The Case For Codifying The Powers Of The Office Of Governor-General

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Debate on the question of whether Australia should become a republic has masked a far more important underlying issue, namely whether the conventions of the office of Governor-General should be codified. The issues are linked in that opinion polls have consistently shown that if Australia was to become a republic, voters would prefer a model which included direct election of a President, yet the risk that an elected President might breach the conventions of the office has proved to be an obstacle to its adoption. Codification of the powers of the office would address this problem. It would also provide an opportunity to clarify areas of uncertainty that became evident during the constitutional crisis of 1975 and to bring the text of the Constitution into alignment with how responsible government actually operates. Codification would therefore be beneficial irrespective of whether Australia became a republic. The constitutions of many other countries – both those that have retained the link to the Crown and those that have become republics – provide examples of how this might be done. The article ends with a model codification of the conventions.

I INTRODUCTION

At the outset, it is important to understand what this article is and is not about. As indicated by the title, it is about the codification of the *powers of the office* of Governor-General. It is not about whether the office should continue to be filled by a Governor-General appointed by the Crown or whether Australia should instead become a republic. Obviously the two questions are connected, simply because much of the opposition to a republic stems from a fear – whether genuinely held or mischievously propagated – that replacing the Governor-General with a President - and in particular by an elected President - would be damaging to our constitutional fabric. Yet the central thesis of this article is that codification of the powers of the office would be beneficial to our constitution, irrespective of whether Australia became a republic. Part II of this article addresses a terminological issue which has confused the debate over the office of Governor-General. It then provides an overview of the powers of the office. Part III examines the consequences of the failure, both during the 1999 republic referendum to give adequate attention to the issue of codification. Part IV examines the law of other jurisdictions where the powers of a Governor-General or President operating within a system of parliamentary government have been codified. Part V concludes with a set of model constitutional provisions which could be adopted to codify the powers of the office in Australia.

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II THE POWERS OF THE OFFICE

Before outlining the powers of the office of Governor-General, it is necessary to address a terminological issue which has bedevilled debate, which is whether the holder of the office is 'head of state'.

Possible correct answers to the question 'Who is our head of state?' are: no-one, the Queen or the Governor-General - depending entirely on what one means by the term.

Since the term is not used in the Constitution, it would be most correct to say that no-one is head of state, as the office does not exist.

But leaving that option aside, if one wants to determine whether the Queen or the Governor-General is head of state, one needs to examine what the Constitution says about their respective roles.

The constitutional position, as stated in s 61, is that executive power is vested in the Queen, and that that power is exercised 'on her behalf' by the Governor-General. It is therefore incontrovertible that the Queen is the source of executive power, even though the Governor-General exercises it for her. If there were no Queen, there would be no Governor-General. The Governor-General's powers are thus entirely derivative, however much monarchists seek to divert attention from this truth in furtherance of an argument that we have an 'Australian head of state' in the person of the Governor-General.[1]

From this it follows that, if by 'head of state' one means 'the person who is the ultimate *source* of executive power under the Constitution,' then the Queen is head of state. However, if by 'head of state' one means 'the person who actually *wields* executive power,' then it would be true that the Governor-General is head of state. The problem is that because the term 'head of state' is unknown to the Constitution, people are free to use it as they like, and while some use it to refer to the Queen, many use it to refer to the person who exercises powers on behalf of the Queen - which is harmless so long as there is clarity that the Governor-General's powers are not his or her own. It is only because the legally accurate phrases 'the person who is the ultimate source of executive power' and 'the person who wields executive power' are clumsy that people have fallen into the habit of using the ambiguous term 'head of state', with all the attendant confusion that has caused. For this reason, the term is best avoided.

The powers of the office of Governor-General are well known, and can be summarised briefly. They can be classified into three categories: legislative powers, executive powers exercised on advice and executive powers exercised independently (the so-called 'reserve powers').

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[1] As an example of this see David Smith, 'Australia's head of state: The definitive judgment' (2015) 89 *Australian Law Journal* 857.

The legislative powers are either regulated by convention or are redundant: Section 58 of the Constitution gives the Governor-General the power 'according to his discretion' to assent to Bills passed by Parliament, to withhold assent, or to reserve a decision pending advice from the Queen. Convention requires that the Governor-General always assents to Bills, and there has therefore been no instance where the power to withhold assent has been exercised. The power of reservation is no longer relevant in that it was exercisable only under s 74 in respect of a law removing the right of appeal to the Privy Council. This section effectively became redundant after s 11 of the *Australia Act 1986* (Cth) removed that right to appeal. Section 59 gives the Queen (and thus the Governor-General) the power to disallow legislation. This power has never been used and was declared redundant at the 1926 Balfour Conference.

Most of the Governor-General's executive powers are exercised on the advice of the government of the day, rather than according to his or her own discretion. In some cases where the Constitution confers power on the Governor-General, the relevant section expressly refers to the 'Governor-General in Council', defined by s 63 as meaning the Governor-General acting on advice. Examples of this are calling an election of the House of Representatives (s 32), creating government departments (s 64), appointing public servants (s 67) and appointing federal judges (s 72). However, even where the Constitution does not expressly refer to the 'Governor-General in Council', but only to the 'Governor-General', convention still requires that the Governor-General acts only on the advice of the government,[2] for example in summoning, proroguing and dissolving Parliament (s 5) (but see the discussion of the reserve powers, below); recommending money Bills to Parliament (s 56); ordering a double dissolution and convening a joint sitting (s 57); appointing members of Executive Council (s 64); serving as Commander-in-Chief of the armed forces (s 68) and submitting constitutional amendments to a referendum (s 128).

The third category of powers consists of those executive powers which are exercised in circumstances where it is evident that the Governor-General cannot take advice.[3] These 'reserve' powers are the powers to appoint a Prime Minister, to dismiss a Prime Minister, to dissolve Parliament and to refuse to dissolve Parliament. However, even though these powers are exercised independently, they are still subject to conventions which restrict the circumstances in which they may be exercised and the way in which they may be exercised.

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[2] The High Court recognised in *Western Australia v Commonwealth (First Territorial Senators Case)* (1975) 134 CLR 201 and *Victoria v Commonwealth (PMA Case)* (1975) 134 CLR 81 that any discretion apparently vested in the Governor-General is, in reality, exercised at the behest of the government of the day. Although the Governor-General is within his or her rights to ask the government to reconsider the advice it is tendering, ultimately, effect must be given to that advice.

[3] The reserve powers are discussed in Dan Meagher et al, *Hanks Australian Constitutional Law - Materials and Commentary* (LexisNexis Butterworths, 10th ed, 2016) 777-80 and in George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory - Commentary and Materials* (Federation Press, 7th ed, 2018) 436-8.

The power to appoint a Prime Minister is subject to the convention that the Governor-General must appoint whoever leads the party or coalition with a majority in the House of Representatives. The operation of this convention requires cooperation between politicians and the Governor-General: convention requires that an incumbent Prime Minister who loses the majority in the house after an election must resign, leaving it open to the Governor-General to appoint whoever is able to command the support of the House. In the possible but unlikely event that a general election produces a result where no one was able to command a majority in the House, convention would require the incumbent Prime Minister to advise the Governor-General to dissolve Parliament and call another election.

The power to dismiss a Prime Minister can be exercised where an incumbent Prime Minister loses his or her majority in the House of Representatives and refuses either to resign or to ask the Governor-General to call an election, where a Prime Minister who had lost an election refuses to resign and to allow the Governor-General to appoint a new Prime Minister or where a government persists in unlawful action. So much is uncontroversial. What was of course controversial was the question that arose during the 1975 constitutional crisis, which is whether the Governor-General could dismiss a Prime Minister who enjoyed the confidence of the House of Representatives but who could not get supply legislation through the Senate. Academic literature on the crisis is vast and, despite the elapse of time, shows no sign of diminishing.[4]

Analysis of the competing views on the actions of then Governor-General Sir John Kerr lies outside the scope of this article but, in anticipation of the rules contained in Part V, the following points are made:

Some have argued that convention dictated that the Senate should not block supply. Although it is questionable whether such a convention existed, the issue is academic in light of the fact that s 53 of the Constitution explicitly confers such a power on the Senate. That section was a key component of the federal bargain struck at the Constitutional Conventions, deliberately included upon the insistence of the smaller colonies.[5] Given the unenforceable nature of conventions, there is no doubt that the Senate was within its rights in using its constitutional power to block supply.[6]

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[4] For two recent books see Paul Kelly and Troy Bramston, *The dismissal: in the Queen's name* (Penguin Australia, 2015) and Jenny Hocking, *The dismissal dossier: everything you weren't meant to know about November 1975* (Melbourne University Press, 2015). Still unknown is what correspondence between Kerr and the Queen would reveal, particularly with regard to whether Kerr raised with the Queen what would happen if Whitlam asked the Queen to dismiss Kerr, which is what Kerr feared might happen if he had forewarned Whitlam that he would dismiss him. In *Hocking v Director-General of National Archives of Australia* [2019] FCAFC 12 the Federal Court of Appeal held that the correspondence with the Queen was personal property of Kerr and thus not subject to the normal rule that Commonwealth documents are released after 30 years.

[5] Meagher et al, above n 3, 156.

[6] For a statements on the fact that conventions do not limit legislative capacity see *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 722 G – 723 C (Reid LJ).

There is also no doubt that Governor-General Kerr acted lawfully in dismissing Prime Minister Whitlam, as s 64 of the Constitution gave him the power to do that. The question was what convention governed how a Governor-General should exercise that power in circumstances when the upper house to which the government was not responsible used its constitutional powers to deny supply to the house to which the government was responsible. This illustrates the inherent weakness of having key parts of the constitutional system governed by convention: Because there are, to use Hart's analysis, [7] no rules of recognition, adjudication or change for conventions, the system is at risk of breaking down when conventions do not address a particular set of circumstances, because there is no way in which a convention can suddenly be created to address those circumstances. Furthermore, as was stated by the Supreme Court of Canada in its comprehensive analysis of the nature of conventions in *Re Amendment of the Constitution of Canada*,[8] conventions frequently *conflict* with the legal rules that must be applied by the courts. In such circumstances, conventions create a false view of the constitution and thus promote uncertainty. In addition, contrary to the argument raised by proponents of government by convention to the effect that conventions are beneficial in that they provide flexibility in addressing new developments,[9] the crisis of 1975 provides evidence for the exact *opposite* argument. Because conventions arise *from* facts, in the sense that they develop in response to different circumstances, and take decades or centuries to become sufficiently recognised, they are inferior to law which *anticipates* facts by framing rules to cover them. The 1975 crisis is all the more remarkable in that it could hardly be said that conflict between the House and the Senate was unanticipated – indeed it was clearly anticipated, because At the 1897 Constitutional Convention, Alfred Deakin said that to combine a government that was responsible to the House with a Senate having the power of veto would be 'to create on the one side an irresistible force and on the other an immovable object.'[10]

However, leaving aside the problem that no convention had become established which would have addressed the circumstances in which Kerr found himself, and even leaving aside Kerr's power under s 64 to dismiss Whitlam, what conclusion do the principles of responsible government *underlying* the conventions indicate should one reach as to the correctness of his actions? Was his dismissal of Whitlam consistent with those principles or at variance with them? Although a government is entitled to hold office if it has a majority in the House of Representatives, the underlying reason *why* that entitlement exists is because its majority *enables* it to govern. However, a government that is unable to obtain supply is *not* able to govern, and thus ought to resign – or be dismissed if it does not resign.[11] Kerr's dismissal of Whitlam was therefore correct, not only as a matter of law but also under

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[7] H. L. A. Hart, *The Concept of Law* (Oxford University Press, 3rd ed, 2012) 94-9.
[8] (1981) 125 DLR (3d) 1, 84-6.
[9] Richard McGarvie, *Democracy – Choosing Australia's Republic* (Melbourne University Press, 1999), 161-2.
[10] *Debates of the Australasian Federal Convention*, Sydney, 15 September1897, 582 (Alfred Deakin).
[11] This argument is canvassed in Charles Sampford, 'The Australian Senate and Supply – Some Awkward Questions' (1987) 13 *Monash University Law Review* 119, 120-1.

convention, because dismissal in the prevailing circumstances was consistent with the *underlying principle* served by the conventions. On this basis, Kerr was correct in acting as he did. This is the approach to the power of dismissal that is embodied in the model code in Part V of this article.

The 1975 crisis also raised the question of who the Governor-General should appoint in place of a Prime Minister who had been dismissed. If the conventions were codified, they would need to make some provision for the continuance of government in that circumstance. Two different situations need to be addressed: The first would be where the Prime Minister had been dismissed for not resigning following loss of confidence, or for failure to secure supply, but there was no-one else who was able to command majority support in the House. In that situation I would argue that since the (former) Prime Minister would obviously be an unsuitable person to appoint as caretaker, the Constitution should provide that the Governor-General should be appoint as acting Prime Minister the leader of the largest party in Parliament which had not formed part of the dismissed government. This, of course, is precisely what happened in 1975 when Kerr appointed Fraser as caretaker Prime Minister pending the election of a new House of Representatives. The other situation in which the Constitution would have to make provision for a caretaker would be where the Prime Minister had been dismissed for illegal conduct. In that circumstance the Prime Minister might still have majority support in the House, but here too it would obviously be inappropriate for him, or even another member of his government, to be appointed as acting Prime Minister, and so again the best option would be for the Constitution to require that the Governor-General appoint the leader of the largest non-governing party as acting Prime Minister until after a general election has been held. The prospect in either of these circumstances of having the leader of the opposition appointed as Prime Minister, even in a caretaker role, would act as a powerful disincentive on Prime Ministers to act unconstitutionally.

The power to dissolve Parliament is usually exercised on the advice of the Prime Minister. However the Governor-General could exercise this power on his or her own initiative after dismissing a Prime Minister (in accordance with the rules described above) if there was no one else able to command a majority in the House of Representatives. In these circumstances the deadlock could be resolved only by Parliament being dissolved and an election being held.

It has been argued that, if a government has recently been elected but shortly thereafter loses the confidence of the House of Representatives, the Governor-General has the power to refuse a request by a Prime Minister to dissolve Parliament if there is someone else who can form a government. However, given that the conventions serve the doctrines of representative and responsible government, the better view is that a Governor-General can never refuse a Prime Minster's request to refer to the voters the question of who should form the government, and this is the approach adopted in the model code.

III THE ROAD NOT EXPLORED

The 1999 constitutional referendum on an Australian republic was marked by political gamesmanship by the Howard government, which was designed to ensure that the referendum would fail. This started with the process by which the question to be put by voters was determined. Given that there were a number of proposed models for a republic, the most democratic method for framing the question would have been to hold a plebiscite in which voters were asked to choose which republican model they favoured, followed by a constitutional referendum at which voters would have been asked whether Australia should remain a monarchy or should become a republic according to the model favoured at the plebiscite.[12] Instead the referendum question was framed by a Constitutional Convention, half elected and half appointed, which produced a compromise model (ultimately supported only by a simple rather than an absolute majority of delegates)[13] under which a committee would consider public nominations for President and would put forward a name to the Prime Minister who, along with the leader of the opposition, would then have proposed that person for approval by a joint sitting of the House of Representatives, which would have to have approved the nomination by a two-thirds majority.[14] Because the process of deciding on a model was given to the Constitutional Convention, voters were never given the opportunity of expressing their preference among the various possible models. Had that occurred it would have in all likelihood led to direct election of a President being the model put to referendum, as opinion polls had shown that that model had the greatest public support.[15] Direct election has remained the popular choice according to polls conducted over the past 20 years.[16]

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[12] This was the process followed in New Zealand when the electoral system was reformed. In 1992 a non-binding plebiscite was held in which voters were asked two questions: the first as to whether they wanted to depart from the existing electoral system, the second as to which of four possible alternative systems they favoured. Then, in 1993, voters were asked in a binding referendum whether they wanted to retain the existing system or adopt the Mixed Member Proportional system, which was the system that had been overwhelmingly favoured in 1992, and which voters approved in 1993. The referenda are discussed in Jack Vowles, 'The Politics of Electoral Reform in New Zealand' (1995) 16 *International Political Science Review* 95.

[13] *Constitutional Convention – Transcript of Proceedings*, Canberra, 13 February 1998, 982 (Deputy Chairman Barry Jones) <https://web.archive.org/web/20110108183541/http://www.aph.gov.au/hansard/conv/con1302.pdf For a discussion of the Convention see Harry Evans 'A Non-Republican Republic: The Convention's Compromise Model' (1999) 20 *University of Queensland Law Journal* 235 and George Winterton, 'Con Con 1998 and the Future of Constitutional Reform' (1999) 20 *University of Queensland Law Journal* 225.

[14] See the Constitution Alteration (Establishment of Republic) 1999 (Cth) Bill and its explanatory memorandum, available at https://www.legislation.gov.au/Details/C2004B00491/Download

[15] See Dennis Shanahan 'Voters rule - No election, no president', *The Australian* (Sydney), 10 February 1998, 1 citing results of a Newspoll which found that 56% of respondents favoured direct election of a President. For a discussion of the Convention see Harry Evans 'A Non-Republican Republic: The Convention's Compromise Model' (1999) 20 *University of Queensland Law Journal* 235.

[16] See John Warhurst, 'The Trajectory of the Australian Republic Debate' (Papers on Parliament No. 51, Department of the Senate, Parliament House, Canberra, 2009) 1, 9, who cites opinion polls taken in 2007 which showed that 80% of respondents favoured a directly-elected President if Australia was to become a republic. See also the survey results published Bede Harris, *Exploring the Frozen Continent – What Australians Think of Constitutional Reform* (Vivid Publishing, 2014) 72-3 citing a 2014 poll which showed that 73% of respondents favoured direct election.

The adoption of the indirect election model split the republican camp, a division which was skilfully exploited by monarchists during the referendum campaign, who urged voters to reject 'this republic' – the implication being that they would have another opportunity sometime in the future to vote for the type of republic they really wanted.[17] The result was that despite the fact that opinion polls had showed a clear majority in favour of a republic before the referendum,[18] the proposed constitutional amendment failed to win a majority in any State or Territory, bar the ACT.[19] Malcolm Turnbull, who led the republican referendum campaign, laid responsibility for the result at the feet of the government, describing John Howard as the 'Prime Minister who broke the nation's heart.'[20]

A key reason why direct election was rejected by the Constitutional Convention, thereby dooming the referendum, was the opinion voiced by many, including prominent politicians from both the Coalition and Labor, that direct election of a President would create a risk that the office-holder might feel that, because they had been directly elected, they had as much of a mandate as did an elected government, and might therefore be tempted to act contrary to convention during a constitutional crisis.[21] Under what specific set of circumstances that might occur was not elucidated, but even assuming that such a risk existed, the argument ignored the fact that, even under the current system, there is nothing to prevent a Governor-General from breaching convention - a vulnerability which exists precisely because the constraints on the office are only conventions and are therefore legally unenforceable. In other words, a Governor-General is no less able than a President (however chosen) to breach the conventions, and so a change to a republic would not have created a risk that did not already exist. Unfortunately, this counter-argument was never made by proponents of direct election.

More importantly however, if the key impediment to giving the people what they wanted – that is, an elected President – was the apprehension that the conventions might be breached, surely the most effective counter to that argument would be to propose that the powers of the office be codified, thereby making them legally enforceable? This too was an argument which direct-election republicans failed to pursue with sufficient vigour, despite the fact that it might have tipped the balance in their favour. Although Malcolm Turnbull stated that if the direct election model was adopted the powers

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[17] Australian Electoral Commission, *Your official Referendum pamphlet*, (1999) 11 https://www.aec.gov.au/Elections/referendums/1999_Referendum_Reports_Statistics/yes_no_pamphlet.pdf

[18] Ray Cassin, Unpalatable choice sank the republic, *The Age* (Melbourne, 6 November 2009) 13.

[19] The results are accessible at Australian Electoral Commission, *1999 Referendum Report and Statistics (1999)* https://www.aec.gov.au/Elections/referendums/1999_Referendum_Reports_Statistics/summary_republic.htm.

[20] Malcolm Turnbull, *Fighting for the Republic* (1999, Hardie Grant Books) 245.

[21] For a discussion of this see George Winterton, 'Reserve Powers in an Australian Republic' (1993) 12 *University of Tasmania Law Review* 249, 260-1.

should be codified,[22] codification never became a central plank of the republican campaign. Furthermore, on the rare occasion when codification was raised, it was met with the argument that codification was not possible. That argument too was not adequately countered, with the consequence that the codification argument was lost by default. This then brings us to the question as to the practicalities of codification, and what Australia can learn from the experience of other jurisdictions.

IV CODIFICATION AND LESSONS FROM OTHER JURISDICTIONS

The opposition encountered by proponents of codification reflects a broader problem which affects debate on constitutional reform in Australia. The essential problem is attitudinal, and has a number of dimensions, two of which are of particular relevance here. The first of these is the tendency to abandon reform proposals as soon as the first negative argument is raised against them. The reason why naysayers are so easily able to capture the field in debates on constitutional reform is that, for the most part, people do not have the necessary knowledge of the constitution which is needed to counter these objections, a problem which has its roots in a history of poor civics education. This also has the effect of making voters averse to constitutional change, because people naturally feel apprehensive about changing a system the workings of which they do not understand. The second attitude which impedes reform is insularity – an attitude that Australia's problems are in some way unique and that the experience of other jurisdictions is inapplicable to us. The combined effect of these attitudes is to give an advantage to constitutional conservatives in resisting change, as is evidenced by the unhappy history of constitutional referenda.

Constitutional conservatives have an almost mystical attachment to the conventions. Yet the conventions arose by accident rather than design, and are, at base, the product of laziness in 18th and 19th century Britain, where no-one bothered to put new constitutional rules into legislative form. Their opposition to codification rests on two key planks – the first is that conventions give flexibility to the Constitution and that codification would therefore not be inadvisable because it would (although an example of circumstances this might occur is never adduced) prevent the Governor-General from responding to the exigencies that might arise.[23] The second is that it is not possible to express the conventions with sufficient specificity to codify them.[24]

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[22] Malcolm Turnbull, 'Presidential power play', *The Australian* (Sydney, 2 February 1998) 11.
[23] McGarvie, above n 9, 161-2, George Winterton, 'A Directly Elected President: Maximising Benefits and Minimising Risks' (2001) 3 *University of Notre Dame Australia Law Review* 27, 42 and Anne Twomey, 'Cutting the Gordian Knot: Limiting Rather than Codifying the Powers of a Republican Head of State', (Papers on Parliament No. 51, Department of the Senate, Australian Parliament, 2009) 19, 21.
[24] John Paul, '1975 And All That - Partisan Perspectives on the Dismissal and Their Implications for Further Debate on the Constitution' (1999) 25 *Monash University Law Review* 317, 370 citing Gareth Evans. See also Richard McGarvie. 'My Constitution', *Daily Telegraph* (Sydney, 26 January 1998) 11.

Turning first to the flexibility argument, it is puzzling why if one would not want flexibility (which means ambiguity) in the rules defining what constitutes the crime of murder, or defining personal tax rates or what procedures must be adhered to when registering a corporation, one would want ambiguity in fundamental rules of the Constitution. Leaving rules both ambiguous as well as unenforceable by the courts is fundamentally incompatible with the doctrines of constitutionalism and the rule of law, which require that rules be definite in their content and application and able to be enforced by judicial remedy when they are breached. The fact that conventions are not justiciable [25] means that compliance with key constitutional rules hangs by the slender thread the good will of political actors. There is no rational basis for the argument that a Constitution should be uncertain or that it should operate in ways which in some instances (think, for example, of the Governor-General's s 59 power to refuse to assent to legislation) are the *direct opposite* of what is stated in its text. There is thus nothing to be gained by leaving key constitutional rules unstated – the question is simply one of drafting them comprehensively.

This then brings us to the next argument, which is the supposed impossibility of reducing the conventions to statutory form. This argument is founded on the view that constitutional practice is somehow different from all other areas of law and incapable of being subject to expressed rules. Perfection is, of course, unattainable in any area of law, but there is nothing *qualitatively* different about constitutional law in general or the rules of responsible government in particular that prevents the reduction of its rules to codified form. Furthermore, if conventions were as ethereal as is alleged, surely it would be impossible to make definitive statements about them at all? In simple terms, if language is capable of stating what the conventions are – as it manifestly is - then surely those statements can be put into the form of legal rules?

As Part II of this article shows, the contours of most of the conventions are well-known, and that in those two instances where there are dispute (whether a Governor-General should have the power to dismiss a Prime Minister who has the confidence of the House of Representatives but cannot get supply legislation through the Senate, and whether a Governor-General can refuse a request to dissolve Parliament) rules which are consistent with the underlying doctrines of representative and responsible government can be devised. The fact that ongoing political rancour between the Coalition and Labor over the events of 1975 has prevented resolution of the question of what should happen if a Prime Minister cannot get supply legislation through the Senate would be laughable were it not for the seriousness of the issues involved. The choice was, and remains, simple: either s 53 should be amended so as to deny the Senate the power to block supply, or the conventions should be codified and should include a provision stating that the Governor-General has the power to dismiss a Prime Minister who cannot get supply legislation through both houses of Parliament. One would have thought that the adoption of either of these courses of action would have been the first order of constitutional

[25] For a statement on the non-justiciability of conventions see *Re Amendment of the Constitution of Canada* (1981) 125 DLR (3d) 1, 84-6.

reform in the aftermath of 1975, yet failure to address this issue over the past 45 years means that we would face another crisis if the same circumstances were to arise today.

So how does one counter the argument either that codification is not possible or the entirely unwarranted concern about what its effects on the Constitution would be? The reality is that taking such a step would not be complex from a constitutional point of view. Debate on this issue has been conducted largely without reference to the experience of other countries, an examination of which shows that Australia's situation is not unique, in that many countries have codified the conventions without difficulty and without adverse consequences for the operation of their constitutions.

Evidence of this is provided by the fact that many countries, both Commonwealth and non-Commonwealth, have office-holders whose functions are the same as those currently performed by the Governor-General in Australia, and whose powers are specified in rules of law contained in the Constitution.[26] Thus in countries such as Bahamas,[27] Barbados,[28] Grenada[29] and Jamaica,[30] all of which are Commonwealth countries which are still constitutional monarchies - the Constitution states that the Governor-General must appoint whoever is able to command a majority in the legislature as Prime Minister, that the Governor-General must dismiss a Prime Minister who no longer commands a majority in the legislature and who refuses to resign or call an election, and either permits or requires the Governor-General to dissolve the legislature if a Prime Minister who has lost the confidence of the legislature fails to resign.

Then there are a number of Commonwealth countries – Dominica,[31] Malta[32] and Mauritius[33] - which are republics with a President occupying the same office formerly held by a Governor-General, whose Constitutions embody the same rules as stated above. Finally, one can point to two other republics - Germany and Ireland – who are not members of the Commonwealth but where similar Westminster-type responsible government systems operate: In Germany the President appoints as Chancellor whoever is elected by a majority of the Bundestag.[34] Where a Chancellor has lost the confidence of the Bundestag and the Bundestag has elected a successor, the President must dismiss the Chancellor.[35] Where the Bundestag fails to elect a new Chancellor the president may dissolve the Bundestag.[36] In Ireland the President must

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[26] A convenient summary of the constitutional powers of Heads of State of both Commonwealth and non-Commonwealth countries is to be found in Commonwealth of Australia, *An Australian republic: the options – The Report of the Republic Advisory Committee*, Australian Parliament, Paper No 168 (1993), Vol 2, 6-18.
[27] *Constitution of Bahamas 1973*, Arts. 73, 74 and 66.
[28] *Constitution of Barbados 1966*, Arts. 61, 65 and 66.
[29] *Constitution of Grenada 1973*, Arts 52 and 58.
[30] *Constitution of Jamaica 1962*, Arts 64, 70 and 71.
[31] *Constitution of Dominica 1978*, Arts. 59, 60 and 63.
[32] *Constitution of Malta 1964*, Arts 76, 79, 80 and 81.
[33] *Constitution of Mauritius 1968*, Arts. 57, 59 and 60.
[34] *Constitution of Germany 1949*, Art. 63.
[35] Ibid Art 68.
[36] Ibid Art 63.

appoint as Taoiseach (Prime Minister) whoever is selected by the Dail (the lower house of Parliament)[37] and a Taoiseach who has lost the confidence of the Dail must resign or ask the President to dissolve the Dail.[38] The fact that the impossibility argument continues to be made despite the evidence from overseas reflects the insularity of debate in Australia - although it is difficult to determine whether that is the product of genuine ignorance of what goes on in other countries or of determination on the part of constitutional conservatives to keep quiet about facts that are inconvenient to them.

These examples show not only that codification is possible but also that the experience of overseas jurisdictions exposes the invalidity of the 'flexibility' argument. Constitutional draughtspersons in those countries had no difficulty in framing the rules directing the powers of a Governor-General or president with sufficient specificity as to cover the eventualities that might arise in the relationship between that person, the Prime Minister and Parliament.

V A MODEL CODE

This code incorporates the conventions as described in Part II. It also addresses the two areas of uncertainty identified there: It resolves the question that lay at the heart of the 1975 crisis, which is whether a Governor-General may dismiss a Prime Minister who has a majority in the House of Representatives but who cannot get supply legislation through the Senate, by stating that in such circumstances a Governor-General may dismiss a Prime Minister. This is consistent with the principle underlying responsible government, which is that a government should hold office only if it has the ability to govern. The model code also requires that a Governor-General should always accede to a Prime Minister's request to dissolve Parliament, thereby giving effect to the principle that voters should never be denied the opportunity to determine their government.

Codification would not only ensure congruency between the text of the Constitution and how responsible government actually operates, but would also enable people to more easily understand the Constitution. Although the issue of codification arose in the context of the debate on whether Australia should become a republic, I would argue that codification is a more important reform than Australia becoming a republic, because although severance of the link with the Crown would serve an important symbolic purpose, codification would give clarity to the day-to-day workings of the Constitution. It would also mean that there would no longer be a difference between how the Constitution reads and how it operates in fact. This reform ought therefore to be pursued irrespective of whether Australia becomes a republic. Having said that, it is also relevant to note that codification would assist in the achievement of a republic, as it would prevent a President from abusing his or her powers, thereby countering the objection raised to the direct-election model which voters overwhelmingly favour. The following model code

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[37] *Constitution of Ireland 1937*, Art 13.1.1.
[38] Ibid Art. 28.10.

contains the text of a constitutional amendment by which the powers could be codified.

1 Exercise of power by the Governor-General

(1) All references to the Governor-General in this Constitution are to be taken as references to the Governor-General acting on the advice of the Executive Council, unless the reference is to the Governor-General acting on the advice of some other person or body, or as directed by this Constitution.

(2) The powers of the Governor-General include the power to summon, prorogue and dissolve Parliament and to be Commander-in-Chief of the defence forces.

2 Appointment of the Prime Minister

Subject to section 3(4), the Governor-General must appoint as Prime Minister the person who has the support of a majority of members of the House of Representatives.

3 Dismissal of the Prime Minister

(1) The Governor-General must dismiss the Prime Minister when

> (i) the Prime Minister no longer has the support of a majority of members of the House of Representatives or
>
> (ii) the House of Representatives or the Senate has rejected a proposed law for the appropriation of money or the imposition of taxation
>
> and, in either of the circumstances mentioned in (i) or (ii), the Prime Minister refuses either to resign or to advise the Governor-General to dissolve the House of Representatives.

(2) The Governor-General must dismiss the Prime Minister when the Prime Minister has refused to comply with an order of the High Court.

(3) If the Governor-General dismisses the Prime Minister in accordance with sub-section (1)(i) of this section, and there is no other person who has the support of a majority of the House of Representatives, or if the Governor-General dismisses the Prime Minister under sub-section (1)(ii) or (2) of this section, he must immediately dissolve Parliament.

(4) If the Governor-General has dissolved Parliament under sub-section (3) of this section, the Governor-General must appoint as Acting Prime Minister the parliamentary leader of the political party which has the most numerous members in the House of Representatives but which did not have any members who were

Ministers immediately before the dismissal of the Prime Minister. The Acting Prime Minister shall hold office until the day upon which the House of Representatives meets after the dissolution contemplated by sub-section (3) of this section.

6 Appointment and dismissal of members of the Executive Council

The Governor-General, acting on the advice of the Prime Minister, shall appoint and dismiss members of the Executive Council.

7 Dissolution of Parliament

The Governor-General must dissolve Parliament when and only when the following circumstances exist:

(i) the Governor-General is advised to dissolve Parliament by the Prime Minister or

(ii) the Prime Minister has been dismissed in accordance with section 3(1)(i) and there is no other person who has the support of a majority of the members of the House of Representatives or

(iii) the Prime Minister has been dismissed in accordance with section 3(1)(ii) or section (3)(2).

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