

## The crisis of 1974–75

In 1975, Australia experienced the most discussed and most important constitutional crisis in the history of the Commonwealth.<sup>60</sup> In its immediate aftermath, Howard (1976: 5) concluded that the crisis had precipitated ‘a fundamental redistribution of power between the two Houses of the national parliament and between Parliament and the executive.’ In retrospect, his assessment has proven to be exaggerated. It is doubtless true, however, that the crisis has continued to reverberate through the thinking of Australian politicians ever since. Even more than a quarter of a century later, the events of 1975 continue to evoke strong, sometimes passionate, reactions.<sup>61</sup>

### The events of 1974

The December 1972 elections had produced the Labor Party (ALP) Government of Prime Minister Gough Whitlam, which enjoyed a secure though not overwhelming majority in the House of Representatives over the long-standing parliamentary coalition of the

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60 For contemporaneous accounts, see Kelly (1976) and Oakes (1976); for the recollections and self-justifications of key participants, see Whitlam (1979), Kerr (1978), and Barwick (1983); for a retrospective account, see Kelly (1995). How the events of 1975 could have unfolded as they did has continued to intrigue political observers and scholars alike. In an otherwise captivating book on Australia in the Twentieth Century, for example, Philip Knightley (2000: 269–282) concludes that the CIA was complicit, and perhaps even instrumental, in a conspiracy that led to Whitlam’s ouster. But then Kelly (1976: 1) reports that Whitlam himself had raised the spectre of CIA involvement.

61 In 1991, more than 15 years after the events discussed here, a national survey of voters were asked whether the Governor-General had been right or wrong to dismiss the Whitlam Government. Forty-three per cent responded that he had been right; 33.6 per cent that he had been wrong. But those figures are far less interesting than is the fact that less than one-quarter of those interviewed failed to respond or answered that they did not know. Not only did more than 75 per cent of the respondents remember a political event that had occurred years earlier, they were prepared to offer a judgment about it. For the poll, visit <http://ssda.anu.edu.au/polls/D0737.html>.

Liberal and Country (now National) parties. Such was not the case in the Senate, however, where the ALP held only 26 of the 60 seats. The Liberal-Country alliance, popularly known as the Coalition, had the same number of seats, leaving control of the Senate in the hands of five members of the Democratic Labor Party (DLP) and three Independents. The DLP Senators usually allied themselves with the Coalition, giving the non-Labor parties a 31–26 margin over the ALP. Even if Labor was supported by the three Independents, what was ostensibly Australia's governing party was in the minority in one of the two houses of Parliament.

The early 1970s unquestionably were an unusual, even unique, period in bicameral relations for the Commonwealth. 'Throughout its first seventy-one years of existence the Senate had rejected only sixty-eight government bills; in the next three years, it rejected no fewer than ninety-three Whitlam bills.' (Souter 1988: 549) This is not to suggest that the Senate hamstrung the Labor Government on all fronts. The Senate passed far more bills (a total of 508) than it rejected. Still, the Senate clearly was much more of an obstacle during this Parliament than it ever had been before.

In April of 1974, the political stakes escalated when the Liberal-Country Party Coalition and its allies-of-the-moment in the Senate voted to defer action on supply bills. 'Supply' is a term sometimes used to refer to all spending bills. At the time of these events, 'supply' also was defined more narrowly to refer specifically to bills that were enacted to authorize spending during the early months of a fiscal year, before the annual budget for that fiscal year was approved. In the 1970s, such supply bills were a necessary and predictable part of Parliament's annual agenda. Today, such bills rarely are needed because Australia changed its annual budget timetable.<sup>62</sup>

As we already have seen, Australia's Constitution (in sec. 53) gives the Senate and the House of Representatives almost the same legislative powers, with exceptions that concern these supply bills as well as other spending and tax bills. In Australia as in the United States, all such bills

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62 'Strictly speaking, supply was the money granted by the Parliament in the supply bills which, before the change in the budget cycle in 1994, were usually passed in April–May of each year, and which appropriated funds for the period between the end of the financial year on 30 June and the passage of the main appropriation bills. The latter appropriate funds for the whole financial year, were formerly passed in October–November and are now passed in June.' (*Odgers' Australian Senate Practice* 2001: 295) Now the annual budget usually is presented in May, allowing time for appropriations to be enacted before the new financial year begins on 1 July and rendering supply bills unnecessary—unless a general election disrupts the normal schedule, in which case supply may be required.

originate in the House, but unlike the situation in the US Congress, the Australian Senate may not amend those bills. So the Australian House of Representatives has enjoyed constitutional primacy over the Senate with respect to these most critical legislative measures. However, the Senate is not powerless to influence tax and spending legislation. First, the Constitution authorizes the Senate to request that the House approve specific amendments to these bills. Second, the Constitution does not require the Senate to pass the bills, nor does it give the House any immediate or convenient legislative recourse if the Senate does not pass them. The Senate may defeat a tax or spending bill, as passed by the House, or it may vote to defer acting on it.

Gareth Evans, who would later become a senior ALP minister, wrote (1975: 11) at the time that the Senate was breaking a convention in denying supply because ‘on 139 previous occasions money bills have been passed by a Senate in which the Government of the day lacked a majority, and none has been previously rejected.’<sup>63</sup> (Note that he strengthens his argument by taking tax and spending bills together, as we would expect a good advocate to do.) Yet this is what the Senate, with its non-government majority, threatened to do in 1974, by moving to defer second reading of Appropriation Bill (No. 4). The merits of the bill were not at issue. Instead, the Coalition, then led by B.M. Snedden, sought to use the fate of the bill, enactment of which was needed to continue the operations of government, as leverage to induce Whitlam and his Ministry to request the Governor-General to dissolve the House so that new House elections could take place at the same time, in May 1974, as the anticipated triennial half-Senate election.

When a motion was made in the Senate ‘That the resumption of the debate [on second reading of Appropriation Bill (No. 4)] be an order of the day for a later hour of the day,’ the Leader of the Opposition offered an amendment that the debate not be resumed ‘before the Government agrees to submit itself to the judgment of the people at the same time as the forthcoming Senate election ...’ (*House of Representatives Practice* 2001: 452–453). Before the Senate voted on the motion or the amendment to it, the Leader of the Government in the Senate announced that the government, anticipating defeat in the Senate, already had sought, and the Governor-General had granted, a double

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63 Historically, Labor had been no friend of the Senate, even though it was the ALP that instituted PR for Senate elections and, it is safe to say, led to the institution’s revitalization (vitalization might be a more apt description). It also was Labor that promoted a stronger Senate committee system. But for many years, the ALP had advocated that the Senate be abolished. It was only at the party’s 1979 national conference that it repealed this plank in its platform.

dissolution of both houses of Parliament under sec. 57 of the Constitution.

Howard (1976: 7) points out that Whitlam did not challenge the constitutional authority of the Senate to act (or not act) as it had. Instead, the Prime Minister 'accepted the political challenge' and called for a double dissolution which, as we have seen, triggers new elections to fill all seats in both the House and the Senate, and is the only constitutional mechanism for requiring Senators to face the electorate before the expiration of what otherwise are their fixed six-year terms. Thus, the Opposition in the Senate, with the assistance of DLP Senators, had achieved its immediate political objective, so it allowed prompt passage of the contested appropriation bill as well as others that were required to continue necessary government funding until after the ensuing general election.

As a matter of form, this double dissolution, which was only the third in the history of the Commonwealth, was not based on the Senate's failure to pass Appropriation Bill (No. 4). The Senate had not yet rejected that bill even once, and certainly not twice as sec. 57 requires as a prerequisite for a double dissolution. However, there were six other bills that, the government contended, already had fully satisfied the requirements of sec. 57. What is more, the Prime Minister asserted that these bills were important to the government's legislative program.<sup>64</sup>

Be that as it may, it is reasonable to infer that the Senate's action (or inaction) and the government's response were prompted less by the merits of the bills in question than by the parties' calculations as to which of them were most likely to benefit from new elections to one or both houses.<sup>65</sup> The government could have continued to muddle through

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64 The Prime Minister also argued that the Senate had taken other steps to interfere with enactment of the government's legislative program, 'stating that 21 out of the 254 bills put before Parliament in the first session had been rejected, stood aside or deferred by the Senate.' However, the Governor-General did not rest his decision to grant the double dissolution on this contention. He stated that, 'As it is clear to me that grounds for granting a double dissolution are provided by the Parliamentary history of the six Bills ... it is not necessary for me to reach any judgment on the wider case you have presented that the policies of the Government have been obstructed by the Senate. It seems to me that this is a matter for judgment by the electors.' (*House of Representatives Practice* 2001: 453)

65 Souter (1988: 516) contends that the government deliberately sought to have these other bills satisfy the requirements of sec. 57 'as a warning to Opposition senators that they too could all be made to face election if they dared to block supply. And that kind of warning was itself a license to break convention [i.e., that the Senate should not block supply bills]. If the Senate was no longer a coward's castle, and senators could be made to share the fate which they had the power to force upon the

with the existing political alignment in Parliament, or it could have asked the Governor-General to dissolve the House only. Instead, the Whitlam Government chose a double dissolution, presumably hoping or expecting that the Labor Party would take effective control of the Senate while retaining its majority in the House. In the process, the government also set a precedent for what would happen in the following year (Howard 1976: 7).

The simultaneous elections of May 1974 did not entirely fulfill the ALP's hopes. The Labor Government remained in office because it kept control of the House. Although Labor's margin over the Liberal-Country coalition in the House was even narrower than it had been before the 1974 election, the strength of party discipline in the House assured Labor's effective control. In the Senate, however, Labor and the Coalition again were tied, this time with 29 seats each, with the two remaining seats held by an Independent and a member of the Liberal Movement, which had splintered off from the Liberal Party several years earlier but would rejoin it several years later. At best, therefore, Labor could hope for a tied vote in the Senate.<sup>66</sup> The deadlock that the Whitlam Government had hoped the double dissolution would break remained in place. There was one other change in Canberra, however, that would prove significant: Sir John Kerr was appointed in July as the new Governor-General.

On the first two days after the new Parliament convened, the House passed the six bills for a third time; the Senate again failed to pass any of them. The government then invoked, for the first and only time in the history of the Commonwealth, the remaining provisions of sec. 57, which set a procedure for breaking a deadlock that the elections following a double dissolution have failed to resolve. This procedure, as described earlier, provides for one more attempt, after a double dissolution and simultaneous elections, for the two houses to reach legislative agreement by conventional means. If this effort fails, as it had in the case of these six bills, the Governor-General may convene a joint sitting of the two houses in which each remaining legislative disagreement is decided by 'an absolute majority vote of the total number of the members of the Senate and the House of Representatives'.

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lower house, then the blocking of supply might not be such a dishonourable action after all.'

66 In case there was any doubt, sec. 23 of the Constitution provides that 'Questions arising in the Senate shall be determined by a majority of votes, and each senator shall have one vote. The President shall in all cases be entitled to a vote; and *when the votes are equal the question shall pass in the negative.*' (emphasis added)

When the joint sitting took place in August 1974,<sup>67</sup> the ALP's majority in the House left little doubt about the outcome. The government was able to prevail by a narrow margin on each of the six bills.<sup>68</sup> Each received the required absolute majority of votes. There were no amendments to any of the bills for the joint sitting to consider.

### The events of 1975

So the situation remained until February 1975, when the Labor Government appointed its Attorney-General, Senator Lionel Murphy, to be a Justice of the High Court (Kelly 1976: 102–108). Although the Prime Minister and his Cabinet colleagues obviously knew that this decision would give them one fewer Senate seats than the Liberal-Country coalition, they also surely must have assumed that this situation was only temporary. When a vacancy occurs in the Senate due to death or resignation (known in Australia as a 'casual' vacancy), the parliament of the Senator's state elects a replacement, according to sec.

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67 Less than a week before the joint sitting, the two houses exercised their authority under sec. 50 of the Constitution and agreed to a set of 18 'Rules for Joint Sittings' (reprinted in *House of Representatives Practice* 2001: 849–851). These joint rules were not adopted in the joint sitting itself. Instead, they were adopted in advance by the two houses acting separately. With regard to the procedures to be followed during the joint session, the rules provided for the standing orders of the Senate to be followed on all questions that the joint rules did not explicitly address. In this context, *Odgers' Australian Senate Practice* (2001: 116) points to 'the parliamentary convention that the procedure of a joint committee of the two Houses follows the procedure of committees of the Senate when such procedure differs from that of the House whether the chair is a member of the House or not.' So it would seem that the two houses agreed to follow the same general principle with respect to the rules they adopted for the joint sitting: that the default authority would be the Senate's standing orders. Parliament also amended the Parliamentary Papers Act and the Evidence Act to bring the joint sitting under the same provisions that applied to sittings of the House and Senate concerning such matters as immunity and admissibility in court of documents presented at the joint sitting. Also, the Parliamentary Proceedings Broadcasting Act was amended to permit the joint sitting to be televised (Zines 1977: 233–235; *House of Representatives Practice* 2001: 465).

68 The High Court later invalidated one of the bills on the ground that the required three-month interval had not elapsed between the first two attempts to pass the bill by conventional means. The government's position was that the clock began to run when the House passed the bill for the first time. The Court rejected this contention and found (as discussed earlier) that the three-month interval begins only when the Senate rejects the bill or has demonstrated conclusively its intent not to pass it. The challenge to the bill had been submitted to the High Court before the joint sitting began, but the Court ruled that the question would not become ripe for adjudication until after the bill's enactment (see Zines 1977: 224–227, and *Odgers' Australian Senate Practice* 2001: 81).

15 of the Constitution. In every such instance since 1949, when Senators first were elected by proportional representation, a Senator who died or resigned had been replaced by someone of the same party.<sup>69</sup> In this case, however, the New South Wales Parliament, with its Liberal Party majority, chose an Independent to replace the resigned ALP Senator.<sup>70</sup> The ALP's situation deteriorated still further when, following the death of a Labor Senator, the Queensland Parliament chose a replacement who was known to oppose the Whitlam Government.

With the Liberal Party's hand strengthened by these two developments, its new leader, Malcolm Fraser, announced that the Senate again would refuse to act on essential budgetary legislation in another effort to compel the government to call new House elections:

We will use the power vested in us by the Constitution and delay the passage of the Government's money bills through the Senate, until the Parliament goes to the people. In accordance with long established constitutional practice which the Prime Minister has himself acknowledged in the past, the Government must resign. (*Australian*, 16 October 1975: 1)

Instead of agreeing to the second reading of two appropriation bills, the Senate voted that the bills 'be not further proceeded with until the Government agrees to submit itself to the judgment of the people, the Senate being of the opinion that the Prime Minister and his Government no longer have the trust and confidence of the Australian people ...' (quoted in *Odgers' Australian Senate Practice* 2001: 101) The Senate had agreed to a similar resolution one day earlier regarding a third, non-appropriation, bill.<sup>71</sup>

69 However, this had not been the uniform practice before 1948. 'In filling a Senate vacancy in April 1931, the South Australian parliament violated a hitherto respected convention that casual vacancies should be filled by nominees from the same party as the deceased. A Labor Senator, Henry Kneebone, replaced a Country Party senator, but the difference he made to the imbalance of power was infinitesimal ...' (Souter 1988: 280)

70 By contrast, when George W. Bush was elected President in 2000 and the US Senate was equally divided between Democrats and Republicans, the President-elect was effectively barred from choosing Republican Senators to fill senior positions in his Administration if those Senators were from states with Democratic governors. The newly-elected President understood that state governors appoint replacements for Senators who have left office for whatever reason, and that they routinely appoint Senators of their own party. Because of the equal party division in the Senate, Bush could not afford to cause even one Republican Senator to resign if that Senator would be replaced by a Democrat. Any contention that a Democratic governor was somehow honor-bound to replace a Republican Senator with another Republican would have been greeted with derision.

71 It was marginally easier for the Opposition to secure Senate majorities for deferring further action on the bills than it would have been to reject what was portrayed as (and what in fact was) essential legislation. Deferral also kept the bills before the

This time Whitlam refused the challenge, perhaps fearing the electoral defeat that Fraser hoped to inflict, but citing constitutional principle:

I state again the basic rule of our parliamentary system; governments are made and unmade in the House of Representatives—in the people's house. The Senate cannot, does not, and must never determine who the government shall be. (*Australian*, 16 October 1975: 1)

If the Senate motion skated on thin constitutional ice, the government's resolution in the House made an uncompromising claim for the House's primacy. Its resolution read in part:

- (1) This House declares that it has full confidence in the Australian Labor Party Government;
- (2) This House affirms that the Constitution and the conventions of the Constitution vest in this House the control of the supply of moneys to the elected Government and that the threatened action of the Senate constitutes a gross violation of the roles of the respective Houses of the Parliament in relation to the appropriation of moneys;
- (3) This House asserts the basic principle that a Government that continues to have a majority in the House of Representatives has a right to expect that it will be able to govern;
- (4) This House condemns the threatened action of the Leader of the Opposition and of the non-government parties in the Senate as being reprehensible and as constituting a grave threat to the principles of responsible government and of Parliamentary democracy in Australia ... (*Votes and Proceedings of the House of Representatives*, 16 October 1975: 987–988)

In describing these developments, *Odgers' Australian Senate Practice* (2001: 101–102), the Senate's authoritative statement of its procedures, argues with apparent indignation that 'Any contention that there is a convention that the Senate should not defer or reject money bills is insupportable.' *Odgers' Australian Senate Practice* proceeds to cite examples in which the Senate had pressed its requests for amendments to money bills and rejected tax bills, as well as instances in which state upper houses had denied supply. There follow several quotations demonstrating, to put it charitably, that Labor's leaders evidently had reconsidered the views they had expressed in 1970 about the proper role of the Senate.

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Senate so that when circumstances changed, the Senate could revive and pass them quickly. That is precisely what ultimately happened.

In 1975, the political clash between Labor and the Coalition seems to have merged in Whitlam's mind with the constitutional clash between the House and Senate.<sup>72</sup>

Whitlam intended to use the crisis triggered by Fraser to defeat the Senate in such a comprehensive manner that no future Senate would contemplate such action, and to ensure that the contradiction within the Constitution since the inauguration of the Commonwealth was finally resolved with the victory of the Representatives over the Senate and of responsible government over federalism. Whitlam would become the last of the founding fathers. He would resolve the contradiction that they had been unable to resolve. (Kelly 1995: 289)

But Whitlam had been Leader of the Opposition in the House when he announced in 1970 that 'our opposition to this Budget is no mere formality. We intend to press our opposition by all available means on all related measures in both Houses. If the motion is defeated, we will vote against the Bills here and in the Senate. Our purpose is to destroy this Budget and to destroy the Government which has sponsored it.'<sup>73</sup> Although the bill in question was a tax bill, Whitlam had announced his party's willingness to vote against appropriation bills as well. Whitlam took this stand about two months after a similar statement had been made by Senator Murphy, then Labor's Leader of the Opposition in the Senate, who happened to be the Senator whose appointment to the High Court early in 1975 was contributing to the problems that Whitlam's Government was having with the Senate.<sup>74</sup>

The Senate is entitled and expected to exercise resolutely but with discretion its power to refuse its concurrence to any financial measure, including a tax Bill. There are no limitations on the Senate in the use of its constitutional powers, except the limitations imposed by discretion and reason. The Australian Labor Party has acted consistently in accordance with the tradition that we will oppose in the Senate any tax or money bill or other financial measure whenever necessary to carry out our principles and

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72 That may explain why, when Whitlam gathered his parliamentary lieutenants around him immediately after being dismissed from office, he neglected to include his own Senate leaders (See Kelly 1995: 266).

73 *Commonwealth Parliamentary Debates* (House of Representatives), 25 August 1970: 463.

74 Souter (1988: 489) reports that Murphy listed '168 financial measures which Labor had opposed in the Senate since 1950.' Souter (1988: 472) also quotes Murphy as having used much the same formulation in May 1967 when the Senate defeated a Post and Telegraph Rates Bill. Note that in both instances, what was at stake was a tax bill, not a spending bill. However important those tax bills may have been for the government's program, the Senate's failure to pass them did not jeopardize government operations in the same way that its failure to vote supply could—and did in 1975.

policies. (*Commonwealth Parliamentary Debates* (Senate), 18 June 1970: 2647)

Later in 1970, Whitlam had gone so far as to imply that it would be in accord with parliamentary practice for the Senate to bring down the government: 'We all know that in British parliaments the tradition is that if a money Bill is defeated the government goes to the people to seek their endorsement of its policies.' (quoted in Souter 1988: 489; see also Liberal Party 1975: 540) However convenient this formulation may have been at the time, it is doubtful that Erskine May would have recognized the constitutional right of the upper house to cast a *de facto* vote of no confidence in the government.

In 1975, after the House and Senate staked out their positions, they proceeded to exchange several more rounds of constitutional broadsides, the House contending that the Senate was exceeding the conventions that limited how its formal authority had been understood and exercised, and the Senate responding that no such conventions existed. Just as *Odgers' Australian Senate Practice* seems to find more merit in the Senate's position, not surprisingly *House of Representatives Practice* (2001: 455) gives more emphasis to the arguments that the House made on three separate occasions during the next several weeks—quoting the House, for example, as rejecting what it characterized as a 'blatant attempt by the Senate to violate section 28 of the Constitution for political purposes ...'

When the House passed a similar pair of appropriation bills for a second time, the Senate again deferred acting on them until the government agreed to new elections:

The Senate affirmed that it had the constitutional right to act as it had and, now that there was a disagreement between the Houses of Parliament and a position might arise where the normal operations of government could not continue, a remedy was available to the government under section 57 of the Constitution to resolve the deadlock. (*Odgers' Australian Senate Practice* 2001: 103)

Whitlam again refused. Several weeks later, and after intense negotiations and a third attempt to enact the appropriation bills, the new Governor-General took the extraordinary and unprecedented step of acting at his own initiative to invoke his power under sec. 62 of the Constitution:

There shall be a Federal Executive Council [in practice, the Government] to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, *and shall hold office during his pleasure.* (emphasis added)

Governor-General Kerr dismissed the Whitlam Government, even though it still enjoyed majority support in the House of Representatives to which, by constitutional convention, it was responsible. To replace it, Kerr appointed a caretaker Liberal Government with Fraser as prime minister. In justifying his decision, the Governor-General argued that, in the Australian system, ‘the confidence of both Houses on supply is necessary to ensure its provision’:

When ... an Upper House possesses the power to reject a money bill including an appropriation bill, and exercises the power by denying supply, the principle that a government which has been denied supply by the Parliament should resign or go to an election must still apply—it is a necessary consequence of Parliamentary control of appropriation and expenditure and of the expectation that the ordinary and necessary services of Government will continue to be provided. (quoted in *Odgers’ Australian Senate Practice* 2001: 104)

In this position the Governor-General was supported by the Chief Justice, who wrote that:<sup>75</sup>

the Senate has constitutional power to refuse to pass a money bill; it has power to refuse supply to the Government of the day. ... a Prime Minister who cannot ensure supply to the Crown, including funds for carrying on the ordinary services of Government, must either advise a general election (of a kind which the constitutional situation may then allow) or resign. (quoted in *Odgers’ Australian Senate Practice* 2001: 105)

Not surprisingly, the two houses reacted very differently. The Senate acted almost instantaneously to pass the stalled appropriation bills. The House agreed to a motion expressing its lack of confidence in the newly-designated prime minister and requesting the Speaker to ask the Governor-General to have Whitlam again form a government. But before the Speaker was allowed to deliver this message, the Governor-General declared, at Fraser’s request and by pre-arrangement, a double dissolution of both houses.<sup>76</sup> As Solomon put it:

In the 1975 double dissolution, the Governor-General had to dismiss a Prime Minister (who controlled a majority in the House of Representatives) and appoint another (who lacked the confidence of that House) to find an advisor who was prepared to recommend to him the course he wished to

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<sup>75</sup> Kerr’s decision to seek the advice of Chief Justice Barwick and Barwick’s decision to provide the advice sought both were controversial decisions in their own right. Kerr thought he needed to make it clear that he already had decided what to do before he consulted the Chief Justice. See Kerr 1975: 542.

<sup>76</sup> Kelly (1995: 271–274) and others have asserted that Kerr deliberately delayed receiving the Speaker until he could argue that it was too late to accede to the House’s request because both houses already had been dissolved.

adopt—namely the dissolution of both Houses of Parliament under section 57. (Solomon 1978: 169)

The basis for Kerr's action was not the appropriation bills, which had not satisfied the timetable of sec. 57, but a total of 21 other bills that did qualify and that, perhaps fortuitously for Kerr and Fraser but not for Whitlam, the ALP Government had been 'stockpiling' (*Odgers' Australian Senate Practice* 2001: 100). Indeed, Zines (1977: 238) observes, 'it certainly appears paradoxical and even ironical that the dissolution was brought about against the wishes of the House of Representatives and on the formal advice of the leader of a party that was concerned to obstruct it'—and, we might add, the leader of the party that had caused the repeated defeat in the Senate of the very bills that now provided the constitutional grounds for the double dissolution.

The December 1975 elections gave the Coalition a solid majority in the Senate and the largest majority ever won in the House, confirming the short-term political acumen of Fraser's strategy.

### Constitutional contention

The Whitlam years were a period of recurring controversy and continuing commotion. In part this reflected Whitlam's own style and personality. Kelly (1976: 351) quotes him as having said that, 'When you are faced with an impasse you have got to crash through or you've got to crash.' Whitlam had brought the ALP back into government in 1972 after so many years in Opposition that his ministers had to learn what it meant to govern, and not all of them succeeded. The most notorious episode, though not the only one that led to ministerial resignations and sackings, was what became known as the 'loans affair', in which a minister was given wide latitude in using questionable intermediaries to negotiate a massive loan from obscure Middle Eastern sources. Whitlam failed to exercise effective supervision over the activities of some of his most senior ministers and even allowed himself to become more directly involved in an attempt to raise money from Iraq to help the Labor Party fund its 1975 election campaign. Whitlam's brief tenure in office undoubtedly was the most tumultuous time in recent Australian history; there is little question that the policies and practices of his government were the prime cause for the Coalition's confidence that the electorate would welcome an early election to remove Whitlam and Company from office.

Our primary concern, though, is with the four major constitutional questions that the events of 1975 raised:

- (1) What are the legislative powers of the Senate with regard to money bills?

- (2) How are vacancies in the Senate to be filled?
- (3) What is the authority of the Governor-General to dismiss the government of the day, and under what circumstances should that authority be exercised? and
- (4) When should the Governor-General dissolve Parliament and compel new House and Senate elections?

In each case, a textual reading of the Constitution provides answers that are satisfactorily clear, if only by implication, but not necessarily satisfying.

First, sec. 53 prohibits the Senate from initiating or amending money bills, but the Constitution does not require the Senate to vote on them, much less to pass them, nor does it give the government and the House a quick and easy recourse if the Senate fails to approve any such bills that the House passes. Although one could argue that the authors of the Constitution *meant* to deny the Senate the ability to frustrate the government's budgetary decisions, or that the Constitution *should have* done so, one could argue just as well that the authors *would have* done so if they had thought it necessary.<sup>77</sup> With the experiences of the United Kingdom and the United States readily at hand, as we shall see, that option did in fact occur to them. So a strict reliance solely on the text of the Constitution leads to the conclusion that the Senate had acted within its formal constitutional powers.

Second, sec. 15 provides for each vacancy in the Senate to be filled by vote of the parliament of the affected state. At the time, the Constitution did not constrain the state parliament's choice in any way, and it certainly did not require that the replacement be of the same party as the Senator he or she was replacing. Although Australia's Constitution originally made no mention at all of political parties, it was written at the same time that the outline of Australia's political party system was becoming visible on the horizon. Although one could argue that the Constitution's authors *may have expected* that vacancies would be filled in ways that preserved the political status quo in the Senate, or that the Constitution *should have* mandated that result, one also could argue that the Constitution's *failure to do so* is telling in view of the growing importance of political parties when the Constitution was

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<sup>77</sup> As evidence that the possibility of the Senate acting as it did in 1975 would not have come as a surprise to the Constitution's authors, W.H. Moore wrote in his 1910 study *The Constitution of the Commonwealth of Australia* (p. 144): 'a check upon the Ministry and the Lower House lies in the fact that the Upper House might in an extreme case refuse to pass the Appropriation Bill, and thereby force a dissolution or a change of Ministry. These are the conditions recognised by the Constitution.' See the discussion in the chapter that follows on the constitutional debates relating to the powers of the Senate.

written. Or one could argue that the introduction of proportional representation for Senate elections should have been accompanied by a constitutional amendment or, failing that, an explicit convention regarding the filling of casual vacancies.<sup>78</sup> In any event, a strict reliance solely on the text of the Constitution leads to the conclusion that the parliaments of New South Wales and Queensland had acted within their formal constitutional powers.

Third, sec. 61 vests the 'executive power of the Commonwealth ... in the Queen and is exercisable by the Governor-General as the Queen's representative.' Under sec. 62, there is to be a 'Federal Executive Council to advise the Governor-General in the government of the Commonwealth.' Further, sec. 64 empowers the Governor-General to 'appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council [that is, 'the Governor-General acting with the advice of the Federal Executive Council'] may establish.' These officers shall be members of the Council; they must be, or must soon become, members of the House or Senate; and, of particular importance, they 'shall hold office during the pleasure of the Governor-General.' Formally, therefore, all executive power is vested in the Governor-General who sometimes is to act with the advice of a Council comprising members of Parliament whom he appoints and may dismiss whenever he chooses. The proverbial visitor from Mars might not appreciate that these provisions are intended to provide for responsible parliamentary government in which actual executive power rests with the prime minister and Cabinet, neither of which is named in the Constitution at all. Nonetheless, if we rely solely on what the Constitution says, we can conclude that the Governor-General acted within his formal constitutional powers in dismissing the incumbent government, and for whatever reasons he thought sufficient.

Fourth, sec. 57 empowers the Governor-General to dissolve both houses when a legislative deadlock has arisen, without specifying the reasons for which, or the circumstances under which, he may or should do so. And surely one situation in which the Governor-General would be most justified in invoking this power is when a stalemate in Parliament threatens to interfere with effective, even normal, operations of the Commonwealth government and when that stalemate might well be broken by new elections. Since the Constitution was written, however, the role of the Governor-General had diminished in practice, as the bonds tying Australia to the Queen had been reduced to little more than a formality. Although one could argue, then, that the

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<sup>78</sup> The issue in fact was canvassed when the first casual vacancy occurred after the 1949 election; see Sawyer 1977: 130–133, 199–202.

Governor-General in 1975 *should not* have exercised a power granted to occupants of his office three-quarters of a century earlier, under considerably different political conditions, one could argue equally well that there had been more than ample time and opportunity to strip the Governor-General of this power if it was not thought advisable to leave it in his hands to be used *in just such circumstances*. So a strict reliance solely on the text of the Constitution leads to the conclusion that the new Governor-General had acted within his formal constitutional powers.

Not surprisingly, however, the four actions—the refusal of the non-government majority in the Senate to act on money bills, the failure of two state parliaments to replace resigned or deceased Labor Senators with persons of the same political persuasion, the double dissolution granted at the request of a newly-installed caretaker government, and especially the Governor-General's decision to dismiss the Whitlam Government when it still enjoyed the confidence of a majority in the House of Representatives—all provoked intense criticism, as well as arguments that textual analyses of what the Constitution does or does not say ultimately were beside the point. Critics argued, often passionately, that essential conventions and understandings that surround and supplement the spare terms of the Constitution are every bit as important, and deserve as much (or more) deference and respect, as the text itself.<sup>79</sup> This is true in any constitutional democracy, or so it was argued, but it is particularly true in Australia, in light of the roots of Australian constitutionalism in Great Britain, where the absence of a written constitution places such conventions at the heart of democratic governance.

While it may be true that the Senate, the two state parliaments, and the Governor-General acted in accordance with the constitutional text, their critics argued that they should not have done so. Just because a constitutional officer or entity *has* a constitutional power does not mean that the power *should* be exercised, or that it should be exercised *at will*. The Senate *should not*, it was claimed, have interfered with the ability of the government and the House to enact legislation that was essential to implementing their program and to funding the daily operations of the Commonwealth government. The state parliaments *should not* have ignored or nullified the will of the people, as expressed in Senate elections, by filling Senate vacancies with supporters of

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<sup>79</sup> For a strong, even extreme, statement of this position, see Archer and Maddox (1976).

parties that the voters had rejected at the polls.<sup>80</sup> And the appointed Governor-General *should not* have interfered with the democratic process by exercising his constitutional authority to dismiss a government that still enjoyed the confidence of the House, nor should he have granted a double dissolution except upon the advice of that government.<sup>81</sup> What is more, all four actions were unprecedented in the post-World War II era, and surely the non-Labor majorities in the Senate and in the two state parliaments acted as they did only for reasons of short-term partisan advantage.

The situation seems to have been reasonably clear. Each of the protagonists—the non-government majority in the Senate, the two state parliaments, and the Governor-General—acted constitutionally, at least according to the text of the document. On the other hand, each acted in an unusual if not unprecedented manner and in violation of established conventions, or so their critics asserted, and all four were charged, though some more than others, with acting for partisan reasons. The text of the Constitution and some of the most important conventions that had developed around it had come into conflict.

As Galligan (1984) argues, disagreements over whether the Senate and the Governor-General acted properly in 1975 turn on whether the Australian Constitution is to be interpreted literally—a dubious proposition in light of the almost unlimited executive power that the Constitution vests in the Governor-General and its failure even to

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80 This argument would be weaker if Senators were elected by plurality vote. Then one could contend that the voters in a state had elected each individual Senator on his or her own merits, and not necessarily as the representative of a political party. If so, the state parliament should not be obliged to look to party affiliation as a controlling qualification in selecting someone to fill a Senate vacancy. Instead, the election of Senators by proportional representation lends strength to the argument that the voters had chosen a party to represent them in the Senate, more than the specific individuals whom the victorious party had nominated. In filling a Senate vacancy, therefore, the state parliament should be required to respect that choice of party.

81 On the day following the double dissolution, the Speaker wrote to the Queen that ‘the failure of the Governor-General to withdraw Mr. Fraser’s commission and his decision to delay seeing me as Speaker of the House of Representatives until after the dissolution of the Parliament had been proclaimed were acts contrary to the proper exercise of the Royal prerogative and constituted an act of contempt for the House of Representatives. It is improper that your representative should continue to impose a Prime Minister on Australia in whom the House of Representatives has expressed its lack of confidence and who has not on any substantial resolution been able to command a majority of votes on the floor of the House of Representatives.’ The Speaker asked the Queen to restore Whitlam to office. The reply on behalf of the Queen noted that, while she was following events ‘with close interest and attention,’ it was not for her to intervene (quoted in *House of Representatives Practice* 2001: 458).

mention the prime minister and Cabinet, much less their responsibility to the House—or whether it is to be understood only in light of the fundamental but entirely undefined conventions of responsible government that its authors recognized, supported, and expected to be followed. Whereas US constitutional lawyers might say that the ‘black letter’ of the Constitution cannot be trumped by conventions that are not even clearly implied by the text, many Australians, drawing on their familiarity and comfort with the very different character of British constitutionalism, are at ease in accepting, in Galligan’s words (1984: 152), ‘the Australian Constitution for what it is: a hybrid combination of legal and conventional, written and unwritten parts.’

Not surprisingly, there were sharp disagreements in and soon after 1975 as to who was right and who was wrong (e.g., Archer and Maddox 1976 and Howard 1976), and the debate has continued (e.g., Kelly 1996 and Paul 1996).

Compare the following statements from the books on which the House of Representatives and the Senate each rely for authoritative expositions of their procedures:

[A] rejection of supply by the Senate resulting in the fall of a Government strikes at the root of the concept of responsible government. (*House of Representatives Practice* 1981: 67)

It is inconceivable that any Senate would deny Supply and force an election except in circumstances when it strongly believed that it was acting in the public interest. The electoral sanction is the safeguard against any irresponsibility. (*Odgers’ Australian Senate Practice* 5th ed., 1976: xx)

A Senate majority certainly would justify any decision to deny supply by claiming that it was acting in the public interest. So this formulation really proposes little prior restraint on the Senate’s exercise of its constitutional power, leaving it to the electorate to hold the Senate accountable for its exercise of that power, but only after its goal has been achieved or the damage has been done, depending on one’s point of view at the time.

Critics of the Senate and the Governor-General have argued that, especially in light of British constitutionalism and the assumption on the part of those who wrote Australia’s Constitution that they were embracing the essential elements of British parliamentarism, some conventions were at least as important—and binding—as the text of the Constitution itself. To illustrate, Archer and Maddox (1976: 147–148) contend that, ‘despite the fact that a selection of legal rules, embodying traditional British institutions adapted to a federal situation, were collected in one document, there can be no doubt that the Australian constitution framers intended the British conventions to operate within

the new system.’ They proceed to argue that the Australian Constitution ‘is above all a summary of British experience. The written document is certainly the foundation of the Australian constitution, but it is not by any means the whole.’ Noting that the written Constitution says nothing about the prime minister, the Cabinet, or political parties, they conclude that ‘these institutions depend on *conventions* of the constitution, and they are just as essential a feature of the total Australian constitution as the legal document itself.’ (emphasis in original)

The contrary argument is essentially that conventions can only supplement, not supplant, explicit statutory or constitutional provisions.<sup>82</sup> West (1976: 50) argues, for instance, that ‘conventions, in British parliamentary practice, exist where statute has not been precise; they do not exist where statute is quite clear, for that would be to defy the authority of parliament and the laws it has passed.’ If a law trumps a convention, then so too must a provision of the Constitution. It is tempting to argue, therefore, that because the Constitution gives the Senate almost the same legislative powers as the House, its authors must have intended the Senate to use those powers. This argument would be much more persuasive, however, if it were not for the respects in which it was understood at the time, and has been understood ever since, that the black letter of other constitutional provisions was not to be interpreted and implemented literally—for example, the vesting of executive power in the hands of the Governor-General, with no reference to a prime minister or Cabinet. If everyone accepts that the authors meant for the Constitution to say one thing but mean another with respect to executive power, why should their words be read literally with respect to legislative power?

Solomon aptly summarizes the conventions that were at issue in 1975:

the convention that the Governor-General acts only on the advice of his ministers, the convention that those ministers must control a majority in the House of Representatives, the convention that the Senate does not reject money bills, the convention that states should replace dead or retired Senators with men selected from the same party as the departed Senator, the convention that the Commonwealth selects the day on which Senate elections are held, the convention that a government which does not have

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<sup>82</sup> Reid (1977: 243–245) went much further than most other commentators in dismissing constitutional conventions as ‘a chimera’—‘simply political rhetoric’. Underlying this conclusion is his criticism of what he saw as a tendency to ‘inanely chant “convention” at every threatened or proposed change of course’, when ‘Every alleged convention in Australian government (that is, every established practice or method) is explicable in terms other than convention; that is, if we take the trouble to reason “why”.’

assured supply will resign, the convention that a Prime Minister defeated on the floor of the House will resign—and so on. (Solomon 1978: 186)

Like West, he goes on to suggest that the strength of, and respect for, conventions—the unwritten rules of the game—needs to be greater in Britain in the absence of written rules of the game—i.e., a written Constitution. In fact, he concludes (1978: 188) that, in Australia, ‘a convention is nothing more than an established practice which remains a practice only as long as it suits the practitioners.’ One wonders if he would have reached the same judgment if he had been writing before the events of 1975, not some years later.

One way of responding to the crisis was to amend the Constitution in order to entrench the conventions so that they would not be violated again. That was the purpose and effect of the 1977 constitutional amendment<sup>83</sup> which amended sec. 15 to provide that:

Where a vacancy has at any time occurred in the place of a senator chosen by the people of a State and, at the time when he was so chosen, he was publicly recognized by a particular political party as being an endorsed candidate of that party and publicly represented himself to be such a candidate, a person chosen or appointed under this section in consequence of that vacancy, or in consequence of that vacancy and a subsequent vacancy or vacancies, shall, unless there is no member of that party available to be chosen or appointed, be a member of that party.

The third and fourth issues might have been resolved if the Australian public had approved a 1999 proposed constitutional amendment that would have transformed Australia into a republic and replaced the Governor-General with a President elected by Parliament. At least there would have been an opportunity to debate whether the President should have the same powers as the Governor-General and, if so, perhaps to clarify the circumstances under which those powers should be exercised. However, the amendment failed in a national referendum in November 1999, by a margin of roughly 55 to 45 per cent (Kirby 2001).

It is the first issue, the constitutional powers of the Senate and the way in which it exercises those powers, that is of primary interest here. Twenty years after the fact, Kelly (1996: 114) described the events of 1975 as the detonation of a ‘time bomb.’ ‘A number of the founding fathers knew they had implanted a contradiction at the heart of the Constitution’—‘the contradiction ... between responsible government

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83 The idea for this amendment pre-dated the events of 1974–1975. It had been included as a recommendation in the 1959 final report of a parliamentary joint select committee appointed in 1956 (*House of Representatives Practice* 2001: 31).

and federalism.’ Paul (1996: 121) has responded by observing that the Commonwealth Constitution was written before Great Britain approved the Parliament Act of 1911 ‘which upheld the supremacy of the Commons especially in budgetary policy by denying to the Lords any power over money bills and by substituting a suspensory veto for an absolute veto over almost all other measures.’<sup>84</sup> As we have seen, however, the drafters were well aware of the long-established understanding in London that money bills were the constitutional responsibility of the House of Commons.

Also writing two decades after the crisis, Galligan (1995: 73) has argued that the events of 1975 ‘did not show that the Senate had power to defeat or remove a government. What it showed was that through wielding its plenary legislative power the Senate could harass a government, deny it supply and create deadlock.’ In that instance, ‘That stalemate was broken by the vice-regal *coup de grace*.’ Kelly (1996: 117) makes a complementary argument—that ‘It is one thing to insist that a government obstructed by a Senate motion to deny supply cannot remain in office once funds to provide for the ordinary services of government have expired. It is quite another to insist that a government denied supply by such a Senate motion has therefore lost the confidence of the parliament and, unless it resigns or advises an election, must be dismissed.’ In this way, he can conclude that the Governor-General acted precipitately in dismissing the Whitlam Government. Kerr had justified his action by contending that ‘A prime minister who cannot obtain supply, including money for carrying on the ordinary services of government, must either advise a general election or resign.’ This, Kelly contends, ‘was to construct a constitutional theory from a legal power.’

According to historical precedent, constitutional provision and political theory, the Governor-General should not have treated the deferral of supply by the Senate as a want of ‘confidence’ in Whitlam and therefore as grounds for a dismissal. He should have treated the situation as a test of the Senate’s financial power to obstruct a government which, if persisted in to the point where funds might expire, would require a general election.

The distinctions that Galligan and Kelly draw are fair and useful in theory, but it is not clear whether, for practical purposes, their distinctions make a difference. One wonders whether the Senate’s lack of authority ‘to defeat or remove a government’ offered much solace to former Prime Minister Whitlam. If the Senate can compel the

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84 Paul (1996: 121–122) notes that the British House of Lords had rejected the Asquith Government’s budget in 1909.

government to resign by refusing to provide funding for continuing government activities, is that not compelling evidence that the prevailing constitutional theory of responsible government is at best incomplete and at worst misrepresentative of the true state of affairs? As Jaensch (1997: 86) has put it, the events of 1974 and 1975 demonstrated that ‘any Australian elected government is in office, *but not in power*, if it does not control the Senate as well.’ (emphasis in original)

### The Crisis in Retrospect

I have argued that the Senate had (and still has) the constitutional authority to deny supply. As we shall discuss in more detail in the next chapter, the Constitution’s authors understood that this authority existed and contemplated the consequences of its exercise. As the events of 1975 unfolded, many wished that the Constitution did not say what it does say, but wishing does not make it so.

To argue that the Senate exceeded its authority is to argue that the explicit terms of the Constitution must be interpreted in light of fundamentally important constitutional conventions that deserve to be accorded at least equal weight. Not so. As West noted, the conventions that give shape and stability to the British political system effectively substitute for a written constitution; they do not supplement or supplant it. The continuity and vitality of democracy in the UK in the absence of a written constitution that defines, allocates, and limits powers, and in the absence of an independent judiciary to interpret and apply the constitution, are indeed extraordinary—just as they are unique and of limited relevance to Australia, where a different question arises: what happens when a core convention collides directly with the written Constitution? In my judgment, the Constitution must prevail. Otherwise, who is to say, if not those in power, exactly what the conventions are and when they are sufficiently fundamental to supersede a direct constitutional prohibition or grant of authority? No, when there is a written constitution, conventions can help to resolve its ambiguities and to fill its interstices, but they cannot be allowed to control if they contradict the Constitution. Otherwise the Constitution has only as much force as those in power choose to allow it.

The same essential argument applies to the so-called reserve powers of the Constitution. Perhaps the most remarkable thing about the Australian Constitution is the executive power that it vests in the Governor-General and its failure even to mention the prime minister and Cabinet and the basic elements of responsible government. Certainly none of the authors intended for the Governor-General to

exercise all of those powers all of the time at his own discretion; some of the authors may not have intended for him ever to exercise any of them except upon the advice of his 'advisors.' The authors created the polite fictions of the Constitution because they thought it unnecessary or too difficult to entrench the actual dynamics of parliamentary government. This decision, however sensible it may or may not have been, has had consequences. And the prime consequence has been to leave critically important powers, such as the power to dismiss a prime minister who continues to enjoy the support of the House, in the hands of the Governor-General to exercise if and when he sees fit. If this now is thought to be inappropriate, the solution is to amend the Constitution, not to pretend that it means something other than what it says.

However, the existence of a power is neither a license to exercise it at will nor a directive to exercise it at all. With respect to the legislative powers of the Senate and its power to reject money bills, the authors of the Constitution devised no foolproof mechanism to prevent the exercise of those powers from creating governmental crises. Instead, they depended on the wisdom, the judgment, and the prudence of those who would be entrusted with acting under the Constitution. The Opposition had the authority and the numbers to deny supply, but it need not and *should not* have done so. The Governor-General had the authority to dismiss the government, but he need not and *should not* have done so when he did.

The accounts of 1974–1975 satisfy me that Prime Minister Fraser and the Coalition deferred supply primarily if not solely to compel an immediate House election that they as well as Labor were convinced they would win. In other words, they took their extraordinary actions for reasons of short-term partisan advantage. The government had demonstrated exceptionally poor judgment, especially regarding the loans affair, but the government's actions could have awaited the verdict of the voters at the next scheduled election. There was no constitutional crisis, other than the one that the Coalition created, that compelled a change of government. Even if all the Coalition's criticisms of Whitlam's Government were well-founded, there was no economic or international crisis that was about to bring Australia to ruin if Labor was allowed to remain in office until closer to the end of its three-year term. There was no imminent risk to Australian democracy, other than whatever risk emanated from the crisis that the Coalition provoked. Surely there was evidence of bungling, ineptness, incompetence, and remarkably unwise decisions (see Oakes (1976) and Kelly (1976, 1995), for instance). But democracies have survived worse—much worse. And there was no evidence that government

ministers were enriching themselves, or that they were abusing their powers in ways that threatened the rights and freedoms of Australians.<sup>85</sup>

Although the conventions of responsible government do not trump the Constitution, they are valuable and valued, and are to be violated only in extreme and unusual circumstances. Even giving due weight to all the failings of Whitlam and his ministry, there were no such circumstances in 1974–1975. The controlling circumstance was the Coalition's conviction that if it could force a House election, it would win. The prospect of winning is not reason enough. Fraser and the Coalition acted constitutionally but irresponsibly.<sup>86</sup>

Neither party could claim with a straight face to have been motivated consistently by attachment to constitutional principle. In 1967, Prime Minister Harold Holt had claimed on behalf of the Liberal Party that it had 'long been a cherished principle of Labor policy that the Senate should not frustrate the financial policies of a Government possessing a majority support in the House of Representatives' because 'It is one of the most firmly established principles of British Parliamentary democracy that a House of review should not reject the financial decisions of the popular House.' So when the ALP decided that its Senators could abstain from voting on a money bill but not vote to reject the bill, Holt criticized the stratagem as a 'cynical abandonment of a long-held principle' and a 'blatant exercise of political opportunism' (Sawer 1977: 126–127). In his 1979 memoir of the crisis, Whitlam positions himself as the defender of responsible government, just as he had as the events unfolded and during the subsequent election campaign. Yet it is worth bearing in mind his 1970 statement, as well as that of Senator Murphy, quoted earlier, and especially Whitlam's declaration that his 'purpose is to destroy this Budget and to destroy the Government which has sponsored it.' (quoted by Sawer 1977: 126) It also should be remembered that, when the Coalition was on the verge of blocking supply in 1974, Whitlam had been quick to seek a double dissolution. The prerogatives of the House

85 Ironically, and certainly unintentionally, the Liberal Party came to the same conclusion. In a leaflet defending its position to the public, the Party (1975: 539) asked 'Is there a crisis? What is it all about?' The Party's response? 'It is about whether we should have an election. An election of the House of Representatives will decide whether the Whitlam Government should continue—or whether we should have a Liberal/National Country Party Government headed by Mr. Fraser.'

86 The responsibility does not rest entirely on Fraser personally, though it is doubtful that the Coalition would have refused to pass the appropriation bills in 1975 without his determined leadership. It will be recalled that the Coalition, under different leadership, that of B.M. Snedden, had refused to vote supply in 1974, and Snedden evidently was contemplating doing it again in 1975 before Fraser replaced him (see Kelly 1976: 102).

and the principles of responsible government do not seem to have been his paramount concern then, presumably because he was as confident of winning an election in 1974 as he was fearful of losing one in 1975.<sup>87</sup>

We can never know what Whitlam and Labor would have done in 1975 if they had been in Opposition but in control of the Senate. We do know, however, what Fraser and the Coalition did: they exercised a valid constitutional power but for party political reasons that disregarded the delicate balance that is built into the Commonwealth Constitution. For this they are culpable.

The Governor-General dismissed the government before the crisis came to a head—before supply ran out—and so he acted prematurely. Undoubtedly he believed that he was acting in a timely and responsible manner in order to prevent an approaching crisis from actually exploding through the Australian economy. In doing so, however, he prevented the political process from running its course, and gave up too soon on the prospects of a political resolution. I share Sawyer's assessment (1977: 161):

One might expect so grave a decision, obviously so prejudicial to the elected government in a parliament not yet eighteen months old, and in circumstances imperilling the reputation of the Governor-General's office, should not be taken until it was virtually certain that no change in the Senate's attitude would take place. This was not at all certain on 11 November 1975.

As David Butler wrote in 1979, 'If he [Kerr] had waited another week or two, the problem would either have solved itself or the justification for decisive action would have become more apparent.' (quoted in Mayer 1980: 56; see also Howard and Saunders 1977: 280)

According to Kelly (1995), public opinion was running strongly against the Opposition's decision to defer supply (even if both sides wondered whether those results were related to how votes would be cast in a 1975 general election). At that point, though, both the political and the economic effects of the Opposition's strategy were largely prospective and hypothetical. If money actually had stopped flowing, I think it very likely that there would have been a powerful public outcry and that one side or the other would have broken. I suspect the army to retreat would have been that of the Coalition of whom Labor and the media could and would have said that 'the only reason the people of

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<sup>87</sup> At the time of the 1975 dispute, Gareth Evans acknowledged (1975: 11), referring to the Senate's refusal in the previous year to vote supply, that 'Mr Whitlam did capitulate in similar circumstances in 1974, but only because he judged that he had a good chance of taking the electorate with him—a judgment which subsequent events vindicated.'

Australia are losing their jobs and not receiving their benefits is because the Coalition refuses, for the rankest of partisan purposes, to allow the budget to come to a vote in the Senate.' I believe that the Coalition would have fractured in the face of such pressure (Sampford 1987: 123). And even though there is no guarantee this would have happened, there was time for Kerr to find out before acting. Yes, there would have been some short-term disruption, but no long-term damage unless both sides still refused to budge, in which case the Governor-General still would have had the option to act.

In this respect, the American experience may have something to offer, though only in retrospect. In 1995, the Democratic President and the Republicans in Congress were unable to agree on most of the annual appropriation bills by the time the new fiscal (financial) year began on 1 October. Consequently, much of the federal government shut down for several days in November, when almost 800 000 government employees could not work because they could not be paid, and then again for several weeks that encompassed Christmas and New Year's, when almost 300 000 employees were told not to report to work for the same reason. When the impasse ended in mid-January 1996, it was primarily because the congressional Republicans realized that they were paying a heavy price among voters for their intransigence. Public opinion polls were blaming them by a two-to-one margin for the shutdown.

There were two primary reasons why the blame fell where it did. First, President Clinton was able to communicate his position effectively, both because of his skills and because of the media attention he was able to command. And second, the Republican congressional leadership, especially House Speaker Newt Gingrich, seemed unrepentant, publicly proclaiming that they were content to shut down the government in order to force the President to make policy concessions. It also is instructive that the disruptions caused by the shutdown were short-lived; creative accounting minimized some damage and no one ultimately lost any salary or benefits.

Unless the costs of a short-term shutdown in Australia would have been significantly greater and more immediate than they had been in the US, Kerr exaggerated the risk of delay when he wrote in his 1978 memoirs that:

If I did not act, very great suffering on a nation-wide scale would follow. I was not prepared to gamble with the future of the Constitution, the economy, and the financial security of very great numbers of people, indeed directly and indirectly the whole nation. ... I was not prepared to delay until after the disaster came to pass in order to get a watertight ground for action based upon visible chaos. (Kerr 1978: 335)

Disaster? Chaos? I doubt it. But was not the Governor-General wise to err on the side of caution? Surely so if all he had to consider was the possible economic disruption caused by a temporary government shutdown. The problem is that he does not seem to have balanced these possible costs against the possible—and, as it turned out, the actual—costs of the political disruption caused by the dismissal.

The temporary government shutdowns in the US carried some cost in money to the Federal budget, to be sure, but the political cost to Republicans was more severe. Although they continued to hold majorities in the House, the momentum behind the so-called ‘Republican Revolution’ of 1995 had dissipated. The episode also has made another such ‘train wreck’ much less likely. In fact, budget disagreements in Washington now immediately elicit assurances from both branches and both parties that a settlement will be reached in time to prevent the government from closing again.

It was not until government offices actually closed that American public opinion began to crystallize to the detriment of the Republican Party. Until then, the contest between Democratic President and Republican Congress was merely an ‘inside the Beltway’ struggle that affected few Americans and to which most Americans paid little attention. Who would benefit and who would suffer politically was something that only became known when all the speeches and votes and vetoes threatened to have actual consequences. And when the political costs and benefits did become clear, Republican intransigence soon melted away.

In 1975, the Governor-General argued that both sides were fixed in their positions, and he was convinced that neither would change. But there is no way he could have known because he dismissed Whitlam at least several weeks before the available funds would have run out. The only things he should have been able to predict with confidence were, first, that only when supply actually was exhausted would it become clear who were the political winners and losers, and, second, that the losers would be under intense pressure to cut their losses. Kerr acted when he did presumably because he had become satisfied that the impasse would not be broken through the normal political process. Perhaps he was right, though I doubt it for reasons I have offered. What is most important, though, is that he did not wait to find out. Even as events were unfolding, there were clear indications that Fraser was having more and more difficulty holding his troops in line. According to Kelly (1995: 235):

A balanced assessment is that there was at least as much evidence that the Senate would crack as that it would hold. The one certainty is that the immediate future was unpredictable. Kerr’s implication that there were no

grounds for a political solution is inconsistent with the volatile mood of the time. Kerr says that because the Senate had denied Supply three times he had to accept this ‘as their decision’. Yet many Coalition figures did not accept this as the ‘final’ decision and expected a backdown.

In sum, ‘Fraser told Kerr that the Senate would hold; Whitlam told him that the Senate would crack. Kerr accepted Fraser’s judgement and rejected Whitlam’s.’ (Kelly 1995: 234) However, he need not have accepted either judgment when he did. Governor-General Kerr dismissed the Whitlam Government on November 11, roughly two weeks before its funding actually would have run out. From mid-October, when the Coalition first voted to defer the supply bill until the day Kerr acted, nothing actually had changed. ‘It was a political crisis on 16 October and it remained a political crisis on 11 November.’ (Kelly 1995: 233) It was not yet an actual crisis with serious effects beyond the confines of Parliament House. We can never know for certain what would have happened if the Governor-General had let another week or more pass. However, Kelly (1995: 240) goes on to quote the Opposition Leader in the Senate to the effect that ‘if the crisis had continued beyond 20 November towards 30 November then Opposition Senators “would have melted away like snow in the desert.”’<sup>88</sup>

The Governor-General acted prematurely, before he had no choice, before the combatants had drawn anything more than rhetorical blood, and before their positions had publicly recognizable and practical consequences. He did not allow the political process to run its course, and so he erred seriously.

As we saw in the preceding chapter, there was nothing unusual in the government confronting a Senate with a non-government majority dominated by a disciplined Opposition party anxious to replace the government in office. Yet ‘The Liberal-National Country Party-controlled Senate demonstrated between 1972 and 1975 that a government must have a majority in the Senate if its very existence were not to be at risk. This had not previously been the case’:

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88 November 11 became a prominent date because it was just about the last date on which it was possible to set the wheels in motion for an election before Christmas. ‘Supply would be passed the day Whitlam was dismissed or Fraser cracked or a compromise was struck. The only difference between a solution in mid-November and one in late November is that the former would produce an election before Christmas and the latter an election in the New Year. ... In his determination to secure a pre-Christmas election Kerr was dismissing a government that was still able to meet all its financial obligations.’ (Kelly 1995: 233)

Many governments had survived in the face of hostile Senates. Their legislative programs might have been (and often were) subject to harassment, but most proposed laws were passed. While the Senate was aware that it probably had the power to force a government to the polls, this power was rarely discussed and the threat of its use never made. Throughout the life of the Whitlam government, the opposition constantly threatened to use this Senate power and of course in the end did so. (Solomon 1978: 9–10)

From a party political viewpoint, Fraser's strategy in 1975 succeeded admirably. So we might expect that similarly situated Opposition parties could have looked for, and found, similar opportunities in the years that followed. This is evidently what Colin Howard (1976: 6) feared when he concluded that, especially because of Kerr's dismissal of the Whitlam Government, 'at the point where political tactics and constitutional law interact, the rules of Australian national government have changed.' Writing soon after the events of 1975, he found in them a fundamental shift from 'the principle of majority government in the House of Representatives' to the conclusion that 'to be entitled to govern a party must be able to ensure the passage of its money bills through both Houses and not just one.' Therefore, he concluded, 'the way has now been cleared for minorities either to prevent a government elected by a majority from governing at all or to permit it to do so only on terms dictated by the minority.' (1976: 8–9)

Indeed, it has been argued that the events of 1975 actually could have elevated the Senate to a position of political and institutional superiority over the House. The government, with its House majority, can secure a dissolution of the Senate before the expiration of Senators' fixed terms only by satisfying the time-consuming requirements for a double dissolution, and then only if it is willing to put at risk the seats of all Representatives as well as all Senators. By contrast, the groundwork now had been laid for the Senate to have two opportunities annually—there typically are two sets of appropriation bills to be passed each year—to force the government to resign and ask for a dissolution of the House simply by refusing to pass those bills, thereby putting the operations of the government at risk.

Surely Howard was partly correct in that nothing has happened since 1975, as a matter of constitutional amendment or interpretation, to prevent a similarly-positioned Senate from again denying supply in order to force a House election or, if the requirements have been met, a double dissolution.<sup>89</sup> Instead, however, both the Coalition and the ALP

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89 When a potential deadlock over essential spending legislation appears on the horizon, satisfying the constitutional requirements for a double dissolution on those

have, as matters of party policy, foresworn any interest in using their numbers in the Senate to block essential money bills in order to pressure the government to resign. Both of Australia's major political combatants recognize that they took the Commonwealth to the brink in 1974–1975. I credit them with recognizing that it would damage the constitutional regime if either were to insist on taking the powers of the Senate to their logical extreme. I certainly credit them with calculating that it would not be in their political interests to be held responsible for the consequences.

### The Theory of Dual Responsibility

Before dismissing Whitlam, Kerr sought the advice of Sir Garfield Barwick, who then was the Chief Justice of the High Court. In his written advice to Kerr and later in a memoir on the subject, Barwick elaborated a theory that Kerr adopted as his own, a theory that, in Australia, the government of the day is actually responsible to both the House of Representatives and the Senate. On its face, this theory seems to derive from the most hard-headed assessment of the realities of the Constitution. In fact, it is a radical theory, especially coming from the occupants of two of the most traditional roles in the Australian political system, one that makes the Senate potentially the more powerful of the two chambers, and one that ultimately is incompatible with the spirit and intent of the Constitution (Sampford 1987).<sup>90</sup>

To anticipate the discussion in the next chapter, it was no secret to the authors of the Commonwealth Constitution that there was an incompatibility between the operations of a system of responsible government as they had come to know it and a Senate with powers almost the same as those of the House of Representatives. Some thought that the problem was more serious in theory than in practice,

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bills requires an interval of at least three months. One consequence, then, is that any government confronting a Senate that it does not control has an incentive to ensure that it is in a position to request a double dissolution not only if and when it wants to but also if and when it needs to. To do so, the government must welcome, or even seek to create, legislative deadlocks with the Senate on non-money bills so those bills can serve as double dissolution 'triggers', having satisfied the requirements of sec. 57 of the Constitution before the crisis blossoms.

<sup>90</sup> This line of argument does have a pedigree. Robert Garran, who later would become co-author of the seminal *The Annotated Constitution of the Australian Commonwealth*, wrote in 1897: 'that the parliamentary system for federal purposes may develop special characteristics of its own is not unlikely. Thus the familiar rule that a Ministry must retain the confidence of the representative chamber may, in a federation—where both Chambers are representative—develop into a rule that the confidence of both Chambers is required.' (quoted in Solomon 1978: 182–183)

and that the balanced judgment and good sense of Australians steeped in British constitutional traditions would prevent the logical possibilities of the Constitution from being carried to their ultimate, destructive extremes. There were others who were more inclined to agree with Winthrop Hackett that the proposed Constitution created a collision waiting to happen: 'either responsible government will kill federation, or federation ... will kill responsible government.' (*Convention Debates*, 12 March 1891: 280) Some of those who saw an actual danger, not a hypothetical one, in the combination of provisions proposed for the Constitution were prepared to sacrifice responsible government or search for some way of adjusting it so that it would rest more comfortably alongside the Senate in what was admittedly a constitutional marriage of convenience.

There does not appear to have been any determined advocacy at the Conventions for the idea that it was practical and desirable to require the government to retain the support of majorities in both houses in order to remain in office. There was a recognition, of course, that the authors were giving the Senate the power to refuse supply, but no evidence that the authors thought that the denial of supply by the Senate would have the same meaning as the denial of supply by the House—the ultimate way in which the House can enforce the responsibility of the incumbent government to it. Writing ten years after Federation, W. Harrison Moore predicted that the Senate would rarely exercise its acknowledged power to refuse to pass an appropriation bill. He recognized that the Senate 'might in an extreme case refuse to pass the Appropriation Bill, and thereby force a dissolution or a change of Ministry.' However, in carefully modulated terms, he let it be known that doing so could be predicated only on a theory of dual responsibility; and for that, there was no precedent on the continent that recently had become a nation:

In the balance of power in the Commonwealth, it is a factor not to be neglected that, while the Senate has a recognized power over money bills beyond that of any other second chamber in the British Dominions, it can hardly exercise the extreme power of rejecting the Bill for the 'ordinary annual services of the Government' upon any other ground than that the Ministry owes responsibility to the Upper not less than to the Lower House. That is a position which in the future, the Senate, as the House of the States as well as the Second Chamber, may take up; but it is a position from which even in the history of Parliamentary Government in the Colonies, the strongest supporters of the Upper House have generally shrunk. (Moore 1910: 144–145)

Yet that is essentially the position that Kerr and Barwick took up in 1975 and thereafter. In the statement that the Governor-General issued

to explain his reasons for dismissing the Whitlam Government, Kerr asserted that:

The position in Australia is quite different from the position in the United Kingdom. Here the confidence of both Houses on supply is necessary to ensure its provision. In the United Kingdom the confidence of the House of Commons alone is necessary. But both here and in the United Kingdom the duty of the Prime Minister is the same in a most important respect—if he cannot get supply he must resign or advise an election. ...

When ... an Upper House possesses the power to reject a money bill including an appropriation bill, and exercises the power by denying supply, the principle that a government which has been denied supply by the Parliament should resign or go to an election must still apply—it is a necessary consequence of Parliamentary control of appropriation and expenditure and of the expectation that the ordinary and necessary services of government will continue to be provided. (quoted in Mayer and Nelson 1976: 542–543)

Several years later, in his memoirs, he added (1978: 315) that ‘There is a sense in which a Government must retain the ‘confidence’ of the Senate to be able to continue in government. It must have the confidence of the Senate expressed by the passing of supply by the Senate.’

It is unclear precisely how, or how precisely, Kerr intended to use the word ‘confidence.’ When we say that, in Great Britain for example, a government would have to resign if it lost in the House of Commons on a vote of no confidence, we mean that the government must resign as a matter of constitutional principle. Is this what Kerr had in mind when he wrote that an Australian government ‘must have the confidence of the Senate expressed by the passing of Supply by the Senate’: that a Senate vote against providing supply is its way of voting its lack of confidence in the government, and that the two votes are constitutionally equivalent, either requiring the government to resign as a matter of constitutional principle? Or was he making an argument grounded not in constitutional principle, but in the practicalities of political power: that if the Senate (but not the House) blocks supply, the government still has a constitutional right to remain in office, but it is no longer practical for it to exercise that right because it lacks, or soon will lack, the means (i.e., money) to continue functioning as a government must? The latter interpretation can be read into his statement that, when the Senate rejected supply, the government had to resign or there had to be an election because one or the other was ‘a necessary consequence of Parliamentary control of appropriation and expenditure and of the expectation that the ordinary and necessary services of Government will continue to be provided.’ In the same

sentence, though, the Governor-General elevated into a ‘principle’ the necessity for a government, if denied supply, to resign or submit to an election.

It is all rather confusing, and the Chief Justice’s letter of 10 November 1975 to Kerr (reprinted in Kelly 1975: 344) does not offer much help. In that letter, Chief Justice Barwick found ‘an analogy between the situation of a Prime Minister [in London] who has lost the confidence of the House of Commons and a Prime Minister [in Canberra] who does not have the confidence of the Parliament, i.e. of the House of Representatives and of the Senate. The duty and responsibility of the Prime Minister to the Crown in each case is the same: if unable to secure supply to the Crown, to resign or to advise an election.’ (Reprinted in Kelly 1975: 344) He leaves us with the same questions: in what sense may an Australian prime minister have or not have ‘the confidence of the Parliament’? Is the duty to resign or seek an election grounded in constitutional principle or practical necessity?

In his 1983 memoir of the affair, Barwick is more enlightening. First, he establishes, convincingly enough, that the Senate had the constitutional power to act as it did. Second, he argues, reasonably enough, that a government that cannot convince Parliament to pass essential spending legislation cannot remain in office. It may go voluntarily or involuntarily, but go it must, whether its departure brings on a new government from the same Parliament, or a new election for the House only or for the House and part or all of the Senate. But then he turns to the more interesting and difficult question: whether the Senate’s action was ‘proper’, not simply whether it was constitutional.

In turn, this question can be broken in half. First, is it ever proper for the Senate to deny supply, knowing that the inescapable result must be the departure of a government that a majority in the House presumably continues to support? And if so, then second, under what circumstances is it appropriate for the Senate to do so? Implicit in his answers to these questions is a provocative theory of how the Australian Constitution should work.

With respect to the House, Barwick explains that a vote of no confidence is effective both because of the government’s acceptance of the conventions of parliamentary government and because of the threat implicit in the House’s vote:

[A] motion of no confidence carried by the House ought to be followed by the resignation of the ministry or by advice to the Governor-General to dissolve the House. The result would be the holding of a general election. The carrying of such a motion is an indication that if the ministry does not take such a course the House in due time will not introduce or carry an appropriation bill for supply. (Barwick 1983: 41–42)

A government leaves office after a vote of no confidence by the House not only because the House thinks it should, but also because the government understands that if it does not, it is the House that will deny supply when the opportunity arises. The constitutional principle is predicated upon this prediction.<sup>91</sup>

Barwick goes on to acknowledge that a government is *not* expected to resign in the face of a Senate vote of no confidence or the Senate's failure to pass 'bills sent up by the House which are considered by the executive government to be essential to its own legislative programmes.'

In other words, whilst it may be said that the government does not need in general to have the confidence of the Senate in the sense that it must retain the confidence of the House, it must so far have that confidence as to obtain the Senate's concurrence to the annual grant of supply. Thus, the only way the Senate may send a government to the polls is by rejecting or failing to pass an appropriation bill for supply. *Put another way, it can be said that the only way the Senate can secure for the electorate an opportunity to express its attitude to the executive government is by not concurring in the grant of supply.* (Barwick 1983: 42; emphasis added)

Here begin to emerge his answers to our questions about the propriety, not the constitutionality, of the Senate's action. Such an action is justified when there is good cause for the Senate to 'secure for the electorate an opportunity to express its attitude to the executive government.'

The power to withhold supply in my view should be regarded as a power held in reserve to be used only on some very special occasion calling for its exercise. The Senate should treat itself as holding the power on behalf of

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91 After making the point that if the House votes no confidence in the government, it must resign immediately, even if it still has funds to continue essential government operations, he derives from it the conclusion that, contrary to my argument, the Governor-General was justified in dismissing the Whitlam Government even while supply remained available. 'Thus, in considering what the Prime Minister ought to have done when the Senate clearly indicated its unwillingness to provide supply—and thus indicating that the Parliament no longer approved the retention of the ministry in government—was not affected by the state of the funds in the Treasury which the ministry could lawfully use in government.' (Barwick 1983: 54) This again indicates the degree to which he considers a Senate vote to deny supply the equivalent of a House vote of no confidence. Sawyer, however, disagrees: 'Denial of supply by a lower House is one of many ways by which loss of confidence in the government may be expressed, and has always been considered in that context. Denial of supply by an upper House, like any other upper House expression of no confidence in a government with a lower House majority, has ever since the Reform Act of 1832 been regarded as irrelevant to the principles governing responsible government.' (Sawyer 1977: 146)

the electorate. It should be used where the Senate forms the view that the interests of the electorate or of some definable part of the electorate requires its use. This presupposes a special occasion when the circumstances, *such as the policies and performance of the executive government of the time*, warrant the use of the power. (Barwick 1983: 46; emphasis added)

The ‘special occasion,’ Barwick clearly implies, need not involve government actions that are demonstrably criminal or unconstitutional or that put the security or survival of the nation at risk; it is sufficient for a majority in the Senate to conclude that ‘the policies and performance of the executive government’ warrant the use of a power that compels that government to resign or be dismissed. But is this position not incompatible with the concepts of responsible government and ministerial responsibility? Yes, he argues, and when this incompatibility arises, it is the latter that must give way:

[I]f there were any seeming antipathy between the concept of responsible government and the Senate’s legislative power to reject or to fail to pass an appropriation bill for supply ... the operation of the principle of ministerial responsibility must be modified in some fashion to accommodate the exercise of the Senate’s powers. (Barwick 1983: 44–45)

The implication of this argument is that a Senate majority should be free to deny supply, and thereby bring down a government, whenever it wishes. The standard that Barwick erects is so weak as to constitute no barrier of principle to deter an Opposition from doing in the future what Fraser did in 1975 because it disagrees with the government’s policies, and what is just as important, because it thinks that ‘the interests of the electorate’ require the Senate to use its power so the electorate can ‘throw the bums out.’

And that is precisely what Barwick has in mind. His theory is not one of dual responsibility, in which the government is effectively responsible to both the House and the Senate. Fundamentally, his is a theory of government responsibility to the Senate. The Senate should send the government to face the voters at an election when a majority of Senators believe that the government has lost the voters’ support. The Senate has both the right and responsibility to force the government to resign because the House obviously will not do so:

There must be occasions when because of a government’s performance or the policies (not electorally endorsed) which it pursues, the electorate should not have to wait the effluxion of a Parliament’s term to express its dissatisfaction with the executive government and its antipathy to those policies. ... A government with a majority in the House, disciplined to the point where dissidence is unlikely to surface, could do untold harm to the country if no means existed to bring about a dissolution during the

parliamentary term. It could become as absolute an executive as a seventeenth century monarch claimed to be. If the Senate did not have the power to send to the polls a government which, because of its actions, has ceased to have the confidence of the electorate, such a disaster might ensue. (Barwick 1983: 47–48)

Party discipline in Parliament, by this argument, has stood responsible government on its head in two respects. First, it is the House that is the obedient agent of the government, not the converse; and second, it is the Senate that must make the government responsible to it by using its power over supply, because the House will not enforce responsibility in any meaningful sense, no matter how the views of the electorate may have changed since the last election.

In 1975, the Opposition in the Senate argued that Whitlam and his colleagues ‘had lost the confidence of the electorate because of the government’s own performance in office’, so, Barwick finds, ‘if the expressed views of the Opposition were genuinely held, then a case for the exercise of this reserve power did exist.’ More generally, ‘If the majority of the Senate is convinced that the electorate has lost confidence in the government and should be given the opportunity to express itself, the power to fail to provide supply would be properly exercised.’ Barwick acknowledges that the Opposition party could benefit politically. However, the Senate’s power to deny supply ‘should not be a tool in the hands of a political group out to achieve some particular party political objective by means of the pressure of a threat of the exercise of the power. It should not be an instrument to produce instability in government by its capricious or merely party political use.’ (Barwick 1983: 48–50)

I have quoted Barwick at length to present what I trust is a fair summary of his argument because he states so clearly why we must reject it as a theory of how the Australian polity should operate. I agree with the Chief Justice that the Senate has the constitutional power to refuse to pass any bill, including an essential money bill, and that the existence of a constitutional power carries with it the perfectly reasonable presumption that there is some circumstance under which it is appropriate for the Senate to exercise that power. Supporters of the government, *any* government, might argue otherwise: that any exercise of the Senate’s power to reject any important bill, much less a basic annual money bill, is an unwarranted interference with the government’s ability to exercise its electoral mandate (we will take up this argument in Chapter 9). But Barwick would take us much too far in the other direction by endorsing the propriety of a non-government majority in the Senate deciding to deny supply and thereby bring down

a government whenever it chooses to argue that the electorate has lost confidence in that government.

Especially in an era of seemingly permanent non-government majorities in the Senate, adopting Barwick's approach would risk producing precisely the kind of government instability that he recognized to be a danger. Kelly, arguing that Barwick and Kerr sought 'to construct a constitutional theory from a legal power', illustrates the 'political absurdities' that could ensue:

For example, under this constitutional theory the Senate, whose members may have been elected three and six years earlier, by blocking Supply can vote no-confidence in an elected government, force the Representatives to the people without having to face any election itself and, if it dislikes the government formed after the subsequent election, vote no-confidence six months later thereby repeating the process. (Kelly 1995: 293–294)

Furthermore, surely it is naive for Barwick to justify efforts by Opposition-led majority coalitions in the Senate to bring down governments, and then to believe that oppositions will refrain from doing so for 'merely party political use.' Parties, just like the individual politicians comprising them, have a natural capacity for equating what is in their political interests with what they perceive to be in the nation's interests. What the former Chief Justice offers to us, then, is the ultimate supremacy of the public opinion poll. The non-government majority in the Senate would be gauging public opinion even more intensively than it already does, waiting for the government's support to falter and then calculating whether its weakness will persist long enough for a new election to take place. And if there is not a supply bill that can be blocked to compel an immediate election, why would it not be equally legitimate for the Senate majority to block every other bill on the Notice Paper until the government agrees to resign? After all, the goal is for the Senate to force the government to face the electorate. Whether the Senate accomplishes this by denying supply or by creating a governmental crisis in some other way, such as engaging in a legislative work stoppage, would hardly seem to matter.

The government has the option of requesting the Governor-General to dissolve the House well before its three-year term would expire, but at least some lip service is paid to the notion that the Governor-General might not grant such a dissolution if it is sought only to increase the government's majority in the House (see the discussion in Chapter 2 of the double dissolution of 1983). However weak this constraint may be (and it is my view that this is a matter that should be decided by the government and the people, not the Governor-General), there would be none at all limiting when the opposition and its Senate allies could force a House election on the government. The best way the government

could protect itself would be by ensuring that at least one bill has qualified under sec. 57 as a double dissolution trigger, so that the non-government majority in the Senate would have to be prepared to put all its seats at risk as well.

No, Barwick's approach to how the Senate should invoke its legislative powers with respect to money bills is entirely too casual. I accept that non-government majorities still retain the right to block supply and, by blunt force, they can try to compel a government to resign when the money runs out. I also accept that they may do so for the same kinds of self-interested reasons that provoked the crisis of 1975. But I cannot join him in inviting them to do so. Since 1975, fortunately, non-government majorities in the Senate either have failed to read his analysis or they have found it unpersuasive as a guide for political action.