A Governor for the Seventh State: Codifying the Reserve Powers in a Modern Constitutional Framework

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Should the reserve powers of State Governors be codified? With a view to the forthcoming referendum on an Australian republic, this essay examines the proposals in the Draft Constitution for the State of the Northern Territory for a modern Office of State Governor. The author focuses on the extent to which codification of the conventions governing the use of the reserve powers would fetter the Governor's ability to exercise independent discretion, and whether such fetters have any place in a State constitutional framework.

IN the lead-up to the referendum on an Australian republic, the functions and powers of the Governor-General have been the subject of intense public scrutiny and debate. The same cannot be said with respect to State Governors, whose on-going role in the federal system has been largely ignored. With this in mind, the Northern Territory's long campaign to gain Statehood has the potential to benefit the Federation as a whole, for it has been the only jurisdiction to examine seriously both the status of the Office of the Governor and the appropriate treatment of the Governor's reserve powers in a modern constitutional setting.

The constitutional framework for a State of the Northern Territory is set out in the Draft Constitution for the State of the Northern Territory,[1] a document endorsed by the Northern Territory Parliament shortly before the September 1998 referendum on Statehood. Although the defeat of the referendum initially put the future of the Draft Constitution in some doubt, it is widely believed that the electorate's

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1. Hereafter 'the Draft Constitution'.

reluctance to endorse Statehood can be attributed to procedural flaws in the 'Yes' campaign, rather than deep-seated resistance to the proposed Constitution per se.[2] On this basis, the current Draft Constitution will continue to serve as the template for further development, subject to the proviso that the final decision on the form of a new State Constitution rests with the Commonwealth Parliament.[3]

From a structural perspective, the Draft Constitution has two distinctive features. First, by providing for the State Governor to be directly appointed by the Premier and hold office at the Premier's pleasure, it anticipates the amendment of section 7 of the Australia Acts 1986 (Cth & UK) and the transition to an Australian republic.[4] Secondly, unlike any existing State Constitution, it expressly codifies the conventions which govern the use of the Governor's reserve powers. A leap into the constitutional dark, the nature and effect of this codification will be the focus of this article.

THE OFFICE OF THE GOVERNOR — AN OVERVIEW

Prior to 1986, a State Governor possessed only the powers of the monarch to the extent that they were committed to him or her expressly or by implication. He or she held the powers expressly given by the Letters Patent (as explained or limited by the Governor's Instructions), together with the powers necessary for the internal administration of the State, having regard to the framework of the State Constitution. This state of affairs changed with the passage of the Australia Act 1986 (Cth), which 'patriated' the monarch's prerogative powers and effectively removed all restrictions on a Governor's exercise of the royal prerogative — except where limited by a State Constitution, State statute or revised Letters Patent.

Pursuant to section 7 of the Australia Act 1986 (Cth), the powers and functions of the monarch in respect of a State can only be exercised by the Governor, who

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2. Standing Committee on Legal and Constitutional Affairs *Report on Appropriate Measures to Facilitate Statehood* (NT Legislative Assembly, April 1999) 31-37.
3. In accordance with s 121 of the Australian Constitution, the Commonwealth 'may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit'.
4. Cl 3.2(1) of the Draft Constitution provides that the Governor 'shall be appointed by the Premier and shall hold office during the Premier's pleasure'. While there can be no doubt that such a provision is presently unconstitutional, the intention of the drafters was clearly to frame a 'republican' State Constitution, predicated on the advent of an Australian republic. Should the Northern Territory gain Statehood before this occurs, cl 3.2(1) will need to be amended to conform with s 7 of the Australia Act 1986 (Cth), which provides for State Governors to be appointed and dismissed by the Queen. The irony, of course, is that the current cl 3.2(1) accurately reflects modern constitutional practice: the Queen has no real discretion to act against the advice of the Premier.

acts in the capacity of the Queen's representative. The only exception relates to the power to appoint and dismiss the Governor, which remains vested in the Queen until such time as the States sever their links with the monarchy.[5]

For all practical purposes, the effect of section 7 has been to transfer powers and functions from the Queen to the State Governors. The former Western Australian Governor, Sir Francis Burt, has gone further, arguing that this transfer has terminated any application of the monarch's prerogative in the States, thus eliminating the Governor's reserve powers.[6] Nevertheless, history has not been kind to Sir Francis's views: his belief that he was totally subject to the advice of the Premier during his term of office is out of step with the views of other commentators.[7]

Before I turn to the reserve powers, it should be noted that most of the powers exercised by State Governors on a day-to-day basis are conferred by Acts of Parliament. These powers are of an administrative nature[8] and are invariably exercised on the advice of the Executive Council, a body which comprises the Governor and a small number of Ministers. State Governors are also vested with the 'ordinary' constitutional powers necessary for the proper functioning of government. Exercised on ministerial advice, these include the power to issue writs for elections, appoint judges and assent to Acts of Parliament. It is sufficient for present purposes to note that the Draft Constitution for the State of the Northern Territory does not depart from this template in any material respect.

All State Governors are entitled to be informed, to be consulted, and to encourage and warn.[9] According to the former Victorian Governor, the Hon Richard E McGarvie, the counselling of Ministers is one of the Governor's most important functions, for it gives the office 'real potential for influence over the conscience of government affairs'.[10] Further to this aim, the Draft Constitution gives the Governor a 'one-off' power to return a proposed law to Parliament with amendments that he

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5. S 7 of the Australia Act 1986 (Cth) provides in part:
   1. Her Majesty's representative in each State shall be the Governor.
   2. Subject to subsections (3) and (4) below, all powers and functions of Her Majesty in respect of a State are exercisable only by the Governor of the State.
   3. Subsection (2) above does not apply in relation to the power to appoint, and the power to terminate the appointment of, the Governor of a State....
   5. The advice to Her Majesty in relation to the exercise of the powers and functions of Her Majesty in respect of a State shall be tendered by the Premier of the State.
6. F Burt *Monarchy or Republic: It's All in the Mind* (1994) 24 UWAL Rev 1, 5.
7. For example, Professor Peter Boyce argues that Sir Francis's erroneous opinion 'could have occasioned some embarrassment had a constitutional crisis or deadlock occurred during his incumbency': P Boyce 'The Reserve Powers of State Governors' (1994) 24 UWAL Rev 145, 147.
8. For example, the making of regulations under Acts and appointments to public offices.
9. These components of a Governor's role were first identified by Sir Walter Bagehot in the late 19th century: W Bagehot *The English Constitution* (London, 1867).
10. RE McGarvie 'Governorship in Australia Today' (1994) 90 Victorian Bar News 45, 50.

or she suggests (whether to correct drafting errors or otherwise).[11] It also requires him or her to 'uphold and maintain the Constitution' and administer the government of the State.[12]

THE RESERVE POWERS OF STATE GOVERNORS

As a matter of constitutional jurisprudence, State Governors are vested with a limited number of reserve powers that may be exercised without, or contrary to, the advice of Ministers. In practice, the use of each reserve power is governed by constitutional conventions, the scope of which will be examined in this section.

Most commentators agree that the Governor has four reserve powers, being the power to appoint a Premier, the power to dismiss a Premier, the power to refuse to dissolve Parliament and a (limited) power to dissolve Parliament.[13] The former Victorian Governor, Richard McGarvie, would add a further power to that list, namely an entitlement to decline to act in accordance with ministerial advice to do something clearly illegal, whether as Governor in Council or in signing a warrant for the withdrawal of money from the Consolidated Fund.[14]

The conventions governing the exercise of the reserve powers have, up to this point, been unwritten and non-justiciable. The absence of written parameters has had certain advantages, for it has allowed the conventions to adapt to new situations and evolve with the institutions to which they relate. On the other hand, the imprecise scope of the conventions has, on occasion, shrouded their exercise in controversy, an obvious example at a State level being the dismissal in 1932 of the Lang

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11. Pursuant to cl 2.2(2):
    (1) Every proposed law passed by the Parliament shall be presented to the Governor for assent.
    (2) On the presentation of a proposed law to the Governor for assent, the Governor shall, subject to this section —
        (a) declare that he or she assents to the proposed law; or
        (b) return the proposed law to the Parliament with amendments that he or she recommends.
    (3) If the Governor returns a proposed law as provided in subsection (2)(b), the Parliament shall consider the amendments recommended by the Governor and the proposed law, with those or any other amendments, or without amendment, may be again presented to the Governor for assent and the Governor shall assent to the proposed law or, as the case may be, the proposed law as so amended.
12. Cl 3.2(2).
13. Republican Advisory Committee *An Australian Republic: The Options* Vol 1 (Canberra: AGPS, 1993) 88; Boyce supra n 7, 147. It should be noted that Mr Brad Selway QC, the South Australian Solicitor-General, does not recognise the existence of an independent reserve power to dissolve Parliament.
14. McGarvie supra n 10, 51.

Government of New South Wales (of which more later).[15] This raises one of the most persuasive arguments for the codification of the reserve powers, namely the need to ensure that they *can* be exercised in the appropriate situation. According to Dr HV Evatt, a former political leader and High Court judge:

> Perhaps the greatest advantage to be derived from defining the extent of the discretion as to the exercise of the reserve powers is that the absence of definition may prevent an over-careful Governor-General from acting when he should, just as it may enable an imprudent or over-zealous Governor-General to act where no reasonable grounds for intervention exist. In each case an error may be fatal to the interests of the people which are committed in the last resort to the care of the Governor-General or Governor.[16]

Dr Evatt's views are supported by Professor George Winterton as well as by the aforementioned Sir Francis Burt, a Governor notable for his belief that the reserve powers no longer exist.[17]

Of course, support for codifying the reserve powers is by no means widespread. The former Victorian Governor, Richard McGarvie, argues that the unwanted by-product of codification is inflexibility:

> Because there is infinite variety in the ways a democratic system may be brought to stalling point or may be abused, it would be very difficult to set out all the circumstances in which the reserve power may be exercised or to do other than provide the Governor with the existing limited discretion to deal with such a situation if it arises.[18]

As an alternative, McGarvie advocates the use of constitutional provisions which would limit the circumstances in which the democratic system itself could be stalled or abused. Although further analysis of this suggestion is outside the scope of this article, I suspect that such provisions might function in the same way as self-executing orders, whereby a certain event would trigger a certain legal response. While superficially attractive, the McGarvie approach is far less conducive to good governance than the codification of existing conventions: the former would create new constitutional norms, whereas the latter would simply formalise current practice.

If the basic features of the conventions governing the exercise of the four reserve powers were in dispute, a legitimate codification exercise would not be

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15. Republican Advisory Committee supra n 13, Vol 1, 89. See infra p 234.
16. HV Evatt *The King and His Dominion Governors: A Study of the Reserve Powers of the Crown in Great Britain and the Dominions* 2nd edn (London: Cass, 1967) 306.
17. Burt supra n 6. Focusing on the power to dismiss a government, Sir Francis argues that the extent of that power should be marked out, and the objective facts conditioning the exercise of the power should, at least in general terms, be laid down by law.
18. McGarvie supra n 10, 51.

possible. However, with the obvious exception of the dismissal of a government for failure to obtain supply, there is a broad consensus as to their core.[19] In so far as codification simply incorporates conventions in a constitution *to the extent that they reflect contemporary practices in the Westminster system*, it is difficult to argue that the Governor's powers and functions have been altered in any fundamental sense.[20] This approach, adopted by the framers of the Draft Constitution, bears no real resemblance to the expansive codification promoted by the supporters of an elected Australian Head of State, which would entrench powers that are well beyond the reach of both the present Governor-General and his State counterparts.[21]

THE CODIFICATION OF THE RESERVE POWERS IN THE DRAFT CONSTITUTION

This section examines the nature of the conventions which govern the exercise of the reserve powers, and the manner and extent to which such conventions have been codified in the Draft Constitution for the State of the Northern Territory. It should be noted that I have not drawn any real distinction between the reserve powers vested in the Governor-General and the equivalent powers vested in State Governors: for all intents and purposes their scope is identical.[22]

THE POWER TO APPOINT A PREMIER

The conventions relating to the appointment of the Premier give effect to the general principle that the appointee must have the confidence of the Lower House of Parliament. Where an appointment follows a general election in which one party (or pre-existing coalition) has won a majority of seats, the outgoing Premier will traditionally advise the Governor to ask the leader of the majority party to

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19. G Winterton 'Reserve Powers in an Australian Republic' (1993) 12 U Tas LR 249, 252.
20. In 1987, the Northern Territory Parliament's Select Committee on Constitutional Development suggested that the representative of the Crown should be required as a matter of law to act in accordance with the advice of his or her Ministers. The basis for this recommendation was that the incorporation of this convention into the constitution would simply enable the law to reflect contemporary practice in the Westminster system: see Select Committee on Constitutional Development *Discussion Paper on a Proposed New State Constitution for the Northern Territory* (NT Legislative Assembly, Oct 1987) 53.
21. See further Winterton supra n 19, 254.
22. This presumption does not apply where the constitutional framework of the Commonwealth and States differs in a material respect. An obvious example is the Governor-General's power to dissolve both Houses of Parliament pursuant to s 57 of the Commonwealth Constitution: since there is no equivalent provision in a State Constitution, comparison of the conventions governing the exercise of the power would be meaningless.

form a government. The only opportunity for independent exercise of the Governor's discretion arises when the election produces a hung Parliament. In that circumstance, the Governor should commission the person who appears most likely to be able to secure the confidence of the Parliament. Should that person then lose a motion of confidence or fail to obtain supply (the loss of which in the Lower House would be a constructive motion of no confidence), the Governor should appoint any other person in whom the Lower House expresses confidence.[23]

In the aftermath of the 1989 Tasmanian election, the State Governor, Sir Phillip Bennett, refused to commission the leader of the Australian Labour Party — in whom Parliament had expressed confidence — until he was satisfied that the support of five Green Independents would endure for a reasonable period. By taking this course of action, the Governor failed to observe the hung Parliament convention, pursuant to which he should have appointed Mr Field as Premier without further consultation. Arguments that the Governor's actions created a new convention[24] have not been supported by further practice.

The Draft Constitution codifies the appointment conventions in the following manner:

3.8 Appointment of Premier and other Ministers

(1) Subject to this section, the Governor shall, from time to time, appoint as the Premier the member of the Parliament who, in the Governor's opinion, commands or is likely to command the general support of the majority of the members of the Parliament.

(2) If a vote of no confidence in the government of the State has been carried in the Parliament by a majority of its members present and voting, and the Governor considers that there is another member of the Parliament who commands or is likely to command the general support of the majority of the members of the Parliament, the Governor may terminate the appointment of the Premier, and may do so without the need to refer the matter to, or act on the advice of, the Executive Council or the Premier.

(3) If a vote of no confidence referred to in subsection (2) includes a recommendation that a named member of the Parliament should be appointed as the Premier in place of the Premier against whose government the vote is carried, the Governor shall act on that recommendation and appoint that member accordingly.

Clause 3.8 preserves the Governor's ability to exercise common sense in commissioning the person most likely to command majority support. However, in

23. A motion of this type is known as a 'constructive no confidence motion': see Republican Advisory Committee supra n 13, Vol 2, 247.

24. ID Killey 'Tasmania: A New Convention?' (1991) 2 PLR 221.

a situation where the Parliament has moved a *constructive* motion of no confidence, the Governor is bound to appoint the person in whom confidence has been expressed. This is the traditional formulation of the hung parliament convention, as opposed to Sir Phillip Bennett's variation.

THE POWER TO DISMISS A PREMIER[25]

This is the most controversial of the reserve powers. Commentators generally agree that there are two situations in which a Governor can validly dismiss an elected Premier: upon a loss of confidence in the Lower House, and where the government engages in serious illegal or unconstitutional conduct. A third situation, where the government is unable to obtain supply in the Upper House, is only relevant to jurisdictions with both Lower and Upper Houses of Parliament. As the State of the Northern Territory will only have a Lower House, the conventions governing the exercise of the dismissal power where supply cannot be obtained fall outside the scope of this article.

Loss of confidence

If the Lower House of the State Parliament passes a motion of no confidence in the Premier (or defeats a motion of confidence moved by the government or refuses to pass appropriation),[26] constitutional convention dictates that the Premier must either tender his or her resignation or advise the Governor to dissolve the Parliament.[27] Should the Premier fail to do so, and the Governor's attempts to induce him or her to follow the convention are unsuccessful, the Governor is entitled to use the reserve power to restore constitutional order.[28]

The application of this principle is less clear-cut where the Premier has informed the Governor that the confidence of the House can be restored. The South Australian Solicitor-General, Mr Brad Selway QC, suggests that in such circumstances the Governor should give the Premier some time to prove his or her claim.[29] Although there are no Australian precedents in this regard, it is useful to

25. This power is also known as the power to dismiss a government.
26. A loss of confidence in the Premier may also be demonstrated if the Lower House either: (i) defeats a matter where the government has previously indicated to the House that a defeat would be regarded as a loss of confidence; or (ii) if the Lower House fails to approve an appropriation Bill.
27. In the case of a constructive motion of no confidence, the accepted convention is that the Premier should simply resign, thereby enabling the Governor to appoint the person who has already been nominated by the Parliament. Where the Premier fails to resign, the Governor is entitled to dismiss him or her.
28. AR Blackshield & G Williams *Australian Constitutional Law and Theory: Commentary and Materials* 2nd edn (Sydney: Federation Press, 1998) 440.
29. BM Selway *The Constitution of South Australia* (Sydney: Federation Press, 1997) 39.

note that the Chief Minister of British Columbia was dismissed in 1900 after he failed to reverse a Parliamentary loss of confidence within four days.

Illegality

The Governor is, by convention, entitled to dismiss a Premier whose government is engaging in conduct that is manifestly illegal or unconstitutional. However, as there is no real agreement as to the nature of such conduct, the conventions governing the proper exercise of the power are unclear.

According to Professor Winterton, the power of dismissal can be exercised when three criteria have been established. First, the government has persisted in breaching a fundamental constitutional provision. Secondly, the government has ignored calls from the Governor to refrain from this conduct. Thirdly, the contravention cannot be brought before the courts.[30]

The difficulty, of course, is to identify a fundamental constitutional breach that is not justiciable. Unlawfully extending the life of a Parliament does not fall into this category: since all State Constitutions prescribe the term of the House(s), conduct of this type could be dealt with by State Supreme Courts. Bribery or corruption would not ordinarily involve a constitutional breach, while refusal to act in accordance with a Commonwealth constitutional requirement would be a matter for the High Court.

Since Federation, there has only been one instance of dismissal on the grounds of illegality: the sacking of New South Wales's Lang Government in 1932. Seeking to evade Commonwealth attempts to seize New South Wales revenue, Premier Lang ordered State public servants to deal with government funds in a manner that clearly breached Commonwealth regulations. One month later, the Governor, Sir Philip Game, asked the Premier to withdraw the directive on the basis that the Crown was breaking the law of the land. When Lang refused (and then resisted pressure to resign) Game dismissed him and commissioned the Leader of the Opposition as Premier.[31]

From a critical perspective, the Lang dismissal did not satisfy the Winterton criteria. While clearly unconstitutional, the Lang Government's deliberate breach of Commonwealth law was always justiciable. In this light, it would appear that the modern scope of the dismissal power should be limited to circumstances where the courts have ruled that a government's actions are manifestly illegal, and the Premier has failed to take the necessary steps to address the illegality.[32]

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30. G Winterton *Monarchy to Republic: Australian Republican Government* (Oxford: OUP, 1986) 46.
31. Republican Advisory Committee supra n 13, Vol 2, 260.
32. In the context of examining the legality, or otherwise, of the actions of former NSW Premier Nick Greiner, the NSW Supreme Court ruled that dismissal on the grounds of illegal conduct is likely to occur 'only in the most extreme circumstances': *Greiner v ICAC* (1992) 28 NSWLR 125, 141.

In the context of Northern Territory Statehood, the Draft Constitution drastically circumscribes the scope of the dismissal conventions. Despite the Clause 3.2 grant of power to the Governor to uphold the Constitution and administer the government of the State, this grant is provided 'subject to this Constitution' and on the basis that the Governor shall, except as otherwise expressly provided in the Constitution, act only in accordance with the advice of the Executive Council. Accordingly, the Governor's ability to terminate a Premier's appointment against advice will be limited to circumstances where the Constitution contains an express provision to this effect.

Pursuant to Clause 3.10 of the Draft Constitution, the commission of the Premier, or any other Minister, may be terminated where:

(i) he or she, by reason of resignation or disqualification for office, ceases to be a member of the Parliament;

(ii) his or her appointment is terminated under section 3.9(2) or (4), which provide that:
- a vote of no confidence in the government of the State has been carried by a majority of the Parliament, and the Governor considers that there is another member who could command the support of a parliamentary majority;[33] or
- the Governor is advised by the Premier to terminate the appointment;[34]

(iii) he or she resigns office in writing signed by him or her and delivered to the Governor.

In effect, Clause 3.10 limits the discretion of the Governor to exercise the dismissal power to circumstances where the Premier has lost a motion of no confidence. As the conventions relating to dismissal on the grounds of illegality are not codified in the Draft Constitution, it is clear that the Governor will have no role in the resolution of any constitutional crisis arising from a Premier's conduct. In such a situation, there will only be two potential arbiters: the courts or the Parliament.

The exclusion of the power to dismiss on the grounds of illegal conduct represents a significant departure from the currently accepted parameters of a Governor's reserve powers. It is not, however, a new idea. In 1988, the Hawke Government's Constitutional Commission recommended that the Governor-

33. In this situation, the Governor may terminate the appointment of the Premier, and may do so without the need to refer the matter to, or act on the advice of, the Executive Council or the Premier: s 3.9(2).

34. S 3.9(4).

General's powers be restricted in this way, on the basis that 'allegations of illegality can and, in our view, should be adjudicated in courts of law; likewise allegations that the Constitution has been, or is about to be, contravened'.[35] The Draft Constitution goes no further than this recommendation.

THE POWER TO DISSOLVE PARLIAMENT

In contemporary Australian practice, a Governor can only dissolve the Parliament on the advice of the State Premier or the Executive Council. As a consequence, some commentators, including the current South Australian Solicitor-General, argue that there is no reserve power to this effect,[36] or contend that it is merely a corollary of the reserve power to dismiss a Premier.[37]

Against this trend, the Draft Constitution gives the Governor a limited power to dissolve the Northern Territory Parliament without acting on advice. While Clause 2.11(3) sets out the commonly accepted position that — subject to this section — the Governor shall not dissolve the Parliament except on the advice of the Executive Council or the Premier, Clause 2.11(4) goes further than any non-codified convention, as follows:

> **2.11 (4)**
> If —
> (a) the Premier resigns or vacates his or her office or a vote of no confidence in the government of the State is carried in the Parliament by a majority of its members present and voting (other that a vote of no confidence referred to in section 3.8(3)); and
> (b) the Governor has not been able, within such time as he or she considers reasonable, to appoint a member of the Parliament who the Governor considers commands or is likely to command the general support of a majority of members of the Parliament to form a government,
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> the Governor may dissolve the Parliament, issue a writ for a general election of members of the Parliament and determine the date on which the general election shall be held, and may do so without the need to refer the matter to, or act on the advice of, the Executive Council or the Premier.

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35. Australian Constitutional Commission *Final Report* Vol 1 (Canberra: AGPS, 1988) 326-327. A majority of the Commission was also of the view that even where the Prime Minister had been found guilty of illegal acts, the question whether such conduct warranted his or her removal from office should be for the House of Representatives to decide, not the Governor-General: 327.
36. Selway supra n 29, 45, citing R Brazier *Constitutional Practice* 2nd edn (Oxford: OUP, 1994) 189.
37. Republican Advisory Committee supra n 13, Vol 1, 88.

It is clear that this sub-clause is intended to solve a constitutional deadlock arising from the failure of any one party to gain sufficient support on the floor of the Parliament to enable it to form a government. However, in a decade where minority governments have held power in New South Wales, Queensland, South Australia and Tasmania, the intervention of a Governor to settle a matter that should be resolved by general support of a majority would be inappropriate. In this context, the decision by the framers of the Draft Constitution to breath new life into a defunct reserve power is overly cautious.

THE POWER TO REFUSE TO DISSOLVE PARLIAMENT

In the normal course of events, a Governor should dissolve Parliament on the advice of his or her Premier. However, the conventions relating to dissolution recognise that the Governor may refuse to follow the Premier's advice in the following circumstances:

(i) Where there is a vote of no confidence in the government early in the life of the Parliament, and it is clear that there is an alternative person who could command majority support and form a new government.[38]

(ii) Where an election delivers no clear winner and the (caretaker) Premier requests another dissolution before the Parliament can attempt to find a workable government.

(iii) Where any constitutional requirements for a dissolution have not been complied with (eg, a 'fixed term' or 'minimum term' provision).

At a federal level, Governors-General have refused dissolutions on three occasions, all of which occurred during the first decade of federalism. The only recent event worth noting took place in 1983, when Prime Minister Malcolm Fraser advised the Governor-General, Sir Ninian Stephen, to dissolve both Houses of the Commonwealth Parliament. Sir Ninian refused to comply with the request until the Prime Minister provided him with further information as to the manner in which the requirements of section 57 of the Commonwealth Constitution had been met.[39] No State Governor has refused a dissolution since 1953, when the Victorian Governor denied Premier Holloway's request on the grounds that his government had only been in office for seven days.

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38. Selway supra n 29, 45.
39. As a matter of political interest, in the period between Sir Ninian Stephen's initial refusal to grant a dissolution and his subsequent acceptance of the Prime Minister's advice, the then Leader of the Opposition, Bill Hayden, was successfully challenged for the ALP leadership by Bob Hawke.

The Draft Constitution does not codify the conventions surrounding the reserve power to refuse to dissolve Parliament. Although Clause 2.11 expressly sets out the circumstances in which the Governor can exercise his or her discretion to dissolve the State Parliament, it is silent in relation to refusal. This raises the issue of whether these conventions would continue to apply in the new constitutional framework.

Clause 2.9 of the Draft Constitution provides:

> Subject to section 2.11(4) a writ for a general election shall be issued by the Governor on the advice of the Executive Council or the Premier.

Read in conjunction with Clause 2.11(1)[40] — which provides for the election date to be determined by the Governor on the advice of the Executive Council or the Premier — and the four year term limit set out in Clause 2.11 (2),[41] it is apparent that the Governor has no independent discretion to refuse a dissolution. As previously discussed, he or she can certainly take unilateral action to *dissolve* the Parliament in exceptional circumstances. But the Governor's reserve power to deny the Premier an election is clearly extinguished.

CONCLUSION

The Draft Constitution for the State of the Northern Territory takes a bold and entirely modern approach to the reserve powers of the State Governor. Unlike existing State Constitutions, which derive their dependence on unwritten constitutional conventions from the 19th century Westminster model, the Draft Constitution reflects the contemporary preference for structural transparency and institutional accountability. Certainly, the conventions governing the exercise of reserve powers have been pruned, but in a way which is consistent with current practices in the six existing States.

To the extent that the Draft Constitution incorporates conventions governing the exercise of the Governor's reserve powers, the exercise of those powers is capable of review by the Northern Territory Supreme Court. In accordance with Clause 5.1(3):

> The Supreme Court ... is a superior court of general jurisdiction in civil and criminal matters relating to the State, including matters arising under this Constitution or involving its interpretation....

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40. Cl 2.11(1) provides: 'Subject to this Constitution, a general election of members of the Parliament shall be held on a date determined by the Governor on the advice of the Executive Council or the Premier.'
41. Cl 2.11(2) provides: 'The period from the date when the Parliament first sits after a general election of members of the Parliament to the date of the next succeeding general election shall be not more than 4 years.'

Quite simply, the effect of this clause is to confer jurisdiction on the Supreme Court to interpret the meaning and effect of the provisions of the Constitution. It is interesting to note that an earlier version — the 1996 Draft Constitution put forward by the Northern Territory Legislative Assembly's Sessional Committee on Constitutional Development — went even further, proposing to give the Supreme Court a Canadian-style advisory jurisdiction in matters arising under the Constitution or involving its interpretation.[42] Needless to say, this proposal did not survive subsequent drafts.

Through the incorporation of provisions which codify the conventions governing the use of the reserve powers, the Draft Constitution clearly defines the scope of the Governor's independent discretion and sets out the essential parameters of the Office. By recognising that the exercise of a Governor's key powers should be in accordance with written norms, it creates a framework for executive accountability that conforms to current constitutional practice. The question is: will it ever be implemented?

42. Cl 6.1(4)(a) of the Final Draft provided for the jurisdiction of the Supreme Court to encompass an advisory jurisdiction in matters arising under the Constitution or involving its interpretation, but only at the instance of the Governor in his or her sole discretion, the Speaker of the Parliament on the resolution of Parliament, the Executive Council or the Premier. However, pursuant to cl 6.1(5), the Court would have the discretion — whether on application or of its own motion — to decline to exercise its advisory jurisdiction in these matters, on the condition that it publish its reasons for so doing.