

ARTICLES

E G Whitlam

THE MACHINERY OF DEMOCRACY

The University of Adelaide Foundation lecture delivered by the Hon E G Whitlam, AC, QC, the Law Centenary Visiting Professor, and former Prime Minister of Australia (1972-1975), in the Bonython Hall on Thursday 28 April 1983. Professor D R Stranks, Vice-Chancellor, presided.

Triennial Elections under the Constitution

The State politicians who drafted and the British Parliament which enacted the Commonwealth of Australia Constitution Act intended that there should be an election **every three years** for the whole of the House of Representatives and for half the Senate. That system is in disarray. In the nine years from the premature election for the House in 1963 to 1972 there were four separate elections for the House and three for the Senate. In the nine years from the double dissolution in 1974 to 1983 there were five elections for the House of Representatives. On only two of those occasions was there an election for half the Senate; on the other three occasions there was an election for the whole of the Senate. A week ago all the members of the House and the Senate were sworn in; unless the Constitution is altered half the Senators will have to face the electors in no more than two years' time and would probably do so in November or December next year. In that case it is overwhelmingly likely that the members of the House of Representatives would face the electors at the same time.

Premature House of Representative Elections

The expectation of triennial elections was fulfilled for the first half century. Once only, in 1914, did disagreements between the Houses lead to a double dissolution. Not till 1929, following the defeat of a year-old government in the House, was an election held for the House alone. The government then elected was itself defeated two years later, and the normal triennial election for the Senate was able to be held at the same time as the election for the House. Following a second double dissolution in April 1951 there was, for the first time, an election for the Senate alone in May 1953. In May 1954 there was, for only the second time, an election for the House of Representatives alone. Eighteen months later Menzies, exercising his prerogative under the Westminster system, advised the Governor-General to dissolve the House and to order elections to fill the places of the long-term senators elected in April 1951.

Menzies' sleight-of-hand did not, however, resolve the difficulties for any newly elected government in having to wait many months before the senators elected with it could commence their terms of office. After the 1955 elections the House commenced its term on 15 February 1956 but the senators on 1 July. Between 1934 and 1946 the interval between the election and installation of senators had never been less than eight months and once it was over ten months.

In May 1956 the Government moved for the appointment of a Joint Committee on Constitutional Review. The committee consisted of two

Liberal and two ALP senators and four ALP, four Liberal and two Country Party members of the House of Representatives. I proposed to make a minority report in favour of simultaneous elections for the two Houses if the committee did not recommend them. In the event the committee, with Senator Wright (Liberal, Tasmania) alone dissenting, recommended in its 1958 and 1959 reports an alteration to the Constitution to provide that a senator should hold his place until the expiry or dissolution of the second House of Representatives to expire or be dissolved after he was chosen.

The necessity for such an amendment of the Constitution soon became more obvious than ever. After normal triennial elections in 1958 and 1961 Menzies again put elections out of kilter by holding a House of Representatives general election in November 1963 twelve months before it was due. He left a long-standing legacy of instability. After the change of government in December 1972 the House of Representatives had to work with a Senate elected in a completely different electoral climate in November 1967 and November 1970. The older half of the Senate was not due to face the people for another year and a half.

Reform by Federal Referendums

The proposal to synchronize the elections and terms of members of the Senate and House of Representatives was put to the electors at a referendum in May 1974, at the same time as the election following the double dissolution in April 1974. Although the Liberal and Country Parties opposed the referendum, it was carried in New South Wales and only narrowly failed to obtain the required support nationwide. On the morning of 11 November 1975 I advised the Governor-General on the telephone to submit a similar bill to the electors at the same time as an election for half the Senate; I arranged to give him that advice in writing at lunch time. Inexplicably he did not put the bill to the electors at the time of the elections following the double dissolution which he arranged that afternoon. The climate for carrying the referendum could not have been better.

In October 1976 the proposal was unanimously endorsed by the delegates to the Australian Constitutional Convention, including the Prime Minister and six Premiers. In February 1977 the proposal was again introduced in the federal Parliament by the Liberal-Country Party Government. It was carried in the House of Representatives by 110 to nil and in the Senate by 48 votes to 10. At a referendum in May 1977 it secured a 62.22 national vote in favour but a majority in only three states, New South Wales, Victoria and South Australia. This time the National Party Premier of Queensland and the Liberal Party Premier of Western Australia campaigned against the proposal which at the Convention seven months before they had not opposed. If the proposition had been put to the electors by the federal Liberal-National Party Government at the same time as the next federal election the two Premiers would not have opposed it and it would have been carried. For 20 years no constitutional alteration had been more thoroughly debated and had won more support among parliamentarians and electors throughout Australia.

Sham Double Dissolutions

By now, however, it had become apparent not only that the Westminster system could be abused to procure premature elections for

the House of Representatives, but that the Australian Constitution could be abused to procure premature elections for the Senate. The Prime Minister who advised the 1914 double dissolution lost the election; the bill upon which the double dissolution was granted was naturally not introduced in the new Parliament. The Prime Minister who advised the 1951 double dissolution won the election and then secured the passage of the bill on which he had sought the double dissolution. The Prime Minister who advised the 1974 double dissolution won the election and then at a joint sitting of the two Houses secured the passage of the six bills on which he had sought the double dissolution.

In November 1975 it was the Governor-General's idea to arrange a fourth double dissolution. He was not advised to grant it by the Prime Minister whom he had just dismissed but he made it a condition of his commissioning the Prime Minister of his choice. To quote the statement which Sir John Kerr attached to his letter to me and which he published immediately:

Mr Fraser will be asked . . . to advise whether he is prepared to recommend a double dissolution.

In his book three years later Sir John revealed that he had prepared the letter in which Mr Fraser confirmed that he would "immediately recommend to Your Excellency the dissolution of both Houses of Parliament". Sir John then admitted that it might seem incongruous that an Opposition which had created the 21 deadlocks should end up in the position, having become the caretaker government, of agreeing and advising that the people should have a chance to settle all the deadlocks it had created. Incongruous indeed!

In 1975 it was obvious to everyone that if Mr Fraser won the election he had no intention of introducing any of the 21 bills upon which Sir John Kerr insisted that he advise a double dissolution. The double dissolution was a transparent sham.

In February 1983 Mr Fraser sought the fifth double dissolution in our history. He did so on the basis of 13 bills which had been introduced with the 1981 budget but had not been re-introduced with the 1982 budget. For the first time a Prime Minister had to write two letters to the Governor-General before securing a double dissolution. The Governor-General was scrupulous to highlight Mr Fraser's advice that the bills were still "of importance to the Government's budgetary, education and welfare policies". In Mr Fraser's press statement the bills were perfunctorily mentioned in a passage ten to six lines from the foot of a statement totalling 83 lines.

The election campaign had not proceeded far before Mr Fraser had to choose between his quiet advice to the Governor-General that the bills were of importance to his Government and a public declaration that, if he was elected, he would not proceed with the bills. For a second time a double dissolution was shown to be a transparent sham. The processes of November 1975 and February 1983 demonstrated that a double dissolution could be procured by a Prime Minister whenever he thought it advantageous to have an election for the whole of the Senate just as Menzies had shown in 1951 and 1963 that a Prime Minister could procure an election of the House of Representatives whenever he thought it advantageous.

Senators as well as members of the House of Representatives thus share an objection to having surprise elections sprung on them by the Government. If, as was once suggested, Prince Charles had been Governor-General he would have been as easily manipulated by the Prime Minister as his lowlier predecessors. Not only must there be synchronized elections and terms for the members of the two federal Houses but the duration of the terms must be fixed.

By now electors are so aware of the abuses to which Prime Ministers can subject the Constitution as it stands that they are more likely than ever before to preclude such abuses in the future. This was the situation with the 1977 referendums. Electors were so exasperated by the perversion of the Constitution in filling the two Senate vacancies in 1975 and the perversity of septuagenarian judges that they carried the constitutional alterations in all States by votes in favour of 77.2% and 80.1% respectively.

Reform by State Legislation

The Australian Constitutional Convention is meeting in Adelaide this week. Most of the delegates are members of the State Parliaments and they will concentrate their efforts on proposed alterations to the federal Constitution. When one is considering means to close off demonstrated avenues of abuse in the federal Constitution one should not overlook the potential and demonstrated avenues of abuse in the State Constitutions. The powers of the State Governors, who are British officials, and the powers of the State Legislative Councils are unsatisfactorily defined. Only the Legislative Council of New South Wales is expressly forbidden to reject money bills from the Assembly. In the 1940s both the Victorian and Tasmanian Councils rejected money bills and sent the Assemblies to the people without having to go to the people themselves. State abuses have not been as frequent or blatant as federal abuses, but State abuses there have been and can be.

This month the Premiers of New South Wales, Victoria, South Australia and Western Australia have announced changes to the machinery for electing their Parliaments. Mr Wran, who in 1981 secured approval by referendum for four-year terms for the New South Wales Assembly, is now considering making the term mandatory. Mr Cain announced that the three parties in the Victorian Parliament had agreed on four-year terms for the Assembly and would discuss fixed terms. On the other hand, Mr Sumner, South Australia's Attorney General, announced that legislation would soon be introduced for fixed three-year terms.

The proportional system of voting was introduced for the Senate by the federal Labor Government in 1949. In 1975 the Dunstan Government led the way among the States in having the Legislative Council of South Australia elected from a State-wide constituency on the proportional system. In 1978 the Wran Government achieved by referendum the same reform in New South Wales. Now the Burke Government aims to achieve it in Western Australia. On the other hand, the Victorian parties cannot agree to change the traditional system of electing the Legislative Council from a number of provinces, although they have agreed that the voting will follow the principle of one vote, one value. It would not be out of place and it should be quite easy for the Premiers of the four states to co-ordinate their constitutional proposals because, for the first

time since the fall of Steele Hall in June 1970, the four of them belong to the same party.

Prospects of Co-operation between South Australia, Victoria and New South Wales

It would be particularly beneficial for South Australia if the Prime Minister and the Premiers of New South Wales, Victoria and South Australia were to continue the consultations which they have had at the National Economic Summit and at the Australian Constitutional Convention on matters of common interests. It is providential that Messrs Hawke, Wran, Cain and Bannon are law graduates from Australian Universities. The three contiguous States share many of the nation's basic resources. They are the nation's manufacturing heartland. They are handicapped by the failure of governments hitherto to pool their arbitration tribunals, railway systems, electricity grids, water resources and even their meat inspectorates.

At the Summit no speaker followed up Mr Wran's advocacy of a single arbitration system. The senior union official from New South Wales actually prepared a speech in which he repudiated Mr Wran's suggestion. The ACTU blue-pencilled the abrasive passage. At the time of the 1946 federal elections a majority of electors voted in favour of the federal Parliament having power over industrial laws, but the referendum was not carried because it secured a majority in only three States instead of a majority in a majority of States. Nevertheless any State can refer its industrial jurisdiction to the federal Parliament.

The Dunstan Government conferred lasting benefits on South Australia by handing over its railways to the National Railways. New South Wales and Victoria should do the same. In no other federal system — the United States, Canada, West Germany, India — are railways conducted by State Governments or in State borders. There would be great economic gains from co-ordinating the railways between Adelaide and the Iron Triangle, through Victoria and New South Wales to Brisbane.

The Hydro-Electric Commission of Tasmania is not the only despotic and secretive Quango. The SEC in Victoria has been substantially unchanged from the form it was given 60 years ago under the great Sir John Monash. ETSA and the Electricity Commission of New South Wales enjoy the forms they were given after World War II. The Commonwealth heavily subsidises the capital works which deliver coal from Leigh Creek and hydro-electricity from the Snowy Mountains.

Future generations will have little patience or respect for the partners in the River Murray Commission if they do not soon consummate steps to purify the waters of our greatest river. All four governments must co-operate to ensure that purity. Inaction by a single State can foul the waters.

As far back as 1964 South Australia agreed to transfer its meat inspection services to the Commonwealth. New South Wales is to do so next July. It will be easier to clean up the Augean stables investigated by Justice Woodward if Victoria now does the same. Tens of millions of dollars would be saved.

The uncertainty of election dates has been responsible for the growing failure of State as well as federal politicians to come to grips with a

range of structural problems which are becoming endemic. The Governments of South Australia, Victoria and New South Wales could spare more time to tackle common problems if their six Houses of Parliament were all to face the electors on the same fixed date.

Both Federal and State Elections on Fixed Dates

The instability of all Parliaments in Australia is due as much to the fluctuating dates of the elections as to the frequency of elections. In the United States elections are held on firm dates in alternate years — the Tuesday after the first Monday in alternate Novembers — for all political positions which are due to be filled — the President, senators, all Congressmen, State governors, State legislators and officials and, in some States, judges. Since December 1949 in a supposedly triennial system of elections, there have been 19 federal elections in Australia. In the United States in the same time there have been 17. In Australia there has been a three year interval between Federal elections only twice; once the interval was just 12 months. There have been countless elections for all the State Houses of Parliament. In Tasmania there are elections for some Legislative Council seats every year. In the United States there have been only 17 State election dates all told, because all State elections were held on the same dates as the elections for the Senate and the House of Representatives.

The federal and State Constitutions do not require State and federal elections to be held on different dates. They are held on different dates to meet the convenience of the Commonwealth Electoral Office. It is of course possible for the Commonwealth and any State to co-operate in other arrangements through the Electoral Office. For instance, the federal and State electoral rolls are compiled and maintained by the Electoral Office in all States except Queensland and Western Australia. Harmony between the two Houses in each of our bicameral Parliaments would be enhanced and deadlocks between them would be reduced by having a fixed election date for both Houses. Public respect for all Australian Parliaments and co-operation between federal and State Parliaments would be enhanced in so far as they were all elected on the same day. Whatever criticisms are made of the processes of the American federal system, everybody is content with having a predictable election day. This not only reduces the incidence of disagreements between the two Houses in Washington but in all the State capitals. It also reduces in the United States the federal — State buck-passing which is encountered in all State and most federal election campaigns in Australia. In Australia State elections are largely and in the United States federal elections are often conducted in a by-election climate. In the United States the parties have to conduct their federal and State election campaigns at the same time. They have to put forward co-ordinated federal and State policies. They have every incentive to promote co-operation rather than confrontation between the Federal Congress and the State Legislatures. As the Australian Governments proceed with their plans to reform their legislatures they should seize every opportunity to emulate the system which has found acceptance for two centuries in the oldest and greatest of federal democracies. The most urgent task for members of both federal and State Parliaments is to standardize and stabilize the machinery of democracy in Australia.