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POST-ELECTION CONSTITUTIONAL USAGE IN THE SHADOW OF MOUNT WELLINGTON: TASMANIA'S CONSTITUTIONAL CRISIS, 1989

Australian States have long been repositories of some of the more intriguing workings of the system of responsible government. Through the second half of the nineteenth century and beyond crises on the displacement and appointment of governments, not least the dismissal of Premier Lang of New South Wales in 1932 by Sir Philip Game, have provided special nuances on the ordering of these governmental processes. The great trials of political strength in Victoria in the 1860's and 1870's exemplify disputes relating to the continuing viability of governments retaining the confidence of lower houses with intransigent opposition from elective upper houses; a situation without effective guiding precedent from Britain with its non-elective House of Lords, echoed nationally with the dismissal of Prime Minister Whitlam by Governor-General Kerr in 1975.

The volatility of State politics has sometimes brought its own complexities to the arrangement of government affairs. Before the growth of political parties in their modern form towards the end of the nineteenth century the formation and demise of governments was often almost a commonplace in some places. In South Australia, for example, between the coming of responsible government in 1857 and federation there were 42 ministries![1] Tasmania was not so volatile. But it had 22 in the same period.[2] On the other hand, Tasmania has experienced more controversial situations in the twentieth century when the Hare-Clark system for Assembly elections has made it difficult at times for parties to obtain working majorities.[3]

There has also been an almost exponential growth in the authority of ministries for the time being. They have exercised increasingly recognisable power in the regulation of independent vice-regal discretions which once lay at the heart of significant aspects of the working of responsible government. With cabinets and their surrounds essentially although not entirely the product of constitutional usage, there has been a shadowland of customary practice where the seemingly inexorable rise of ministerial authority has been manifested in the progressive acknowledgement of the rights of Chief Ministers to become dominant, prevailing advisors to the Crown in such matters as the calling of elections well before the expiry of a Parliament's life.[4]

The nature of this ministerial authority in the Australian States may have also been advanced for some purposes with the passing of the *Australia*

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Merrin McKay (LLB (Tas), Barrister and Solicitor, Supreme Court of Tasmania) undertook the detailed research and examination of the final events in Tasmania in 1989 which provided the foundation for this article.

1 Castles and Harris, *Law Makers and Wayward Whigs* (1987), pp 160-161.

2 Townsley, 'The Governor, Cabinet and the Administration' in Green (Editor), *A Century of Responsible Government 1856-1956* (1956), 211 at 246.

3 See: Table 2.2, Townsley, *The Government of Tasmania* (1976) at 24.

4 Ibid, 106-112.

Acts and other instruments accompanying these. These have partially moved the position of State Premiers from the realm of customary usage to the direct endowment of powers in relation to the nature of the authority of the monarch in the working of State government.[5] Separate instruments re-constituting or re-ordering the powers of State Governors have placed vice-regal officer holders in a new constitutional environment.[6] In this the growing hegemony of ministries for the time being may be increased in the absence of Parliamentary intervention to influence vice-regal discretions relating to a variety of matters, not least with respect to the formation of governments and the calling of elections when these are not regulated by express constitutional fiat.

There has long remained, however, one context in which the nature of ministerial authority has seemed more constrained. This relates to the practices surrounding the intervening period between an election and the reconvening of a legislature in its aftermath. While ministries in the absence of formal constitutional restraints have increasingly dominated the exercise of vice-regal discretions in other circumstances, this has seemingly remained an aspect in the working of responsible government where this should not be operative and understandably so. One fundamental essence of the system of responsible government has been seen to be the authority of an electorate to determine the membership of a legislature.[7] This has been accompanied by the authority of a newly constituted Parliament's lower house to decide upon the future nature of the executive branch of government at its highest level.

Hidden in the interstices of government practices, however, there have sometimes been echoes of the growing strength of ministerial authority more generally to become increasingly dominant in these circumstances. This situation could, at least in theory, be enhanced by some of the consequences flowing from the *Australia Acts* and their accompanying instruments. Even before these, in South Australia in 1968, for example, after an election had not given either major party in the Assembly a working majority, one formal submission to the State Governor canvassed the possibility that an incumbent ministry might seek a further election whatever the future determination of the Assembly, albeit in the context of arguing this would be constitutionally inappropriate.[8]

More normally, however, the growth of strong political parties and their dominance of governmental affairs have tended to obscure the uncertainties

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5 *Australia Acts*, s 7(5).

6 Castles, 'Now and Then. The Tasmanian constitutional crisis and State Governors' powers after the Australia Acts', (1989) 63 ALJ 781.

7 But in the absence of Commonwealth or State equivalents to the 14th amendment to the United States Constitution the accuracy or otherwise of State electoral systems to reflect the majority of an electorate in terms of Parliamentary representation would seem to be irrelevant in constitutional terms.

8 Harris and Crawford, 'The Power and Authorities Vested in Him: The Discretionary Authority of State Governors and the Power of Dissolution', (1969-70) 3 Adel LR, 302 at 308, 'Memorandum from the Leader of the Opposition to the Governor'. A submission by the incumbent Premier did refer to the support his Party had received which exceeded that in numerical terms of all others elected to the Assembly. But the submission stated this did not affect the constitutional situations directly. 'While it might be said that this is not a subject which ought to weigh a decision on constitutional matters' it was nevertheless considered appropriate to draw the Governor's attention to this as there could be support for considering its relevance from this source. 'Memorandum from the Premier to His Excellency the Governor', Ibid 304 at 305.

which may still exist on the regulation of matters relating to responsible government in these circumstances. On the defeat of a government in a poll, an incumbent Chief Minister may simply resign to enable the immediate commissioning of another, as evidenced by the transfer of power which took place nationally after the defeat of the Fraser government in 1983. In other situations, as in South Australia in 1968, the incumbent ministry resigned when it became clear on the reconvening of the legislature that it no longer possessed the confidence of the House of Assembly.

But the working of governmental processes is not always as simple as this. With political volatility, particularly with uncertainties on Parliamentary majorities, subtle issues can arise on the ordering of constitutional arrangements in these circumstances. This has now been illustrated forcibly in the aftermath of the 1989 election for Tasmania's House of Assembly. In a classical fashion, the Hare Clark system produced no working majority for any party. The incumbent ministry of Premier Gray obtained 17 seats, one short of this. The Australian Labor Party had 13, two less than previously. The balance of power then rested with five other members without affiliations to these two major parties. In the ensuing weeks before the reconvening of the legislature this created constitutional issues, possibly new precedents, on the working of the usages which may be applicable in these circumstances.

In historical terms the election of these five members was not especially significant. Individuals or small groups of representatives have long been in similar Parliamentary situations. In recent times in South Australia, for example, in 1968 and again in 1989, no major party obtained a working majority in the House of Assembly. There was a similar occurrence in Tasmania in 1969 when the sole Parliamentary representative of a group called the Centre Party was poised between two other parties with equal numbers in the Assembly.

The normally accepted course in these situations has been to rely on political processes to determine the future course of government. Where necessary, this has ultimately found its highest political expression in voting in a legislature to determine whether a proposed government has its confidence. Thus in South Australia in 1968 a sole independent member, with the balance of power in the Assembly after an election, was elected Speaker on the reconvening of Parliament. When it became clear that the then incumbent government no longer had the confidence of the House after its defeat on an adjournment motion, the incumbent Premier resigned. He was immediately replaced by the previous Leader of the Opposition.[9] In reverse, after the Bannon government failed to get a working majority in the 1989 State election it stayed in office when it became clear that two independent Labor members would give it general support. The 1969 Tasmanian situation was resolved when the sole representative of the Centre Party agreed with one party to enter into a coalition and also take ministerial office in a new administration.[10]

Of considerable significance traditionally in this regard has been the way these moves have generally been kept isolated from the working of vice-regal authority. One reason for this has been that to do otherwise would be to draw the Crown into an examination of political rather than

9 Ibid 334.
10 Townsley, *op cit*, pp 60.

constitutional issues in the exercise of any discretionary authority which may be available to it. Another potent cause lays deep within the nature of responsible government as it has evolved in Britain and in its adaptions in countries like Australia. For the Crown to appear to determine the nature of a ministry could be to usurp the authority of a legislature to select whichever it chooses as the appropriate political representation of the executive branch of government to be responsible to it. Incidentally, but no less significantly, this might also be regarded as an interference with the expressed will of an electorate.

Nevertheless, however this may be, there were two occasions in Tasmania in mid-1989 when activities which normally would be treated as political were drawn more formally into the ordering of constitutional processes, separately from the internal working of the legislature. The first of these occurred well before the reconvening of Parliament. After abortive negotiations with the incumbent government, the five independents entered into an arrangement with the Australian Labor Party on the future course of government in a document called the Tasmanian Parliamentary Accord.[11] The details of this were then immediately transmitted by the ALP Leader, Michael Field, to the Governor's Official Secretary and received by him.[12] Later, after the reconvening of Parliament, the government of Premier Gray was defeated on the floor of the Assembly on an amendment to a motion on the Address in Reply to the Governor.[13] Mr Gray did not immediately resign, although he did later. Meanwhile, the Governor Sir Phillip Bennett, entered into consultations with the approval of the Premier with the main Opposition parties and the independents.[14] Before commissioning Mr Field, however, the Governor went further. Despite the normally accepted way the Assembly might have been regarded as being determinative of the situation, Sir Phillip sought and obtained individual assurances that the independents would support a new administration headed by Mr Field.

In substance, the Accord as submitted to Government House was a political agreement, a statement of political intent, no more. Its basic purpose was to commit the five independents to supporting a Labor administration provided certain conditions were fulfilled. They agreed to support Labor budgets and supply bills. The independents affirmed they would not support nor abstain from voting on any Opposition motions of no confidence, as well as attending all Parliamentary sittings and participating in House divisions. In return the Australian Labor Party agreed to a total review of the Assembly's procedures and Standing Orders, the determination of agreed sitting times and the creation of new committees on Parliamentary estimates. New procedures were to be

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11 *Mercury* (Newspaper), 30 May 1989, pp 1 and 3; *Examiner* (Newspaper), 30 May 1989, p 1 and 2. The original agreement was signed by the Parliamentary leader of the Australian Labor Party, Michael Field, and Dr Brown, one of the independents.

12 The actual transmission of this document was originally reported in one newspaper as being submitted by Opposition Leader Field to the Governor. But this was subject to a 'clarification' in the *Mercury* (Newspaper), 31 May, 1989. As it stated, 'Mr Field delivered a letter to the Governor's official secretary and did not meet the Governor'. Whatever the constitutional niceties involved, however, the State Governor, Sir Phillip Bennett, later seems to have treated this as an official submission which he received. *Bennett to Field*, 29 June, 1989. In this the Governor referred to the 'full copy of the Tasmanian Parliamentary Accord which you submitted to me on the 29th May . . . '.

13 Tas Parl Debates (1989) 41st Parl 1st Session (V & P No 1) Wednesday 28 June 1989.

14 *Mercury* (Newspaper) 30 June 1989 at pp 1 and 3; *Examiner* (Newspaper) 30 June 1989 at pp 1-2.

introduced on the registration of the pecuniary interests of Parliamentarians and for the disclosure of gifts and donations to individuals and groups for political purposes. Plans were also agreed upon to provide a legislative research service, increased staffing for the independent Parliamentarians and the institution of consultations on policy matters relating to the national estate. Legislation was to be introduced for a four year, fixed Parliamentary term.

In the absence of any publicly available explanation, the urgency shown by Mr Field in submitting this document in Government House suggests it was not simply provided for the Governor's information. Rather it was regarded as being of some constitutional significance in possibly influencing whatever discretionary authority the Governor might be called upon to exercise in the prevailing circumstances. If so, whether for tactical or other reasons on the part of Mr Field, an arrangement which otherwise would have been regarded as being of no more than political significance seemed to be given a special constitutional profile which normally would not have been accorded to it.

The Accord, however, took on a constitutional significance which extended well beyond this in the final denuoement of the Tasmanian situation. It became central to the way the Governor affirmed that he would act in commissioning Mr Field, despite the determination of the House of Assembly that Mr Gray no longer possessed its confidence.[15] This agreement was ostensibly raised to a status which gave it a purported standing in the conduct of constitutional affairs which seems without normal parallel, at least in terms of the more contemporary ordering of responsible government in Australia.

The genesis of Sir Phillip Bennett's stance on this was to be seen in a letter he sent to Mr Field on 29 June.[16] Acknowledging that the Gray government had been defeated on the floor of the House of Assembly, the Governor nevertheless did not indicate that he would necessarily proceed to appoint Mr Field in his stead. As he set it out: 'I wish to explore your capacity to form an alternative administration.' This was so, even though, as the Governor acknowledged, Mr Field had assured him that 'with the support of all five Independent members of the Assembly, you can form a minority government'. 'While in no way casting doubt on that assurance', as the Governor formally stated it, he went on to affirm: 'I am bound to satisfy myself that neither side is under a misapprehension about the other which throws into doubt your capacity to govern.' With this in mind, he then sought 'assurances' on five aspects of the Accord.

Even in terms of form this might be regarded as going beyond the generally assumed position of a Governor in these circumstances. In South Australia in 1968 and 1989, for example, there is no evidence that any

15 The Standing Orders of the House of Assembly complicated the way in which any expression of Parliamentary will on the standing of the Gray government could be determined. A no confidence motion, *strictu sensu*, could not be moved without the suspension of Standing Orders which required 21 votes, which the combined representation of the Australian Labor Party and independents could not achieve on the floor of the House. The determinative vote (after a lengthy, continuous sitting) was in the form of an amendment to the Address in Reply moved by the government; essentially serving the same purpose as a no confidence vote as acknowledged by the Governor (*Bennett to Field*, 29 June, 1989, Letter 1).

16 This is Letter 1, the first of two letters sent by the Governor to Mr Field on 29 June.

formalisation along these lines was essayed in relation to the independent members with the balance of power in the Assembly. With impeccable constitutional propriety in terms of local South Australian usage in 1989, the position of the Bannon government was determined by political processes without direct vice-regal involvement in the nature of the support which the independent members would give to the continuance of this administration. The Premier, however, assumedly informed the Governor of his position in the legislature as he comprehended it, a normal act of courtesy to the Crown.

But far more importantly, the substance of the precise assurances Sir Phillip Bennett sought seemed to move considerably further, placing in contention the continuing viability of limits previously operating in places like South Australia on the nature of Crown authority in these or similar circumstances. It has generally been assumed, particularly in recent times, that the Crown is required to maintain a separation from the working of Parliamentary affairs, excluding itself from any interference with the manner in which a legislature goes about its activities. In form at least this dates back in Britain to the constitutional struggles of the seventeenth century. The exclusion of the monarchy or its representatives from the immediate precincts of Parliamentary deliberations except by invitation is a long respected, enduring symbol of the long standing consequences of these events. Expressed in more contemporary terms it is encompassed within the concomitant right of Parliaments not to be inhibited by any notion that the Crown is any way directing the way a legislature goes about its business. Implicit in this, and vitally so, is the preservation of the independent position of individual members of a legislature, whatever their outside political allegiances might be. They, too, must be free of any binding outside influence on the exercise of their Parliamentary activities, not least if the source of this might seem to be the Crown.

In 1914, in a constitutional environment when Governors exercised more independent authority than today, the question of gubneratorial power to attempt to dictate the course of Parliamentary activities in Tasmania provided an instructive precedent of the more general course of constitutional usage on this in this century. After an incumbent Premier had been defeated in the House of Assembly he was refused a dissolution by the Governor. Another Chief Minister was commissioned in his place but only after the Governor had extracted a pledge that he would call an immediate election. The new Premier, however, refused to abide by this condition, claiming it was unconstitutional. He received unanimous support for his stand from the members of the Assembly. When the issue was subsequently referred to London for an opinion a British Secretary of State had no difficulty in affirming the new Premier was not bound by the condition the Governor had purported to make binding on him. It was beyond vice-regal authority to attempt to interfere with the inherent rights of a Premier and Parliament in this way.[17]

Nevertheless, in his letter to Mr Field on 29 June seeking assurances, before agreeing to commission Mr Field, Sir Phillip Bennett does not appear to have felt constrained by such reservations. As he set it out, he asked specifically to be assured that the Accord was 'binding' with acknowledgement 'it will be adhered to by all the signatories'. To this end, he also sought to clarify the status of this political document signed originally only by Mr Field and one of the independents, Dr Brown.

17 Townsley, Government of Tasmania, *op cit*, pp 107-108.

These were not, however, the only ways in which the Governor sought assurances before commissioning a new government. He seems to have regarded the stability of the House of Assembly in the working of its legislative processes as of especial concern, however traditionally the operation of these may be regarded as matters which came within the purview of the independent authority of a legislature and its members. He noted the independents had reserved a right in the Accord to move a no-confidence motion against a minority Labour administration. He sought comment on this from Mr Field, pointing out this would 'thereby restrict the capacity of that Government to legislate'. The Governor also sought assurances on two further matters which related directly to the pursuance of political activities in the legislature. He sought elaboration on the Accord as it set out 'consensus in some areas but does not constitute comprehensive agreement on policy'. He noted the Accord contained, as he described it, 'the major issue of a fixed four year Parliamentary term'. As the Governor went on, this 'is a significant constitutional issue, which may not appear to have been fully canvassed in the election campaign'.

The express terms in this letter, however, were not the only ones which seemed to move the Governor's position to a context where vice-regal judgement on the future course of political activities had become matters of weight in his deliberations. He also seems clearly to have regarded the collectivity or coherence between the independent members as an influence on the manner in which he would determine whether Mr Field should be commissioned.

The five independent members had in fact acted in concert in various ways during the course of the election campaign and afterwards. They had described themselves in poll literature as 'The Independents' not simply as 'Independents'.[18] They espoused common policies on a variety of issues, with particular regard for the protection of the environment. Popularly they were sometimes called the 'Green Independents'. Two had served in the previous Assembly. They had normally acted together, although not invariably so. Their voting on different sides of the Assembly had never been on important matters of policy.[19]

Nevertheless, for ideological or other reasons, they had exercised a right not to be formally acknowledged as a political party even if in political terms they had sometimes been like one. They had not taken up the opportunity to register as a political party under the State Electoral Act.[20] The two independents previously in the legislature had not been accorded party status in the Assembly. Their chosen roles, however ambiguous it may have seemed at times, were ones to which they were entitled, not least with regard to the operation of Parliamentary and other functions. In these

18 On 26 April, during the course of the election campaign, the Director of Public Prosecutors applied for an injunction under section 253 of the *Electoral Act*, 1985 (Tas) to restrain five named candidates from using the phrase 'The Independents' in electoral advertising, as allegedly violating section 209(1)(b) of the same enactment. This provides that any person who prints, publishes or distributes electoral material 'containing an untrue or incorrect statement intended or likely to mislead or improperly interfere with an elector in or in relation to the recording of his vote' may be guilty of the offence of 'disseminating false electoral information'. The matter, however, did not proceed.

19 Written response to questions by an independent member to one of the authors, 30 October, 1989.

20 *Electoral Act*, 1985 (Tas), Part IV. The Act enables 100 persons who have attained the age of 18, and who are ordinarily resident in Tasmania and are members of a party to seek registration under the Act (s 55(1)).

circumstances, the formalisation of their position, particularly as this seemed to be treated as bearing constitutional weight collectively, might well be regarded as intruding upon the political stance the independents had chosen to adopt, perhaps even influencing the perception of their political situation in elements of the community at large. In terms of constitutional tradition, like the Accord, the assurances could be no more than statements of present political intent. To hold otherwise in historical terms would be to allow extra-Parliamentary processes to intrude unconstitutionally within the four walls of a legislature by opening up the possibility of seeking to inhibit the rights of individual members in it.

But whatever such traditional approaches might seem to dictate, the last hours of the Gray administration were marked by the assumption that, quite separate from Parliamentary determinations, the Governor was setting pre-conditions to any change in government, however they might or might not be justified in terms of contemporary constitutional practice. This was notably so in relation to the standing being sought for the Accord and the adherence of the independents to it for constitutional purposes.[21] Mr Field responded to the Governor, forwarding a copy of the document signed by himself and the five independents. He affirmed: 'Each of the signatories is bound by and will adhere to the Accord.' He went further in stating that although the Accord was originally only signed by himself and Dr Brown it 'is regarded by all as binding'. Mr Field also attested that the independents' Parliamentary conduct would be regulated by this arrangement. In addition to what was in the Accord, he wrote that he was 'further authorised' to indicate that 'none of them will move any motion of no confidence in my Government, unless some issue of gross impropriety, conception or grave maladministration were to arise which could not be resolved by negotiation between the members of the Accord'.

The weight the Governor seemed to attach to this is to be seen in a letter he wrote later to Mr Field agreeing to commission him as Premier.[22] In it there was no simple acceptance of the will of the legislature on a change of government. There was the further important implication, whether ultimately this should be enforceable constitutionally or not, that adherence to the terms of the Accord and the assurances given to him in relation to the ordering of Parliamentary processes were conditions on which a Field administration was to remain in office. After noting the receipt of the 'assurances' he had sought, Sir Phillip Bennett then made these of central importance in agreeing to commission Mr Field. As he affirmed: 'I do this on the understanding that you, your party and the Independents will comply with the assurances to which I have referred'.

Taken by itself, this letter is a noteworthy event in the history of responsible government in this country, at least in recent times. It carries with it assumptions on the role of vice-regal authority with respect to political activities and their pursuance within the framework of Parliamentary activities which hardly rests easily with the manner in which these have evolved in Britain and Australia, particularly in the twentieth century. But this and its surrounds cannot stand alone within an increasingly complex constitutional milieu on the nature of vice-regal powers which were also exposed in the Tasmanian situation in mid-1989.

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21 *Field to Bennett*, 29 June, 1989, responding to Letter 1 of the Governor of the same date.
22 *Bennett to Field*, 29 June, 1989. Letter No 2.

This, in its turn, provided an interactive background which may make the Governor's actions seem more explicable, whether justified or not in terms of past constitutional usage. The fulcrum of this was the position of Premier Gray who remained in office through to the re-assembling of the legislature. He asserted a right to demand a further election in the light of the uncertainties on the future course of government, as he viewed it. The essence of his position was that a ministry with the confidence of the previous Parliament was entitled to interpose the authority gained from this, even though the earlier legislature no longer had any constitutional existence. This could require another election immediately if he demanded it if the new legislature did not repose the same confidence in his administration.[23]

In the osmosis-like fashion in which constitutional practices are varied and evolved, there has long been an increasing emphasis like this on the possible dominance of existing ministries in affecting the exercise of the governmental discretions which may be made in the name of the Crown. Beginning with the operation of everyday government activities this has moved notably to the context where the use of once independently functioning Crown powers in relation to Parliaments have come under the hegemony of ministerial 'advice'. In the absence of formal constitutional directives to the contrary, the calling of elections on the request of an incumbent ministry well short of the expiry of a Parliament for example, has become largely if not entirely subsumed within the ambit of ministerial not gubernatorial authority. This has been abundantly illustrated in Tasmania, as elsewhere, in the progressive assertion by incumbent ministries of a right to seek dissolutions well short of the expiry of a Parliament's term. The evolving constitutional position is to be seen in the contrast between the refusal by Sir Herbert Nicholls to accede to a ministerial request for the dissolution of Tasmania's House of Assembly in 1923, with some further support in 1950, and the reality of the position, whatever the verbal formulae used, where dissolutions were granted to incumbent Tasmanian governments in 1956, 1959 and again in 1972.[24] More problematically, however, there has remained understandable doubt on the weight to be accorded to the advice of an incumbent ministry by a Governor in the aftermath of a poll and up to the time when a legislature is reconvened, and the future course of government may need to be determined in circumstances like these in Tasmania in mid-1989.

In very special circumstances it may be conceivable that there could be situations where a new election could be called immediately after another by general consensus even before the reconvening of a legislature. A national conflagration on an election day, the wholesale loss of ballot records or the possibility of wholesale electoral fraud, for example, could be regarded as providing justification for this. Beyond this, however, there have also been suggestions that the standing of an incumbent ministry even between elections through to the reconvening of a Parliament may provide a continuing measure of authority to achieve this.

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23 *Mercury* (Newspaper), 14 June 1989, pp 1, 2 and 8; *Examiner* (Newspaper) 15 June 1989, p 1.

24 Townsley, *The Government of Tasmania*, *op cit*, pp 108-112, provides a convenient summary of these constitutional events.

The genesis of this seems to be assertions based on purported British practice in the nineteenth century when no Prime Ministerial requests for dissolutions were refused after the failure of Sir Robert Peel to obtain one from Queen Victoria in 1841. This view has been affirmed in relation to Britain on the basis that a 'wise' Sovereign would not refuse such a request.[25] It is one thing, however, to claim this to be the constitutional position during the life of a Parliament compared to the circumstances which may prevail up to the first meeting of a legislature after an election, as in Tasmania in mid-1989.

In Australian terms, the gradual accretion of ministerial power to prevail in seeking dissolutions in the life of a Parliament has been illustrated as much as anywhere in Tasmania in the twentieth century. In September 1956 a Minister defected from the Cosgrove government, giving the Opposition a majority of one on the floor of the Assembly. The Opposition leader advised the Governor he could form a ministry with the confidence of the legislature. The incumbent government, on the other hand, asserted a constitutional right to a new election, citing a variety of precedents relating to Britain and elsewhere where this was done, albeit well into the life of a Parliament. The incumbent Premier was granted the election he sought despite the availability of an alternative government, stating it was correct in the circumstances 'that the electorate should have an opportunity of expressing its will'.[26]

It is, however, a constitutional step of considerable magnitude to transpose any usage referring to the well established life of a Parliament to the interim period between Parliaments. At the very least, it could serve to deny a newly elected Parliament of its traditional right to determine the future course of government after an election, untrammelled by the influence of a previous House which no longer has any constitutional existence. This would also apply with equal force on the re-assembly of Parliament in the immediate aftermath of an election where the lower house of a legislature has traditionally been able to assume the responsibility to determine the nature of the political headship of government without any outside influence of an executive character.

Nevertheless, in an affirmative way which has no parallel in contemporary Australian experience, Premier Gray publicly espoused the possibility of seeking and obtaining a further election if it seemed likely he might no longer remain in office. In essence he re-iterated the view of Sir Robert Cosgrove in 1956, transposed to the different circumstances he faced after the 1989 poll. Publicly he did not resile from this through to the time he finally resigned on the afternoon after the defeat of his government in the House earlier that day. When this possibility was mooted it also received an imprimatur from three Tasmanian Queens' Counsel who had all been prominent in the State's political life.[27] Later, it also seemed to be claimed publicly that the opinions of five prominent lawyers on the

25 Ibid 106.
26 Ibid 109-111.
27 *Mercury* (Newspaper), 16 June 1989, p 4 and 22 June, 1989, p 8; *Examiner* (Newspaper), 27 June 1989, p 7. The Queens' Counsel were M Hodgman, QC, P Rae, QC and R Wright, QC. Two, Hodgman and Wright, had formerly been Liberal members in the Commonwealth Parliament. Rae had served as a Liberal member in both the Commonwealth and State Parliaments, holding ministerial office in the Gray government.

mainland supported this contention.[28] These opinions have so far not been revealed publicly. It therefore remains uncertain as to whether they supported the unassailable proposition that a political leader could seek an election in the present state of constitutional usage or went on further to assert the far more controverted position that an incumbent Premier's 'advice' would invariably have to be accepted by a Governor in any circumstances.

Mr Gray's stated position received further prominence with the establishment of a body describing itself as the Concerned Voters Association on 7 June. It determined to circulate a petition to the Speaker of the House of Assembly asking for a new election if the existing ministry was defeated on the reconvening of Parliament. The same group urged individual voters to write to the Governor and Premier supporting this claim.[29] At the same time, a printed card[30] was available to be signed individually, addressed to the Governor. It was asserted in this that a new election should be ordered 'so that the will of all Tasmanians can be fairly established'. The basic reasons for this, as the card stated it, was that the independents were said to have campaigned on the basis they would make 'no deals or alliance with the major parties'. 'These assurances', it asserted, 'have now been proved false with the signing of the 'Parliamentary Accord''. As it went on, 'the signatories to this document have pledged a no confidence motion on the floor of the House, in the present Government'.

Behind this political debate, however, there remained the underlying issue of the constitutional standing of Mr Gray and its potential bearing on the possibility of a further election. Up to the time of the signing of the Accord he had remained in office and understandably so. The independents had negotiated with both major parties and there could be no certainty on the outcome of the future course of government. If the transmission of this document to the Governor's Secretary by Mr Field was intended to open the possibility of a change of administration before the convening of Parliament it had no obvious effect. Premier Gray saw the Governor not long after its receipt in Government House. Soon after he announced he was staying in office for the time being.[31]

In abstract constitutional theory there is no change in the status of an incumbent ministry in the hiatus period between Parliaments. By usage it has often been assumed that no significant administrative initiatives should be taken in such a period, at least until the outcome of an election has been determined. In 1975, Governor-General Kerr sought to formalise this in the special circumstances following the dismissal of Prime Minister Whitlam. Malcolm Fraser was commissioned as a 'caretaker' in Whitlam's place. In the absence of any formal constitutional directives on this,

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28 *Mercury* (Newspaper), 29 June, 1989, p 1; *Examiner* (Newspaper) 29 June, 1989, p 5. These lawyers were: Sir Maurice Byers QC, R Ellicott QC, T Hughes QC, Prof D Lumb and Prof P Lane.

29 Concerned Voters Association, *Examiner* (Newspaper) 7 June 1989, pp 1 and 2; 8 June 1989 p 4 and 9 June 1989, p 44; Tasmania For The Future unidentified business and community groups co-ordinated by the Government Whip, Mr Barker and Government Liaison Officers, *Mercury* (Newspaper) 7 June 1989, p 3 *Advocate* (Newspaper) 8 June 1989, p 6.

30 The printed card has no obvious reference to its origin.

31 *Mercury* (Newspaper) 31 May 1989, p 6 and 1 June (1989) p 8; *Examiner* (Newspaper) 30 May 1989, pp 1 and 2; *Advocate* (Newspaper) 30 May 1989, p 6 and 1 June 1989, p 6.

however, there is nothing more than tradition which dictates this to be the situation in other circumstances.

With his continuance in office Mr Gray thus retained the full panolpy of ministerial authority which he seemed increasingly to consider significant in the outcome he was publicly seeking on the calling of a further election. Implicit in this was the contention that in the evolving ways of constitutional usage, a new stage had been reached where the Governor should essentially be a cipher for an incumbent Premier in the exercise of vice-regal discretions which might be available to call a new poll, regardless of the considered will of the legislature.

The possibility that the manipulation of traditional Parliamentary and executive processes might occur along these lines has long been acknowledged in the Republic of Ireland which is a partial heir to the British system of responsible government. Viewed in their historical context, provisions in the Republic's Constitution relating to the formation of governments after an election point significantly to one way in which the will of a legislature may remain controlling in these situations. They avoid the style of outside interference which may be essayed in the more amorphous, uncertain ways where constitutional usage remains the gravamen of some governmental processes, like those at issue in Tasmania in mid-1989.

In the Republic, the supremacy of the legislature in the formation of governments after an election is expressly directed. Article 13.1.1 of its Constitution prescribes that the appointment of a Taoiseach, the head of Government or Prime Minister, by the President shall be 'on the nomination of Dail Eireann', the Republic's House of Representatives. Article 28.10 complements this. It lays down that a 'Taoiseach shall resign from office upon his ceasing to retain the support of a majority in Dail Eireann unless on his advice the President dissolves Dail Eireann and on the reassembly of Dail Eireann after the dissolution the Taoiseach secures the support of a majority of Dail Eireann'. The President, however, as the Constitution further directs expressly, is not required to accept such advice. As article 13.2.2 declares, the President 'may in his absolute discretion refuse to dissolve Dail Eireann on the advice of a Taoiseach who has ceased to retain the support of a majority in Dail Eireann'. These provisions go further in ensuring the continuity of executive administration, describing this as 'interim government'. As article 28.11.1 states, if 'the Taoiseach at any time resigns from office all other members of the Government shall be deemed also to have resigned from office, but the Taoiseach and the other members of the Government shall continue to carry on their duties until their successors have been appointed'.

In origin, these provisions were instituted for a purpose which superficially may seem remote from the present constitutional situation in Australia. In the immediate aftermath of the initial division of southern Ireland from the remainder of Great Britain it remained within a constitutional relationship with the British Crown. In these circumstances, those who prepared the country's first Constitution understandably sought to ensure any potential exercise of Crown discretionary powers in relation

to the Irish legislature would be appropriately, formally constrained.[32] With the course of time however, and the full independence of the Republic, these provisions now serve to regulate ministerial powers where otherwise these may have accrued authority for ministries to exercise those in practice, in the Crown's stead, as in Australia.

In Australia, too, the perceived need in some circumstances to regulate once independently exercisable Crown powers along similar lines in relation to legislatures has not been entirely neglected. This has received strong acknowledgement in the constitutional changes necessary to effectively extend the lives of State Parliaments. Thus in South Australia, for example, after the first meeting of the legislature in the aftermath of an election, the nature and extent of vice-regal authority, necessarily presumed to have come increasingly under the hegemony of ministerial authority, is now affirmatively regulated within the first three year period in the existence of a Parliament.[33] But in South Australia, as in Tasmania, the recognition of a need to also control ministerial influence in the period between the calling of an election and the first meeting of the legislature afterwards has so far not been formally regulated in the same way.

It may well be, too, that in the absence of formal constitutional directives operating in this way, the situation of incumbent ministries in these circumstances may actually have been advanced in the light of the constitutional changes in the ordering of State affairs which have occurred with the passing of the Australia Acts. The Acts themselves go part way towards this in formally acknowledging the status of State Premiers as such and giving them discretionary authority to determine the nature of the powers the monarch may exercise when present in the confines of a State. But even more significantly the Letters Patent or other instruments reconstituting and providing for the further regulation of the offices of State Governor as separately existing manifestations of the governmental systems in the Australian States may contain the essence of even more expansive powers which may be exercisable by incumbent ministries in relation to previously existing vice-regal authority.[34]

In all States, sometimes in varying ways, the nature of the authority of Governors can now be regulated independently of Parliamentary agreement, in the absence of any legislation providing to the contrary. This in itself could provide a potent way in which the very nature of the office of Governor and the powers exercisable in this regard may be altered to suit ministerial convenience. But even beyond this, the transfer to local hegemony of powers once exercisable by the Crown and the British government may also have the potential to enable more precise directives to be given with constitutional force to the incumbents of vice-regal office in

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32 These and other details on the operation of the Republic of Ireland's Constitution have been supplied by Professor Alan Ward, Professor of Government, the College of William and Mary, Virginia, an acknowledged expert on the working of the Republic's Constitution. His detailed analysis on their working in a 1989 constitutional crisis is contained in an article 'The Irish Constitution and the Political Crisis of 1989' to be published in 1990 in *Parliamentary Affairs*.

33 *Constitution Act Amendment Act*, 1985 (SA), s 4, incorporating sections 28 and 28A in the principal Act. For equivalent provisions in Victoria see: *Constitution Act*, 1975 (Vic), s 8. In Tasmania in 1989 a *Constitution Amendment Bill* was introduced to extend the life of the Assembly along similar lines with special provision for controlling the authority of the Governor in this regard (s 2A of proposed amendment to section 12 of the *Constitution Act*, 1934 (Tas)).

34 Castles, 'Now and Then', (1989) 63 ALJ 781 at 783-784.

a variety of circumstances, not least in a period from the calling of an election to the first re-assembly of a legislature afterwards. The successors of Disraeli, Palmerston and others may now have transferred to local State ministries the powers which such forbears could once exercise over the Australian colonies and their Governors.[35]

The nature and extent of this may not yet be clear. But this situation, and the potential which may be hidden within it, is an illuminating example of a condition in the working of State governmental affairs at their highest level which can no longer be viewed in the more simplistic way which sometimes may have existed in the past. Once, constitutional usage, sometimes made convergent in the States for many purposes by the underlying influence of British administrators, through into the second half of the nineteenth century, provided one touchstone for the working of State government in this way. It also enabled British officials, with an overlay of long established, paternalistic attitudes towards colonies and the preservation of imperial interests, to at least have an influence on the way vice-regal discretionary powers might be exercisable in the Australian States despite their seeming autonomy within the national federation.[36] Alongside this, however, the regulation of government affairs in Australia has long had a complex mix of more formal constitutional directives affecting these practices even if this has not always been as clearly recognised as it might. But as the 1975 national constitutional situation had emphasised clearly in its outcome, whatever the nature of constitutional usage the more formal regulation of Crown powers can be given precedence, whatever past constitutional experience might seem to dictate. In these circumstances, the passing of the *Australia Acts* and what has come with them, could well presage new possibilities for the dominance of ministerial authority over governmental processes along the lines argued by Mr Gray in mid-1989, in the absence of legislative directives to the contrary.

In the past, there may have been good reasons why some practices of government should remain within the ambit of constitutional usages. But the increasing congruence of more formal constitutional developments like those encompassed in the *Australia Acts* and the other instruments coming with them, point to a governmental milieu in which their continuing operation, subject to these and other influences, could drastically alter the previously accepted norms on the authority of legislatures and other aspects which have long been regarded as going to the essence of responsible government. Without express constitutional provisions as in the Republic of Ireland or the adaption of constitutional provisions like those in South Australia on legislative terms to the interim period between the calling of elections and the first meeting of a Parliament afterwards, the Tasmanian situation in mid-1989 exposes how the present condition of State governance could be drawn inexorably to a point where the fair retention or regulation of power after an election in the traditional way could be placed in jeopardy. The Tasmanian crisis of 1989 suggests this may yet be not quite so. But it certainly does not preclude this possibility at some future time.

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35 Ibid 784-785.

36 British government memoranda now being progressively revealed under the '30 year rule' with respect to such documents in Britain show the continuing concern and attitudes of British officials to the functioning of vice-regal office in the Australian States as well as in other remaining parts of the then British Empire. For example, Commonwealth Relations Office, *The Right to Refuse a Dissolution of Parliament*, C.2100/6 1950.