Sir Maurice Byers Lecture 2020

'Maurice Byers – Legal Advice in the Constitutional Maelstrom of the Whitlam Era'

By Anne Twomey

'It was the best of times, it was the worst of times' to be a Solicitor-General. The Whitlam era produced a maelstrom of constitutional controversy. The work was interesting and challenging, but the pressure was enormous – especially the pressure to conform to the Government's political agenda.

Sir Maurice Byers was Commonwealth Solicitor-General from 1973 to 1983. He took up this office after the first flush of Whitlam's victory, at a time when conflict with the Senate was intensifying. By the time Byers ended his term as Solicitor-General, he had served a long-lived Coalition Government and was back working for a Labor Government, but one that built on consensus, rather than conflict.

Byers' legal opinions are bound in three volumes held by the National Archives. They are themselves a lesson in how to write a legal opinion. They are predominantly short, clear and direct. Most importantly, they are also helpful.

When asked by a government whether it is constitutionally valid to do X, a Solicitor-General can either address the question narrowly, and say 'No' (if it is not), or can be more proactive, stating that: No, the Government cannot validly do X, but it can achieve its aim, or much of its aim, by doing Y and Z, which are constitutionally valid. Byers was the second type of Solicitor-General. He was the one who was prepared to stand up and give the Government the uncomfortable news that it could not do X, but also to help it achieve its policy aims by suggesting alternatives.

This was particularly notable from Byers' opinions in his later years as Solicitor-General. He contributed significantly to policy development by steering Governments away from unconstitutional courses of action, and towards valid means of achieving the underlying aim. Sometimes his opinions, in reviewing proposed laws, also suggested a better or more elegant way of achieving the desired outcome, or pointed out problems that government advisers had not spotted, and ways to address them.

These types of positive contributions occurred when written advice was sought, behind closed doors, on a proposal that had not yet been made public. Byers was generally unafraid of giving an unpopular answer. For example, he advised that there was nothing unconstitutional about a Queensland bill to create a Treaties Commission in 1974,[1] and that certain key clauses of the *Racial Discrimination Bill* were constitutionally invalid because they were supported neither by the race power nor the external affairs power.[2] In the latter case, the Government ignored his advice and went ahead with the bill anyway.

Greater difficulty arose, however, when there was a public crisis and the Government was in a fix. This puts a Solicitor-General in a very difficult position. On the one hand, the Solicitor-General is serving the government of the day and its policy agenda. On the other hand, he or she has an obligation to advise the Government as to the correct legal position, rather than simply rubber-stamp the outcome that the Government wants.

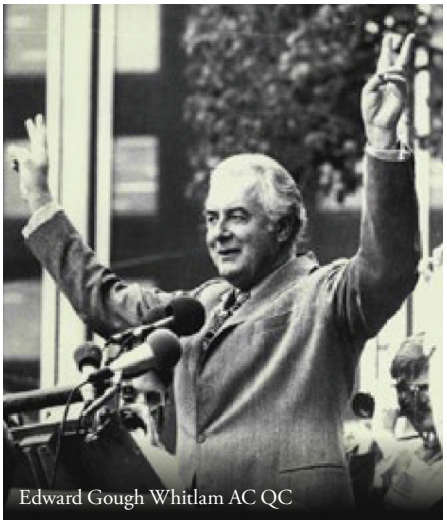
Managing this potential conflict can be difficult. In litigation, for example, it is accepted that the Solicitor-General acts, as counsel, upon the Government's instructions. Even if the Solicitor-General personally disagrees with the correctness of the position, he or she will argue the case as instructed as long as it is not legally unarguable. Byers, for example, successfully defended the validity of provisions of the *Racial Discrimination Act 1975* (Cth) in *Koowarta v Bjelke-Petersen*,[3] despite having previously advised that one of them was invalid. Lionel Murphy, who as Attorney-General had overridden Byers' opinion, later provided the key fourth judgment to hold that the provision was valid.

When it comes to providing legal opinions to Government, the position can be more fraught, especially in dealing with a crisis that is already in the public realm. There can be great pressure to produce an opinion that justifies Government conduct that has already occurred, or is proposed to occur. That pressure is intensified if a joint opinion of the Solicitor-General and the Attorney-General is required – especially if that Attorney-General is someone like Murphy, with legal views that are strongly coloured by political interests.

This is a problem not only for the Solicitor-General to manage, but also for the Government. During the rolling crises from 1973 to 1975, it was often as significant to consider when the Solicitor-General was not asked to advise, as when he was. As we shall see, this in itself led to a relationship of distrust between the Governor-General and the Crown Law Officers.

The first volume of Byers' opinions, covering the period 1973-1976, was opened for public access in 2011.[4] After being asked to give this lecture, I applied for access to the other two volumes.[5] I was pleasantly surprised to be granted access to both the Byers volumes in a timely fashion, without redaction. I thought the Archives may have learnt something from the *Hocking* litigation.[6] I immediately arranged for someone in Canberra to photograph the pages of interest to me. A couple of weeks later, I was informed by the Archives that the wrong button had been pushed, and that the files remained confidential. Apparently it would be 'contrary to the public interest' to release them because of 'ongoing sensitivities'! This is not the world's most convincing application of the public interest test, and having read the opinions before receiving this notification, I can't say that I can see any plausible basis for this decision.


Sir Maurice Byers CBE, QC


Edward Gough Whitlam AC QC


Lionel Murphy QC

The 'ongoing sensitivities' appear primarily in Volume 1, which is open to public access because the decision was made before the pall of secrecy paralysed the public service and the National Archives.

This article discusses the opinions in Volume 1, because they are the more sensitive and interesting ones. But from reading all of them, it strikes me that the real reason that Governments do not want to release such opinions is that it shows, embarrassingly, how the Solicitor-General sometimes advises that something is unconstitutional and the Government goes ahead and does it anyway. It has nothing to do with the impact on litigation and everything to do with keeping deception and duplicity out of public view. It should not be the role of the National Archives to cover up such matters, even if they are 'sensitive'.

Referendum and Double Dissolution Bills

This brings me to the very first written opinion that Sir Maurice gave as Solicitor-General.[7] It concerned the referendum bill on simultaneous elections. That bill had been passed by an absolute majority by the House of Representatives, but was then on 4 December 1973 referred by the Senate to a committee. The Government wanted to interpret this as a 'failure to pass', so it could start the three month period before passing the bill again, and put it to a referendum without the agreement of the Senate. But Byers inconveniently advised on 13 December 1973 that the bill had not failed to pass. Taking into account its complexity and effect, he did not consider that the period for scrutiny by a Senate committee was unreasonably long. In his view, as it had not yet failed to pass, the procedure for putting it to referendum against the Senate's wishes had not yet been triggered.

The Government rejected his advice. The Prime Minister, Gough Whitlam, and the Attorney-General, Lionel Murphy, went to see the Governor-General, Sir Paul Hasluck, on 21 March 1974 and advised him that all the referendum bills met the requirements of s 128 of the Constitution. No mention appears to have been made of the fact that there was controversy about whether one of the bills actually did satisfy the Constitution or that the Solicitor-General, upon good grounds, thought it did not. Hasluck was also provided a written opinion by Murphy that all four bills met the constitutional requirements.[8] The referendums failed. But if they had passed, there would have been a real question of the validity of the one on simultaneous elections.

We know this, because at the same time the referendum bills were voted on, there was a double dissolution election. The concept of 'failure to pass' applies in the same way in s 128 and the double dissolution provision in s 57. One of the double dissolution bills, the *Petroleum and Minerals Authority Bill 1973* (Cth) (PMA Bill), gave rise to the same issue about whether it had failed to pass. But when the Governor-General, Sir Paul Hasluck, was advised on 10 April 1974 to grant that double dissolution, attached were two separate legal opinions. One was a joint opinion by Byers and Murphy, that a double dissolution could be granted with respect to more than one bill (a proposition with which the High Court later agreed). The other was an opinion by Murphy alone that each of the bills, including the PMA Bill, satisfied the requirements of s 57. Presumably, either Byers refused to give such an opinion, or was not asked because it was known he would not agree.

Hasluck, in granting the double dissolution, wrote that he had 'accepted the learned Opinion of the Attorney-General',[9] not knowing that the learned Solicitor-General took a different view. Hasluck also recorded that Whitlam went through each bill with him and stated that 'he thought the record was clear' that they would satisfy the terms of section 57. Hasluck stated that he was primarily interested in the 'failure to pass' and that the record should be 'such as to do us credit in the eyes of the constitutional critic and historian'.[10] It did not.

What is the relevance of this? It takes us to Sir John Kerr's dissatisfaction with the legal advice he received from the Crown Law Officers. After Kerr became Governor-General, one of the first legal issues he faced was the issuing of a proclamation for a joint sitting of both Houses of Parliament to deal with the double dissolution bills. When Kerr looked at the details of the bills, he realised that it was 'extremely doubtful indeed' that the PMA Bill satisfied the conditions of s 57.[11] He raised the question of whether he could include this bill in the proclamation for the Joint Sitting, as it did not appear to qualify.

Kerr was then given a joint opinion by Murphy and Byers that he was bound by Sir Paul Hasluck's decision to list them as double dissolution bills and could not act contrary to that in issuing the proclamation. The opinion asserted that the Constitution does not permit the Governor-General by one act of state to contradict or examine the validity of another.[12] Surely, however, if an error has been made, it can be corrected? This has previously occurred, for example, when the Governor-General gave royal assent to a bill submitted to him in error, which had not passed both Houses. It would seem unlikely that the Constitution would prevent the Governor-General from correcting an error so that conformity with the Constitution could be achieved.

Kerr too was dubious about this joint opinion, but said that he acted on this advice, on the basis that the courts would later hold a resulting law as invalid. But this experience planted the seeds of distrust between Kerr and the Crown Law Officers. While he was unsurprised by Murphy's approach to legal issues, he was surprised


Sir John Robert Kerr, AK, GCMG, GCVO, QC

that the Solicitor-General did not advise upon whether the bill satisfied the terms of section 57.[13] He seemed to think that Byers was ducking disagreement with Murphy or being muzzled by not being asked to advise, and it led him to doubt the legal advice that he was receiving. He wasn't confident he was getting the full story, and he was right.

Kerr was also right about the PMA Bill on both counts – first that it should be put to a joint sitting (which the High Court accepted in *Cormack v Cope*[14]) and second that it breached the terms of section 57 and was invalid (which the High Court accepted in *Victoria v Commonwealth and Connor*[15]). By that time, Murphy had moved to the High Court bench (although he did not sit on the case) and Byers was left to argue the validity of a law that he most likely considered invalid. Byers must have felt some vindication in his loss, as no doubt did Kerr.[16]

The Gair affair

One of the hallmarks of the Whitlam period in government was attempts by both sides to manipulate the numbers in the Senate. This started with the Gair affair. Vince Gair was a DLP senator who had recently lost the leadership of his party. He was disgruntled and was open to receiving a government appointment. At that time (prior to the 1977 constitutional amendment) each State had 10 senators and a casual vacancy was filled at the next half-Senate election, regardless of how long the original term had left to run. This opened the system to manipulation. If Gair resigned his seat to take up a government posting, then six seats, instead of the normal 5 seats, would have been up for election in Queensland, with the likely result that the Labor Party would win three out of six seats, rather than two out of five. It was an easy way to bolster Labor's Senate numbers.

So on 13 March 1974, Murphy asked Gair if he would accept the post of Ambassador to Ireland and Gair said he was prepared to do so. This was done while the Minister for Foreign Affairs was out of the country, as he wouldn't have agreed to it.[17] Instead Whitlam was the acting Minister for Foreign Affairs. The following day, Whitlam and Murphy went to see the Governor-General, Sir Paul Hasluck. It was the same meeting at which they convinced him to agree to put the referendum bills to the people, including the one Byers thought invalid.

Hasluck, fortunately, left written records of these meetings, so we know what happened, at least from his perspective. Hasluck queried how Gair could be appointed as an ambassador while still a senator. As a former MP, Hasluck was conscious of the fact that Members and Senators were disqualified if they took up an office of profit under the Crown. Whitlam and Murphy satisfied Hasluck that his action in signing the Executive Council Minute on 14 March merely involved the nomination of Gair, as distinct from his appointment.[18]

Ambassadorial appointments cannot be made without the other country agreeing. The Irish Government gave agreement to the appointment on 19 March, and the Commonwealth received that approval on 20 March. In the meantime, Gair had continued to sit and vote as a senator. On 21 March, the Executive Council approved a minute which provided for the setting of Gair's salary and other terms and conditions of appointment and stated that his appointment 'commences on and from a date to be determined by the Minister of State for Foreign Affairs'.[19]

That Executive Council Minute was discussed in a private meeting on the morning of 21 March by Hasluck, Whitlam and Murphy. Hasluck said:

> 'We had a discussion during which I again raised the question whether an appointment could be made while Senator Gair was still a member of the Senate and, if so, whether it would be a valid appointment. I also asked what would be the position of Senator Gair if he accepted another office under the Crown while still a Senator. Was it necessary for him to resign first? Senator Murphy, Attorney-General, spoke in a somewhat roundabout way but he reassured me by saying that no appointment had yet been made. My approval was only approval of an intention to appoint and the actual appointment would come later. Even the Executive Council minute, which we were to consider shortly, was not an appointment but the approval of certain steps to be taken towards the making of an appointment.[20]

On the evening of Monday 1 April 1974, a Government official leaked to a journalist at *The Sun* that a senior politician had accepted a diplomatic posting. By 11pm Laurie Oakes had worked out by a matter of deduction that it must be Vince Gair. He rang a Labor figure and said he had uncovered the scheme. The response was a panicked 'Christ, how did you find out?'. Then to be sure he rang Mrs Gair and congratulated her. She said they were very pleased.[21] This was enough for a scoop that let the cat out of the bag on 2 April. Gair had not yet resigned as a senator, but was expected to do so that day.

The Queensland Premier, Joh Bjelke-Petersen, realised that if the Queensland Governor issued the writs for the impending half-Senate election immediately, before Gair resigned, this would mean that only five seats would be filled at the half-Senate election, leaving Gair's vacant seat to be filled by a person appointed by the Queensland Parliament for the next three years.[22] There had been a long practice of not issuing a supplementary writ to fill a casual vacancy at a half-Senate election if the vacancy occurred after the writ for the election had been issued but before polling day.[23] There was frantic scurrying in Queensland to get together the paperwork to issue the writs. In the meantime National Party Senators were given the task of distracting Gair so that he wouldn't resign before the writs could be issued.

The kitchen and bar staff in Parliament House had chosen that week to go on strike. In what became known as the night of the long prawns,[24] a hungry Gair, alienated by his own party, was lured into Senator Maunsell's office by the offer of fresh Townsville prawns and beer. When the division bells rang at 10pm, Maunsell accompanied Gair to the chamber to vote. What was the division about? It was the Senate's second consideration of the PMA Bill. Gair voted in favour of it, but the majority declined to give it a second reading.[25] This later provided evidence that Gair still regarded himself as a senator and had not yet resigned. The writs were issued by the Queensland Governor at 11pm on 2 April for five seats as no casual vacancy had yet been caused by Gair's resignation.

The following morning Whitlam and Murphy discovered that they had been out-played in Senate manipulation by Joh Bjelke-Petersen and a bucket of prawns. They repaired to Whitlam's office, along with Byers and Sir John Bunting, who took a record of the meeting. Murphy then

proposed that they 'take the line' that a casual vacancy had occurred earlier because Gair had been disqualified for holding an office of profit under the Crown or breached s 45(iii) of the Constitution for agreeing to take fees for providing the services of an ambassador, and that this occurred either on 14 March or 20 March. This was the complete opposite of what he had very recently advised the Governor-General on two occasions. Bunting recorded that 'the Solicitor-General indicated his concurrence in what the Attorney-General had said'.[26] Byers was sent off to write an opinion to this effect, while Murphy went off to write a statement for Gair to give to the President saying that he had been disqualified earlier.

Bunting recorded that he was 'anxious that the Prime Minister in particular, and the Attorney-General as well, should understand one of the implications of what was now being decided. This was that from the date of vacation of office, which I took to be probably 14 March, but at any rate not later than 21 March, Gair had continued to take his place in the Senate. This seemed to me a contempt of the Senate and to be contrary to law. But not only that, the Prime Minister and the Attorney-General must be taken to have known. This will reflect on the Prime Minister and perhaps seriously. The Prime Minister noted the point.'[27] Neither Whitlam nor Murphy was deterred.

Hansard then records a comedic farce. The protagonists could not get their story straight with Murphy and Whitlam in different Houses arguing different dates of disqualification and the disgruntled Minister for Foreign Affairs stating that Gair had not taken up the post until 3 April,[28] which was after the writs were issued. Byers' opinion was tabled in the Senate.[29] When Murphy was asked why he had not objected to Gair voting if he knew Gair was disqualified, Murphy bizarrely said it would not have mattered except for the Queensland Government's actions in issuing the writs.[30] Murphy relied on Byers' advice regarding disqualification.[31] He moved a motion to have the matter referred to the Court of Disputed Returns,[32] but the Senate amended it to declare instead that Gair was still a senator as at 3 April. It went on to censure the Government and call for its resignation.[33]

Byers then advised that there was a powerful argument that the House no longer had the power to decide under section 47 of the Constitution about the qualification or disqualification of a senator. This was because Parliament had now 'otherwise provided' and the exclusive forum for determining such matters was now the Court of Disputed Returns. He also advised that the Queensland writ was unenforceable while a question as to whether a place has become vacant in the Senate was unresolved. He considered that the Commonwealth Electoral Officer could disregard the writ. He advised that proceedings could be taken in the High Court seeking a declaration that the writ was invalid.[34] Such proceedings were then commenced.[35] The Senate used the Gair affair to justify blocking supply and a double dissolution was then held, incorporating the PMA Bill.

As for Byers' opinion on the disqualification of Gair – does it stack up? Byers argued that Gair held an office of profit under the Crown and was therefore disqualified from Parliament from the time the first Executive Council minute was passed on 14 March. Byers concluded:

> I think that the better view is that a person holds an office of profit notwithstanding that he has not either commenced his duties or received his salary or that the appointment is expressed to be operative as from a future date.[36]

Byers also argued that Gair was disqualified under s 45(iii) as he had agreed to take a fee for services rendered to the Commonwealth to the extent that he had accepted 'the emoluments which the post of Ambassador confers on him', even though he had not yet received anything.

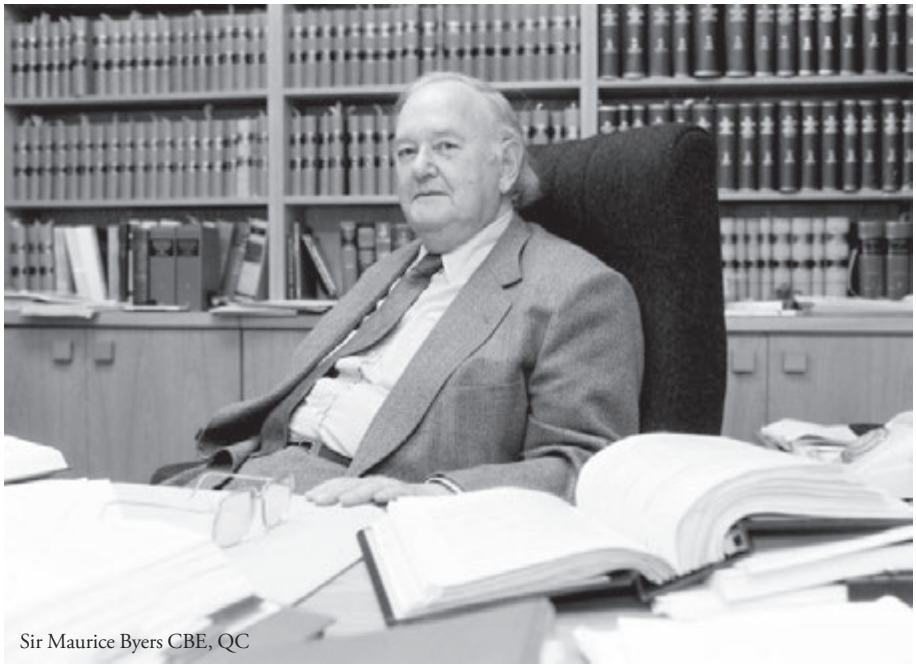
Funnily enough, all governments since seem to have rejected Byers' opinion. Otherwise, it would have resulted in the instantaneous disqualification of numerous MPs who have in the past agreed to take up lucrative government posts, but did not resign until a more convenient time, some months later. For example, the former Attorney-General, Senator Brandis confirmed that he was going to be UK High Commissioner on 20 December 2017,[37] but did not resign from the Senate until 7 February 2018, continuing to vote on bills in the meantime. He clearly didn't adopt Byers' view. No doubt he would have argued that there is a difference between agreeing to take up an office in the future, and actually holding the office.

There would be good policy grounds, however, to follow Byers' wider approach, as one of the reasons for this disqualification is to prevent offers of lucrative postings from being used to influence the voting and behaviour of sitting MPs.

Dismissal of Ministers

Another controversial issue that arose in Byers' time was the dismissal of Ministers. This played out in two stages – first the dismissal of individual Ministers, Clyde Cameron and Jim Cairns, and later the dismissal of the whole Government. The two are related.

In May 1975, Whitlam decided to demote Clyde Cameron, who was Minister for Labour and Immigration. Whitlam had previously told Hasluck that he was dissatisfied with Clyde Cameron because Cameron 'was satisfied to win an argument even if he lost the battle, and [he] tried to settle each industrial trouble by 'paying Danegeld'.'[38] Whitlam asked for Cameron's resignation, but he refused to give it.[39] Cameron, in a letter to Whitlam, which was conveyed to Kerr, insisted that the Governor-General's power to dismiss Ministers was a prerogative power that could only be exercised for good cause. He claimed that he was entitled to be heard by the Governor-General and that the rules of natural justice applied. He regarded



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the issue as justiciable and said the High Court would overturn any action by Kerr that was taken without giving Cameron natural justice.[40] In Cameron's hand-written notes, held by the National Library, it appears that he based his view upon earlier advice from the Attorney-General's Department about a proposal to remove a judge of the Commonwealth Industrial Court. It had apparently told Cameron that while Parliament could initiate the removal of a federal judge, the judge had to be given notice of the complaint against him and be afforded the opportunity to be heard in his defence.[41] Cameron translated this opinion to his own position as a Minister.

Whitlam advised the Governor-General to dismiss Cameron without giving him the opportunity to be heard and that such action was non-justiciable. Kerr told Sir Martin Charteris, in the Palace letters, that Whitlam's advice was 'supported by appropriate legal and constitutional opinion'.[42] In hand-written notes by Kerr it appears that he was told the advice was from Clarrie Harders, the Secretary of the Attorney-General's Department, and that he then rang the Attorney-General, Kep Enderby, who gave the same advice.[43]

While it was not clear whether anyone had researched the precedents, a similar situation had arisen in 1918. The Governor-General dealt with the Minister's plea to be heard[44] by insisting upon a full meeting of the Executive Council, including the Minister, before dismissing him upon the Executive Council's advice.[45] In 1931 when the issue arose again, the Attorney-General advised that such a matter was the prerogative of the Governor-General alone, and that the advice of the Executive Council was not required.[46] That such decisions, at the State level, are non-justiciable and do not require procedural justice was later held by the NSW Court of Appeal in *Stewart v Ronalds*.[47]

Back in 1975, Kerr told Charteris that he accepted this advice and considered it his duty to dismiss Cameron without hearing him. Charteris replied that he did not believe that the Queen had ever faced such a situation, but that he had no doubt that the course Kerr took in acting on the Prime Minister's advice and refusing to receive Cameron to hear his arguments, is the same that would have been followed by all British Sovereigns in modern times.[48] Kerr went through the same exercise with the dismissal of Jim Cairns, who also called for natural justice, and was denied it upon Whitlam's advice. Dismissal was immediate, with no opportunity to seek other courses.

This is of interest for two reasons. First, in such a significant matter, Byers was not called on to advise. We do not know whether this was because he took a different point of view, or was too busy, or there was insufficient time to ask him. Secondly, however, it set up the Whitlam dismissal in 1975. It was Whitlam himself who had impressed upon Kerr that his power was a prerogative one, that it could be exercised without giving the dismissed person any opportunity to respond and dispute it, and that the action would be non-justiciable.


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When it came to Whitlam's own dismissal, under the same power,[49] Whitlam's prior advice that the matter was non-justiciable opened the way for consulting judges, which would not have been appropriate if the action were justiciable,[50] and for swift action without providing any period of time in which Whitlam could respond or take other courses of action.

Advice on the Governor-General's powers

Byers did, however, provide opinions in relation to the Governor-General and his or her powers. He provided two opinions about the Governor-General's Instructions and Letters Patent, one in September 1975[51] and another in November 1983.[52] He also prepared what became the disputed 'draft' opinion about the Governor-General's reserve powers in November 1975.[53] Kep Enderby notoriously presented it to the Governor-General on 6 November, crossing out Byers' signature, writing 'draft' on it, saying that he had not carefully read it and that it did not necessarily reflect his views.

This draft opinion is often mischaracterised as saying that the Governor-General did not have the power to dismiss Whitlam or that the reserve powers did not exist. This is untrue. It recognised that such a power existed, but argued that Kerr did not have a duty to exercise it and was not compelled to do so in the circumstances. That, in itself, is a perfectly reasonable view to take, with which most would agree. The Governor-General had a discretion, but not an obligation, to act, and how he exercised that discretion remains a subject of genuine and heated debate. But that is ultimately a political issue, not a question of law.

In a later opinion, given in 1983, Sir Maurice confirmed his view that the constitutional power of Sir John Kerr to dismiss the Whitlam Government existed, that the Governor-General possessed this power in his own right, and that it was his alone and not the Queen's to exercise. But in his view there was no duty to exercise the power.[54]

The problem with relying on Solicitors-General for opinions on the reserve powers is that their background is that of barristers who apply statutes and judicial precedents. The reserve powers are not in statutes and are not the subject of judicial precedents in countries such as Australia and the United Kingdom. Solicitors-General rarely have strong backgrounds in history, politics and archival research. The best they can do in the circumstances is rely on what has been written in books. But because most evidence concerning the use, or near-use, of reserve powers is kept highly confidential and can take a very long time to be revealed (as the recent Kerr-Palace correspondence has shown), books are not always accurate and there is a long lag between events and their accurate public recording.

When Byers advised on the reserve powers in 1975, he was relying on books by Evatt from 1936 and Forsey from 1941 (which focussed primarily on Canada) and Jennings (which only dealt with the UK). This explains a lot about Byers' opinion. He spent a lot of the opinion arguing that the dismissal of governments was extremely rare, referring to the last UK precedent in 1783 and those identified by Forsey in Canada, but without addressing at all the far more recent examples, that were completely on point, about governments being removed for failing to achieve the passage of supply. These examples had happened in Victoria in the 1940s and 1950s.[55] They were not in any books, but were certainly within living memory. Indeed, supply had been blocked in Victoria on at least nine occasions as a means of forcing the government to an election. It was a well-used political weapon.

One example will suffice. In Victoria in 1945, the Labor Party and rebel Liberals joined to block supply to the conservative Dunstan Government. On 26 September 1945,

Dunstan went to the Governor and requested a dissolution, which would not be held until November when the electoral rolls had been revised. As supply was due to run out on Sunday, an election in November would either have meant months without supply or months of unlawful government spending. The Governor said he would grant a dissolution much earlier, on 3 October, if Dunstan obtained a vote of supply first 'thus obviating the illegality of payments due to the public service, or possibly the withholding of such payments during that period'. The House voted to refuse supply to the Dunstan Government. It also resolved that it would grant supply to a new government if Dunstan resigned. Dunstan went back to the Governor and insisted on a dissolution. The Governor said he would not be party to the illegal application of public moneys and that he required Dunstan's resignation.[56] Dunstan was effectively dismissed, as he had no choice, but it was described publicly as 'resignation'. The Governor commissioned a caretaker government, to pass supply and advise an election, which occurred.

There were several such precedents to call upon – including where it was Labor blocking supply, where the upper house forced a lower house to an election, where the Chief Justice was consulted, where the Governor refused to allow a government to continue without supply, where there was a forced resignation/dismissal, and where there was a caretaker government which did not hold a majority in the lower house, but advised an election. None of what happened in 1975 was new. But none of this was mentioned in Byers' draft opinion to Kerr. Instead the impression was left that such happenings were virtually unimaginable.

Perhaps Byers was unaware of these precedents, as a New South Wales barrister might well be unfamiliar with Victorian constitutional crises. But it does seriously undermine the standing of the opinion.

Moreover, Byers stressed throughout the opinion that the Crown, in granting a dissolution, acts upon the advice of ministers from the party with a majority in the House of Representatives, and that the only exception is the 'doubtful case of the forced dissolution'. But that is clearly incorrect. Minority governments may advise a dissolution. So too can a government that has been defeated in a vote of no confidence, having lost its majority. So too can a caretaker government. The only difference is that the Governor-General is not obliged to accept the advice from ministers who are not responsible, but he or she is always entitled to do so.

Even the use of old precedents by Byers did not give the full picture. He quoted from the Victorian Governor, George Bowen, in 1877, about how a Governor should not intervene in a dispute between the houses. It would have been more pertinent, however, to mention that Bowen was actually punished by the British Government for acting on legal advice from the Attorney-General to authorise supply, despite its rejection by the upper house. It was his acquiescence in government advice and failure to act that was criticised.[57] Bowen was demoted and sent to Mauritius. His predecessor, Governor Darling was recalled from office in Victoria for acting on advice to authorise spending without Legislative Council approval and for permitting the use of bank loans to prop up a government that could not secure supply.[58]

Byers also asserted that the rejection of money bills was intended to be dealt with by the deadlock provision in section 57 of the Constitution, and that therefore no reserve power could be used to deal with the position until a double dissolution, and if necessary, a joint sitting, had been held. This seems implausible. The three month delay between any rejection or failure to pass and a second attempt to pass the appropriation bill drags it out, not to mention the double dissolution, the summoning of Parliament, defeat of the bill in both houses again and a joint sitting. If s 57 had been relied upon to deal with the supply crisis in 1975, there could not have been an election until at least February or March, which would have resulted in a deep and prolonged economic crisis, like the one that Bowen was punished for presiding over in 1877. Back then, public servants and judges were dismissed because they could not be paid, courts were closed, mortgages were called in, forced sales occurred, shopkeepers lost business and there was a run on the banks.[59]

On the afternoon of 11 November 1975, Byers gave oral advice via Harders to Kerr that once the process of exercising the reserve powers had been started, with the dismissal of Whitlam, it could be completed and that Kerr did not have to change course because of the vote of no confidence passed by the House of Representatives. Had Byers been familiar with the Victorian precedents, he might have noted one from 1952. Supply was blocked by the upper house, the conservative Premier was forced to resign and a new Premier appointed. Supply was then passed by the upper house but the new Government was defeated on confidence in the lower house. The Governor, after consulting two Chief Justices,[60] then forced the resignation of the new Premier[61] and reinstated the old one, but on the condition that an immediate election would be held. It appears that Kerr was not advised of this precedent. But even if he had been, Byers and Murphy had previously advised that he could not contradict one act of state by a later one – so presumably Byers would have taken the view that having dismissed the Whitlam Government, Kerr could not, shortly afterwards, have restored it to government.

Sir Maurice Byers CBE, QC

In any case, Byers' advice that Kerr could proceed with the dissolution was right – but for a slightly different reason. The convention has always been that a Prime Minister defeated in the lower house must either secure a dissolution or resign. Fraser, upon his defeat in the House of Representatives, either had to secure a dissolution or resign. He secured a dissolution, which satisfied his obligations. There was no breach in convention in granting it – although Kerr always had the choice of refusing it and reinstating Whitlam, as the Victorian example showed.

Later advices

After the dismissal of the Whitlam Government, Sir Maurice Byers continued to advise both the Fraser and Hawke Governments, during less turbulent times. His advices moved back to the more comfortable legal domain and seem to have been more regularly respected and given effect. These opinions (i.e. the ones kept secret by the Archives) deal with everything from quite contemporary problems, such as whether Commonwealth officers can be compelled to give evidence to a State royal commission,[62] to the more eclectic, such as whether a law that prohibited unauthorised military drills would have the effect of banning marching girls.[63] There is a fascinating pre-*Cole v Whitfield* opinion about whether a goods and services tax would breach ss 92 and 114 of the Constitution,[64] and another interesting opinion about the legal basis for the power to call out the troops after the Hilton bombing, in what became known as the siege of Bowral.[65]

Being a Solicitor-General is one of the most demanding, but no doubt rewarding, of jobs. It mixes important legal issues with issues of policy and sometimes high political drama. Serving two masters – the government of the day and the law – is a difficult task at the best of times. Sir Maurice had to manage it in the worst of times. Some of his choices may be criticised, as I have, and I don't think that Solicitors-General are best equipped to deal with matters such as advice on the reserve powers – but I do think it remains correct to say that Sir Maurice's opinions overall are masterful, insightful and most importantly helpful, from a policy development perspective. They are testimony to the high regard in which Sir Maurice continues to be held, and they should be released (again) by the National Archives so that all can have access to them. BN

ENDNOTES

1 'Treaties Commission Bill 1974 (Qld)', October 1974, p 174: National Archives of Australia ('NAA') A3177 BYERS 1973-1976.
2 'Racial Discrimination Bill', February 1975, p 245: NAA A3177 BYERS 1973-1976.
3 (1982) 153 CLR 168.
4 'Solicitor General's Opinions – Byers 1973-1976': NAA A3177 BYERS 1973-1976.
5 'Solicitor General's Opinions – Byers 1977-1979' NAA A3177 VOL 12; and 'Solicitor General's Opinions – Byers 1980-1983' NAA A3177 VOL 13.
6 *Hocking v Director-General of the National Archives of Australia* [2020] HCA 19.
7 'Constitution, s 128: *Constitution Alteration (Simultaneous Election) Bill 1974*' December 1973: NAA A3177 BYERS 1973-1976.
8 Memorandum by Sir Paul Hasluck, 'The Proposed Referendum, March, 1974', p 29: NAA: M1767 4.
9 Letter by Sir Paul Hasluck to the Prime Minister, 11 April 1974: NAA A4204 1993/285.
10 Memorandum by Sir Paul Hasluck, 'The Crisis of April, 1974', p 34: NAA: M1767 4.
11 Sir John Kerr, 'Notes relevant to Legal Opinions and Advice Available to the Governor-General in connection with the Constitutional Crisis October/November 1975': NAA M4081 2/17.
12 'Joint Sitting of the House of Representatives and the Senate – Section 57 of the Constitution' July 1974: NAA A3177 BYERS 1973-1976.
13 Sir John Kerr, 'Notes relevant to Legal Opinions and Advice Available to the Governor-General in connection with the Constitutional Crisis October/November 1975': NAA M4081 2/17.
14 (1974) 131 CLR 432.
15 (1975) 134 CLR 81.
16 Compare Whitlam's implausible claim that 'Kerr was shaken when the High Court heard a challenge to Halsuck's right to grant a double dissolution in April 1974 on the ground that the Senate had twice rejected the *Petroleum and Minerals Authority Act* and Hasluck's [sic] right to submit the Bill to the joint sitting in August' and that the Court 'overruled Hasluck': Gough Whitlam, 'The Coup 20 years after' in Michael Coper and George Williams (eds), *Power, Parliament and the People* (Federation Press, 1997) 141. It was the Whitlam Government's advice, not Hasluck, that was found wanting. Kerr's view was upheld by the Court, so he was unlikely to have been shaken by it. Further, it was Kerr, rather than Hasluck, who submitted the Bill to the joint sitting.
17 Senator Willesee, the Minister for Foreign Affairs, told Hasluck that Whitlam had waited till he was out of the country to 'pull the trick' as he would have been 'dead against that': Memorandum by Sir Paul Hasluck, 'The Crisis of April, 1974', p 32: NAA: M1767 4.
18 Memorandum by Sir Paul Hasluck, 'Mr Whitlam Looks Ahead, March 1974', p 26: NAA: M1767 4.
19 Commonwealth, *Parliamentary Debates*, Senate, 3 April 1974, 637.
20 Memorandum by Sir Paul Hasluck, 'Proposed Referendum, March 1974', pp 29-30: NAA: M1767 4.
21 Michael Lallo, 'Leaks, The Lodge and a life in politics, Laurie Oakes tells all', *Sydney Morning Herald*, 21 November 2015: https://www.smh.com.au/entertainment/tv-and-radio/leaks-the-lodge-and-a-life-in-politics-laurie-oakes-tells-all-20151019-gkcs9t.html.
22 For contrasting accounts of Bjelke-Petersen's role in the affair and the views of his legal advisers as to the effectiveness of this manoeuvre, see: Joh Bjelke-Petersen, *Don't You Worry About That!* (Angus & Robertson, 1990) 108-113; and Hugh Lunn, *Johannes Bjelke-Petersen – A Political Biography* (UQP, 1984) 172-6.
23 Geoffrey Sawer, 'The Gair Affair – A tangled constitutional conundrum', *The Canberra Times*, 4 April 1974, p 2.
24 Bob Bauding, 'The night of the long prawns', *The Australia*n, 4 April 1974, p 1.
25 Commonwealth, *Parliamentary Debates*, Senates, 2 April 1974, p 572.
26 E J Bunting, Minute, 'Meeting in Prime Minister's Room, 3 April 1974, 12.20pm': NAA A1209 1975/1213.
27 E J Bunting, Minute, 'Meeting in Prime Minister's Room, 3 April 1974, 12.20pm': NAA A1209 1975/1213.
28 Commonwealth, *Parliamentary Debates*, Senate, 4 April 1974, 667.
29 Commonwealth, *Parliamentary Debates*, Senate, 3 April 1974, 638.
30 Commonwealth, *Parliamentary Debates*, Senate, 3 April 1974, 606.
31 Commonwealth, *Parliamentary Debates*, Senate, 3 April 1974, 610.
32 Commonwealth, *Parliamentary Debates*, Senate, 4 April 1974, 681.
33 Commonwealth, *Parliamentary Debates*, Senate, 4 April 1974, 688.
34 'Courses available to the Australian Government in relation to the vacancy in the Senate of the place of Mr Gair', April 1974: NAA A3177 BYERS 1973-1976.
35 *Hatcher v Queensland and Weiss*, (No 38 of 1974). The proceedings were commenced by the solicitor Morgan Ryan representing Frank Hatcher, who proposed to stand in the half-Senate election in Queensland. The Crown Solicitor advised the Attorney-General that the proceedings were incompetent: Memorandum by R B Hutchison, Crown Solicitor, 10 April 1974: NAA A432 1974/214. The proceedings were discontinued on 18 April.
36 'Re Sections 44 and 45 of the Constitution', April 1974: NAA A3177 BYERS 1973-1976.
37 'George Brandis says he got the London job because he's a 'big political beast'', ABC News, 20 December 2017: https://www.abc.net.au/news/2017-12-20/george-brandis-a-big-political-beast/9275414.
38 Memorandum by Sir Paul Hasluck, 'The Crisis of April, 1974', p 35: NAA: M1767 4.
39 Daniel Connell, *The Confessions of Clyde Cameron 1913-1990 as told to Daniel Connell* (ABC Book, 1990) 219.
40 A copy of the letter is printed in: Clyde Cameron, *The Cameron Diaries*, (Allen & Unwin, 1990) 474.
41 Clyde Cameron, Hand-written notes for memoirs: National Library MS Acc09.007 box 109.
42 Letter by Sir John Kerr to Sir Martin Charteris, Buckingham Palace, 11 June 1975: NAA AA1984/609 Part 1.
43 Sir John Kerr, 'Dismissal of Mr Whitlam, Mr Cameron and Dr Cairns', undated: NAA M4524 9.
44 Telegram from the Hon J A Jensen to the Governor-General, 11 December 1918: NAA: A11047 CONSTITUTIONAL 6 (p 89).
45 Letter by the Governor-General to the Secretary of State for the Colonies, 20 December 1918: NAA: A11047 CONSTITUTIONAL 6 (p 11).
46 Frank Brennan, 'Termination of Appointment of Ministers of Crown', Opinion Number 1485, 3 March 1931, in Peter Benson and Adam Kirk (eds), *Opinions of the Attorneys-General of the Commonwealth of Australia*, Vol 3: 1923-45, (Attorney-General's Dept, 2013) 247.
47 (2009) 76 NSWLR 99, 112-3 [44]-[47].
48 Letter by Sir Martin Charteris to Sir John Kerr, 19 June 1975: NAA AA1984/609 Part 1.
49 The dismissals occurred under s 64 of the Constitution in all three cases, but the major difference was that the dismissal of Cameron and Cairns occurred upon the advice of the Prime Minister, whereas the dismissals of Whitlam was the exercise of a reserve power. If anything, this difference would make the dismissal of Whitlam even less likely to be justiciable.
50 See further: Anne Twomey, 'Legal Advice by Judges on the Exercise of Reserve Powers' [2016] *Public Law* (April) 285.
51 'Opinion – Governor-General's Instructions', September 1975: NAA A3177 BYERS 1973-1976.
52 'Letters Patent Relating to the Office of the Governor-General', November 1983: NAA A3177 VOL 13.
53 'Governor-General's Powers: Potential Refusal of Supply', November 1975: NAA A3177 BYERS 1973-1976. A copy is also available online in NAA M4081 2/6.
54 'Letters Patent Relating to the Office of the Governor-General', November 1983: NAA A3177 VOL 13.
55 See further: Anne Twomey, 'The exercise of reserve powers in Victoria from 1912-1955' (2014) 39 *Australian Bar Review* 198.
56 See the Governor's records of these events at Public Records Office Victoria ('PROV') VPRS 7571/P001/18.
57 See further: Davis McCaughey, Naomi Perkins and Angus Trumble, *Victoria's Colonial Governors 1839-1900*, (MUP, 1993) 181-2.
58 Henry Turner, *A History of the Colony of Victoria* (Longmans, Green & Co, 1904) Vol II, 132-4; and Raymond Wright, *A People's Counsel – A History of the Parliament of Victoria 1856-1990* (OUP, 1992) 75-8.
59 Henry Turner, *A History of the Colony of Victoria* (Longmans, Green & Co, 1904) Vol II, 199-200.
60 The Chief Justice of Victoria and the Chief Justice of the High Court were both consulted. A C Castles, 'Now and Then' (1988) 62 ALR 472, 473-4; and Philip Ayres, *Owen Dixon*, (The Miegunyah Press, 2003) 235-8.
61 The Governor told the Premier that he could either resign voluntarily or 'at the Governor's request', meaning a forced resignation. The Premier refused to resign voluntarily, so his resignation was forced. See the relevant correspondence between the Premier and the Governor: PROV VPRS 7571/P001/18. The Premier also told the press that he had tendered his resignation 'but not voluntarily': 'Governor's 'No' to Hollway – Asks Premier to Resign', *Herald*, 31 October 1952.
62 'State Inquiries: Power to Compel Production of Commonwealth Documents or the Giving of Evidence by Commonwealth Officers', December 1977: NAA A3177 VOL 12.
63 'Crimes Act 1914, Section 27: Proclamation by the Governor-General to Prohibit Unauthorised Military Training' August 1978: NAA A3177 VOL 12.
64 'Broad Based Retail Tax: Constitution, ss 92 and 114' August 1978: NAA A3177 VOL 12.
65 'Call out of the Defence Force', February 1978: NAA A3177 VOL 12.