been tactically acceptable. According to Professor Geoffrey Sawer:

> The Premier nominated Mr A P Field, nominally a member of the ALP (though immediately and automatically disqualified as such member by allowing himself to be nominated) and he was elected in a division *in which the Liberal ministers in the cabinet voted against the Premier* (his emphasis). The action of the ALP on this occasion, though humanly understandable, was a disastrous error of judgment, and the operative cause for the removal of the Whitlam government in the following November. It was far more important in 1975 than it had been in 1962 that the whim of the Country Party leader, however plainly in breach of the principle he himself purported to be following, should be satisfied.[35]

[33] Alan Ramsey, 'Contempt for Parliament and people', *The Sydney Morning Herald*, August 29 1998, 43.

[34] Fraser *at that time* had no desire to force an election.

[35] Geoffrey Sawer, *Federation Under Strain: Australia 1972-1975*, (1977) 136.

Kelly's own negative interpretation of Malcolm Fraser's motives disregards a subsequent cause which his book barely acknowledges.[36] But Kelly wrote in 1976 that the announcement on 10 October 1975 of the High Court's narrow decision (4-3) upholding legislation providing for the election of two Senators from each of the Commonwealth territories was 'the single most important event ... shaping Fraser's decision to block the Budget'.[37] I agree! The coalition parties had intimated earlier that the Budget would pass but with that High Court decision they reversed themselves because they concluded that an election for half the Senate, whether held in 1975 or deferred into early 1976 (with the *immediate* seating of the four newly elected Territorial senators), could give the Whitlam Government a temporary Senate majority. The coalition parties feared that this majority would then enact an electoral redistribution, already twice rejected by the Senate, which they had judged to be so skewed as to prevent them from converting a comfortable majority of the two-party preferred vote into a majority of seats. While survival in office was Whitlam's overriding objective throughout the constitutional crisis, survival other than as a near-permanent Opposition was the coalition's primary concern in attempting to force a House election on the existing boundaries.

A revival of public interest in the Loan affair when Rex Connor was caught misleading Parliament and then forced to resign provided Fraser with the ostensible pretext for recalling his earlier statement that the Opposition's willingness to let the Budget pass was conditional upon there being no extraordinary and reprehensible circumstances. Perhaps the coalition parties miscalculated in their dire prognosis as to the redistribution's potential or to the likely emergence of a temporary Labor Senate majority capable of passing it; but their forebodings proved potent enough for them to take advantage of the changed composition in the Senate and of the heightened public controversy prompted by Connor's resignation.

Whatever some coalition Senators might have claimed *after* Whitlam's dismissal — that they were almost ready to defy their parties' settled strategy and vote for Supply unconditionally — those electoral anxieties would, I submit, have bound them to the strategy of forcing an immediate House election. Why should any one of them, as well as courting political extinction, have wanted to attract the ignominy of assisting the Labor Party to entrench itself in office?

[36] 42 and Op cit (fn 1) 109-10.
[37] P Kelly, *The Unmaking of Gough* (1976) 258 and 266.

KELLY AND THE IMPLICATIONS OF WHITLAM'S CONDUCT

Kelly's assessment of the developments subsequent to the Senate's deferring the Appropriation Bills deals lightly with the unprecedented nature of Whitlam's response and the quandary this presented Kerr.

An ANU seminar paper entitled 'Thoughts on the Constitutional Crisis' given by Professor R S Parker three days after the dismissal made the following unarguable point:

> One of the most viable conventions of parliamentary government is that a Government without Supply should resign, and it is viable — that is, more enforceable than most — because under our system a Government cannot govern without Supply and stay within the law; it cannot govern without Supply if it is to protect the community from economic chaos — *and that is one of the first duties of any Government* (emphasis added). This is equally true whether the first chamber or the second chamber withholds Supply — under constitutions where it is legally necessary that both Houses must take part in granting Supply. On this point the Governor-General's logic is plain and impeccable.[38]

This observation was well-founded and consistent with statements in a notable book by Professor W (later Sir) Harrison Moore reviewing federated Australia's institutions.[39] Appointed Professor of Law at the University of Melbourne in 1892, Moore

> took an immediate interest in the work of the Federalists at the 1893 Corowa conference and in the drafting of the proposed Constitution. By the time the Australasian Federal Convention's first meeting in Adelaide in 1897 ended, Moore was an acknowledged authority on the drafts and was 'used as a human reference library' by the Convention members.[40]

Kelly has not acknowledged Moore's definitive statement of the Senate's powers,[41] his own book being narrow in its range of sources. Moore emphasized in words which Griffith and the Founding Fathers would have comprehended that:

> ... a check upon the Ministry and the Lower House lies in the fact that the Upper House might in an extreme case refuse to pass the Appropriation Bill, *and thereby force a dissolution or a change of Ministry*. These are the conditions recognized by the Constitution. It marks the province of the Senate

[38] This paper was published in the *Newsletter* of the Royal Institute of Public Administration (ACT Group), 3(2), 14-15.

[39] W Harrison Moore, *The Constitution of the Commonwealth of Australia*, 1910. The first edition had been published in 1902.

[40] Loretta Re, *Australian Dictionary of Biography*, vol 10, 574.

[41] Op cit (fn 39) 139-57.

in financial matters, and prevents the House of Representatives from taking a course which might justify or excuse the Senate in rejecting an Appropriation Bill[42] (emphasis added).[43]

This statement disregarded the double dissolution procedure in Section 57 which he discussed later in his book.

The Constitutional Commission's Advisory Committee on Executive Government asked 'What are the consequences for executive government of the Senate denying or deferring Supply?'. It reported on 30 October 1987 that this had been indirectly answered in 1974–75:

> Leaving aside the actual intervention in the process by the Governor-General, Sir John Kerr, in the 1975 crisis, it is clear that the refusal of the Senate to pass the legislation containing the Government's Budget, or providing it with Supply, means the Government may have to agree with whatever conditions or demands the Senate is insisting upon, including the demand that it hold an election for the House of Representatives ... [The] Senate, by refusing to pass the Budget or Supply, can in effect pass a 'no-confidence' motion in the Government and force it into an election. This will be an election just for the House of Representatives unless:
> (a) an election for half the Senate is due to be held, in which case the Government may decide to have that half-Senate election at the same time, or
> (b) there is other legislation which the Senate has rejected on two occasions so as to fulfil the requirements of Section 57 for a double dissolution, allowing the Government to have the whole of the Senate face an election as well as the House of Representatives ...
> ... [Ultimately] the consequences could effectively be the same as a vote of no-confidence in the Government by the House of Representatives, except that no other group in the House of Representatives would *normally* be able to gain the confidence of the House of Representatives. (my emphasis) Consequently there is one significant difference: when the Government loses the confidence of the House of Representatives, a general election is only one possibility; the formation of a different Government is another. But the latter option is not possible when the Senate blocks Supply because the Government defeated in the Senate still retains the confidence of the House of Representatives ...

This applied to the situation faced by Gough Whitlam as Prime Minister both in 1974 and in 1975. The Constitutional Commission itself conceded that point in substance when it reported:[44]

[42] This same statement appeared in the book's first edition in 1902 when it was open to members of the 1897-8 Convention to challenge it immediately.
[43] Id 144.
[44] Constitutional Commission, Background Document, 'New Scheme on Parliament', 2 October 1987, 6.

> Although a number of commentators have argued to the contrary[45] (and the matter has never been decided by the High Court),[46] it is widely accepted that Section 53, while denying the Senate power to amend a Supply bill, enables it to reject or refuse to pass Supply. Consequently, the Senate can bring down a Government because:
> No Government can continue without money; and
> The Constitution does not provide any mechanism suitable for resolving such a dispute.

All this is fully consistent with what Sir Harrison Moore had published in 1902 and 1910 except that the Advisory Committee, mindful of the stability of the bipolar party system prevailing in the House of Representatives since 1909-10, saw little *normal* prospect of a change of Ministry being forced by a denial of Supply by the Senate but only of a general election. As to the reserve powers of the Crown and their vesting by the Constitution as *statutory* powers in the person of the Governor-General, their existence had been documented extensively and convincingly prior to 1975 and conceded more recently by this Advisory Committee. These conclusions are not acknowledged by Kelly. Kerr prefaced the 1988 edition of his memoirs with a 23-page discussion of these and other developments subsequent to 1975.

I digress in mentioning the provision for a double dissolution in Section 57. The need for a mechanical device for the resolution of deadlocks greatly exercised the 1897-8 Convention. First raised late in the Adelaide session in 1897, the issue was debated at length at the second session in Sydney and at the third session in Melbourne in 1898. The section did not emerge in its final form with provision for an absolute rather than a two-thirds majority at the ultimate joint session until a second referendum was required in 1899 to ratify the draft Constitution; it did so on G H Reid's insistence. Unlike the Senate's absolute veto in respect of all legislation, the double dissolution, followed if necessary by a joint session, was not conceded uncontested. It divided those who argued either that it was unnecessary or that it would dilute the Senate's powers and those like Reid whose support for the draft Constitution was made contingent upon it.

Although Section 57's wording attests that its promoters hoped it would apply to any Bill, Kerr was not being contentious in claiming:

[45] Sir Richard Eggleston, a former judge of the Commonwealth Industrial Court, was one of those commentators. But see J E Richardson, 'The Legislative Power of the Senate in Respect of Money Bills', (1976) 50 *ALJ* 273-90, for a closely reasoned rebuttal of such views.

[46] In *Victoria* v *The Commonwealth* (1976) 50 ALJR 7, a majority (Barwick CJ, Gibbs, Stephen and Mason JJ) held that the Senate in effect had the power to reject Money Bills. Professor Sawer said (*Federation Under Strain*, p 117), 'These statements cannot be described as entirely *obiter*, since they were in answer to an argument which sought to minimize the relative authority of the Senate in the bicameral system. Nevertheless, the point was not directly in issue nor thoroughly argued, and cannot be regarded as settled by judicial decision'.

> [It] provides a means, perhaps the usual means, of resolving a disagreement between the Houses with respect to a proposed law. But the machinery which it provides necessarily entails a considerable time lag which is quite inappropriate to a speedy resolution of the fundamental problems posed by the refusal of Supply. Its presence in the Constitution does not cut down the reserve powers of the Governor-General.[47]

One of Robert Menzies' reasons for establishing the Joint Committee on Constitutional Review in 1956 was the inefficacy of Section 57 when Money Bills of an urgent nature were deadlocked. The denial of Supply by the Senate does predicate certain consequences within the terms of the Constitution as Sir Harrison Moore recognized. And those statements I have quoted from the Founding Fathers to the same effect still apply even though they were made *before* the issue of a possible deadlock-breaking mechanism was debated. The Victorian Constitution provides for a deadlock-breaking mechanism but regardless of this the Legislative Council by denying Supply on two occasions has forced a prompt dissolution of the Legislative Assembly. And a prompt dissolution of the House of Representatives should follow a denial of Supply by the Senate!

When Supply was denied by the Senate in 1975, and when its denial was threatened in 1974, Section 57 was irrelevant to the Bills in question; other Bills met its requirements. The Senate's motion on both occasions ruled out any possible deadlock due to that Chamber's actions alone, because it allowed for the passing of the Supply Bills as soon as the Government agreed 'to submit itself to the judgment of the people'. A deadlock was avoided in 1974 because Whitlam requested a double dissolution; a deadlock arose in 1975 because Whitlam refused to advise a House of Representatives election with or without some form of Senate election.

If the extent of the Senate's ultimate sanction against an administration through its refusal of Supply and the consequences of its use are no longer seriously disputed, even by known critics of Kerr who were well-represented on the Advisory Committee and on the Commission itself, one could conclude that the issue had been resolved in Kerr's favour. But Kelly has claimed:

> There was no constitutional provision that required a Prime Minister, faced with the Senate's deferral of Supply, to call an election. Sir John Kerr believed that Whitlam was entitled to remain in office and seek a political solution to the crisis. The Governor-General never suggested that Whitlam's action was unconstitutional at the time he launched his 'tough it out' campaign on 15th October.[48]

Kelly's first point puts him on very dangerous ground indeed. Neither the Prime Minister nor the Cabinet is mentioned in the Constitution's text. Nor does it contain a *specific* provision setting out the Parliamentary prerequisites for the formation of a Ministry. Nor is there consequently a *specific* provision

[47] Paragraph 7 of his 'Detailed Statement of Decisions' which he made public immediately after he had dismissed Gough Whitlam.

[48] 43.

requiring Ministers to resign or to seek a dissolution on losing the confidence of the House of Representatives. Would Kelly seriously argue from this that a Prime Minister denied Supply by the House could attempt to browbeat it as Whitlam did the Senate in 1975? I doubt it. Yet any logical inference from Kelly's statement could have countenanced Arthur Fadden, the Prime Minister leading a wartime non-Labor coalition in 1941, attempting to intimidate those two Independent members of the House into resuming their support for his administration after their earlier defection to the Opposition had sufficed to defeat his Budget. Fadden, however, resigned to make way for John Curtin to form a Labor administration not because the Constitution expressly mandated such a resignation or because any court could have enforced it but because it was required according to well-established conventions of Parliamentary practice.

Section 53, apart from denying the Senate the right to initiate and amend '[proposed] laws appropriating revenue or moneys, or imposing taxation' and the right to increase 'any proposed charge or burden on the people', states unequivocally that, these exceptions aside, 'the Senate shall have equal power with the House of Representatives in respect of all proposed laws'. This should imply, even if it does not expressly decree, that consequences of equal gravity will flow from a refusal by either House to pass an Appropriation Bill! Should Kerr have allowed Whitlam sufficient time to exploit the gradual exhaustion of lawfully appropriated moneys to force the Senate into submission as Kelly seems to imply? As I have already hypothesized in Fadden's case, with a Government censured or denied Supply by the Lower House through defections, might not a complaisant Governor-General permit a Prime Minister to browbeat those defectors no less successfully thereby circumscribing the House's right to hold an administration accountable to it during a parliamentary term? If Whitlam had succeeded with the Senate in 1975, would any court subsequently be able to prevent a Government from treating it as a precedent for dealing similarly with the House and for claiming that such conduct fell within Section 53? And how would 'responsible government' fare in that event? Kelly might well argue that no Government would deny the right of the House to drive it from office. But as Kerr remarked in his memoirs:[49] 'My opinion, that the Senate has untrammelled power to refuse or withhold Supply, was I believe the accepted view until the propaganda and argument of October-November 1975'. And the accepted view was that the Senate's use of that power would require a dissolution!

Kelly has also implied that at first Kerr countenanced Whitlam's remaining in office until 'a political solution' had been reached. Kerr claimed, however, that '[at] the outset of the Supply crisis, I twice encouraged Mr Whitlam to call elections. But he would have none of it'.[50] Kelly, in his repeated use of the expressions 'a political crisis' calling for 'a political solution' to describe the deadlock over Supply, ignores Whitlam's own description on 16 October of the Senate's action that day in deferring the Appropriation Bills as 'a situation

[49] Sir John Kerr, *Matters for Judgment* (1978) 317. Quoted in Kelly op cit (fn 1) 215.
[50] Kerr, *The Bulletin*, September 10 1985, 75.

of grave constitutional crisis'.[51] Furthermore Kerr has claimed in his memoirs that nothing he said or did could have led the Government to think that he supported its course of conduct.

Kerr clearly expected Whitlam to avoid a grave break-down in the machinery of government by conceding *within a reasonable time* the need for an election for the House or reaching a compromise with the Opposition. And for one or other development — the compromise option he quietly encouraged — Kerr waited for more than three weeks while the Senate voted to deny Supply a second and a third time (25 October and 6 November respectively). But Kerr felt that with no settlement in sight he could not permit the *unconditional* persistence by Whitlam in his declared strategy much beyond 6 November with that third deferral and with unsatisfactory responses by the Law Officers to his request for specific advice on the reserve powers and the Government's alternative financing proposals. Parker's observation is so pertinent: 'a Government cannot govern without Supply if it is to protect the community from economic chaos — *and that is one of the first duties of any Government*' (emphasis added).

The denial of Supply, as the Founding Fathers acknowledged, is the ultimate sanction of any Parliament to enforce an administration to be accountable to it. But Whitlam, by an audacious process of inversion outlined on 16 October within minutes of speaking of 'a situation of grave constitutional crisis', tried to exploit the prospective depletion of lawfully appropriated moneys *to retain office*. Whitlam attempted this in order to force some Opposition Senators into capitulating and unconditionally voting to pass Supply out of a concern that the public would blame them and not the Government for the impending chaos. But as Barwick wrote of Whitlam's strategy: 'Brinkmanship of this kind might be accepted in the factional infighting in a political or industrial group, but to my mind not in an assembly of honourable representatives of the people'.[52]

Kelly has continued:

> There was neither a constitutional obligation nor a political convention that obliged Whitlam to call an election at this point. Whitlam argued, with considerable effect, the reverse proposition — that there was a constitutional obligation upon him to defeat the Senate's manoeuvre. This obligation arose to the extent that the concept of responsible government as reflected in the Constitution, was being put at risk by the Coalition's tactic.[53]

But responsible government in Kelly's sense was not reflected in the Constitution and there was no precedent, either in constitutional obligation or in political convention, for Whitlam's strategy. Furthermore, that untenable doctrine as paraphrased by Kelly was first enunciated by Whitlam on 12 September 1975 at a function at Goulburn — hence Kerr's reference to it as the 'Goulburn doctrine'. Yet Whitlam, consistently with the views of

[51] *Parliamentary Debates*, House of Representatives (Cth), vol H of R 97, 2199.
[52] Sir Garfield Barwick, *A Radical Tory* (1995) 293.
[53] Op cit (fn 1) 43.

authorities including the Founding Fathers, had himself previously acknowledged, in and out of office, that the Senate's denial of Supply would oblige any Prime Minister either to resign or to seek a dissolution of the House at the very least![54]

ANALYSIS OF WHITLAM'S OPINIONS PRIOR TO THE 1975 CRISIS

When Whitlam was a newly-elected Labor member and the Menzies-Fadden Government was deeply unpopular, an election for half the Senate was scheduled for 9 May 1953 with Labor confident of regaining the control it had lost in 1951. The Chifley Government had legislated in 1948 to increase the Senate's membership from 36 to 60 with a corresponding increase in the House's membership and to change the Senate's voting system from full preferential voting to proportional representation of the Single Transferable Vote (STV) variety. Arthur Calwell as a Minister had enthusiastically promoted these changes in the Caucus with the declared calculation that: first, even if Labor lost office in 1949, all its sitting members in the House would, if re-endorsed, be returned; and, second, a working ALP majority in the Senate would be retained through the continued presence of Senators elected in 1946 and an electoral system applying to the increased number of Senate places being contested in 1949 in such a way as to minimize Labor losses and coalition gains.[55] Calwell was proved wrong on the first calculation but correct on the second! Kelly's reference to this voting change makes no acknowledgment of the blatant party political calculation behind it.[56]

The Prime Minister, R G Menzies, discussed the consequences of an evenly divided Senate in Brisbane:

> Under the Constitution all questions will be decided in the negative. This would mean that the Government would be in a minority and that the Senate could reject any measure it liked — the Budget or an Appropriation Bill. No public servants, troops or others would be paid. A complete financial crisis would be produced. It could produce a *general election* and a political crisis ....
>
> Mr Menzies said there was a real brawl going on in the Labour Party at present about an equally divided Senate. Dr Evatt said in Adelaide that *Labour did not propose to force an election* because one would be due in July 1954. Mr Calwell, however, did not agree with this because he knew that if an election was held in July, 1954, we would win handsomely and he

[54] Some of these statements (and also those of the then ALP Senate Leader, Lionel Murphy) were pointedly and effectively quoted by Sir David Smith at the 1998 Constitutional Convention. See *Report of the Constitutional Convention — Transcript of Proceedings* (1998) vol 3, 123-5.

[55] Fred Daly, *From Curtin to Kerr* (1977) 51. Daly (a Federal Labor MP 1943-75) gave what I believe to be the only account by one who was present of the arguments employed in persuading the ALP Federal Caucus to adopt the electoral measures incorporated in the *Representation Act* 1948 and the *Commonwealth Electoral Act* 1948.

[56] Op cit (fn 1) 32.

> is getting anxious ... [If] the Senate is 30-all, Labour will have the greatest temptation in the world *to use the Upper House ... to refuse Supply and force an election* (emphasis added).[57, 58]

The next day *The Sydney Morning Herald* in a second Leader commented as follows:

> Labour is making a determined effort to capture control of the Senate, but its strategy in the event of success is by no means so clear. Mr Calwell has asserted his party's intention of bringing about *an immediate general election*, if it can control the Senate. His leader has taken a contrary line. It would be the primary task of a Labour Senate majority, says Dr Evatt, 'to persuade or compel' the Government to adopt his policies ... (emphasis added)

The *Herald* in a leader on 27 April returned to Calwell's threat: 'The Deputy Leader of the party has asserted that if Labour succeeded in gaining a Senate majority it would force a general election'.

According to Dr Don Markwell the British High Commissioner, Sir Stephen Holmes, reported this party debate to the Commonwealth Relations Office:

> If the outcome of the elections is a deadlocked Senate, it is not beyond possibility that the Federal Government may be brought down this year ... [It] would be possible for the Labour Party in the Upper House to withhold Supply from the Government, or at any rate seriously to delay its provision ... Dr Evatt wishes to leave himself freedom on [sic] action, and has said that Labour will 'examine the situation and act with responsibility'. Mr Calwell, however, has flatly stated that 'we will be in power for the Royal Visit'.[59,60]

Arthur Calwell's boast would have been meaningless if all parties had not accepted that a dissolution of the House would have resulted from a denial of Supply by the Senate. Again according to Dr Markwell, *The Times* of London's Canberra correspondent reported on election eve that if Labor won a majority or a blocking half in the Senate it '... would be within its rights to force a general election before the present year is out by refusing supply in the Senate'.[61] And a leading article published in that newspaper three days earlier[62] had also mentioned Calwell's hopes for this outcome and for Labor's swift return to office. In Calwell's home state of Victoria in late 1952 Labor had been elected to office as a State Government with a majority in its own right for the first time in its history after joining with some dissident Liberals in the Legislative Council to deny Supply to a non-Labor administration and

57 *The Sydney Morning Herald*, April 8, 1953, p 5.

58 No Supply Bill could have met the requirements of Section 57 according to Calwell's timetable. Nor was it likely that a Labor-dominated Senate would have brought any other Bill within those requirements.

59 This was the official visit scheduled for early 1954 of H M The Queen and H R H the Duke of Edinburgh — the first visit to Australia by a reigning monarch.

60 DO35/5185, Public Records Office, London. Further references are in DO35/5270.

61 'Test for Mr Menzies', *The Times*, 8 May 1953.

62 'The Australian Senate', *The Times*, 5 May 1953.

force the very election which yielded that result. No wonder Calwell less than a year later should have relished the prospect of a similar feat in Canberra! When the count disclosed that the Government had narrowly retained its Senate majority, Menzies and Evatt departed for London to attend the Coronation of H M Queen Elizabeth II on 2 June.

Significantly Evatt, while reserving his position during the Senate campaign, did not question the assumptions behind his deputy's boast. This he could have done indirectly by questioning Menzies' reported statements in Brisbane. Evatt, however, could feel confident that Menzies, on being denied Supply by the Senate, would advise a dissolution of the House of Representatives. If on the contrary he had acted as Whitlam did in 1975, Evatt could have forcefully argued for his dismissal by the Governor-General just as Bob Ellicott did of Whitlam in 1975. Evatt's own authorship has established this:

> But is it permissible to agree that the occasion will never arise when, in the crisis of a political controversy, a Governor-General may think it proper to exercise his ultimate authority and even dismiss a Ministry which has the support of a majority of the Assembly, appoint the Opposition Leader as Prime Minister, and grant a dissolution of Parliament to the new Prime Minister? Surely it is wrong to assume that the Governor-General for the time being will always be a mere tool in the hands of the dominant party. It is true that a Governor-General could not safely exercise his reserve powers unless he had good reason to suppose that the electorate would vindicate his action. But that the possibility of similar action by a Governor-General against the advice of his Ministers for the time being is not merely academic, was shown in May 1932, when the Governor of New South Wales [Air Vice-Marshal Sir Philip Game] dismissed from office a Ministry [led by J T Lang] in full possession of the confidence of the popular Assembly. After the Governor had dismissed his Ministers the Leader of the Opposition [B S B Stevens] became Premier, and being unable to face the Assembly for an hour, secured, first a prorogation, and then a dissolution of Parliament ... (parentheses added).[63]

The Governor-General could have acted accordingly, confident in the electoral climate of 1953 that an Evatt Ministry he commissioned after dismissing Menzies would be confirmed in office by the electors.

Whitlam seemingly viewed Calwell's conduct with equanimity both in 1948 and in 1953. In his Chifley Memorial Lecture of 1957 he made this bland observation: 'If ... Labor ... had not been outmanoeuvred over the double dissolution in 1951, there would have been a general election at the end of 1952 which, from the marked trend of by-elections at that time, would have returned a Labor Government with a great majority'.[64] But if the Chifley Government had not attempted at Calwell's urging to be too clever by half in its fiddling with electoral matters in 1948, there would have been no need for a double dissolution in 1951. The 1949 election would have given the Menzies-Fadden

[63] H V Evatt, *The King and His Dominion Governors* (1936) 305, republished in *Evatt and Forsey on the Reserve Powers* (1990).

[64] E G Whitlam, *On Australia's Constitution*, (1977) 19-20.

Government majorities in both Houses as conjoint elections for the House of Representatives and half the Senate had done with all administrations, except the Cook Government in 1913, between 1910 and 1946 inclusive. And any conjoint election in late 1952 for the House and half the Senate would also have given Labor majorities in both Houses. But a Senate majority has consistently eluded Labor since 1951 because its short-term advantage in 1949 has emerged as its long-term nemesis.

The Labor-dominated Senate was determined between 1949 and 1951 to frustrate the Menzies-Fadden Government. Its calculated obstruction then and at other times should be read against Professor Geoffrey Sawer's observation, which Kelly has overlooked in a book he has cited more than once:

> ... when the Senate majority has been of a different party from that of the majority in the House of Representatives and consequent Ministry, the Senate has, irrespective of the party controlling it, been as obstructive as it dared, having regard to electoral prospects and the dangers of provoking a double dissolution. *All parties have used the Senate when it suited them* (emphasis added).[65]

Kelly has claimed that the coalition parties' actions in 1975 amounted to 'the last gasp of the born-to-rule Liberal Party; the party that believed Labor could govern neither successfully nor for long'.[66] But Labor's actions already recounted attest that born-to-rule assumptions have not been a Liberal monopoly. The Labor Opposition in 1951 was confident that a double dissolution would *not* be granted to Menzies by W J (later Sir William) McKell, whom they had had translated from the NSW Labor Premiership to the Governor-Generalship in 1947, on the mistaken assumption that he would allow old party loyalties to sway him. Indeed such born-to-rule assumptions underlie repeated attempts by Labor since 1972 to employ electoral mechanisms to retain office. Apart from the proposed redistribution of 1975, there was the unsuccessful attempt by Whitlam in 1974 to have the Constitution provide for electoral divisions based on *an equality of population and not of electors*. The unacknowledged calculation behind this referendum proposal was the entrenchment of an electoral malapportionment designed to work in Labor's favour.

In 1959 Whitlam signed the Report of the Joint Committee on Constitutional Review as one of its members along with A A Calwell, his future leader, and three other former Ministers in the Chifley Government, E J Ward, R T Pollard and Senator N E McKenna, and also Senator P J Kennelly, elected to the Senate in 1953 and Deputy Labor Senate Leader 1956-67. As Mr R J Ellicott QC pointed out in 1976, this Report 'expressly acknowledges that the provision of finance by the Parliament is essential for the maintenance of responsible government and accepts the existence of the Senate's power of rejection or deferral'.[67]

[65] Op cit (fn 35) 124.
[66] 40.
[67] G Evans (ed), *Labor and the Constitution 1972-1975* (1977) 292. See also *The Report of the Joint Committee on Constitutional Review*, (1959) para 181.

The Menzies Government lost its majority in the Senate in the 1955 elections when the ALP and Democratic Labor Party Senators could combine to draw even with Government Senators. The likelihood of subsequent inter-House deadlocks, especially those relating to financial measures, prompted Menzies to set up that afore-mentioned Joint Committee. In 1976 Professor Jack Richardson, after quoting that Committee Report's recommendations concerning inter-House disagreements, then added:

> The necessary assumption of the Committee's observations was that the Senate was not precluded by constitutional convention from exercising its legal powers with respect to Money Bills, and there is not a word reported in the records of the Committee's deliberations to indicate that any member of the Committee was of opinion that there was any constitutional convention or practice restricting the Senate in the exercise of its constitutional power to reject a Money Bill.[68]

Or, if it comes to that, restricting the Senate from failing to pass a Money Bill by repeatedly deferring its consideration!

On 8 April, 1974, Whitlam as Prime Minister was confronted during Question Time with the statement in the Senate on 18 June 1970 by the then Opposition Senate leader, Senator Lionel Murphy, affirming that Labor 'has acted consistently in accordance with the tradition that we will oppose in the Senate any tax, any money bill or other financial measure whenever necessary to carry out our principles and policies'[69] and with his tabling of 169 such measures opposed in whole in or part by the Labor Opposition between 1950 and 1970. Whitlam then attempted to distance himself from Murphy's actions, although many of his own Parliamentary utterances in 1970 were fully consistent with Murphy's. Whitlam, in his latest book,[70] has been prepared to place the blame for Murphy's statement on 18 June 1970 on 'the ambitious Clerk of the Senate' (J R Odgers) who is alleged to have 'foisted ... the notorious list of Bills on Murphy'. Was Murphy indeed so susceptible? Did he not have a mind of his own? But Whitlam, on 8 April 1974, declared *inter alia* that:

> ... it is *inappropriate* for the Senate to purport to cut off Supply for the House of Representatives ... [My] attitude on this matter ... has been expressed in committees of the Parliament — the Joint Committee on Constitutional Review — and on many occasions in the House itself. *I do not have the same objection to the Senate or an Upper House refusing Supply if it also faces the people at the same time.* That is a point of view which I have stressed in the Constitutional Review Committee which sat in 1956, 1957, 1958 and 1959 ... I believe it is *quite wrong for any House of*

[68] Op cit (fn 45) 285. Professor Richardson wrote with inside knowledge as a senior officer of the Commonwealth Attorney-General's Department at the time who had been the Legal Secretary of the Joint Committee on Constitutional Review.

[69] This was consistent with a statement he had made in the Senate in 1967.

[70] Op cit (fn 3) 41.

Parliament to refuse Supply to a Government without facing the consequences itself. I am very happy for both Houses of this Parliament to face the consequences of any refusal of Supply (emphasis added).[71]

Whitlam was not questioning the Senate's power to force an election but was affirming in what circumstances it might *appropriately* be exercised. And those circumstances — permitting him to advise a double dissolution — were present in October-November 1975, as they had been in April 1974.[72]

Whitlam's comments in 1970, especially those he made when the Labor Opposition attempted to force the Gorton Government to the polls through the rejection of its Budget in the Senate, have been dismissed by Kelly[73] as no more than 'political rhetoric' because the DLP did not join with the ALP in the vital divisions and were not expected to do so despite some very blatant overtures from Labor's leaders. (In those divisions mere abstention by the DLP would have given Labor the numbers to throw out the Gorton Government's Budget with the support of Independents). But is one seriously to believe that Whitlam would have recoiled from forcing the Gorton Government to an election for the House if the DLP had given him the numbers? All the 'political rhetoric' of Whitlam and also of Senators Lionel Murphy and Don Willesee in that Budget debate,[74] backed as it was by a Caucus decision, would have been meaningless if it had not acknowledged that the Gorton Government would have been obliged to call an election for the House with the Senate's rejection of its Budget. Whitlam recently[75] has unsuccessfully attempted, by employing some casuistry, to argue his way out of the implications of his party's conduct in 1970.

Bob Ellicott has also recorded Whitlam's comments in March 1975 in relation to Supply for Medibank: ' ... if there is again a refusal of a Supply Bill there will certainly be an election but we see some marvellous issues to fight on, not the least Medibank ... I don't seek a double dissolution. I am not working for one but if Supply were refused there will be a double dissolution'.[76]

Furthermore Kerr has recorded, and Whitlam has never denied, that at a meeting at Admiralty House as late as 25 August 1975, 'the Prime Minister said to me that an election could occur early in December if Supply were denied.'[77] Eighteen days later at Goulburn Whitlam executed his volte-face.

[71] *Commonwealth Parliamentary Debates*, House of Representatives (Cth) vol 88, 1110-11.

[72] *The Final Report of the Constitutional Commission* which dealt equivocally with the events of 1975, concluded nonetheless (vol 1, para 4.555, 236) 'that it should not be open to a Senate, in which a Government may not have a majority of supporters, to deny a Government essential means of governing and thereby force a general election for the House, *unless the Senate itself has to face the judgment of the people at the same time*' (emphasis added). But those conditions were met in 1975 by Malcolm Fraser in his advice to Kerr and could have been met by Gough Whitlam if he had chosen to give that advice himself and thereby had gone to the people as Prime Minister!

[73] Op cit (fn 1) 34.

[74] *Commonwealth Parliamentary Debates*, Senate (Cth), vol 45, 256 and 269.

[75] Op cit (fn 3) 41.

[76] Op cit (fn 67) 292.

[77] Op cit (fn 49) 246.

Apart from the circumstances surrounding the 1953 Senate election, Kerr itemized all these instances and others in an article which Kelly cited only once in connection with some other matter.[78] They clearly illustrate that when Whitlam somersaulted on 12 September 1975 and announced to Parliament on 15 October that the Senate's deferring of the Appropriation Bills would not oblige him to call a House election, he could find no precedent, then and later, to justify his change of front.

WHITLAM'S 'DISTINGUISHED PREDECESSOR ASQUITH'

The Asquith Liberal Government's response to the House of Lords' refusal to pass the Finance Bill on 30 November 1909 should have provided the most compelling precedent for the Whitlam Government in 1975. The Asquith Cabinet's anticipation of the House of Lords' action has been described in the King's official biography:

> The Cabinet, as Mr Asquith reported to the King on 8th September, was now occupied with a preliminary discussion of the situation which would arise in the event of the House of Lords' rejecting, or *delaying,* the Finance Bill, and the Lord Chancellor was requested to prepare as soon as possible, in consultation with the Law Officers, a memorandum on the legal aspects of the case. Mr Asquith added that if the House of Lords rejected the Budget the Cabinet was of the opinion that it 'ought to be followed by an acceleration of the register so as to secure at the earliest possible moment an appeal to the country' (emphasis added).[79]

Lord Loreburn, who as Sir Robert Reid had served as Solicitor-General and as Attorney-General in the administration of Lord Rosebery from 1894 to 1895, had been Lord Chancellor since 1905 and the Law Officers whom he consulted were the Attorney-General, Sir William Robson, and the Solicitor-General, Sir Samuel Evans. But these were not the Government's only legal heavyweights! The Prime Minister, H H Asquith, had been an eminent leader of the Bar and if his potential had not distinguished him from his Liberal contem-poraries for accelerated promotion he might have enjoyed that *cursus honorum* for such a lawyer-politician through the posts of Solicitor-General and Attorney-General to that of Lord Chief Justice or Lord Chancellor. The Secretary of State for War, Richard Burdon Haldane, had also been a leader of the Bar with a very successful appellate practice like Loreburn before 1905: Haldane in 1912 succeeded Loreburn as Lord Chancellor. Augustine Birrell, the Chief Secretary for Ireland, had been a successful Chancery silk and from 1896 to 1899 had been Quain Professor of Law at University College, London.

When Robson was appointed a Lord of Appeal in Ordinary early in 1910 and Evans the President of the Probate, Divorce and Admiralty Division shortly afterwards, they were replaced as Law Officers by two outstanding appoint-

[78] Kerr, *The Bulletin*, September 3, 1985.
[79] Sir Sidney Lee, *King Edward VII*, vol II (1925/1927) 666.

ments. Sir Rufus Isaacs, whose success since his call to the Bar in 1887 had been almost phenomenal, was appointed Solicitor-General in 1910 before being promoted some months later to be Attorney-General. From October 1913 until 1921 as Lord Reading he was to serve as a highly regarded Lord Chief Justice although regularly called away from full-time judicial work by special wartime assignments. Sir John Simon succeeded Isaacs as Solicitor-General in 1910 and then as Attorney-General in 1913. He declined the Lord Chancellorship in May 1915, choosing to become Home Secretary instead, and the Woolsack claimed his successor as Solicitor-General, Sir Stanley (later Viscount) Buckmaster, another outstanding lawyer who almost certainly would have succeeded Isaacs as Solicitor-General but for his absence from the Commons from the election of January 1910 until his return in a by-election in October 1911. Simon left the Government early in 1916 to resume a practice at the Bar which was to prove almost legendary. After holding senior Cabinet posts from 1931 (Foreign Secretary until 1935, then Home Secretary again and Chancellor of the Exchequer in 1937) he finally served as Lord Chancellor from 1940 until 1945 in Churchill's wartime coalition and caretaker administration. Viscount Simon, in the words of Professor R F V Heuston, has 'an assured place among the greatest jurists who have been on the Woolsack'. A comparison of the outstanding legal luminaries on the Liberal benches at Westminster in 1909-11 with the exiguous legal talents available to the Whitlam Government in 1975 is enough to make one squirm with embarrassment.

The Asquith Government contemplated no course other than the one foreshadowed in the Prime Minister's report to the King on 8 September 1909. Speaking in the Lords in the second reading debate on the Finance Bill on 22 November (some eight days before the vital vote) to the motion moved by the Conservative leader, Lord Lansdowne: 'That this House is not justified in giving its consent to this Bill until it has been submitted to the judgment of the country',[80] Lord Loreburn LC remarked: 'The sense of the country is apparently to be taken upon this measure ...' and later spoke of '... the coming general election, assuming that His Majesty is pleased to dissolve Parliament ...'[81] After the Lords had carried Lord Lansdowne's motion on 30 November Asquith was even more emphatic when speaking in the House of Commons on 2 December:

[80] Note the similarity between the wording of this motion and the wording in the motion moved on three occasions in the Senate in October-November 1975. See *infra*. The important difference was that the Senate only set out to delay the Appropriation Bills 'until the Government agrees to submit itself to the judgment of the people' whereas the House of Lords intended the Finance Bill to be deferred so as to make it an issue in any subsequent election. But the relevant motions pointed to delay rather than outright rejection although in both cases the granting of Supply was effectively denied for the extent of the delay.

[81] *Official Report, Parliamentary Debates, Lords*, 1909, Volume IV, columns 759 and 760.

> I may be pardoned if in passing, I refer at this point to two suggestions which have been made, proceeding from very opposite quarters, and both of them I think, for obvious but very different reasons, untenable. The first is that the Executive should continue to demand and enforce the new taxes sanctioned by Resolution notwithstanding the prorogation of Parliament. It is frankly admitted by those who put that suggestion forward that it is a revolutionary proposal. It would certainly bring anyone who adopted it into rapid collision with the courts of law, and it does not commend itself to the judgment of His Majesty's Government. The second suggestion ... is that here and now, before the present Session closes, the Government should bring in a new Budget and submit it for approval or rejection to the House of Lords ...
>
> I dismiss these impossible suggestions, and I come *to the course — the only course* — which, in the circumstances, it is open to the Government, without either breaking the law or sacrificing constitutional principle, to pursue. That course is to advise, as we have advised the Crown, to dissolve this Parliament at the earliest possible moment. His Majesty has been graciously pleased to accept that advice ... (emphasis added).[82]

Writing of this event in 1954, Roy Jenkins,[83] who was to become Home Secretary and Chancellor of the Exchequer like Asquith and also Sir John Simon before him but, unlike the former but like the latter, never Prime Minister, could claim confidently:

> Any course other than immediate dissolution was out of the question. The legislature had refused Supply, and in these circumstances no Government could carry on. It was this, most of all, which gave the full measure of what the Lords had done. They had not merely confronted the Government with the choice of an immediate election or of acceptance of the loss of a particular measure, as they had frequently done before. They had left the Government with no choice, and had taken upon themselves the right of deciding when a Government could carry on and when it could not, when a Parliament should end and when it should not ...[84]

Ten years later Jenkins was to make this point again in his biography of Asquith: 'A dissolution was of course inevitable once the Lords had performed the act of rejection. There was no dispute in the Cabinet about this. The legislature had refused Supply, and in these circumstances no Government could carry on'.[85] And the late Dr Stephen Koss claimed in his biography of Asquith, published within a year of the 1975 crisis in Australia, that in the Asquith Cabinet, divided as its members were on how to reform the House of Lords, 'one thing, and one thing alone, was certain: if the peers had the temerity to refuse Supply, the Government had no option but to dissolve'.[86]

[82] *Official Report, Parliamentary Debates, Commons*, Volume XIII, columns 549-550.

[83] Now Lord Jenkins of Hillhead. He succeeded Lord Stockton on his death in 1986 as Chancellor of the University of Oxford and he recently chaired a committee to advise the present British Government on proportional representation.

[84] Roy Jenkins, *Mr Balfour's Poodle: Peers* v. *People* (1954) 107.

[85] Roy Jenkins, *Asquith* (1964) 202.

[86] Stephen Koss, *Asquith* (1976) 116. See also A Lawrence Lowell, *The Government of England* (1914) vol 1, 427.

This judgment has been consistently vindicated in legal textbooks. The following quotation conclusively states the whole matter in its historical context: while acknowledging the impact of the *Parliament Act* of 1911 on the subsequent constitutional practice at Westminster, it states the issue where both Houses still possess the same powers over Supply as had been the case at Westminster before 1911:

> No Government can exist without raising and spending money. In the Bill of Rights 1689, article 4, the levying of money for the use of the Crown without grant of Parliament was declared illegal. Relying on the principle that the redress of grievances preceded Supply, the Commons could thereafter insist that the Crown pursued acceptable policies before granting the taxes or other revenue which the Crown needed. It has been said of the financial procedure of Parliament that the Crown demands money, the Commons grant it and the Lords assent to the grant.[87] Today a Government regards it as a condition of holding office that its financial proposals should be accepted by the Commons ... A Government which failed to ensure Supply would have to resign or seek a General Election. [What follows is a footnote.] *Hence the necessity for a General Election after the Lords had rejected the Liberal Government's Finance Bill in 1909.* In 1975, the Governor-General of Australia dismissed the Prime Minister of Australia, Mr Whitlam, after his Government had failed to get the approval of the Senate to two Appropriation Bills. The Governor-General applied the principle that if a Prime Minister cannot get Supply, he must resign or advise an election. Unlike the House of Lords [since 1911], the Australian Senate is authorized by the Australian Constitution to reject Appropriation Bills (parentheses and emphasis added).[88]

Kelly's book has repeatedly quoted, more often than not out of context, from Sir Ivor Jennings' study *Cabinet Government*, but he seems to have overlooked the same author's observations in his companion study *Parliament* on the powers of the House of Lords before 1911: 'The power to reject Finance Bills was a reserve power for use in exceptional cases only, since it is in essence *a power to refuse supplies, and that is, in constitutional theory, a power to overthrow the Government or compel a dissolution*' (emphasis added).[89] Surely Kelly would have been obliged to note this if he had been aware of it? Regrettably Kelly,[90] in quoting Jennings on a Monarch's capacity to act as mediator in inter-House deadlocks,[91] has not done so in a comprehensive way, not taking note of vital references to the dispute over the Finance Bill of 1909, the closest approximation in Westminster's experience to Australia's experience in 1975.

Of five page references to Asquith in Kelly's index, only one alludes, however obliquely, to his recommendation of a dissolution in 1909.[92] This

87 Erskine May *Parliamentary Practice* (1976) 695 was then cited.
88 E C S Wade and G Godfrey Phillips, (A W Bradley ed), *Constitutional and Administrative Law* (1977) 186-7.
89 W Ivor Jennings, *Parliament* (1939) 406.
90 Op cit (fn 1) 159.
91 W Ivor Jennings, *Cabinet Government* (1951) 360-1.
92 Op cit (fn 1) 163.

reference is contained in an edited extract from a parliamentary speech by Bob Ellicott, a former Solicitor-General who at the time was shadow Attorney-General, on 21 October 1975: 'The Prime Minister said in Question Time that I was not born in 1911. He thought that I might not have heard of Asquith. But I had heard of Asquith when I was a little boy. What I learned about Asquith was that Asquith had the courage to face the people . . .' Ellicott's apparent obliqueness is because Kelly omitted what followed: 'When the House of Lords rejected the Finance Bills (sic) in . . . 1909, . . . he [Asquith] went to the people. That is the thing that honourable members opposite have to do now — go to the people'.

Kelly in one of two indexed page references to the House of Lords makes his own solitary reference to its handling of the Finance Bill in 1909 but again he omits to mention the consequent dissolution:

> At Westminster the notion of responsible government reached its zenith following the great conflict from 1909 to 1911 when the Lords denied Supply to the Commons. The resolution of this conflict established the ascendancy of the Commons over the Lords. This triumph for responsible government (sic) — thereby ensuring that the leader who enjoyed the confidence of the Lower House would prevail against a hostile Upper House — was repeatedly raised by Whitlam to justify his own stance during the 1975 crisis . . .[93]

However repetitively Whitlam tried to justify his own position in 1975 by vague references to that conflict and however inappropriately he referred to 'my distinguished predecessor Asquith',[94] he was also seemingly selective in not mentioning the dissolution of December 1909 consequent upon the Lords' refusal to pass the Finance Bill and the subsequent election of January 1910. Asquith in 1909 never even contemplated a strategy comparable with Whitlam's in 1975. The ultimate triumph of the Commons over the Lords was enacted as the *Parliament Act* of 1911 after a general election on that specific legislation in December 1910. Moreover, the references in Kelly's book to Asquith's advice to King George V — given principally in connection with that same Parliament Bill and the Irish Home Rule Bill — had no relevance at all to Asquith's dealings with King Edward VII over the Finance Bill. (This is also a point to be sheeted home to Sir Maurice Byers for his own use of Asquith's statements in the 'opinion' presented to Kerr on 6 November.) King Edward VII's death on 6 May 1910 some days *after* the Finance Bill had received Royal Assent, having been passed by the Lords without a division on 28 April, meant that his successor, King George V, had no official dealings with Asquith in that connection. And King Edward VII's situation in 1909 was completely dissimilar to Kerr's situation in 1975. However distressing the King might have found the conduct of the Lords in 1909 and however impatient he might have been with the Conservative leaders, Arthur Balfour and Lord Lansdowne, he was never placed like Kerr in the incomparably more

[93] Id 16.
[94] *Commonwealth Parliamentary Debates*, House of Representatives (Cth), vol 97, 2302.

agonizing situation of having to decide whether he should either dismiss or continue to support in office a Ministry which, having first been denied Supply, had then resolved if need be to govern without it. Asquith in 1909, unlike Whitlam in dealing with the Governor-General in 1975, never even contemplated embarrassing the Crown by placing the King on the horns of that dilemma.

WHAT THEN WERE WHITLAM'S PRECEDENTS?

In an earlier book, Barwick had written that 'until 1975 no Prime Minister in any Westminster system, including the United Kingdom, has ever failed to resign or advise a dissolution if unable to secure Supply'.[95] Barwick later acknowledged in his memoirs that '... there were exceptions which I had overlooked, namely in the colony of Victoria in what might be called its frontier days. With those exceptions my statement was accurate'.[96]

But even those exceptions can be distinguished. The acrimonious Victorian inter-house disputes (1865-6 and 1877-8) involved the Legislative Assembly's improper 'tacking' of some extraneous policy content to an Appropriation Bill, which the Legislative Council could not amend, instead of properly making the extraneous matter the subject of a separate Bill which the Council could amend. The Commonwealth Constitution expressly prohibits such 'tacking' in Sections 54 and 55. And, as Sir Harrison Moore pointed out, these sections 'also deprive the House of Representatives of the power of effectuating its control over finance by including the whole of the financial measures for the year in one Bill — the course hinted at by the Commons resolutions of 1860 (see *infra*), and adopted in the Colonies for the purpose of compelling the Upper House to accept an unwelcome measure'[97] (my parenthesis). In both the above-mentioned cases the Legislative Council laid the Appropriation Bill aside, not to force a dissolution of the Legislative Assembly, but rather in the hope that the Government in control of the Assembly would thereby feel forced to resubmit the Appropriation Bill without the 'tacked' policy matter.

In 1865-66 the Governor of Victoria, Sir Charles Darling, encouraged the Ministry led by James McCulloch, which was prepared to defy the Legislative Council, in a number of expedients which were clearly unlawful, notwithstanding the perverse advice as to their alleged legality from the Attorney-General (and future Chief Justice), George Higinbotham. This action of Darling's, as well as his attacks on some former Ministers, brought his career to an end with his recall by the Secretary of State for the Colonies, Edward (later Viscount) Cardwell. In justification of his encouragement of the Ministry in these illegal expedients, Darling had earlier pleaded the usage of the Imperial Parliament, and the extreme necessity of the case, arguments rather similar to those which erroneously found favour with Whitlam in

[95] Sir Garfield Barwick, *Sir John Did His Duty* (1983) 55.
[96] Op cit (fn 52) 282.
[97] Op cit (fn 39) 144.

1975. Cardwell was unmoved and, in Dr Alpheus Todd's words, 'severely reprimanded the Governor, for these doings'. In a despatch dated 27 November 1865, Cardwell explained at some length that the Governor had misunderstood the Imperial practice in matters of Supply and taxation and pointed to the irregularity of permitting extraneous provisions to be included in a Supply Bill. Towards the end of his despatch, the Secretary of State declared:

> ... that in collecting duties without sanction of law, in contracting a loan without sanction of law, and in paying salaries without sanction of law, the Governor had departed from the principle of conduct announced by himself and approved by the Colonial Secretary — the principle of rigid adherence to the law. I deeply regret this. The Queen's representative is justified in deferring very largely to his constitutional advisers in matters of policy, and even of equity; but he is imperatively bound to withhold the Queen's authority from all or any of those manifestly unlawful proceedings by which one political party, or one member of the body politic, is occasionally tempted to endeavour to establish its preponderance over another. I am quite sure that all honest and intelligent colonists will concur with me in thinking that the powers of the Crown ought never to be used to authorize or facilitate any act which is required for an immediate political purpose, but is forbidden by law.[98]

In 1877-8, the Governor, Sir George Bowen, unlike Sir Charles Darling, was very careful not to be drawn into such conduct. He was reluctantly prepared to support the Ministry led by Graham Berry in the dismissal of certain office-holders but was insistent that no illegality should result. Even so, some of his actions were reproved by the Colonial Secretary, Sir Michael Hicks-Beach (later 1st Earl St. Aldwyn), and he served out the remainder of his proconsular career in much less elevated postings than those he had coveted. In the 1865-66 dispute a dissolution did not end the impasse between the two Houses nor would one have done so in 1877-8 as has been fully explained by Dr Alpheus Todd in his classic work.[99] It is clear, however, from what Todd wrote that vice-regal intervention to obtain a dissolution, where Ministers had refused to advise one, could have seemed a compelling option if the circumstances attending the Council's laying aside of the Appropriation Bill had been different.[100]

Asquith, who wrote warmly of Cardwell in his memoirs and was well-acquainted with Hicks-Beach (Chancellor of the Exchequer in Lord Salisbury's Conservative administration from 1895 to 1902 and Lady Loreburn's uncle), significantly did not treat the conduct of either of the administrations in these Victorian colonial *causes célèbres* as a precedent in 1909. Barwick's original statement therefore would have been incontrovertible if it had had the following italicized addition or something like it: 'until 1975 no Prime Minister in any Westminster system, including the United Kingdom, had ever failed to resign or advise a dissolution if unable to secure Supply *when either course by facilitating the securing of Supply could have avoided*

[98] Quoted in Alpheus Todd, *Parliamentary Government in the Colonies* (1894) 136.
[99] Id chiefly at 136 ff, 721 ff, and 730-2.
[100] Id 730-2.

any breach of constitutional principle or any potential inducement to illegal conduct'.

In both his book and his lecture, Kelly has quoted one of Whitlam's Ministers, John Wheeldon, almost without exception as a critic of Kerr. Kelly did not find it in himself, however, to quote from an article Wheeldon wrote,[101] wherein, apart from two criticisms of Kerr, he made the following admissions. Kerr 'had to deal with a situation that few constitutional heads of State have had inflicted on them'. And also:

> Some conventions of the Westminster system are more essential than others. The convention that a Government which is not able to carry its Budget through the Parliament should resign is one of the conventions vital to the survival of a parliamentary democracy ... Any Government functioning under the Westminster system that tries to hold on to office without having its Budget accepted by Parliament for as long as we did ought to be dismissed.

CONFLICTING TESTIMONY AND TACTICAL CONFUSION

Whitlam's approach to the Senate's denial of Supply in 1975 was devoid of a single persuasive, let alone compelling, precedent; it involved suspending any acknowledgement of past practice. To acknowledge, as Kelly did, that: 'Above all, Whitlam proceeded on the false assumption that he could remain in office after the exhaustion of supply or could rely upon non-parliamentary provision of supply'[102] is to state the obvious so blandly as to fail at the outset to admit to the unprecedented nature of Whitlam's strategy. But, for what that statement is worth, Kelly seems unable to say much more in criticism of Whitlam's approach than to chide him for 'severe tactical mistakes' in his dealings with the Governor-General.[103] Kelly asserts: 'On 16th October Whitlam should have provided Kerr with formal written legal advice (*which he never did*) that the House of Representatives was not obliged to go to an election at the behest of the Senate' (emphasis added). But such written advice would have been so excessively inventive that, to adapt Oscar Wilde's put down of Charles Dickens on the death of Little Nell, any lawyer as well-furnished as Kerr would have needed a heart of stone to have read it without laughing. This judgment is reinforced by the questionable arguments presented in the draft Byers opinion which, though employing the first person plural throughout, has been erroneously termed a joint opinion of the Law Officers, most recently by Whitlam.[104] This document[105] was signed only by the Solicitor-General, M H (later Sir Maurice) Byers QC, as late as 4 November and given to Kerr by the Attorney-General, Kep Enderby QC, on 6 November after he had struck out

[101] *The Weekend Australian*, November 10-11, 1990.
[102] Op cit (fn 1) 44.
[103] Op cit (fn 1) 43.
[104] Op cit (fn 3) 4, 37.
[105] Op cit (fn 1) Appendix B.

Byers' signature in Kerr's presence and, signifying to him that he was not in entire agreement with its contents, had written the word 'Draft' in front of the heading 'Joint Opinion'. This 'opinion' was submitted in lieu of a joint opinion signed by both Law Officers on the Ellicott statement of 16 October on the role of the Governor-General and the reserve powers.[106] Kerr as early as 21 October had asked Whitlam for such a signed joint opinion.

Kelly has claimed: 'He [Whitlam] assumed the reserve powers either did not exist or would not be used'. The latter assumption alone is the correct one even if Whitlam has subsequently disavowed any belief in the existence of the reserve powers. Kelly has claimed further that Whitlam's 'aim should have been to reassure Kerr and frighten Fraser'.

Kerr has given his own account of his dealings with Whitlam from September until the time he dismissed him. In reviewing *Matters for Judgment*, Professor Geoffrey Sawer asked whether Kerr's despatches to The Queen 'provide a diary on crucial dates and conversations' during 1975.[107] Kerr was able to confirm that these despatches did indeed form

> ... a detailed running account, one might almost say a 'diary', of events as they unfolded, including my conversations with Mr Whitlam ... [My] correspondence with the Palace [when published] ... will show the total consistency between what I wrote in *Matters for Judgment* and the running account I had given Her Majesty as the events actually took place. Other records I made of conversations will also, one day, be available. I have nothing whatever to fear from what history might reveal (parentheses added).[108]

According to these despatches, which could not have been inspired by some preconceived plan of Kerr's or doctored by him subsequent to their despatch, Whitlam not only acknowledged to him the existence of the reserve powers but also on no less than five occasions made very plain his own awareness that he might feel obliged to dismiss him.[109]

Furthermore, Kerr in his letter dismissing Whitlam asserted:

> You have previously told me that you would never resign or advise an election of the House of Representatives or a double dissolution and *that the only way such an election could be obtained would be by my dismissal of you and your Ministerial colleagues* (emphasis added).

At no time on 11 November subsequent to his dismissal when Whitlam had unrestricted access to all media outlets did he question, let alone repudiate, the content of that italicized portion of Kerr's letter to him of that date. It therefore stands uncontradicted!

[106] Id, Appendix A.
[107] *The Canberra Times*, 4 December 1978.
[108] Op cit (fn 51).
[109] These occasions are recorded in op cit (fn 49) 252-3, 309 and in op cit (fn 51), an article repeatedly but only selectively cited by Kelly in his book.

Whitlam, a NSW Queen's Counsel since 1962, earned his spurs more as a politician than as a practising silk; yet he must have sensed that his position from September 1975 had no backing in constitutional theory and practice and amounted to no more than bluff. But for as long as he persisted in this bluff the only strategy available to him in dealing with Kerr was essentially the same as in dealing with the Opposition Senators. Hence the emptiness in Kelly's expressed regret that 'Whitlam squandered his greatest advantage — being able to advise and confide in Kerr.' Such advice and confiding could only have been directed to the expedient of enlisting Kerr's connivance in the continuance of Whitlam's established strategy with the Senate beyond 11 November — something he could not have countenanced with an already grave depletion in lawfully appropriated moneys being greatly magnified over that succeeding week in an increasingly turbulent environment.

Whitlam's intuition of his unsure position provides the reason for his omission to act in conformity with Kelly's stated desiderata and to avoid those 'severe tactical mistakes'. By 11 November Whitlam was reduced to advising a half-Senate election for 13 December, the last practicable election date in 1975, knowing all lawful appropriation would run out a fortnight earlier. Any caretaker Ministry replacing Whitlam's, if it was to go to the polls by 13 December, needed to be commissioned no later than 11 November, as Kerr well knew.

KELLY'S ASSERTIONS ANALYSED

Kelly has frequently resorted to extreme assertion.[110] He claims that Kerr 'chose to become a constitutional innovator'[111] while blithely attributing this same disposition to Whitlam:

> Whitlam's stand was designed not just to save his own Government; not just to thwart the triumph of the 'federalism' interpretation of the Constitution implicit in any success by Fraser. Beyond this, Whitlam intended to use the crisis triggered by Fraser to defeat the Senate in such a comprehensive manner that no future Senate would contemplate such action, and to ensure that the contradiction (sic) in the Constitution since the inauguration of the Commonwealth was finally resolved with the victory of the Representatives over the Senate and of responsible government over federalism. *Whitlam would become the last of the founding fathers. He would resolve the contradiction they had been unable to resolve* (emphasis added).[112]

The questionable historical references in this crude rodomontade should not

[110] Op cit (fn 1) 44-5.

[111] What is essentially the same questionable claim was made by Professor Brian Galligan, 'The Founders' Design and Intentions Regarding Responsible Government', *Responsible Government in Australia*, Pat Weller and Dean Jaensch (eds) (1980) 1 at 9.

[112] Op cit (fn 1) 43.

disguise Kelly's appraisal of Whitlam's exertions as constitutional innovator being geared to weakening Section 53 without formal amendment and thereby destroying that vital concession which enabled all six Australian colonies to federate in 1901!

Kelly goes further:

> It seems to me the technique used by Sir John and Sir Garfield Barwick was to construct a constitutional theory from a legal power. They said that because the Senate had the power over appropriation a Government was therefore responsible to both the Senate and the House of Representatives.
>
> It is one thing to insist that a Government obstructed by a Senate motion to deny Supply cannot remain in office once funds to provide for the ordinary annual services of government have expired. It is quite another to insist that a Government denied Supply by such a Senate motion has therefore lost the confidence of the Parliament and unless it resigns or advises an election, must be dismissed . . .
>
> According to historical precedent, constitutional provision and political theory, the Governor-General should not have treated the deferral of Supply in the Senate as a want of 'confidence' in Whitlam and therefore as grounds for a dismissal. He should have treated the situation as a test of the Senate's financial power to obstruct a Government which, *if persisted in to the point where funds might expire, would require a general election* (emphasis added).

If one takes Kelly's first point, that is the misdeed he has attributed to Kerr and to Barwick — and he has unfortunately expressed it in the loaded terms of that equivocal concept of 'responsible government'[113] — it would appear to put both of them in very good company indeed for it could equally well be sheeted home to the Constitutional Commission which the Hawke Government appointed, to its Advisory Committee on Executive Government and to other eminent constitutional authorities including the Founding Fathers, for they all held that a denial of Supply by the Senate required a Ministry to resign or advise a dissolution.

Kelly's own invocation of 'historical precedent, constitutional provision and political theory' in this context is inconsistent considering the breaches of precedent he has been prepared to overlook. It is an extraordinary claim that the efficacy of specific motions lawfully carried by a legislative chamber in the vital matter of Supply should depend on the amount of lawfully appropriated moneys still remaining in the kitty and on the desperate devices of the beleaguered Ministry in exploiting this residue for the purpose of haggling as to whether or not these motions should be seriously entertained at all or as to which party should yield first — the Ministry or the legislative chamber. There was much less of a risk of a rapid running down in such lawfully appropriated moneys in 1909 when the Asquith Government accepted the House of Lords' challenge and recommended an immediate dissolution than was the case in

[113] Refer back to my fuller elaboration on this in the light of statements by Melbourne, Holroyd and Griffith.

1975 when the Whitlam Government refused to recommend a dissolution as Asquith had done and tried instead to browbeat the Senate into passing the Appropriation Bills. In 1975 Kerr, unlike King Edward VII, faced the quandary of dealing with a Prime Minister whose administration had not only been denied Supply once but thrice in separate votes by the Upper House over three weeks and who still would not advise a dissolution.

It is no less extraordinary for Kelly to imply in the first sentence of his second paragraph that Kerr in that situation should have been unable to ensure that such a dissolution would be obtained from that or another set of Ministers until he had been officially advised that the last lawfully appropriated cent had been shelled out of the counting house! This bizarre claim is then somewhat qualified in the last sentence of his third paragraph when Kelly is prepared to assert that Kerr's action might not have been premature if the Senate's refusal to pass the Appropriation Bills had reached the point 'where funds might expire'. Kelly does not say at which stage short of exhaustion the probability of the same could be foreseen by Ministers or whether their own self-interest would prevent them from apprising Kerr of this. From the Senate's first deferral of Supply there had been a significant running down in lawfully appropriated moneys and those departments already affected by this were worried about the legal standing of expedients they might adopt while it persisted.

A further extraordinary claim by Kelly, not cited here, is that Kerr should have been advised by the Prime Minister alone, and not by Malcolm Fraser as Leader of the Opposition, about the Opposition's intentions as reflected in the actions of Opposition Senators. Kelly then cites the last paragraph of Barwick's advice to Kerr to claim that the latter transgressed its terms because he could not then have been 'satisfied' that Whitlam was unable to secure Supply on 11 November. But consider Barwick's conclusion in his memoirs:[114]

> My ... observation is that it may be that Sir John delayed too long in taking action. I incline to the view that he ought to have acted, at the latest, by 25 October. I think this because by the delay after that date, the Prime Minister had the party-political advantage enabling him to indulge in brinkmanship to coerce some, no doubt the weaker, of the Senators to break ranks. In fact the Prime Minister did have the advantage of Sir John's delay until 11 November.

BAGEHOT *REDIVIVUS*

One argument directed to a further criticism of Kerr is founded on an elaboration in Kelly's book of a misreading of Walter Bagehot's observations on the powers of a constitutional monarch: namely, that a possible alternative to exercising the reserve powers — certainly a precondition to their being exercised at all — was to be found in 'advising, warning and mediating to secure

[114] Op cit (fn 52) 297.

a political solution (sic)'. Kelly seems to have discovered Bagehot belatedly; there is no reference to him in either edition (1976 or 1994) of his earlier book *The Unmaking of Gough*. If Whitlam's reproach is that Kerr 'failed to 'counsel and warn'',[115] then he is misquoting Bagehot, for the latter identified three rights possessed by 'the Sovereign ... under a constitutional monarchy such as ours ... — the *right* to be consulted, the *right* to encourage, the *right* to warn' (emphasis added).

The first time, to my knowledge, that Kerr was reproached for not treating these rights as obligations was when Professor D A Low so interpreted them after correctly but artlessly quoting Bagehot's full statement of them.[116] Kelly, who quotes the relevant passage[117] almost in full,[118] seems to have uncovered Bagehot by first uncovering Low.

Kelly has consulted and cited Bagehot's work *The English Constitution* (1867) only in the 1993 Fontana edition with an Introduction first published in 1963 by R H S Crossman, who might well have composed it with greater wisdom and insight after he had served in Harold Wilson's Cabinet from 1964 to 1970. But in the World Classics edition first published in 1928, the relevant passage from Bagehot is not only discussed but set out almost in full and sagely criticized in the Introduction by Arthur James, Earl of Balfour, who had been the Conservative Leader of the Opposition when the House of Lords had declined to pass the Asquith Government's Budget in 1909. Lord Balfour's credentials in 1928 (two years before his death) for offering such criticism were impressive.

Educated at Eton and Trinity College, Cambridge, Balfour, whose close interest in the natural sciences and in the humanities was to be acknowledged in Fellowships of the Royal Society and of the British Academy, was elected to Parliament in 1874. He was first given office as President of the Local Government Board in 1885 by his uncle Lord Salisbury who as Prime Minister was responsible for Balfour's other appointments until 1902. In 1886 he was appointed Secretary for Scotland and entered the Cabinet later that year. It was as Chief Secretary for Ireland from March 1887 that he made his mark in what was then the Cabinet's most demanding post. In October 1891 he was appointed First Lord of the Treasury and Leader of the House of Commons and was Lord Salisbury's successor as Prime Minister from 1902 until 1905. In both latter positions he reported to the Sovereign on the proceedings in the House from 1891 to 1892 and from 1895 to 1905, serving Queen Victoria and King Edward VII in this and in other capacities. As Prime Minister he also reported to the King on the proceedings in Cabinet. Balfour entered the first coalition War Cabinet, led by Asquith, as First Lord of the Admiralty in 1915 and was Foreign Secretary in David Lloyd George's coalition from 1916 to 1919. From 1919 until that coalition broke up in 1922 Balfour was Lord

[115] Op cit (fn 1) 299, citing Whitlam, *The Truth of the Matter* (1978) 89.
[116] D A Low, *Wearing the Crown — New Reflections on the Dismissal 1975*, University of Adelaide Foundation Lecture, 12 July 1983.
[117] Walter Bagehot, *The English Constitution* (1993) 113.
[118] Op cit (fn 1) 135.

President of the Council. He held that same high office from 1925 to 1929 in the second Conservative administration of Stanley Baldwin. As Foreign Secretary and as Lord President Balfour would have had direct dealings with King George V at least as regularly as the Prime Minister. Asquith alone shared with Balfour such official and privileged access to those three Sovereigns, but not for as long.

Balfour, in opening the second part of his Introduction, reflected: 'It might perhaps be thought that after his brilliant analysis of Cabinet Government there was little for Bagehot to say about the British Constitution except by way of epilogue'. Certainly it was in this mildly and humorously perplexed spirit that Balfour then tackled Bagehot's treatment of the Monarchy:

> ... He held (most rightly) that, quite apart from forms and ceremonies, a Monarch of experience and capacity, fully informed on public affairs, and in close personal touch with his Ministers, would always be a most valuable element in the body politic. He thought the post of 'Sovereign over an intelligent and political people was the post which a wise man would choose above any other' ... And, since he was certainly a wise man ... we may assume that he would have been well pleased had Destiny placed him on the throne. With some naïveté he has indicated the sort of speech that on fitting occasions such a King might make to his Ministers.[119]

Then, after quoting the 'speech' with which Bagehot had illustrated the exercise of 'the right to encourage, the right to warn', Balfour added in words which should have cautioned Kelly, if he had read them, against lapsing into a similar solecism:[120]

> There is a certain unintended humour in this sketch of an imaginary address by an imaginary Monarch to imaginary Ministers on the problems raised by an imaginary crisis. Its object, however, is clear enough, and no one need criticize its substance. It is at any rate in perfect harmony with Bagehot's view that constitutional Kings, *if* (his emphasis) they possess character, ability, and industry, *may even in matters of pure policy* (my emphasis) do very valuable service to the State ...
>
> But he was haunted by the 'if'. He argued that no long hereditary line, be it of Kings or be it of peasants, can maintain a steady level of excellence through many generations ... [While] 'the benefits of a good monarch are almost invaluable, the evils of a bad monarch are almost irreparable'.
>
> *Presumably this (surely somewhat excessive) estimate of Royal influence refers rather to social than to political affairs, and is therefore scarcely within the compass of a discussion on the Constitution* ... (emphasis added).

What is clear from the foregoing is that Balfour, even on the most favourable assessment of a Sovereign's capacities, correctly limited Bagehot's celebration of 'the right to encourage, the right to warn' as rights, not duties, sometimes to be exercised in 'matters of pure policy' and, taking Bagehot's

[119] Bagehot (1928) and subsequent editions in the World Classics series, xv-xvii.
[120] Op cit (fn 1) 126–7.

statement in its proper order, presumably only after a Monarch's 'right to be consulted' had been acknowledged by Ministers. Whitlam at no time felt bound to acknowledge Kerr's 'right to be consulted', as was demonstrated in the Loan affair. (Kelly has himself observed in reference to the Supply deadlock:[121] 'In truth, Whitlam had no interest in talks with Kerr that canvassed any option other than his own victory'.) Nor indeed did Lloyd George make a habit of acknowledging King George V's right to be consulted — King George's own summary of Bagehot's guidance to constitutional monarchs, which his official biographer has quoted in its entirety, scrupulously placed those three rights in the context of '(b) ... the *continuance* of Ministries' and not '(a) the *formation* of Ministries' or '(c) ... the *break up* of a Ministry' (his emphasis).[122] King George was correct in the ordering of this summary: Bagehot had indeed broached this whole subject in the context of a Monarch's duties 'during the continuance of a Ministry, rather than at its creation ...'[123] or, for that matter, at its termination.

It is plain enough that Balfour interpreted Bagehot too sagely to go so far as Low and Kelly in first elevating these rights into duties and then, after plucking them completely out of the context in which Bagehot had written of them, asserting that a Monarch would be bound to discharge them as the prerequisite to the exercise of a purely discretionary power.

It is against this background that one must question Kelly's claim that 'Kerr makes the unsubstantiated claim in his own defence that Walter Bagehot's dictum about 'warning' does not apply to the reserve powers'.[124] In making this claim, Kelly cited Kerr[125] without any page reference. It is true that Kerr made the bald statement that 'Bagehot does not say that the Crown has a duty to warn in such circumstances'.[126] But, after quoting Bagehot's three rights, Kerr was to make nonsense of Kelly's claim by writing the following:

> ... By some acrobatic leap of logic, it is said that the existence of these rights means the Crown has a duty to exercise them. By a further leap, it is said that, before exercising the reserve powers, the Crown has a duty to 'warn' of this.
>
> This is a total misunderstanding of what Bagehot is saying. In the passage where Bagehot speaks of these rights of the Crown, he is referring to what the Sovereign (in Australia, the Governor-General) may do on those occasions when he or she is concerned about policy intentions of the Government. No one disputes, certainly I do not, that in such matters, these rights — to be consulted, to encourage, to warn — are, in the end, the only rights the Crown has: in the end, the Crown must accept Ministerial advice on policy matters. But the question that arose in 1975 was quite different. It was the incapacity of the Government, without parliamentary Supply, to govern. And I proposed to exercise a different type of power — the reserve powers of the Crown.

[121] Id 140.
[122] Quoted in Sir Harold Nicolson: *King George V: His Life and Reign* (1967), 100.
[123] Op cit (fn 119) 112.
[124] Op cit (fn 1) 300.
[125] Op cit (fn 50)
[126] Id 75.

> In the exercise of such reserve powers, which he clearly recognized, Bagehot did not suggest that the Crown had a *duty* to warn. The Crown's *right* to warn in any and all cases does not mean it has a *duty* to warn in any particular case.[127]

Kerr had also referred to Bagehot in an earlier article:

> The 19th century English writer Walter Bagehot is sometimes quoted as saying that the Crown has three rights — 'to be consulted, . . . to encourage, and . . . to warn'.[128] Some people misread Bagehot, and take him to mean that there are no other powers. But Bagehot clearly recognized the existence of reserve powers. He described these powers as being 'for extreme use on a critical occasion', and he quite specifically mentioned the Sovereign's right to force an election.[129] This is pointed out by Oxford's Dr Geoffrey Marshall in his recent book on constitutional conventions.[130, 131]

Note that 'this power . . . for extreme use' was not discussed by Bagehot in the same context as the three 'rights' mentioned earlier.

Barwick in discussing this very point in his memoirs[132] has also questioned the relevance of the *right* to warn being elevated into a *duty* to be discharged in 'the performance of a discretionary act in respect of which no advice was necessary or given'. In their arguments both Kerr and Barwick, it seems, would have had very powerful support from Balfour and King George V. If Bagehot did suggest that the Crown has a specific *duty* to warn in the exercise of the reserve powers, the onus of substantiation rests on Kelly to quote the specific statement *in that context*. As matters stand, Kelly's misreading of Bagehot has caused him to exaggerate the scope of a Governor-General's capacity to influence a Prime Minister whose intransigence is exacerbating an unprecedented constitutional crisis. In the context of 1975, this so distorts the respective roles and powers of the two parties as to make Kerr, not Whitlam, answerable for the latter's irresponsibility.

Although Kerr was prepared to give some status to these aforementioned 'rights' in an Australian Governor-General's day-to-day practice in purely policy matters, it is open to question whether Bagehot could have done so with quite the same confidence.

Bagehot was very modest about the relevance of his study *The English Constitution* even when limited to that phenomenon. As he was to write in his Introduction to the second edition published in 1872: 'It describes the English Constitution as it stood in the years 1865 and 1866. Roughly speaking, it describes *its working* as it was in the time of Lord Palmerston . . .' (my emphasis). At that time India was the only British overseas realm which rejoiced, as it had done since 1774, in a Governor-General. (One must discount the conferring of that title which was 'nothing more than a name' on Sir Charles FitzRoy and Sir William Denison as Governors of New South Wales

[127] Id 79.
[128] Op cit (fn 117) 113.
[129] Id 116.
[130] Geoffrey Marshall, *Constitutional Conventions* (1984) 19-21.
[131] Op cit (fn 78) 72.
[132] Op cit (fn 52) 294-5.

from 1850 to 1861). And by 1865-1866 only three Governors-General of India, the 1st Earl Canning, the 8th Earl of Elgin and Lord Lawrence, had rejoiced in the more impressive title of Viceroy which dated from 1858. The Canadian Provinces did not have a Governor-General placed over them until they had completed the process of confederation in 1867 when *The English Constitution* was first published as a book, having first been serialized in 1866. While the Viceroy of India dealt with the Secretary of State for India, in Bagehot's day all other Governors outside India were answerable to the Secretary of State for the Colonies. Colonial Ministers might petition that Secretary of State to recall a Governor but he was not obliged to do so. Bagehot, however, had no direct knowledge in his lifetime of the office of Governor-General, such as Australia's has been since the adoption of the Balfour formula in 1926 and the enactment of the *Statute of Westminster* in 1931; for it has evolved into an office whose incumbent can have his recall authorized by the Sovereign on his own Prime Minister's direct advice with little in the way of a formal process of delay, let alone a refusal of such advice.

As I can find in *The English Constitution* no reference to the House of Lords' rejection in 1860 of the Bill to remove the excise duty on newspapers, sponsored by W E Gladstone as Chancellor of the Exchequer, and to the events which followed,[133] I would also conclude that rejection of a Budget by the House of Lords was an event which was simply not in Bagehot's contemplation, let alone a prolonged crisis over Supply such as Whitlam was prepared to countenance in 1975. Bagehot wrote most eloquently in urging a policy of restraint on the House of Lords and, as he died in 1877 when Lord Beaconsfield was still Prime Minister, he had not the slightest glimmering in his lifetime of the development later in the nineteenth century by Lord Salisbury of his doctrine of the mandate, first enunciated by him in the Lords in 1869 but little noticed at the time, which predicated a much more vigorous policy of resistance by the Upper House.[134] The limitations placed by the constitutional practices of his own time on Bagehot's ability to envisage certain occurrences in a subsequent era should be remembered before Kelly and Low, in a mode of interpretation which is anachronistic in the proper sense of that word, attempt to generalize from the somewhat quaint particularities of Bagehot's study — a study for which he himself made such modest claims.

ALLEGATIONS OF DECEPTION

Kelly has also accepted without question the accusation of the late James McClelland, one-time Senator and a Minister in Whitlam's administration in 1975, that 'Kerr planned an ambush. He did his best to deceive us and mislead us about his intentions on the reserve powers'.[135]

[133] See G H L Le May: *The Victorian Constitution* (1979), 132-3.
[134] Id 133 ff.
[135] 45.

Kerr dealt at some length with the charge of deception.[136] He wrote specifically:

- At no stage did I ever say to anyone anything that ruled out the use of the reserve powers.
- At no stage did I say or agree that there was no crisis until the money had run out and the nation was in chaos.
- Neither the purpose nor the effect of my conversations with Mr McClelland during the crisis was to lull him or anyone else into a false sense of security.
- Before Mr Fraser came into my study on November 11, after Mr Whitlam had been dismissed, I did not disclose to anyone in or associated with the Opposition what my intention was.[137]

Kerr also wrote the following in his memoirs:[138]

> An unfounded assertion ... is that I 'deceived' Mr Whitlam and other Ministers — that I set out on a deliberate course of deception, aimed presumably at inducing them to believe that I would not exercise any reserve power which I had as Governor-General, whereas I intended to do so.
>
> That charge is totally without foundation. The simple fact, as must be clear from the preceding pages, is that although throughout the weeks as the crisis mounted I was thinking hard about it in all its aspects and with all its implications, it was not until the end of that day of 6 November that I knew I must make up my mind as to any action taken by me, and follow that decision through.

After referring to his request for a joint opinion by the Law Officers on the Ellicott statement of 16 October (see above) and itemizing a significant number of statements by Whitlam, Kerr continued:

> ... [It] was obvious Mr Whitlam accepted that I had the reserve powers and might conceivably use them. He never questioned me on my views. Since his statements made it plain that he was well aware of the reserve powers and of the risk he might run by his policy, I had no reason, nor impulse, to volunteer a statement to him of what he clearly knew. I believed, quite starkly, that if I had said anything to Mr Whitlam about the possibility that I might take away his commission I would no longer have been there. I conceived it to be my proper behaviour in the circumstances to stay at my post and not invite dismissal. (He then in a footnote referred to pp. 329-32 of his book and continued the main text as follows). *I elected as the only neutral and intelligent course to follow, that I should keep silence about my thinking unless and until I decided I must act* ... (emphasis added)
>
> Mr Whitlam ... on a television programme in London in July 1976 stated that I had given no indication to him or to his Ministers that I was contemplating the possibility that I would take away their commissions, and went so far as to say, 'He in fact led us to think he was supporting the course of conduct we took'.

[136] Op cit (fn 50), 72-5.
[137] Id 74.
[138] Op cit (fn 49) 308-11.

> This last charge too is totally false. I believe that nothing I said or did could lead the Government to think that I supported the course of conduct it took — namely attempting to govern without Supply. I remained scrupulously neutral as to the political wisdom of the parties, not supporting or opposing either the Senate's denial of Supply or the Government's counter-strategy; and I kept my own counsel as to the constitutional rights and wrongs as to what was happening until I decided [on 6 November late in the day] what must be done (my parenthesis).
>
> As to Mr Whitlam's complaint that I gave no indication I was contemplating recourse to the reserve powers, I say simply that when I was in a position to tell what I intended to do I told him, leaving him an opportunity to indicate to me what his response would be. From the time when Mr Whitlam began publicly to hammer the theme that I had no choice but to adopt his advice he disqualified himself from being offered a running account of the development of my thinking, until such time as it crystallized in a way which might affect him positively. The Prime Minister had no claim to be made privy to the Governor-General's inmost mind. My clear belief was that Mr Whitlam ... was concentrating on techniques to ensure that I would not bring them [the reserve powers] into play ... Mr Whitlam was not entitled to receive a running report on how I was wrestling with the problem he had set. Any guesses he made on this he made on his own responsibility (parenthesis added).
>
> ... Mr Whitlam's failure to ask my view of the reserve powers must, I have always believed, have been deliberate avoidance. How natural it would have been to open up the question with me, if he had wanted to know. He never did ask that or any other question on what was going on in my mind ...

Dr Markwell made the following relevant observation:

> For all his complaints about Sir John Kerr's not having 'counselled and warned', Mr Whitlam — characteristically blaming others for his own failings — fails even to consider the proposition that he should have tried to discover the Governor-General's views. Rather than ever raising the subject openly and directly with the Governor-General, Mr Whitlam was content with the impressions gained by Ministers, nods of Sir John's head and chance or entirely distinguishable remarks ...[139]

Two further points arise from these accusations of deception. The first point is that they were belatedly aired. Kerr[140] stressed that Whitlam made no reference to deception on 11 November 1975, either in his public statements (at a time when his access to every media outlet would have ensured their widest possible dissemination) or in a telephone conversation with him subsequent to his dismissal, and that when asked at his press conference that day, 'Are you suggesting the Governor-General may have misled you?', he replied, 'No, I'm not saying that.'

The second point is that there is the same element of the *ex post facto* in the recollections and reconstructions of others. Suppose Kerr's encouragement of

[139] Don Markwell, 'The Dismissal: Why Whitlam was to blame', (1984) *Quadrant* 19-20.
[140] Op cit (fn 50) 1985.

a compromise had succeeded or Whitlam on or before 11 November had experienced a change of heart and had advised an election for the House of Representatives and as a consequence of either eventuality there had been no dismissal! Would Kerr have been made the target of accusations of deception in either event? It now seems that some of Whitlam's Ministers, their minds concentrated by the dismissal *after the event*, have scavenged in their recollection for titbits from past conversations with Kerr, without acknowledging the possibility of tricks of memory or even of mishearing, to reconstruct and thereby attribute to him some deliberate attempt either (i) to conceal from them some master plan leading ineluctably to dismissal or (ii) to assure them no such plan existed or (iii) to assure them that the reserve powers would in no circumstances be invoked.

Kerr himself observed of Whitlam:

> The pattern of attitudes to me of the Prime Minister was marked by his public stressing of the theme that I must unquestionably do his bidding and the private reminders to me of the risks I would run if I opposed him. *I do not mean to imply that there were any warlike words. It was all politely and smilingly done* (my emphasis). But in his determination to win, over institutions and opponents, I had not the slightest doubt that if he felt the need the Prime Minister would seek to have me recalled before I could dismiss him.[141]

Kerr wisely interpreted politeness as amounting to no more than that. Whitlam and his Ministers should have made the same assessment of Kerr's politeness. If Kerr's resolution to employ the reserve powers had hardened only as belatedly as the end of 6 November in the light of the state of play as then revealed, there obviously could have been no pre-existing master plan to be concealed or expressly disavowed.

6 — 11 NOVEMBER

On 6 November the Senate for the third time voted to deny Supply by the Opposition's agreed procedure of deferring consideration of the Appropriation Bills until the Government had agreed to submit itself to the judgment of the people.[142] That same day at Government House, Canberra, Malcolm Fraser confirmed what he had already recounted to Kerr in Melbourne on 3 November concerning a meeting that he and his senior colleagues

[141] Op cit (fn 49) 333.

[142] Note once again the similarity between the words employed in those Senate motions to defer consideration of the Appropriation Bills and those employed in the House of Lords' motion carried on 30 November, 1909 to defer consideration of the Finance Bill. Not a mere coincidence, I consider. Yet Whitlam has made the unsustainable claim, most recently in his latest book (1 ff), to the effect that: 'The Opposition Senators did not vote to refuse Supply; they simply refused to bring it to a vote'. But on that 'reasoning' it could have been claimed that the Lords had not voted to refuse Supply in 1909. It never occurred to anyone then, least of all to Asquith, to advance such a specious argument!

parliamentary and organizational, both federal and State, had had on the weekend 1-2 November. This top level meeting in Kerr's words had settled, 'in a way binding on all concerned, a final coalition policy for the crisis'. Kelly attempts to play down this meeting's significance by describing the proposed compromise as 'a substantial retreat'[143] but even he has had to concede that in its design 'to intimidate any waverers, to kill the prospect of a Senate election and to impress Kerr ... it succeeded brilliantly'.[144] Kerr described Fraser's stand:

> As a result of decisions made at that meeting he would offer a compromise to the effect that Supply would be granted if the Prime Minister would agree to hold an election for the House of Representatives at the same time as any election held for the Senate ... Mr Fraser said that this was as far as the Opposition parties were prepared to go and that if it were rejected they would unfailingly stand firm on the refusal to pass Supply.[145]

The terms of this proposed compromise underlined the coalition's unchanged determination for reasons already outlined to avoid an election for half the Senate alone which could have given the Whitlam Government a temporary majority in the Upper House. This was to remain the Opposition's position and it must have been obvious to those taking note of it, including Kerr, that any Opposition Senator who broke ranks after the settlement of such a policy at such a high and representative party level could expect expulsion from his or her party and, as a consequence, political extinction. Whitlam foolishly and unhesitatingly rejected this compromise. But, as Kelly has explained[146] and as Whitlam has acknowledged, his plan before the crisis broke had been to hold a half-Senate election in 1976 and, if still faced with a hostile Senate, seek a double dissolution in late 1976, thereby allowing himself a term no more than six months longer than Fraser's compromise permitted.

On 6 November Kerr also received in response to a request made on 30 October — having until then received 'no information whatsoever about the financial situation'[147] — a briefing on the Government's alternative financial proposals from the Treasurer, Bill Hayden. Hayden later claimed that Kerr seemed little concerned or interested in what he was saying. Kerr has claimed that he did not discuss the legal and constitutional issues with Hayden although he had serious doubts as to the legality of the scheme. And this taciturnity was not really surprising for what was beyond dispute was that Kerr was still awaiting advice on the very same alternative arrangements from the Law Officers which, like the briefing from Hayden, had had to be solicited on 30 October. In the context of discussions concerning these arrangements which government representatives were having with the private banks *on that very day 6 November*, Kelly himself has acknowledged[148] that '[there] was very little

[143] Op cit (fn 1) 187.
[144] Id 186.
[145] Op cit (fn 49) 291.
[146] Op cit (fn 1) 186.
[147] Op cit (fn 49) 289.
[148] Op cit (fn 1) 210.

prospect that the banks would have cooperated with the Government if the issue had continued'. Later that same day Kep Enderby handed to Kerr a document dealing with these proposed alternative arrangements, signed neither by him as Attorney-General nor by the Solicitor-General, headed 'Joint Opinion'. Kerr recounted:

> ... He took his pen and added the word *draft* to the heading. So there was the Government, already embarked upon the arrangements to get money from the banks in order to bypass the processes of Parliament, and no signed opinion of either of the Law Officers was being offered to me in support of the legality of what was being done, but merely this unsigned draft.[149]

In an even more belated response to Kerr's request of 21 October for advice from the Law Officers on the Ellicott statement of 16 October on the reserve powers, the Attorney-General then handed Kerr the document I have already described which was treated by Enderby merely as a draft. Kelly has Byers signing himself not as Solicitor-General but as Crown Solicitor,[150] a distinctly different office which Byers had never held but one which had been held much earlier by Gough Whitlam's father, H F E Whitlam. Kerr could only treat that document then as 'an indication of the probable views of Mr Byers'. Kerr commented:

> ... I could not know what might be the content of any final joint opinion should one ever emerge; and none ever did ... I must say that to receive on 6 November, from the Attorney-General of Australia, on two crucial areas of policy and at a critical time, those two unsigned, inconclusive draft 'opinions' was not particularly helpful. I found the lack of properly provided assistance deeply disquieting.[151]

Kerr almost certainly would not have received any 'assistance', even on those unsatisfactory terms, if he had not specifically asked for it.

The Ellicott opinion on the reserve powers runs to roughly two and half pages.[152] The opinion originally signed by Byers on 4 November is roughly of nineteen and a half pages; but it is of questionable substance. The four opening pages and portion of the fifth page set out the respective motions of the two Houses of which Kerr would already have been apprised from his own copies of the daily Hansard. The next four pages give a list of Appropriation and Supply Bills which the Senate had passed when the Government had been in a minority there. This list, however, reveals and establishes nothing of significance in the absence of any analysis of the political background to the passing of these Bills — whether or not the times were propitious for forcing a Government to a general election and whether since 1956 the principal Opposition party could consistently have done this without the cooperation,

[149] Op cit (fn 49) 301.
[150] Op cit (fn 1) Appendix B.
[151] Op cit (fn 49) 303.
[152] Op cit (fn 1) Appendix A.

not necessarily forthcoming, of minor parties in the Senate. Despite an appearance of scholarship the remainder of the opinion quotes almost every authority out of context as Kerr himself must have realized. Because the House of Lords' treatment of the Finance Bill in 1909 and its consequences have been excluded from consideration, much of what is set out in these pages is irrelevant. Kelly's book flatters the author of this document with a reverential consideration. Kerr's own analysis of this document's shortcomings receives no consideration from Kelly other than a citation (in an endnote) of the relevant pages in Kerr's memoirs.

Kerr outlined at some length how Dr Eugene Forsey, the Canadian author of a classic text on the royal power of dissolution, had been misunderstood by Byers on the whole question of forced dissolutions. Senator Forsey himself in his Epilogue to Kerr's memoirs brutally concluded his own analysis of Byers' treatment and interpretation of his views (which he considered 'perhaps otiose' because Kerr had dealt 'so thoroughly with this matter') by dismissing them as 'incorrect and irrelevant'. It is to be regretted that those other authorities cited in the Byers opinion, having been long deceased, were not able to treat the travestying of their own work with the same devastating justice. In fairness to Byers, however, I should make this concession. Sir Owen Dixon, addressing the High Court on his retirement, recalled the performance of one of his predecessors as Chief Justice, Sir Frank Gavan Duffy, in his days as a prominent leader of the Victorian Bar: Dixon claimed that if ever an advocate could make bricks without straw in open court Gavan Duffy could. I do not doubt that Byers had been a formidable advocate but in the specific instance under discussion he had the misfortune to hold a brief which required him to attempt to fashion a brick from a bucket of brackish water.

This is not to say that the document was not revealing in some parts. In paragraph 9 of the document Byers said:

> The Senate's resolution indicates an intention to defer passage of the Appropriation Bills until either the Ministry resigns or the Governor-General acting against its advice dismisses it and, upon advice of Ministers in a minority in the Representatives, dissolves it. The Ministry has not resigned and will not do so.

To which Kerr at length commented *inter alia*:

> This last statement is particularly noteworthy. It confirms, in this unexpected place, what I otherwise knew from Mr Whitlam's statements. Its inclusion in the document handed to me by the Attorney-General was significant: Mr Byers' opinion was prepared by him on the basis of instructions that the Government would not resign, and the Attorney-General in handing it to me made no disclaimer of those instructions. Mr Byers also takes for granted that there will be no advice from the Government for a dissolution, as he also states that the only alternative to resignation of the Ministry is forced dissolution ... Mr Byers [also] came to the conclusion [paragraph 15] that the Governor-General was not, in the situation which then existed [4 November], constitutionally *obliged* immediately to seek an explanation from the Prime Minister of how he proposed to overcome the situation. He also said (paragraph 16) that if the Prime Minister were 'unable to suggest measures which would solve the disagreement between the Houses and left

> the Government without funds to carry on' it would not be the Governor-General's *duty* to dismiss his Ministers ... I agree with Mr Byers that a Governor-General is under no legal compulsion to exercise these powers: this is the essence of a discretionary power ... (squared parentheses added)
>
> The Government's banking exercise showed that we were facing the real prospect of money running out. (By 11 November no beginning had been made on the scheme to get money from the banks; the banks had not even agreed to participate; and no other plan for financing government existed).
>
> In the crisis I was entitled to real information, help and advice, but not receiving them, I prepared therefore to cope with the situation myself.
>
> ... By the evening of 9 November I had made up my mind as to what I must do if the two leaders were still in deadlock when 11 November came up, inexorably, on the calendar.[153]

Was this altogether an unreasonable approach for Kerr to take in the circumstances? And, in the light of the foregoing details, especially Byers' statement in paragraphs 15 and 16 of the 'draft opinion' already quoted, how could Kelly reproach Kerr, as he did, for not having taken more vigorous action *much earlier* in the course of the deadlock in attempting to prise out of the Government some indication of its intentions in coping with it? These queries are directed at Kelly in the knowledge that Byers, whose 'opinion' he was prepared to treat deferentially, was prepared to assert, even as late as 4 November, that Kerr was not constitutionally *obliged immediately* to seek an explanation from Whitlam of how he proposed to overcome the situation as it then existed: that is to say, after the Senate had already twice deferred consideration of the Appropriation Bills and with a third deferral by the Senate looming only two days thereafter as Byers would no doubt have been aware from his own knowledge of the Government's timetable for resubmitting those Bills to the Senate. But if, according to Byers, Kerr was not constitutionally obliged to seek some guidance from Whitlam of his intentions even at that late stage, was there any time beyond it that Byers would have conceded that Kerr was entitled to some advice from Whitlam on how he proposed that the deadlock be broken which went beyond waiting for some Opposition Senator or Senators to vote with the Government or for a capitulation by Fraser and the Opposition as a whole?

THE *DÉNOUEMENT*

Although the events of 11 November have been analysed *ad nauseam*, some points relating to them still need to be established. It has been well-documented that there are plenty of precedents in support of a Governor-General seeking advice from the Chief Justice in determining his approach to exercising a discretionary power and of doing so without the approval of the Prime Minister.[154] There is therefore no justification in continuing to assert that Kerr acted improperly in so doing and that the only precedent was the

[153] Op cit (fn 49) 304-8.

[154] D Markwell, 'On Advice from the Chief Justice', July (1985) 29 *Quadrant* 38; D Markwell, 'The Dismissal' October (1985) 29 *Quadrant* 5; D Markwell, 'Advice to the Governor-General' April (1986) 29 *Quadrant* 5.

consultation in 1914 of Sir Samuel Griffith as Chief Justice by the then Governor-General, Sir Ronald Munro Ferguson (later Viscount Novar of Raith), with the consent of the then Prime Minister, Joseph Cook. It should also be noted that Kerr turned to the Chief Justice for advice only *after* he had sought advice from the Law Officers on the reserve powers and then found the 'draft opinion' presented to him so manifestly unsatisfactory and unhelpful. Although Kerr by 9 November had made up his mind to act as he did on 11 November, in the absence by then of a settlement of the deadlock by the party leaders, Whitlam's subsequent conduct confirmed Kerr in that course.

Kerr wrote of a discussion with Whitlam:

> ... On September 29, we discussed the idea of his calling a half-Senate election in response to denial of Supply by the Senate. I asked Mr Whitlam what he would do for Supply while awaiting the half-Senate election should he want to have one. As I wrote in my book, 'He realized that there would be a profound constitutional crisis when the money first started to run out — in early November, he said — but he also declared he would certainly not recommend a double dissolution. On the contrary he told me he would call for a vote of confidence from the House of Representatives and would argue to me that he was entitled to retain his commission for as long as he held the confidence of the House of Representatives despite his failure to obtain Supply'.
>
> As I wrote, 'here again it is clear that Mr Whitlam had it in his mind that he might have to argue for the retention of his commission'. That is, he realized that I might take the view that, as he could not get Supply, I would have to dismiss him. This conversation is also important for showing Mr Whitlam's acknowledgment that the money would be starting to run out in early November. Mr Whitlam has confirmed that we talked on September 29, and has not disputed the detailed account of this conversation I gave in my book. He has confirmed my account of his remark on October 16 ... [his statement to me in my study in the presence of Tun Abdul Razak and others] ... that 'It could be a question of whether I get to the Queen first for your recall or you get in first with my dismissal'.[155]

Kelly has discussed the option of a half-Senate election at length. He says *inter alia*:

> If Whitlam's initial response on 15 October had been to seek a half-Senate election then the Governor-General would presumably have agreed to such a poll ... But the longer Whitlam pursued his 'tough it out' tactic without a Senate election, the more likely a Governor-General would query prime ministerial advice for such an election when it was finally offered. This is because a Senate election called when Supply was close to being exhausted would not be conducted until after the Supply crunch came ... This problem for Whitlam was really his lack of a fall-back position ... The truth is that in this situation there was only one fall-back option — calling a general election.[156]

[155] Op cit (fn 49) 76-7.
[156] Op cit (fn 1) 144-5.

I am in a position to confirm the accuracy of this statement. I have the advantage over Kelly in having discussed the 1975 crisis with Kerr on many occasions. He assured me more than once that he would not have felt justified on 15-16 October in refusing a request for a half-Senate election if he could have been assured then that there would be a sufficient amount of lawfully appropriated moneys to finance it. By 11 November he would have found it impossible to consent to a half-Senate election for the very reason that Kelly has given. One may speculate, as Kelly has done, on what would have eventuated if Whitlam had been granted a half-Senate election on 15-16 October. The fact that we can only speculate is due to Whitlam's omission, to his passing up a significant opportunity.

Were Kerr's fears that Whitlam, if crossed, would appeal to The Queen for his recall justified and should he have been swayed by them? Kelly has written of Kerr's concern for job security and others have taken up the refrain. Admittedly Kerr negotiated with Whitlam before his appointment as Governor-General that he should serve an extended term, even ten years, and Billy Snedden as Leader of the Opposition had agreed. Fraser's displacement of Snedden on 21 March 1975 meant that his consent would be required to Snedden's undertaking. Kerr's concern was understandable for, in becoming Governor-General in 1974, he had denied himself a well-paid position as Chief Justice of New South Wales without qualifying for its pension. But his conduct in the 1975 crisis was not determined by fears for his long-term security but by his determination to remain as Governor-General until the Supply deadlock had been resolved without any question of the Constitution being subverted.

Kerr himself reasoned as follows:

> The importance of this was not that it was John Kerr who would have faced dismissal. I knew that I was in for a tough time whatever happened. If I were as concerned for myself as some people have said, I would simply have done whatever Mr Whitlam demanded — I would have been Mr Whitlam's puppet. But that would have been a betrayal of my duty to maintain constitutional government — a spineless abdication of my responsibility.[157]

Kerr could have added that if he had also wished to insulate himself against a wrathful Opposition coalition, he would simply have proceeded with an already arranged overseas trip on official business to Canada, the United Kingdom and Ireland, which Whitlam had wished him to make in early November, and have left his domestic vice-regal responsibilities in the hands of the then Governor of New South Wales, Sir Roden Cutler VC, acting as Administrator of the Commonwealth. With the denial of Supply in early October, however, Kerr with Whitlam's approval cancelled this projected official visit overseas. After the crisis Kerr thought seriously of resigning from the Governor-Generalship both during the caretaker period before the election of 13 December 1975 and shortly afterwards. Kerr was persuaded by Fraser on both occasions to remain in office for reasons outlined in his memoirs; and he

[157] Op cit (fn 49)

willingly and without pressure resigned in 1977. Either way he sustained a significant financial loss in not remaining Chief Justice of New South Wales and completing his term at the statutory retiring age.

Kerr's misgivings as to possible dismissal were vindicated by Whitlam's conduct on 11 November. Instead of seizing the opportunity Kerr gave him of going to the election as Prime Minister, Whitlam at the very mention of possible dismissal leapt up and said, 'I must get in touch with the Palace at once!' Kerr did not interpret this unguarded remark as meaning an immediate call to the Palace from his own study but simply as an indication of Whitlam's likely conduct if with due warning earlier he could have appealed expeditiously to The Queen. To Whitlam's denial that he had so expressed himself Kerr has responded:

> Mr Laurie Oakes's book *Crash Through or Crash*, published in 1976, says that Mr Whitlam said, 'I will contact The Queen', when I said I would have to dismiss him. Mr Oakes did not get that story, which is close to the truth, from me — indeed, I at no stage spoke to him about the dismissal. I can only conclude that this version came either from Mr Whitlam or from someone to whom he had given his account of what happened in my study. (Mr J B Paul made this point in a letter to *The Sydney Morning Herald* of February 15 1979; as far as I know, Mr Oakes has not given any alternative explanation for what he wrote in his book.)[158]

Nor has Kelly given any alternative explanation for quoting Whitlam in exactly the same terms as Oakes in his own book *The Unmaking of Gough* both in its 1976 and 1994 editions!

Whitlam substantiated these details at a press conference within hours of his dismissal. When questioned, 'Have you been in touch with Buckingham Palace or with London about the action of the Governor-General?', he replied:

> The Governor-General prevented me from getting in touch with The Queen by just withdrawing my commission immediately. I was unable to communicate with The Queen, as I should have been entitled to do *if I had any warning of the course that he, the Governor-General, intended to take* (emphasis added).

Could one have asked for a more telling yet more artless admission of a purpose thwarted? Kerr once told me that he had learned subsequent to Whitlam's dismissal that a special unit in his department had been put on alert to activate the whole process of recalling him if so instructed. If correct, this would explain why Byers and Whitlam's departmental head, John Menadue, conceded to Kelly that Whitlam if forewarned would have sought Kerr's recall.

Kelly has claimed: 'If his [Kerr's] own dismissal was the price that Kerr might have to pay for honouring his responsibilities then he should have accepted that price'.[159] Responsibilities to whom and to what? To Whitlam or to the Constitution? If Kerr had had to honour his responsibilities to the

[158] Id 77-8.
[159] Op cit (fn 1) 46.

Constitution within the terms of Section 61 of that fundamental law and of his Oath of Office, which has similar phraseology to a judge's oath, then clearly he should not have invited his own dismissal by The Queen acting on Whitlam's calculated advice as a committed party.

Whitlam himself has challenged Kelly's claim that Labor Senators could have denied Supply to Fraser if notified of the dismissal in time:

> ... If Labor Senators had voted against the Bills they would have been defeated by 31 votes to 26. We would have failed to block Supply and we would have been discredited in the process.
>
> Throughout October and November [Senator] Cleaver Bunton [Independent] and [Senator Raymond] Steele Hall [Liberal Movement] voted in favour of passing the Appropriation Bills (my squared parentheses). The last vote in the Senate in 1975 was on the second last sitting day, Thursday 6 November, on a proposal to defer the Appropriation Bills. That question was carried by 29 votes to 28. The 26 Labor Senators were supported by Bunton and Hall. If on 11 November the 29 Coalition Senators had voted to pass the Bills and the 26 Labor Senators had voted to reject them Bunton and Hall would again have voted to pass them.[160]

Whitlam has recently restated this position.[161]

Kerr's critics who have claimed that he should not have intervened but should have left the parties to reach what is blandly termed 'a political solution' seem unable to acknowledge that the parties' own exchanges on 11 November revealed that they were confirmed in their respective set positions and that these made no allowance for a compromise. The only 'political solution' Whitlam was prepared to countenance was the abject surrender by the Senate through ceasing to deny Supply to his administration; and such a surrender, as Whitlam's gamble calculated, would for all practical purposes have undermined its powers as set out in Section 53 of the Constitution. This the Opposition parties would not countenance.

It is as well to speculate how these critics would have reacted if the political party roles had been reversed. Supposing it had been a non-Labor Government which was being challenged in 1975 to call an election by a Labor-controlled Senate denying it Supply! This might well have been the case in 1953 if the Menzies-Fadden Government had lost control of the Senate or in 1970 if the ALP Senators had been able to get the numbers to achieve what the rhetoric of the Labor leadership in both Houses had so clearly predicated.[162]

With the political party roles reversed in 1975, any response by such a non-Labor Government comparable with Whitlam's in 1975 would, I submit, have

[160] E G Whitlam: T*he Coup Twenty Years After*, Address to the National Press Club Canberra, 8 November 1995, 8.

[161] Op cit (fn 3) 11-12.

[162] Here I must exclude the Deputy Leader of the Opposition, Lance Barnard. He alone of the Labor Parliamentary leadership entered that Budget debate of 1970 *after* the DLP Senators through their Deputy Leader, Senator Frank McManus, had indicated that they would not be responding to Senator Murphy's blandishments and cooperating with the ALP Senators in forcing the Gorton Government to the polls. Barnard therefore prudently confined his comments in that Budget debate to matters relevant to his shadow portfolio of Defence.

been roundly condemned from all sides as an attempted subversion of the Constitution. There would have been no remonstrating letters to newspaper editors over the signatures of sundry 'concerned' Professors of Law seeking to question the Senate's actions — let alone one such drafted in the Attorney-General's office as in 1975. There would have been no attempt by them at plucking some convention previously unacknowledged from the air and a remonstrance to the Senate to observe it by desisting from denying Supply. Instead there would have been learned disquisitions on the true meaning of Section 53 and the implications this would have for the accountability to Parliament of an incumbent administration. And if the Governor-General had felt obliged to dismiss such a non-Labor Government, in the midst of its attempts to achieve what Whitlam in 1975 had attempted to achieve, there would doubtless have been a ceremonious wielding of a thurible in censing the reserve powers of the Crown with solemn references to the works of H V Evatt and Eugene Forsey, due emphasis being given to their standing as avowed socialists.

Kerr's intervention was strictly limited in its application. Having satisfied himself that he could not obtain advice from Whitlam to have the House of Representatives dissolved either alone or with half the Senate or with the whole of the Senate as was then possible, he dismissed Whitlam's administration merely in order to be advised by other Ministers who would be better placed to obtain Supply and would then give the very advice Whitlam himself should have given. Such advice from Whitlam would have been comprehensible to most people, certainly to all who accepted the Constitution or who had at least some understanding of the Senate's place in it, whether they were contented with it or not. Since 12 September 1975 when Whitlam first expounded his 'Goulburn doctrine' there has never been any sound reason, in constitutional theory and practice, for anyone to have been mesmerized by it.

THE MONARCHY VS REPUBLIC DEBATE AND THE GHOST OF '75

Finally there is the question of the implications of all this for those who are faithfully wedded to republicanism — *not* as that word would have been understood in its classical sense by Montesquieu and others like him, but as misinterpreted by Australia's anti-monarchic confederates in their fevered exertions to remove The Queen from Australia's Constitution.

At the time of completing this article's final draft — August 1999 — I am faced with something of a quandary in broaching this subject. This article must be in press in a matter of weeks but it will not be published until after the referendum on this issue has taken place, at the earliest, in November.

It is not for me to speculate on how the electors will settle the matter. I shall content myself with declaring my belief that there are compelling reasons for Australia to remain a constitutional monarchy, even in its present attenuated form with a non-resident Monarch and with the prerogatives of the Crown

reposed in the Governor-General and in the State Governors. This is not the occasion for me to restate these reasons, however overwhelmingly they were vindicated to my satisfaction by the proceedings and outcome of the 1998 Constitutional Convention. I shall confine myself to dealing with them merely in the context of the 1975 constitutional crisis.

Kelly has claimed that the 1975 crisis, or something like it, could have been better handled by a President sufficiently secure in that office not to fear arbitrary dismissal. This is a paradoxical coming from an identity who has consistently reproached Kerr for not passively submitting himself to arbitrary dismissal by The Queen on Whitlam's unyielding advice or at least running the risk of incurring it. But Kelly himself has undermined this hypothesis by claiming in his book that Whitlam's only fall-back option was calling a general election. If a Prime Minister in Whitlam's position (in the sort of Australian republic Kelly was then contemplating) had refused thus to 'fall back' — if his strategy against a hostile Senate had not forced it to climb down and unconditionally vote Supply to his administration in a reasonable time — then a President with security of tenure in that situation would have had to dismiss that Prime Minister in exactly the same way that Kerr dismissed Whitlam.

Kelly, however, was to find himself overtaken by events, for the preferred republican model to emerge from the 1998 Constitutional Convention allowed even less security of tenure to a President than the Governor-General could be said to enjoy at present.

The Honourable Richard McGarvie, a former Governor of Victoria, has claimed, in my view not altogether convincingly, that in the overheated climate of the 1975 constitutional crisis Sir John Kerr was not quite as insecure in his position as he apprehended.[163] A factor some commentators overlook is that Kerr had to assess Whitlam's likely determination to have him recalled by The Queen and his very single-mindedness in expeditiously securing this as a pre-emptive strike and an insurance against his own dismissal. What if Whitlam had proceeded irrespective of any obstacle of a purely 'formal' kind which might have confronted him? The Queen in that event might well have found herself in the no-win situation of being damned if she did accept Whitlam's advice to recall Kerr (or even have delayed before accepting it) and damned especially if she did not dismiss him. But McGarvie's scepticism concerning the possibility of instant dismissal of a Governor-General by The Queen on a Prime Minister's advice is sound enough in situations where the stakes might not seem as high as in 1975 and the Prime Minister might be less prone to 'crash through or crash'.

[163] Richard McGarvie, 'Resolving the Republic Issue by 2005', Winter (1998) *Victorian Bar News*, 20. He has cited in support of this claim Sawer, op cit (fn 36) 184 (which was published *before* Kerr's *Matters for Judgment*) and Bill Hayden, *An Autobiography* (1996) 293-4. See also Linda Kirk, 'Til Dismissal Us Do Part: Dismissal of a President' (1998) 412 *UNSWLJ* Forum 20.

The battle of the models had been foreshadowed at a conference at Old Parliament House in Canberra on 6-8 May 1995 organized by the Constitutional Centenary Foundation at which the Foreign Minister, Senator Gareth Evans, played a prominent role.

Although Evans, by then Deputy Leader of the Opposition, was to modify his position significantly at the Constitutional Convention in February 1998, the uncompromising position he took in May 1995 was to provoke a furious reaction in Malcolm Turnbull as leader of the Australian Republican Movement. Evans claimed that the residual controversy in popular memory left by the 1975 constitutional crisis ruled out any hope of Australia's unwritten constitutional conventions being codified. Reformers, he declared, would need 'twenty or thirty years' in which to do it. He described any definition of these controversial conventions as a 'labour of Hercules'. (I do not know whether Evans at the time attributed these words to Sir Robert Menzies, but this was the very expression once applied by Menzies to the task of obtaining an affirmative result in a constitutional referendum.) Evans added: 'The ghost of '75 is still with us and the strength of feeling is going to be with us for another generation or so. You're just not going to get ready consensus, or even hard-won consensus, on those issues — frankly I think the task is impossible'.

There was subsequently a great deal of division among the conferees on the method of choice of the republican head of state and the powers to be vested in such an office. Evans ruled out the practicability of a popularly elected head of state, even one limited to largely ceremonial functions, because of complications arising from the Senate's powerful position as a second chamber. As I have remarked, Evans has since modified his views, but significantly they were to be echoed by Turnbull and others.

It is a paradox much to be savoured that my recording angel in this instance should be none other than Paul Kelly, writing almost a fortnight before the Constitutional Convention opened in Canberra:

> On January 12, Turnbull wrote a four-page letter to all ARM Convention delegates highlighting the huge problems by combining an elected presidency with the current constitutional powers. Turnbull argues that 'it is common ground that were Australia to have a directly elected head of State there would need to be a complete codification of the reserve powers'. He says the ARM's policy is not opposed to direct election of a president providing the reserve powers are codified. This is Kim Beazley's position too.
>
> The problem is getting any agreement on codification, which means reopening the 1975 dismissal and defining the rules under which a president must operate if a Senate blocks Supply to force a Government with the confidence of the Lower House to an election.
>
> Put bluntly, full codification will either confirm Sir John Kerr's action and strengthen the Senate or do the opposite. In his letter, Turnbull warns the ALP that in practice walking down this path is more likely to confirm the powers of the Senate and head of State such that 'the Labor Party has most to lose from a directly elected president'.
>
> Labor should ponder this point carefully. Much of the appeal of an elected president is because the consequences of such a model have not

> been addressed. It means a politician or former politician as president and a codification of powers that weakens the Lower House in a Supply crisis. Unless the powers of an elected presidency are codified then a new issue is introduced into the republican debate — a fundamental change in the system of government.[164]

No-one who witnessed the Constitutional Convention closely as I did could be in any doubt that the issues as Turnbull, and Kelly in his turn, spelt them out exercised a powerful influence on the proceedings and, given the numbers commanded by the ARM, ultimately on the outcome.

All this has been well summed up by a former Chief Justice of the High Court of Australia.[165] After dismissing as 'a clumsy sham' the tacking-on of a scheme for community involvement in the procedure for appointment of the President, Sir Harry Gibbs continued:

> Even more objectionable is the suggested procedure for the dismissal of a President. In this regard the Australian Republican Movement has displayed remarkable pliability. It originally proposed a procedure (requiring a two-thirds majority of Parliament) which would have made the President virtually irremovable, but has eventually suggested one which would place the President entirely at the mercy of the Prime Minister, who can effect an immediate dismissal. Although the Prime Minister's action in removing a President must be considered by the House of Representatives, failure to ratify it does not restore the President to office but merely renders him or her eligible for reappointment. It appears that a President, once dismissed, could be reappointed only if nominated again by the Prime Minister, who might well be the person who had effected the dismissal, since although the vote of the House refusing to ratify the dismissal would constitute a vote of no confidence in the Prime Minister, it would be a matter of conjecture whether the Prime Minister would resign. Since the questions regarding the appointment of an acting head of state were left unanswered by the Convention, it remains doubtful whether the person acting as President would have effective power to enforce compliance with the constitutional conventions and secure the dismissal of the Prime Minister in those circumstances.[166] Another question left unanswered by the Convention was whether a President, who had been removed, could be reinstated only after the nomination procedure already mentioned, involving public consultation and the compilation of a short list, had been carried out. In these recommendations the position of the Senate is completely ignored. No doubt it was intended to prevent the President from dismissing a Prime Minister

[164] 'Republicans risk hollow victory', *The Australian*, January 21 1998.

[165] Sir Harry Gibbs, 'Some Thoughts on the Constitutional Convention', 1998 4(2) *UNSWLJ* 16. That particular issue of *Forum*, dealing with the Constitutional Convention, was notable for the devastating criticisms by so many contributors, especially by avowed republicans, of the Convention model.

[166] The legislation submitted to Parliament for the proposed alteration to the Constitution to make Australia a republic placed any acting President in a similar situation to a President — the Prime Minister would possess the same arbitrary power of dismissal, although presumably this would affect the acting President, if a State Governor, purely in his or her federal office *pro tem* and not as a State Governor.

> whose Government had been denied Supply by the Senate in circumstances similar to those of 1975. The suggested procedure might have that result, but it would do nothing to avert the chaos that would ensue. It would prevent a President from taking valuable and uncontroversial initiatives such as that taken in Tasmania in 1989 by Sir Phillip Bennett, who did not accede to the request of the Premier that an election be held because he was able to satisfy himself that the Opposition could form a Government with the support of the Greens. *The suggested procedure fails completely to strike the necessary balance between the offices of President and Prime Minister, and greatly strengthens the position of the latter at the expense of the former* (emphasis added).[167]

Gibbs concluded his article as follows:

> One rather gets the impression that some delegates to the Convention were less concerned to achieve excellence in the proposed constitutional model than to have a republic at any price.[168] The model proposed by the Convention is so obviously defective that it must surely have little chance of success at a referendum. If, by some possibility, it were adopted, the result would be a disaster for Australia.

The pliability of which Gibbs had written earlier obviously cut both ways. The addendum of prior popular consultation to the original nomination process proposed by the ARM — that the Prime Minister should present, and the Leader of the Opposition should second, a nomination, which would require approval of a two-thirds majority of a joint sitting of both Houses of Parliament[169] — was an enticement to all those delegates committed to the direct popular election of the President to join forces with the ARM. The switch by the ARM on the method of dismissal was an attempt to attract the support of all those who had backed the ultra-minimalist prospectus promoted by the former Governor of Victoria, the Honourable Richard McGarvie. On both counts the ARM fell short of succeeding in this attempt at adding significantly to its hard-core support.[170]

[167] Some of Sir Harry's fellow contributors to this issue of *Forum*, notably Professor George Winterton, Professor Cheryl Saunders, Linda Kirk and John Williams — all republicans — were also critical of the Convention model's dismissal procedure. Sir Harry Gibbs's successor as Chief Justice, Sir Anthony Mason, also expressed misgivings on this procedure. See *The Republic and Australian Constitutional Development* (unpublished paper presented at ANU Seminar Series 'The Republic: What Next?' 11 May 1998).

[168] Republican critics of the Convention model who later declared their willingness to campaign for a Yes vote in the referendum relegated themselves to that less than savoury category of zealots who strive for a republic at any price, however gravely flawed it seems in their own eyes.

[169] On which Sir Harry commented: 'It may be doubted whether, in a time of crisis, the political unanimity required by this procedure would be found evident'. Others, even declared 'republicans', expressed misgivings on this very point, even in terms of political mischief-making rather than any clearly defined crisis independent of such machinations.

[170] See McGarvie (fn 164) 18–22, especially 19–21 for his concern at the debased and vulnerable standing of the head of state as formulated by the Convention model.

And it is hard not to conclude that the cobbling together of this particular republican model had been largely due to its progenitors feeling constrained by a continuing reluctance by many, but principally by identities in the Labor Party, to acknowledge as fallacious that party's interpretation of the 1975 constitutional crisis. Critics of the republican model favoured by the Convention, and these include many avowed republicans, observed the continuing influence of the events of 1975 on those pursuing the republican agenda. Even those are still prepared to demonize Sir John Kerr were struck by this![171]

Howard Nathan, remarked: 'Banquo's ghost in the form of John Kerr, deceased, attended all sessions. At every table and in every corridor he silently influenced most debate. All delegates considered it would have been impolite as well as indecent to have referred to him directly'.[172]

My contention, however, is that the figure who most influenced debate throughout the Convention did not 'haunt' its proceedings as an unacknowledged 'ghost', but rather, while still very much in the flesh, merely contented himself with viewing its proceedings from the public gallery on the opening day of the Convention. This figure of course was Edward Gough Whitlam.

If Whitlam had chosen to advise a double dissolution in 1975, as he had chosen to do in 1974, would debate on the issue of the powers of the head of state in an Australian republic have taken quite the form it has done since? I can emphasize this point adequately by quoting from an article on that conference held at Old Parliament House on 6-8 May 1995 which I wrote in the light of the subsequent statement to Parliament by Paul Keating on his Government's response to the Report of the Republic Advisory Committee:

> There is a delicious paradox in Evans's raising of the 1975 spectre. The residual rancour from those events has been due in no small degree to the partisan perspectives that the ALP has taken and kept focused on this issue, chiefly at the urging of Whitlam and his shopsoiled retinue of acolytes-cum-claqueurs.
>
> Before the 1975 crisis erupted there seemed to be broad agreement — not least among ALP identities, including Whitlam — that the Senate did indeed possess the power to withhold Supply from an administration which enjoyed the confidence of the House of Representatives. And although the experts on the subject of the reserve powers were less broadly based, there seemed to be agreement among them that a stubborn refusal by an administration already denied Supply to resign or seek a dissolution would be a compelling pretext for invoking the reserve powers.
>
> How strange it must seem then that the ghost of '75, which many thought

[171] See Professor Brian Galligan, 'The Republican Model', April (1998) *Quadrant.*

[172] 'The Convention from the Inside', April (1998) *Quadrant* 21-5, 22. Nathan served as Counsel to the Deputy Chairman of the Constitutional Convention, Barry Jones. He is a reserve Justice of the Supreme Court of Victoria.

> How strange it must seem then that the ghost of '75, which many thought would accelerate the advent of an Australian republic, could in the long term act as a factor retarding any push toward that particular goal.
>
> Evans doubtless will not concede this state of affairs readily but, if he should, he will have the tendentious disputation fostered by his own party, and not least by himself as a prominent publicity-seeking controversialist on this issue, to thank that it has come to this ...[173]

My conclusion to that article is not unsuitable as a conclusion to this one, especially if the referendum should have been defeated by the time this article is published: 'Truly this will be the case of the *enragés* class of '75 being hoist with their own petard!'

[173] 'Ghost of '75 will haunt PM's republic', *The Australian*, Opinion, June 7 1995, 11. The article had been originally submitted before Keating's statement under the title 'Much binding in a republican marsh'.