PROROGUING THE PARLIAMENT OF AUSTRALIA: THE EFFECT ON THE SENATE AND THE CONVENTIONS THAT CONSTRAIN THE PREROGATIVE POWER

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ABSTRACT

Political controversies in New South Wales and Canada recently have focused public attention on the constitutional practice of proroguing parliament. They have also shone a light on two lingering areas of uncertainty that surround its operation under the *Commonwealth Constitution*. This article seeks to clarify these two muddy areas of the law concerning prorogation. The first is the effect of prorogation on the Senate and its committees. Since Federation, the Senate has purported to authorise its committees to continue to function notwithstanding a prorogation of the Parliament. However, it is argued that this practice is unsupported by the provisions of the *Constitution* and the Senate has no such power. Second, the article examines the operation of the conventions that constrain the Governor-General's power to prorogue. Prorogation generally is exercised on the advice of the Prime Minister. However, this article contends that where a Prime Minister seeks to prorogue Parliament to avoid a vote of no confidence, the Governor-General will have a discretion to reject the advice. It may also be open to the Governor-General to reject an advice to prorogue where the purpose is to avoid scrutiny of a fundamental constitutional illegality. In Australia, the uncertainties that surround prorogation, coupled with the now precarious political landscape in Canberra, create the very real possibility of a prorogation crisis at the Commonwealth level. This article provides a response to these uncertainties. In doing so it offers a solution to how a prorogation crisis can be resolved, whilst maintaining the fine balance of power in our constitutional system.

INTRODUCTION

In 1910, Premier James McGowen formed the first Labor Government in New South Wales with only a bare majority in the Legislative Assembly. The following year, with McGowen and the Governor in England attending the coronation of King George V, two Government members suddenly resigned.[1] In a bid to head off a vote of no

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confidence in the now opposition-dominated Assembly, acting Premier William Holman advised Lieutenant-Governor William Cullen to prorogue Parliament until by-elections could be held. But Cullen declined to follow the advice. Holman responded by offering his resignation and Cullen asked Opposition Leader Charles Wade to form government. Wade agreed to take the Premiership, but only on condition the Lieutenant-Governor grant him a dissolution of the Parliament. Cullen also declined this request and so Holman withdrew his resignation and Cullen granted him the prorogation he had originally advised.[2]

The Holman-Cullen case was controversial at the time and a century later prorogation is still far from a settled subject. Two recent controversies demonstrate the continuing uncertainty surrounding its operation. In 2010, the New South Wales Government prorogued the Parliament in an attempt to shut down a Legislative Council Committee inquiry into a contentious electricity privatisation deal. The manoeuvre created considerable controversy before both sides backed down and a political stalemate was reached.[3] However, the argument over the legal effect of the prorogation on the NSW Legislative Council and its committees remains unresolved. In 2008, the Canadian Prime Minister advised his Governor-General to prorogue Parliament in order to avoid an impending vote of no confidence — just as Holman had done in NSW almost a hundred years earlier. While eventually the Governor-General granted the prorogation, there has been considerable debate in Canada about whether she could have refused the Prime Minister's advice.[4]

With the Commonwealth Parliament now precariously balanced and a minority Government holding power only by virtue of support from the crossbenchers, the triggers are now in place for a politically charged prorogation; this time at the Commonwealth level. Given the continuing uncertainty about the operation of prorogation in Australia, the situation has the potential to lead to a constitutional crisis. In light of the recent events in NSW and Canada, this article seeks to answer how such a crisis should be resolved at the Commonwealth level by addressing two key uncertainties surrounding prorogation. First, the article considers the effect of prorogation on the Australian Senate and its committees. Since its creation the Senate has asserted a power to authorise its committees to continue to function after prorogation. However, the article argues that this assertion has no constitutional basis and that the Senate has no such power. It also dismisses the assertion that the Senate itself has the power to function after prorogation.

Second, the article addresses the constitutional conventions that constrain the prerogative power to prorogue. According to convention prorogation usually is exercised by the Governor-General on the advice of the Prime Minister. However, in certain circumstances the Governor-General may be able to exercise power contrary to, or without, advice.[5] Looking to the controversy in Canada as well as Australian

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1 H V Evatt, *William Holman, Australian Labor Leader* (Angus & Robertson, 1979) 208.

2 Anne Twomey, 'How to Succeed in a Hung Parliament' (2010) 54(11) *Quadrant Magazine* 36, 37; Anne Twomey, *Constitution of New South Wales* (The Federation Press, 2004) 465.

3 Legislative Council General Purpose Standing Committee No 1, Parliament of NSW, *The Gentrader Transactions* (2011) 12 ('*Gentrader Report*').

4 See below page 84.

5 See, eg, Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford University Press, 1984) 35-44.

precedents, the article argues that if an Australian Prime Minister advised a prorogation in order to avoid a vote of no confidence, the Governor-General could exercise a discretion to reject that advice. It also argues that it would be open to the Governor-General to reject advice to prorogue where the purpose was to avoid the scrutiny of a parliamentary committee investigating a fundamental constitutional illegality. In the politically charged environment which would surround a prorogation crisis at the Commonwealth level, the article concludes that such a crisis should be resolved by adhering to the established powers and limits set down by the *Constitution*. The article begins by considering what it means to prorogue the Parliament.

WHAT IS PROROGATION?

Prorogation brings to an end a session of Parliament. It differs from a dissolution in that the Parliament is not terminated — it is merely suspended. It also differs from an adjournment as all pending business before the House lapses on prorogation. The traditional understanding of the effect of prorogation is that it puts an end to all Bills and proceedings in a House.[6] While the High Court in *Attorney-General (WA) v Marquet* found that in Australia prorogation did not prevent royal assent of Bills that had already passed both Houses of Parliament, the majority held that prorogation still terminated all business *pending* in a House.[7] The period between a prorogation and the summoning of the Parliament for the new session is referred to as a 'recess'.

The constitutional nature of prorogation in the United Kingdom is described in *May* as follows:

> The prorogation of Parliament is a prerogative act of the Crown. Just as Parliament can commence its deliberations only at the time appointed by the Queen, so it cannot continue them any longer than she pleases.[8]

In Australia, the power to summon and prorogue the Commonwealth Parliament is conferred on the Governor-General by s 5 of the *Constitution*. While the provision permits the Governor-General to hold sessions of the Parliament 'as he thinks fit',[9] the power is constrained by constitutional convention. Conventions are not enforceable by the Courts but are recognised by constitutional actors as binding.[10] The general rule is that the powers of the Governor-General can only be exercised on the advice of the responsible Minister, although in some circumstances it is argued that the Governor-General may exercise her powers contrary to, or without, advice.[11]

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6 *Western Australia v The Commonwealth* (1975) 134 CLR 201, 239 (Gibbs J).

7 (2003) 217 CLR 545.

8 Sir Donald Limon and W R McKay (eds), *Erskine May's Treatise on the law, privileges, proceedings, and usage of Parliament* (Butterworths, 22nd ed, 1997) 232 ('*May*').

9 Section 5 of the *Constitution* states:

> The Governor-General may appoint such times for holding the sessions of the Parliament as he thinks fit, and may also from time to time, by Proclamation or otherwise, prorogue the Parliament, and may in like manner dissolve the House of Representatives…

10 See, eg, H V Evatt, *The King and His Dominion Governors: A Study of the Reserve Powers of the Crown in Great Britain and the Dominions* (Cass, 2nd ed, 1967) 9-10, 119-120; Eugene Forsey, 'The Courts and the Conventions of the Constitution' (1984) 33 *University of New Brunswick Law Journal* 11, 12.

11 See, eg, Marshall, above n 5, 35-44.

The organisation of the Parliament into sessions has its origins in England and stems from the time of the Stuart Kings, when the Crown's prerogative to summon and prorogue the Parliament was not constrained by the conventions of responsible government.[12] In the UK, prorogation is still used annually to 'wipe the Parliamentary slate clean' of pending business and prior to the dissolution of the House of Commons.[13] The Commonwealth followed this British practice until 1928. However, the practice was discontinued for the next 65 years and the Commonwealth Parliament was prorogued only irregularly and for special purposes. During this time proclamations dissolving the House of Representatives included a phrase that purported to discharge Senators from attendance until the day appointed for the next session of Parliament.[14] The practice of proroguing Parliament prior to the dissolution of the House of Representatives was reinstituted in 1993 after doubts were raised about the constitutional validity of this phrase.[15]

THE EFFECT OF PROROGATION ON THE SENATE AND ITS COMMITTEES

While it is generally understood that prorogation puts an end to all business and proceedings of a House of Parliament, there is contention over the effect of prorogation on the Australian Senate and its committees. It is well established that the Parliament through legislation may authorise a parliamentary committee to continue to function notwithstanding prorogation.[16] Conversely, the practice in the Houses of Westminster is for committees established by *order or resolution of a House* to be terminated or suspended at the end of a session.[17] However, in Australia there has been considerable uncertainty about the effect of prorogation on the Senate and those committees established by order or resolution. The effect of prorogation also has been the subject of debate in some Australian States, with the Legislative Councils of South Australia,

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12 See *Egan v Willis* (1998) 195 CLR 424, 478 (McHugh J).

13 *May*, above n 8, 231.

14 Eg, see the words of the proclamation dissolving the House of Representatives in 1969 reprinted, in part, in R J Ellicott, 'Power of Senate and Committees to Sit after Dissolution House of Representatives' (Tabled Senate Paper No 2094/1984, Department of the Senate, Parliament of Australia, 1984) 1:

> I… do by this Proclamation dissolve the House of Representatives as at noon on the twenty-ninth day of September One thousand nine hundred and sixty-nine.
>
> And I discharge Senators from attendance as from that time on that date and until the day appointed for the next session of Parliament.

15 Harry Evans (ed), *Odgers' Australian Senate Practice* (Department of the Senate, 12th ed, 2008) 505 ('*Odgers' Australian Senate Practice*'); John Vander Wyk, 'The Discharge of Senators from Attendance of the Senate upon a Dissolution of the House of Representatives' (1988) 2 (July) *Papers on Parliament* 15. While it remains unclear whether the Senate and its committees can sit while the House of Representatives is dissolved, the question has become largely academic as the Commonwealth has reinstated the practice of proroguing the Parliament prior to a dissolution of the House in order to avoid the issue.

16 I C Harris (ed), *House of Representatives Practice* (Department of the House of Representatives, 5th ed, 2005) 227.

17 *May* above n 8, 234.

Western Australia and, most recently, New South Wales on occasion asserting a right to authorise their committees to continue notwithstanding prorogation.[18]

NSW Prorogation Controversy

The 2010 prorogation controversy in NSW arose after the Treasurer Eric Roozendaal announced on 14 December that an agreement had been reached to privatise part of the State's electricity assets. The deal attracted widespread criticism and was made more controversial by its proximity to the fast-approaching State election fixed for 26 March 2011.[19] On the morning of 22 December three non-Government members of the NSW Legislative Council's General Standing Committee No 1 contacted the Council's Clerk Assistant of Committees to propose an inquiry into the sale.[20] On the same morning — on the advice of Premier Kristina Keneally — the NSW Governor prorogued the Legislative Assembly until 4 March 2011 and the Legislative Council until 10 May 2011, after the election.[21] The Premier publicly warned the Standing Committee that it was not empowered to meet and transact business during the recess.[22] This reflected advice the Premier had received from her department and was based on a 1994 opinion of the Crown-Solicitor, I V Knight.[23]

On 2 January, Knight provided a further advice reiterating his view that the Legislative Council did not have the power to authorise its committees to sit during a recess.[24] In response the Clerk of the Parliament, Lynn Lovelock, issued her own advice stating that the Council did have such a power.[25] While the focus of the legal arguments concerned the powers of the Legislative Council, the practical consequence was that if the committee did not have the authority to sit it would not have the powers, immunities and privileges usually afforded a parliamentary body. Witnesses would not be protected from defamation actions arising from their testimonies, nor would the committee have the authority to summon witnesses or enforce orders by punishing contempt.[26]

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18 See New South Wales Legislative Council, *Transcript of the 5th Conference of Presiding Officers and Clerks of the Parliaments of Australia, Fiji, Nauru, Papua New Guinea and Western Samoa*, *Parliament House: Perth 16-18 May* (New South Wales Legislative Council Printer, 1972) 59, 66; Jan Davis, 'Matters Concerning the Effect of Prorogation: "An Argument of Convenience"' (Papers Presented at the 41st Conference of Presiding Officers, Darwin, 5–8 July 2010) 1-4.

19 See, eg, Paul Bibby, Brian Robins and Sean Nicholls, 'Sold ... State Gets $5.3b for Electricity Assets', *Sydney Morning Herald* (Sydney), 15 December 2010, 9.

20 *Gentrader Report*, above n 3, 3-4.

21 New South Wales, *Government Gazette of the State of NSW: Special Supplement*, No 139, 22 December 2010, 6109, 6109.

22 Kristina Keneally cited in *Gentrader Report*, above n 3, 4.

23 Letter from Paul Miller, General Counsel of the Department of Premier and Cabinet to Matthew Cross, 3 February 2011, Annexe 2.

24 I V Knight, Crown Solicitor of NSW, 'Prorogation: Effect on Committees' (Advice No D2010/41014, 2 January 2011) 2.

25 Lynn Lovelock, Clerk of the Parliament, 'Advice to the President of the Legislative Council on the Power of Standing Committees to Sit during the Prorogation of the House' (11 January 2011).

26 See generally Harry Evans, 'The Power of the Senate or its Committees to Meet After a dissolution of the House of Representatives or a pProrogation of the Parliament' (Tabled Senate Paper No 2085b/1984, Department of the Senate, Parliament of Australia, 1984) 2.

In this milieu of legal opinion key witnesses refused to appear, citing concerns about privilege, and the Committee resolved to seek warrants for their arrest. At this point the President of the Legislative Council, citing the contrary legal advice, defused the situation and did not request that the Supreme Court issue the warrants.[27] A political stalemate was reached, during which the Committee continued to sit without calling these witnesses and the Government maintained the Committee did not have the normal legal powers but did not seek to shut it down.[28] Whilst the Government therefore managed to limit the extent of the committee's inquiry by proroguing the Parliament, the decision appeared to backfire politically when it lost the 2011 election in a landslide.

Prorogation and the Senate

The events in NSW demonstrate how prorogation can be used as a political tactic. They also show the continuing uncertainty that exists over the effect of prorogation on Upper Houses in Australia — including the Senate and its committees. Since its creation the Senate has asserted its power to authorise committees to meet during a recess, and Senate committees have continued to meet regularly during prorogation and occasionally when the House of Representatives has been dissolved.[29]

This assertion has not remained uncontested, with critics denying the existence of such a power.[30] Others have supported the Senate's power to authorise its committees to continue notwithstanding prorogation,[31] and while the Senate persists in asserting such a power, so too does the uncertainty around the operation of prorogation at the Commonwealth level. With the Government in the minority in the Senate there is the potential for the same controversy that arose in NSW to be repeated at the Commonwealth level. Given the current uncertainty surrounding the operation of prorogation, all that would be required to create a constitutional crisis is an embarrassing inquiry and an attempt by the Government to try to shut it down by proroguing the Parliament.

Professor Colin Howard has argued that prorogation does not terminate the functions of the Senate itself.[32] The Senate has never asserted such a power. However, it is possible to envisage circumstances where a minority government and an unruly Senate might disagree over a decision to prorogue the Parliament; perhaps, for example, where the Government sought to prevent the passage of an opposition-backed Bill though the Senate. It is therefore necessary to consider two questions. First, does the Senate have the power to authorise its committees to continue to function

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27 *Gentrader Report*, above n 3, 12.

28 Ibid 8-12.

29 See, eg, Senate Standing Order 20 authorising the Library Committee to act during recess.

30 See Ellicott, above n 14; Harris, above n 16; Knight, above n 24.

31 See James Odgers quoted in New South Wales Legislative Council, above n 18, 61-2; *Odgers' Australian Senate Practice*, above n 15; Evans, above n 26; Gavan Griffith, 'In the Matter of the Power of the Senate or its Committees to Sit after Dissolution or Prorogation' (Tabled Senate Paper No 2085a/1984, Department of the Senate, Parliament of Australia, 1984); Colin Howard, 'Opinion on the Power of the Senate and its Committees to Sit and Function during Recess and after Dissolution of the House of Representatives' (Tabled Senate Paper No 2095/1984, Department of the Senate, Parliament of Australia, 1984).

32 Howard, above n 31 28; see also Odgers, above n 31.

notwithstanding prorogation? Secondly, does the Senate itself have the power to continue to function notwithstanding prorogation?

These questions are not solely matters for academic consideration. Gleeson CJ's NSW Court of Appeal judgment in *Egan v Willis* indicates that the courts can be called upon to decide the powers of Australia's legislative chambers in certain circumstances. He states that 'whilst it is for the courts to judge the existence in a House of Parliament of a privilege, if a privilege exists it is for the House to determine the occasion and manner of its exercise'.[33]

Although the question of justiciability was not raised on appeal before the High Court in *Egan v Willis*, the joint judgment of Gaudron, Gummow and Hayne JJ gave support to the principle that the court can inquire as to the existence of the powers of a legislative chamber 'when they are elements in a controversy arising in the courts under the general law'.[34] It is likely that a contested summons to appear before a Senate committee sitting during a recess would provide a sufficient controversy to establish justiciability over questions of the effect of prorogation on the Senate and its committees.[35]

Powers of the Senate

The Senate has always asserted a power to authorise its committees to continue notwithstanding prorogation.[36] However, practice alone is not sufficient to establish the power of a legislative chamber. Practice may evidence whether the House is empowered to undertake a particular act, but that act must still have a basis in law. To determine whether the Senate has that power today, it is instead necessary to look to the powers of the Senate at its creation.

Quick and Garran provide an account of the powers of the Houses of Parliament in 1901. On the Houses of Westminster they state that, 'the rights, duties, powers, privileges, and immunities of each House of the British Parliament, and of the committees and members of each House, form a part of the common law technically called the *lex et consuetudo parliamenti*'.[37] The High Court held in *R v Richards* that this law was settled in England by around 1840.[38]

In the colonies, however, the *lex et consuetudo parliamenti* was not part of the common law received from England.[39] The powers, privileges and immunities of the colonial legislatures were instead granted to the Houses of Parliament by the imperial statutes that created them. The Houses of the Australian Commonwealth Parliament were expressly granted their powers and privileges by the *Constitution* in 1901;[40] thus, it remains the starting point to identify the powers of the modern Australian Senate.

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33 (1996) 40 NSWLR 650, 653.
34 (1998) 195 CLR 424, 438-9.
35 For an analysis of this issue in relation to the 2010 NSW prorogation see Knight, above n 24, 25.
36 *Odgers' Australian Senate Practice*, above n 15, 507.
37 Sir John Quick and Sir Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 501.
38 (1955) 92 CLR 157, 162.
39 Quick and Garran, above n 37, 503.
40 Ibid.

Sections 49 and 50(ii) of the *Constitution* have been put forward as empowering the Senate to authorise its committees to function during prorogation.[41] They provide that:

> 49. The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.
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> 50. Each House of the Parliament may make rules and orders with respect to
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> [...]
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> (ii) The order and conduct of its business and proceedings either separately or jointly with the other House.

Section 49 and the Powers, Privileges and Immunities of the Senate

Under s 49 (when combined with s 51(xxxvi)) the Parliament may legislate to empower committees to continue during a recess. However, there is no general legislation empowering Senate committees to do so. If s 49 is to support such a power, it must therefore have been a power held by the House of Commons on 1 January 1901. This is a question of fact and the current practice of the House of Commons does not support the assertion. The 22nd edition of *May* states that the effect of prorogation on the House of Commons is to 'suspend all business, *including committee proceedings*, until Parliament shall be summoned again'.[42] *Griffith & Ryle* agrees that House of Commons committees may not sit during a prorogation.[43]

Earlier authorities suggest that the House of Commons has never had this power. When asked during parliamentary debates in 1921 whether a committee could sit when Parliament was not in session the Speaker of the House of Commons replied, '[i]t is quite clear that when the House has been prorogued the Committees of the House cease to function.'[44] Joseph Redlich's 1908 study *The Procedure of the House of Commons* confirms that the practice in the early 1900s was also for committees to end with the session.[45] Finally, Alpheus Todd stated in 1894 that it was 'highly irregular and unconstitutional for a branch of the legislature to appoint a committee with liberty to sit during the recess after prorogation'.[46]

Howard correctly points out that a lack of precedent cannot confirm with certainty whether the House could permit committees to sit, and the contemporary reports may be disputed.[47] The *lex et consuetudo parliamenti* is an equivocal area of the law and the absence of a House of Commons practice cannot conclusively deny the existence of a power. However, a power cannot be established merely because the evidence against it is equivocal. A power still must be proved and the evidence provides strong support

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41 *Odgers' Australian Senate Practice*, above n 15, 507.

42 *May* above n 8, 233 (emphasis added).

43 Robert Blackburn and Andrew Kennon (eds), *Griffith & Ryle on Parliament: Functions, Practice and Procedures* (Sweet & Maxwell, 2nd ed, 2003) 183. ('*Griffith & Ryle*').

44 United Kingdom, *Parliamentary Debates*, House of Commons, 7 November 1921, vol 148, col 176-7.

45 Joseph Redlich, *The Procedure of the House of Commons: a Study of its History and Present Form* (Archibald Constable & Co, 1908) vol 2, 196.

46 Alpheus Todd, *Parliamentary Government in the British Colonies* (Longman's, Green and Co., 2nd ed, 1894) 695.

47 Howard, above n 31, 14.

for the conclusion that the House did not have the power to authorise its committees to continue to sit during a recess in 1901.

Gavan Griffith, former Commonwealth Solicitor-General, did not agree. Not convinced by the records of House of Commons practice, he instead categorises the power to be 'of a sort which fairly might be regarded as necessarily inherent in the House of Commons'.[48] He seeks support for his proposition in the practice of other parliaments that have derived their powers, privileges and immunities from the House of Commons; reasoning that if their Houses have the same practice as the Senate, it would corroborate his argument that the power was one necessarily granted to the Senate by s 49.

Griffith points to Houses of both the Queensland and Western Australian Parliaments, which have previously asserted the power to authorise their committees to sit during a recess, as evidence of his assertion.[49] However, the last time this occurred in Queensland was in 1918 and it only happened once in WA, in 1971.[50] Other than on these rare occasions, both States have relied on royal commissions to conduct inquiries extending beyond a session. Royal commissions require the commissioning of committee members by the Governor;[51] it seems inconceivable that such a course would be taken if the same result could be achieved by a simple resolution of the House. Also, the practice of committees sitting during recess has been disavowed by the Attorneys General of both States and has long since ceased;[52] so these instances cannot lend more than marginal support to Griffith's proposition.

The strongest evidence to support Griffith's argument is the practice of the South Australian Parliament. The SA Legislative Council has appointed its committees to continue after prorogation since at least the late nineteenth century, a practice which persisted unopposed until 2005 when it was challenged by the SA Government in similar circumstances as arose in NSW in 2010.[53] In 1901, s 35 of the *South Australian Constitution Act* (No 2, 1855-56) granted the powers, privileges and immunities to the Houses of the South Australian Parliament in almost identical terms as s 49.[54] On its face, the practice of the SA Houses of Parliament would therefore appear to corroborate the assertion that the power to authorise committees to sit during a recess is granted to the Senate by s 49. However, the evidence is not so straightforward.

It was E G Blackmore, the Clerk of the South Australian Parliaments, who first recorded in 1885 the power of the SA Houses of Parliament to appoint committees to continue during a recess in his *Practice of the House of Assembly*.[55] Then in 1897 Blackmore was made clerk to the Australian Federal Conventions during the Adelaide

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48 Griffith, above n 31, 13.
49 Ibid 17-8.
50 See New South Wales Legislative Council, above n 18, 59, 66. The Legislative Council of Queensland has, of course, since been abolished.
51 Ibid 68-69.
52 Ibid 58-69. The Speaker of the Queensland Legislative Assembly, the Hon David Nicholson, appears to agree with the arguments of Odgers, under a misapprehension that Senate Committees at the time were empowered to sit during a recess by Commonwealth legislation, rather than by orders of the Senate.
53 Davis, above n 18, 2-4.
54 See now the equivalent s 9 of the *Constitution Act 1934* (SA).
55 E G Blackmore, *Manual of the Practice, Procedure and Usage of the House of Assembly of the Province of South Australia* (2nd ed, 1890) 88.

session; the session when s 49 was introduced into the draft Constitution.[56] Following the creation of the Commonwealth, Blackmore was appointed as the first Clerk of the Senate, and on 6 June 1901 the Senate adopted his Standing Orders from the South Australian Legislative Assembly as its own interim Standing Orders. These first Senate Orders included provisions appointing the Library and House Committees 'with power to act during recess', and that practice has continued in the Senate since.[57]

Rather than corroborating Griffith's assertion that the power was granted to the Senate under s 49, the development of the Senate's Standing Orders instead suggests it was an error in the South Australian Parliament that is at the root of the Senate's practice; a practice that was, according to the British Government of the time, erroneous. In 1836 the King in Council proclaimed that:

> Through ignorance of the principle which forbids such a proceeding, instances have occurred wherein certain colonial legislative chambers have given permission to their select committees to continue sitting after the prorogation of the local parliament.[58]

While the statement was made with respect to an act of the legislature of Lower Canada, it just as easily could have been referring to the practice in South Australia only a few decades later. And it follows that if the South Australian Parliament was the *source* of the Senate's practice, it cannot corroborate Griffith's theory that the power to authorise committees to continue during a recess was inherent to the House of Commons in 1901. Indeed, the preceding analysis demonstrates that there is no substantial evidence to support this conclusion. Therefore, the power of the Senate to authorise its committees to function notwithstanding prorogation cannot be supported by s 49.

Section 50(ii) and the 'order and conduct' of the Senate

Howard argues that even if the power to authorise committees to continue during a recess is not granted to the Senate by s 49, it is still a power regarding the 'order and conduct of the business and proceedings' of the Senate supported by s 50(ii) and need not be limited by analogy to the practice of any other House.[59] This argument cannot hold for two reasons. First, on its face powers regarding the 'order and conduct' of the Senate do not extend to authorising committees to sit during prorogation. This was Knight's conclusion when he considered the equivalent provision of the NSW *Constitution Act 1902* — s 15(1)(a) — which provides that the Legislative Council can make Standing Rules and Orders for its own 'orderly conduct'.[60] He referred to the case of *Fenton v Hampton* where Fleming CJ defined the scope of 'orderly conduct' of the Houses of Westminster as extending 'no farther than providing for and regulating the mode of conducting business and forms of procedure, so as to secure method and good order'.[61]

In *Crick v Harnett* Pring J of the NSW Supreme Court defined the limits of s 15 as dealing with the 'internal management' of the business and proceedings of the

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56 Quick and Garran, above n 37, 500-1.
57 Journals of the Senate 26 quoted in *Odgers' Australian Senate Practice,* above n 15, 507.
58 Quoted in Todd, above n 46, 695.
59 Howard, above n 31, 19.
60 Knight, above n 24, 9-10.
61 (1858) 14 ER 727, 731.

House.[62] Although the Privy Council overturned the decision on the facts, it approved the principle set out by Pring J.[63] Authorising committees to continue after prorogation cannot be described as a matter of 'internal management' of a House of Parliament. It is a matter that extends the temporal boundaries of the current proceedings of the House and interferes with the specific constitutional power of the Governor-General to prorogue the Parliament. If the Senate simply could continue its functions during a recess by referring its business to a committee the power to prorogue would be neutered. Indeed, following this logic the Senate could appoint a committee of the whole, and sit that way. The practical effect of such an interpretation would be to alter the specific constitutional power of the Governor-General to prorogue the Parliament, in so far as that power extends to the Senate, by a simple resolution of the House. This extends well beyond the principle of internal management.

The second issue is that unlike s 15(1)(a) of the NSW *Constitution Act*, s 50(ii) does not *empower* the Senate to make orders. Dixon CJ in *R v Richards* describes the operation of s 50 as 'permissive or enabling'.[64] While that case turned on whether s 50 limited the powers granted under s 49, it was also implicit in his reasoning that s 50 is not, in and of itself, a separate grant of power. Therefore s 50(ii) alone cannot empower the Senate to authorise its committee to continue during a recess.

Delegated Powers and the Effect of Prorogation on the Senate

A further argument against a conclusion that the Senate holds the power to authorise its committees to continue during a recess is one of constitutional principle. The legal powers of a committee must derive from somewhere; if not from statute then from the House that creates it. Conversely, a House can only delegate powers to a committee that the House itself holds. To borrow the constitutional idiom, the stream cannot rise higher than the source.[65] This principle of delegated power is the basis of the committee system in both the House of Commons and the Senate.[66]

Redlich identified the practical limitations that this relationship placed on House of Commons committees:

> [A] committee only exists, and only has the power to act, so far as expressly directed by the order of the House which brings it into being. [...] The House may at any time dissolve a committee or recall its mandate, and it follows from the principle laid down that the work of every committee comes to an absolute end with the close of the session.[67]

It follows that if the Senate itself does not have the power to sit during a recess, the Senate cannot authorise a committee to do so. However, if the Senate is not subject to the Governor-General's power to prorogue the Parliament under s 5 and can continue not withstanding prorogation, it would be a strong argument that the Senate could authorise its committees to do so too. This is the argument adopted by Howard and to determine if it is correct it is necessary to consider the construction of 'prorogue' in s 5 of the *Constitution*.

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62 (1907) 7 SR (NSW) 126, 139.
63 *Crick v Harnett* (1908) 8 SR (NSW) 451 (Privy Council).
64 *R v Richards; Ex parte Fitzpatrick* (1955) 92 CLR 157, 169.
65 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 258 (Fullagar J).
66 On the House of Commons see *May* above n 8, 627; for the source of various Senate committee powers see *Odgers' Australian Senate Practice*, above n 15, 376-7.
67 Redlich, above n 45, 196.

As noted earlier, 'prorogue' means to terminate a session of a House of Parliament. It is a legal technical word and as such should be construed *prima facie* according to its established meaning.[68] The Governor-General is empowered by s 5 to 'prorogue the Parliament', which in s 1 includes the Senate. Were the Senate to have the power to continue functioning during a recess there would need to be either: a clear intention that 'prorogue' was to have a different meaning under s 5 than its established meaning; or that the Senate was not to be read as part of the 'Parliament' for the purposes of the provision.

Howard's analysis of the *Constitution* leads him to the conclusion that the Senate is not subject to the power to prorogue the Parliament under s 5. He argues that there is a manifest intention in the *Constitution* that the Senate shall not be subject to prorogation.[69] To support this assertion, he points to the cautiousness of the deadlock procedure in s 57 to emphasise the independent nature of the Senate. He also argues that the final provision in s 53, which enshrines the equal status of the Senate, supports his argument, and that ss 7 and 13 also grant the Senate a proportional, continuous character different from that of the House of Representatives.

This is an odd conclusion. Cautious or not, s 57 rests the power to dissolve a deadlocked Parliament in the Governor-General; including the power to dissolve the Senate. Further, s 53 provides for the equal status of the Senate and the House of Representatives. If the Senate could continue notwithstanding prorogation it would instead have a greater power than the House of Representatives. The provisions demonstrate no clear intention that the phrase 'prorogue' in s 5 should not be given its legal technical meaning. Further, in the next phrase in s 5, the Governor-General is empowered to dissolve the 'House of Representatives' only. The distinction between the targets of the power to prorogue and the power to dissolve is clear; the power to prorogue is directed at the whole Parliament, including the Senate. Therefore, s 5 can only be construed to mean the power to prorogue the Parliament extends to proroguing the Senate, and so the Senate cannot have the power to continue to function notwithstanding prorogation.

The Effect of Prorogation on Senate Committees

If the Senate does not have the power to continue during a recess, it cannot authorise its committees to do so because it does not have this power to delegate. Further, it has been shown that ss 49 and 50(ii) do not support this power. Therefore, according to the powers and limits of the *Constitution*, Senate committees must terminate on prorogation. However, for a century the Senate has authorised its committees to continue after prorogation and with such a well-established practice it may be attractive to conclude that the Senate has such a power. It may be a particularly attractive conclusion in a prorogation crisis where the committee under threat has greater political legitimacy than the Government that seeks to terminate it.

Harry Evans, former Clerk of the Senate, recently argued that prorogation no longer serves a constitutional purpose beyond assisting the executive avoid parliamentary scrutiny.[70] He proposes that any constitutional change to a republic

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68 *Attorney-General v Brewery Employees' Union of New South Wales* (1908) 6 CLR 469, 531 (O'Connor J).

69 Howard, above n 31, 28.

70 Harry Evans, 'Prorogation: Uses and Abuses' (2011) 22 *Public Law Review* 256, 256-8.

should include the abolition of the power to prorogue. However, Sir William Blackstone gave a pertinent caution against tipping the constitutional balance between Parliament and Crown:

> If nothing had the right to prorogue or dissolve a parliament but itself, it might happen to become perpetual. And this would be extremely dangerous, if at any time it should attempt to encroach upon the executive power: as was experienced by the unfortunate king Charles the first: who, having unadvisedly passed an act to continue the parliament then in being till such time as it should please to dissolve itself, at last fell victim to that inordinate power, which he himself had consented to give them.[71]

While a Prime Minister of Australia no longer risks losing her head to a perpetual Parliament,[72] she might still lose her Prime Ministership to an interminable Senate and Blackstone's warning still is relevant today. The balance of power between the executive and the Parliament in Australia is built on centuries of constitutional development and one part of the system of government cannot unilaterally expand its own powers. In a crisis, the solution is still to look to the powers and limits as set out by the *Constitution*; those powers and limits still provide that, despite contrary practice, the Senate and its committees cannot continue during a recess.

THE CONVENTIONS THAT CONTROL THE POWER TO PROROGUE THE PARLIAMENT

In the Holman-Cullen case, introduced at the beginning of this article, at issue was not the effect of prorogation. The effect was clear; a prorogation would terminate the business of the NSW Legislative Assembly and prevent a vote of no confidence in the Government. Rather, what remains unresolved from the Holman-Cullen case is the second issue concerning prorogation in Australia: how is the power to prorogue exercised and what are the conventions that control its use?

In the current hung Parliament, with the Commonwealth Government holding the confidence of the House only with the support of the crossbenchers,[73] these questions are of potentially crucial significance. Were the Government to lose their support, or one of their own Members through retirement, death or pursuant to s 44 of the *Constitution*,[74] and face an imminent vote of no confidence, the Prime Minister might

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71 William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 2nd ed, 1765-1769) Book 1, Ch 2.

72 Note that s 28 of the *Constitution* requires the expiration of the House of Representatives after three years.

73 See Brenton Holmes and Sophia Fernandes, '2010 Federal Election: A Brief History' (Research Paper No 8, Parliamentary Library, Parliament of Australia, 2012) 30-36.

74 *Australian Constitution,* s 44. Section 44 of the *Constitution* reads in part:
Any person who –
(i) is under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or citizen of a foreign power; or
(ii) is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer; or
(iii) is an undischarged bankrupt or insolvent; or
(iv) holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth; or

seek to forestall the vote by advising the Governor-General to prorogue Parliament. However, it is not settled whether according to convention the Governor-General would have to accept the advice. It is also unresolved whether there might be other circumstances in which the Governor-General could refuse such advice. To answer these questions it is necessary to begin by considering the nature of the constitutional conventions.

What are constitutional conventions and how are they identified?

Section 5 of the *Constitution* grants the Governor-General the power to summon and prorogue the Commonwealth Parliament 'as he thinks fit'. The only express limitation is s 6, which requires that 12 months shall not intervene between sessions of Parliament. However, the power to prorogue is not exercised on the Governor-General's whim; it is controlled by constitutional conventions that dictate how the express powers of the *Constitution* are to be exercised.

The term 'convention' entered the constitutional lexicon with A V Dicey's study of the subject in 1885[75] and the concept has been built upon considerably since. The shifting character of the conventions themselves has made the term difficult to define but Eugene Forsey captures the key elements: '[c]onvention is the acknowledged, binding, extra-legal customs, usages, practices and understandings by which our system of government operates'.[76]

The first element is that conventions are not laws and are not enforceable by the courts. The second is that although conventions are not laws, they are still binding; that is what separates them from other established practices.[77] The ordinary view is that they are binding because of the political sanctions that flow from a breach of convention.[78] However, Ian Killey suggests more optimistically that conventions are followed because they are considered to be constitutionally 'right'.[79] In this way, the second element relates to the third: conventions must be acknowledged by constitutional actors as binding on themselves and others.[80]

Conventions will be easily identified where there is contemporary practice and uniform acceptance of their existence. However, where there is no contemporary usage or clear understanding they will be harder to distinguish.[81] To determine whether a convention exists it is necessary to look for either express agreement or precedents that demonstrate an acceptance of a binding convention.

(v) has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons;

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

75 A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, [1897] 1959).

76 Forsey, above n 10, 12.

77 Ian Killey, *Constitutional Conventions in Australia: an Introduction to the Unwritten Rules of Australia's Constitutions* (Australian Scholarly Publishing, 2009) 20.

78 See, eg, Ivor Jennings, *The Law and the Constitution* (University of London Press, 5th ed, 1959) 103, 127-34.

79 Killey, above n 77, 24.

80 Jennings, above n 78, 135.

81 Killey, above n 77, 27.

A final contested element of the convention is a constitutional rationale. Some have argued that a reason is necessary for a convention to exist,[82] while others have questioned why a reason should be required if there is already acceptance.[83] Perhaps a preferable understanding is that a rationale will assist in determining whether a convention has been established and whether it continues in varied circumstances.

The Conventions of the Commonwealth

The general principle pertaining to the exercise of the Governor-General's powers is that she acts on the advice of her responsible Ministers. There are, however, limited exceptions to this general convention where the Governor-General will have a personal discretion to exercise a power without, or contrary to, the advice of her Ministers. The powers subject to this occasional discretion are the 'reserve powers'.[84] A well-established reserve power in Australia is the power to dismiss the Prime Minister. It is a generally accepted convention that the Governor-General will have discretion to dismiss a Prime Minister in circumstances where either: the Prime Minster has been defeated in the Lower House on a vote of no confidence, having not resigned or advised a dissolution; or where the government is engaged in a persistent breach of a fundamental law.[85]

Debate exists over whether the power to prorogue the Parliament is also a reserve power and in what circumstance it may be exercised contrary to advice. Resolutions passed at both the Adelaide and Brisbane Constitutional Conventions agreed that prorogation should be exercised on the advice of the Prime Minister.[86] However, those resolutions were not adopted in the Republic Advisory Committee Report and even that document does not act as a code of Australian conventions.[87] Alternatively, it has been suggested by others that while the power to prorogue the Parliament generally must be exercised according to advice, the Governor-General will have a discretion to refuse the advice if the prorogation is for the purpose of avoiding a vote of no confidence.[88] There has been considerable controversy over this issue in Canada where such circumstances arose in 2008.

The 2008 Canadian Prorogation Crisis

Following the October 2008 general election in Canada, the Conservative Party led by Prime Minister Stephen Harper formed a minority government with 143 seats in the House of Commons. Despite earlier demonstrating confidence in the Government, the Canadian Liberals and two other opposition parties holding the remaining 163 seats quickly became dissatisfied with Harper's economic policies. On 1 December 2008 they

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82 See, eg, Marshall, above n 5, 8-9.

83 For a discussion of this debate see Killey, above n 77, 30-46.

84 Republic Advisory Committee, *An Australian Republic: The Options* (Australian Government Publishing Service, 1993) 244.

85 Ibid 256-7.

86 Ibid 281-89 (Attachments 1 and 2).

87 Ibid 274-95.

88 *Odgers' Australian Senate Practice,* above n 15, 504; Twomey, *Constitution of New South Wales,* above n 1, 465; Greg Taylor, *The Constitution of Victoria* (The Federation Press, 2006), 131-132; Eugene Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (Oxford University Press, 1943); for a review of the various Canadian positions see Nicholas MacDonald and James Bowden, 'No Discretion: On Prorogation and the Governor General' (2011) 34(1) (March) *Canadian Parliamentary Review* 7.

announced their intention to pass a vote of no confidence at the earliest opportunity and made written agreements to form a coalition government.[89]

On 4 December, before the Parliament had an opportunity to sit, Harper advised Governor-General Michaëlle Jean to prorogue the Parliament until 26 January 2009. The Governor-General obliged but not before she spent two hours questioning Harper about matters including the economy, the viability of the alternative government, and the mood of the Parliament and nation.[90] While controversy ensued, the prorogation allowed Harper to avoid the vote of no confidence — at least temporarily. In the interim, the Liberal Party appointed a new leader and their coalition agreements with the other minor parties collapsed. By the time the Parliament was summoned for the new session on 27 January, Harper had amended his economic policy sufficiently to gain the support of the Liberals and the Government kept the confidence of the House.

The event sparked widespread debate in Canada about the constitutional conventions and how they should operate in such controversial circumstances.[91] Andrew Heard argued that in the circumstances the Governor-General was obliged to refuse the advice to prorogue.[92] Conversely, Nicholas MacDonald and James Bowden argued that the reserve powers of the Governor-General do not apply to prorogation and that Jean had to follow the Prime Minister's advice.[93] Professor Peter Hogg took a more nuanced approach arguing that an imminent vote of no confidence was sufficient to activate the reserve powers and the Governor-General could have refused the advice, but in the circumstances she made the right decision.[94]

Australian Precedents

Canadian scholars writing on the 2008 controversy resorted to local Canadian precedents arising in varying circumstances to support their respective positions. Hogg relied on the King-Byng Affair of 1926 in which the Canadian Governor-General refused the advice of the Prime Minister to dissolve Parliament while there was a motion of censure being debated by the House.[95] MacDonald and Bowden preferred the Macdonald-Dufferin Prorogation of 1873, where despite initial reservations the Governor-General granted a prorogation that prevented a parliamentary committee from tabling a report Parliament detailing government corruption.[96] However, the Australian precedents provide greater insight into conventions related to the crisis.

In the Holman-Cullen case, Cullen's reversal of his decision indicated he had originally made a poor choice. However, the actions of those involved suggest a clear

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89 Peter Hogg, 'Prorogation and the Power of the Governor General' (2009) 27 *National Journal of Constitutional Law* 193, 195.

90 Michael Valpy, 'The 'Crisis': A Narrative' in Peter Russell and Lorne Sossin (eds), *Parliamentary Democracy in Crisis* (University of Toronto Press, 2009) 3, 16.

91 See generally Peter Russell and Lorne Sossin (eds), *Parliamentary Democracy in Crisis* (University of Toronto Press, 2009).

92 Andrew Heard, 'The Governor General's Suspension of Parliament: Duty Done or a Perilous Precedent?' in Peter Russell and Lorne Sossin (eds), *Parliamentary Democracy in Crisis* (University of Toronto Press, 2009) 47.

93 MacDonald and Bowden, above n 88, 15.

94 Hogg, above n 89; it was reported that during her meeting with Harper the Governor-General took advice from Professor Hogg: Valpy, above n 90, 16.

95 Hogg, above n 89, 198.

96 MacDonald and Bowden, above n 88, 8-9.

acceptance that, with an impending vote of no confidence, it was within the Governor's discretion to reject the Premier's advice. The practice is tentatively supported by the 1899 precedent involving NSW Premier Reid. When Reid realised he had lost the support of his colleagues after the 'Neild affair' and was going to lose an imminent censure motion, he advised Governor Beauchamp to prorogue the Parliament. His intention was to give a Royal Commission the opportunity to bring the full facts of the affair to light before a vote went ahead. But Beauchamp refused the request because he believed that Reid did not have the support of a majority of members.[97] After the censure motion succeeded Beauchamp refused a further request from Reid to dissolve the Parliament.[98]

These precedents demonstrate a convention at the beginning of the twentieth century that a Governor could refuse advice to prorogue the Parliament where its purpose was to avoid a vote of no confidence. However, at that time in Australia the Governor had a greater discretion than the vice-regal representative does today. For the convention to continue it must be shown that the rule is still accepted by contemporary constitutional actors, and so it is necessary to consider more recent cases in Australia where a Governor has granted a prorogation in those same circumstances.

Acceptance by Contemporary Participants

Anne Twomey outlines a 1971 case in Western Australia where the Government was facing a vote of no confidence when, due to the death of the Speaker, it lost its majority in the Legislative Chamber.[99] The Premier advised Governor Douglas Kendrew to prorogue the Parliament until a bi-election could be held and he obliged. However, Kendrew subsequently sought advice from the British Foreign Secretary as to whether he had made the right decision.[100] In their response, the British would not be drawn on the existence of a discretion to reject the advice, only stating that he had acted appropriately.[101] While the case does not demonstrate an acceptance of the convention, Kendrew's uncertainty shows that he did not reject it outright.

A clearer precedent is the 1981 Tasmanian Prorogation. The year was a tumultuous one in Tasmanian politics, with the Parliament deadlocked over the Franklin and Olga Dam proposals and Premier Lowe being ousted from the Premiership by his Labor colleague Harry Holgate in the 'Remembrance Day coup'.[102] An embittered Lowe subsequently had quit the Labor party to sit on the crossbenches in the House of Assembly and was followed by the Government whip.[103] Premier Holgate was left with a minority Government and had been defeated twice on minor votes in the

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97 Geoffrey Hawker, *The Parliament of New South Wales, 1856-1965* (Government Printer of New South Wales, 1971) 63.

98 Ibid 63.

99 Anne Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (The Federation Press, 2006) 78.

100 Anne Twomey, 'Cutting the Gordian Knot: Limiting Rather than Codifying the Powers of a Republican Head of State' (2009) 51 (July) *Papers on Parliament*, 19.

101 Twomey, above n 99, 78.

102 'Australian Political Chronicle: July to December 1981' (1982) 28(1) *Australian Journal of Politics & History* 107 (*'Australian Political Chronicle'*).

103 Ibid 109.

Assembly.[104] Also, the Government's preferred Olga Dam had been resoundingly defeated in a referendum on the issue, though hurried changes to the Referendum Act had left the final result far from certain.[105]

On 14 December 1981, with Parliament due to return the following day from an adjournment and a vote of no confidence imminent, Holgate requested Governor Stanley Burbury prorogue the Parliament. Burbury granted the prorogation until 26 March 1982 and it bought Holgate some time. However, it also sparked public anger and the vote of no confidence was passed shortly after the Parliament was summoned for the new session three months later.[106]

While Burbury granted the prorogation, it was done with acceptance by both the Governor and Premier that he had a discretion to refuse the advice to prorogue. In his request, Holgate cited reasons for the prorogation including the volatility of the Parliament, the need to analyse the disputed referendum result and to clarify funding requirements for the proposed dams.[107] Were Burbury obliged to follow the Premier's advice such appeals would have been unnecessary. It was also reported that the Governor *did* exercise discretion over the length of the prorogation, rejecting Holgate's initial request that the Parliament be prorogued until May.[108]

This precedent supports Hogg's interpretation of the events in Canada in 2008 where the Governor-General sought to inform herself on a range of issues before granting the prorogation to Prime Minister Harper. While both Governor Burbury and Governor-General Jean followed Ministerial advice to prorogue, they recognised that there was a discretion to reject the advice, should they have chosen to exercise it. Together these precedents provide contemporary support for the conclusion that the convention followed by Cullen in 1911 persists, and that a Governor-General will have the discretion to refuse advice to prorogue the Parliament if it is for the purpose of avoiding a vote of no confidence.

Rationale for the Convention

Hogg argues the rationale for such a convention is that the reserve powers are enlivened when the Prime Minister tenders the advice to prorogue, where the effect of prorogation would be to preclude parliament from passing judgment on the Government.[109] While Hogg's rationale explains why the Governor-General can refuse the advice, it is not a sound reason to explain why the Governor-General may also grant the prorogation in those circumstances.

The issue with this rationale is that Hogg relies on the King-Byng Affair as precedent, but that was a case relating to dissolution. There is no reserve power to dissolve the Parliament contrary to advice.[110] Where there is an actual loss of confidence the reserve power of the Governor-General that is enlivened is the power to

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104 Ralph Chapman 'Adminstrative Chronicle: Tasmania' (1982) 41(3) *Australian Journal of Public Administration* 290, 290.
105 *Australian Political Chronicle*, above n 102, 110.
106 Ibid 110.
107 Chapman, above n 104, 291.
108 *Australian Political Chronicle*, above n 102, 110.
109 Hogg, above n 89, 198.
110 Republic Advisory Committee, above n 84, 264.

dismiss the Prime Minister.[111] It is submitted that a better constitutional rationale for the convention is that an impending vote of no confidence will give rise to the Governor-General's personal discretion because the prorogation is for the purpose of avoiding a parliamentary event that may otherwise have enlivened the reserve power to dismiss the Prime Minister. This rationale accurately supports both the Australian and Canadian precedents and explains why the Governor-General has the discretion to reject *or accept* the advice to prorogue when there is an impending vote of no confidence.

Therefore, it is argued that the necessary elements to form a convention are present. If the Australian Prime Minister was facing an imminent vote of no confidence and, to avoid such a vote, advised the Governor-General to prorogue the Parliament, the Governor-General could exercise a discretion to accept or reject the Prime Minister's advice. Whether it would be wise to exercise that discretion would, of course, depend on the particular circumstances.

Prorogation to Avoid Scrutiny by Committees: An Extension of the Convention?

Does the convention include any other circumstances where the Governor-General has the discretion to refuse advice to prorogue — perhaps where the prorogation is for the purposes of shutting down a Parliamentary committee, as discussed earlier in this article? It has been noted that the Governor-General will have a reserve power to dismiss a Prime Minister where the Government is acting illegally. This power was exercised dramatically in the dismissal of the Lang Government by NSW Governor Sir Phillip Game in 1932.[112] George Winterton argued that the power may only be used in extreme circumstances where: (1) the government was persisting in a breach of a fundamental constitutional principle; (2) it had ignored calls from the Governor-General to desist; and (3) where the breach was non-justiciable.[113] I describe this as a 'fundamental constitutional illegality'.

It follows from the proposed rationale for the convention relating to votes of no confidence that if prorogation is for the purpose of avoiding a parliamentary event that may otherwise enliven the reserve power to dismiss the Prime Minister for 'fundamental government illegality', then the Governor-General also has a discretion about whether to follow that advice. The obvious circumstance would be where a Prime Minister sought a prorogation to prevent a parliamentary committee from inquiring into a 'fundamental constitutional illegality'. If it is accepted that prorogation terminates the business of a Senate committee, this is a real possibility at the Commonwealth level.

There are no precedents for this assertion. In NSW in 2010 there was no suggestion that the Governor could reject the Premier's advice. Again in Canada in 2009, Prime Minister Harper was granted a prorogation that this time stifled a committee of inquiry into the torture of Afghan detainees of the Canadian Military, and no such discretion

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111 See, eg, George Winterton, '1975: The Dismissal of the Whitlam Government' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 229, 244.

112 See Anne Twomey, 'The Dismissal of the Lang Government' in George Winterton (ed), *State Constitutional Landmarks* (The Federation Press, 2006) 129.

113 George Winterton, *Monarchy to Republic: Australian Republican Government* (Oxford University Press, 1986) 45-6.

was raised.[114] In the Macdonald-Dufferin Prorogation the reported 'hesitation' of Governor-General Dufferin in accepting the Prime Minister's advice to prorogue probably is not sufficient to conclude that he acknowledged a discretion to reject the advice.[115] However, these precedents are not destructive to the assertion.

First, the reserve power to dismiss a Prime Minister appears more tightly constrained in Canada than in Australia. Second, in the Macdonald-Dufferin Prorogation, and the prorogations in Canada (2009) and NSW (2010), the governments' actions being investigated by the committees were not the sort of fundamental constitutional illegalities that would enliven the reserve power to dismiss a Prime Minister. Finally, if a committee were inquiring into such an illegality it would be a reasonable response for the Governor-General to refuse a prorogation. A refusal to prorogue is not equivalent to a dismissal; it merely forces the Prime Minster to face the Parliament. If no fundamental constitutional illegality is uncovered there is no possibility of the Governor-General's dismissing the Prime Minister — just as the Prime Minister will face dismissal from a failed vote of no confidence.

Jennings argued that a single precedent may be sufficient to establish a convention, if supported by a good constitutional reason.[116] It is submitted that were a Governor-General advised to prorogue the Parliament, for the purpose of terminating a parliamentary committee's inquiry into a 'fundamental constitutional illegality' that otherwise may have enlivened the reserve power to dismiss the Prime Minister, then the Governor-General could exercise a discretion to refuse to grant the prorogation.

CONCLUSION

The recent controversies in Canada and NSW demonstrate a continuing uncertainty about the operation of prorogation. Given the current political fragility in Canberra, there is the distinct possibility of a similar controversy arising at the Commonwealth level. It is important that this uncertainty regarding prorogation be resolved by reference to the powers provided by the *Constitution* and the conventions that have developed around their use. The powers within the constitutional system are finely balanced and they require careful maintenance.

The argument that the Senate and its committees may continue notwithstanding a prorogation may be an attractive one, but it does not accord with the powers and limits provided by the *Constitution*. Rather, the Governor-General has the power to prorogue the Senate, acting on the advice of the Prime Minister and according to the constitutional conventions. Those conventions include reserve powers that are flexible enough to prevent the abuse of prorogation by a Prime Minister seeking to avoid a vote of no confidence. They are sufficient also to protect the role of committees in the Parliament. The current political landscape in Canberra creates the potential for a prorogation crisis. If, however, such a crisis were to be resolved according to the powers and limits provided by the *Constitution*, the balance of power in the constitutional system would be maintained.

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114 Errol Mendes, 'Prorogation redux: Harper in contempt of the Parliament', *Toronto Star* (Ontario, Canada), 5 January 2010, 15.

115 Hogg, above n 89, 197 nn 10.

116 Jennings, above n 65, 134-6.