

## The Political Theory of Constitutional Conventions

### **Abstract:**

Conventions are a crucial part of constitutional systems with Westminster style parliamentary responsible governments. Most commentary on conventions is by constitutional lawyers who typically work from a legal perspective, from Dicey who first made the sharp distinction between law and convention to the present day. Yet conventions are basic political rules affecting the structure and powers of government that are not enforceable in courts of law, so not amenable to jurisprudential treatment that purports to view them as quasi-laws. Rather, foundational questions regarding conventions need to be addressed from a political science perspective. What is a convention (how it exists, in what form and specific applications); what gives a convention legitimacy (creation with agreement and binding in practice); and how conventions remain stable yet adaptable (changes, breaches and effects) are all political questions requiring answers derived from political practice and political theory. Conventions are often defined negatively, in terms of not being law, and usually with the implication that they are inferior to law. This is methodologically unsound and leads to a superficial understanding of conventions. Constitutional conventions need to be addressed from a political science perspective—drawing on political history and accepted practice to distil how they operate in practice, and on political and institutional theory to determine their structure and legitimacy.

### **Selected Stream: Australian Politics**

Political stability in Australia is at least partly dependent on a shared understanding, acceptance and respect for Constitutional conventions, and as the sixth oldest continuously functioning democracy in the world controversies and conflict in relation to conventions are rare. Part of the reason has been the dominance of two major party groupings with party structures and political cultures that imitate and replicate the

conventions, and these principal political actors have upheld the conventions. However, there is the potential for the two major groupings to differ in their interpretations, particularly when government is at stake, but more importantly these groupings are not as dominant as they once were and new actors may also invoke new interpretations and practices. As recent political events demonstrate, there is always the potential for new political scenarios, which call into question supposed convention or reveal that there is no precedent.

Increasingly, Westminster-derived parliamentary democracies are experimenting with non-traditional governing arrangements and traditional understandings of unwritten conventions are being challenged. For example, in South Australia, Tasmania and the Australian Capital Territory, independents and minor party parliamentarians have served in cabinets with special concessions and without entering coalitions. In many states (and the ACT) and at a Commonwealth level, the government has entered into written parliamentary agreements with a minor party. Minority governments, close elections, and a powerful senate where minor parties often hold the balance power are now common occurrences and subject our Constitutional conventions to increased scrutiny. Such situations were unlikely to have been envisaged by the Constitutional framers, and it can no longer be taken for granted that certain conventions are enduring. With such fundamental changes to the Westminster parliamentary system occurring, it has become necessary to develop this field of research.

This is not simply an Australian phenomenon, with other Westminster-derived parliamentary democracies now grappling with similar issues. The United Kingdom and New Zealand with their unwritten Constitutions have successfully accommodated coalition and minority governments with multi-party cabinets, while Canada has a long history of minority government (despite a majoritarian electoral system). Yet even with this tradition of minority government, Canada has also witnessed a Presidentialisation. 'Prime Ministerial' government—where power is increasingly centralised—has challenged 'Parliamentary' government, where the parliament holds the government to account for its decisions (Russell, 2008). This in turn raises questions for the relevance and adaptability of some conventions. Canada has also recently experienced its own political crisis, or parliamentary dispute, and Canada looked to Australia and lessons from 1975 as they

navigated unprecedented events. However the Australian experience raised as many questions and nuances as it provided potential answers.

Our paper tackles select aspects of this large field, with the purpose of highlighting something of the complexity of the constitutional conventions in play, the current context of political change and adaptation of conventions, and continuing disputes over core conventions at the heart of parliamentary government. We are concerned with three foundational questions: what is a convention (how it exists, in what form and specific applications); what gives a convention legitimacy (creation with agreement and binding in practice); and how conventions remains stable yet adaptable (changes, breaches and effects). We address these large questions by considering recent experiences of minority government and cabinet formation at state and Commonwealth level, the continuing controversy over basic constitutional conventions sparked by recent disclosures of the 'third man' in 1975, and the more routine handling of the re-commissioning of Rudd as prime minister in June 2013. This paper is preliminary to a larger project on constitutional conventions in Australia and comparative parliamentary systems.

### **Identifying conventions**

Australia has a hybrid constitution, comprised of both a written document and 'conventional' or unwritten parts mainly to do with the executive and government. Conventions by their very nature are customary, informal, uncodified, and therefore unenforceable by courts of law. Although fundamental, these are not explicitly articulated. They include such key areas as the office of prime minister, cabinet practices, the vice-regal office, electoral procedures, government formation and dissolution, and parliamentary functioning. Constitutional conventions (not gatherings where constitutional issues are discussed) are rules based on practice not contained in the written Constitution, and therefore are not legally enforceable. Nevertheless, they are broadly accepted as binding, if particular aspects are contentious. The constitutional framers assumed that the written document would be read in light of the unwritten conventions. Furthermore, they put archaic and absolutist monarchic formulations in the Constitution, while assuming that practitioners would appreciate that these were proxies for established executive positions of prime minister and cabinet, and well known parliamentary practices.

Conventions govern political practices relating to the activities of the cabinet and prime minister, neither of which are mentioned in the written document, and the Crown; the dissolution of parliament; the appointment and removal of ministers; the role of advice to the governor-general; the doctrines of collective and individual ministerial responsibilities; how responsible government based in the house of representatives operates given the powers of the senate; the transaction of parliamentary business; caretaker government; the independence of the judiciary; relationships with and between the public service, the executive and the legislature; and the chain of accountability involving public servants.

Many of the conventions exist to regulate the constitutional monarchy, with the written Constitutional vesting power in the Crown and the conventions giving practical effect through political actors such as the Prime Minister. The Governor-General's powers are formally expressed in absolutist monarchist terms, but limited by convention to certain reserve powers (Galligan, 2007). Yet conventions are subject to change: for example the appointment of the Governor-General is now made on the advice of the Australian prime minister rather than on British advice. Conventions evolve and adapt to changing circumstances, which makes defining them even more challenging. Many conventions are uncontroversial, but others are subject to disagreement during times of political uncertainty.

Most of the work that has been done in this area has been in Constitutional law, which is more concerned with the written Constitution and interpretations of the Constitution, rather than conventions. There is an understandable tendency in this work to privilege law over conventions. However, Australia's hybrid Constitution, melding law and convention, requires greater emphasis on conventions to balance the preeminence of law. The common approaches have been more legalistic case study approaches or historical path dependency in examining precedent (interviews with political elites has been another favoured approach). Two strands of research have dominated this area of study so far: Constitutional law and parliamentary studies. Constitutional law with a focus on the written Constitution and understanding the Westminster system and how it has adapted and evolved in Australia (Craven, 2004; Saunders, 2010). Legal scholars have provided some of the most comprehensive treatments of particular aspects of parliamentary practices,

such as parliamentary privilege, using court cases to advance an understanding (Campbell, 2003). Constitutional law, particularly the operation of federalism in Australia, power of political institutions and rights and freedom (implied and otherwise), has been the main focus of scholarship (Dicey, 1982; Winterton, 1983; Waugh, 1996; Craven, 2004; Carney, 2006; Saunders, 2010).

There is a growing body of literature on the role of the Australian parliament, particularly the hybrid nature of the bicameral system and the grafting of the federalist system from the United States onto the British Westminster system and how it has adapted (Bach, 2003; Halligan, Miller & Power, 2007; Uhr, Bach & Massicotte, 2011). Interviews with political elites have been one of the most popular approaches (Halligan, Miller & Power, 2007; Tiernan & Weller, 2010). One of the foremost scholars in the area, Constitutional theorist Geoffrey Marshall, successfully bridged the gap between Constitutional law and politics and produced a number of books and articles on Constitutional conventions, but much of his work is becoming dated and Britain-centric. Traditional Westminster conventions have already changed in many areas and previous cases and precedents only reveal part of the story, and have in many ways been superseded by new or adapted practices.

By drawing on real political discourses around the conventions, particularly where there are differing interpretations, it becomes possible to identify the underlying points of agreement. Rather than focusing on what the courts (to the extent that courts become involved) or elites think conventions are, or how the conventions have evolved, we need to examine how political actors have behaved and why in contentious situations and the discourses surrounding them there is agreement or disagreement on particular conventions and how they apply. This is difficult intellectual terrain as conventions are based on shared understanding and so if political elites universally think that something is a convention then it probably is. However, there are many instances where political elites differ in their interpretations, and furthermore the public and the media can often be confused as to which interpretation is correct, yet even under these circumstances conventions still exist in the absence of a shared understanding.

### **Types of conventions**

Controversies are a good indication of the existence of conventions, and there are seven main areas where the 'rules' are subject to interpretation: the formation of government, the dissolution of parliament, caretaker governments, confidence votes, prorogation, cabinet government, and individual ministerial responsibility. The first controversial area, the formation of government, came to the fore after the 2010 federal election resulted in a 'hung' parliament. The role of the Governor-General was questioned, along with debates about who had the first 'right' to form government and how coalitions or alliances could or should be formed when such possibilities were not put before the electorate. The change of leadership within the Australian Labor Party from Julia Gillard to Kevin Rudd again raised questions. These cases demonstrate that the first 'right' to try and form or continue in government rests with the party in government.

At the state level, the major parties refused to cooperate with the Greens during the 2010 Tasmanian state election, and after they won the same number of seats, Labor premier David Bartlett advised the governor to commission a minority Liberal government as they won the most votes. Governor Peter Underwood released a statement, and under the sub-heading 'Irrelevant matters' stated that:

In view of certain public statements made by some candidates in the lead up to the election I express my view that the commissioning of a person to form a government is entirely the Governor's prerogative and it is not within the gift of any political leader to hand over, or cede to another political leader the right to form a government, whatever the result of the election. For the same reason it is also appropriate to express my view that the total number of votes received by the elected members of a political party is constitutionally irrelevant to the issue of who should be commissioned to form a government.

Eventually, Bartlett continued as premier after inviting Greens into the cabinet. Independents have had written undertakings with minority Labor governments in Queensland, Victoria, South Australia the Northern Territory, and a minority Liberal government in New South Wales. Every written agreement has the stated aims of stable government and accountability. For the government, the main issue was ensuring supply and confidence, while placing conditions under which a motion of no confidence could be

supported; generally it could only be moved by the independent member (rather than the opposition) and only due to corruption, mismanagement or similar wrongdoing. In most agreements the government also pledged to run full term or to introduce fixed terms, which is a lasting consequence of many of these agreements in many states.

In both New South Wales, Victoria and at the Commonwealth level, most of the independents negotiated and signed the agreements as a group. Earlier agreements with independents had focused more on parliamentary and other accountability reforms, along with promises to be consulted, given committee positions, and extra staffing and resources.

The second controversial area, the dissolution of parliament, concerns how governments can be brought down or dismissed (such as the 1975 Dismissal) and the roles of the governor-general and the senate. These issues have again been raised during the most recent parliament given its makeup, opposition tactics and threats by crossbench members to possibly withdraw support. The conventions in this area are examined in more detail in the next section. A related area is confidence votes, frequently referred to in the most recent parliament. While it is accepted that a government that loses the confidence of the lower house must resign, it is unclear what exactly constitutes a vote of confidence. In the recent parliament, the loss of a vote on a major government bill has been regarded by many as being equivalent to a confidence vote, and while the government has predictably challenged such interpretations, they have been reluctant to test this on the floor of parliament. Thus a confidence vote needs to be flagged as such or supply must be blocked.

The fourth area that is subject to conventions is caretaker governments, which often exist after the dissolution of parliament, during election campaigns and before the formation of government. Caretaker conventions have received the most academic attention, with detailed 'handbooks' or 'manuals' recognising different circumstances and prescribing rules (Tiernan & Menzies, 2007; Simms, 2011). Caretaker conventions have generally received bipartisan support and are actually written down, although the status and robustness of such texts might well be tested in practice.

The fifth area is prorogation. While virtually unheard of in Australia, prorogation was recently used in Canada by prime minister Harper, then leading a minority government, to shut down parliament in order to avoid a vote of no confidence. While highly controversial, this was strategically successful and bought the government time to wait out a united push by combined opposing parties that soon fragmented. There seems little to prevent a similar tactic being used in Australia if a government is wanting to terminate all business pending before the houses. However, it is unclear what effect this would have on senate business. This is untested and the conventions remain unclear.

The sixth area is cabinet government, particularly the issue of cabinet solidarity and collective ministerial responsibility. This has rarely been a contentious issue in Labor governments, with their formal pledge to abide by caucus decisions and strong history of caucus solidarity. Liberal-National coalitions have written agreements and maintain unity. However, this is becoming complicated with the rising presence of Greens and Independents and minority government situations where cross-party alliances or coalitions of convenience do not necessarily accept the mantra of collective ministerial responsibility, or negotiate exceptions.

From the mid 1990s in Australia, there has been the emergence of what is sometimes known as the 'New Zealand' model (a parliament once described as more Westminster than Westminster) where collective responsibility is loosened and support parties can gain ministerial roles with the right to dissent on certain issues (Paun 2011: 450).

The first significant deviation from the traditional Westminster practice of collective cabinet solidarity occurred in the Australian Capital Territory in 1998. This is unsurprising given the proportional representation electoral system, history of non-majority governments, and other non-traditional Westminster features such as the absence of a vice-regal post and necessity of an investiture vote. Prior to the appointment of Independent Michael Moore to Chief Minister Kate Carnell's Liberal cabinet, the government commissioned Prof. Philip Petit to investigate the basis upon which a non-government member could become a minister. In his report, *Review of Governance of the Australian Capital Territory*, Petit identified three conditions for such an appointment: Moore had to give prior notice of the issues on which he reserved the right to dissent in public and in the legislature after

absenting himself from the relevant cabinet discussion (a long list of broad-ranging issues); he had to implement all cabinet decisions related to his portfolio areas, even if he had absented himself and dissented; and he could not threaten to resign in cabinet negotiations. Chief minister Carnell was able to secure her position and add a more ideologically congruent voice to cabinet balance the right-wing, a tactic many have argued that British prime minister David Cameron used in encouraging a coalition with the Liberal Democrats. Moore's health portfolio was also a more challenging portfolio for the government, and while Moore gained ministerial influence, he could also be blamed for failings. Moore emphasised that the success of the arrangement was highly dependent upon trust.

South Australian Labor Premier Mike Rann adopted a similar arrangement, but granted further dispensation to the non-government ministers. Under the agreement, the independent and National party ministers did not have to provide a list of issues that they could disagree with, however broad-ranging, and instead were effectively given *carte blanche*. They were also offered a ministerial position in a future Labor government if they served in line with the agreement.

The Western Australian Nationals copied these arrangements in entering a 'partnership', rather than a coalition, with a minority Liberal government in 2008. Notably, the Liberals had already secured the support of two independents without the need for formal agreements, and one entered the cabinet under traditional conditions. She was subsequently demoted but she did not bring down the government. While cabinet solidarity was varied in these arrangements, cabinet secrecy was still expected (something that majority government cabinets sometimes have difficulty with).

The 'greens' first entered a Parliamentary Accord with Labor in Tasmania in 1989 while still known as the Green Independents. This was the first such written agreement focusing on parliamentary and accountability reforms, which increased consultation and resources for non-government members, but also many policy commitments. It broke down in acrimonious circumstances and with Labor reluctant to govern with Green support after the 1996 election, the Liberals governed without a majority or an agreement with the Greens.

More recently Tasmanian Greens joined a Labor cabinet. As in the ACT arrangement, the Green ministers are required to provide a comprehensive list of matters of conscience where they would likely disagree, but are able to add to the list at a latter date. There is also provision for 'matters of significant concern', which is open like the provisions in the South Australian and Western Australian arrangements, except it is framed in terms of party policy and acknowledging that Greens ministers are subject to their own internal party dynamics. The key difference from earlier arrangements is that resignation is acknowledged as an option, with the expectation that the Greens will do so if they cannot abide by the other traditions of cabinet. While popularly described as a coalition, the other three Greens are not part of the government and may take a different position to their colleagues in cabinet.

The Greens charted a similar path in the ACT. They have previously supported minority governments in the investiture votes, without entering formal agreements. After winning a record number of seats in 2008, they entered a parliamentary agreement to support a minority Labor government in exchange for parliamentary reform and one of the most extensive policy programs contained in an Australian agreement. This was despite the Liberal offering cabinet positions. Outside of the agreement, they tactically won the speakership for the first time in any jurisdiction.

After the recent ACT election, despite losing three of their four seats, the Greens sole member entered cabinet and is explicitly subject to cabinet confidentiality but not solidarity on matters of serious concern. However, most of the agreement focuses on specific policy commitments.

Despite these innovations (or perversions) in Westminster practice, the Commonwealth's *Cabinet Handbook* retains the traditional conceptualisation of the collective executive:

Cabinet collective responsibility is most obviously expressed in the principle of Cabinet solidarity. In governments using the Westminster system, members of the Cabinet must publicly support all government decisions made in Cabinet, even if they do not agree with them. Cabinet ministers cannot dissociate themselves from, or repudiate the decisions of their Cabinet colleagues unless

they resign from the Cabinet. It is the Prime Minister's role as Chair of the Cabinet, where necessary, to enforce Cabinet solidarity.

However the UK's recently updated *Cabinet Manual*, recognises, in the words of Cabinet Secretary Sir Gus O'Donnell that:

The content of the Cabinet Manual is not static, and the passage of new legislation, the evolution of conventions or changes to the internal procedures of government will mean that the practices and processes it describes will evolve over time. If the Cabinet Manual is to continue to play a useful role as a guide to the operations and procedures of government, it will need to be updated periodically to reflect such developments.

With a coalition between the Conservatives and Liberal Democrats, the *Manual* now states that:

The Cabinet system of government is based on the principle of collective responsibility. All government ministers are bound by the collective decisions of Cabinet, save where it is explicitly set aside, and carry joint responsibility for all the Government's policies and decisions.

The formal agreement between the parties states that: 'There is no constitutional difference between a Coalition Government and a single party Government, but working practices need to adapt to reflect the fact that the UK has not had a Coalition in modern times'. The agreement contains a comprehensive policy program, noting likely and allowable disagreement on higher education funding and nuclear power plant construction. In this way, The UK coalition preserved the doctrine of collective responsibility by specifying minimal exemptions (Paun 2011: 451).

The seventh area of contention is individual ministerial responsibility and under what circumstances a minister should resign and what are the appropriate relationships with the public service. There have been a series of scandals over the years where ministers have been called on to resign for either personal failings or failings of their departments. A

common misconception is that ministers are accountable for all of the actions of their departments, yet the actual convention is more nuanced, if less widely understood (Weller, 2007). This is the most contentious political convention and can be argued to no longer exist.

### **1975 Rekindled**

If these recent examples show the adaptability of conventions in accommodating minority government and modifying cabinet conventions, the rekindling of the 1975 Kerr/Whitlam confrontation highlights the continuing dispute over core executive conventions. The 1975 constitutional crisis has its institutional roots in the founders' original design of the constitution. They opted not to build in a mechanism for breaking deadlocks over supply, even though they recognised the problem in combining a responsible government executive based in the lower house with a powerful senate with coequal legislative powers (Galligan, 2007; Brenton 2010). The experience of colonial politics also led to warnings of potential problems, but the Constitutional framers thought that the system could be made to work with the cooperation of reasonable politicians. The Australian senate's powers are remarkable and unlike that of any other upper house in a Westminster-derived parliament (Uhr, 1999; Brenton 2010). In Westminster-derived parliamentary systems, budget bills are generally regarded as equivalent to a vote of confidence. The idea that the senate should not block bills appropriating money, even though the written Constitution gave the senate that power, was a frequent practice that many regarded as a convention. However, the events of 1975 demonstrated that it was not necessarily binding.

The supposed convention, that the government must resign if it is unable to secure supply from parliament, meant that the upper house could bring down a government, even though another convention was that government is based on retaining the confidence of the lower house. In dismissing prime minister Gough Whitlam, governor-general Sir John Kerr claimed a 'reserve power' to uphold the Constitution, despite the convention that the Governor-General act on the advice of ministers. Malcolm Fraser was appointed prime minister despite lacking confidence of the lower house, and even when this was affirmed he did not resign, having had already advised the governor-general to call an election. Curiously, the convention that the governor-general act of the advice of the prime minister

in dissolving Parliament and calling an election was satisfied by Fraser's advising Kerr to call the election, even if that was a condition of his appointment.

The uncovering of detailed archival material on 'The Dismissal's "third man"' by Jenny Hocking (Hocking 2012; *Age* 26/8/2012) has revived public discussion of key aspects of the 1975 constitutional crisis. Since the publication of Malcolm Fraser's biography, it has been on the public record that governor-general Kerr phoned Fraser the morning before dismissing Whitlam to secure his agreement to being appointed caretaker prime minister and calling an election. Kerr's own previous denials were shown to be self-serving fabrications. As Fraser said when questioned about the discrepancy, he was hardly unlikely not to recall the most important phone call of his political career. Relying on Kerr's testimony and papers, Hocking has uncovered the 'third man', even if she has somewhat overstated Mason's role and misunderstood the governor general's reserve powers.

In response, Mason published his own measured account of his collaboration with Kerr in the unfolding 'Greek tragedy'. Mason makes clear his close friendship with Kerr and the various meetings and exchanges he had, including drafting a short letter of dismissal that was not used (Mason *Age*, 27/8/2012). Mason emphasises that Kerr had made up his mind to dismiss Whitlam well in advance of their discussions. In Kerr's earlier account, the conversations with a then undisclosed person 'did not include advice as to what I should do but sustained me in my own thinking as to the imperatives within which I had to act, and in my conclusions, already reached as to what I could and should do' (quoted Mason 2012). Mason told Kerr that he had a duty to warn the prime minister of his intended actions, which Kerr did not do. In all of this, Mason says he acted not as an advisor but as a friend: 'I wasn't advising him [Kerr] as a legal adviser—I was there in the capacity of a friend' (quoted Michael Gordon, *Age*, 27/8/2012).

Hocking's disclosure and Mason's response have ignited controversy regarding conventions that were at issue. According to Troy Bramston writing in *The Australian* 'conventions were trashed, precedents flouted and the advice of the prime minister and the government's chief legal officers were ignored' (Bramston, *Australian* 27/8/2012). Senior Labor ex-ministers subsequently canvassed by Troy Bramston expressed shock and criticism of Mason's role in advising Kerr. Some said that had this been known, it was

doubtful Mason would have been appointed chief justice in 1987 (Bramston, *Australian* 1-2/9/2012). According to Gareth Evans, resources and energy minister at the time and subsequently attorney-general, the disclosures showed ‘the extraordinary level of indifference to constitutional convention his behaviour revealed—not in my view annulled by his difference with Kerr on the question of prior warning’. Keating, a newly appointed minister who was with Whitlam the last time he met with Kerr prior to the dismissal said of the ‘coup’: ‘A manoeuvre beyond the bounds of convention and the reasonable exercise of the reserve powers’.

Various particular conventions or aspects of conventions were referred to by respondents. The main ones were that the governor-general should only act on advice of the prime minister or official legal advisors, and that the judiciary should be strictly independent. Barry Jones, science and technology minister in 1975 summed up these two key conventions: ‘We all believed that governors-general only acted on the advice of prime ministers and that the judiciary was strictly independent. The events of November 1975 proved this to be wrong’ (quoted Bramston, *Australian* 1-2/9/2012).

Hocking assumes that the reserve powers *per se* are questionable, and that the governor-general is an official who should always act on advice of the prime minister and the government’s formal legal advisors. In her view Kerr subverted ‘the role of the governor-general in a parliamentary democracy, as an appointed official who acted on the advice of ministers’. Hocking’s account is coloured by this view:

Kerr accepted without question the existence of “the reserve powers”—powers that, although unspecified in the Constitution and subject to intense debate, would, if presume to exist, enable the Governor-General to act independently, even against the advice of his elected ministers’ (Hocking 2012, 307).

Kerr’s actions represented a dramatic subversion of the role of the governor-general in a parliamentary democracy as an appointed official who acted on the advice of his ministers. According to Hocking, in seeking external advice without the knowledge, much less approval of the prime minister, Kerr had stepped away from the office of the governor-general defined in terms of its relationship with elected government (Hocking 2012, 309).

Clearly, however, Kerr and his supporters including Mason rejected all these claims. In their view, the governor-general possessed not only the traditional reserve powers of acting independently of the prime minister and government of the day, but also a power to intervene in a deadlock between the two houses of parliament to break a deadlock over supply, to dismiss the prime minister and force an election. This position had been publicly advocated by Bob Ellicott, Liberal front bencher and leading lawyer, as part of the Liberal Coalition's strategy in blocking supply. It was rejected by in the 'draft' opinion of the law officers given to Kerr, and in their second meeting when given a copy by Kerr, Mason had said he disagreed with it (*Mason Age*, 27/8/2012).

### **Unclear Australian conventions**

The above controversy shows that basic conventions governing the executive in the Australian Constitution are in dispute at the highest level of Australian politics and law. There is the deep divide between Labor and Liberal Coalition leaders and senior ministers and their legal advisors—Labor supported by the formal 'law officers', Labor attorney-general Kep Enderby and solicitor-general Maurice Byers; and the Liberals supported by their shadow attorney-general Bob Ellicott, formally by Chief Justice Barwick, and informally by Justice Mason. The disagreement is about the core conventions of the Constitution: the first is the extent of the independent or 'reserve' powers of the governor-general to act without, and contrary to, the prime minister's advice; the second is the meaning and basic rule of responsible government; the third is whether the governor-general can seek independent advice; and the fourth whether the judiciary should formally or informally provide that advice.

Complicating matters is the propensity of some to bolster their case by either denying older, well-established conventions, on the one hand, or on the other hand, presenting innovations as if they were well established conventions. Whitlam defenders like Hocking deny that the reserve powers of the governor-general exist at all, yet they are well established and quite specific (see the draft prepared for the republican referendum that were uncontroversial). The formulation of Barry Jones cited above that 'governor-generals only acted on the advice of prime ministers' is incomplete. That is the normal convention

that applies except when the reserve powers come into play. Then, by definition and general agreement, the governor-general acts independently of the prime minister. The issue in 1975 was whether the reserve powers extended to resolving a parliamentary deadlock between the house of representatives and the senate by dismissing a prime minister who could not get supply through the senate but refused to advise an election for the house of representatives. This was clearly a novel situation and the Kerr/Fraser/Ellicott/Barwick/Mason view supporting such a vice-regal intervention is an innovation. The question regarding the governor-general's reserve powers is not whether they exist—they do—but whether they include dismissing a prime minister who retains the support of the house of representatives but cannot get supply passed by the senate.

Related to this, but even more fundamental, is the core convention of responsible government. The generally accepted view prior to 1975 was that the prime minister and government held office while ever they had support of the house of representatives. This convention determines who governs after an election and, subject to constitutional limitations on terms, how long they remain the prime minister and government. Whitlam and his supporters relied, unquestioningly, on this core convention. Some went further and claimed that the senate's explicit constitutional power over supply had been curtailed by a convention not to use it as the Liberal coalition were doing in denying the government supply.

The counter Liberal coalition strategy depended on shifting the effective meaning of responsible government to responsibility to parliament. If the senate had power to pass or not pass supply, a government would need to have sufficient senate support to pass supply if it were to govern. If it did not it would have to resign or be dismissed. This was an unprecedented innovation in the basic principle of responsible government: that where there is a bicameral legislature like that of Australia, the prime minister and his government are responsible not just to the house of representatives but to parliament.

Each of these opposing positions sought to present a consistent and integrated account of the Australian constitution. Preserving the traditional responsible government convention by denying the senate's explicit constitutional power over supply was not credible, or politically realistic. Making the tenure of the prime minister and government responsible to

parliament and dependant on senate support was a bold innovation, opportunistically effective when coupled with the innovation of expansive vice-regal power discussed above, but unworkable as a constitutional rule. Neither side properly understood or respected the founders' constitutional design of deliberately combining partly incompatible institutions without a fail-safe circuit breaker except political good sense and compromise. It was never envisaged that the governor-general might come in as the circuit breaker.

The third convention under dispute was whether the governor-general can seek independent advice. Kerr is criticised by the Whitlam followers for doing so, and claims are made that the governor-general should act only on the advice of the prime minister or the government's law officers. But that is to conflate the normal situation with the exceptional one where the governor-general is using, or contemplating using, the reserve powers of the office. If there are no reserve powers, then of course there is no scope for going beyond the prime minister and official law officers. If, as is the case, there are certain reserve powers then, virtually by definition, the governor-general is entitled to seek independent advice. That is because when the reserve powers come into play the governor-general is not accepting, or acting against advice of a prime minister. The classic cases are when a prime minister advises a new election when defeated in a confidence vote in the house of representatives shortly after a previous election and where there is a reasonable chance of an alternative person forming a government; or where there is a hung parliament and no one with majority support in the house of representatives; or where a corrupt prime minister refuses to advise the calling of parliament or to resign. To claim that in such instances the governor-general is bound to follow the advice of the prime minister makes no sense.

The fourth controversial issue is whether the governor-general can seek advice from the judiciary, either formally from the chief justice, or informally from one of the justices who is a friend. This was done in the past, as Don Markwell has documented. There is substantial and growing support for a strict separation of the judiciary. This is for a mix of reasons. One is protecting the judiciary from controversy, such as occurred regarding Barwick and more recently Mason. Another is preventing potential conflicts of interest in having advised the governor-general on a matter that might come before the High Court. This is often overstated because conventions by their very nature cannot come to the High Court for

decision. However, associated matters such as Whitlam's proposed bank financing scheme to meet public payments might.

### **Making the Right Call**

The continuing controversy over the 1975 crisis, rekindled by Hocking's disclosure of the 'third man', shows the difficulty of reaching agreement on core constitutional conventions of Australian executive government. The re-commissioning of Kevin Rudd to replace Julia Gillard as prime minister suggests that more routine conventions governing vice-regal decision-making are not as clear as they might be. This is evident in the exchange of letters between Stephen Brady, the official secretary of the governor-general, and Robert Orr, acting solicitor-general on 26 June 2013.

After losing the leadership ballot in the Labor caucus on the evening of 26 June 2013, prime minister Julia Gillard advised the governor-general, Quentin Bryce, to 'send for Mr Rudd and ask him to accept appointment to the office of Prime Minister'. She further advised that she wished to resign with effect from the appointment of Mr Rudd, and that her resignation was intended to leave ministerial appointments other than her own unaffected until such time as Rudd, as prime minister, advised otherwise (Letter, 26 June 2013).

This seemed straight forward, but the political situation was somewhat more complicated. Gillard had relied on agreements with key independents to form government and maintain a majority in the house of representatives, and it was unclear whether they would continue to support the Labor government if Rudd were reinstated. Both Windsor and Oakshott had previously indicated that their support had been pledged to Gillard, and there was some doubt as to whether they might now support an opposition no confidence motion if one were put. The parliament was about to shut down for the winter recess—the caucus vote was called on Wednesday evening after the close of parliamentary business, and there was only one more scheduled sitting day, Thursday, before the long winter recess. The election was due in mid September; and Windsor and Oaksott, had already announced they would not be recontesting their seats. Parliament was winding down and these two independents were becoming lame duck.

According to convention, the governor-general would normally be expected to accept the outgoing prime minister's advice. The complication here was the basic conventional rule of responsible government that the prime minister have the confidence or support of a majority of the house of representatives. The governor-general needed that assurance. Prudently, on receiving Gillard's recommendation, Bryce met with the acting solicitor-general, and after the meeting requested written confirmation of the oral advice she received. The official secretary's letter (26 June 2013) confirmed the governor-general's intention of seeking an assurance from Mr Rudd that he would 'announce his appointment at the first possible opportunity to the House of Representative in order to give the House the opportunity for whatever, if any, action it chooses to take'. In other words, she would appoint Rudd provided he met the house. This assurance was a sticking point with acting solicitor-general Orr who responded in a formal letter confirming his opinion that Rudd should be commissioned as prime minister (Letter of 26 June 2013). It was open to the governor-general to seek assurance from Rudd to announce his appointment to the house at the first possible opportunity, Orr conceded. However, Orr was in disagreement as to whether this was required: 'I confirm that I do not think that the Governor-General can require such an assurance or make the appointment conditional on such an assurance'.

The matter was not tested because Rudd confirmed early on the morning of 27 June that he intended doing what the governor-general required. In his letter to the governor-general received just after 8 am, Rudd asked to be commissioned, confirmed his 'intention to announce this to the House of representatives at the nearest opportunity', and detailed that he would do so when the house convened at 12pm that day. He was duly commissioned mid-morning and met the house in the afternoon. There was no motion of confidence, and business was carried on with the new prime minister in place.

Suffice it to say, the governor-general was both correct regarding constitutional convention, and prudent politically in insisting that Rudd undertake to meet the house of representatives. Rudd's concurrence confirmed this, and avoided any confrontation or stand-off that might have occurred had he refused to give such an assurance. The acting solicitor-general's advice was wrong, and fraught with political danger if Rudd had refused to given an undertaking to meet the house. He would have been a new Labor leader of a

minority government with unknown parliamentary support in the lead up to an election. Who knows how a Rudd refusal to meet the house would have played out—to say the least, there are troublesome possible scenarios. The disagreement between the acting chief law advisor and the governor-general underlines the need for greater consensus on constitutional conventions.

### **Towards a political theory of conventions**

The above examples of evolving and disputed constitutional conventions highlight the need for more systematic research and analysis. Compared with other major political institutions, conventions are relatively neglected and under theorised. They are often defined negatively, in terms of not being law, with the implication that they are inferior to law. There is a slim literature on the character and recognition of conventions that draws on a number of prominent, mainly English, jurists. Here we sample some key issues without attempting to be exhaustive, or to critically develop and apply to the Australian case.

Prominent English scholar A. V. Dicey was influential in tilting the balance in favour of constitutional law and against constitutional conventions (Dicey 1885/1915), even if his treatment was most unsatisfactory (McLean 2012). According to Dicey, the difference was that constitutional law consists of those rules affecting the structure and powers of government that are enforceable in courts of law. Conventions are political rules and practices that are not so enforceable. There are problems of demarcation and circularity in this: what rule or principle determines what is enforceable by law? Leaving it to the courts to decide is hardly enough.

We need what H. L. A. Hart, a more profound English jurist, termed a ‘rule of recognition’ (Hart 1961, ch.4). The rule of recognition defines the conditions under which the rules of a particular system of positive laws are acknowledged to be valid laws. Such a rule is pre-legal and cannot be said to be valid in the same sense as rules that it determines are valid. Hart is talking about law or the system of law, but something similar is required for identifying valid conventions.

Sir Kenneth Wheare, the Australian who was prominent at Oxford, defined conventions in his *Modern Constitutions* (Wheare 1951 p.27): 'By convention is meant a binding rule, a rule of behaviour accepted as obligatory by those concerned in the working of the Constitution.' Geoffrey Marshall, another prominent Oxford don who wrote the classic account of *Constitutional Conventions: The Rules and Forms of Political Accountability* (Marshall 1984), broadened the concept: 'conventions, as a body of constitutional morality, deal not just with obligations or duties but confer rights or entitlements'. Conventions were variable in character, Marshall pointed out. The rule of cabinet secrecy, for example, was due to consensus on the part of cabinet, and might be changed to full disclosure—in other words, it was an obligation that depended on cabinet's agreement.

How are conventions established, and how are they recognised? According to Marshall, this could be done in several ways: via a series of precedents; by agreement among people; or through being based on some acknowledged principle of government. Any or all of these ways of establishing and recognising conventions are less precise compared to law, which is specified by statute or decided by judges in particular cases. This recognises that conventions are different, not inferior, to laws.

The Canadian *Patriation* case (1982) gives a masterly account of conventions, paradoxically by a superior court of law, the Supreme Court of Canada. The question put to the Court by the Canadian government was the hotly contested one of whether there was a binding constitutional convention requiring the Canadian government to have the consent of the provinces before it could properly request the British parliament to amend the Canadian constitution, the British North America Act, in ways that would affect federalism and the powers of the provinces. The Canadian Supreme Court held by a majority that there was. In so doing it accepted the framework of determining conventions put forward by another prominent English legal and political scholar, Sir Ivor Jennings (1959). Jennings had proposed a tripartite test that turned on three questions: Are there precedents? Did the actors in the precedents believe that they were bound by a rule? And are there reasons for the rule?

These authoritative sources are richly suggestive, but patently incomplete. We need to develop both the detailed case study of particular cases and controversies, and articulate

the enduring rules and practices as well as the developments to meet new political circumstances. But as well, we need to ground the analysis of constitutional conventions in deeper political and institutional theorising. As indicated at the beginning, this is a large topic for further work on Australia and comparative parliamentary systems.

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