

*M. C. Harris**

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“THE POWERS AND AUTHORITIES VESTED IN HIM”

THE DISCRETIONARY AUTHORITY OF STATE GOVERNORS AND THE POWER OF DISSOLUTION

1. Introduction

The term of South Australia's Thirty-Eighth Parliament (under its Premier Mr. D. A. Dunstan) having expired, elections were held on 3rd March 1968 for the Thirty-Ninth Parliament, with the following results in the House of Assembly:

Australian Labour Party (Leader Mr. Dunstan)	19 seats
Liberal and Country League (Leader Mr. Hall)	19 seats
Independent (Mr. Stott)	1 seat

Several of the seats were closely contended: for example the seat of Millicent was held by the A.L.P. by only one vote after a protracted count¹. The state of the parties in the Legislative Council (elected on a restricted franchise) was

Australian Labour Party	4 seats
Liberal and Country League	16 seats

In the Lower House, Mr. Hall was capable of forming a government because the Independent member had declared his support for the L.C.L. on all major issues. Mr. Dunstan was therefore incapable of commanding a majority on the floor of the House.

In contrast to the respective strengths of the parties in the House of Assembly, the actual percentages of votes recorded were:

Australian Labour Party	50.7 per cent.
Liberal and Country League	42.8 per cent.
Others	4.1 per cent.
Informal	2.3 per cent.

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1. The election in this seat was subsequently declared void by a Court of Disputed Returns but the Australian Labor Party member was then re-elected by a somewhat greater margin. The result could not have affected the Government. An Australian Labor Party petition in relation to the seat of Chaffey was withdrawn.

The equality of seats between the L.C.L. and the A.L.P. was due to a very considerable weighting of seats in favour of the country².

The narrowness of the election result, together with the apparent denial of the principle of majority rule which would ensue if Mr. Hall formed a Ministry, led to much controversy which was not confined to South Australia. Some commentators were of opinion that Mr. Dunstan could constitutionally call a second election either before meeting the new House or immediately after defeat there³. Mr. Dunstan himself stated that "In certain circumstances it would be open to me to give this advice (i.e. to call a new election) to the Governor"⁴. The submissions⁵ presented to the Governor and published below must be read in the light of these facts, particularly the possibility (as canvassed) of a new election, the apparent unfairness of the election result, and the uncertainty of the final result pending a decision of the Court of Disputed Returns (then unconstituted).

2. The Submissions

A: MEMORANDUM FROM THE PREMIER TO HIS EXCELLENCY THE GOVERNOR

20th March, 1968

Your Excellency, I forward together with this memorandum, a formal memorandum from me setting out the views of Ministers in accordance with Instruction VI of Instructions passed under the Royal Sign Manual and Signet to the Governor. It is expressed in this form as in 1962 it would appear that after oral discussion with the then Premier, Sir Thomas Playford, who had then eighteen supporters in the House of Assembly as compared with nineteen Opposition members and two Independents, you received a submission from the Leader of the Opposition on the situation and forwarded it formally to Sir Thomas on 26th March, 1962, requesting advice from the Ministers in the terms of paragraph VI. The advice of Ministers then given to you in the terms of that paragraph was as follows:—

"In the opinion of Ministers the proper constitutional method of dealing with the present position is for you to issue an early proclamation summoning the House of Assembly. This would enable the House to decide whether the present Government has the confidence of the

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2. The average number of voters in metropolitan seats was 28,000, whereas in country seats (some of which encroached on the metropolitan area) it was 9,600.
 3. Professor A. C. Castles ("The Age" 6 March 1968), Mr. R. L. Reid ("The News" 14 March 1968).
 4. "The Advertiser" 9 March 1969: *c.f.* a similar statement by Mr. Mackenzie King in the Canadian case of 1926, cited by Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (1943) at 131.
 5. The authors wish to thank the Lieutenant-Governor and the leaders of the two political parties for agreeing to the publication of the documents in this article.

House or whether it should resign to enable another Ministry to be formed.”

and you will see from the formal memorandum enclosed that the advice of the Ministers as to what has to be done at this stage, namely:—

“In the opinion of Ministers the proper constitutional method of dealing with the present position is for you to issue an early proclamation summoning the House of Assembly.”

is in exactly similar terms.

There are certain further matters which I believe that as Premier I am duty-bound to bring to your attention. The election result has been very narrowly achieved and long drawn out. The narrowness of the election in the two seats which took so long to determine gives weight to the possibility of some different conclusion from the declared election result arising out of proceedings before the Court of Disputed Returns which the Opposition has announced it will initiate and which a Government candidate will almost certainly initiate. In consequence, the memorandum formally given to you stresses the situation that actions before the Court of Disputed Returns could result in either the Opposition or the Government having twenty seats in the House in the foreseeable future, and that in practical terms would be a very different result from the one declared so far.

You put to me this morning the possibility of your being faced with the position in which, at this stage, I would not be able to tell you that I had a working majority in the House while the Leader of the Opposition, in contrast, would be able to do so, and you asked me what the constitutional position would be in these circumstances. You also stressed to me that the advice which I gave you must be strictly in accordance with the Constitution and the law as on legal matters I would have to advise you as Attorney-General. I have therefore included with this memorandum, a separate memorandum in my capacity as Attorney-General advising you of the constitutional situation and the weight of precedent.

There is a further matter which I feel obliged, as Premier, to inform you of. While it does not affect the constitutional situation directly, the position is that the Government has clearly obtained at the election an overwhelming majority of popular support, and the fact that this popular support could be thwarted by the present electoral distribution has aroused feelings in this State to an unprecedented degree. While it might be said that this is not a subject which ought to weigh a decision on constitutional matters, I would point out that it was such a very matter [sic] which was the subject of a memorandum by His Majesty, King George V. to Mr. Asquith on 11th August, 1913—see the Royal Archives quoted by Harold Nicholson in his Biography of King George V. At the moment, approaches to me and intimations to me have been made concerning moves to protest against the present situation which I fear could reach disquieting proportions were the normal constitutional process at this stage not to be followed. In the view of Ministers, the normal constitutional process at this stage, given the indeterminate result so far reached, is that the Ministry should not resign but should meet Parliament.

B: MEMORANDUM FROM THE ATTORNEY-GENERAL
TO HIS EXCELLENCY THE GOVERNOR

20th March, 1968

I respectfully advise Your Excellency that where an election has taken place which does not clearly give to the Government a majority or indeed thereafter leaves the Government in a minority, it is the normal procedure for the Government to meet the House so that the situation may be determined there if it advises the Governor on that course.

Before the transition in the status of the Australian State Governors which began with the Balfour Declaration of 1926 and has continued more strongly since then it has been recognised as being virtually axiomatic in both Britain and Australia for more than one hundred years that a Prime Minister or Premier who faces the possibility of a hostile majority in the Lower House of a newly-elected Parliament must be given the opportunity to prove that he has lost the confidence of this House on the floor of the House before any further steps are taken to deal with the constitutional situation.

In Britain, except where the Prime Minister has voluntarily resigned after an election, it would seem well settled that a Prime Minister is entitled to an opportunity to meet Parliament before any determination is made on the continuation of the existing Government. In 1841, for example, the Whigs were defeated at a general election, but met Parliament, and it was only after their defeat on the floor of the House of Commons that moves were set in train with respect to forming a new Government.

In 1923, after finding that he had no majority in the Commons, Mr. Baldwin, after meeting His Majesty, King George V, came to the conclusion that it was his duty to meet Parliament before taking any steps to tender his resignation—see Jennings, "Cabinet Government", Chapter II.

In Australia, the precedents supporting the position that a Premier should be given the opportunity to meet Parliament before any steps are taken to see if a new Government can be formed or a dissolution may be desirable seem even stronger than in Great Britain. In South Australia, for example, the existing Government, after the 1905 elections, was in a clear minority. It was, however, given the opportunity to meet Parliament and the Government resigned only after two defeats in the House of Assembly on two successive days after the new Parliament was convened—see Combe, "Responsible Government in South Australia", Page 141. After the elections for the twentieth Parliament, the Government only had nine members to nineteen members representing the A.L.P. in a House of Assembly of forty-two members and it was clear that the Government could not command the support of the majority. Nevertheless the Government waited until Parliament met before it resigned—see Combe, "Responsible Government in South Australia", Page 144.

Constitutional authorities seem to have accepted the view that the situation after the 1962 election was one in which Sir Thomas Playford was entitled to remain in office whatever the extra-Parliamentary expressions of other support until Parliament was convened and the position of the Government was con-

firmed by voting in the House of Assembly. That was the view which you yourself took after advice to you by your then Ministers in exactly the same terms as the present advice tendered to you by Ministers on this occasion.

The Tasmanian situation in 1948 is also one which strongly supports the conclusion that no steps should be taken until Parliament is convened.

In 1948, the A.L.P. Government was returned as a minority group in the Assembly elections. It did not resign, however, and it seems to have been recognized that no steps should be taken to change the Government in the absence of a voluntary resignation by the Premier—See W. N. Craig, Vol. I, Tasmanian Law Review, July, 1960, Page 491.

I can find no precedent where a Government has not voluntarily resigned before meeting Parliament for a Governor's refusal to accept advice given by his Ministers that they should meet Parliament.

That my advice is in accordance with generally accepted constitutional practice also clearly appears from Pages 173-174 of Ridge's "Constitutional Law", Eighth edition, 1950.

C: MEMORANDUM FROM THE PREMIER TO
HIS EXCELLENCY THE GOVERNOR

20th March, 1968

In accordance with Instruction VI of Instructions passed under the Royal Sign Manual and Signet to the Governor of the State of South Australia and its dependencies in the Commonwealth of Australia, and in accordance with Your Excellency's request that the advice orally tendered to you this morning by me should be placed in writing, Ministers respectfully advise as follows:—

The recent State election has resulted in nineteen seats (including Millicent) having been declared won by Government members, nineteen seats (including Murray) by Opposition members, and one by an Independent member. The Independent member has declared publicly that he would support a Government led by the Leader of the Opposition on all matters of confidence. The Opposition candidate for the seat of Millicent has informed the Returning Officer for the State that he will present a petition to the House of Assembly for a dispute as to the election in that seat to be heard by the Court of Disputed Returns. The Government candidate for the seat of Murray has informed Ministers that it is extremely probable that he will present a petition for reference to the same Court as to the election in that seat.

In these circumstances, the possibility arises of a different result from that set forth above, and affecting the majority support in the House of Assembly, occurring within a short time.

It does not, therefore, appear that at this stage there could be any assurance of Government with stability for any reasonably long term.

In the opinion of Ministers the proper constitutional method of dealing with the present position is for you to issue an early proclamation summoning the House of Assembly. This would enable the Constitution of the Court of

Disputed Returns, the reference to it of petitions on disputed elections, and the tendering to you of such further advice by Ministers at that time as would be proper in the exigencies of any situation then arising.

**D: MEMORANDUM FROM THE LEADER OF THE OPPOSITION
TO THE GOVERNOR**

Parliament House,
North Terrace,
ADELAIDE, S.A. 5000
21st March, 1968

His Excellency Lieutenant-General

Sir Edric Bastyan, K.C.M.G., K.C.V.O., K.B.E.,
Governor of the State of South Australia,
Government House,
ADELAIDE, S.A. 5000

Your Excellency,

I have the honour as Leader of the Liberal and Country League members of the South Australian Parliament to address this memorandum to Your Excellency praying that Your Excellency may be pleased to exercise the discretion reposed in you as Governor of this State according to the laws and customs of this State, and to entrust the formation of a Government for this State, following the recent elections, to that party leader who is shown to command the votes of a majority of the members elected to the House of Assembly.

I do this as there have been statements in the Press that if the Premier in his capacity as Attorney-General (or the Cabinet collectively) should tender your advice other than as set out above, Your Excellency would be constitutionally obliged to follow such advice and that no discretionary power would remain in Your Excellency as Her Majesty's Representative in this State.

I desire to submit that this is not and never has been the position in relation to the constitutional powers and discretions reposed in Your Excellency for the following reasons:—

1. Clause VI of Your Excellency's Instructions as Governor clearly shows that such discretion does inhere in Your Excellency.
2. The Instructions are referred to in the Letters Patent constituting your high office as indicating the duties of Your Excellency.
3. These powers and authorities are inferentially confirmed by the reference to their exercise by a Governor's Deputy in Section 69 of the Constitution Act of this State. If they can be exercised by a Governor's Deputy, they must be capable of exercise by the Governor.

4. The proper constitutional usage is as set out by the Rt. Hon. W. N. Asquith, formerly Prime Minister of the United Kingdom, in 1923 when he said:—

“It does not mean that the Crown should act arbitrarily and without the advice of responsible Ministers, but it does mean that the Crown is not bound to take the advice of a particular Minister to put its subjects to the tumult and turmoil of a series of General Elections so long as it can find other Ministers who are prepared to give it a trial. The notion that a Minister—a Minister who cannot command a majority in the House of Commons . . . in those circumstances is invested with the right to demand a dissolution is as subversive of constitutional usage as it would, in my opinion, be pernicious to the general and paramount interests of the nation at large.”

The correctness of this view is conceded by the late Dr. H. V. Evatt, a former leader of the Australian Labour Party, in his book “The King and His Dominion Governors” (1st Edition) at pages 69 and 237.

5. A similar statement is made by Professor K. J. Scott in his book “The New Zealand Constitution” published in 1962, when he says (at pages 82 and 83):—

“The appointment of a new prime minister is the only official action that a Governor-General takes when there is no prime minister in office. Advice may be given by the outgoing prime minister, but the Governor-General is not bound to accept it. The Governor-General is entitled to seek advice wherever he pleases. He may, for instance, consult leading members of more than one party, or elder statesmen outside the House. It happens that on every occasion in New Zealand history when an outgoing prime minister has nominated a successor the nominee has been asked to form a government, but this could be only because the advice has coincided with the Governor-General's own appreciation of the situation.”

6. Professor Keith in “The British Cabinet System”, (2nd Edition), page 301, said:—

“The right to a dissolution is not a right to a series of dissolutions. The King could not, because a Ministry had appealed and lost an election, give them forthwith another without seeming to be endeavouring to wear out the resistance of the electors to the Royal will.”

7. Reference may usefully be made to Marshall and Moodie “Some Problems of the Constitution” (1959), at pages 56 and 57, and also to “The Royal Power of Dissolution of Parliament in the British Commonwealth”, by Dr. Forsey, especially at pages 268 and 269.

8. The existence of such a discretion has been many times affirmed by Governors and Governors-General in Australia during this century. To select only a few instances, it has been so affirmed:—

(a) by Sir Thomas Carmichael as Governor of Victoria in 1909;

- (b) by Sir Ronald Munro-Ferguson as Governor-General of the Commonwealth in 1918;
- (c) by Sir Dudley de Chair as Governor of New South Wales in 1926;
- (d) by Sir Isaac Isaacs as Governor-General of the Commonwealth in 1931;
- (e) by Sir Ronald Cross as Governor of Tasmania in 1956.

I may add that I have the written assurance of Mr. Stott, M.P., that he is prepared to support a government led by me, on vital issues. This means that I am assured of the support of an absolute majority of the members of the House of Assembly on such issues.

It is respectfully submitted that Your Excellency's decision should not be influenced by the possibility of appeals being made to the Court of Disputed Returns by any defeated candidates. Whether such appeals be instituted and whether they be successful cannot affect the representation in the House of Assembly at its first meeting. The members who have now been declared to be elected will take their seats and occupy them unless and until a decision of the Court of Disputed Returns adverse to them be given.

For all these reasons it is humbly submitted to Your Excellency that Your Excellency has an undoubted discretion reposed in you as Governor and that such discretion should be exercised, as I am confident it will be, according to established usage and custom.

I have the honour to be
Your Excellency's obedient servant,

**E: MEMORANDUM FROM HIS EXCELLENCY THE GOVERNOR
TO THE HONOURABLE THE PREMIER**

Government House,
ADELAIDE.
21st March, 1968.

The Governor refers to The Premier's formal Memorandum of 29th March, 1968.

His Excellency The Governor accepts the advice of Ministers that the proper Constitutional method of dealing with the present position is for The Governor to issue an early Proclamation summoning Parliament.

This will enable the House of Assembly to constitute the Court of Disputed Returns should such court be necessary for reference to it of petitions on disputed elections.

It will also enable the House to decide, upon the floor of the House of Assembly, which party commands the confidence of the House.

The Governor requests that Parliament be assembled for the conduct of business as early as possible.

As soon as Ministers advise The Governor as to the date upon which Parliament can be assembled, The Governor will issue the necessary Proclamation.

(Sgd.) EDRIC BASTYAN
GOVERNOR

3. Commentary

These submissions, and the published opinions on the various issues at the time, raise the problem of the extent of the reserve powers⁶ of a Governor to dissolve or refuse to dissolve Parliament and generally, the propriety of any refusal of the advice of a Premier⁷. The indications are that a dissolution was not in fact requested, but the real point is that (perhaps given slightly different political circumstances) such a dissolution might well have been asked for. In any case, certain other matters, in particular the right of a defeated Premier to meet Parliament, the relevance of Disputed Returns, and (at least by inference) the status of Federal and United Kingdom constitutional precedents, were canvassed and require comment.

(A) THE LEGAL POSITION

Of the legal power of the King or his representatives to dissolve Parliament, assent to bills, dismiss Ministers, and so on, there is of course no doubt. As Muhammad Munir C.J. said in *Federation of Pakistan v. Moulvi Tamizuddin Khan*:

“The question in what circumstances these powers of the King are to be exercised is an entirely different question and has nothing to do with the legal powers of the King, though clearly defined conventions have come to be recognised which the King can ignore only if he wishes to take the responsibility of ceasing to be a constitutional monarch. But these conventions cannot be enforced by the courts, though they will undoubtedly be taken cognizance of in the interpretation of written constitutions. The only issue that the court is required to determine in such cases is whether the legal power existed or not, and not whether it was properly and rightly exercised, which is a purely political issue”⁸.

Under Section 6 of the South Australian Constitution Act 1934-1965, the Governor has power to

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6. By the term “reserve powers” we mean the Crown’s legal powers of Assent, Veto, Dissolution and Dismissal.
 7. The best discussion of these issues is still Evatt, *The King and His Dominion Governors*, (2nd ed., 1967). See also Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (1943). Because of the frequency with which these books will have to be cited we will refer to them as Evatt, and Forsey. Apart from the treatments in standard constitutional law texts, the following will be found useful: Evatt, “The Discretionary Authority of Dominion Governors” (1940) 18 Canadian Bar Review 1; Campbell, “The Prerogative Power of Dissolution: Some Recent Tasmanian Precedents” (1961) Public Law 165, and Craig, “The Governor’s Reserve Power in Relation to the Dissolution of the Tasmanian House of Assembly” (1960) 1 Tasmanian Law Review 488.
 8. See the report of the case in Jennings, *Constitutional Problems in Pakistan* (1957) at 88-89.

“(d) dissolve the House of Assembly by proclamation or otherwise whenever he deems it expedient.”

This section is a legal formula only⁹. The Governor may dissolve without shown that “he deems it expedient”. In effect the rider is only concerned to emphasize the point that dissolution may take place at any time before the full term of the House¹⁰ expires. Of course it is now never the Governor himself who deems dissolution to be expedient but the Governor on the advice and with the consent of Executive Council who does the deeming. This is a neat illustration of Jenning’s maxim about the relation between law and convention:

“In practice the two are inextricably mixed and many conventions are as important as any rules of law”¹¹.

(B) THE LEGAL STATUS OF THE GOVERNOR’S INSTRUCTIONS AND THE INTERPRETATION OF CLAUSE VI

It has frequently been observed that the question as to the exact legal status of the Governor’s Instructions is at once simple to ask and yet very difficult to resolve conclusively. Recently, however, the matter has received attention in a valuable article entitled “The Legal Status of Royal Instructions to Colonial Governors”¹². The writer comes to the general conclusion that “Royal instructions were above all the private orders of the Crown to the Royal Governor. As such, they were a matter between the Crown and the Governor only . . . Royal instructions, in general, did not have the force of law”¹³.

We adopt this as being in general terms an accurate assessment of the legal status of Instructions issued to the Governor of an Australian State¹⁴. On the other hand, it is apparent that in terms of constitutional law and practice, the Governor’s Instructions have over a considerable period of time become entrenched in the constitutional structure of the Australian States. Hence, whatever their status in strict point of law, we must note that the Crown’s representative and his advisers have habitually acted on the basis that these Instructions have a continuing constitutional relevance and may not therefore be ignored.

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9. This section is to be found in the original Constitution Act of 1855-1856 which is generally accepted as having introduced responsible government in South Australia.
 10. The full term is three years: Constitution Act 1934-1965 s. 28(1).
 11. *The Law and the Constitution* (5th ed., 1959) at 84.
 12. D. B. Swinfen (1968) *Juridical Review* 21.
 13. *Id.*, at 39. By “law” the author means Letters Patent, Orders-in-Council, local statutes, and Imperial statutes applying by paramount force. He concedes that one possible exception to the above proposition arises in the content of *constituent* Instructions in which the Crown, exercising its prerogative to legislate for conquered or ceded colonies, uses such Instructions to provide these colonies with a Legislature; *id.*, at 37-38.
 14. Strictly speaking one would have to make two further exceptions in the case of
 - (a) Instructions which have received the imprimatur of an Imperial Statute, for example, the Australian Constitutions Act 1842 s.40, and
 - (b) Instructions which are contained in Letters Patent.

It seems, therefore, that a more profitable line of inquiry is to attempt to discover the proper interpretation of the Governor's Instructions, and in particular that of Clause VI. This most controversial clause, which is to be found in the Instructions of all State Governors, reads as follows:

"VI. In the execution of the powers and authorities vested in him the Governor shall be guided by the advice of the Executive Council, but if in any case he shall see sufficient cause to dissent from the opinion of the said Council he may act in the exercise of his said powers and authorities in opposition to the opinion of the Council, reporting the matter to Us without delay, with the reasons for his so acting."

There appear to be at least three possible interpretations of this provision.

In the first place, it may be argued that Clause VI is no more than a restatement of the *legal* power of the Crown (as represented by the Governor) to exercise its "reserve powers" in a personal capacity without the benefit of ministerial advice, or alternatively contrary to such advice. That this is not a feasible interpretation appears clear from the exhortation in the first part of the provision that the Governor "shall be guided by the advice of the Executive Council". Such a direction would clearly have no possible place in a definition of the legal power of the Crown to exercise its reserve powers in a way not susceptible to legal controls.

In the second place, it may be argued that Clause VI is no more than a restatement of the fundamental principle that *conventionally* the Crown (as represented by the Governor) is obliged to exercise its reserve powers on the basis of ministerial advice. It is further postulated under this "conventional" theory of the reserve powers that the constitutional validity of each exercise of reserve power is subject to the operation of various conventional rules and practices. These principles, derived as they are from precedent, writings and from the nature and operation of parliamentary government itself, regulate and control the manner in which the reserve powers are exercised. They are of an obligatory nature and thus constitute objective criteria of constitutionality as to which the Crown is required to be satisfied. Hence if the advice which the Crown or its representative receives from its advisers for the time being is not in accordance with these unwritten rules of the constitution, the Crown ought to reject that advice, provided always that there are alternative advisers responsible to Parliament to replace those whose advice the Crown has rejected.

Under Clause VI, however, this by no means appears to be the position. Indeed this provision apparently invests the Governor with a discretion to disregard the advice of his Executive Council, irrespective of whether that advice is in conformity with the objective criteria which *conventionally* regulate the proper constitutional exercise of the reserve powers. It may thus be affirmed that Clause VI neither restates the strict legal power of the Crown, nor reaffirms the conventional situation. Rather it appears that in terms the Governor is able to decide for himself the extent to which responsible government will be permitted or discouraged in the State in which he is in office.

This interpretation is strengthened when it is borne in mind that following the grant of responsible government to the Australian colonies in the middle

of the nineteenth century the Imperial Government made it plain that it wished to maintain a residual supervisory power over both the internal and external affairs of these overseas possessions. The office of Governor was one of the chief weapons fashioned by the Imperial Government to perform this task. The writings of the nineteenth century constitutionalists are permeated with the notion that the Governor's rôle was that of supreme political superintendent. This thesis is expounded in its most robust and, viewing the matter from a contemporary aspect, in its most offensive form in Todd's work¹⁵. The matter is well and succinctly put by Evatt in the following terms: "In truth the Governor, at any rate up to the nineties, assumed the role of supreme political superintendent and also that of political prophet. As time went on the more preposterous reasons for the exercise of discretionary powers came to be abandoned"¹⁶.

George Higinbotham, Chief Justice of Victoria, was of the view that Clause VI of the Instructions was illegal. His repeated argument was that the clause was a direct inducement to the Governor to violate the public law of the colony. It was not to be regarded as obsolete, but as a viable directive which if relied upon literally would overturn the whole notion of responsible government, the principles of which were enshrined in the Constitution Act. Evatt refutes this as a purely legal argument by pointing out that the Constitution Act did not purport to define the *general* discretionary authority of the Governor in relation to his Ministers¹⁷. Rather, one might put it no higher than to say that insofar as the Constitution Act and other statutes dealt with particular matters previously dealt with in the Instructions, those matters had been rendered obsolete¹⁸.

If it is accepted that Clause VI was intended and has often been interpreted as investing the Governor with powers of a "political prophet" or "overlord", it must equally be said that such a power in no sense reflects the contemporary constitutional (as contrasted with the legal) development of the Australian States. It is precisely this cleavage between theory and practice which has produced uncertainty in the operation of Clause VI, and has contributed to the ambivalent posture of the Instructions as a whole. A short examination of two New South Wales precedents directly involving Clause VI provides ample demonstration of these propositions.

In 1916 the Governor, Sir Gerald Strickland, was recalled by the Colonial Office in somewhat humiliating circumstances. He, purporting to exercise a reserve power on his own personal discretion, had been on the point of dismissing the Premier, Mr. Holman. His object, if one accepts Evatt's view, was entirely laudable, and was intended to protect the people against a coalition government "which had never received any popular endorsement, and the first act of which was to suspend for a period of one year the electors' right to elect their representatives"¹⁹. Moreover, on the basis that Governor

15. *Parliamentary Government in the British Colonies* (2nd ed., 1894) Preface at xiii.

16. Evatt at 224.

17. *Id.*, at 125.

18. *Ibid.*

19. *Id.*, at 15. At the same page the author demonstrates the extraordinary contrast between the case of Sir Gerald Strickland and, perhaps the most famous example

Strickland had done no more than place strict reliance on the terms of Clause VI, his conduct in purporting to dismiss his Premier was, *prima facie* unexceptionable. It seems fair to conclude, therefore, that in 1916 Clause VI no longer constituted in the view of the Imperial authorities an accurate formulation of the Governor's powers.

In 1926, the Governor of New South Wales, Sir Dudley de Chair, explicitly raised the matter of Clause VI in seeking advice from the Secretary of State for the Dominions, Mr. Amery, on the question whether he should accede to the Premier's request for the appointment of nominees to the Legislative Council with a view to that chamber's ultimate abolition. Amery's reply stated (*inter alia*) "I have considered the terms of paragraph 6 of the Royal Instructions, but I do not find that they affect in any way the conclusion indicated above"²⁰. The conclusion referred to was "that *established constitutional principles* require that the question should be settled between the Governor and the Ministry"²¹. This appears plainly to support our view of the conventional situation, and to reject any notion that the discretionary powers contained in Clause VI are in any way relevant to or impose any gloss on the conventional situation. In short Amery's telegram supports the view that in New South Wales at least the legal powers of the Crown had come to be regulated in all cases by obligatory rules of constitutional usage and practice, and further that insofar as Clause VI introduced any element of discretionary power to this conventional situation it was to be ignored. Sir Dudley de Chair, however, quite perversely and in the face of strong opposition from his advisers, particularly from Mr. McTiernan, the Attorney-General, chose to construe the telegram as placing the discretionary powers of the Governor "beyond question"²². Despite strong protestations by McTiernan to Amery to the effect that in placing a literal reliance on Clause VI the Governor was liable to act in a manner which was totally at variance with existing constitutional practice, the matter has been allowed to lapse. There are few who would argue that the discretion in Clause VI ought to be retained. Indeed the preponderance of opinion would wholeheartedly support McTiernan's view that Clause VI is entirely obsolete, and should either be redrafted, or removed from the Instructions. Either course would presumably be achieved by formal advice to the Crown in England²³. However, until Clause VI is either redrafted or removed it constitutes a potential threat to the development of a coherent body of constitutional doctrine in the Australian States. Furthermore whenever it is invoked it involves not only a slur on their political autonomy, but tends also to blur rational discussion of the relevant principles.

of dismissal, that of Mr. J. T. Lang by the Governor, Sir Phillip Game, in 1932. The common feature of these two precedents is the innate element of "legalized anarchy": in the one case anarchy from outside in the form of Imperial interference; in the other internal anarchy produced by the actions of a Governor whose decision was based on matters which were within the jurisdiction of the High Court to decide: see Constitution Act 1901-1967 s.75 (iii).

20. *N.S.W. Parliamentary Papers*, vol. 1 at 315.

21. *Ibid.* Italics ours.

22. *Ibid.*

23. It seems to be incontestable that at least since Amery's telegram in 1926 the British Government has viewed the Governor's personal discretionary power as obsolete, and considers that his relations *vis-à-vis* his advisers are to be regulated exclusively by convention.

We will return to this aspect of the matter when we examine the submissions of the Leader of the Opposition.

(C) THE CONVENTIONAL SITUATION

In deciding which rule will provide a solution, or at least some insight into the solution of significant constitutional questions it is inevitable that all those interested in these matters should turn to precedent.

In choosing the proper precedent the initial problem arises as to the *manner* in which precedents ought to be selected. Large constitutional problems have a peculiar attraction for the amateur and the professional alike. In South Australia the political events of March 1968 created a great deal of public interest in the reserve power of the Crown to dissolve Parliament, and the constitutionally sanctioned occasions for its exercise.

The main characteristic of the controversy was the very wide spectrum of opinion as to the rules which regulate this power. This prevailing climate of antagonistic opinion, in every case confidently asserted and in the main on the basis of specific precedents, points up Evatt's view that "doctrines of overwhelming importance are treated as being too vague to be defined at all, or if defined, defined in an unsatisfactory manner"²⁴. It seems certain that the very obvious eclecticism inherent in the choice of precedent has contributed greatly to the present unsatisfactory situation. In March 1968, there was an obvious tendency to choose the helpful precedent and to ignore the unhelpful. The natural result of this eclecticism is that "what is really the appropriate subject for specially trained constitutional lawyers and historians tends to become the hunting ground of mere political party polemics"²⁵.

We would contend that the cardinal principle is that each precedent must be carefully and minutely examined in the light of its own particular circumstances. The utility of precedent in the solution of constitutional problems is thus dependent on an exact assessment of all the relevant facts. Too often there have been attempts to categorize precedents under particular heads by concealing or overlooking vital differentiating factors. In the context of dissolution this tendency has made the statement of fundamental propositions extremely difficult. For example, the constitutionality of a grant of a second dissolution to a defeated Government in a Parliament elected under its own auspices ought never to be determined on the basis of one particular precedent until it has been demonstrated that the precedent relied arose out of substantially the same circumstances. In sum, there are no axiomatic authorities, but merely individual precedents which may or may not elucidate and provide solutions to particular constitutional problems²⁶. Our final comment is that the partial selection of precedent to bolster a weak or non-existent case, and its presentation to the Governor or those advising the Governor as "authority" is deplorable, and can only serve to undermine the conventional infra-structure of the constitution. We would suggest that just as an advocate is primarily an officer of the court, so too are those advising the Governor officers of the

24. Evatt at 1.

25. *Id.*, at 2. See also Forsey, *Preface*, at xiii-xiv.

26. This principle is advocated both in Evatt at 2-3 and Forsey, *Preface*, at xiii-xiv.

constitution. Both are under an obligation to present all relevant authority in the hope that the proper decision will be made²⁷.

In the Australian States a further problem arises out of the controversy over the constitutional status of the Governor. If, as many would contend, the position of the Governor may legitimately be equated with that of the Monarch or the Governor-General, it is apparent that United Kingdom and Commonwealth precedents dealing with the principles upon which the reserve powers ought to be exercised will be highly relevant. On the other hand, there is a good deal of authority for the proposition that since the Balfour Declaration of 1926 referred in terms only to Governors-General, the constitutional position of Governors may not be treated as identical. Hence it follows that State precedents which proceed on the basis that a State Governor has some residual discretionary power to dissent from ministerial advice, continue to be relevant. This argument, however unfashionable it may be, derives additional weight from the fact that in point of law, the Australian States are still subordinate to the United Kingdom Parliament²⁸. Our position is that all precedent, whether it be United Kingdom, Commonwealth or State, is equally relevant to the determination of the principles upon which the reserve powers ought to be exercised. Furthermore we would argue that only those State precedents which accurately reflect the present constitutional development of the Australian States, and the undoubted political autonomy they have achieved, ought to be relied on. We would therefore contend that in the main all 19th century exercise of the reserve power are *prima facie* suspect, and in many cases one may undoubtedly "nose" the distinctive odour of Clause VI²⁹.

If Clause VI can no longer be regarded as accurately stating the constitutional position of the Governor, and ought therefore to be treated as irrelevant to the solution of problems concerning the reserve powers, this does not in itself establish that in point of constitutional theory there is no distinction between the respective positions of the Governor, the Governor-General, and the Monarch. The Imperial Conference of 1926 declared that the Governor-General of a Dominion held in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty in Great Britain. This specific reference to the Governor-General and the omission of any reference to the office of Governor has led some, particularly Keith³⁰ to argue that there is a difference in the relative constitutional status of the States and the central Government of the Commonwealth. We consider this argument to be without any cogency. Its fallacies have been relentlessly exposed by Evatt³¹ and need not be elaborately recanvassed here.

27. We do not, of course, contend that the conventional situation has become concretized and that there is accordingly no room for development. We merely point out that before any form of development takes place, whether in a legal, political or any other context, it is desirable to be fully aware of what has previously taken place.

28. Colonial Laws Validity Act 1865, ss.2,3. See further the judgment of Dixon J. (as he then was) in *Attorney General for N.S.W. v. Trethowan* (1931) 44 C.L.R. 394 at 425-427.

29. See *sup.* at 312 ff., and generally Evatt at 111-120. Forsey at 67-68 takes a contrary view of the relevance of these precedents.

30. *Constitutional Law of the British Dominions* (1933) at 150.

31. *Op. cit.* at 201-216.

It is beyond argument that in terms of the internal workings and arrangements of the federal system, the States are co-equal partners with the central authority. This domestic co-equality has important implications for the manner in which the Crown acts in the States. As Evatt puts it . . . "no valid distinction can, or should, be drawn between the position of the Governor-General in relation to Ministers whose sole lawful authority is marked out by the . . . Australian (Constitution) . . . and the position of the Governors . . . of the States . . . in relation to Ministers whose sole lawful authority is marked out by the (same Statute)"³².

It remains to say something of the value of Keith as an authority. His prodigious output of constitutional writing has been matched by an unfortunate tendency to equate quantity with infallibility. It was doubtless in the minds of Evatt³³ and Forsey³⁴ to redress the balance, and by close examination of his work to point up the inaccuracies and inconsistencies. This was in our view a most valuable and necessary thing to do, in view of the pre-eminent and usually unassailable place which Keith's work had hitherto occupied. It is most certainly wrong to characterise what these writers have done as an exercise in polemics and to describe their books as "too polemical, too contentious and wasteful"³⁵. We would, in short, acknowledge that there is much in the works of Keith to command assent. On the other hand there is so much in his work which is positively contradictory of views elsewhere expressed that it seems unwise to place any great reliance on his views as to the Governors relative status and his powers. It is often difficult to resist the conclusion that Keith's opinion were motivated by his perception of the merits of particular constitutional situations. For example in 1917, following the recall of Sir Gerald Strickland, Governor of New South Wales for his purported dismissal of Premier Holman, Keith wrote castigating the Governor's action, and advocated the practice that in future the Governor of an Australian State should have no personal discretion in internal affairs, and should proceed exclusively on the advice of responsible Ministers³⁶. As Evatt points out, his proposed new practice applied to Commonwealth and States without differen-

32. *Id.*, at 216. This argument, which is completely accepted in Forsey at 4-7, has not unnaturally found favour in the Australian States, notably in Tasmania. In a series of precedents involving the prerogative of dissolution in 1950, 1956 and 1959, successive Premiers advised incumbent Governors in terms of Evatt's co-equality argument. It is uncertain from the replies of the different Governors, notably that of Sir Ronald Cross in 1956, whether they unreservedly accepted a complete analogy between their position and that of the Governor-General. On the other hand, it seems clear that on none of these occasions was the Governor prepared to accede to the proposition that he was a mere cipher, whose duty was to accede to any advice which was given with respect to the exercise of the reserve powers. Insofar as these precedents assert the existence of constitutional rules for the exercise of the reserve powers they are unexceptionable. On the other hand the reply of Sir Ronald Cross in 1956 is redolent of Clause VI, and the existence of personal discretionary power. Accordingly it is difficult to assert with any confidence that Australian Governors view their constitutional position as identical with that of the Monarch or the Governor-General. For a full discussion of the Tasmanian precedents see the articles by Campbell and Craig cited *sup.* n.7.

33. Evatt *op. cit.*

34. Forsey *op. cit.*

35. Wheare, (1945) 61 *Law Quarterly Review* 411.

36. (1917) 17 *Journal of Comparative Legislation* 231.

tiation³⁷. In contrast, by 1926 Keith had performed a complete *volte face*, and was advocating the view that the Australian States were in an inferior position to the central Government. It seems fair to attribute this doctrine, with its overtones of large gubernatorial discretion, to his personal involvement in the 1926 New South Wales crisis in which he openly supported the Governor's position against the advice offered by Premier Lang³⁸. For these reasons we would reject the authority of Keith's writings, at least in the controversial area of the Governor's reserve powers³⁹.

(D) THE RIGHT OF A DEFEATED PREMIER TO MEET PARLIAMENT

It will be seen that Document B (Mr. Dunstan's submission as Attorney-General) is entirely concerned with this problem, and than on this point at least the parties are not *ad idem*. Although Mr. Hall's submission (Document D) is not altogether clear, it does not seem to be concerned with this point⁴⁰.

There seems no doubt that Mr. Dunstan's general thesis is correct. It is usual for a clearly defeated Premier to resign immediately: this is what Sir Thomas Playford did in 1965, for example. There were however a number of reasons why Mr. Dunstan did not follow this course, such as the closeness of the election, the fact that no party had won a majority of seats, and the general political situation. Again, politically it would be inadvisable for a clearly defeated Premier not to resign—the impression of clinging to office is an unfavourable one—but Mr. Dunstan could claim he was not clearly beaten.

Mr. Dunstan's citation of precedent is most interesting⁴¹: of the six cases he cites, three are South Australian, two United Kingdom and one Tasmanian. Between them they may fairly be said to establish his claim, though it should be noted that in each case the Premier or Prime Minister either continued to govern if the lower House supported it (as it did Sir Thomas Playford in 1962) or resigned if it did not (as in the other cases). In fact the position they establish (the Playford case apart) is rather stronger than Mr. Dunstan needed, since they apply not only to Governments which have no majority but to those in a clear minority. The case most analogous is the 1962 one, and the real point here is that the support of Independents or other Members is basically to be determined inside and not outside Parliament. It is more satisfactory that this support be determined beyond dispute in public than in private as a result of personal statements of the members concerned.

37. Evatt at 56.

38. *Id.*, at 56-57.

39. We again point out that an equality of status does not necessarily involve or even presuppose an identity of conventional rules and rule structure. In the area of the reserve powers, however, and in particular with respect to dissolution, the basic principles regulating the exercise of these powers seem to be identical in the United Kingdom and in the Commonwealth. Thus these precedents are of particular utility when on analysis they are found to be relevant.

40. It should be remembered that Mr. Hall did not know what advice Mr. Dunstan was tendering to the Governor.

41. As to the status of precedents generally, see *supra* at 317. Ridge, *Constitutional Law* (8th ed., 1950) at 173-174 supports Mr. Dunstan's advice.

(E) FROM WHOM MAY ADVICE BE RECEIVED

It is (as all writers on the topic agree) a cardinal principle that some adviser must undertake responsibility for every act of a Governor in the exercise of his public powers⁴². Furthermore the Governor must only act on the advice of one set of advisers at a time. Normally this advice comes from Executive Council, which is, effectively, the Cabinet under the leadership of the Premier⁴³.

However Mr. Hall's submission (Document D⁴⁴) was apparently unsolicited, and although it is not in terms clear it is easy to see that the submissions it contains might in other circumstances have been contradictory to the advice offered by the Premier. This raises the problem when and in what circumstances a Governor may take advice from persons other than his constitutional advisers for the time being.

In these terms the problem has been little dealt with⁴⁵. In practice, the Governor needs no advice apart from that of Executive Council in relation to the normal government of the State: the proper avenues for dissent are, for example, through Parliament or the press. The problem only becomes crucial when "constitutional" issues such as dissolution or the resignation and commissioning of a Premier are raised. Even in these cases what a Governor ought to do is reasonably clear: if the advice is constitutional or (generally speaking) if the Premier has the confidence of the popular House, his advice must be accepted. If on the other hand the advice is unconstitutional *and* the Premier has not the confidence of the popular House the advice must normally be refused and alternative advisers found to accept responsibility for this decision.

It will be seen that this leaves the Governor with certain decisions to make on matters of fact (for example, whether the Premier possesses the confidence of the popular House) or constitutional law (for example, whether the advice may constitutionally acted upon)⁴⁶. This latter question will usually be the subject of advice by the Attorney-General⁴⁷, but Governors appear to have had independent recourse to constitutional authorities and precedents to deter-

42. See, e.g., Evatt (1940) 18 Canadian Bar Review 1 at 7; Ridge *op. cit. sup.* n.41 at 167. In Tasmania in 1914 the Governor accepted an offer by the Leader of the Opposition to form a government, on the condition that the latter advised dissolution. This prompted the Secretary of State for the Colonies to direct the Governor that this condition was not a proper one to impose since, in the event of the new Premier not advising a dissolution, the original condition was left a purely personal one without the responsibility of any Ministers to support it: see Forsey at 34-35, Evatt at 30-36.

43. Constitution Act 1934-1965., s.66(2); see also Art. IV of Letters Patent Constituting the office of Governor, dated 29 October 1900, as amended.

44. *Sup.* at 308 ff.

45. Evatt at 130-131; Campbell "The Prerogative Power of Dissolution: Some Recent Tasmanian Precedents" (1961) Public Law 165 at 174-176.

46. Evatt at 175-191 has effectively established that it is not for the Governor to exercise his powers in matters of disputed legality which are justiciable (as matters of convention are not). On this basis the action of Sir Phillip Game in the 1932 crisis are open to criticism.

47. See Document B, *sup.* at 306 ff.

mine the correctness of any such advice⁴⁸. The question of extend of parliamentary support is normally, in a two-party system, a matter which is fairly easily ascertainable either in or outside Parliament and can safely be left to the cognizance of the Governor⁴⁹.

Subject to this a solution to the question from whom advice may be received is best found by drawing a distinction between receiving advice and acting on it. A Governor may receive submissions in constitutional matters from the Leader of the Opposition⁵⁰ but he may not act on those submissions if they are contrary to the advice of his Premier, while yet retaining his existing advisers. When a Governor may properly change his advisers is of course a separate question and will be dealt with later⁵¹.

(F) THE POWER OF DISSOLUTION

We now turn to the rules which ought to control the reserve power of dissolution, for we believe that of all the reserve powers, the power to dissolve Parliament is of the greatest practical significance. Indeed, the point has been well made that there is the greatest danger in the present state of doubt and obscurity. Of all the powers which could theoretically be manipulated so as to defeat the popular will, the most cogent is the power of dissolution⁵². Our point, in short, therefore, is that there is an overwhelming need for a definitive statement of the rules and practices which in any given situation govern the exercise of the power to grant or refuse a dissolution, and in very rare cases of the power of the Crown to force a dissolution⁵³. We now turn to the matter of identifying the main principles which conventionally ought to govern the exercise of the power.

We have already⁵⁴ criticized the notion of a "discretion" in relation to the conventions surrounding the power of dissolution. The general principle on

48. In 1914 Sir Ronald Munro-Ferguson received advice from Sir Samuel Griffith, Chief Justice of the High Court: see Evatt (1940) 18 Canadian Bar Review 1 at 4-6. In 1931 Sir Isaac Isaacs came to an independent decision on certain legal points which confirmed advice of his Attorney-General: Evatt at 185-189.

49. As will be seen, certain questions of rather greater difficulty may occasionally be left to the Governor to solve. But in any case there is a clear difference between an exercise of discretion (which term has already been criticized) and of judgement as to the existence of a state of affairs. An exercise of discretion may be wise or unwise, biased or impartial, but within its scope it cannot (unlike a judgement on fact or law) be right or wrong.

50. In the U.K. at least, there is some evidence that the Monarch has taken advice (usually of an informal character) from 'elder statesmen' in relation to various matters, such as the appointment of a new leader to the Conservative Party; see Marshall and Moodie, *Some Problems of the Constitution* (1959) at 58-66: and during the 1911 crisis; see Evatt at 58. Generally speaking, however, it is in Australia a matter to be settled between the Governor and his responsible advisers (which may include the Leader of the Opposition): see Amery's reply to Sir Dudley de Chair in 1925, cited by Evatt at 122.

51. *Post* at 326-327.

52. Evatt at 109; Forsey at 8, although we are not to be taken as necessarily accepting the latter's argument *in toto* with respect to the potentialities of an abuse of this power.

53. Forsey at 7, 270.

54. *Sup.* at 316.

which all conventions are founded is that of parliamentary government, a principle well stated by Hood Phillips:

“To ensure that the power of government shall be exercised in accordance with the popular will, that will must be ascertained from those best qualified to know it, namely, the elected representatives of the people”⁵⁵.

It follows, in our view, from this that the Governor who is neither elected nor personally responsible to the people, shall not exercise his powers so as to defeat or deny the popular will as expressed through its elected representatives. Put more simply, there is in our view no room for the independent discretion of the Governor: what he should do is in every case⁵⁶ governed by a conventional rule. A further corollary, in relation to the power of dissolution, is that (normally) it should not be exercised where a viable alternative government is possible⁵⁷.

The following tentative rules relating to the Governor's exercise of the power of dissolution may now be proposed. It should be remembered that conventional rules, being merely political understandings, are always subject to change and are frequently uncertain⁵⁸. Relevant precedents may often be too old to be of any use in determining the current situation⁵⁹: indeed what actually happened is in some cases quite unclear.

(1) A Premier who has the support of the popular House and who insists on a dissolution is entitled to one⁶⁰. There is in our view no need for any pressing issue for the decision of the electorate (a factor that Forsey tends to stress). Of course, Governments dislike elections as much as electors and a Premier is unlikely to want one except if some pressing matter has arisen upon which he deems an electoral verdict necessary. The point is that any such decision is for the Premier rather than the Governor to make.

(2) Where a Premier has had the support of the popular House for a substantial period but is then defeated on an important issue or vote of no-confidence, whether he can ask for a dissolution or must resign depends on a number of factors. The primary one (as we have said) is the availability of a stable alternative government. Thus a defeated Premier in such circumstances must establish that he is entitled to a dissolution. This was the position taken by the Governor of Victoria in the 1908 case⁶¹ when a dissolution was granted to a defeated Premier after two years in office.

On the other hand, where no viable alternative Government is possible, the Premier is clearly entitled to a dissolution⁶².

55. *Constitutional and Administrative Law* (4th ed., 1967) at 81.

56. It is again important to remember the distinction between a discretionary decision and a judgement on matters of fact or law see *sup.* n. 49.

57. See especially Forsey at 262-263, 265-269.

58. *Sup.* n. 27.

59. *Sup.* n. 29.

60. Forsey at 260-261 states that at least a Parliament must be allowed to meet and transact “the ordinary business of the session”, but in the final analysis he agreed with Evatt, *op. cit.* at 260, that such a discretion must be granted: Forsey at 269.

61. Evatt at 229-233.

62. *Sup.* n. 57.

The most difficult problem in this area is to determine what other factors may be used to rebut the presumption raised against a Premier's claim to a dissolution by the existence of an alternative government. Several have been suggested and these must now be examined.

- (a) "Where the Parliament is approaching expiry through the efflux of time"⁶³

This factor is obviously a relevant one, although it is a rather difficult criterion to apply. Forsey (apart from excluding Parliaments in their first sessions⁶⁴) is quite imprecise as to exactly when a Parliament is approaching expiry through effluxion of time. Presumably the fact that Mr. Hall had managed to govern for a year would not in itself entitle him to a dissolution if Mr. Dunstan received a majority, for example, through a favourable by-election. On the other hand, if only two months remained Mr. Hall's position would seem much stronger.

Not very much assistance can be gained from precedent in relation to this problem⁶⁵, but the tendency in this century has been to grant dissolution. Marshall and Moodie, perhaps conscious of the problems, have sought to restrict the time limit during which no dissolution can be claimed to the period immediately after an election⁶⁶. This view has the merit of certainty, but one cannot help feeling that such a position (at least in relation to the Australian States) has not yet been reached. For example Lord Byng's refusal in the 1926 Canadian case of a dissolution to Mr. King occurred after almost a year of the life of the (five-year) Parliament⁶⁷.

Perhaps the real solution is that the efflux of time factor *by itself* will only be sufficient to entitle a defeated Premier to a dissolution in a very restricted number of cases where the justification for dissolution is manifest but that manifest, be sufficient to entitle a defeated Premier to a dissolution, but that combined with other factors it will be of more importance. Twentieth century precedents of grants of dissolutions to a defeated Premier have usually been accompanied by such reasons as that the alternative government would not be sufficiently stable⁶⁸.

- (b) "Some great issue of public policy at stake"⁶⁹

In the case of a defeated Ministry it seems that the existence of some great issue of public policy dividing the major parties has been considered to be a

63. Forsey at 267.

64. *Id.*, at 264-265.

65. Nineteenth century precedents are inconclusive: for example dissolutions were granted in N.S.W. in 1882 after two years (Forsey at 275); and in 1889 after two years and despite the protest by the Assembly that an alternative Government could be found (*ibid.*); in Victoria in 1894 after three years (*ibid.*); and in Queensland in 1884 after four years (*id.*, at 276). On the other hand a dissolution was refused in N.S.W. in 1866 after two years (*id.*, at 234).

66. *Some Problems of the Constitution* (1959) at 56.

67. Forsey at 131 *et. seq.* The refusal of a dissolution to Prime Minister Scullin in 1909 has been criticized (*id.*, at 265): for a different view see Evatt at 50-54.

68. *Sup.* n. 61.

69. Forsey at 267.

relevant factor⁷⁰. Presumably this must be a matter for the decision of the Governor, although of course the subject of advice from the Premier and the Leader of the Opposition.

The "public policy" consideration raises some rather difficult problems. What is an issue of public policy? In other areas disputes have been manufactured to suit constitutional rules⁷¹: in any case political parties are almost always divided over a variety of issues which might fairly be described as issues of public policy? How can a Governor measure the relative importance of an issue of public policy? When is such an issue "great"? Must the issue be directly concerned with the Government's defeat, or at least be the occasion of such defeat? Can the existence of a great issue of public policy of itself entitle to a dissolution a Premier who would not otherwise be so entitled? If so⁷² what reason of principle is there which could produce this result? Presumably it is for the electorate to decide as between the rival attitudes to the issue of policy. But why should it not decide the main point at issue—which party is to govern without the necessity of any (real or manufactured) issue of public policy? As Forsey concedes⁷³ the 1909 Commonwealth precedent suggests that an issue of public policy of itself is not enough. If so, and Forsey does not pursue this, it is hard to see how it can combine with any other factor to entitle a defeated Premier to a dissolution. In any case, with which other factors, and in what circumstances?

It should be noted that Forsey, who of all writers most stresses the relevance of the "public policy" factor regarded a dissolution before expiry of the life of the Parliament as

"an extraordinary and irregular manifestation of the national will"⁷⁴. The modern view is rather more liberal, looking on elections to solve rather than create difficulty. In cases of doubt we do not feel it is necessary to seek such pegs as "public policy" upon which to hang dissolutions.

(c) The "mandate" view: Government majority lost by "flagrant disregard of electoral pledges.

Evatt has made the point that

"under existing practice, the mere fact that some sort of alternative Ministry is possible does not, and should not, prevent the grant of a dissolution by the King's representative"⁷⁵.

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70. See Campbell "The Prerogative Power of Dissolution Some Recent Tasmanian Precedents" (1961) Public Law 165 at 176-179 for her discussion of the 1959 Tasmanian precedent.
71. The 1914 double dissolution was obtained by Ministers deliberately creating the condition required by the Constitution Act 1901-1967 s.57: see Evatt at 37-49, especially at 45. In 1918, Prime Minister Hughes deliberately made an issue of confidence out of the conscription referendum: *id.*, at 153-156.
72. Forsey, *op. cit.*, by his insistence on this factor tends to suggest that it can.
73. *Id.*, at 265.
74. A quotation from a newspaper article at the time of the 1926 Canadian controversy, cited by Forsey at 25, 258, with evident approval.
75. Evatt, "The Discretionary Authority of Dominion Governors" (1940) 18 Canadian Bar Review 1 at 9.

In particular he suggested that a Governor ought to consider whether an alternative Ministry would enjoy a popular "mandate", or whether it, or any member upon whom it depended, was proposing to act "in flagrant disregard" of electoral pledges⁷⁶.

This view is perhaps capable of legitimate application in one area. Where a Premier has lost the confidence of the Lower House because a supporter has defected to the Opposition, it is hard to see what claim the Leader of the Opposition has to form a government. In such circumstances a dissolution is clearly the best solution: either the member's defection will be approved and the Leader of the Opposition be in a position to form a Government or the Premier will be reinstated.

This is the course Sir Ronald Cross took in Tasmania in 1956, although other justifications for his decision (such as that the alternative government was not viable) may be suggested⁷⁷. There is no difficulty in leaving to the Governor the decision as to when a majority has been lost by tergiversation⁷⁸.

Apart from this rather narrow area, the determination of the respective "mandates" of the parties to govern would obviously involve the making of subjective political judgments by the Governor. From a practical point of view, therefore, Evatt's criteria seem unsatisfactory both on the ground that the "would seem to be very difficult of application"⁷⁹ and because they would inevitably require the Governor to enter the political arena⁸⁰.

- (d) "A dissolution is allowable, or necessary, whenever the wishes of the legislature are, or may fairly be presumed to be, different from the wishes of the nation"⁸¹.

Insofar as this view is identical with Evatt's "mandate" it is open to the same criticism. In any case Forsey links them, claiming that both are "very difficult of application"⁸².

This is quite true, but there is a much stronger objection: the constitutionality of a Governor's actions in any particular situation does not depend (nor ought it to depend) on the subsequent electoral verdict. Thus the constitutionality of Sir Philip Game's dismissal of J. T. Lang in 1932 is still open to question, and has been strongly criticised, although Lang lost the subsequent elections⁸³.

76. *Ibid.*

77. See Campbell's discussion: "The Prerogative Power of Dissolution: Some Recent Tasmanian Precedents" (1961) Public Law 165 at 170-176.

78. For the reasons given in relation to ascertaining the general parliamentary situation, it is preferable that this be ascertained if possible on the floor of the House: see *sup.*, at 319-320.

79. Forsey at 269.

80. That this is not always thought to be undesirable is perhaps shown by the fact that the last two Governor-Generals to be appointed had both been Members of Parliament and Ministers (*viz.* Lord Casey and Sir Paul Hasluck).

81. Dicey, *Law of the Constitution* (8th ed., 1915) at 428-429.

82. *Op. cit.* at 269.

83. See Evatt at 157-174.

There are several reasons why this should be so. First, if it were true that a dissolution was proper whenever there were grounds for believing the Opposition would win, no rules in relation to the exercise of the power of dissolution could be formulated: all would depend on the subjective decision of the Governor.

Secondly, elections, though they may be fought on particular issues, can hardly be taken as decisions on matters of conventional law. It is usually impossible to tell why an election is won or lost: certainly it is never won or lost for a single reason but for many.

Finally a rule such as this would bring the Governor squarely into the political arena. The decision of when the members of the legislature "may fairly be presumed to be" unrepresentative of the wishes of the nation is an impossibly difficult one. In relation to parliamentary democracies of our type, there would seem to be no merit at all in the suggestion.

Although it is easy to criticize the suggestions of various authors in this area it is very hard to suggest exactly what the rules are. Certainly the prime factor is the presence or absence of a viable alternative government. Then, as long as Parliament is not "approaching expiry through the effluxion of time", or (possibly) if there is no issue of public policy at stake, it would seem that there ought to be no dissolution. The exception to this rule is that the adverse majority must not have been gained by the defection of a supporter of one of the parties to the other side.

(3) It is almost universally agreed that "a Government which has had one dissolution and been defeated, and then asks for a second, cannot have it if an alternative government can be found"⁸⁴. The result seems almost inevitable, since the whole purpose of an election is to decide which Government shall hold office in the next Parliament. To reject such a decision (if unfavourable) and call for another would appear to be indefensible: in Evatt's phrase it would

"represent a triumph over, and not a triumph of, the electorate"⁸⁵.

However two exceptions to this rule would have been suggested. Forsey states that a second dissolution is allowable

"where an Opposition party had secured a majority by flagrant and notorious fraud, corruption, terrorism or some combination of such methods"⁸⁶.

His suggested remedy in such cases (which he admits would be extremely rare) is a temporary government of some elder statesmen to ensure that a second election is properly run.

More to the point is the suggestion of Marshall and Moodie⁸⁷ that

84. The proposition is originally Keith's: see *The Constitution; Administration and Laws of the Empire* (1924) at xiii-xiv. It is cited by Forsey at 94 and approved at 110.

85. Evatt at 109: cited by Forsey at 8.

86. *Op. cit.* at 260.

87. *Some Problems of the Constitution* (1959) at 57.

"it is difficult . . . to decide in advance whether the rule applies on the basis of upholding the authority of the electorate when a Prime Minister, who has lost his parliamentary majority, has yet obtained (say) 60 per cent. of the votes cast . . ."

Insofar as their suggestion is not equivalent to Forsey's⁸⁸, that is, insofar as the disproportionate vote was not obtained by "flagrant and notorious fraud, terrorism or some combination of such methods" but either by an unfair distribution of votes or by those anomalies to which the system of single member electorates is admittedly subject, the suggestion is theoretically interesting but elusive in its practical application. In the case of a "gerrymander" it is hard to see how a second election could improve matters since the only remedy would be legislation to alter the boundaries and remove the inequality. In fact the more flagrant the gerrymander, the less likely a second election would be to alter the result.

The same criticism can be levelled at the second alternative (accidental imbalance) which would be just as likely to occur in the second election as in the first.

The real point in our view behind both suggestions is that these cases would really come within the scope of the extraordinary reserve power of the Crown in the case of emergency to force a dissolution. This power has been recognised by most writers on the topic: see for example the judgment of Mohammed Munir C.J.:

"In the United Kingdom the Crown, which since long [sic] has ceased to exercise its discretion in opposition to the advice of the Ministry will be considered to be justified in exercising its reserve powers of withholding assent or directing dissolution if Parliament ever attempted to prolong its own life indefinitely"⁸⁹.

Of course, if a newly elected Parliament were found to be unwilling to support any ministry at all there would be no alternative but to call a new election.

(G) THE SUBMISSIONS

Document B (Mr. Dunstan's submission in his capacity as Attorney-General) is concerned with the point of his right to meet Parliament. This was undisputed and has been already dealt with⁹⁰.

It remains to deal with his submission as Premier in Document A, and the formal advice contained in Document C. Three matters requiring comment arise from these two submissions.

88. *Sup.* n. 86. Of course in this area it would be hard to find two writers whose fundamental premises differed so widely as do Forsey's and Marshall's and Moodie's. This makes their apparent agreement in this one area all the more striking.

89. Jennings, *Constitutional Problems in Pakistan* (1957) at 86. See also Forsey at 270-271.

90. *Sup.* at 319.

It should be noted that the Premier stresses the possibility of the overall result being affected by a decision of the Court of Disputed Returns⁹¹. Mr. Hall on the other hand submitted

“that your Excellency’s decision should not be influenced by the possibility of appeals being made to the Court of Disputed Returns by any defeated candidates. Whether such appeals be instituted and whether they be successful cannot affect the representation in the House of Assembly at its first meeting. The members who have now been declared to be elected will take their seats and occupy them unless and until a decision of the Court of Disputed Returns adverse to them be given”⁹².

The apparent conflict can perhaps be reconciled if one looks at what the Governor was actually being asked to do in each submission. If anything the fact that certain seats were the subject of Disputed Returns reinforced Mr. Dunstan’s advice to issue an early proclamation summoning Parliament (whose function it is to constitute the Court). On the other hand, as far as the Governor is concerned, a particular member’s election to the House was quite valid, and the possibility of its avoidance by the Court ought not to have influenced any necessary assessment of the support the Premier enjoyed (or failed to enjoy) in the House⁹³.

Secondly, Mr. Dunstan lays some stress on the disparity between votes cast and seats won, and claims that this factor ought to influence the Governor to wait until Parliament meets. Since in any case Mr. Dunstan’s advice was quite proper this additional factor can hardly have influenced the Governor’s decision.

The suggestion remains an interesting one. Marshall and Moodie’s example⁹⁴ relates to a 60 per cent. majority of votes but otherwise the similarity is close. One would have thought that such factors as actual popular support (as distinct from Parliamentary support) were not matters which a Governor could properly assess⁹⁵.

Finally it will be noticed that, the formal advice contained in Document C is only in part in the same terms as that of Sir Thomas Playford in 1962. In 1962 the advice to issue an early proclamation summoning the House was expressly to

“enable the House to decide whether the present Government has the confidence of the House or whether it should resign to enable another Ministry to be formed”⁹⁶.

Mr. Dunstan, on the other hand, keeps his options open:

91. *Sup.* at 305.

92. *Sup.* at 310.

93. Nevertheless the status of any Government dependent for its existence on a disputed seat must only be provisional. In that sense too (had the A.L.P. persisted with its challenge in the seat of Chaffey) Mr. Hall’s advice would have been in effect temporary.

94. *Some Problems of the Constitution* (1959) at 57.

95. See further, *sup.* at 326-327.

96. *Sup.* at 304-305, ll.14-17.

"This would enable the Constitution of the Court of Disputed Returns, the reference to it of petitions re disputed elections, and the tendering to you of such further advice by Ministers at that time as would be proper in the exigencies of any situation then arising"⁹⁷.

We turn now to Document D, Mr. Hall's submission as Leader of the Opposition. In some respects it is difficult to ascertain precisely what matters are being dealt with in this submission. For example, the first paragraph appears *sub silentio* to raise the matter of dismissal, following the refusal of a dissolution to the Premier⁹⁸. One matter, however, is clear, and that is that by and large this document was designed to refute the notion that the Premier was entitled legitimately to seek a second dissolution, and that if he so advised, the Governor was constitutionally bound to act in accordance with that advice. We now proceed to examine this document in some detail in order to see how successful was the "no dissolution" case.

Paragraph 1 is, in our view, ambivalent and could be taken as advising the dismissal of the Premier *instanter* without there being an opportunity of first meeting Parliament. This course of action, as we have elsewhere demonstrated, would have been unconstitutional. Moreover, the word "discretion" which appears in line 4 is open to criticism, in that it suggests that a Governor has an unfettered power to do what he likes. This, of course, is very far from the true position as we contend, and that is that the Governor is constitutionally *obliged* to apply the conventional rules appropriate to the relevant reserve power. We do not wish to labour this point, and are content to point out that the offensive word appears no fewer than seven times in the course of this submission⁹⁹. However, although it is a dangerously ambiguous expression, we are prepared, generally speaking, to accept that in its present context it was not intended to support the existence of an uncontrolled discretionary power vested in the Governor to do exactly what he pleased. On the other hand, it is far from certain that it was indeed merely to set out the orthodox conventional doctrine.

Paragraph 2 raises the same problem. The point is clearly being made that the Governor would not be bound to accede to any advice by Premier Dunstan for a second dissolution. On the other hand, the use of the expression "discretionary power"¹⁰⁰ if interpreted literally would equally clearly allow the Governor to accept this advice—the very thing Mr. Hall is at pains to prevent! The reference¹⁰¹ to the advice "as set out above" raises once again the problem of what that advice actually was.

Paragraph 3 contains a general opening in which there is a further reference to "constitutional powers and discretions". Then follow a number of specific points which are generally, but by no means exclusively, designed to meet the "second dissolution" case.

97. *Sup.* at 307-308, ll.25-28.

98. *Sup.* at 308, ll.5-8.

99. *Sup.* at 308-310, ll.4, 12, 16, 17, 70, 93, 94. It should be pointed out that some such phrase as "according to established usage and custom" (*id.* at 95) appears in several instances.

100. *Sup.* at 308, ll.12-13.

101. *Sup.* at 308, l.11.

Item 1: This submission is to be deplored for the reason that it treats Clause VI of the Instructions as relevant to the solution of contemporary constitutional problems in the Australian States. We have examined this clause in some detail elsewhere in this article, and reiterate our conclusion that it is obsolete, and should be removed from the Governor's Instructions at the first opportunity or be redrafted. This submission also refers to the "discretion" of the Governor¹⁰².

Item 2: A mere *reference* to Instructions in Letters Patent does not thereby invest them with the *legal* force of Letters Patent. It would, of course, be otherwise if the instructions were incorporated into the Letters Patent¹⁰³.

Item 3: This submission is in our view entirely unhelpful and does nothing to illuminate the problem of what the "powers and authorities" referred to are¹⁰⁴. Section 69 of the S.A. Constitution Act is a reference to the legal powers of the Governor, and *ex hypothesi* says nothing which is remotely relevant to the conventional position.

Item 4: This is the first direct reference to the problem of a second dissolution. The citation from Asquith is well-known, and certainly constitutes a direct refutation of the view that in the circumstances of March 1968 Premier Dunstan would have been entitled to a second dissolution. The case against a second dissolution is reinforced by a reference to the work of Evatt. Particular passages are referred to but these are not exhaustive, not is there any direct quotation¹⁰⁵. The general impression is that much more relevant material could and should have been marshalled for the purpose of this highly important submission.

Item 5: This appears to be off the point. Scott was dealing with the appointment of a successor to a Prime Minister with a parliamentary *majority*.

Item 6: This submission is back to the problem of a second dissolution. The citation of Keith is apposite, but there are other passages in his prolific writings which might have been cited in support of the contrary proposition¹⁰⁶.

Item 7: The work of Marshall and Moodie generally supports the modern "no rejection" theory of ministerial responsibility¹⁰⁷. Certainly, they do suggest that normally a Premier who has had a dissolution, and has been defeated at a general election would not be entitled to a second dissolution. It is clear, however, that for them this is by no means an absolute principle. Their hypothetical example of a Government gaining 60 per cent. of the popular vote at a general election, yet finding itself in a parliamentary minority

102. *Sup.* at 308, 1.19.

103. See Swinfen, "The Legal Status of Royal Instructions of Colonial Governors" (1968) *Juridical Review* 21 at 36, and the Colonial Laws Validity Act 1865.

104. *Sup.* at 308, 1.22.

105. The submission refers to Evatt at 69, 237. Additional reference might have been made generally to Chapters 7 and 8, and also to pages 44, 109. In addition there is Evatt's important article in (1940) 18 *Canadian Bar Review* 1, which together with Forsey would have considerably reinforced this submission.

106. Keith, *Imperial Unity and the Dominions* (1916) at 85: see also (1917) 17 *Journal of Comparative Legislation* 231.

107. *Some Problems of the Constitution* (1959) at 50-57.

demonstrates that in some situations they would support the grant of a second dissolution to a Premier with a plurality of the popular vote, notwithstanding a parliamentary minority¹⁰⁸. The reference to the work of Forsey would be unexceptionable were it not for the fact that the particular references do not deal with the question of a second dissolution. The passages referred to contain general observations with respect to the power of dissolution, and are not directly applicable to the particular problem. Elsewhere, however, Forsey supports the view that no second dissolution might properly have been granted to Premier Dunstan in March 1968¹⁰⁹.

Item 8: This submission contains a random selection of precedents designed to show that the "automatic" dissolution principle has not been adopted by Australian Governors and Governors-General. We proceed to examine these in turn.

(a) *Victoria, 1909*—this was a *grant* of dissolution. However, it appears that before granting the dissolution, the Governor ascertained whether an alternative and viable form of government was available. The Governor further expressed the view that in granting or refusing a dissolution he could only refuse the advice of Ministers for the time being "if he feels that in doing so his action would be supported by the constituencies"¹¹⁰. As Evatt observes this proposition is very difficult of application "because if a dissolution is to be refused, no consultation of the constituencies can take place at all"¹¹¹.

(b) *Commonwealth, 1918*—this is an interesting precedent, but is not strictly concerned with the problem of a second dissolution. What in fact happened was that Mr. Hughes resigned, having been defeated at a referendum on the conscription issue. This he had pledged to do. The Governor-General recommissioned him on the basis that the "parliamentary situation" demonstrated that the National Party, led by Mr. Hughes, was the only one which could carry on the Government of the country¹¹².

(c) *New South Wales, 1926*—This precedent has nothing to do with the problem of dissolution. We have dealt with its value as a precedent in earlier contexts, and repeat our view that insofar as the Governor in this case purported to rely on Clause VI as investing him with personal discretionary power, its value as a guide to the solution of contemporary problems is minimal.

(d) *Commonwealth, 1931*—This was a *grant* of dissolution by the Governor-General, Sir Isaac Isaacs, to Mr. Scullin. In this case it is clear that the Governor-General did not grant dissolution as a matter of course, but first apprised himself of details as to the relevant strengths of the various parties

108. *Id.*, at 57.

109. Forsey at 266.

110. *Votes and Proceedings, Legislative Assembly (Victoria) First Session 1909*, at 213.

111. Evatt at 232.

112. The full details of this precedent are set out, and its implications discussed in Evatt at 153-156.

in the House, and the "probability in any case of an early election being necessary"¹¹³.

(e) *Tasmania, 1956*—This, too, was a *grant* of dissolution by the Governor to the Labor Premier, following the defection of a Government member to the Opposition on a motion of no-confidence. The Governor clearly rejected the notion that it was only in extreme circumstances that he would be justified in rejecting his Premier's advice. On the other hand he apparently accepted the Premier's contention that an alternative government ought not to govern where it relied for its majority on the support of one who had defected from the former government. We take this to support our view of the convention that dissolution generally ought not to be granted in the face of an alternative *viable* government. The majority of the alternative government, depending as it did upon the support of a turncoat, was so precarious that an election was the prudent course to take.

We make two comments on this array of authority. In the first place, the indifferent use of State and Commonwealth authority suggests a total equation of the constitutional status of the Governor and Governor-General. If this is so, and we can only assume this to be the position, the reliance upon Clause VI in submission 1, and the 1926 N.S.W. precedent (Submission 8 (c)) appears both anomalous, and somewhat irresponsible.

Second, we would have thought that a far stronger case against a second dissolution could have been made. Such precedents as relate to the power of dissolution are concerned with *grants*, not refusals of dissolution¹¹⁴. For example, it would surely have added weight to Item 8 had reference been made to the Commonwealth precedents of 1904¹¹⁵, 1905¹¹⁶, and 1909¹¹⁷ in all of which dissolutions were sought by Commonwealth Prime Ministers and *refused* by the Governor-General. Moreover the Commonwealth Double Dissolution of 1913 would have been a worthwhile addition to the list¹¹⁸, as would have been some reference to the very helpful (from the Opposition's point of view) Tasmanian precedents of 1948, 1950, and 1959¹¹⁹.

(H) CONCLUSIONS

Previously we attempted to formulate in a tentative manner the guiding principles for the proper exercise of the reserve power of dissolution. Assuming that these rules accurately and adequately reflect the proper usage with

113. *Id.*, at 237.

114. As we have noted above (at 331-332), two of the five selected precedents (*viz.* Item 8(6) and (c).) are not relevant to the question of dissolution.

115. Forsey at 35-40.

116. *Id.*, at 36.

117. Evatt at 50-54. Other relevant cases of *refusal* are the U.K. precedent of 1910 (see Forsey at 11-13), the Canadian precedent of 1926 (*id.*, at 131-203) and the South African one of 1939 (*id.*, at 251-256).

118. Evatt at 45-56; also "The Discretionary Authority of Dominion Governors" (1940) 18 Canadian Bar Review 1 at 4-5.

119. See Campbell "The Prerogative Power of Dissolution: Some Recent Tasmanian Precedents" (1961) Public Law 165; Craig, "The Governor's Reserve Powers in Relation to the Dissolution of the Tasmanian House of Assembly" (1960) 1 Tasmanian University Law Review 488.

respect to dissolution, the question poses itself as to whether these and other rules should be enacted in legal form, or whether they should remain in their present unwritten conventional form.

We believe, like Evatt, that there is much to be said in favour of a statutory formulation of the rules governing the constitutional exercise of the power of dissolution, and indeed of the other reserve powers of the Crown. It is beyond dispute that hitherto this area of the constitution has been vague, confused and uncertain. This has in turn given rise to a very real evil, and that is that in the existing state of uncertainty, political polemicists have been able to exploit this phenomenon for unworthy, or at least partisan ends. Confusion has thus been compounded, and dust thrown in the eyes of those conscientious enough to want to know the true constitutional position. We do not consider that Evatt is over-dramatising when he writes: "If agreement upon constitutional practice is rendered impossible, the near future must see the end of political democracy"¹²⁰.

The opposing argument would presumably be based on the traditional ground that the unwritten, unformalised nature of conventional rules is precisely what imparts flexibility and viability to the constitution. Once these rules are enshrined in statutory form, they become "concretized" and lose their flexibility. The all-important capacity to develop as and when political forces dictate constitutional change is whittled away. There is a very real danger that the formalised rules of the constitution will become part of the anachronistic deadwood of the statute book, and thus stifle the natural and necessary growth processes of the constitution.

We consider this latter argument to be unrealistic. There is no reason why a statutory scheme of conventions should not be amenable to change as and when political necessity dictates¹²¹. A committee, with appropriate parliamentary, legal and politico-scientific representation, could be set up to examine the statutory provisions periodically, with power to recommend amendments to Parliament if it considers them to be necessary¹²².

The 1968 South Australian precedent will not go down as one of great moment. For a time, however, it fomented considerable interest and speculation both locally and nationally. More significantly, the occasion provided an opportunity to re-examine certain crucial areas of the constitution, particularly with respect to the reserve power of the Crown to dissolve Parliament, which we believe to be matters of general rather than parochial significance.

120. Evatt at 281.

121. The feasibility of reducing the valid exercise of the reserve powers to precise rules of constitutional obligation in statutory form is demonstrated by the Western Nigerian attempt in its constitution: see especially ss.31(4), 33(10) and 38(1). On the other hand the decision of the Privy Council in *Adegbenro v. Akintola* [1963] A.C. 614 demonstrates the interpretative problems which will almost inevitably accompany such legislation. For a further discussion of this case see Evatt, (2nd ed.) *Introduction* at xxix-xxxiii (Z. Cowen).

122. We do, of course, concede that the initial job of drafting the rules to cover all exercises of the reserve power would be extra-ordinarily difficult, and would require a great deal of expertise, ingenuity and time. This does not, however, render the task impossible: see Evatt "The Discretionary Authority of Dominion Governors" (1940) 18 *Canadian Bar Review* 1 at 6.

Epilogue

On 20th April the House met and elected a Speaker (Mr. Stott, Independent), on the nomination of the Leader of the Opposition. After the Governor's address Mr. Hall moved the adjournment and was supported by the casting vote of the Speaker¹²³. Mr. Dunstan then resigned and Mr. Hall was commissioned to form a government.

*This is the way the world ends
This is the way the world ends
This is the way the world ends
Not with a bang but a whimper.*

123. See *Hansard, Thirty-ninth Parliament, First Session, April 16 and 17, 1968*, at 6-7.