

Two Refusals of Royal Assent in Victoria

GREG TAYLOR*

Abstract

The Governor of Victoria, having objected to two Bills passed by Parliament in the 1850s, received advice from the colonial government to refuse assent to them. These are the only occasions on which the Royal assent has been refused locally in Victoria, and one of the very few such incidents in Australian history. One of the Bills would have implied a statement that UK law of the day was incompatible with religious liberty, and thus raised sectarian and Imperial complications; the other was a constitutional amendment passed without following the prescribed procedure. This article reconstructs the events and the public reaction, as far as possible; considers whether the Governor acted rightly; and concludes that the Crown should refuse assent if advised to do so by its Ministers, despite occasional views to the contrary.

1. Introduction

When, as a result of a recent minor controversy in Victoria (involving delay in the granting of Royal Assent to a certain Bill),¹ attention was drawn to the possibility of the refusal of Royal Assent by a state Governor, nothing was known about two incidents in the 1850s in which Royal Assent was refused by the Governor of Victoria except that they had happened. Even that knowledge was shared by only one or two specialists and readers of such arcana as Todd's *Parliamentary*

* Senior Lecturer, Law School, Monash University. I should like to thank Ray Purdey, Clerk of the Legislative Assembly, Victoria, and Clerk of the Parliaments, for granting permission to refer to material in the Parliamentary archives and Sean Marshall in the Papers Office of the Legislative Assembly, Victoria, for his assistance with those materials; and also the staff of the La Trobe Reading Room, State Library of Victoria. I am also grateful to Jeffrey Goldsworthy, Geoff Lindell, Charles Parkinson, Francis Reynolds and Megan Richardson for their comments on a draft; the usual caveat applies. Some of the materials in this note are the result of a Canadian Studies Award from the federal Canadian Government. I cannot adequately express my gratitude for this opportunity, or for the hospitality of the Law Schools of the Universities of Ottawa and Alberta, and of numerous individual scholars, while I was in Canada.

1 There are two excellent notes on this incident: Anne Twomey, 'The Refusal or Deferral of Royal Assent' [2006] *Public Law* 580 at 599; John Waugh, 'Government Control of Royal Assent in Victoria' (2006) 8(4) *Constitutional Law & Policy Review* 69. Principal primary sources include Victoria, *Parliamentary Debates*, Legislative Assembly, 18 October 2005 (The Speaker) at 1436; Victoria, *Parliamentary Debates*, Legislative Council, 19 October 2005 (Bill Forwood, J Madden, B Atkinson) at 1397; see further Victoria, *Parliamentary Debates*, Legislative Council, 15 November 2005 (Bill Forwood) at 1870; Victoria, *Parliamentary Debates*, Legislative Council, 24 November 2005 (The President) at 2301; Victoria, *Parliamentary Debates*, Legislative Assembly, 15 November 2005 (The Speaker) at 2025–2026.

Government in the British Colonies.² This note seeks to fill the gap thus revealed in the documentation and analysis of our legal and constitutional history and to contribute in a small way to what will be the work of generations of scholars: filling the countless gaps in our knowledge of Australian legal history of which the state of affairs just described is symptomatic.³

It is of course well known that Royal Assent has not been refused to a Bill passed by both Houses of the United Kingdom since the early 18th century, and it seems clear that the Queen would now be breaching a convention of the British Constitution if she did so at least without, or contrary to, ministerial advice, always assuming that there were no highly exceptional circumstances involving threats to democracy itself which were not susceptible of correction at a later election.⁴ In modern times, there is ‘nothing to be said for a power to refuse assent to a Bill because the [Crown] thinks it wrong’.⁵ The consequent lack of examples of the refusal of assent by the Crown’s representative in Great Britain or the United Kingdom since Queen Anne’s day makes the two cases that occurred in Victoria almost exactly 150 years after the last British case, and about 150 years before the present day, all the more interesting.

In both Victorian cases, ministerial advice to refuse assent was forthcoming — although in one of them, as we shall see, it seems that the Governor may have strongly suggested the tendering of such advice to an unenthusiastic Ministry, and left them little choice about whether to provide it. My conclusion will therefore be that the Governor acted rightly in at least one case (the other one) and the correctness of his action in the second falls to be decided by other considerations. It follows that there must, in my view, be cases in which the Royal Assent may properly be refused on advice, a view on which I shall elaborate later.

It is necessary by way of introduction to distinguish refusal of assent from disallowance by the Imperial authorities, especially as the Governor of the day in the 1850s occasionally referred confusingly to the exercise of his own local veto as a ‘disallowance’. The power to disallow colonial legislation properly so called

2 Alpheus Todd, *Parliamentary Government in the British Colonies* (2nd ed, 1894) at 169.

3 By way of comparison, there is at least some information available on comparable Canadian cases: Eugene Forsey, ‘Disallowance of Provincial Acts, Reservation of Provincial Bills and Refusal of Assent by Lieutenant-Governors Since 1867’ (1938) 4 *The Canadian Journal of Economics and Political Science* 47 at 55; Eugene Forsey, ‘The Present Position of the Reserve Powers of the Crown’ in H Evatt & Eugene Forsey, *Evatt and Forsey on the Reserve Powers* (1990) at lviif; Peter Hogg, *Constitutional Law of Canada* (4th ed, 1997–2004) at 9–17; Frank MacKinnon, *The Government of Prince Edward Island* (1951) at 154; Frank MacKinnon, ‘The Royal Assent in Prince Edward Island: Disallowance of Provincial Acts, Reservation of Provincial Bills, and the Giving and Withholding of Assent by Lieutenant-Governors’ (1949) 15 *The Canadian Journal of Economics and Political Science* 216; John Saywell, *The Office of Lieutenant-Governor: A Study in Canadian Government and Politics* (1957) at 221.

4 This was last seriously canvassed during the Home Rule Crisis, which presented the additional complication of occurring just after another major change in the constitution, the enactment of the *Parliament Act* 1911 (UK), had made it arguable that the convention about Royal Assent should also change. See Vernon Bogdanor, *The Monarchy and the Constitution* (1995) at 129–133.

5 Ivor Jennings, *Cabinet Government* (3rd ed, 1959) at 400.

was a power vested in the Queen and was not the equivalent of her moribund power to refuse Royal Assent to British legislation. Rather, it was exercised as an Imperial override on colonial legislation assented to locally but which conflicted with Imperial interests, affected the Crown's position or dealt with certain sensitive topics such as marriage and divorce.⁶ There was a related power in the Governor to refer doubtful legislation to the Queen (in reality of course to the Colonial Office and its sister departments of state in London) for consideration without either assenting to it or denying assent. This was referred to as 'reservation', and was required in particular cases by legislation or the Royal Instructions to the Governor.

The (Imperial) power of disallowance was exercised only once in the history of responsible government in Victoria — in relation to Act No 95 (1860) relating to the colony's naval defence, apparently because the Act was *ultra vires*⁷ — although we shall see that another Act only narrowly escaped the same fate in 1865. Five Victorian Bills were reserved by the Governor under responsible government for a verdict in London but not assented to there, the last two cases occurring in 1862.⁸

The power of disallowance from London has now been abolished by s 8 of the *Australia Act* 1986 (Imp & Cth). The power to reserve bills for the Queen's personal assent may still be exercised but, under ss 7(4) and 9(2) of the same Acts, the Queen may assent in person to bills only when personally present in Victoria, and no bill is ever required to be reserved. The power might possibly therefore be used again only for symbolic or ceremonial reasons, although even this is unlikely. Both powers have perished with the Imperial relationship that justified and sustained them.

The powers that survive as the functional equivalent in Victoria of the Queen's powers to give and to withhold Royal Assent to bills passed by UK Parliament are the powers of the Governor to give or to withhold Royal Assent. In what follows, I shall refer to the withholding of Royal Assent by the Governor not as disallowance (except in quotations which use that term), but as withholding of Royal Assent or vetoing a bill.

Then, as now, the Governor's powers to assent and to withhold assent were not clearly granted by Victoria's basic constitutional document, which during the events to be described here was the original Constitution for responsible

6 R Campbell, 'Desertion and Divorce: the Colony of Victoria, Australia, 1860' in Eric Ives & A Manchester (eds), *Law, Litigants and the Legal Profession: Papers Presented to the Fourth British Legal History Conference at the University of Birmingham, 10–13 July 1979* (1983).

7 See the opinion of the law officers reproduced in Daniel O'Connell & Ann Riordan (eds), *Opinions on Imperial Constitutional Law* (1971) at 173f.

8 See the list in John Quick & Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1976) at 695. Thomas Webb, *A Compendium of the Imperial Law and Statutes in Force in the Colony of Victoria* (2nd ed, 1892) at 120, adds a reference to a bill from 1853 (before responsible government) and mentions also a final case from 1864. The latter can only be a reference to Act No 207, the statute which was passed in 1864 and narrowly escaped disallowance in 1865 for reasons that will be stated later.

government drafted in Victoria in the mid-1850s and contained in Schedule 1 to the *Victoria Constitution Act 1855* (18 & 19 Vic c 55).⁹ Section 1 of the *Constitution Act* made ‘Her Majesty’ a constituent part of the legislative process, and, it appeared, its principal motor:

1. There shall be established in Victoria, instead of the Legislative Council now subsisting, One Legislative Council and One Legislative Assembly, to be severally constituted in the Manner herein-after provided; and Her Majesty shall have Power, by and with the Advice and Consent of the said Council and Assembly, to make Laws in and for Victoria, in all Cases whatsoever.

In today’s terms, we should say that, under this section, the Crown was a constituent part of Parliament, and this indeed is what s 15 of the *Constitution Act 1975* (Vic) now says; but even the term ‘Parliament’ was not used in the first *Constitution Act* of Victoria to describe the legislature — it conferred the name ‘Parliament’ upon itself by Act No 1 (1857) s 3 — and, as can be seen from the quotation above, the *Constitution Act* even went so far as to continue the fiction of the Crown as the principal legislator acting only with the advice of the real legislative bodies.

In his capacity as part of the legislative branch, and in formal terms the chief element of it, the Governor thus had a power to declare or withhold the Crown’s assent to legislation passed by both houses of the legislature, and Imperial statutes authorised him also to reserve the Bill for consideration in London.¹⁰ With the obvious exception that there was no equivalent to the last-mentioned power in the British Constitution, this conferred upon the Governor a function equivalent to the Queen’s in the United Kingdom in relation to bills passed by the Parliament of that country.

The Governor was however also the British Empire’s (the Colonial Office’s) representative in the colony as well as its constitutional sovereign or Queen-substitute. In colonies possessing responsible government, as Victoria did from November 1856 and thus during the events in question here, the Governor was expected, as a general rule, to exercise the power in accordance with the same conventions that bound the Queen, being her representative in the colony. Unlike the Queen, however, the Governor had two possible sources of advice in this regard, and there was the possibility of occasional discordance between the advice of his responsible Ministers and his duty to the Empire, either as conveyed to him in the Royal Instructions to the Governor or in despatches and other communications from the Colonial Office, or as perceived by him on the spot.¹¹ It is in this dilemma that Sir Henry Barkly was caught in the first instance of refusal of Royal Assent by a Governor under responsible government.

⁹ Act No 22 (1857) (Vic) s 10 provided that the Schedule might be referred to as the *Constitution Act*. I adopt that usage here.

¹⁰ *Australian Constitutions Act 1842* (Imp) (5 & 6 Vic, c 76) s 31; *Australian Constitutions Act 1850* (Imp) (13 & 14 Vic, c 59) s 12; *Victoria Constitution Act 1855* (Imp) (18 & 19 Vic, c 55) s 3.

¹¹ For a reference to and a discussion of another occasion on which such a conflict occurred, see Michael Clarke, ‘Victorian Political Deadlocks’ (1928) 13 *Victorian Historical Magazine* 65 at 78; Charles Parkinson, ‘George Higinbotham and Responsible Government in Colonial Victoria’ (2001) 25 *Melbourne University Law Review* 181 at 189, 195, 199, 204.

2. *The Oaths of Office Bill*

A. *Background*

The immediate genesis of the Oaths of Office Bill 1857 (Vic), to which Royal Assent was to be refused by the Governor on 24 November 1857, lay in a remark by John O'Shanassy in the Legislative Assembly on 2 June 1857. John O'Shanassy had been Victoria's second Premier and was in office (for the first time only, as it turned out) from 11 March to 29 April 1857. By the start of June he was out of office again, and Victoria's first Premier, William Haines, had resumed the premiership. During a debate about the continuation of state aid to religion, for which s 53 of the *Constitution Act* then provided,¹² O'Shanassy proposed — according to the unofficial and not always completely accurate Victorian 'Hansard' then published by the *Argus* — an amendment to the motion by which there should be added 'a declaration of right [asserting] the religious equality of all Her Majesty's subjects in the colony of Victoria without exception, and that this should be fundamentally guaranteed'.¹³ The language of fundamental guarantees is one to which we are only now becoming accustomed in Australian law. It must have seemed even more startling and alien in 1857.

Slightly later in the same debate, just before the motion was put, O'Shanassy elaborated on his proposal in an exchange with Attorney-General Michie: it was for 'the removal of certain restrictions and disabilities which at present existed, such as the provision of separate oaths prescribed for him on taking office, which he looked upon as an insult to him as a Roman Catholic'.¹⁴ *The Age's* Parliamentary report however has O'Shanassy repeating his statement that he 'wanted some guarantee of entire civil and religious liberty', to which Attorney-General Michie is said to have replied that 'the hon. member had chosen the largest term in Johnson's Dictionary'.¹⁵ Both reports however have Attorney-General Michie reacting favourably to the proposal to remove the separate oath prescribed for Roman Catholics, and indeed he repeated this sentiment in another debate in mid-July.¹⁶ It is worth noting at this point the tension between the noble but limited ambition of amending the law of oaths to remove an invidious distinction and the greater hopes entertained by members such as O'Shanassy for an express reference to the broad general principle of religious equality, for it was this tension that was to bring about, in part, the refusal of Royal Assent to the Oaths of Office Bill.

A record still exists in the Victorian Archives¹⁷ of the separate oath which O'Shanassy — along with his fellow Roman Catholic and Irish nationalist Charles Gavan Duffy — swore and subscribed upon their assumption of office in the second Victorian Ministry under responsible government on 11 March 1857. All

12 The provision was repealed from the end of 1875 by Act No 391 (1871) s 1.

13 Victoria, *Parliamentary Debates*, Legislative Assembly, 2 June 1857 at 708.

14 *Id* at 709.

15 *The Age* (3 June 1857) at 6.

16 Victoria, *Parliamentary Debates*, 15 July 1857 at 966.

17 VPRS 1091/P0000/1/V2.

others, including Attorney-General Michie when he assumed office, took what were then the usual oaths of allegiance, supremacy and abjuration, and made the declaration required by the statute 9 Geo IV, c 17, 1828 (UK) s 2 in substitution for the former sacramental test for office-holders.¹⁸ The latter statute was enacted on 9 May 1828 and thus just in time for the general reception of British statutes in what was to become Victoria that was effected by s 24 of the *Australian Courts Act* 1828 (9 Geo IV c83). The oath of abjuration, it should be explained, was an oath against the Pretender and his descendants, but there is no need to burden this note with a description of the contents of that or the other two oaths for the benefit of those who may need their memories refreshed further, as the oaths concerned have been described in a recent article by Enid Campbell.¹⁹

O'Shanassy and Duffy, however, were Roman Catholics, and therefore made none of those oaths and declarations. Instead they took a single oath provided by the *Roman Catholic Relief Act* (1829) 10 Geo IV, c 7, s 2 ('Roman Catholic Relief Act'), which, having missed the *Australian Courts Act* (1828) but by just under ten months, had come to apply in Victoria by way of a statute of New South Wales, (1830) 10 Geo IV No 9 (NSW). The *Roman Catholic Relief Act* oath contained elements of all three oaths and the declaration referred to, but also some new material. As it was this oath which O'Shanassy declared to be 'an insult to him as a Roman Catholic', I set it out here in full:

I *A.B.* do sincerely promise and swear, That I will be faithful and bear true Allegiance to Her Majesty Queen *Victoria*, and will defend her to the utmost of my Power against all Conspiracies and Attempts whatever, which shall be made against her Person, Crown, or Dignity; and I will do my utmost Endeavour to disclose and make known to Her Majesty, Her Heirs and Successors, all Treasons and traitorous Conspiracies which may be formed against Her or Them: And I do faithfully promise to maintain, support, and defend, to the utmost of my Power, the Succession of the Crown, which Succession, by an Act, intituled *An Act for the further Limitation of the Crown, and better securing the Rights and Liberties of the Subject*, is and stands limited to the Princess *Sophia*, Electress of *Hanover*, and the Heirs of her Body, being Protestants; hereby utterly renouncing and abjuring any Obedience or Allegiance unto any other Person claiming or pretending a Right to the Crown of this Realm: And I do further declare, That it is not an Article of my Faith, and that I do renounce, reject, and abjure the Opinion, that Princes excommunicated or deprived by the Pope, or any other Authority of the See of *Rome*, may be deposed or murdered by their Subjects, or by any Person whatsoever: And I do declare, That I do not believe that the Pope of *Rome*, or any other Foreign Prince, Prelate, Person, State, or Potentate, hath or ought to have any Temporal or Civil Jurisdiction, Power, Superiority, or Pre-

18 See Enid Campbell, 'Oaths and Affirmations of Public Office' (1999) 25 *Monash University Law Review* 132 at 134.

19 Enid Campbell, 'Oaths and Affirmations of Public Office under English Law: An Historical Retrospect' (2000) 21(3) *Journal of Legal History* 1 at 13–15. The forms current at the time of the events described here are in (1714) 1 Geo I Stat 2, c 13, s 1 as amended by (1765) 6 Geo III, c 53, s 1. This emerges from a clause in the Governor's Instructions preserved in sources such as CO 309/43/505 (AJCP 827); *Victorian Parliamentary Papers*, 1855–56 vol II at 607.

eminence, directly or indirectly, within this Realm. I do swear, That I will defend to the utmost of my Power the Settlement of Property within this Realm, as established by the Laws: And I do hereby disclaim, disavow, and solemnly abjure any Intention to subvert the present Church Establishment, as settled by Law within this Realm: And I do solemnly swear, That I never will exercise any Privilege to which I am or may become entitled, to disturb or weaken the Protestant Religion or Protestant Government in the United Kingdom: And I do solemnly, in the Presence of God, profess, testify, and declare, That I do make this Declaration, and every Part thereof, in the plain and ordinary Sense of the Words of this Oath, without any Evasion, Equivocation, or mental Reservation whatsoever.

So help me GOD.

This oath is not as startlingly elaborate or different as it may appear at first sight. Non-Roman-Catholics were also required to swear, for example, that they did not believe that princes excommunicated by the Pope might be murdered by their subjects — this was part of the oath of supremacy. But, of course, the very fact of having to be sworn separately could easily be seen as an assertion of second-class citizenship. Furthermore, only Roman Catholics were required to swear that their *faith* did not include the article that princes excommunicated or deprived by the Pope might be deposed or murdered by their subjects. Only Roman Catholics were required to swear not to ‘subvert the present Church Establishment’ (the declaration which others made by the Act of 1828 in lieu of satisfying the old sacramental test requiring merely the lack of an intention to ‘injure or weaken’ the established Church), and only Roman Catholics were required to swear to ‘defend to the utmost of my Power the Settlement of Property within this Realm’. This last rather sweeping clause of the oath first appeared in ‘*An Act for the Relief of His Majesty’s Popish, or Roman Catholick Subjects of Ireland*’²⁰ passed by Grattan’s Irish Parliament in 1793 and was apparently invented for the purpose of preventing the reversal of property settlements that occurred after the Civil War by those who became eligible for offices in Ireland as a result of the Act. In the *Roman Catholic Relief Act* oath the aim however was to prevent Roman Catholics from voting for the disendowment of the established Church,²¹ although this clause was, to say the least, not a very obvious means of doing so.

In Victorian law, s 32 of and Schedule C to the Victorian *Constitution Act* provided a simple oath of allegiance for those taking seats in the colonial legislature, so the oaths mentioned were not required of members of the local Parliament. This was the analogous situation to that in which s 2 of the *Roman Catholic Relief Act* applied in the United Kingdom, but as the Victorian *Constitution Act* was a later Imperial statute applying by paramount force in the colony it prevailed in Victoria in that context.²² So what was the legal basis for the oath’s applicability in Victoria? Clauses 1 and 2 of the Governor’s Royal

20 (1793) 33 Geo III, c 21, s 7. The precise words were ‘I do swear that I will defend to the utmost of my power the Settlement and Arrangement of Property in this Country as established by the Laws now in being’.

21 *Parliamentary Debates*, House of Commons, 15 June 1857, coll 1763.

Instructions required the administration of the three oaths and an oath of office, or alternatively the *Roman Catholic Relief Act* oath, to the chief officers of the colony present when the Governor was sworn in and to persons ‘who shall hold any office or place of trust or profit’ under the Crown.²³ Thus, O’Shanassy and Duffy were required to take the *Roman Catholic Relief Act* oath not, as would have been the case in the United Kingdom, because they had joined the legislature, but when they became members of the executive government, for instance, Ministers. And this requirement existed in Victoria not merely for Ministers of the Crown, but for the appointment to ‘any office in the public service’,²⁴ as the Instructions said and the first *Oaths of Office Bill* was later to confirm in its preamble.

This requirement was therefore somewhat anomalous from the start, as it involved the adaptation to the executive of an oath originally designed for members of the (British) legislature, and indeed it is clear that the Colonial Office realised that this was so. In a circular despatch to all colonies²⁵ dated 20 May 1857,²⁶ the Colonial Office, acting on advice from the Attorney-General for the Queen (ie, the chief English law officer), disapproved the practice of administering the oaths of supremacy and abjuration, or in their place the *Roman Catholic Relief Act* oath, to colonial office-holders. Unless the law provided otherwise, the circular decreed, only the oath of allegiance should be administered to all. The circular stated that the Attorney-General had indicated that the *Roman Catholic Relief Act* oath was ‘inapplicable to the case of colonial holders of office’, no doubt because the oath’s applicability was expressly restricted to members of the Imperial Parliament. This of course was a rule admirably suited to a highly diverse colonial Empire, and would have met the need for a religiously neutral oath-taking ceremony for Victorian Ministers equally admirably.

But Victoria had been overlooked. When the provisions in the Royal instructions to the Governor (and also those in the instructions to the Governor of New South Wales) that have been summarised were pointed out to the Colonial Office, the officials were clearly surprised to find that they existed at all. If the general rule indicated in the circular despatch had applied, the oath would not have

22 Witnesses giving evidence in court were not required to swear the oaths mentioned either; the common law had long recognised religious plurality in this context; while it required evidence to be given on oath, it permitted witnesses of most religions to take oaths more or less suited to their religious beliefs. See generally Australian Law Reform Commission, *Interim Report No 26: Evidence* (1985), at 106; for a contemporary illustration of the law’s liberality, see the *Ballarat Star* (21 October 1857) at 3, in which it is recorded that a witness’ conscience could be affected, it seemed, only by the killing of a rooster before evidence was given, which was done; and, in relation to the Australian Aborigines, whose religious practices were not of a type which the common law recognised as suitable for oath-taking, see (*Colonies*) *Evidence Act* 1843 (6 & 7 Vict s 1) (Imp); 1854 17 Vict, No 11 (Vic).

23 Sir Charles Hotham’s Instructions in this respect are reprinted in Victorian Parliamentary Papers, 1855–56 vol II at 607. Barkly’s are identical and can be found in CO 309/43/505 (AJCP 827).

24 VPRS 14559/P0001/1.

25 Except Mauritius. I have made no attempt to discover why Mauritius was excluded.

26 CO 854/5/416f (AJCP 1054). This was laid on the table of the Legislative Council (Victoria, *Parliamentary Debates*, 1 September 1857 at 1143), but not printed.

been required in Victoria; but Victoria's Royal Instructions to the Governor differed from those on which the ruling in the circular despatch had been based: the latter referred only to the oath of allegiance, while Victoria's provisions referred also to the oaths of supremacy and abjuration or, in place of all three oaths, the *Roman Catholic Relief Act* oath. The Colonial Office officials minuted that there had clearly been an 'oversight' resulting in the retention of 'antiquated'²⁷ provisions in Victoria (and New South Wales).

This 'oversight' was the basis on which Messrs O'Shanassy and Duffy were required, on assuming office as the Queen's Ministers of State for Victoria on 11 March 1857, to take the *Roman Catholic Relief Act* oath, while their Anglican and Protestant colleagues had to take not fewer than three oaths, and also made the declaration in lieu of satisfying the sacramental test.

B. The Oaths of Office Bill in the two Houses

As stated, O'Shanassy objected quite strongly to this state of affairs, although clearly not so strongly that his desire for office was overwhelmed by his conscientious scruples. But no doubt he, like many Roman Catholics of the time, found the oath 'offensive [... but,] in conscience, acceptable [...] in order to qualify for [...] office'.²⁸ Clearly, too, his sense of injustice was also shared by some of his colleagues in the Victorian Parliament, including Attorney-General Michie, a member of the Anglican congregation at East St Kilda, which had been influenced by the Oxford Movement and was close to Roman Catholicism in religious practice;²⁹ membership of this congregation indicates a degree of openness towards Roman Catholics that might still have been lacking on the part of contemporary 'lower' Anglicans.

On looking into the question of oaths, Attorney-General Michie clearly came across the New South Wales 'Act to simplify the oaths of qualification for office'³⁰ which had received the Royal Assent on 20 January 1857. It overrode, of course, what the Colonial Office was shortly to describe as the 'antiquated' Royal Instructions in that colony. He decided to adapt that statute for Victoria.

Section 1 of the statute of New South Wales substituted for the three oaths and one declaration, or alternatively the *Roman Catholic Relief Act* oath, a simple oath of allegiance applicable for all purposes. The Bill introduced into the Legislative Assembly of Victoria on 3 July 1857 was essentially a carbon copy of that Act. In introducing the Bill, Attorney-General Michie did not miss a further opportunity to describe some of the present oaths as 'absurd'.³¹ On 15 July 1857, he promised in the Assembly to deal with the Bill 'on an early and future evening'.³² He repeated the word 'absurd' on moving the second reading on 17 July,³³ again

27 CO 309/43/498 (AJCP 827).

28 Fergus O'Ferrall, *Catholic Emancipation: Daniel O'Connell and the Birth of Irish Democracy 1820-30* (1985) at 319.

29 Janette Bomford, *Spirit of St Kilda* (2003) at 15.

30 20 Vic No 9.

31 Victoria, *Parliamentary Debates*, Legislative Assembly, 3 July 1857 at 895.

32 Victoria, *Parliamentary Debates*, Legislative Assembly, 15 July 1857 at 966.

agreed with O'Shanassy's sentiments on the insulting nature of the oath he had been required to swear and even indicated his willingness to deviate from the model of New South Wales by omitting words describing Victoria as 'belonging to and dependent on' the United Kingdom as they were not essential. He further referred to the fact that the proposed new oath would remove the barrier to Jewish participation set up by the concluding words of the oath of abjuration and the declaration replacing the sacramental test: '... upon the true faith of a Christian'.³⁴ (There was also, it should be noted at this point, a provision in the Bill for religious persons whose religious beliefs forbade the swearing of oaths, and of course also for atheists: cl 5 of and the 'Last Schedule' to the Bill, as ultimately vetoed, provided a form of affirmation for persons who were 'unwilling from alleged conscientious motives to be sworn').

The Age's report³⁵ adds two further remarks reported to have been made by Attorney-General Michie: amusingly, at least by the standards of that age, he is said to have compared some of the promises made in the old oaths to the prohibition on marrying one's grandmother — in each case, the lack of desire to bring about the prohibited state of affairs would suffice to ensure that it did not occur, and promises not to do so were therefore superfluous. More seriously, he added that he

was of opinion that subjects of this description were of more importance than houses, or land or gold. True, it was a kind of subject they could not handle [ie, touch], and look up and price. It was beyond price. It was a right that all citizens should enjoy.

The enlightened tone continued throughout the debate. Duffy added his protest to that of O'Shanassy at having had to swear the special oath: he 'had felt his face grow hot with very shame — to make a declaration that he would not commit a crime of the greatest magnitude'.³⁶ Various verbal and minor substantive amendments were made to the Bill as Parliament considered it. The words stating that Victoria was dependent on the United Kingdom were indeed removed.³⁷

The Bill began its path towards the Royal veto, however, when George Evans, an ordained Congregationalist minister, rose and objected to its preamble. The model New South Wales statute had no preamble, but in Victoria one had been adopted, it appears, as a gesture towards asserting the principle of religious equality advocated by O'Shanassy and not merely making a mechanical change to the law. As originally drafted, the preamble ran as follows:

Whereas there is no church establishment settled by law in this colony and it is desirable and expedient that religious belief not incompatible with the welfare of

33 Id at 982.

34 Campbell, above n18 at 134–135; Campbell, above n19 at 19, 21.

35 *The Age* (18 July 1857) at 6.

36 Victoria, *Parliamentary Debates*, Legislative Assembly, 17 July 1857 at 983.

37 Id at 983.

civil society should not operate to disqualify any of her Majesty's subjects in the said colony from entering upon any public service in the said colony to which private citizens may by law be admissible.³⁸

Evans did not object to the principle, but to the words 'religious belief not incompatible with the welfare of civil society'. According to the unofficial 'Hansard',³⁹ this was

because he would not dignify with the name of "religious belief" any doctrines which were not compatible with the welfare of society, and because it would raise the question as to what religious beliefs were compatible with the welfare of society. This might lead to an enquiry before some sort of tribunal into the merits of different forms of religious belief. This might occur some day: he could conceive the bare possibility of it.

*The Age's*⁴⁰ report of the same debate, with which the *Herald*⁴¹ agrees on this point, has him saying that he was worried that a zealot might raise the accusation that an opponent's religious belief was not compatible with the welfare of society. The preamble was therefore changed to words drafted by Evans:⁴² it now started 'Whereas it is desirable in the colony of Victoria to recognise the right of all Her Majesty's subjects to absolute civil equality in respect of religious belief', and it referred to the conscientious objections of some of Her Majesty's subjects to taking the existing oaths.⁴³ Either on that day or on 4 August 1857, when it came up again,⁴⁴ the preamble was further amended so that, in its final form, it began, 'Whereas it is desirable to recognise and establish'⁴⁵ It was that last word — 'establish' — that would seal the fate of this Bill. The fatal objection that would be taken by the Governor to the Bill was foreshadowed in the Assembly on 12 August 1857, when the title of the Bill was amended to bring it into line with the preamble and make it a Bill to 'assimilate and simplify the Oaths of Qualification for Office and to recognise and establish in Victoria the right of absolute civil equality of all Her Majesty's subjects irrespective of religious belief'.⁴⁶ Mr Service stated that he was opposed to this amendment, as 'it would imply that heretofore religious equality had not existed in the colony, which he was by no means disposed to admit'.⁴⁷ Nor, as it turned out, was the Governor.

The Bill enjoyed a smooth passage through the Legislative Council, and finally passed on 26 August 1857.⁴⁸

38 *The Age* (18 July 1857) at 6.

39 17 July 1857 at 983.

40 *The Age* (18 July 1857) at 6.

41 *Herald* (18 July 1857) at 6.

42 *Ibid.*

43 *The Age* (18 July 1857) at 6.

44 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 August 1857 at 1037.

45 CO 309/43/503 (AJCP 827).

46 VPRS 14559/P0001/1; Victoria, *Votes and Proceedings of Parliament*, Legislative Assembly, 12 August 1857 at 420f.

47 Victoria, *Parliamentary Debates*, Legislative Assembly, 12 August 1857 at 1066.

48 Victoria, *Parliamentary Debates*, Legislative Assembly, 26 August 1857 at 1125.

C. *The Royal Veto*

In those days in Victoria Royal Assent was given by the Governor in public, in a ceremony in the Upper House conducted in imitation of the former British one. A number of Bills therefore received Royal Assent all at once at a public ceremony. The Oaths of Office Bill missed the batch that was assented to at the Royal Assent ceremony on 27 August 1857,⁴⁹ for the message from the Legislative Council to the Legislative Assembly reporting the former's agreement to the Bill was sent only on that day and not taken notice of in the Assembly until 1 September 1857.⁵⁰ But when it was realised that the Bill had been excluded from the batch dealt with at the ceremony on 2 October 1857, although the batch included far more complex and recent Bills such as the Audit Bill 1857 (Vic),⁵¹ eyebrows were clearly raised. While there were no immediate plans to swear in new Ministers of the Crown, office holders in the public service, and others including Justices of the Peace, were affected on a regular basis by the requirement to swear the old oaths.

The first question about why the Bill had not been assented to was asked in the Legislative Council on 6 October. The Postmaster-General, William Mitchell, stated, according to 'Hansard',⁵² that 'the matter rested with the government entirely. He would answer the question on the following day.' Although the *Herald*⁵³ also has a reference to the government rather than the Governor, this is presumably a slip by either the reporter or the speaker, as Mitchell was himself a member of the government and could hardly profess ignorance of its doings. In *The Age*,⁵⁴ which did not use either expression, it is also clear that Mitchell was unable to say what was going on, and the reason for his reticence is even clearer: 'he could not at present explain the reason, but would make inquiries'. Mitchell received the same question two days later, and this time 'Hansard'⁵⁵ has him replying that 'the matter rested entirely with the Governor, and therefore the Bill must have been presented to him. It was not, in his opinion, the province of that House to inquire why the Governor delayed the Royal Assent to the Bill.' This sounds somewhat startling, but it must be remembered that this was said in the Upper House, and the Governor's responsible advisors were required to have a majority only in the Lower.

However, Mitchell went still further five days later, when the same question was asked yet again:

[H]e was not in a position to give any more express answer to the question than he had given on a former occasion, when he said that with reference to any course which his Excellency the Governor might think it proper to adopt, any inquiry into his conduct would be unconstitutional on the part of the executive government as well as of the members of the Council.⁵⁶

49 Victoria, *Parliamentary Debates*, Legislative Council, 27 August 1857 at 1134.

50 Victoria, *Votes and Proceedings of Parliament*, Legislative Assembly, 1 September 1857 at 455.

51 Victoria, *Parliamentary Debates*, Legislative Council, 2 October 1857 at 1291.

52 6 October 1857 at 1303.

53 *Herald* (7 October 1857) at 5.

54 *The Age* (7 October 1857) at 5.

55 Legislative Council, 8 October 1857 at 1308.

56 Victoria, *Parliamentary Debates*, Legislative Council, 13 October 1857 at 1315.

If all this was truly said by Mitchell — for neither *The Age*⁵⁷ nor the *Herald*⁵⁸ records the concluding words quoted — the reference to the ‘executive government’ was certainly an error on his part, a hearkening back to the days before responsible government.

*The Age*⁵⁹ joined in the questioning chorus on 12 November 1857, querying sarcastically why the Oaths of Office Bill had not been assented to and suggesting that the fault might lie with that ‘great statesman’, Attorney-General Michie, who had perhaps committed some blunder with respect to it.

The existence and nature of an objection on the part of the Governor, if not the reason for it, was at last revealed on 17 November 1857, when a message was sent by the Governor to the Assembly under s 36 of the *Constitution Act*⁶⁰ suggesting the omission of certain words in the title and preamble. The Governor’s proposal was to remove the words struck through in the following extract:

~~An Act to assimilate and simplify the Oaths of Qualification for Office and to recognise and establish in Victoria the right of absolute civil equality of all Her Majesty’s subjects irrespective of religious belief.~~

~~WHEREAS it is desirable to recognise and establish in Victoria the right of absolute civil equality of all Her Majesty’s subjects irrespective of religious belief and there are large numbers of Her Majesty’s subjects who entertain conscientious scruples to the taking of certain special oaths of office by law imposed on such persons on appointment to any office in the public service of the said Colony and it is expedient for the promotion of the harmony and welfare of the inhabitants of Victoria that such special oaths should be abolished:~~

The word ‘such’, as underlined above, was also to be replaced by ‘certain’. No substantive provisions of the Bill were affected.

The Age, then, as now, not above the odd outbreak of political bias, immediately jumped to the conclusion that the suggestion ‘to *strike out the clause granting civil equality irrespective of religious belief!*’ — the italics and exclamation mark were its — was the doing of Attorney-General Michie, who had proposed the Bill without any real intention to have it passed, but rather to dispel the shame of sitting in the squatters’ Cabinet. It was, *The Age* thought, without any apparent trace of sarcasm, ‘[n]ot likely’ that the Governor himself was responsible for these suggestions. Each of these statements was completely wrong, nor was there any real justification for making them. Attorney-General Michie’s statements in favour of the Bill give no indication of anything but the warmest support for it, and when it came to the crunch, as we shall see, he did his best to save as much as he could of it. *The Age* was therefore engaging in pure speculation, uninformed by sources.

57 *The Age* (14 October 1857) at 6.

58 Ibid.

59 *The Age* (12 November 1857) at 4.

60 Victoria, *Votes and Proceedings of Parliament*, Legislative Assembly, 17 November 1857 at 545; Victorian Parliamentary Papers, 1856–57 vol. II at 249; Victoria, *Parliamentary Debates*, Legislative Assembly, 17 November 1857 at 1376.

In fact the message was clearly the Governor's personal idea. In his report to the Colonial Office⁶¹ the Governor referred to it as such, although he adds that he discussed it with his advisors, presumably on an informal basis rather than in Council. There is no trace in the minute book of the Executive Council⁶² of any consideration by it of the proposed message, while it may confidently be supposed that the Governor would have been anxious to ensure that any formal advice to send the message concerned would be recorded.

The Governor's message was dealt with by the House on the same day, and the unofficial 'Hansard' records the following exchange, which suggests that some thoughts of entering into an argument with the Vice-Regal office-holder were being entertained:

Mr Duffy asked the Hon. the Chief Secretary whether he would object to the nomination of a day more remote than the following one for the consideration of the propriety of presenting a message to his Excellency in preference [*sic*] to this Bill. [... A]s the alterations were of a very important character, he should feel it his duty to move that a call of the House he [*sic*] made for their consideration.

Mr Michie had no objection to a more distant day being named for the consideration of the amendments, provided the Bill was not thrown over to the next session.

Mr Duffy did not know when the present session would terminate. He certainly thought it desirable that the reasons for the proposition contained in his Excellency's message, of striking out the provision of the Bill which gave civil equality irrespective of religious belief, should be laid before the House; and he would, therefore, suggest that the consideration of that message should be postponed to the commencement of the ensu[ing] session.

Mr Michie acceded to the proposition, as the prorogation was likely to be only for a few days.⁶³

After initial reluctance, there appeared to be an agreement on the part of the government, therefore, to allow the Bill to lapse at prorogation (which, as it was understood at the time, had the effect of automatically killing the Bill)⁶⁴ and to see what could be done in the following session. But it seems that the government

61 CO 309/43/497 (AJCP 827).

62 VPRS 1080/P0000/3, 4.

63 Victoria, *Parliamentary Debates*, 17 November 1857 at 1377.

64 In *Attorney-General (Western Australia) v Marquet* (2003) 217 CLR 545 at 574–576, 583–586, 637, the High Court of Australia held that bills may in fact be validly assented to after prorogation, but clearly it was the understanding of the day that prorogation would kill the bill and permit a new one to be introduced, as we shall see in relation to the Duration of Parliament Bill when a special prorogation for that very purpose was considered. Compare the use of prorogation for that purpose recorded in Ray Wright, *A People's Counsel: A History of the Parliament of Victoria 1856–1990* (1992) at 77. It is also possible that the dicta in *Marquet's* case would be inapplicable even today given that consideration of the Governor's message was still pending at prorogation, thus making the bill itself, arguably, still pending business of the Houses rather merely than a bill awaiting assent.

initially hoped that the desired amendments would be made before the end of the session in the interests of settling the matter and having the Bill passed in a form more or less acceptable to all. At least, with the amendments proposed, the Bill would have changed the formal law with the desired effect, although the ringing declaration of religious equality would be gone. What was missing so far, as Duffy pointed out, was any public declaration of the precise reasons for the objection to the proclamation of the basic principle. In short, he was clearly saying, he was not going to do what the Governor asked unless the Governor or his advisors at least gave him a reason for doing it, and perhaps not even then.

As prorogation approached, the desired amendments had still not been made, and at a meeting of the Executive Council on 23 November 1857, the day before prorogation, formal advice was tendered to veto the Bill.⁶⁵ Thus, when the Governor came to assent to the last batch of Bills of the session and to prorogue the Parliament on the following day, '[t]he Royal Assent was withheld from the *Oaths of Office Bill*', as 'Hansard' records.⁶⁶ The official copy of the Bill presented to the Governor for assent has endorsed on it, over the Governor's signature, 'In the name and on behalf of Her Majesty I withhold the Royal Assent from this Bill'.⁶⁷ *The Age*, again not without some colouring attributable to its own views, gives us a sketch of what actually happened at this event, close to unique in the history of responsible government in Australia:

Suddenly the House was electrified by a change of the monotonous *formula* [*ie*, that used to indicate the Royal Assent to the other Bills in that day's batch]. His Excellency declined to affix his signature to the Bill for the abolition of certain Oaths of Qualification for Office; and the Clerk of the House cried out, 'In the name and on behalf of Her Majesty, I WITHHOLD the *Royal Assent from this Bill!*' A subdued, but perfectly perceptible murmur of astonishment and dissatisfaction pervaded the vast assemblage of Victorian ladies and gentlemen who had come to enjoy this memorable exhibition of responsible government.

Most of those assembled in the Council chamber did not then know that the Bill had just been the subject of a long and animated debate in the Assembly.⁶⁸

That was at least the correct place for it, given that the Governor's chief advisor and principal law officer were both members of that House, and that House sustained the government in office by its continued confidence. Attorney-General Michie defended the veto, as he had undertaken to do at Executive Council on 23 November 1857. It is clear that the debate was quite vigorous; indeed, the *Bendigo Advertiser*,⁶⁹ which seems to have had its own reporter present, called it an 'angry discussion' which gave vent to 'angry feelings'.

If one takes at face value the agreement to allow the Bill to lapse at the end of the session reached in the exchange between Attorney-General Michie and Duffy

65 VPRS 1080/P0000/4/21f.

66 24 November 1857 at 1397.

67 VPRS 14559/P0001/1.

68 *The Age* (25 November 1857) at 4. Italics and small capitals as in original.

69 *Bendigo Advertiser* (25 November 1857) at 2.

quoted above, such anger does not really make sense, as the denial of Royal Assent merely formalised the killing of the Bill that was to occur at prorogation anyway. I suspect, however, that the supporters of passing the Bill intact, such as Duffy, were hoping to call the Governor's and the government's bluff, daring it to allow the Bill to lapse rather than assenting to it with all the others passed that session and thinking that the government would shrink from such a step. This is another reason for thinking that the move to postpone the consideration of the Governor's message was intended as a polite way of refusing to agree to it at all, at least until reasons for doing so were provided. Perhaps the government did not grasp this; more likely, it saw only too well what was intended and stuck to its guns.

Duffy had suggested in the earlier debate that 'the consideration of that message should be postponed to the commencement of the ensu[ing] session', and it would of course always be possible to take up the topic in the next session. But his suggestion is really the Parliamentary equivalent of postponing consideration of the Governor's message 'to the Greek calends' given that an assent ceremony would occur as of course immediately before prorogation, and also that the Bill would, according to the understanding of the day based on the Westminster practice in which Duffy was very well versed,⁷⁰ be automatically killed by the prorogation if not assented to then. While there are certainly some passages in Duffy's speech which might be taken to suggest that he was simply outraged by the spectacle of the denial of Royal Assent to a proposed law passed by the Houses, it is telling that he had himself, in form although I suggest not in substance, contemplated virtually the same result arising from prorogation without assent.

O'Shanassy joined in the debate on the veto not so much on the constitutional point, but on the point of substance, stating that government patronage was exclusive (by which he meant that Roman Catholics were excluded),⁷¹ and that it was simply 'not the fact'⁷² that religious equality existed in the colony. This suggests that, in addition to the abolition of the offending oaths and the general declaration of the principle of religious equality, he hoped also to use the declaration as a springboard from which to end the exclusivity he perceived — so, for him, the preamble was not a mere matter of expressing pious sentiments.

For the constitutionalist, the most interesting part of the debate is the explanation offered by the government for the vetoing of its own legislation — a course which raises obvious difficulties connected with the need for the Lower House to retain confidence in the government and for the Vice-Regal officer to act in accordance with the advice of persons possessing the confidence of the Lower House. Attorney-General Michie was perfectly clear to the House about the extent of the Governor's and his personal involvement. Interjectors, for their part, again raised the question what precisely the Bill was meant to do.

70 John Waugh, "'The Inevitable McCulloch" and his Rivals, 1863–1877' in Paul Strangio & Brian Costar (eds), *The Victorian Premiers 1856–2006* (2006) at 39.

71 O'Shanassy was himself to face similar allegations during his time as Premier: Geoffrey Serle, *The Golden Age: A History of the Colony of Victoria, 1851–1861* (1977) at 312.

72 Victoria, *Parliamentary Debates*, Legislative Assembly, 24 November 1857 at 1398.

Michie said that, if the passages to which the Governor objected were withdrawn,

the measure [would be] complete for the fulfilment of the purpose with which it was introduced. ('No, no' and 'hear, hear'.) The Bill, in its present form, implied that civil liberty, irrespective of religious creed, had not previously existed in this colony, and his Excellency was not prepared to affirm that proposition. It was therefore determined that the Royal Assent should be withheld from this Bill.⁷³

But who precisely had determined that assent should not be granted? Shortly afterwards, O'Shanassy had the boldness to ask straight out whether the Governor had been in receipt of advice to veto. Michie's reply is clearest in *The Age's* report,⁷⁴ where he says that he 'would at once take on himself, so far as it was possible for one member of the government to take on himself the whole responsibility of the vetoing of the Bill, and acquit his Excellency of any participation in it'. While the clarity of this report might have been affected by the editorial line of *The Age*, its first half at least is merely a clearer statement of what 'Hansard' less clearly suggests. Interestingly though 'Hansard'⁷⁵ recorded Michie as stating also that 'his Excellency was not prepared to assent to this measure in its present shape'. So there we have it: the objection came from the Governor, and the advice to veto came from Michie.

Reading the minutes of Executive Council's meeting on 23 November 1857 confirms that the veto was suggested by Michie. The alternative to a veto was the reservation of the Bill and its transmission to London for the consideration of the Colonial Office. Michie did not advise that because it would take too long, and if the Colonial Office rejected the proposed measure all the waiting would have been in vain. The formal advice tendered to the Governor was thus to veto the Bill 'in order that an amended Bill might be introduced early next session'.⁷⁶ Michie made this point in the Legislative Assembly too, stating that 'he could assure the House that the measure might still be passed into a law within twenty days'⁷⁷ if it were only phrased in a manner that did not provoke objection.

We have one further source which was not available to all the actors of 1857 — the Governor's despatch to the Colonial Office dated 4 December 1857 explaining his decision.⁷⁸ This sheds light on a number of further points. In his despatch, Barkly took the view that he was called upon constitutionally to make a decision relating to the Bill, as it had been presented to him for the Royal Assent and he could not simply ignore it. As a matter of constitutional propriety, there is something to be said for this, and it is also the case that the law positively required it, given that an Imperial statute of 1842 still applicable in Victoria stated that the Governor 'shall'⁷⁹ declare his will. At any rate, it would scarcely have shown

73 Id at 1397f.

74 *The Age* (25 November 1857) at 6.

75 Legislative Assembly, 24 November 1857 at 1400.

76 VPRS 1080/P0000/4/22.

77 Victoria, *Parliamentary Debates*, Legislative Assembly, 24 November 1857 at 1400.

78 CO 309/43/495ff (AJCP 827); VPRS 1084/P0000/3/V2/180–183.

respect for an elected Parliament to ignore its proposals altogether. The despatch also shows that his Excellency was not at all averse to the principle of the Act. He specifically mentions the fact that he had been unable to appoint ‘gentlemen of the Jewish persuasion’ even as Justices of the Peace because they could not take the three oaths and make the declaration. While the idea of a message under s 14 had come from him personally, the Governor says, the suggestion to veto the Bill rather than reserve it was indeed Attorney-General Michie’s, and was made in the interests of permitting the rapid enactment of a new bill.

Above all, however, this source tells us that the objection raised by the Governor was that, if he signed the Bill, this would have been ‘tantamount to an admission by The Queen, in whose name the enactment of course runs’, that religious equality did not exist in the colony, and that ‘whatever my individual opinion might be, I did not feel authorised to make on behalf of the Crown’ such an admission. There were some things he found less than satisfactory in the Bill, such as a lack of a declaration that it did not affect Imperial officers such as the Governor and military personnel; he also thought that naturalised persons should be required to take a more elaborate oath; but he would not have vetoed the Bill on those grounds, nor on the grounds that the words indicating the dependency of Victoria on the United Kingdom were omitted. But he objected more strongly to not being consulted at all about the introduction of the Bill, and pointed out that the retention of the *Roman Catholic Relief Act* oath had been a matter of controversy in the United Kingdom.

Research reveals that the fear of the Governor that he might inadvertently involve the Crown in a matter of political controversy was by no means far-fetched. One need only look at the debates on what was to become the statute (1858) 21 & 22 Vic, c 48 (UK). This statute, not unlike the Victorian one, substituted one oath for the three previous oaths, although its oath was rather longer; it also offered relief to ‘Her Majesty’s Subjects Professing the Jewish Religion’ (s 5);⁸⁰ but, importantly, it, unlike the Victorian Oaths of Office Bill, did not repeal the provision for a separate oath for Roman Catholics, but, on the contrary, specifically confirmed that the law on that question was to remain unchanged (s 6).

Immediately before a division in the House of Commons on 25 June 1857 — the date means that this report would have reached Melbourne just as the Victorian Bill was going through — George Bowyer MP — author of then well-known texts on constitutional law, member for Dundalk, heir to a Baronetcy, and like Cardinal

79 See above n10. In addition, Joint Standing Order XV (reprinted as it existed at the time in the Victoria, *Votes and Proceedings of Parliament*, Legislative Assembly, 23 July 1857 at 388) stated that a bill ‘shall’ be presented to the Crown by the Clerk of the Parliaments, although given the statutory provision referred to this rule merely nominated an officer to discharge the statutory duty.

80 As did the Act following it in the statute book (1858) 21 & 22 Vic, c 49, which authorised the omission of the words ‘and I make this declaration upon the true faith of a Christian’ in the oath taken by Jews in Parliament in order to allow Lionel Rothschild to take the seat to which he had been elected.

Newman a convert from Oxford Movement Anglicanism to Roman Catholicism⁸¹
— unburdened himself of the following opinions:

The Roman Catholic members were accused of illiberality for resisting this measure [ie, because it benefited Jews]. What occurred in the year 1829, when Catholic emancipation was passed? Not one Catholic sat in either House of Parliament at that time, or was a party to the settlement — if settlement it was — which was then made. The Roman Catholics were obliged to accept what the Legislature had done without their having any voice in the matter. But they were now, for the first time, called upon by their votes to say that the oath forced upon them in 1829 was right and necessary. That he was not prepared to admit. Hence his opposition to this Bill. [...] The Catholic oath was absurd and nugatory — far more absurd and nugatory than Protestants supposed. It did not even fulfil the purpose for which it was intended. It did not deny the doctrines which they intended that Catholics should deny. (Here the hon. Gentleman was again interrupted by cries and confusion: Mr Speaker ordered the Bar to be cleared, and order was gradually restored).⁸²

But despite the force of the opinions expressed, they did not carry the House. Indeed a similar attempt just over a month earlier, although accompanied by more moderate rhetoric and reactions and without the provocative participation of such a conspicuous defector from the established Church, had also failed.⁸³ On that occasion, the *Times*,⁸⁴ while saying pleasant things about the effect of Roman Catholic members on the tone of parliamentary debate, had called the Roman Catholic agitation for relief ‘not from exclusion, but from an oath which they nevertheless now take without any hesitation, and are able to interpret at least to their own entire satisfaction’ ‘ill-advised’ and an example of their ‘usual wrongheadedness’. As we saw, when the Bill reached the statute books in the following year it expressly preserved the separate oath for Roman Catholics.

The point is not who was right in these debates and who was wrong. The point is that the issue was a controversial one on which the Crown would be loath to express an opinion, and a colonial Governor subject to recall by the Colonial Office doubly so. This renders the Governor’s reluctance to assent to a bill which might have been thought to decide the issue in controversy against the views of the majority of the Parliament of the United Kingdom rather easier to understand. The wonder is that this was not pointed out more clearly at the time to the politicians and public of Victoria; possibly it was thought that doing so would not assist in calming trouble, and any references of Victorian politicians to this debate in the United Kingdom were made behind closed doors. On the other hand, perhaps an express reference would have been superfluous: the discomfort caused by the oath to some Roman Catholics at the time was obviously so notorious that one is driven to speculate that perhaps the O’Shanassy party was ‘playing dumb’, and either was

81 Also the subject of biographies in both the *Oxford Dictionary of National Biography* and the *Catholic Encyclopaedia*, from which these notes are taken.

82 *Parliamentary Debates*, House of Commons, 25 June 1857, col 364.

83 *Parliamentary Debates*, House of Commons, 15 June 1857, col 1759–1794.

84 *Times* (16 June 1857) at 9.

from the start, or at some stage during the proceedings became, well aware of the weapon they would be handing their co-religionists in the United Kingdom if they procured the passage of an Act which declared the separate oath a badge of religious inequality and to which a representative of the Crown had assented.

At any rate, a satisfactory compromise was swiftly found in Victoria. As Attorney-General Michie had promised, a revised Oaths of Office Bill was indeed introduced⁸⁵ early in the new session, on 3 December 1857, nine calendar days after the first Bill was vetoed. Its preamble was a clever compromise, meeting the objection of the Governor without abandoning the aspirations of those such as O'Shanassy for a ringing declaration:

WHEREAS the civil and religious rights and liberties of all Her Majesty's subjects in Victoria are and ought to be absolutely equal irrespective of their faith or form of belief AND WHEREAS for the purpose of openly recognising and continuing such equality and of removing anything which may be deemed or construed to separate or distinguish any class of such subjects in this colony from any other class thereof and in order to promote the harmony and welfare of the people it is expedient to provide and establish two uniform oaths of affirmations of allegiance and office respectively in lieu of the oaths and declaration now by law required in that behalf.

This was obviously a carefully crafted compromise commanding the assent of all parties, which went through Parliament without amendment. Rather than establishing a new principle, it merely confirmed an existing state of affairs, brought the formal law into line with that state of affairs in order to promote harmony and welfare and removed a merely perceived distinction.

The second Bill was, with a few minor changes in wording and the correction of a drafting error in the vetoed Bill, otherwise exactly the same as the vetoed Bill.⁸⁶ It became law speedily, on 27 January 1858, as Act No 45 — just over two months after the veto of the first Bill. *The Age*, still keeping a watchful eye on the Victorian Bill and unable to express its satisfaction at this without a pointed reference to earlier quarrels, commented that the Bill was 'at length one of the laws of Victoria'.⁸⁷

85 Victoria, *Parliamentary Debates*, Legislative Assembly, 3 December 1857 at 6. It seems that Duffy was engaged in a little harmless horseplay in objecting here to the form in which the Bill was introduced, or indulging his penchant for showing off purported expertise acquired at Westminster (Waugh, above n70 at 39). There is a fuller report in *The Age* (4 December 1857) at 6, which indicates that O'Shanassy also joined in and records laughter after Duffy's contribution. The rule to which Duffy refers did exist and may be found in Erskine May, *A Treatise on the Law, Privileges, Procedure and Usage of Parliament* (3rd ed, 1855) at 365. The objection resulted in the withdrawal and reintroduction of the Bill (Victoria, *Parliamentary Debates*, 17 December 1857 at 65), so that possibly it should be said, in accordance with the adage, that it was only the third attempt which was successful.

86 Clause 2 of the vetoed Bill appeared to provide that the oaths superseded by the Act might be taken at any hour. Section 5 of the Act corrected this to refer to the oaths under the Act.

87 *The Age* (28 January 1858) at 4.

Coincidentally assent was granted to Act No 45 on exactly the same day as another more significant event in Australian legal history occurred: assent was granted to the Torrens system legislation in South Australia. The great *Real Property Act* [1858] (SA) thus commenced its career as Australia's most successful legal export. As the Bill for the *Real Property Act* had been a non-government proposal throughout, the government of South Australia considered but rejected the possibility of advising non-assent to it. Under very considerable pressure from the public and the press to allow the great reform to proceed, the Attorney-General, Richard Hanson, minuted that the government should usually agree to Parliament's decision to enact legislation, but added that it would be otherwise if 'the principle of the Act violates some important constitutional rule, or the inconveniences to be anticipated from assenting to it are of such magnitude as to justify the government in an appeal to the people to support it in rejecting the measure'.⁸⁸ Neither of these criteria was satisfied, he thought.

Returning to the proceedings relating to Victoria: the Colonial Office minuted on receipt of the Victorian Governor's despatch on the *Oaths of Office Act* merely that the Governor had been right to protest at the failure to consult him about the Bill, while approving its general policy⁸⁹ — something which, of course, will not surprise us given the statements in the circular despatch of 20 May 1857 quoted earlier. Clearly no indignation was aroused in London by this exercise of the Vice-Regal power of veto. I shall refer shortly to their formal reply to Barkly.

The preamble survived until 1890, when Act No 45 was repealed by s 2 of and the First Schedule to the *Public Service Act* 1890. Part V of and the 9th to 11th Schedules of that Act re-enacted the substantive provisions of the Act, but omitted the precious preamble on which so much labour had been spent thirty-two years before. It is not open to doubt, however, that John O'Shanassy would have welcomed the re-emergence of the preamble's contents, in a modified form, in ss 14, 19(1) and 38(4) and (5) of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic).

D. Assessment

Needless to say, the refusal of the Royal Assent to the first Bill hardly went unnoticed by the press and the public. *The Age* in particular provided a constant stream of anti-government comment⁹⁰ and purported demonstrations of the government's breach of faith with the forces agitating for the abolition of state aid to religion,⁹¹ conveniently glossing over the fact that the move to abolish state aid had been defeated and so the government might have considered itself released from any promises it had made as part of the agitation for its abolition.

The Age — in accordance with its general anti-government line and its stance on the issue to this point, and despite the fact that it also noticed, at about the same

88 South Australia, *Parliamentary Papers*, no 51/1858, p 3.

89 CO 309/43/499f (AJCP 827).

90 *The Age* (25 November 1857) at 4; (1 December 1857) at 4; (3 December 1857) at 5.

91 *The Age* (8 December 1857) at 5; (14 December 1857) at 5. Duffy had also done this: Victoria, *Parliamentary Debates*, Legislative Assembly, 24 November 1857 at 1399.

time, the Governor's propensity to talk about matters religious and indeed virtually any subject under the sun⁹² — laid the blame for the vetoing of the first *Oaths of Office Bill* at the feet of the government and not the Governor. It found that its 'strong disgust and indignation' had been aroused by the events and went to add, in words that indicated that it too was concerned about the general declaration of human rights as well as about the principle of equal oaths for all:

What the country [ie, the community, as we should nowadays say] expected was a declaratory Act recognising the right of every man to worship God according to his conscience, without sacrificing an iota of his rights as a Victorian citizen. [...] We need scarcely observe that the motive for shedding all this mystery over the business was that of inducing the country to believe that Sir Henry Barkly was the real opponent of the Bill. These despicable manoeuvres were persevered in till the close of the session rendered any further concealment impossible, and at the same time Mr Michie and his colleagues could calculate upon escaping through sheer force of audacity.⁹³

Nevertheless, it did come close to hitting the nail on the head at least once, when it commented that '[o]bviously, if [religious equality] existed in Victoria no *Oaths of Office Bill* would be necessary'.⁹⁴

The *Ballarat Sun*,⁹⁵ in a long leading article, called the proffered ground for the veto, the contents of the preamble, 'a very captious ground of objection'. It suggested that the real objector was not the Governor, but Attorney-General Michie's colleagues in the Ministry, who had made him the 'scape-goat' in order to conceal their real objection to the principle of religious equality.

The more conservative *Argus*⁹⁶ was puzzled by the course of events, but decided to blame neither the government as a whole nor the Attorney-General's colleagues, but rather the Empire. For want of any better explanation, and also proceeding from the premise that the ground proffered by the government was too weak to constitute more than part of the story at best, it speculated that the Governor had received secret instructions from the Colonial Office to veto the Bill. There is reason to savour this explanation given that George Higinbotham was editor of the *Argus* at the time, and he was later, as Chief Justice, to carry on a campaign against Royal instructions to the Governor as inconsistent with local self-government.⁹⁷

92 *The Age* (3 December 1857) at 4.

93 25 November 1857 at 4.

94 *Argus* (14 December 1857) at 5. The reference in the original newspaper report is actually to religious *liberty*, a word which occurs in the previous sentence. I have substituted a more accurate term for the word 'it' that occurs in the sentence I have quoted.

95 *The Ballarat Sun* (26 November 1857) at 2.

96 *Argus* (5 December 1857) at 4. This was also the explanation favoured by the *Bendigo Advertiser* (1 December 1857) at 2.

97 See, for example, Victoria, *Parliamentary Papers*, 1884 vol I at 709; *Toy v Musgrove* (1888) 14 VLR 349 at 381–385; John Bennett, 'The Royal Prerogative of Mercy: Putting in the Boots' (2007) 81 *Australian Law Journal* 35 at 40–43. In relation to the authorship of the editorial in question, I must make the same qualifications here as does Serle, above n71 at 279 fn†.

The *Argus*, showing more sense in this respect than *The Age*, rightly stated that neither Barkly nor Attorney-General Michie was likely to have objections to the principle of the Bill or to wish it vetoed without some good reason. Its search for a good reason led it to the conclusion that the Governor might have received secret instructions to refuse assent. But this explanation, while it no doubt appealed to the future Chief Justice, was also rapidly disproved by events: no such instructions prevented the granting of immediate assent to the second Bill only just over two months later. Nor, it can now be seen, were any such secret instructions referred to by the Governor in his report to the Colonial Office; rather, his despatch informs the Colonial Office of an action the Governor has taken off his own bat. Finally, any such instruction would have been a remarkable reversal of policy having regard to the circular despatch of 20 May 1857 (the terms of which the *Argus* may possibly be excused for not knowing given that it was laid upon the Table of the Legislative Council, but not ordered to be printed)⁹⁸ and given the content of the standing Instructions, which required that bills affecting religion should be reserved only if they *limited* religious equality by prohibiting divine worship, even divine worship *not* conducted in accordance with the rites of the Church of England.⁹⁹ Nevertheless, the *Argus* too was not wholly wrong: the Imperial connexion was to blame in a more subtle fashion than it guessed.

The *Herald*,¹⁰⁰ for its part, showed a familiarity with constitutional usage and the Latin language which would hardly be expected in its successor journal today. In a long leader, it provided perhaps the soundest and frankest commentary possible at the time, which also well explained the reasons why the government was in something of a bind in explaining to Parliament why it had done what it had done. The leader writer wrote:

What the real point of difficulty was we could not make out, nor whether this objection originated with his Excellency or was suggested to him by his Ministers; although Mr Michie, when he was hard pressed and saw the constitutional dilemma the government had placed itself in, did assume a kind of *ex post facto* responsibility.

The dilemma was this, — that either the Ministry had remained in power, though for a single day, after the Governor had, spontaneously and *ex proprio motu*, vetoed one of their own Bills, which they had presented to him — an act of meanness, on their part, unparalleled in the history of responsible government, as well as of the basest treachery to the Legislature and the Constitution — or that they had actually advised him to do so, than which we cannot conceive of anything more presumptuous or perfidious.

It went on, however, to mar these sensible limited observations by the wild accusations that the government (in which there was admittedly a strong Anglican element) were concerned to shore up ‘the peculiar pretensions of the Anglican Church’, ‘had declared war against the principle of an absolute equality of civil

⁹⁸ As above n26.

⁹⁹ As above n23.

¹⁰⁰ *Herald* (25 November 1857) at 4.

rights, irrespective of religious opinions', and so on. If war on religious equality was the government's intention, it is clear that it either rapidly surrendered or, with equal rapidity, made a strategic decision to conduct the struggle by very much less conspicuous means, which also failed — for, as we have seen, an Oaths of Office Bill amended in only minor respects became law two months and two days after this editorial was written, and under the same government.

Indeed, the speedy steps taken by Attorney-General Michie to reintroduce a revised version of the Bill caused *The Age*¹⁰¹ some puzzlement when recapitulating the events for its readers in Europe a few weeks after the refusal of assent to the first Bill and after the second Bill (which was to become law) had been introduced. Having recited its version of the events, the newspaper then noted the appearance of the new Bill and found that (in its view) it 'recognises the principle even more explicitly than the first'. It could only wonder whether the second Bill would also be vetoed, which, of course, it was not. Indeed, *The Age's* comment here recognises how successful the carefully written compromise embodied in the second Bill was even in the eyes, or perhaps more accurately the one eye, of the most convinced supporters of the first Bill. Of course the government was not opposed to religious equality. But the newspapers of the time were under the usual journalist's pressure to write a dramatic account and appear to be in possession of full inside knowledge when they were not.

I concluded above that the objection to the title and preamble of the Bill initially came from the Governor personally, not the government. The objection was not however based on his own personal wishes or tastes — as we saw from his despatch, he rejected several lines of objection he might have pursued for such reasons — but rather on what it would be acceptable for him, as the Crown's representative, to commit the Crown to saying not just to the community of Victoria, but to the Empire as a whole about the status of Roman Catholics required to swear the *Roman Catholic Relief Act* oath.

Combined with that particular point was perhaps the thought that two salutary lessons would be taught to the infant Victorian government by his objection: first, that they should not propose legislation without at least informing him of it and seeking his wise guidance upon it; and, secondly, that they could not forget the interests of the wider Empire in their proposals for legislation, and, if they did, the Governor might be called upon to remind them of them. In principle, making these two points was well within the Crown's remit; indeed, they clearly fall both within the *dictum* in Bagehot's classic text that the Crown's rights include 'the right to be consulted, the right to encourage, the right to warn'¹⁰² — even though that text did not appear until about a decade later — and within the most recent Australian contribution on the topic by Sir Guy Green, in which the concept of a 'benign

101 *The Age* (14 December 1857) at 5.

102 Walter Bagehot, *The English Constitution* ([1867] 1964) at 111. See also George Winterton, 'The Role of the Governor' in Clement MacIntyre & John Williams (eds), *Peace, Order and Good Government: State Constitutional and Parliamentary Reform* (2003) at 211.

mentor'¹⁰³ is spoken of. Even today comparable warnings and reminders would fall within the sort of counsel that the Crown might legitimately offer, although obviously there can be no Imperial repercussions of Victorian statutes any more.

The government, for their part, were, I suspect, initially none too pleased to be faced with the Governor's objections after the Bill had passed in a form apparently acceptable to all concerned. But the government were, I also suspect, reluctantly compelled to admit that there was some point in the objection raised by the Governor. No significant protest by the Ministry is recorded against the Governor's action; they might, for example, have left behind a record of a fuss in the Executive Council's archives, but did not; and when push came to shove, as we saw, Attorney-General Michie accepted responsibility for the veto with enthusiasm, because he was able to argue that it was the quickest means of securing assent to a revised Bill. That move certainly appears to have been his idea, although the Governor's refusal to assent personally of course was not. The government appear to have been acting genuinely throughout, but made the simple mistake of not consulting the Governor and not thinking of all the implications of their actions. It is easy to understand this given that responsible government was new in Victoria, and they could not necessarily be expected to anticipate the trouble that the amendment to the preamble would cause.

In assessing the propriety of the Governor's actions on the basis of these conclusions of fact, it must first be stated that the better opinion is that a Governor acts rightly if he refuses Royal Assent to a bill on the advice of his Ministers. This is because there may be a reserve power to refuse to grant assent, but there is none to grant assent in the face of contrary advice. Sometimes however, the view is expressed that this cannot be right because, if the government is faced with the question whether assent should be given to a bill which it opposes, it must have lost control of the Lower House, and thus be compelled to resign,¹⁰⁴ or, alternatively, that the Governor in granting or withholding Royal Assent is acting as a branch of the legislature and should be advised by the legislature (which has passed the bill) rather than by Ministers. In the contemporary debate in 1857, some newspaper commentators saw the first point at least, as we have seen.

However, both views are overly simplistic. There are many reasons why the Governor might withhold assent to a bill on advice that are consistent with the retention of confidence in the Ministry by the Lower House. For example, the government might change between the passage of the bill and its presentation for assent.¹⁰⁵ A bill might be passed despite the government's opposition but not have

103 Guy Green, 'Governors, Democracy and the Rule of Law' (2006) 9(1) *Constitutional Law & Policy Review* 11 at 13.

104 Compare the opinion of the Canadian government reported by Eugene Forsey, 'Disallowance', above n3 at 56; the minute of the Clerk of the Queen's Privy Council for Canada of 1882 reproduced in William Hodgins (ed), *Correspondence, Reports of the Ministers of Justice and Orders in Council: upon the Subject of Dominion and Provincial Legislation 1867-1895* (1896) at 78.

105 Forsey, 'Present Position', above n3 at lviii; Waugh, above n1 at 73.

the status of a test of the government's confidence.¹⁰⁶ The second refusal of assent in Victoria's history, with which I shall deal shortly, concerned a bill in relation to which binding manner-and-form stipulations had not been followed and which would have been invalid if assented to. Several cases involving flaws in bills have occurred in Canada in which it has been deemed advisable to dispose of the bill finally by the refusal of assent.¹⁰⁷ There is another case from the late 1960s in Canada in which a serious technical flaw in a Bill led to its non-proclamation; this is a variant on the same theme as executive non-assent, and indeed on the case that arose in Victoria in 2005, and thus a circumstance in which assent might also properly be refused on advice.¹⁰⁸ Or the government might just change its mind. As John Maynard Keynes is reported to have said, '[w]hen somebody persuades me that I am wrong, I change my mind. What do you do?'¹⁰⁹ There is no reason to think that we need to invent a constitutional obstacle preventing governments from adopting a similar attitude on rare occasions, such as when circumstances suddenly change.

To take an historical example of this: the outbreak of the First World War created a need to suspend the *Government of Ireland Act* 1914 (4 & 5 Geo V c 90); *Welsh Church Act* 1914 (4 & 5 Geo V, c 91) before they had begun to operate. The suspension was affected by the *Suspensory Act* 1914 (4 & 5 Geo V, c 88), which suspended those Acts to a date to be fixed by Order in Council if the war lasted longer than a year, as of course it did. Although ministerial advice to refuse assent, given the debates preceding the enactment of those statutes, was unlikely in the extreme to be forthcoming from the government then in power, I suggest that such advice could properly have been given and accepted in those circumstances; indeed, in those circumstances it would arguably show more respect for the substantive rights of Parliament to annul such legislation entirely by such means and allow a fresh start to be made once the repercussions of the changed conditions had become clear than it was to enact a provision suspending its legislation for an indefinite time and until a date to be fixed at the discretion of the executive.

Nor can anything be made of the fact that the Governor (or in the United Kingdom, the Queen) is acting as a branch of the legislature in granting Royal Assent. The usual conventions requiring the Governor to act on the advice of Ministers enjoying the confidence of the Lower House, and thus exposing them

106 Twomey, above n1 at 592.

107 Saywell, above n3 at 222. Compare also the cases involving disallowance recorded in GV La Forest, *Disallowance and Reservation of Provincial Legislation* (1955) at 73.

108 Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (1991) at 37. In Victoria however the Governor's power to suggest amendments is the more obvious remedy. Take also the case of an error in Parliamentary proceedings between the Houses referred to in Bill Hayden, *Autobiography* (1996) at 524, or the confusion recorded in Harry Evans (ed), *Odgers' Australian Senate Practice* (7th ed, 1995) at 270. In such cases it might be uncertain what the procedural status of a bill is and caution may dictate unequivocally killing it by refusing Royal Assent to it.

109 These words are commonly attributed to Keynes: see for example <http://en.wikiquote.org/wiki/John_Maynard_Keynes> (visited 20 February 2007).

rather than the Crown to political controversy that may result from the Crown's actions, continue to apply.¹¹⁰

Anne Twomey however believes that there is 'much to be said for'¹¹¹ the view that Royal Assent is given on the advice of the Houses of Parliament, with the result that it cannot be refused on the advice of the executive. While conceding that practice has not always affirmed this proposition, her argument appears to be based, at first sight, on the enacting words of British statutes or, in some Australian states, constitutional formulae stating that the Monarch legislates with the 'advice and consent' of the Houses of Parliament (and not the executive government). In addition to that, she states (although it is not entirely clear whether she is reporting her own view or another's) that, as bills must be presented to the Queen for assent regardless of the government's wishes, it would be 'extraordinary'¹¹² if the government could thwart this process by advising the refusal of assent.

I suggest however, although with due respect to the thoroughness of Anne Twomey's research, that neither argument stands up. First, the enacting words to statutes, however they may run, are not words of a statute until after Royal Assent is given, and it would therefore be something of a *petitio principii* to derive from them an obligation to assent to a proposed statute in which they appear on the advice of the body which passed the proposed statute and to ignore all other advice.¹¹³ Secondly, the mere fact that something is presented to the Queen — to take another example, but one not unrelated to the historical development of legislative procedure, a petition — simply does not entail that advice to refuse its prayer cannot be tendered *aliunde*. This is so in relation to petitions even though s 5 of the *Bill of Rights* (England) of 1688¹¹⁴ gives a statutory right to petition the Sovereign. It is not in the least 'extraordinary' that not all requests are granted. It is accordingly not relevant that the enacting words of Victorian statutes included the 'advice and consent' phrase at the time of the Oaths of Office Bill, as indeed did that Bill itself.

It is however also true that s 1 of the Victorian *Constitution Act* of 1855 (quoted above), which was of course already a statute, contained the 'Advice and Consent' phrase on which Twomey relies. But the 'Advice and Consent' phrase formerly found in s 1 is merely historical and decorative, verging on entirely fictional. The phrase can be (and in 1975 was) changed in Victoria to eliminate the reference to the advice and consent of the Houses of Parliament.¹¹⁵ The enacting words were

110 As is shown by Waugh, above n1 at 71. I make no reference to s 87E of the *Constitution Act* 1975 (Vic), to which he refers, as it did not exist at the time in question here.

111 Twomey, above n1 at 601.

112 Id at 582.

113 Mention should be made of the fact that it is certainly within the powers of Parliament to offer advice to the Crown. See Eugene Forsey, *Freedom and Order* (1974) at xii & 73ff. The occasion for Forsey's essay appears from that source, and he establishes beyond doubt the right of Parliament to address the Crown in order to make known its views on the government's doings. The question here is a different one, namely whether Parliament's advice binds the Crown to act in accordance with it.

114 Preserved as part of the law of Victoria by the *Imperial Acts Application Act* 1980 ss 3, 8.

115 *Constitution Act* 1975 (Vic) s 16; contrast the statutes referred to by Twomey, above n1 at 584.

altered too, in 1985, to eliminate the ‘advice and consent’ phrase. No-one suggested on either of these occasions that this extinguished a conventional rule about the Governor’s assent. That was because of their merely historical/decorative status. When those words had a place in the law of Victoria in this context, they were thus a poor basis from which to argue for a constitutional convention reflecting (at least to some extent) real power relationships, either just before the words were expunged or in any period of modern constitutional history.

Adopting a rule that Ministers may never constitutionally advise assent would, in addition, result in there being effectively no constitutional means for refusing assent except by an exercise of the reserve powers, at least until a mechanism is developed by one or possibly both Houses of Parliament for rescinding its or their ‘advice’ to the Crown to enact legislation. Perhaps no such mechanism has developed because it is appreciated that Royal Assent can be refused on other advice. At any rate, once it is appreciated that there may occasionally be good reasons why the Governor may refuse assent, it can readily be seen that there must be a source of such advice to contradict the ‘advice’ given by the Houses of Parliament in passing bills.

Although precedents for refusal on advice in Australia are quite rare, there have been twenty-seven cases in the provinces of Canada in which assent has been refused on executive advice¹¹⁶ and even one case in which a provincial government did not object to the proposed disallowance of a provincial statute by the federal authorities.¹¹⁷ This is a significant course of practice confirming the approach suggested here.

The view that it ‘would not be in accordance with constitutional precedent’ for Ministers of the Crown to tender advice to refuse assent was expressed on one occasion by Zelling J,¹¹⁸ but this merely re-states the empirical observation that such advice is rarely forthcoming — an unsurprising state of affairs given that Ministers normally control one House of Parliament, so that legislation will not come to pass without their consent, and governments rarely lose the confidence of the House nowadays in mid-term.¹¹⁹ Although I therefore differ from Anne Twomey, and do so with reluctance, I am greatly fortified in my view by the fact that both Geoffrey Lindell¹²⁰ and John Waugh¹²¹ share it.

It seems correct, therefore, that a Governor may refuse assent to a bill if faced with advice to do so from his responsible advisors. I would go further and say that

116 Saywell, above n3 at 221.

117 La Forest, above n107 at 72.

118 *West Lakes v South Australia* (1980) 25 SASR 389 at 415.

119 Thus, Geoffrey Lindell accurately comments that ‘the true test for the existence of such a convention can only arise where a minority government holds office and legislation has been passed against the wishes of such a government’: Geoffrey Lindell, ‘Lessons to Be Learned from the Australian Capital Territory Self-Government Model’ in Clement Macintyre & John Williams (eds), above n102 at 49 fn 30.

120 Geoffrey Lindell, ‘The Arrangements for Self-Government for the Australian Capital Territory: A Partial Road to Republicanism in the Seat of Government?’ (1992) 3 *Public Law Review* 5 at 14 fn 45; see also Lindell, above n120.

121 Waugh, above n71 at 71.

he is bound to do so. If we concede a choice to a modern-day Governor when confronted by a bill and advice to veto it, we raise the possibility of a controversial decision by the Crown which Ministers will not defend. Taking the matter to its logical conclusion, the Governor would be in an impossible position if he granted assent against the advice of the government which then resigned as a result. In jurisdictions with restrictions on the holding of elections other than at predetermined times (restrictions that most Australian jurisdictions now have), it might be quite difficult or even legally impossible for the Crown to resolve such a situation, even by going to the extreme of calling an election. We must be careful not to set up a rule which might permit the Crown to be drawn into political controversy or illegality if its advisers are prepared to push things to the limit.

Twomey gives the example of a bill passing both Houses of Parliament after a 'free vote' is granted, and the government's recommending that it not receive assent despite that. She follows that up by postulating a situation in which a government suffers a defeat on a bill when party discipline does apply and then recommends that assent be withheld from it, and it becomes clear that she is uneasy about the refusal of Royal Assent because of the problems it raises with ignoring the will of Parliament and the possible democratic deficit that may ensue.¹²²

I certainly share the feeling that the denial of assent should not become a well-used instrument of political life for essentially the same reasons as she gives. Nevertheless, it is perhaps inevitable that less hesitation might occasionally be felt in asking Australian state Governors to veto proposed state legislation than there is to ask the Queen herself to carry out the equivalent action in the United Kingdom. This is because, in Australia, the precedents for doing so are less than three hundred years old, colonial and even early 20th century legislation having been occasionally vetoed by the Crown via the Colonial Office; Governors change regularly, and both they and their office are less of an institution than the Queen herself; the Governorship is not hereditary but in effect in the gift of the elected Premier;¹²³ and the doctrine of parliamentary sovereignty is attenuated here by federalism anyway. Even so, refusal of assent has not of course become, and should not become, an everyday occurrence in Australia either. But if it does occur in one of the situations mentioned by Twomey when there is a real question about its propriety and whether it can be reconciled with the democratic nature of the polity, I submit that this is a situation in which a political decision may have political consequences for the government on the floor of Parliament, and not in Government House.

The issue should be whether the government can defend its advice on the floor of the House having regard to whatever reasons it can muster in favour of the action it has chosen, and the extent to which the government succeeds in convincing members that the situation really is one of those very exceptional ones in which the denial of assent really is justified. As in other areas, if Parliament is dissatisfied with the advice and the resulting refusal of assent, its remedy lies with

122 Twomey, above n1 at 600-601.

123 *Australia Act* 1986 (Imp & Cth) s 7(5).

the censuring of the responsible government, and one House of Parliament can even bring down the government. This possibility ensures that the refusal of assent can be the subject of consideration by Parliament itself, and no democratic deficit arises.

Returning however to the events of 1857 in Victoria, on my reconstruction of events the advice which the Governor formally received to refuse assent might not be considered to be freely and willingly volunteered. It was, rather, brought about by the Governor's refusal, or at least strong and expressed reluctance, to grant Royal Assent on his own responsibility, and the consequent choice created for the Ministry between recommending the vetoing of the Bill locally and sending it to London for the consideration of the Colonial Office. There was also a possible third option of trying to overcome the Governor's reluctance, depending on how difficult that would have been, but it was either not attempted or attempted unsuccessfully. The question therefore is whether the Governor's stance was right on that slightly but significantly different basis.

The answer to that question might depend on the precise facts or even the tone of voice in which the Governor made his objection. It is not possible to establish who precisely said what, to whom or when. The lack of any direct evidence on how the objection was made does not necessarily mean that the Governor came down hard on his Ministry and suppressed the evidence. It is clear that the Governor raised the point, but it would be consistent with the available evidence that the Governor gently raised it with the Ministry and, like a good pedagogue, permitted them to come to the conclusion themselves that the tendering of advice to assent would not be in the best interests of the constitutional relationship between the Governor and the government, Victoria's standing with the Colonial Office or the Empire as a whole. Or, again, the Governor might have raised the issue without peremptorily refusing to assent, being prepared to be convinced by his Ministry that his fears were groundless, but instead found that they were convinced by his objection and fearful of putting a foot wrong and offending the Empire so soon after Victoria had received responsible government.

History's verdict on Barkly's performance as constitutional Governor of Victoria has generally been very kind, Geoffrey Serle judging for example that he 'on the whole showed great skill'¹²⁴ in his relations with Parliaments. His biographer comments on his 'patience with the often brash and inexperienced colonial politicians';¹²⁵ commends his ability 'to make good use of his position without formal machinery';¹²⁶ comments in recounting an incident involving great political controversy during one of O'Shanassy's premierships on the great unlikelihood 'that the cautious and constitution-minded Barkly would have said anything unfitting to his constitutional position';¹²⁷ and quotes an apparently contemporary assessment to the following effect:

124 Serle, above n71 at 311.

125 Mona Macmillan, *Sir Henry Barkly: Mediator and Moderator 1815–1898* (1970) at viii.

126 *Id* at 97.

127 *Id* at 122.

I think that we have a very good constitutional Governor in Barkly. I am very sure he thoroughly understands the system of which he is a constituent element. He is vigilant in the extreme. He exercises a very wholesome influence by never interfering with the determination of his constitutional advisors, and yet by the intelligence of his suggestions he is said to have great influence and weight. His manners are gentle and there is almost a sleepiness in his demeanour when action is called for [...].¹²⁸

Certainly, when the Oaths of Office Bill was submitted to Barkly, there was no recorded formal advice given by the Executive Council to assent, as would probably have occurred if the government had decided to force the issue; and the Ministry was prepared to present the Governor's message to Parliament as a means of solving the dilemma. This suggests that they were either convinced by the Governor's objection, or unwilling to force the issue because they could see that he was quite possibly in the right.

While Attorney-General Michie stated in Parliament that 'his Excellency was not prepared to affirm'¹²⁹ that religions were not equal in Victoria, and his defence of the choice of the veto over reservation is noticeably more enthusiastic than his defence of the prior decision not to assent which brought about the choice, that merely indicates that vetoing was his own personal brainwave. Attorney-General Michie's attribution of the opinion quoted to his Excellency does not permit us to conclude anything about the Ministry's reaction to it or the firmness with which it was made in the first place. Perhaps Attorney-General Michie and the Ministry were embarrassed about their error, and were very understanding of the dilemma in which it placed the Governor: in a letter to Michie QC on 5 September 1863,¹³⁰ Barkly referred to him as 'one of the few Victorian politicians who really comprehended my difficulties and did justice to my motives'.¹³¹

There is one further reason for suspecting that Barkly's hint, if one was given, was quite a gentle one and within the bounds of constitutional propriety: Barkly's despatch home mentioned no screaming rows with his responsible Ministers nor any indication by him to them that advice, if given, might have to be rejected, and I strongly suspect that he would have mentioned something like this in this confidential forum. Nor is there any other reason to suspect that any major rows broke out. In relation to the next case, the Duration of Parliament Bill, we shall see that the Governor received advice which he considered (and which actually was) unacceptable, and responded with a minute which accepted the advice in form but in substance was an instruction to go away, think again and do better (which duly occurred, because there was a providential change of government). There is nothing like that on the record here.

128 Id at 128.

129 Victoria, *Parliamentary Debates*, Legislative Assembly, 24 November 1857 at 1398.

130 Victorian Government Gazette, 14 August 1863 at 1771, notifies the appointment of Michie to the office of Queen's Counsel on the recommendation of none other than Attorney-General Higinbotham.

131 Australian Manuscripts Collection, La Trobe Library, M 5628, box 42/2 (1).

None of this is conclusive evidence, but certainly there is no reason to suspect that Barkly deviated from his general standard, as exemplified by the assessments of his conduct just quoted, in relation to the Oaths of Office Bill, and in relation to such a man the absence of evidence speaks in his favour. It should also be mentioned that one of Barkly's final acts as Governor was to recommend O'Shanassy, with whom he had afterwards fallen out but continued to hold in high regard, for a Knighthood (along with Edward Cohen, a practising Jew who was Mayor of Melbourne).¹³² This shows a remarkable fair-mindedness and willingness to rise above the fray.

Barkly, incidentally, seems to have been quite free with counsel and advice to his government while bills were being prepared for his assent; indeed, as we might expect after reading *The Age's* description of the broad sweep of subjects to which he was pleased to direct his attention, he was never backward in coming forward with his views on the government's doings: a volume of his comments on proposed legislation preserved in the Public Record Office of Victoria¹³³ to which he was asked to assent amply proves this. Unfortunately it includes nothing on the Oaths of Office Bill, although it does show that his Excellency, while free with comment and advice on many bills, was always cautious to confine himself to comments, queries and suggestions, and did not veto bills just because he might have been dissatisfied with this or that detail. His despatch on the Oaths of Office Bill and his biographer's assessment confirm his awareness of the need for him to use this power with great caution, and his belief that he was justified in doing so only in the interests of the Empire as a whole, whose representative he was in Victoria.

Whether the Governor acted rightly is, at any rate, a question of limited utility today, for the Empire and with it the dual loyalty of Australian colonial/state Governors which caused the problem of 1857 has ceased. At the latest this occurred with the passage of the *Australia Act* 1986 (Imp & Cth) s 7(1); as a matter of constitutional fact, it began to occur much earlier. Possibly the nearest analogy today would be a bill which could be argued to harm Australia's relationships with other Commonwealth or foreign countries, but such bills of course might well be the subject of a de facto federal veto, most obviously by legislation supported by s 51(xxix) of the Constitution. Given that a state government will rarely if ever admit that a proposed piece of legislation would have that effect, it is likely that a Governor who vetoed a bill on the grounds that it did would involve himself in a political controversy which is quite capable of solution by the usual means by which political crises are solved. The problem that arose in relation to the Oaths of Office Bill was, rather, due to the peculiar position of the Governor in the early colonial days — when he owed obedience to the Colonial Office and was the Empire's man in the colony, but was also a mini-constitutional-sovereign of the colony in place of the Queen and thus expected to act in accordance with the advice of his responsible Ministers as well.

132 Macmillan, above n125 at 136, 143.

133 VPRS7584/P0001/1.

For this reason, as well as because of the absence of any precise information about the manner in which the Governor gave expression to his misgivings, it is difficult to resolve the question of whether the Governor acted rightly even by the standards of the time. The analogy with the Crown in the United Kingdom breaks down because of the dual-loyalty problem, and there is nothing analogous today by which the Governor's actions could be judged. We must of course be careful not to judge the actions of yesterday by the standards of today, and it is hard for us to place ourselves in the position of the people of the 1850s in determining not merely what is strictly legal, but what is proper and acceptable behaviour in the polis. Some occurrences which, by today's standards, were quite surprising occurred in the early years of representative government in Victoria: while researching this topic, I also came across a minute¹³⁴ which indicates that Cabinet was divided in 1862 about whether the Governor should give the Royal Assent to the *Real Property Act* 1862 (Vic) (which introduced the Torrens system in Victoria) or rather reserve it for the consideration of the Imperial authorities, so that the Governor was required to choose between conflicting advice from his Ministers on this very topic (he chose to assent).

Perhaps the nearest current analogy to the position of a colonial Governor of those times is that of the Lieutenant-Governors of the Canadian provinces, appointed by the federal government but also mini-constitutional-sovereigns of their provinces.¹³⁵ Refusals of assent by Lieutenant-Governors in Canada have occurred rather more frequently than in Victoria,¹³⁶ but the office of Lieutenant-Governor is no longer (if it ever was) quite comparable to the office of Governor of early colonial Victoria, as the legal position of the Lieutenant-Governor as a federal officer supervising the province tends to take something of a back seat nowadays to the conception of the office as the Vice-Regal office in the province.¹³⁷ That, of course, is why there are many, many fewer instances of refusal of assent than there are disagreements between the federal and provincial governments.

In Canada, however, the federal Government also has an express power to disallow provincial statutes under ss 56 and 90 of the *Constitution Act* 1867 (Can.) 30 & 31 Vict, c 3, a power which is not wholly unlike that formerly possessed by the Imperial authorities in relation to the Australian colonies/states;¹³⁸ bills can

134 VPRS 7674/P0001/1.

135 See the minute of the Clerk of the Queen's Privy Council for Canada of 1882 quoted in Hodgins (ed), above n105 at 7; W P M Kennedy, *The Constitution of Canada 1534-1937: An Introduction to its Development, Law and Custom* (2nd ed, 1938) at 383, and on the quasi-colonial status of some Canadian provinces in the early days see Chester Martin, 'The Colonial Policy of the Dominion' (1922) 16 *Transactions of the Royal Society of Canada* II:35, 35, 45f.

136 See above, n3.

137 See, for example, the statement of the Lieutenant-Governor of Ontario quoted in Kenneth Munro, 'Alberta's Crowning Glory: The Office of Lieutenant-Governor' in Richard Connors & John Law (eds), *Forging Alberta's Constitutional Framework* (2005) at 308.

138 W M Martin, 'The Veto Power' (1925) 3 *Canadian Bar Review* 80. Reference to the actual text of ss 56 and 90 underscores the similarity of the two powers. Kennedy, above n135 at 422, states that 'the principles are common'.

also be reserved by Lieutenant Governors under ss 55 and 90 for the Governor-General's pleasure, and reservation was the other option suggested by Barkly in 1856. But the analogy is an imperfect one because the Canadian power is no longer used for reasons only indirectly connected with the dual-loyalty issue.¹³⁹ However, 20th century examples exist in which the power of disallowance was used in order to avoid conflict with overriding federal interests,¹⁴⁰ and Pierre Trudeau suggested in 1975 that it might still be used in order to prevent conflicts with federal law.¹⁴¹ There are also numerous examples of disallowance and reservation of bills for conflict with Imperial or federal interests from the 19th and early 20th centuries,¹⁴² including one involving a statute 'completely ignoring as applicable to the Indians of B[ritish] C[olumbia] the honour and good faith with which the Crown has always dealt with the Indian tribes'.¹⁴³ Several provincial statutes were disallowed because they discriminated against Asians, which raised a conflict with Imperial interests in good relations with China and Japan¹⁴⁴ as well as being an 'example of discriminating legislation such as had been on several occasions disallowed as being incompetent to a provincial legislature upon grounds of public policy'.¹⁴⁵

Disallowing bills because they 'conflict with Dominion [ie, federal] policies or interests',¹⁴⁶ apparently the most often used ground for federal disallowance,¹⁴⁷ suggests that the power of veto might also have been rightly used in such cases by the local Lieutenant-Governor in his capacity as a federal officer, or an officer of the Crown more generally, if the conception of the Lieutenant-Governor as Ottawa's man in the province had remained more or less as strong as the conception of the Governor of Victoria as the Colonial Office's representative was in the early days of responsible government in Victoria.

139 Hogg, above n3 at 5-19.

140 Forsey, 'Disallowance', above n3 at 51f; W P M Kennedy, 'The Disallowance of Provincial Acts in the Dominion of Canada' (1924) 6 *Journal of Comparative Legislation and International Law* 81 at 84; Martin, above n138 at 89-90. It is probably also correct to place the three disallowances in Alberta in 1937 under the same heading; compare Dale Gibson, 'Bible Bill and the Money Barons: The Social Credit References and their Constitutional Consequences' in Connors & Law (eds), above n137 at 200; G V La Forest, 'Disallowance of Provincial Legislation' (1956) 34 *Canadian Bar Review* 632 at 636; J R Mallory, 'Disallowance and the National Interest: The Alberta Social Credit Legislation of 1937' (1948) 14 *The Canadian Journal of Economics & Political Science* 342 at 349f, 354, 356; Munro, above n137 at 291f; L Wilson, 'Disallowance: The Threat to Western Canada' (1975) 39 *Saskatchewan Law Review* 156 at 177. See also J R Mallory, 'The Lieutenant-Governor's Discretionary Powers: The Reservation of Bill 56' (1961) 27 *Canadian Journal of Economics & Political Science* 518 at 520.

141 Hogg, above n3 at 5-19 fn 69a.

142 Hodgins (ed), above n104 at 1330-1334; La Forest, above n107 at 21, 24, 36, 44, 58; Wilson, above n140 at 158, 170-174.

143 Eugene Forsey, *Freedom and Order: Collected Essays* (1974) at 180; Hodgins (ed), above n104 at 1332.

144 La Forest, above n107 at 66, 94-96.

145 Id at 96.

146 Wilson, above n140 at 165. See also Kennedy, above n135 at 497.

147 La Forest, above n107 at 68; Wilson, above n140 at 167.

Also on record from Canada is a case from 1900 in which the federal Government there admitted (even if only at the insistence of the British Treasury) that the Imperial authorities could, if objectionable Canadian legislation of a financial character were ever passed, properly disallow it, an admission which was confirmed despite the *Statute of Westminster* 1931 22 George V, c 4.¹⁴⁸ If Imperial interests could be properly defended in this fashion in relation to the Dominion of Canada in 1900, it seems that they could also be capable of defence by the similar means of refusal of assent in the colony of Victoria in 1857.

It is also worth noting that, as appears from Twomey's meticulous research, a case of refusal of assent by an Australian state Governor on British instructions occurred as late as 1912, suggesting that such instructions remained legitimate even after federation.¹⁴⁹

An even better guide is the reaction to the vetoing of the Oaths of Office Bill by the appointed judge of the day, the Secretary of State for the Colonies, who was advised by the experienced officials of the Colonial Office. It was the Secretary of State who fulfilled the role of the State Premier nowadays¹⁵⁰ in the sense that it was he who would have been responsible for tendering advice to the Queen to dismiss the Governor. In this case, he very conspicuously did not.

The Secretary of State replied on 12 March 1858 to Barkly's despatch reporting his non-assent to the Bill. The reply, although it was of course based on the information provided by Barkly in his despatch, did not formally express approval of his action,¹⁵¹ but no exception was taken to it in the reply, while agreement was expressed with his view that he should have been consulted about the Bill.¹⁵² This virtually amounts to an approval of the veto itself. The Colonial Office might have privately reprimanded the Governor; it might even have recalled him; but it did neither of those things. Given the fact that the Colonial Office was well aware of the need for a large degree of colonial legislative independence and not hesitant about reprimanding Governors who had done the wrong thing, this is a good indicator that, at this stage of Australian constitutional development, the action of the Governor was not beyond the bounds of acceptability.

Barkly's sound judgment was vindicated by the fact that, before the despatch of 12 March 1858 was even sent from London, he sent one himself reporting that, as the second Oaths of Office Bill:

does not, [un]like its predecessor, make Her Majesty admit by implication that the continuance of the oaths prescribed by the *Roman Catholic Relief Act* is incompatible with the existence of civil liberty in a state, and is similar in its provisions to the New South Wales Act (20 Vic No 9) already approved, I at once signified the Royal Assent to it.¹⁵³

148 Kennedy, above n135 at 501; Thomas Le Duc, 'The Last Vestige of Disallowance' (1934) 12 *Canadian Bar Review* 579.

149 Twomey, above n1 at 589.

150 *Australia Act* 1986 (Imp & Cth) s 7(5).

151 It appears that this was not necessarily exceptional anyway: Serle, above n71 at 310.

152 CO 309/43/499ff (AJCP 827); VPRS 1087/P0000/11/V2/229-232.

153 VPRS 1084/P0000/3/V2/204f.

Thus, if there was a hint in the Secretary of State's reply of 12 March 1858, in which approval of the veto was not formally expressed, that the Colonial Office would not countenance a further refusal of assent on policy grounds, Barkly already had an adequate answer on the way.

It should also be mentioned that it has become established since Barkly acted that the sending of a message by a Governor to a House of Parliament suggesting amendments to a Bill, a power that is now contained in s 14 of the *Constitution Act* 1975 (Vic), is not one of the reserve powers of the Crown.¹⁵⁴ It would therefore be wrong for a Governor to send a message to a House suggesting an amendment without receiving advice to do so, which, as we saw, appears to be what Barkly did in 1857. However, it was by no means established then that this was so; the power was a new one without a direct analogue in the British Constitution; no protest, whether public or private, is recorded on the part of the government against Barkly's action; there are later precedents for similar unauthorised action by the Vice-Regal office-holder in British Columbia;¹⁵⁵ and Barkly barely defended his action in his despatch to the Colonial Office, no doubt because he did not think it necessary to do so.

3. *The Duration of Parliament Bill*

On 4 June 1858, hardly six months after refusing assent to the Oaths of Office Bill, Barkly found himself again refusing Royal Assent, this time to a Bill to extend the duration of the Legislative Assembly. This refusal, however, was far less controversial.

The Bill concerned was a simple but important Bill which proposed to reduce the duration of the Legislative Assembly (including the existing Assembly) from five years (as was provided for by s 19 of the original *Constitution Act*) to three. Again the first Bill designed to do this was presented to the Governor for Royal Assent and vetoed on Ministerial advice, and a second Bill was introduced, passed and received the Royal Assent,¹⁵⁶ in this case becoming Act No 89 (1859).

In the case of the first Duration of Parliament Bill, however, the difficulty was contained in the *Constitution Act* itself, which had been drafted by Victorians, and had nothing to do with the conflicting Imperial loyalties of the Governor. Section 60 of the *Constitution Act* provided that

it shall not be lawful to present to the Governor of said Colony for Her Majesty's assent any Bill by which an Alteration in the Constitution of the said Legislative Council, or Legislative Assembly [...] may be made, unless the Second and Third Readings of such Bill shall have been passed with the Concurrence of an absolute Majority of the whole Number of the Members of the Legislative Council and of the Legislative Assembly respectively: Provided also, that every Bill which shall be so passed shall be reserved for the Signification of Her Majesty's Pleasure thereon.

154 See Taylor, *The Constitution of Victoria* (2006) at 94.

155 Saywell, above n3 at 221 fn 97.

156 In this case, as the Bill was required to be reserved, this was done and the Queen personally gave assent.

As the number of members of the Assembly was 60,¹⁵⁷ an absolute majority was thirty-one members. Section 61 exempted from this requirement bills relating to the qualifications of electors and members, electoral boundaries, the number of members and various bits of electoral machinery such as the writs.

The problem in short was that the Duration of Parliament Bill had not been passed by the Legislative Assembly in the manner required by s 60, although it fairly clearly did not come within any of the exceptions listed in s 61 and almost equally clearly came within the requirement for absolute majorities in s 60 because it affected the Assembly's 'constitution'.

Oddly enough formal Parliamentary agitation for the reduction from five to three years began immediately after the debate on state aid on 2 June 1857 in which O'Shanassy complained of the insult offered to him as a Roman Catholic by the oath he had had to take. The next item of business was his proposal to introduce a measure to reduce the duration of Parliament. Rather discourteously, Haines, the Premier, procured the refusal of leave by the House for introduction of the Bill, citing the lack of urgency, the press of other business and the possibility of an omnibus reform Bill in due course.¹⁵⁸ This promise too was redeemed speedily enough: Haines himself introduced the desired Bill on 16 December 1857,¹⁵⁹ along with a number of other reform Bills, as promised.

A select committee was formed on 19 January to consider the group of Bills concerned, which included Messrs O'Shanassy and Haines, Evans and a number of other early luminaries.¹⁶⁰ It brought up a progress report only a week later, on 26 January 1858 — the day was not then a public holiday, as it was merely the foundation day of one sister colony — and unanimously approved the Bill.¹⁶¹ This speedy approval, given in advance of the assessment of all other components of the reform package, indicates that O'Shanassy had been right to say in the Assembly on 19 January¹⁶² that there was 'little difference of opinion' on the question.

Unanimity was, however, to be the Bill's downfall, for there was obviously so little dispute about the principle that 31 members did not bother to remain present for the second reading, as the *Constitution Act* required. Neither the Assembly's journals¹⁶³ nor 'Hansard'¹⁶⁴ nor any newspaper I have consulted records the number of members present when the Bill received its Second Reading on 5 January as a prelude to being referred to the Select Committee. When the Bill came on for Third Reading on 29 January after the committee had reported, and an absolute majority was again required, a division on another question had occurred shortly before in which 48 members participated,¹⁶⁵ but there is again no record of

157 *Constitution Act* 1975 (Vic) s 10.

158 Victoria, *Parliamentary Debates*, Legislative Assembly, 2 June 1857 at 710.

159 Victoria, *Parliamentary Debates*, Legislative Council, 16 December 1857 at 58.

160 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 January 1858 at 144–147.

161 Victorian *Parliamentary Papers*, 1857–58 vol I at 635–637, 643; Victoria, *Parliamentary Debates*, Legislative Assembly, 26 January 1858 at 177.

162 Victoria, *Parliamentary Debates* at 146.

163 5 January 1858 at 42.

164 Legislative Assembly, 5 January 1858 at 106.

the number present at the third reading of the Duration of Assembly Bill.¹⁶⁶ Later statements in the Assembly also suggest that there was not merely an omission to record the number of members present at one of the stages at which an absolute majority was required, but that there in fact was not such a majority present at all.¹⁶⁷

In the Legislative Council, however, opposition to the immediate passage of the Bill¹⁶⁸ meant that a division was held, at which 18 of its 30 members voted in favour of the Bill at the second and 19 at the third reading. A reference to s 60 of the *Constitution Act* in the debate in the Council suggests that the error of the Assembly had been spotted, probably by GW Rusden, its Clerk, who is also probably responsible for the fact that, in the Legislative Council, the journals themselves recorded the fact that the requisite majorities were obtained on both second and third readings.¹⁶⁹ As soon as the Bill had passed the Legislative Council, GW Rusden had the pleasantly painful duty of writing a letter to the Governor's Private Secretary in which he discharged his duty of apprising the Governor of the facts of the case, mentioning that there was no indication that the Bill had been passed by the requisite majorities in the Legislative Assembly.¹⁷⁰

It was too much to hope that such an omission would escape the comment of a Governor such as Barkly, who, as mentioned earlier, was never backward in coming forward with comments upon and even objections to bills passed before Royal Assent was granted, even if he was equally well aware of the need to be cautious in the extreme about pushing his objections except in clear and obvious cases. This however, was a clear and obvious case. On receiving the Bill on 11 February 1858, Barkly referred it to the law officers.¹⁷¹ This was the correct course of action. Although Parliament's Joint Standing Orders required bills to be presented the Governor by the Clerk of the Parliaments, the Clerk could not of course advise the Governor constitutionally. In presenting the Bills, the Clerk was acting as a servant of the Houses that passed the bills and carrying out a duty imposed on him by the Joint Standing Orders; no advice by him to do anything was implied in what he did or could properly have been tendered by him.

The first law officer to see the papers was Solicitor General Fellows, who is described by Geoffrey Serle as a 'cold, subtle, venomous, old Etonian arch-Tory'.¹⁷² His opinion, scrawled on a copy of the Bill, was as follows:

I do not conceive there has been any oversight. This Bill does not alter the Constitution of the C. or A. [Council or Assembly] and it is only on that ground

165 Victoria, *Parliamentary Debates*, Legislative Assembly, 29 January 1858 at 210f; see also Victoria, *Votes and Proceedings of Parliament*, Legislative Assembly, 29 January 1858 at 83.

166 Victoria, *Votes and Proceedings of Parliament*, Legislative Assembly, 29 January 1858 at 84; Victoria, *Parliamentary Debates* at 212.

167 Victoria, *Parliamentary Debates*, Legislative Assembly, 26 October 1858 at 128; *Herald*, 27 October 1858 at 6; and, less clearly, *The Age*, 27 October 1858 at 6.

168 Victoria, *Parliamentary Debates*, Legislative Council, 9 February 1858 at 256.

169 Victoria, *Votes and Proceedings of Parliament*, Legislative Council, 9 February 1858 at 36f.

170 VPRS 7674/P0001/1.

171 *Ibid.*

172 Serle, above n711 at 255.

that an absolute majority is necessary — a mere alteration of the *Constitution Act* does not require it.¹⁷³

This is so subtle that it is hard to make out precisely what it was meant to mean, but it appears to be an attempt to argue that the Constitution of the Houses is something other than, and outside, their structure according to the *Constitution Act*, and that the Houses' duration, therefore, was not included within their 'Constitution' for the purposes of s 60. This is a clearly untenable opinion, as s 60 of the *Constitution Act*, in referring to the Houses' 'Constitution', obviously intended to refer to their constitution as set up by other parts of the Act. It is necessary to recall that, at this stage of Victorian constitutional development, the Solicitor-General was a Minister of the Crown rather than a distinguished independent barrister,¹⁷⁴ and Solicitor General Fellows was a member of the Legislative Assembly for St Kilda.

That opinion was all that Barkly had at the meeting of Executive Council on 24 February 1858. At it, he laid a long minute before the Council¹⁷⁵ referring to the Clerk's letter and the lack of a certificate by the Clerk of the Legislative Assembly under Standing Order 264¹⁷⁶ stating that the Bill had been passed by an absolute majority. Obviously, the Solicitor-General's view put the Governor in a bit of a bind, for, although clearly right, the Governor would need to tread very carefully in disagreeing with his responsible Ministers. The Governor's minute therefore stated that he 'inclines to the view of the Solicitor-General', but actually spent more time arguing against it. (This cautious approach is another reason why we should not jump to the conclusion that Barkly had acted improperly six months before when considering the Oaths of Office Bill.)

The Governor went on to say in his minute that he thought it 'remarkable' that s 61 of the *Constitution Act* contained no exception for the duration of the Assembly, suggested that the objection to the legislation might also be raised in England and worried about the 'offence [that] might be given by thus altogether ignoring the interpretation put upon the *Constitution Act* by one branch of the legislature', presumably a reference to the Legislative Council and its Clerk's views. He also referred to the fact that this was the first time that such a point had been raised and that the issue 'may prove of vast importance to the future political destiny of the colony' — a prescient remark given that a far-reaching proposal for constitutional reform was to come to grief on the requirement for an absolute majority in the Legislative Assembly just over twenty years later¹⁷⁷ — which meant that he was 'anxious to have the formal and deliberate advice of the Executive Council in regard to it'. (Again, no such broad hints to go away and

173 VPRS 7674/P0001/1; underlining as in original.

174 The present arrangement was introduced by the *Solicitor-General Act* 1951 (Vic) s 2; see now *Attorney-General and Solicitor-General Act* 1972 (Vic) s 4(2).

175 VPRS 1080/P0000/4/132–137. These minutes and various other documents are also attached to the Governor's despatch to the Secretary of State, CO 309/45/292 (AJCP 829).

176 The text of this standing order may be found in Victoria, *Votes and Proceedings of Parliament*, Legislative Assembly, 1856–7 at 366.

177 Todd, above n2 at 754f.

think again are recorded in the discussion of the Oaths of Office Bill; perhaps then they were not needed in that case, because Ministers were more easily convinced.)

As an aside, it is interesting to note that a similar course was also being contemplated with respect to another Bill, this time because of an alleged default in the Legislative Council. Barkly's original draft minute contained the following passage, which was crossed out and does not appear in the transcript of the minute actually read at Executive Council:

Moreover should that [the view that s 60 did include the proposed alteration of the duration of the Legislative Assembly, and thus absolute majorities were required] prove ill-founded, another and more difficult question arises as to a Bill purporting 'to secure the Independence of the Legislature', which though agreed to by both Houses has been withheld from the Royal Assent because of its not having passed the Council with the concurrence of an absolute majority of the whole number of members.¹⁷⁸

In other words, they could hardly tell the Council off for not obtaining absolute majorities for the Independence of the Legislature Bill, which in due course became Act No 91 (1859) and affected the qualifications of members, but let through a Bill dealing with the more fundamental subject of the duration of the Legislative Assembly. (In the result the disagreement among the law officers about whether the Independence of the Legislature Bill required absolute majorities was resolved by reserving it and asking for the opinion of the English law officers: Attorney-General Kelly and Solicitor General Cairns reported that the Independence of the Legislature Bill came within s 61, and therefore absolute majorities were not required.)¹⁷⁹

Proceedings of the Executive Council on the Duration of Parliament Bill were adjourned, but resumed on 2 March,¹⁸⁰ when the Governor's minute was again read, after which the Clerk read an opinion of Attorney-General Michie. It stated, '[w]ith every desire to arrive at a different opinion, I am constrained to think that the duration of Parliament is an alteration of the constitution of the Assembly and requires an absolute majority of either House to give it the force of law'.¹⁸¹ He rejected the view that there was a distinction between merely altering the *Constitution Act* and altering the Constitution of the Assembly as 'merely a verbal' distinction.

Attorney-General Michie, however, again suggested a way out. He pointed out that there was no penalty attached to the presentation of the Bill for the Royal Assent, even though doing so was declared 'unlawful' by s 60 and would breach the *Constitution Act*. He further expressed the view that the case involved 'an irregularity not sufficient to stop the progress of the Bill'. Furthermore, as the Bill had passed the Assembly without a division, there was no evidence one way or the other about whether the required majority had been achieved, and the presumption

178 VPRS 7674/P0001/1.

179 VPRS 1084/P0000/3/V2/334f; VPRS 1087/P0000/12/V2/587-593.

180 VPRS 1080/P0000/4/144-147.

181 The original is in VPRS 7674/P0001/1.

would be in favour of validity. It is however significant that Attorney-General Michie although himself a member of the Assembly, did not feel able to assert that he had been present when the Bill had passed its Second and Third Readings and could state from his own personal knowledge that an absolute majority had been obtained for it. Rather, he relied solely on the absence of formal evidence either way.

Leaving aside the constitutional proprieties, his legal position was at least arguable: Royal Assent might cure all defects in the Bill, or at least the courts might refuse to inquire into Parliamentary proceedings in order to assess a statute's validity; the latter proposition continued for decades to be part of British constitutional law, and only recently, with the development and growing use of statutory legislative procedures, has it been qualified.¹⁸² But Victorian legislative procedures were set out in a statute of the Imperial Parliament. And in Australia, where written Constitutions prevail, we have long recognised that, as it was put in 1960,

the framers of a constitution may make the validity of a law depend on any fact, event or consideration they may choose, and if one is chosen which consists in a proceeding within Parliament the Courts must take it under their cognisance in order to determine whether the supposed law is a valid law [...].¹⁸³

Although that was not said until over a century later, it was certainly not beyond the realm of the possible as matters stood in 1858 to think that a colonial statute conflicting with the conditions of law-making laid down in an Imperial statute might be invalid, as various events in South Australia would shortly show. In particular, the English law officers took a stringent view of similar errors in South Australia in an opinion of 1862 and pronounced them fatal to the validity of the Acts concerned.¹⁸⁴ It was thus South Australia rather than Victoria which incurred the opprobrium of being named in the preamble to the *Colonial Acts Confirmation Act* 1863 (Imp) 26 & 27 Vict c 84 as the proximate cause of the need to pass a general validating Act for colonial statutes relating to the constitutions of legislatures passed in disregard of the proper forms.

Furthermore, the procedural error in this case was a simple and clear one; indeed, it was possible to demonstrate it mathematically. On the assumption that judicial review of the issue was even possible, there was thus much less of a case for giving assent as a means of remitting the matter to the courts, the usual arbiters of the validity of doubtful legislation.¹⁸⁵

If the Duration of Parliament Bill were sent home — for reservation was required by s 60 too — there was furthermore a risk that the Imperial authorities might return the Bill assented to, or — worse — unassented to, and accompanied

182 *R (Jackson) v Attorney-General* [2006] 1 AC at 262, 281, 289, 305–307, 319, 320; S A de Smith & Rodney Brazier, *Constitutional and Administrative Law* (8th ed, 1998) at 90–93.

183 *Clayton v Heffron* (1960) 105 CLR 214 at 235 (Dixon CJ, McTiernan, Taylor & Windeyer JJ).

184 Peter Howell, 'Constitutional and Political Development, 1857–1890' in Dean Jaensch (ed), *Flinders History of South Australia: Political History* (1986) at 136; O'Connell & Riordan (eds), above n7 at 32–34.

by sharp criticism of the Governor and his law officers for illegal or improper conduct. Although drafted by Victorians, s 60 was also formally part of an Imperial Act applying by paramount force to the colony; while (as Barkly pointed out in his minute) the breach of mere local Standing Orders might be a venial sin not invalidating proceedings, breach of an Imperial Act was not in the same class; and of course, as the Governor had also pointed out in his minute, there was also the need to set a good precedent for the future at this very early stage of Victoria's constitutional development. The Colonial Office might well have taken the same general line.

A reprimand for breaching applicable Imperial law was indeed what the Colonial Office doled out in 1865 to a later Governor, Sir Charles Darling. He was told in no uncertain terms that he should have withheld assent to Act No 207 (1864) (Vic), which purported to prevent actions to recover customs duties that were feared to be invalid because the Acts imposing them had not been reserved. The Secretary of State said:

[I]f not superfluous, I conceive it [Act No 207 (1864)] would be illegal and invalid. It is intended to remove virtually from certain Acts an invalidity which is supposed to attach to them in virtue of an Act of the Imperial Parliament and thus (whatever may be its real effect) affirms implicitly the principle that the colonial Legislature may prohibit the colonial Courts from giving effect to a British statute expressly extending to the colony. I think that the manifest impropriety of this law, in its relation to the Imperial Parliament, should have attracted your attention, and that you should, on that account, have refused your assent to it. [...]

You must understand [...] that you are on no account to assent to its revival or continuance.¹⁸⁶

The Act was saved from disallowance only because it was limited to a year and about to expire anyway. This despatch also strikingly confirms, of course, the Governor's position as not merely the Queen-substitute for his colony, but also the representative/agent of the Colonial Office subject to its direction, whatever the advice of responsible Ministers might be.

Barkly no doubt did not want to receive a despatch such as that just quoted.

Nobody appears to have noticed that s 60 of the *Constitution Act* was not itself entrenched, and so the Duration of Parliament Bill, if passed, might have been seen

185 Contrast the opinion of Attorney-General Symon in Patrick Brazil & Bevan Mitchell (eds), *Opinions of the Attorneys-General of the Commonwealth of Australia, with Opinions of Solicitors-General and the Attorney-General's Department* Vol 1 1901–1914 (1981) at 238–240, in which the opposite view was taken. In that case however it was not only already established that judicial review was possible: a complex question of inter-governmental immunities in federations was involved, not a simple question of whether enough members of Parliament had been present upon a particular occasion. See also the comment in Geoffrey Lindell, 'Introduction — The Vision in Hindsight Explained' in Geoffrey Lindell & R L Bennett (eds), *Parliament: The Vision in Hindsight* (2001) at xxvf. Note also the exception possibly implied by the addition of the words 'procedurally valid' to what Kirby J had to say in *Durham Holdings v New South Wales* (2001) 205 CLR 399 at 432 fn 215.

186 Victorian *Parliamentary Papers*, 1864–65 Vol II at 258.

as later legislation inconsistent with it and thus superseding it; or, alternatively, a brief bill might have been rushed through Parliament repealing s 60 itself,¹⁸⁷ or an amendment suggested by the Governor to the Bill itself adding a clause to repeal s 60 *pro hac vice*. If this sort of thing occurred to Barkly, he probably thought it wise not to suggest it to his Ministers; if the law officers thought of it, they might have feared the reaction of the Governor and the Parliament itself.

At all events, Executive Council's advice on 2 March 1858 was to reserve the Duration of Parliament Bill as if the procedural defect did not exist. I expect that Barkly received the advice unenthusiastically, and wondered whether to refuse assent again, but this time without even formal advice to do so on the part of his Ministers. I suspect that he would not have done so, but would rather have reserved the Bill as s 60 required and sent it to London accompanied by a frank despatch. But the Governor was saved by the bell. The second Haines Ministry was replaced by the second O'Shanassy Ministry on 10 March 1858 — the members of which were, of course, sworn in in accordance with the *Oaths of Office Act*,¹⁸⁸ which had received the Governor's assent exactly six weeks beforehand.

The new government had less at stake, as it was not they who were in power when the error was made which had caused the problem in the first place. On being sworn in, the immediate advice of the new law officers was that the matter should stand over until they had had time to consider their predecessors' advice.¹⁸⁹ On 12 April 1858, the Executive Council met¹⁹⁰ and received the advice of Attorney-General Chapman and Solicitor General Ireland that the duration of the Assembly was clearly part of its constitution, pointing out astutely that no one would doubt this for a moment if the duration of the Assembly were to be lengthened; that it was therefore not lawful to present the Bill for assent;¹⁹¹ that reservation would not cure the defect but might merely provoke the censure of the Imperial authorities and the English law officers; and that the House should either be prorogued or the Act vetoed in order to permit the making of a fresh start. The Governor thought that prorogation 'might prove an inconvenient precedent' (it was not due to happen anyway, as had been the case in November 1857). The Council therefore advised him to veto the Bill. Although this is not expressly stated in the minutes of Executive Council, it was also the case that dissolution was not imminent, nor was the three year period to which the Bill would shorten the existing Assembly's duration about to expire, and therefore little would be lost by postponing the shortening of the House's duration for a few months.

187 This occurred in New South Wales: *An Act to simplify the oaths of qualification for office* (1857) 20 Vic No 10; see Anne Twomey, *Constitution of New South Wales* (2004) at 269. Such a Bill would have had to be reserved, as that in New South Wales indeed was, but as the Duration of Parliament Bill also had to be reserved this was no great obstacle if the Bills were sent to London with a suggestion about the order in which assent might be given to them.

188 VPRS 1080/P0000/4/156; VPRS 1091/P0000/1/V2.

189 VPRS 1080/P0000/4/157.

190 VPRS 1080/P0000/4/199–201.

191 The principle behind the conclusion that the duration of an elected House of Parliament is part of its constitution is expressed in *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 573 (Gleeson CJ, Gummow, Hayne & Heydon JJ).

So it was that, on 4 June 1858, the Governor again vetoed a bill.¹⁹² This one is preserved in the Archives endorsed as follows:

I hereby certify that the above print of the Bill intituled 'An Act to shorten the duration of the Legislative Assembly' is the Bill to which the Legislative Council and the Legislative Assembly of Victoria have agreed, and further that the second and third readings of the said Bill were severally passed in the Legislative Council with the concurrence of an absolute majority of the whole number of the members of the Legislative Council.

GW Rusden
Clerk of the Parliaments

In the name and on behalf of Her Majesty I withhold the Royal Assent from this Bill.

Henry Barkly
Governor
Parliament Houses
Melbourne 4 June 1858¹⁹³

In proroguing Parliament, the Governor had this to say, adding his voice to the evidence that it was not merely a failure to record the number of members present in the Assembly that had caused the problem:

The Bill for shortening the duration of Parliament was passed by the Assembly without the concurrence of a majority of the whole House. I have been advised that such a majority was necessary under the Constitution Act, and that it was also requisite that it should be reserved for the signification of Her Majesty's pleasure.

To have transmitted to the Secretary of State a Bill which had been irregularly passed would have been to incur the risk of having it returned to me for re-introduction. As a means of avoiding this delay, I have disallowed it, with a view to its early introduction in the ensuing session. As it could not take effect, even with the present Parliament, until the end of next year, this delay will be of no consequence, and it can be re-enacted, reserved and received back from England long before the earliest possible period for its operation can arise.

There is an obvious reminder of the reasoning behind the vetoing of the first Oaths of Office Bill here. Indeed, the next paragraph but one in the Governor's speech after the extract just quoted ran as follows:

The Bill for the Simplification of the Oaths of Office places persons of all religious denominations on a footing of equality, and its enactment will, I have no doubt, promote, as intended, the harmony and welfare of Her Majesty's subjects in this colony.¹⁹⁴

192 Victoria, *Parliamentary Debates*, Legislative Council, 4 June 1858 at 546.

193 VPRS 14559/P0001/1.

194 Victoria, *Parliamentary Debates*, Legislative Council 4 June 1858 at 546.

It seems that the vetoing of the Duration of Parliament Bill took the public somewhat by surprise. The *Argus*¹⁹⁵ commented in a leader on the morning of prorogation that the Bill was ‘this morning awaiting only the Royal Assent’, and appeared to have no inkling that the opposite fate awaited it. It is hard to see why the failure to announce assent to this Bill between its passage in the Legislative Council on 9 February 1858 and the beginning of June caused less comment than in the case of the Oaths of Office Bill, and the *Argus* was so confident of its receiving the Governor’s approbation so many months after it had been passed. Perhaps some people (although obviously not the *Argus* given its hope that the Bill would be assented to locally) thought that the Bill was required under s 60 to be reserved, a process that always consumed a few months, and neither asked themselves whether the additional requirement of absolute majorities had been satisfied nor noticed the hint in the Legislative Council that there was a problem with this requirement.

The *Herald*¹⁹⁶ commented that

It took the auditors in the Council chamber yesterday rather by surprise, to hear the Clerk announce that his Excellency had withheld his assent from another of the reform Bills, — that, namely, for shortening the duration of Parliament; but a satisfactory explanation of the circumstance is given in a paragraph of the speech. A mere error of form had rendered the Bill invalid.

That appears to be all the newspapers had to say about this event.

As mentioned earlier, the Bill was re-introduced in the following session. This time the Legislative Assembly fell over itself to follow conspicuously all prescribed procedures. A division was taken which resulted in a majority of 34–0 for the Bill, just above the required thirty-one votes. What is apparent only from the newspaper reports¹⁹⁷ and not from ‘Hansard’¹⁹⁸ is that, when the division was called, four members of the Assembly withdrew rather than vote, presumably in order to avoid associating themselves with an unpopular cause by voting ‘no’. One of the four, interestingly enough, was Peter Lalor, one of the leaders at the Eureka Stockade, whose stance in Parliament on issues such as these was, as his biography in the *Australian Dictionary of Biography*¹⁹⁹ points out, ‘puzzlingly inconsistent’. The newspapers also report that the Speaker had difficulty in conducting a division without members voting for one side of the question!

As required by s 60, the Bill, having passed using the correct procedure, was reserved on 17 December 1858; Royal Assent was proclaimed on 23 April 1859. The second elections for the Legislative Assembly took place in August and September 1859,²⁰⁰ well under three years after the first meeting of the first Parliament.

195 *Argus* (4 June 1858) at 4.

196 *Herald* (5 June 1858) at 4.

197 *The Age* (10 December 1858) at 6; *Herald* (10 December 1858) at 5.

198 9 December 1858 at 501.

199 Ian Turner in Douglas Pike (ed), *Australian Dictionary of Biography*, Vol V at 52.

200 Victorian Government Gazette, 11 August 1859 at 1683.

It seems quite clear that the Governor acted rightly in vetoing the first Bill. I have already mentioned several good reasons in this case for not taking any other course of action, such as seeking assent and awaiting the courts' view of the matter. Furthermore, the Governor's action was unequivocally approved by the contemporary judge of such matters, the Colonial Office.²⁰¹ As Twomey comments, describing the very situation under discussion here but without any apparent awareness that she is, and thus all the more relevantly:

One circumstance in which the Governor may have a discretion to refuse assent is where there has been a breach of the required manner and form for enacting the Bill. Certainly, if the advice from the Solicitor-General [now of course an independent officer], provided through the Attorney-General, stated that there was a breach of a validly entrenched manner and form requirement, and the law prohibited the Bill from being presented for assent unless the manner and form requirement was first met, then the Governor would be justified in not giving assent. This follows from the proposition that the Governor cannot be required to act contrary to the law.²⁰²

It was precisely this spirit, and a concern for the future of the rule of law in the infant colony of Victoria, which animated Barkly in 1857 and 1858.²⁰³

201 CO 309/45/293f (AJCP 829).

202 Twomey, above n1 at 221f.

203 For a reference to a case in which the Governor did not refuse assent largely because it would not have been in the interests of the polity to do so, see Serle, above n71 at 304.