REFLECTIONS ON CONTROL OF THE GOVERNOR-GENERAL'S POWERS

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In 1975 the Australian Senate deferred consideration of certain appropriation bills. The House of Representatives was then controlled by the Whitlam Labor Government. The government was therefore unable to secure supply because of the action in the opposition-controlled Senate. Mr. Whitlam did not resign or advise an election, and on 11th November, 1975, the Governor-General, Sir John Kerr, acting under s. 57 of the Constitution, simultaneously dissolved both houses of the Parliament. In the election that ensued Mr. Whitlam's party was defeated.

The Governor-General's action proved highly controversial and has prompted discussion of a number of basic questions. What are the Governor-General's present powers? Where are they to be found? How, if at all, may they be reviewed?

Much of the discussion of the Governor-General's powers turned on the phrase "reserve powers". Some appear to confine these words to prerogative powers. But the usual notion is that they cover the Crown's power of assent, veto, dissolution and dismissal and perhaps also the powers of prorogation and summoning of Parliament, regardless of whether such powers arise under the royal prerogative, or under the Constitution, or otherwise. A semantic argument about the term would be unprofitable because all those possible sources of power, and limitations on them, need to be considered. But it would be unreal to consider these particular powers exercisable by the Governor-General in isolation from some more general appreciation of the position and powers at large of the Governor-General.

OFFICE AND POWERS OF GOVERNOR-GENERAL

Covering clause 3 of the Commonwealth of Australia Constitution Act 1900 enables the Queen to appoint a Governor-General for the Commonwealth. The Governor-General is mentioned surprisingly

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often in the Constitution itself.[1] In 16 sections—including the important ss. 5, 57, 58, 61, 64 and 128—powers are bestowed on the *Governor-General* himself. In eight sections powers are conferred on the *Governor-General in Council,* a phrase expanded and defined in ss. 62 and 63 of the Constitution. The historical reason ascribed for a distribution of power in that particular manner is that the powers conferred on the Governor-General himself were thought to have formed part of the royal prerogative prior to Federation. The powers conferred on the Governor-General in Council were not regarded as forming part of the prerogative.[2]

Of these sections the most important include s. 5 which gives the Governor-General power to fix times for sessions of Parliament and to prorogue the Parliament, and also to dissolve the House of Representatives; s. 28 which provides a maximum period for the House of Representatives of three years and which permits earlier dissolution by the Governor-General and s. 57, the so-called "deadlock provision" to resolve disagreements between the Houses under which the Governor-General in appropriate cases may dissolve both Houses simultaneously and may subsequently convene a joint sitting of the Houses. S. 58 enables the Governor-General to declare, according to his discretion, but subject to the Constitution, that he assents to a proposed law presented to him in the Queen's name, or that he withholds assent, or that he reserves the law for the Queen's pleasure. S. 61, provides, importantly, that the executive power of the Commonwalth is vested in the Queen, is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth. S. 64, which also appears in Chapter II of the Constitution dealing with executive government, provides that the Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish. It goes on to provide that such officers shall hold office during the pleasure of the Governor-General, shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth. That section, incidentally, provides a nice example of the way in which the various powers are given to the Governor-General. It provides that the Governor-General alone may appoint

1 That is the Constitution of the Commonwealth of Australia which is set forth in the ninth clause of the Commonwealth of Australia Constitution Act 1900.

2 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* 406 (1901).

officers but that Departments of State are to be established by the Governor-General in Council.

Of considerable importance is the way in which powers are conferred on the Governor-General and the way in which conditions precedent to his authorised actions are described. Most of the sections conferring power on him say that the Governor-General *may* do certain things. S. 5, for example, says that he *may* appoint such times for holding the sessions of Parliament as he thinks fit and *may* also from time to time prorogue the Parliament and *may* in like manner dissolve the House of Representatives. Other sections, far less numerous, use the word "shall". Thus under s. 21 in certain specified circumstances the Governor-General *shall* notify a Senate vacancy to the Governor of the relevant State. And the "deadlock" section, s. 57, in describing the necessary prerequisites to a double dissolution provides that certain things *shall* happen (e.g., no dissolution *shall* occur within six months of the expiry of the House of Representatives by effluxion of time). But it also provides that a joint sitting *may* deliberate and *shall* vote; and it further says that the Governor-General *may* dissolve the Senate and the House of Representatives simultaneously and *may* subsequently convene a joint sitting. As Lane, writing of this considered use of "may" and "shall" throughout s. 57, has observed "such assiduity cannot go for nothing".[3] In other words the use of "may" and "shall" in the Constitution in relation to the Governor-General is deliberate and indicates that, as a matter of construction, when the Constitution uses "may" it means "may". That is, it confers a discretion and not a discretion coupled with a legal obligation to exercise it in a particular way.

PREROGATIVE POWERS

Also relevant to a consideration of the Governor-General's powers is s. 2 of the Constitution, which reads:

> A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him.

The last part of this section is, in terms, wide enough to enable prerogative powers to be vested in the Governor-General. If a

[3] P. H. Lane "Double Dissolution of Federal Parliament" 47 *A.L.J.* 290 at 293.

Governor-General were ever to exercise prerogative powers it must have seemed necessary to those who drafted the Constitution that they be specifically assigned to him, for, certainly at and after Federation, the law was that some aspects at least of the prerogative did not automatically pass to a Governor or Governor-General. That is, he was not held to be in the same position as a Viceroy.[4] More recent observations in the High Court indicate that with the passage of time and under the influence of historical factors such as the Balfour declaration, a wider view should now be taken of the Governor-General's powers. Thus in *New South Wales v The Commonwealth (The Seas and Submerged Lands Case)* Jacobs J. said:[5]

> Clearly the Crown in the Australian Executive Council and in the Australian Parliament has one bound which the British Parliament has not, for it cannot transgress the Constitution. But subject to that Constitution it in Council and in Parliament has that pre-eminence and excellence as a sovereign Crown which is possessed by the British Crown and Parliament. Exactly when it atained those qualities is a matter of the constitutional history of the British Commonwealth of Nations largely reflected in the Imperial Conferences following the Great War. Legal recognition came through the *Statute of Westminster,* 1931 and its later adoption by Australia. Now the Constitution is the only limitation There is no gap in the constitutional framework. Every power right and authority of the British Crown is vested in and exercisable by the Crown in Australia subject only to the Constitution.

Earlier in the *Communist Party Case* in 1951, Williams J., in referring to s. 61 of the Constitution, was prepared to assume that, even at the date of the Constitution, the executive power of the Commonwealth included such of the then existing powers of the King in England as were applicable to a body politic with limited powers, that is to the Commonwealth.[6] These and other dicta[7] seem now to more nearly equate the Governor-General to a Viceroy. Another potential source of possible vice-regal power was alluded to in *Victoria v The Commonwealth (The Australian Assistance Plan Case).*[8] Barwick C.J. dissented in that case and was of the view that the

4 Musgrave v Pulido, (1879) 5 App. Cas. 102; Bonanza Creek Goldmining Company Limited v Rex, (1916) A.C. 566.

5 New South Wales & Ors v The Commonwealth (The Seas and Submerged Lands Case), (1976) 50 A.L.J.R. 218, 275.

6 Australian Communist Party v The Commonwealth, (1951) 83 C.L.R. 1, 230.

7 Such as those in Barton v The Commonwealth, (1974) 131 C.L.R. 477.

8 (1975) 134 C.L.R. 338.

disputed appropriation was beyond power, there being "no inherent executive power of disbursement".[9] But, even so, he concedes the existence of what he calls a not yet "fully explored" source of power which arises from the very formation of the Commonwealth and its emergence as an international state. These powers are, he says, "inherent in the fact of nationhood and of international personality".[10] Other members of the Court (including Gibbs J. in dissent) appear to agree with this view.[11] If these not yet fully explored powers include executive powers (the dicta seem to allow that the powers may be both legislative and executive) they are presumably vested in the Queen and exercisable by the Governor-General as required by s. 61 of the Constitution,[12] perhaps with the aid of s. 51 (xxxix).[13]

THE LETTERS PATENT

If these dicta correctly state the law that there is now no need and no room for an exercise of power by the Queen under s. 2 of the Constitution to assign powers to the Governor-General, because he now possesses all powers she could give him. That would by no means have been clear at the time of Federation or at any rate not as clear as it is now becoming. But, whether necessary or not, the power of the Queen under s. 2 to assign powers to the Governor-General has in fact been exercised by Letters Patent dated the 29th October, 1900, as amended from time to time.[14] These are, therefore, another potential source of the Governor-General's powers. Clause V in these Letters Patent provides that the Governor-General may on the sovereign's behalf exercise all powers under the Commonwealth of Australia Constitution Act 1900 "or otherwise" in respect of the summoning, proroguing or dissolving of Parliament. Sawer says, correctly, that this assumes by the use of the words "or otherwise" that there are powers to, for example, dissolve Parliament outside the Constitution. Such an assumption is, he argues, not correct and the power to do these things is to be found exclusively and clearly in ss. 5, 6, 28 and 57 of the Constitution.[15] A notable omission from his list is s. 61.

9 Id. at 353.
10 Id. at 362
11 Id. per Gibbs J. at 375, per Mason J. at 396-7 and per Jacobs J. at 406.
12 Id. per Jacobs J. at 406.
13 Id. per Mason J. at 397
14 Commonwealth Statutory Rules 1901-1956, Vol. V., 5301.
15 G. Sawer "The Governor-General of the Commonwealth of Australia" *Current Affairs Bulletin,* March 1976 Vol. 52 No. 10, 20 at 23.

EFFECT OF STATUTE ON PREROGATIVE

It is clear that a prerogative power, such as that of dissolution, can be abrogated, suspended or made subject to conditions by a statute, such as the Constitution. This was made clear by the House of Lords in *Attorney-General v De Keyser's Royal Hotel*,[16] and the principle has been accepted by the High Court. In so accepting it, Mason J. in *Barton v The Commonwealth*[17] regarded it as "well accepted" that a statute will not be held to abrogate a Crown prerogative unless by express words or necessary implication.[18]

THE POWER OF DISSOLUTION

On the wider view of the Constitution, exemplified by the quotation above from Jacobs J., all the prerogative powers that can be conferred on the Governor-General have been conferred by the Constitution itself, which therefore has completely abrogated the prerogative with no loss of power to the Governor-General. On that view, Sawer is right and the words "or otherwise" in cl. V can have no operation. But if the older narrow view is still the law, the prerogative has only been partly abrogated by the Constitution (e.g. in its provision for dissolution in the "particular and exceptional situation"[19] set out in s. 57). Remaining prerogatives (e.g. to dissolve in other than deadlock situations) still exist and can be conferred on the Governor-General pursuant to s. 2 of the Constitution; so cl. V has room to operate and, it is submitted, has operated to confer the balance of the prerogative power to dissolve (among other powers). On either view, the Governor-General is thus fully seized of the plenitude of the power to dissolve Parliament.[20] If this argument is correct, it is clear that the power to dissolve Parliament is not confined to a dissolution under s. 57. The power reposed in the Governor-General, derived from either of the above sources, is the Crown's power to dissolve

16 (1920) A.C. 508.

17 Supra note 7 at 501.

18 See also The Australian Assistance Plan Case, (1975) 134 C.L.R. 338 per Jacobs J. at 405-6.

19 The State of Western Australia & Ors v The Commonwealth (The Territorial Senators' Case), (1975) 134 C.L.R. 201, per Barwick C.J. at 216.

20 This approach can be applied to all the prerogative powers: either they are reposed in the Governor-General specifically or generally in some sections of the Constitution or arise from the fact of nationhood. If there be no specific or general vesting in that way one can look for some other grant thereof such as the Letters Patent referred to above.

Parliament, and that was not a power legally confined to dissolution in the circumstances or manner outlined in s. 57.[21]

But this argument encounters a difficulty in dicta by Barwick C.J. & Gibbs J. to the effect that dissolution of the Senate can only be effected by action pursuant to s. 57.[22] There would be no difficulty if those dicta were referable only to a dissolution of the Senate separately from the House of Representatives, for it is almost impossible to argue that a separate Senate dissolution is possible.[23] But in those dicta their Honours were speaking of a double dissolution, and would, it seems, confine Senate dissolution to a double dissolution under s. 57.

Such an approach is difficult to reconcile with the wide views of power set out earlier. In particular it is difficult to reconcile with Barwick C.J's identification of a source of power inherent in the fact of nationhood.[24] But, more importantly, such a view represents a limitation of or taking away from the power to dissolve Parliament; it confines dissolution to one particular case. Such a restriction did not exist in the prerogative. It can only arise if s. 57 is viewed by their Honours as abrogating the whole prerogative—an approach not in accord with the principles of interpretation applied to a statute's effect on prerogative, and an approach which, it is submitted, is not justified by the specific and particularistic terms of s. 57.

Another difficulty raised by confining Senate dissolution to a s. 57 situation is that it leaves a potentially serious gap in the machinery of government. Suppose that, in the future, a deadlock arose over supply and that there were no other measures fortuitously "stockpiled" so as to satisfy s. 57. Dismissal of a Prime Minister and appointment of a caretaker government to obtain supply would not be a solution as, supply being obtained, there would be no power in the Governor-General to dissolve Parliament. His main alternatives would then be to dissolve the House of Representatives or to dismiss the caretaker

21 Although the *effects* of dissolution of a parliament with an hereditary upper chamber will be different from the *effects* of dissolution where there is an elected upper house. In the latter case, an elction for a new upper house is required; in the former it is not.

22 Cormack v Cope, (1974) 131 C.L.R. 432, per Barwick C.J. at 449-50. Victoria v The Commonwealth (the P.M.A. Case), (1975) 134 C.L.R. 81, per Gibbs J. at 155-6. See also L. Katz "The Simultaneous Dissolution of Both Houses of the Australian Federal Parliament" (1976) 54 *Can. Bar Rev.* 392.

23 J. Goldring "The Royal Prerogative, and Dissolution of the Commonwealth Parliament" 49 *A.L.J.* 521. I say "almost impossible", because there remains the admittedly faint argument that a power to dissolve the whole (e.g. under the prerogative) includes a power to dissolve a part.

24 The Australian Assistance Plan Case, supra note 8.

government and re-appoint the Prime Minister who had initially failed to obtain supply—alternatives not likely to inspire the Leader of the Opposition to accept a caretaker commission. Suppose, then, that (for these reasons or others) the deadlock continued, and, well before the requisite three months was up, supply ran out, severe hardship and civil commotion emerged, and the government openly proclaimed its intention to circumvent the Constitution in obtaining funds. Or, more generally, suppose that such threats to civil order and constitutional government arose independently of any deadlock at all. Barwick C.J. and Gibbs J's dicta apparently mean that in those situations no dissolution of Parliament (i.e. no double dissolution) is possible. It seems implicit in their Honour's dicta that no matter how great the threat to the "execution and maintenance of (the) Constitution, and of the laws of the Commonwealth" (s. 61), the Governor-General could not bring about a double dissolution unless he presently had available a measure complying with the s. 57 prescriptions. If their Honours meant that, it is suggested, with respect, that such a potentially serious gap ought not be left without clear authority. So far from there being such authority, there are the arguments and dicta, outlined above, to the opposite effect, suggesting that the power to dissolve is not so confined.

POSSIBLE CONTROL OF VICE-REGAL POWERS

Whatever the precise extent of the Governor-General's powers, a question arises as to how, if at all, they may be controlled. Recent litigation has dealt with the extent to which the High Court will examine an allegedly invalid exercise of the Governor-General's discretionary powers, in particular the power of dissolution.

Earlier, in the *Communist Party Case*[25] the High Court was concerned with statutory discretions. But Dixon J. made the following general observations on the immunity of the Governor-General's decisions:[26]

> In the case of the Governor-General in Council it is not possible to go behind such an executive act done in due form of law and impugn its validity upon the ground that the decision upon which

25 (1951) 83 C.L.R. 1.

26 Id. at 178-9. Cf. P. W. Hogg "Judicial Review of Action by the Crown Representative" 43 *A.L.J.* 215. And on the availability of writs against those around the Governor-General, see the material in P. H. Lane, *The Australian Federal System* 845 n. 26 (1972).

> it is founded has been reached improperly, whether because extraneous considerations were taken into account or because there was some misconception of the meaning or application, as a court would view it, of the statutory description of the matters of which the Governor-General in Council should be satisfied or because of some other supposed miscarriage. The prerogative writs do not lie to the Governor-General. The good faith of any of his acts as representative of the Crown cannot be questioned in a court of law . . . "

Nevertheless there are dicta such as that of Lord Devlin in *Chandler v D.P.P.*[27] to the effect that although the Courts will not review the proper exercise of discretionary power they will intervene to correct excess or abuse. Lord Devlin in that case was speaking of prerogative powers just as much as those conferred by statute and the case before him concerned the defence prerogative power. However, His Lordship's view still leaves unanswered the question what is a "proper exercise" of discretionery power. More importantly it seems at variance with Dixon J's approach to the matter. Dixon J. indicated in the passage quoted that in the case of the Governor-General in Council, and presumably in the case of the Governor-General alone, even what His Honour called an improperly reached decision could not be reviewed by the Court.

Two recent High Court cases—*Cormack v Cope*[28] and *Victoria v The Commonwealth (P.M.A. Case)*[29]—have clarified the position to some extent, at least in relation to the power to dissolve conferred by the deadlock provision, s. 57. These cases indicate that the Court will go rather further than might hitherto have been thought in reviewing decisions taken by the Governor-General. They have held that where the Constitution lays down conditions precedent for the exercise of a discretion by the Governor-General the High Court has jurisdiction and will in an appropriate case exercise that jurisdiction to examine whether the conditions precedent have in fact occurred or been complied with.

Before the Governor-General can exercise either of his discretions under s. 57 (to dissolve Parliament or to convene a joint session) certain events must occur; for example, there must be the necessary interval of three months. Speaking of these pre-requisites Barwick C.J.

27 (1964) A.C. 763 at 810. Cf. Laker Airways Ltd. v Dept. of Trade [1977] 2 All E.R. 182, per Denning M.R. at 192.

28 Supra note 22.

29 Supra note 22.

in *Cormack v Cope* said " . . . it is not given to the Governor-General to decide whether or not in fact the occasion for the exercise of the power of double dissolution has arisen . . . only this Court can decide that fact if it comes into question"[30] Or, as Mason J. put it in the *P.M.A. Case,* s. 57 "presupposes the occurrence of specified events as facts; it makes no reference to the opinion of the Governor-General, a traditional formula which could and should have been invoked had it been intended to place his decision beyond the reach of the Court in a suit for a declaration of invalidity".[31] This is consistent with what Fullagar J. said some years earlier in the *Communist Party Case*:[32]

> A power to make laws with respect to lighthouses does not authorize the making of a law with respect to anything which is, in the opinion of the law-maker, a lighthouse. A power to make a proclamation carrying legal consequences with respect to a lighthouse is one thing: a power to make a similar proclamation with respect to anything which in the opinion of the Governor-General is a lighthouse is another thing.

In the result the Petroleum and Minerals Authority Act was held invalid, not because it went beyond Commonwealth legislative competence but because the Governor-General had erred when he formed the view that the necessary conditions for the exercise of his discretion to dissolve Parliament had arisen in respect of the Bill for the Act and consequently it was not a proposed law within the meaning of s. 57. The requirements of s. 57 are mandatory and not merely directory, and are justiciable.[33]

The ability to attack a decision of the Governor-General on such a matter in such a way raises acute difficulties that were alluded to by Gibbs J. in the *P.M.A. Case.*[34] Suppose, for example, that the provisions of s. 57 were invoked in respect of one proposed law only, and that the Governor-General's belief as to a condition precedent (for example the three month interval) was found subsequently to be erroneous. It now seems clear that the purported dissolution would be void. What then is the status of any subsequent joint session and of the law purportedly passed at such a joint session?

30 Supra note 22 at 450.
31 Supra note 22 at 183.
32 Supra note 25 at 258.
33 P.M.A. Case, supra note 22, per Barwick C.J. at 120, per Gibbs J. at 162, per Stephen J. at 180, per Mason J. at 183. See also The Teritorial Senators' Case supra note 19.
34 Supra note 22 at 156-7.

Some of the Justices in the *P.M.A. Case* suggest that the answer to that problem lies in the fact that Parliament would "in fact" be dissolved.[35] But as Zines has pointed out:[36]

> To say that Parliament is dissolved even though the dissolution is not authorized, is surely to conclude that the provisions laying down the condition precedent to dissolution are either directory, and not mandatory, or are not justiciable. The only relevant "fact" is a document executed by the Governor-General stating that the Houses are dissolved. To call the legal effect of that document a "fact" is not very helpful.

Gibbs J. suggests a possible way out of the dilemma by indicating that the s. 57 conditions do not attach to those sections of the Constitution—ss. 12 and 32—giving power to issue writs for elections. His Honour suggests that the issue of writs would be in order and thus a new Parliament would be validly assembled.[37] Stephen J. makes some observations to the same effect.[38] It is arguable that it would not be in order and in any case that does not satisfactorily solve the logical problem posed by Zines as to the existence or non-existence of the previous Parliament. It can hardly be the situation that the previous Parliament "invalidly" dissolved can continue to exist side by side with the "validly" assembled Parliament. But how can it cease to exist if the mandatory conditions precedent to dissolution have not been fulfilled? There is no readily apparent answer to the dilemma.

CONVENTIONS

Much of the debate about the events of November 1975 concerned control of the Governor-General's powers by the so-called conventions, which proved to be ill-defined and elusive. Their relevance and applicability were hotly contested by the disputants.

By the time the Constitution was drawn up there was available historical experience not only of the American and Canadian systems of federation, but British and Colonial experience of responsible government in which discretionary vice-regal powers had been claimed and exercised in deadlocks and crises of various kinds. Such powers were usually, but by no means invariably, exercised on advice, there

35 Id. per Barwick C.J. at 120, per Gibbs J. at 157, per Stephen J. at 178.
36 L. Zines "The Double Dissolutions and Joint Sitting" in G. Evans (Ed.) *Labor and The Constitution 1972-1975* 231 (1977).
37 Supra note 22, per Gibbs J. at 157.
38 Id. per Stephen J. at 138.

being no clear practice.[39] Had the founding fathers wished to change that (e.g. by removing discretions, by making it mandatory to act on advice or by otherwise incorporating "conventional" practice into the law), then the drafting of a new Constitution provided the opportunity to do that. But they produced a document which as noted, is punctilious in its use of *may* and *shall,* and is careful to distinguish as a matter of language the way in which powers are given to the Governor-General. It is submitted that in those circumstances one cannot assume that the discretionary powers deliberately granted were granted in the hope or expectation that they would almost at once ossify and be unavailable for use under the impact of alleged practices or conventions. It should not be assumed that even clear conventional practices evolved in a non-federal British system with an hereditary upper house and with no written constitution were intended to be automatically transplanted into the quite different governmental structure which came into being at Federation. Indeed Richardson has shown that the powers conferred on the Senate under s. 53 of the Constitution in relation to money bills were intended to be real powers to be used as and when occasion seemed to require to those in whom the powers were vested.[40] It is submitted that a similar approach should be adopted with regard to powers conferred upon other arms of government by the Constitution. Having been carefully conferred they should be taken to be real powers intended to be used when occasion requires.

Apart from these considerations, Australian Governors-General have claimed and at times have exercised their discretions, although not in exactly the same situation as arose in November 1975; but then that particular situation had not previously arisen in the relatively short time since Federation. It is enough to mention briefly that Lord Northcote, Governor-General, refused requests for dissolution in 1904 and 1905. In 1909 the then Prime Minister Fisher asked the Governor-General, Lord Dudley, to dissolve the House of Representatives after Fisher was defeated on a motion of no confidence. Fisher's advice and request for dissolution were refused by the Governor-General. (Fisher resigned, and Deakin was commissioned to form a new government

[39] Examples both ways may be found throughout H. V. Evatt, *The King and His Dominion Governors* 144, 220 (1936) and E. A. Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* 147 (1968).

[40] J. E. Richardson, "The Legislative Power of the Senate in Respect of Money Bills", 50 *A.L.J.* 273 at 283-4.

which survived for about a year). In the 1914 double dissolution Sir Ronald Munro-Ferguson, the Governor-General, on being asked for a double dissolution by Prime Minister Cook, sought advice from the Chief Jutice (with Cook's acquiescence) and Sir Samuel Griffith affirmed the Governor-General's position in his advice as an independent arbiter.[41] Sir William McKell, in 1951, appears to have asserted his right to come to an independent decision.[42] Most writers on the subject are emphatic on the existence of a personal discretion in the Crown, at least in relation to the grant or refusal of a dissolution. Forsey, writing in 1943, collected precedents of 110 grants of dissolution and 51 refusals in various places.[43]

But that is not to deny an expectation that in normal circumstances these discretions will be exercised in a particular way; that is, it may well be that a practice or usage will normally give some degree of predictability to the use of these powers. Hanks suggests that conventions stabilise a particular distribution of power while allowing for gradual evolutionary shifts in power. That is, they describe the current distribution of power. He also suggests that they link the political system to the general consensus of what may be legitimately done with the political process. He says "an action that is likely to destroy public respect for the existing distribution of powers would not be described (in a democratic society) as conforming to the political rules or conventions".[44] If that is the role of conventions, one conclusion which could be drawn from the result of the election following November 11, 1975, is that the electorate evidenced its overwhelming support (if not respect) for the existing distribution of power and for the way in which that power was exercised in November, 1975.[45] It seems clear that at Australia's present state of constitutional development, conventions, if they exist, are only helpful in prediciting or regulating normal business or decision making. They do not help, and almost seem to hinder, analysis of new or "unconventional" occurrences.

41 These four incidents are discussed in Evatt, supra note 39, Chs. V and VI and Forsey, supra note 39 at 35 et seq.

42 This and the earlier examples are dealt with by P. J. Hanks in "Vice-Regal Initiative and Discretion", *Aust. Current Law Digest* Dec. 1975, 294.

43 Forsey, supra note 39 at 65.

44 P. J. Hanks "Parliamentarians and the Electorate" in G. Evans (Ed.), supra note 36 at 187.

45 In the election, the former Opposition under Mr. J. M. Fraser was voted into office with a record majority, and secured control of both houses.

POSSIBLE JUDICIAL CONTROL

Some have viewed with disquiet the events of 11th November, 1975, and have urged that controls be introduced to prevent any repetition of those events. They have usually assumed that definition and enforcement of conventions or constitutional amendment are the two possible ways of controlling vice-regal discretions. But if the technique which the High Court showed it was willing to use in the *P.M.A. Case*[46] is considered in association with dicta of Isaacs J. in earlier cases, a third possibility emerges, namely greater judicial control by the High Court over the circumstances in which discretions of this type can be used.

The dicta occur in two cases on the defence power. S.51(vi) of the Constitution confers the defence power on the Parliament and it is therefore a legislative and not an executive power. The power has been described as a purposive power by which is usually meant that it is not necessarily related to some class of activity or to some subject matter or class of undertaking or operation but to the purpose of defence.[47] In that respect it is not dissimilar to prerogative or executive powers which likewise could be described as purposive rather than subject oriented.

The defence power itself is also a constant power but the traditional formulation of it adhered to in the High Court is that though the meaning of the defence power does not change its application depends upon facts and as the facts change so may the actual operation of the power.[48] In ascertaining the facts which determine the extent of operation of the power the Court can and does take judicial note of such things as the character of the war, its notorious incidents and its far-reaching consequences.[49]

The first of the two cases is *The Commonwealth v The Colonial Combing, Spinning and Weaving Company Limited (the Wool Tops Case)*[50] in which Isaacs J. spoke of the insufficiency of the mere words of s. 61 or the mere words of other sections of the Constitution, taken by themselves and apart from the circumstances of the moment to form an invariable measuring rod of Commonwealth executive power.

46 Supra note 22.
47 Stenhouse v Coleman, (1944) 69 C.L.R. 457.
48 Andrews v Howell, (1941) 65 C.L.R. 255.
49 Stenhouse v Coleman, supra note 47 at 469; Communist Party Case, supra note 6 at 256.
50 (1922) 31 C.L.R. 421 at 442.

His Honour said "It is equally undoubted law that in presence of national danger in time of war the prerogative attracts, by force of *the circumstances that exist,* authority to do acts not otherwise justifiable" (emphasis added). "But", His Honour continued, "it must appear to the Court, if the executive action is challenged . . . that the Executive considered this step necessary for the national security and in fact acted on that basis". Normally the Court would accept the judgment of the Executive and cannot, His Honour said, investigate reasons. But he continued "unless the Executive satisfies that condition the Court is free to inquire as to the legality of the step complained of". A little later His Honour reverted to this theme and speaking in more general terms of s. 61 and not especially of defence powers pointed to what he considered was another "very striking instance of the impossibility of regarding the mere written words of the Constitution as affording the only test of validity. *Those written words have to take into account the circumstances of the moment* and the extent of constitutional development"[51] (emphasis added). Those words suggest that executive powers generally might be subject to control in much the same way as the defence power has been controlled, i.e. their operation may vary depending on the facts or circumstances.

The above passage is not only one in which Isaacs J. indicated that such an aproach might be possible. Earlier in the case of *Farey v Burvett*[52] His Honour had also referred to, among other things, s. 61 of the Constitution and, in a passage which anticipated that cited earlier from a more recent judgment by Jacobs J.,[53] His Honour said that these provisions carry with them the Royal war prerogative "and all that the common law of England includes in that prerogative so far as it is applicable to Australia". He went on to state that it was not then necessary for him to decide the full extent of the prerogative but he described it as being "certainly great in relation to the national *emergency which calls for its exercise*"[54] (emphasis added) and he cited *Chitty on the Prerogatives of the Crown.* His Honour said that the prerogative was included in the Commonwealth powers and indicated what he described as the completeness of authority vested. The Constitution did provide for a distribution of powers but in so doing His Honour said it contemplated in general the "normal orderly peaceful

51 Id. at 446.
52 (1916) 21 C.L.R. 433.
53 Supra note 5.
54 Supra note 52 at 452.

progress of the nation, working out its own destiny . . . "[55] This suggests that in other than normal situations the distribution of powers might change. In these passages His Honour was speaking, not only of legislative power but of the executive power. While it is true that he was dealing with the defence prerogative in these remarks, they seem quite capable of being applied to other prerogative powers vested by s. 61 or otherwise. His Honour expressed himself in general terms.

Applying this suggested approach to the events of November 1975 one could say that the Governor-General was confronted with a situation not previously encountered, at least in the same form, and indeed a situation which has been described as a crisis and a situation calling for a swift solution. This emergency called forth a greater scope for the exercise of his powers under s. 61 (or possibly under the Letters Patent) which he could have exercised even had there not been a fortuitous stockpile of measures satisfying s. 57. His action might therefore be characterized as quite legal because of the emergency and departure from a normal situation. By the same token it would not be legal for him to dissolve both houses in the state of affairs that exists today, there being no crisis or emergency (and no "deadlock" situation). Further, a Court could, it is suggested, take judicial notice of the facts which pertained at the time of the 1975 difficulties or at any other notorious public emergency. Clearly, an expansion of the law in this direction is not a perfect answer. The main problem is to identify the purpose against which the exercise of power is to be measured. Even if it be confined to the purposes mentioned in s. 61, that is not as precise as, say, the purpose of "defence". Nevertheless it would seem to give some greater measure of certainty as to when the Governor-General could or could not legally act compared with the futile and profitless debate about control by conventions. The suggested approach gives the judiciary a role (if it wants it) in resolving conflicts between legislature and executive; and it is, or can be made, consistent with the reasoning in the *P.M.A. Case* in that the court would not be reviewing the actual discretionary decision, but would be deciding if the circumstances precedent to its exercise (i.e. the appearance of a sufficient emergency) had arisen.

It is not argued that the above method of control represents the state of the law at the moment. Rather, it is one way it could develop should it be thought necessary or desirable to exert more control over

[55] Id. at 453.

vice-regal discretions. Conventions are ineffectual, constitutional amendment unlikely and bloody revolution distasteful. The above offers one possible way forward within the existing Constitution and law.[56]

[56] The writer acknowledges a useful discussion with his colleague, Mr. Koroknay, on this last portion of the paper. Responsibility for it remains with the writer.